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

Case No. CV-23-2446

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

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents,

-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,

Intervenor-Defendants-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE

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Plaintiffs-Appellants respectfully submit this memorandum of law in support of their motion, brought by order to show cause, asking this Court to grant a preliminary injunction during the pendency of their appeal from an order[1] of Supreme Court, Albany County (Ryba, J.) dated December 26, 2023, denying that relief. More specifically, Plaintiffs-Appellants seek to enjoin Defendants-Respondents from taking any action to implement the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York (the "Mail-Voting Law"). A recently scheduled, and rapidly approaching, special election makes such relief even more urgent.

PRELIMINARY STATEMENT

On February 13, 2024, six and a half weeks from now, a high-profile special election of national importance will be held to fill a vacancy in New York's 3rd Congressional District as a result of the expulsion of George Santos from the House of Representatives. Ballots may be distributed as early as the first week of January under the recently enacted Mail-Voting Law, which purports to allow every voter to vote by mail even though the voter does not meet the qualifications to cast an absentee ballot under Article II, Section 2 of the New York State Constitution. And

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[1] A copy of the Decision/Judgment, dated December 26, 2023, that is the subject of this appeal is attached as Exhibit W to the accompanying Affirmation of Michael Y. Hawrylchak, dated December 28, 2023.

of course, this upcoming congressional election is only the first high-visibility example of the impact of the Mail-Voting Law, which applies to all elections in the state of New York — down to the smallest local elected offices — held on or after January 1, 2024.

If the Mail-Voting Law, enacted in clear violation of the New York State Constitution's limitations on absentee voting, is allowed to go into effect and is then later held unconstitutional, the damage that will be done — not least to New York voters' confidence in the legitimacy of their electoral system — will be devastating and irreversible. Absentee mail-voting ballots will be distributed to hundreds of thousands of New York voters who are constitutionally ineligible to cast them. These constitutionally invalid mail-voting ballots will be cast in elections throughout the state. Allowing the Mail-Voting Law to take effect while its constitutionality remains in serious doubt is a recipe for voter distrust and confusion and creates the potential of widespread disenfranchisement if it is held unconstitutional after mail-voting ballots have already been cast.

Perhaps worse, if the Mail-Voting Law is held unconstitutional after mail-voting ballots have already been counted and have decided elections, many New Yorkers will understandably feel that those election outcomes are illegitimate, the result of a constitutionally invalid law passed in direct defiance of the will of the voters who had just rejected a constitutional amendment to authorize such a law.

This Court should, therefore, grant Plaintiffs-Appellants' motion for preliminary injunction, enjoining the implementation and enforcement of the Mail-Voting Law to preserve the status quo while this litigation is pending.

More than two and a half months after oral argument and only days before the Mail-Voting Law is due to take effect, Supreme Court denied Plaintiffs-Appellants' motion for preliminary injunction, asserting that they had failed to prove irreparable injury and that the balance of equities did not favor an injunction. Decision/Judgment, at 5. Although a violation of the Constitution is presumptively irreparable, the court's conclusory rejection of irreparable injury failed to address the various injuries asserted by different categories of plaintiffs, including candidates for state, local, and federal office, registered voters, and political parties and committees, in the action. *Id.* Nor did the court discuss or analyze any of the caselaw cited by Plaintiffs-Appellants in support of their injuries. *Id.* Supreme Court's balancing of the equities just assumed that the Mail-Voting Law is constitutional, even though the court declined to even mention Plaintiffs-Appellants' likelihood of success on the merits or to even consider the severe consequences if the law were to go into effect and later be declared unconstitutional. *Id.*

Plaintiffs-Appellants' likelihood of success is overwhelming. New York's long history prohibiting universal mail voting is an undisputed matter of historical record. There is no ambiguity about the state's constitutional history barring such

voting, the Legislature's previous recognition of that restriction, the 2021 referendum upholding the prohibition, or the State's acknowledgement of this constitutional limitation in litigation as recently as last year. The State's entire defense of the Mail-Voting Law rests on a novel, never-before-asserted source of plenary constitutional authority over elections, and an insistence that every single state constitutional actor to consider the issue over more than 150 years — up to and including the current Attorney General in 2022 — has fundamentally misunderstood the Constitution's limitations on absentee voting until now.

