SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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,

-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.

Index No 908840-23

Hon. Christina L. Ryba

MEMORANDUM OF LAW IN SUPPORT OF THE STATE OF NEW YORK AND GOVERNOR KATHY HOCHUL'S MOTION TO DISMISS

LETITIA JAMES
Attorney General
State of New York
Attorney for State of New York and Governor Kathy Hochul
The Capitol
Albany, New York 12224-0341
Telephone: (518) 776-2284

Matthew J. Gallagher
Noah C. Engelhart
Assistant Attorneys General, of Counsel

Table of Contents

Defendants, State of New York and Governor Kathy Hochul ("Governor Hochul"), in her official capacity as Governor of the State of New York ("Defendants"), respectfully submit this Memorandum of Law in support of their Motion to Dismiss pursuant to CPLR 3211(a).

PRELIMINARY STATEMENT

Plaintiffs, a group of alleged qualified citizen voters ("Voter Plaintiffs"), candidates for public office ("Candidate Plaintiffs"), elected and appointed state and local officials, including local election commissioners ("County Election Commissioner Plaintiffs"), and political party organizations ("Organizational Plaintiffs"), seek declaratory and injunctive relief in this action related to duly enacted statutory provisions authorizing early voting by mail in New York State. Complaint, NYSCEF No. 1 ("Compl.") ¶¶ 1, 8-27.

Specifically, Plaintiffs seek a declaration that Chapter 481 of New York Laws 2023, titled the New York Early Mail Voter Act ("EMVA"), authorizing early voting by mail in any election conducted by the Board of Elections in which the voter is eligible to vote, is unconstitutional on the grounds that it violates art. II, § 2 of the New York Constitution. *Id.* ¶¶ 2-3. Plaintiffs also seek permanent injunctive relief prohibiting Defendants, their agents, and anyone acting on their behalf, from enforcing and/or implementing EMVA or from counting votes cast under the relevant provision of EMVA. *Id.* at p. 21.

Defendants' Motion to Dismiss should be granted because (1) Governor Hochul is entitled to legislative immunity; (2) the Complaint fails to state a claim; and (3) Candidate Plaintiffs, County Election Commissioner Plaintiffs, and Organizational Plaintiffs lack standing.

PLAINTIFFS' COMPLAINT

Plaintiffs allege that EMVA, which permits early voting by mail in any election conducted by the Board of Elections in which the voter is eligible to vote, is unconstitutional on the grounds that it violates art. II, § 2 of the New York Constitution. *Id.* ¶¶ 2-3. Plaintiffs claim that EMVA

gives all voters the same rights that the two categories of absentee voters have under art. II, § 2. *Id.* ¶ 47.

Plaintiffs contend that EMVA will cause them to suffer harm. *See id.* ¶¶ 52-64. County Election Commissioner Plaintiffs allege that EMVA will require them to perform tasks that violate the New York Constitution and impose financial burdens on the county boards of elections. Compl. ¶¶ 54-56. Candidate Plaintiffs aver that EMVA will impact voter outreach programs and "materially affect the competitive environment" of running for public office. *Id.* ¶ 57. Organizational Plaintiffs also allege that EMVA will impact their voter outreach programs, which will require them to "adjust their existing operational programs." *Id.* ¶¶ 58-61. Finally, Voter Plaintiffs contend that their votes against a previously-proposed constitutional amendment to allow no-excuse absentee voting will be nullified by EMVA, and their votes will be "diluted by the many thousands of constitutionally invalid ballots cast by mail[.]" *Id.* ¶¶ 63-64.

ARGUMENT

POINT I

PLAINTIFFS' COMPLAINT FAILS TO STATE A CAUSE OF ACTION

A complaint must be dismissed for failure to state a claim where no reasonable view of the facts stated in the complaint create an entitlement to relief. *See Hilgreen v. Pollard Excavating, Inc.*, 210 A.D. 3d 1344, 1346 (3d Dep't 2022). "The function of a motion to dismiss is 'merely to assess the legal feasibility of the complaint[.]'" *Collins v. Indart-Etienne*, 59 Misc. 3d 1026, 1046 (Sup. Ct., Kings County 2018) (quoting *Ryder Energy Distrib. V. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 779 (2d Cir. 1984). Here, Plaintiffs' Complaint fails to state a cause of action because (1) Governor Hochul is entitled to legislative immunity, and (2) the Complaint fails to state a cognizable legal claim that EMVA is unconstitutional.