BACKGROUND

In order to evaluate Plaintiffs-Appellants' right to a preliminary injunction, it is necessary first to review the history of constitutional limitations on voting by mail, the statewide referendum in 2021 in which voters resoundingly rejected a proposed constitutional amendment to permit universal mail voting, the Legislature's subsequent enactment in 2023 of the Mail-Voting Law nevertheless purporting to authorize it, the impact such a law would have on Plaintiffs-Appellants, and the decision by the court below denying their request for a preliminary injunction to prevent the Mail-Voting Law's implementation pending the resolution of this litigation.

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. New York Times, *For Absentee Voting* (Oct. 5, 1919), *available at* 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. 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, each time it again had to propose to amend the constitution — and obtain 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 (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]," State of New York Br., Doc. No. 21, at 2–3, Oct. 5, 2022, *Amedure v. State*, No. 2022-2145 (N.Y. Sup. Ct. Saratoga Cty.) (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* Attorney General Br., Doc. No. 13, at 24–25, Oct. 28, 2022, *Cavalier v. Warren Cty. Bd.*, No. 536148 (3d Dep't) ("*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 that 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 people 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

In 2019, the Legislature sought to expand mail voting permanently to all eligible voters, regardless of their location or health status. The Legislature understood, however, 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. 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 [or] physical disability.

Id.; *see also* 2021 NY Senate-Assembly Bill S360, A4431, 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 (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 (emphasis added).

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. 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. In doing so, they exercised their sovereign function. Had the Legislature 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. (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.

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

IV. The Interests of Plaintiffs-Appellants

Plaintiffs-Appellants 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.[2] 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

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[2] "Ex. __" refers to the exhibits to Affirmation of Michael Y. Hawrylchak, dated December 28, 2023.

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 in 2021, 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 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.

V. The Procedural History of this Litigation

On September 20, 2023, the very day the Mail-Voting Law was signed by Governor Hochul, Plaintiffs-Appellants brought this action in Supreme Court,

Albany County, by order to show cause, challenging the law's constitutionality under the New York State Constitution. Simultaneously with the filing of their complaint, and mindful of the short period before the law would go into effect and the possibility that circumstances might arise whereby an election might need to be held in early 2024, Plaintiffs-Appellants brought a motion for preliminary injunction, seeking to enjoin the implementation or enforcement of the Mail-Voting Law while the litigation was pending.

Briefing on the motion for preliminary injunction was completed on October 12, 2023, and oral argument on the motion was held before Justice Ryba on October 13, 2023. At oral argument, Plaintiffs-Appellants noted that due to the possibility of special elections to fill vacancies, the Mail-Voting Law could impact elections early in 2024:

> [T]his takes effect as of January 1st. It applies to every election in the State of New York, including special elections which can happen at any time.
>
> . . .
>
> [I]f there are special elections early — it could be very early in the year. Special elections can happen at any time. There could be special elections in January if there is a vacancy that occurs unexpectedly. We can't know when the earliest election that will be [a]ffected could be, but it could be very early in 2024.

Transcript of Oral Argument, Ex. R, at 11. At the conclusion of the argument, Justice Ryba indicated that she would "be issuing a decision in due course." *Id.* at 39.

The Decision/Judgment from which Plaintiffs-Appellants now appeal creates a misleading impression that Plaintiffs-Appellants were not diligent in pursuing preliminary injunctive relief. This is not accurate. As noted above, the motion for preliminary injunction was made the day the Mail-Voting Law was signed, September 20, 2023, precisely because of the short interval of time before the law would take effect, and it was fully briefed shortly thereafter and argued on October 13, 2023[3], months before the law was due to take effect.

The Decision/Judgment states that Defendant-Intervenors and State Defendants filed motions to dismiss "[i]n opposition to the Order to Show Cause." Decision/Judgment, at 3. In fact, these motions were not connected with the motion for preliminary injunction, to which Defendant-Intervenors and State Defendants had already filed opposition briefs, but rather were motions to dismiss in lieu of answer to the complaint. Indeed, the State Defendants' motion to dismiss was not made until *after* the motion for preliminary injunction was already argued and fully submitted.

The Decision/Judgment cites Plaintiffs-Appellants' letter to the court proposing jointly on behalf of all parties an extended briefing schedule for the motions to dismiss and Plaintiffs-Appellants' cross-motion for summary judgment,

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[3] The briefing and oral argument of the motion for preliminary injunction are not mentioned in the Decision/Order.

suggesting that Plaintiffs-Appellants' agreement to a longer briefing schedule demonstrates a lack of urgency on the injunctive relief. Decision/Judgment, at 3. But this briefing schedule had no connection whatsoever with the motion for preliminary injunction, which had already been fully briefed and argued. It was precisely *because* the motion for preliminary relief was fully submitted that Plaintiffs-Appellants were open to a less rushed briefing schedule for the merits briefing. Indeed, Plaintiffs-Appellants' initial email proposal to counsel for all parties concerning a briefing schedule for the cross-motions on the merits reflects the expectation that a decision on the preliminary injunction will be forthcoming shortly. *See* Ex. S ("[W]e are currently waiting for the Court's decision on the preliminary injunction, which will likely have a significant effect on the issues at play in the motion to dismiss/summary judgment briefing. With that in mind, Plaintiffs would like to suggest a briefing schedule that would allow both sides a little more time to prepare our remaining briefs.")[4].

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[4] Moreover, Plaintiffs-Appellants proposed briefing schedule was expressly aimed at achieving a faster final resolution to the litigation: "We think it's in everyone's interest to keep this case moving forward, so to that end, Plaintiffs intend to cross-move for summary judgment. Because Plaintiffs do not intend to seek any discovery and the core merits issues in this case are pure questions of law, we would like to enable the Court to reach final judgment sooner rather than later." Ex. S.

Plaintiffs-Appellants subsequently filed two letters with the court, on December 4, 2023,[5] and December 21, 2023, to inform it of the timing of the upcoming special election to fill the newly created vacancy in New York's 3rd Congressional District and to urge a decision on the motion for preliminary injunction. Ex. T, U. Contrary to the description in the Decision/Judgment, these requests were not sent "despite" the extension of the merits briefing schedule. Decision/Judgment, at 3. Rather, they had nothing to do with the merits briefing, but were entirely in line with Plaintiffs-Appellants' consistent position throughout briefing and argument of the preliminary injunction motion. Indeed, the "change in circumstances" described in Plaintiffs-Appellants' first letter — the sudden congressional vacancy requiring a special election early in 2024 — was expressly anticipated by Plaintiffs-Appellants during oral argument in explaining the urgency of the preliminary injunction. Ex. R, at 11.

On December 26, 2023, having received no decision on a motion for preliminary injunction that was argued and submitted on October 13, 2023, and

[5] The Decision/Order incorrectly states that "[t]hree days later, on December 7, 2023, plaintiffs filed their papers in response to defendants' motions to dismiss in compliance with the time-line above." Decision/Order, at 3. This is false. Plaintiffs-Appellants completed their merits briefing — opposition to motions to dismiss and cross-motion for summary judgment — on November 13, 2023. As noted, this is completely irrelevant to the motion for preliminary injunction, which had already been fully briefed and argued a month earlier.

having received no response to two letters urging prompt decision, and with only days remaining before the Mail-Voting Law was due to take effect, Plaintiffs-Appellants took the extraordinary action of initiating an Article 78 proceeding for relief in the form of mandamus to compel Justice Ryba to issue a decision, providing an advance courtesy copy to Justice Ryba and counsel to all other parties in this action. *See* Ex. V. At 11:13 pm that evening, the Decision/Judgment denying Plaintiffs-Appellants motion for preliminary injunction was issued.

Plaintiffs-Appellants now appeal this decision and seek a preliminary injunction pending appeal pursuant to CPLR § 5518.

PELIMINARY INJUNCTION STANDARD

Plaintiffs-Appellants 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 (2005).

ARGUMENT

Plaintiffs-Appellants 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-Appellants 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. (N.Y. Election Law §§ 8-700 et seq.). If that move were lawful, then the text of Article II, Section 2 would be superfluous. So would 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 the 2021 constitutional vote, in which New Yorkers rejected an expansion of mail voting beyond the existing two categories. Because the Legislature cannot blithely 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 unfairly disadvantaged candidates fall short, there is no remedy that can make them whole — as is the unrecoverable expenditure of money and resources. And while allowing the Mail-Voting Law to take effect could lead to catastrophic results, 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-APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE STATE CONSTITUTION DOES NOT AUTHORIZE UNIVERSAL MAIL VOTING.