A. **Governor Hochul is Entitled to Legislative Immunity**

"[T]he United States Supreme Court has ruled that there is a common law immunity applicable to state and local legislators, similar to that provided to members of Congress under the United States Constitution (art. I, § 6), that also grants immunity to members of the executive branch 'when they perform legislative functions.'" *Larabee v. Spitzer*, 19 Misc. 3d 226, 237 (Sup. Ct. New York County 2008), *aff'd sub nom.*, 65 A.D. 3d 74 (1st Dep't 2009). Here, the Complaint's only reference to Governor Hochul is her signing EMVA into law, which is clearly a legislative function. *See id.* (referring to the signing of a bill as a "legislative function" which requires dismissal on immunity grounds). Compl. ¶¶ 1, 51. Accordingly, Plaintiffs' claims against Governor Hochul are barred and subject to dismissal under CPLR 3211(a)(7). Therefore, the Complaint should be dismissed as to Governor Hochul.

B. **EMVA is Constitutional**

1. Early Voting by Mail is Constitutional Under the United States Constitution and Consistent with Federal Law.

To the extent that any of Plaintiffs' challenges to EMVA are construed as challenges under the federal Constitution, early voting and early voting by mail are consistent with the United States Constitution and federal law. Article I, § 4, cl. 1 of the United States Constitution provides, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Thus, the Constitution "invests the States with responsibility for the mechanics of congressional elections . . . but only so far as Congress declines to preempt state legislative choices." *Foster v. Love*, 522 U.S. 67, 69 (1997) (internal citations omitted).

In *Foster v. Love*, the United State Supreme Court defined "election" as "the combined actions of voters and officials meant to make a final selection of an officeholder[.]" *Foster*, 522 U.S. at 71. Applying that definition, two federal circuit courts have held that an "election" does not preclude early voting methods that culminate on election day.

In *Millsaps v. Thompson*, the Sixth Circuit considered whether Tennessee's early in-person voting system conflicted with federal statutes that established when federal elections were to be held. *See generally Millsaps v. Thompson*, 259 F. 3d 535 (6th Cir. 2001). Recognizing the definition of "election" prescribed by *Foster*, it determined that an "election" requires more than just voting, and that early voting does "not create a regime of combined action meant to make a final selection on any day other than federal election day." *Id.* at 547.

Unrestricted early voting in Texas was challenged as being preempted by federal election statutes that require that the "'election' of members of Congress and presidential electors occur on federal election day." *Voting Integrity Project, Inc. v. Bomer*, 199 F. 3d 773, 774 (5th Cir. 2000). Texas allowed early voting to begin seventeen days before election day, but no election results were released until the votes were tabulated on election day. *Id.* at 775-76. The Court held that "[b]ecause the election of federal representatives in Texas is not decided or 'consummated' before federal election day, the Texas scheme is not inconsistent with the federal election statutes as interpreted by the court in *Foster*." *Id.* at 776.

While there is no express federal constitutional right to voting by mail, federal courts have routinely permitted mail-in voting laws. *See, e.g.*, *Org. for Black Struggle v. Ashcroft*, 978 F. 3d 603, 607-09 (8th Cir. 2020) (granting a stay of an injunction attempting to block Missouri's implementation of mail-in voting law on equal protection grounds); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 810-11 (1969) (upholding an Illinois statute that permitted absentee voting

by mail as constitutional); *Bost v. Ill. State Bd. of Elections*, No. 22-cv-02754, 2023 U.S. Dist. LEXIS 129509, at *4 (N.D. Ill. July 26, 2023) ("Under the power conferred by Congress, state legislatures are permitted to set rules for ballots received by mail.").

As such, the U.S. Constitution gives state legislatures broad authority to determine the conduct and manner of their respective states' electoral process. *See Foster*, 522 U.S. at 69; *Cook v. Gralike*, 531 U.S. 510, 523 (2001). As federal courts have interpreted the U.S. Constitution as permitting both early voting and mail-in voting, EMVA is constitutional under the U.S. Constitution.

2. Early Voting by Mail is Constitutional Under the New York Constitution

Nowhere in the Complaint do Plaintiffs allege that the New York Constitution expressly forbids early voting by mail. Instead, Plaintiffs assert a series of conclusions of law that EMVA is unconstitutional as an unlawful "absentee ballot" under art. II, § 2 of the New York Constitution. *See* Compl. ¶¶ 66-74; Plaintiffs' Memorandum of Law, NYSECF No. 3 ("Pl. Mem. of Law") 20-24.[1] However, the Legislature's authority to enact EMVA stems from the State's plenary power to determine lawful methods of voting as set forth in art. II, § 7 of the Constitution. Plaintiffs further fail to allege that the Legislature lacks this plenary power under art. II, § 7 of the Constitution.