Although Supreme Court denied Plaintiffs-Appellants' motion for preliminary injunction without even considering likelihood of success on the merits, the case that the Mail-Voting Law violates the New York State Constitution is overwhelming. The Mail-Voting Law is inconsistent with the text, structure, and history of both Section 2 and Article II as a whole. Whereas Section 2 allows the Legislature to authorize absentee voting only for a few, narrowly defined categories of voters, the Mail-Voting Law purports to authorize absentee voting for the entire electorate. Because the Mail-Voting Law exceeds the Legislature's authority under Section 2, Plaintiffs have established a likelihood of success on the merits.

Text. Section 2 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 Mail-Voting Law, by contrast, applies to "*every* registered voter." 2023 NY Senate-Assembly Bill S7394, A7632, perma.cc/QL4T-HGDZ, at 2 (§ 8700(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," *Sherrill v O'Brien*, 188 N.Y. 185, 207 (1907), it should hold that the plain text of Section 2 does not authorize the Mail-Voting Law and that it is therefore unconstitutional.

It does not matter that the Legislature labeled the process "mail voting" rather than "absentee voting." The two terms are "interchangeabl[e]." *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 343 n.2 (3d Cir. 2020). Mail voting is, by definition, a form of absentee voting. *See, e.g.*, Black's Law Dictionary, Sixth Edition 8 (1990) ("Absentee voting" defined as voting without "appear[ing] at the polls in person on election day."). Indeed, absentee voting is done almost exclusively by mail. N.Y. Election Law §§ 8-400, et seq. Courts have dismissed any proffered "distinction between voting by mail and absentee voting" as "contradicted . . . by law and, frankly, common usage." *Albence v. Higgin*, 295 A.3d 1065, 1090 (Del. 2022). *Cf. Yaniveth R. ex rel. Ramona S. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016) ("[W]e construe words of ordinary import with their usual and commonly understood meaning.").

Even if there were a theoretical difference between absentee voting and mail voting, the Mail-Voting Law obviates any such distinction by making them interchangeable. Under the law, *both* are universal and operate in exactly the same manner. 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 (§ 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.

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. There was no pre-Section 2 authority in the Constitution to allow mail voting for anyone in the state. Certainly there is no such textual grant. And there is no indication of any implied grant. Indeed, if the purpose of Section 2, as the State contends, were to merely reduce a pre-existing authority to writing, surely the people would not have done so only partially, making explicit that such authority exists for the absent, the ill, and the disabled, while leaving any such authority for everyone else to be inferred.

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 (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 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 (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.

Intervenors and the State argued below that the *expressio unius* canon of construction is inapplicable when interpreting the New York Constitution. *See* NYSCEF No. 70, at 7; No. 75, at 8. This is incorrect. The Court of Appeals and the Appellate Division have routinely applied the canon in constitutional cases. For example, the Court of Appeals invoked *expressio unius* verbatim while interpreting a constitutional provision in *People ex rel. Killeen v. Angle*. *See* 109 N.Y. 564, 574–75 (1888) ("Under established rules of construction these express provisions for the supervision by the legislature over the cases referred to, afford the strongest

implication that, in other respects, it was not intended to leave the powers conferred by the amendment to such control or supervision. '*Expressio unius personae vel rei est expressio alterius*.'"). More recently, the First Department invoked *expressio unius* while interpreting Article VII, Section 4 of the Constitution, and the Court of Appeals affirmed. *See Silver v. Pataki*, 3 A.D.3d 101, 107 (1st Dep't 2003), *aff'd sub nom. Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004). The Second Department likewise relied on *expressio unius* in *Hoerger v. Spota*, where it applied the maxim to the Constitution's rules for district attorneys under Article XIII, Section 7 and Article IX, Section 2. *See* 109 A.D.3d 564, 569 (2d Dep't 2013). Once again, the Court of Appeals affirmed. *See* 21 N.Y.3d 549 (2013). Moreover, the Court of Appeals has never wavered from its declaration that "[t]he same rules apply to the construction of a Constitution as to that of statute law." *Wendell*, 246 N.Y at 123. *See also Hoerger*, 109 A.D.3d at 569 (applying *Wendell*'s holding to *expressio unius*).

The authorities on which Intervenors relied below, NYSCEF No. 70, at 7, do not support rejection of the canon. First, Intervenors cited *Cancemi v. People*, 18 N.Y. 128 (1858), but the language they rely on comes not from the Court's opinion, but from a Reporter's summary of arguments that does not appear in the New York Official Reports. The actual opinion of the Court of Appeals makes no mention of the canon and lends no support to its rejection. The other opinion Intervenors cited,

Barto v. Himrod, 8 N.Y. 483, 493 (1853) (Willard, J.), is no more availing — in dicta, it urges caution in the application of *expressio unius*, before reaching the same result that the canon would have supported. Moreover, Justice Willard's passing reference to the canon addressed whether the constitutional provision requiring certain debt-related laws to be submitted to the people necessarily prohibited the Legislature from submitting entirely separate topics of legislation to a popular vote as well. *See id.* Here, however, Section 2 applies to a single topic — absentee voting — and authorizes only a subset of voters to participate. If the canon does not apply in these circumstances, the authorization in Section 2 would be superfluous.

Structure. The State's main defense of the Mail-Voting Law below was grounded in Article II, Section 7, which, they claimed, gives the Legislature plenary authority to regulate voting in any manner it sees fit. NYSCEF No. 75, at 5. Section 7 provides that "[a]ll 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." Under the State's theory, Section 2 merely gives the Legislature the option to create exceptions to any laws enacted pursuant to Section 7.

The State's position cannot be reconciled with the rest of Article II. As the Court of Appeals reiterated only weeks ago, "[a]ll parts of the constitutional provision or statute must be harmonized with each other as well as with the general

intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof," and "our well-settled doctrine requires us to give effect to each component of the provision or statute to avoid a construction that treats a word or phrase as superfluous." *Hoffman v. New York State Independent Redistricting Commission*, No. 90, 2023 WL 8590407, at *7 (N.Y. Ct. of App. Dec. 12, 2023).

For starters, Section 2 and Section 7 are directed at different issues. Section 7 refers to the *mechanics* of voting — paper ballot, lever machine, etc. — while Section 2 refers to the *location* of voting. *Compare* N.Y. Const., Art. II, §2 (addressing voting somewhere other than "personally at the polling place"), *with* N.Y. Const., Art. II, § 7 (authorizing the Legislature to determine the mechanics of voting, whether they be "by ballot, or by other such method as described by law," and requiring "signatures, at the time of voting, of all persons voting by ballot or voting machine"). The Court of Appeals has long held that it is "too clear for discussion" that the phrase "or by such other method as prescribed by law" was added to Section 7 in 1895 "solely to enable the substitution of voting machines" for paper ballots. *People ex rel. Deister v. Wintermute*, 194 N.Y. 99, 104 (1909). Moreover, the State's argument that Section 2 allows exceptions for absentee voting while the Mail-Voting Law is a generally applicable rule under the authority of Section 7 is a post hoc invention that appears nowhere in the Constitution itself or

any constitutional interpretation prior to 2023. It also makes no sense, given that the two forms of voting are indistinguishable under the Mail Voting Law. *See supra.*

Furthermore, interpreting Section 7 to authorize absentee voting for the entire electorate would render Section 2 "functionally meaningless." *Harkenrider*, 38 N.Y.3d at 509. The Court of Appeals has repeatedly rejected such outcomes. In *Harkenrider*, the State asserted the right to unilaterally draw a congressional redistricting map when the Independent Redistricting Committee failed to propose its own map as required by Article III, Section 5-b. *Id.* at 512. In defense of this position, the State invoked the Legislature's "near-plenary authority to adopt" election-related laws. *Id.* at 526 (Troutman, J., dissenting in part). The Court of Appeals disagreed, because deferring to the State's invocation of its general authority to regulate elections would render Section 5-b a nullity. *See id.* at 509. *Harkenrider* is not an outlier. New York courts have a long history of rejecting constitutional interpretations that leave whole sections of the Constitution "meaningless surplusage[.]" *Koch v City of New York*, 152 N.Y. 72, 85 (1897); *see also People v. Moore*, 208 A.D.3d 1514, 1514–15 (3d Dep't 2022) (art. I, §6 right to counsel would be "rendered meaningless"); *Clark v. Greene*, 209 A.D. 668, 672 (3d Dep't 1924) (adopting party's interpretation "is to hold that the language used in section 3, article 5 of the Constitution . . . is meaningless.").