The New York Legislature is granted with plenary power to prescribe the method of conducting elections, which is only limited by the New York Constitution. *See Burr v. Vorrhis*, 229 N.Y. 382, 388, 395 (1920) ("The regulation of elections, the description of the ballots, the prescription of the conditions upon which and the manner in which the names of candidates or nominees may appear upon the official ballots, the method of voting, and all cognate matters are

[1] Page numbers refer to those supplied to documents by NYSCEF.

legislative"); *People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 242 (1912) ("It is clear that the otherwise plenary power granted to the Legislature to prescribe the method of conducting elections cannot be so exercised as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents the elector from voting, or from voting for the candidate of his choice, violates the Constitution.") (citing *Matter of Hoper v. Britt*, 2023 N.Y. 144, 150 (1911)); *Cnty. of Nassau v. State, New York State Bd. of Elections*, 32 Misc. 3d 709, 713 (Sup. Ct., Albany County 2011) (recognizing that art. II, § 7 of the State Constitution "empowers the State legislature to define alternate methods of voting").

The plenary delegation of power to the legislature to define the manner or method of voting began in the latter nineteenth century. In 1892, lever voting machines were permitted under state law and their use quickly expanded through various legislative enactments until most elections were conducted on them. 3 Charles Z. Lincoln, *The Constitutional History of New York* 108 (1905). At the Constitutional Convention of 1894, the delegates took note of the evolving mechanisms for voting. *Id.* at 108-09. Some delegates feared the Constitutional requirement that elections be "by ballot" would legally endanger the use of lever voting machines and other future innovations in voting. *Id.* Accordingly, in 1894, New York's Constitutional Convention advanced an amendment approved by voters providing, "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." *Id.* at 110, 114; N.Y. Const. art. II, § 7 (emphasis added). That same provision remains in the Constitution today. *See* N.Y. Const. art. II, § 7.

At all times the legislature retained the plenary power to authorize generally applicable methods of voting. *See People v. Cook*, 14 Barb. 259, 322 (N.Y. Gen. Term 1852) ("The right to

vote is conferred by the constitution, without any restriction as to the manner of voting"); *Cnty. of Nassau*, 32 Misc. 3d at 713 (recognizing that art. II, § 7 of the State Constitution permits the legislature to implement alternate voting methods). There is no language in the New York Constitution expressly prohibiting the use of early voting by mail. And, contrary to Plaintiff's argument, *see, e.g.*, Compl. ¶ 68; Pl. Mem. of Law 20-21, the existence of an absentee voting provision in the Constitution does not render EMVA unconstitutional. The Constitution of the State of New York confers upon "[e]very citizen" the right to vote in elections for public office, subject to qualifications based upon age and residence. N.Y. Const., art. II, § 1. Article II, § 1 provides no limitation on where a voter votes.[2] *See id.*

Thus, EMVA is within the powers delegated to the Legislature and Governor by the Constitution to prescribe the general manner of voting available to all voters. Such power being designed to give the lawmakers of the day the ability to discern and embrace "*improved methods of voting"* especially those that have come into use broadly throughout the country. *See* 3 Charles Z. Lincoln, *The Constitutional History of New York* 111 (1905).

3. The Absentee Voting Provision of the New York State Constitution Does Not Render EMVA Unconstitutional

The existence of an absentee voting provision in the New York Constitution does not preclude the Legislature from enacting early mail voting.[3] Plaintiffs allege the contrary, relying

[2] Article 2, § 1 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. 2, § 1.

[3] Constitutional challenges to statutes allowing early voting by mail have been dismissed by the highest courts in Massachusetts and Pennsylvania, despite the existence of absentee voting provisions in their state constitutions. *Lyons v. Secretary of the Commonwealth*, 490 Mass. 560 (2022); *McLinko v. Department of State*, 279 A. 3d 539 (Pa. 2022). In each case, the commonwealths considered aspects of the respective legislation that are analogous to the New York Constitution and EMVA, specifically, the plenary power of the legislatures to regulate the process of elections, the existence of constitutional absentee voting provisions, and arguments that elections were only to occur on a designated day or voting was required to take place in person. *Lyons*, 490 Mass. at 568-69; *McLinko*, 279 A. 2d at 579-80.

upon the maxim *expressio unius est exclusio alterius*—the expression of one is the exclusion of others. Pl. Mem. of Law 20-21. That maxim applies, "in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Colon v. Martin*, 35 N.Y. 3d 75, 78 (2020) (citing McKinney's Cons Laws of NY, Book 1, Statutes § 240).