The Commissioner Defendants similarly argued below that Article II, Section 1 grants the Legislature plenary authority to determine how people vote, and that Section 2's authorization of absentee voting for limited categories of voters merely authorizes exceptions to the manner of voting generally applicable. NYSCEF No. 58, at 13. This construction suffers from the same defect: what "exception" could there be from a plenary grant of authority? Section 2 is permissive, not mandatory: it states that the Legislature "*may*, by general law, provide a manner" of absentee voting for voters "who, on the occurrence of any election, may be absent from the county of their residence or . . . the City of New York" or are "unable to appear physically at the polling place because of illness or physical disability." N.Y. Const., Art. II, §2 (emphasis added). If Section 1 allows the Legislature to authorize absentee voting for all voters, then Section 2's statement that the Legislature "may" authorize absentee voting for absent or disabled voters is not an exception. It is entirely redundant.

In Supreme Court, the State attempted to support its "plenary authority" argument with authorities from Massachusetts and Pennsylvania. *See* NYSCEF No. 70, at 7–9. While the Court need not look beyond New York precedent to resolve this case, *see Harkenrider*, 38 N.Y.3d at 509, the Massachusetts and Pennsylvania decisions are inapposite. In *Lyons v. Secretary of the Commonwealth*, the Massachusetts Supreme Judicial Court considered a challenge to Massachusetts'

mail-voting law under Article 45 of the Massachusetts Constitution, which provided for absentee voting. 490 Mass. 560 (2022). After examining "the debates during the constitutional convention preceding [Article 45's] submission to the voters in 1917," which included discussion of whether various categories of individuals should be permitted to vote absentee, the court held that "it [was] reasonable to assume that the drafters would have included language expressly foreclosing the Legislature's authority to further expand voting opportunities if that was the result they intended." *Id.* at 577. As discussed above, New York's constitutional history is different and quite straightforward, and no similar "assumption" is warranted here.

And in *McLinko v. Department of State*, the Pennsylvania Supreme Court sharply divided over the constitutionality of a mail-voting law, but ultimately upheld the law because it had previously "rejected [Plaintiffs'] interpretation" of the Commonwealth's absentee voting provision "in the context of the Constitution in effect at the time [the mail voting law] was enacted." 279 A.3d 539, 580 (Pa. 2022). Again, no similar constitutional history exists in this case. Moreover, the law had already been in effect for more than a year and used by millions of Pennsylvania voters before it was challenged. *Id.* at 544-45.

To the extent that persuasive authority is relevant, however, the Delaware Supreme Court's unanimous decision in *Higgin* is most on point. Like New York, Delaware's Constitution authorizes its legislature to provide for absentee voting for

those who "are unable to appear in person." *Higgin*, 295 A.3d at 1071. 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. 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. Although the State argued that "the laws were within the General Assembly's plenary power to enact and therefore valid," *id.* at *4, the Delaware Supreme Court unanimously held that the legislation was "clear[ly]" unconstitutional," *id.* at *49, because "the categories of voters identified in [the Constitution] constitute[d] a comprehensive list of eligible absentee voters" and "suggest[ed] the exclusion of others." *Id.* at *56, *60.

History. 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, deliberation, and votes. 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), 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 Proposed Amendments*. Throughout this period, courts recognized that absentee voting could extend only so far as authorized by the Constitution. *E.g.*, *Sheils v. Flynn*, 164 Misc. 302, 308 (Sup. Ct. Albany Cty. 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 Commissioner Defendants argued below that the Legislature's plenary authority is confirmed by the history of Article II, Section 1. According to this argument, constitutional amendments may have been necessary to allow individuals not specified in Section 2 to vote absentee in the past, but such amendments were no longer necessary after the language requiring voting 'in the election district' was removed from Section 1. NYSECF No. 58, at 14; *see also* Ex. R, at 34:21–25. But this conspicuously omits a critical fact: the language requiring in-person votes to be cast at polling places "in the [voter's] election district" was removed in 1945 — not to allow anyone to vote absentee by whatever method the Legislature chose, but to "remov[e] disqualification in relation to votes of certain *electors of a nonpersonal election district after removal within thirty days preceding an election from one election district to another in the same county*." *Proposed Amendments*, at 22 (emphasis added). In other words, Section 1 was not amended to eliminate a

requirement that voters vote at their polling place; it was amended specifically with a continued in-person requirement in mind: a voter who moved from one district to another within thirty days of an election would not have his ballot disqualified if he mistakenly voted at his old polling place. *Cf. Amedure v. State*, 77 Misc. 3d 629, 636 (N.Y. Sup. Ct. Saratoga Cty. 2022) (the Constitution "retain[ed] the implicit preference for 'in person' casting of ballots in elections" after the 1945 amendment).