This maxim is inapplicable. The Court of Appeals advised that it "requires great caution in its application", *Barto v. Himrod*, 4 Seld. 483, 493 (1853), and the United States Supreme Court has repeatedly cautioned that "[t]he force of any negative implication, however, depends on context. We have long held that the expressio unius canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it . . . ." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (internal citation omitted). Here, "absentee voting" and "early voting by mail," as prescribed in EMVA, are distinguishable such that no such "irrefutable inference" can be drawn that the absentee voting provision excludes voting by mail to all qualified voters. *See generally id.*; N.Y. Const. art. II, § 2.

The absentee voting provision in the Constitution confers the Legislature with the authority to provide individuals an opportunity to vote when they (1) anticipate being absent from their county of residence, or New York City, on the day of an election or (2) may be unable to appear personally at the polling place because of illness or physical disability. N.Y. Const. art. II, § 2. Thus, the provision expressly concerns individual voters who anticipate not being able to vote in person due to absence, illness, or physical disability. *Id.* It does not, however, limit the plenary power of the Legislature to provide for the method of voting or otherwise restricting voting to in-

person elections. *See id.* Additionally, there is no express language in the provision that can be interpreted to restrict the Legislature's power to provide for methods of voting under art. II, § 7.

Furthermore, EMVA does not render the absentee voting provision superfluous. The absentee voting provision establishes a constitutional minimum that may be afforded to "absentee" voters. There is no similar constitutional guarantee to voting by mail, beyond the Legislature's authority to prescribe the method and manner of voting. *See* N.Y. Const. art. II, § 7.

4. The 2021 Proposed Constitutional Amendment Does Not Bar the Legislature from Enacting EMVA

The Legislature's prior proposal to amend the absentee voting provision of the Constitution to include no-excuse absentee voting does not make EMVA unconstitutional. The 2023 Legislature is not bound by the acts of the 2021 Legislature. *See Forti v. New York State Ethics Commission*, 147 A.D. 2d 269, 277 (3d Dep't 1989) ("one Legislature is not bound by the acts of any previous one"). Thus, simply because a prior legislature unsuccessfully attempted to institute no-excuse absentee voting through a constitutional amendment does not preclude the current Legislature from instituting early mail voting under its plenary power pursuant to art. II, § 7 of the Constitution. Also, it should not be assumed that the 2021 Legislature believed a measure like voting by mail to be unconstitutional because it was proposed via the mechanism of a constitutional amendment. *See Clark v. Cuomo*, 66 N.Y. 2d 185, 190-91 (1985) ("Legislative inaction, because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences,'" quoting *United States v. Price*, 361 U.S. 304 310-11 (1960)).

Equally, EMVA is not unconstitutional because of an unsuccessful proposed constitutional amendment to the absentee voting provision. It is impossible to ascertain why each individual voter rejected the proposed amendment in 2021, which could have been for a myriad of reasons, not necessarily being the specific issue of voting by mail. Therefore, the voter's rejection of the

no-excuse absentee voting provision should not be extrapolated to infer a wholesale rejection of EMVA by the people of New York.

Ultimately, based on the foregoing, Plaintiffs fail to state a legally cognizable claim that EMVA is unconstitutional. Therefore, Defendants' Motion to Dismiss should be granted, and Plaintiffs' Complaint should be dismissed in its entirety.

POINT II

PLAINTIFFS LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF EMVA

The Complaint should be dismissed because County Election Commissioner Plaintiffs, Candidate Plaintiffs, and Organizational Plaintiffs lack standing. *See* CPLR 3211(a)(3), (7). Neither the County Election Commissioner Plaintiffs, Organizational Plaintiffs, nor Candidate Plaintiffs have alleged the requisite injury-in-fact as a matter of law to establish standing.

To establish standing, a litigant must demonstrate a cognizable injury, meaning that it suffered an injury in fact that falls within the zone of interests protected by the statute invoked. *See Matter of Society of Plastics Indus. v. County of Suffolk*, 77 N.Y. 2d 761, 772-73 (1991). Such an injury must be "real and different from the injury most members of the public face." *Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 13 N.Y. 3d 297, 306 (2009). "Aggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of defendants (or respondents), or—put another way—that it has sustained special damage, different in kind and degree from the community generally . . . ." *Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y. 2d 406, 413 (1987). That injury-in-fact must also be within the "zone of interests sought to be protected by the statute." *Soc'y of Plastics Indus. v. Cty. of Suffolk*, 77 N.Y. 2d 761, 774-75 (1991).