Historical inaccuracies aside, the argument fails on its own terms. New York amended its Constitution three times *after* 1945 to allow for new categories of absentee voters. For example, in 1955, Section 2 was amended to allow voters to cast absentee ballots if they were unable to vote in person due to illness or disability. *See Proposed Amendments*, at 27. And it was amended in 1963 to allow absentee voting for anyone who is absent from their county of residence on election day, regardless of whether that absence was "unavoidable." *Wise v. Bd. of Elections of Westchester Cnty.*, 43 Misc. 2d 636, 637 (Sup. Ct. Westchester Cty. 1964) (noting "a person away from home for vacation purposes was not qualified to vote as an absentee" prior to 1963, but under the amendment, "[u]navoidable absence from one's place of residence . . . ceased to be a requirement").

The Mail-Voting Law also reverses popular sovereignty. The question whether the 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. The Court of Appeals recently denounced a similar move after another failed constitutional amendment. In *Harkenrider*, "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). After "New York voters rejected this constitutional amendment," 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 would "render the constitutional . . . process inconsequential." *Id.* at 517 (cleaned up). So too, here.

II. PLAINTIFFS-APPELLANTS SATISFY THE REMAINING PRELIMINARY INJUNCTION FACTORS.

As noted above, Plaintiffs-Appellants are likely to prevail on the merits of their constitutional claim. They also satisfy the other criteria for a preliminary injunction: Plaintiffs-Appellants will be irreparably injured if the Mail-Voting Law is allowed to go into effect, and the balance of the equities decisively favors maintaining the status quo and enjoining the implementation of the Mail-Voting Law pending this appeal.

A. Plaintiffs-Appellants will be irreparably injured if

implementation of the Mail-Voting Law is not enjoined.

The Decision/Judgment denying the motion for preliminary injunction disposes of irreparable harm with the conclusory assertion, without citation, that Plaintiffs-Appellants "cannot establish that they will suffer electoral disadvantages based on the Early Mail Voter Act."[6] Decision/Judgment, at 5. But the Decision/Judgment does not mention, let alone distinguish, the caselaw cited by Plaintiffs-Appellants concerning the numerous cognizable harms that flow from an illegally conducted election, and it does not even acknowledge the various other categories of harms asserted by Plaintiffs-Appellants that have nothing to do with electoral disadvantage.

As an initial matter, courts have found that electoral candidates "have a cognizable interest in ensuring that the final vote tally accurately reflects the legally valid votes cast," such that "[t]he counting of votes that are of questionable legality threatens irreparable harm," even without a determination that individual candidates will be disadvantaged by the inaccurate tally. *Carson v. Simon*, 978 F.3d 1051, 1061

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[6] Supreme Court also bizarrely characterizes Plaintiffs-Appellants as having argued "that early voters by mail will cast more votes for *defendants* than plaintiffs." Decision/Judgment, at 4–5 (emphasis). But the defendants against whom this case was brought, and whom Plaintiffs-Appellants seek to enjoin, are the State of New York, the Governor, the New York State Board of Elections, and its two Co-Chairs, not any electoral opponents of Plaintiffs-Appellants, many of whom are not even candidates for office.

(8th Cir. 2020) (cleaned up). Supreme Court's cramped view of harm effectively requires a candidate to know the result of an election before it has occurred.[7]

In any event, the Candidate Plaintiffs did expressly allege in their affidavits that the changes they will have to make to their campaign strategies in response to the Mail-Voting Law will place them at an electoral disadvantage. Ex. I ¶ 12; Ex. M ¶ 13; Ex. P ¶ 12. Supreme Court rejected these allegations without any explanation. And of course, if the completely foreseeable flood of mail-voting ballots does alter the results of elections, the actual harm will be immeasurable. 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*, No. EFC-2020-1376, 2020 WL 8093628, at *1 (N.Y. Sup. Ct. Oswego Cty. Nov. 10, 2020) (finding "irreparable