Plaintiffs' fail to allege any cognizable injuries. Instead, Plaintiffs' alleged harms are entirely speculative and prospective in nature, focusing mainly on several separate categories of potential harm of varying levels of specificity, namely (1) the alleged administrative and financial burden to the County Election Commissioner Plaintiffs, (2) the alleged financial burden on the Organizational and Candidate Plaintiffs, and (3) the alleged impact on Voter Plaintiffs. County Election Commissioner Plaintiffs' alleged damages are speculative, but also fail to establish standing as a matter of law. Organizational Plaintiffs and Candidate Plaintiffs assert equally speculative damages but also fail to demonstrate how their alleged damages are different in kind and degree from the community generally. Because none of the aforementioned Plaintiffs can show the required injury-in-fact for standing here as a matter of law, their claims against Defendants should be dismissed.

A. **County Election Commissioner Plaintiffs Fail to Allege Injury-in-Fact**

Plaintiffs allege that EMVA "will impose substantial new administrative burdens on election personnel, including Plaintiff county election commissioners" by requiring the processing of additional mail-in ballots. Compl. ¶ 52. Plaintiffs also allege that EMVA would impose "substantial new financial burdens" on local boards of elections to pay for postage and processing of the mail-in votes. *Id.* ¶ 55.

While EMVA could theoretically increase the number of mail-in ballots cast in any given election, Plaintiffs fail to demonstrate that this alleged increased burden constitutes injury-in-fact and is anything beyond speculation. Rather, Plaintiffs only allege that EMVA will cause "substantial" administrative burdens due to the potential increase in mail-in ballots based on the presumptive costs found in the affidavits of the County Election Commissioner Plaintiffs. *See, e.g.*, Compl. ¶ 52; Affidavit of Plaintiff Teal, NYSCEF No. 9 ("Teal Aff.") ¶ 5.

The New York State Legislature routinely passes laws that modify or expand the administrative responsibilities of state and local government agencies, including county boards of elections. *See, e.g.*, N.Y. Elec. Law § 8-600 (codified into law in 2019 and expanding the availability of early voting in New York State and requiring local boards of elections to facilitate early voting). To the extent that the County Election Commissioner Plaintiffs allege that EMVA places an unfair administrative or financial burden on their respective boards of elections, their remedy properly lies with the legislature, not with the courts. *See generally Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y. 3d 270, 287 (2009) ("Defendants predict dire financial consequences from our ruling . . . . If the statute imposes unacceptable burdens, defendants' remedy is to seek legislative relief").

Furthermore, insofar as any increased burden by the Legislature on the County Election Commissioner Plaintiffs constitutes monetary loss due to increased budgetary demands, that type of harm cannot be held to be within the "zone of interests" sought to be protected by art. II, § 2 of the New York Constitution. *Soc'y of Plastics Indus. v. Cty. of Suffolk*, 77 N.Y. 2d 761, 774-75 (1991) ("[T]he requirement that a petitioner's injury fall within the concerns the Legislature sought to advance or protect by the statute assures that groups whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes at the expense of the statutory purposes."). The purpose of art. II, § 2 was to provide qualified absentee voters an additional method of exercising their constitutional right to vote. The budgetary concerns of local governmental agencies, purely economic in nature, cannot be said to be within the "zone of interests" of by art. II, § 2, namely voter enfranchisement.

As this Court held in *County of Suffolk v. State*, while a local municipality, through its board of elections, may have monetary interest in the implementation of a voting statute, that does

not necessarily mean that said organization has standing to sue over the constitutionality of such a statute. *Cty. of Suffolk v. State*, No. 6833-06, 2007 N.Y. Misc. LEXIS 3855, at *9 (Sup. Ct., Albany County May 3, 2007). Rather, such municipal plaintiffs "do not ordinarily have the substantive right to raise constitutional challenges" unless "by complying with the State statute, the municipality will violate a constitutional proscription." *Id.* (citing *Jeter v. Ellenville Cent. Sch. Dist.*, 41 N.Y. 2d 283, 287 (1977)). However, that constitutional safeguard must be of a type which lends itself to being enforced by the local municipality rather than the voter or some other party. *Id.*[4]

Finally, County Election Commissioner Plaintiffs also allege harm to the various election officials due to placing "the Commissioner Plaintiffs in an untenable position, as it will require them to perform acts that violate the New York Constitution or to refrain from actions compelled by New York statutes." Compl. ¶ 54; Pl. Mem. of Law 18. As discussed previously, EMVA is not unconstitutional under art. II, § 7, and therefore County Election Commissioner Plaintiffs will suffer no harm as they are not being required to administrate an unconstitutional law.

Therefore, County Election Commissioner Plaintiffs cannot establish the requisite injury-in-fact for standing as a matter of law, and therefore Defendants' Motion to Dismiss should be granted as to County Election Commissioner Plaintiffs.

B. **Organizational and Candidate Plaintiffs Fail to Allege Injury-in-Fact**

Plaintiffs' assertions about the harm likely to be suffered by the Organizational and Candidate Plaintiffs equally fail to rise to the level of injury-in-fact required for standing. Plaintiffs

[4] In *Cty, of Suffolk*, the constitutional provisions at issue were protections for voter enfranchisement (art. II, § 1) and voter secrecy (art. II, § 7), and the Court held that the petitioner County of Suffolk lacked standing to sue based on those provisions. *Id.* Here, County Election Commissioner Plaintiffs are suing under art. II, § 2, which establishes the constitutional safeguard of guaranteeing the minimum availability of absentee voting. That safeguard is personal to voters themselves, and thus County Election Commissioner Plaintiffs lack standing and are not the appropriate parties to challenge EMVA on constitutional grounds. *Id.*

assert that both Candidate Plaintiffs and Organizational Plaintiffs are harmed by EMVA because they will be required to change their campaigning and voter mobilization strategies to reflect the changes made to voting by EMVA, namely an increase in mail-in voting. *See generally* Compl. ¶¶ 57-61. Allegedly, the increased availability of mail-in voting will drastically change Plaintiffs' voter outreach mobilization plans. *Id*. However, nothing in EMVA prevents traditional in-person voting. *See generally* N.Y. Elec. Law § 8-700. As such, Plaintiffs' present campaign strategies will remain equally effective in reaching voters and mobilizing them for in-person voting, an option which remains open to all voters. Furthermore, EMVA also only takes effect on January 1, 2024, with the subsequent general election in New York State not until November 5, 2024. Organizational and Candidate Plaintiffs, therefore, have more than a full calendar year to modify their campaign and voter mobilization strategies and shift adequate campaign funds from canvassing for traditional in-person voters to those who might instead opt to take advantage of early mail-in voting as permitted by EMVA.

The Organizational and Candidate Plaintiffs also allege that their electoral prospects will be damaged by EMVA due to its "material[] effect" on the "competitive environment." Compl. ¶ 59. However, nowhere in Plaintiffs' papers is it stated how increasing the number of methods voters will have to cast their ballots under EMVA could damage particular candidates' likelihood of being elected. All candidates and parties are equally able to canvass for early mail-in votes as they so choose. Equally important is that all candidates and political parties are affected similarly by EMVA, and as such, Plaintiffs cannot establish the "special damage" required for standing as established by the Court of Appeals. *See Sun-Brite Car Wash, Inc. v. Bd. of Zoning & Appeals*, 69 N.Y. 2d 406, 413 (1987). In other words, allowing a voter to cast his or her ballot by early mail-in voting as an alternative to in-person voting inherently favors no one candidate or party

over another. EMVA does not provide an advantage to one candidate or party to the detriment of another, and thus there is no injury, whatsoever, to Organizational Plaintiffs or Candidate Plaintiffs.

Therefore, Organizational and Candidate Plaintiffs cannot establish the requisite injury-in-fact for standing as a matter of law, and therefore Defendants' Motion to Dismiss should be granted as to Organizational and Candidate Plaintiffs.

CONCLUSION

For the reasons discussed above, Defendants' Motion to Dismiss should be granted in its entirety and Plaintiffs' Complaint should be dismissed in its entirety with prejudice.

Dated: October 16, 2023

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants State of New York and Governor Kathy Hochul
The Capitol
Albany, New York 12224

By: s/ *Matthew J. Gallagher*

Matthew J. Gallagher
Assistant Attorney General, of Counsel
Telephone: 518-776-2284
Email: Matthew.Gallagher@ag.ny.gov

Noah C. Engelhart
Assistant Attorney General, of Counsel
Telephone: 518-776-2701
Email: Noah.Engelhart@ag.ny.gov

TO: All Counsel of Record (via NYSCEF)