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[7] And the extent to which a candidate is disadvantaged by universal mail-voting will depend on how much time and money that candidate invests in a mail-voting campaign. But this time and money expended in reaction to an unconstitutional law, which cannot be recovered, is *itself* an irreparable injury. One way or another, these candidates are irreparably harmed by the Mail-Voting Law.

harm" to candidate if likely ineligible absentee ballots are included in initial vote tally). If the Mail Voting Law is held invalid only after an election has occurred, it will be impossible to restore candidates to the positions they would have been in absent the illegally cast ballots. *Cf. Brown v. Chote*, 411 U.S. 452, 455 (1973) ("irreparably lost"). And political parties likewise have a legal interest in their candidates' electoral prospects and suffer injury when this interest is impaired. *See Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) (so holding on the basis of "[v]oluminous persuasive authority").

Moreover, Plaintiffs-Appellants will suffer irreparable harm regardless of the outcomes of upcoming elections. Both the Candidate Plaintiffs 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."). Indeed, because the law does not replace in-person voting with mail-in voting, but instead creates a second parallel universal voting method, Candidate Plaintiffs and Organizational Plaintiffs cannot simply reallocate all their resources, but must develop new programs in addition to their existing ones. *See* Ex. A at ¶¶ 11; Ex. B ¶¶ 11; Ex. D at ¶¶ 11; Ex.

I ¶¶ 9; Ex. M ¶¶ 10; Ex. N ¶¶ 13; Ex. P ¶¶ 9; Ex. Q ¶¶ 10. Supreme Court did not address this source of harm.

The Voter Plaintiffs have established harm, too: the dilution of their votes by the many thousands of constitutionally invalid ballots that would be cast by mail. *See Baker v. Carr*, 369 U.S. 186, 208 (1962) (recognizing constitutional injury to voters due to "dilution by a false tally" or "by a stuffing of the ballot box"); *see also Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020) (cleaned up) (a "presumption of irreparable injury flows from a violation" of the Constitution). Again, Supreme Court did not even address this harm.

Finally, the Mail Voting Law will inevitably increase the number of mail-in ballots cast. Accordingly, Commissioner Plaintiffs will likely suffer harm: Any significant increase in the number of mail-in ballots will undoubtedly impose additional burdens on the election personnel tasked with processing those ballots. The law only requires Plaintiffs-Appellants to show that their expected harms are not "merely speculative." *See Golden v. Steam Heat Inc.*, 216 A.D.2d 440, 442 (2d Dep't 1995). There is no requirement that non-speculative harms be alleged at a particular level of specificity.[8]

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[8] There is also nothing speculative about these Commissioners having to choose between counting unconstitutionally cast ballots and violating the Mail-Voting Law.

Regardless, the Commissioner Plaintiffs can anticipate future harms with more specificity than is common at the preliminary-injunction stage. When the State dramatically expanded mail-in voting during the pandemic, they were forced to rework their office processes, hire additional personnel, and work longer hours to process absentee ballots. *See* 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. Because the new law mimics the pandemic measures, they have established more than "a mere possibility" that these burdens will reoccur. Bank of Am., N.A. v. PSW NYC LLC, 29 Misc. 3d 1216(A), 2010 WL 4243437, at *10 (Sup. Ct. N.Y. Cty. 2010). And, once again, Supreme Court did not address this harm.

B. The balance of equities tilts decidedly in favor of granting a preliminary injunction.

In denying the motion for preliminary injunction, the Decision/Judgment asserted that "since the statute has yet to be declared unconstitutional,[9] the balances do not tip in plaintiffs' favor because enjoining the Early Mail Voting Act at this

[9] To the extent Supreme Court suggests that the constitutionality of the Mail-Voting Act can be presumed for purposes of the balancing of equities, this is utterly without authority. If courts could simply conclusively presume the legality of conduct sought to be enjoined, then the balance of equities would also tilt against an injunction. On the contrary, "where 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) (emphasis added). Here, where Supreme Court chose not to even consider the likelihood of success on the merits, any such presumption is wholly inappropriate.

juncture would harm New York voters." Decision/Judgment, at 5. But the opposite is true — it is because the statute is about to go into effect while its constitutionality remains in doubt that the balance of equities tips decidedly in favor of placing it on hold.

If the Mail-Voting Law is later held unconstitutional — as is highly likely given the unbroken constitutional history and the weakness of the State's defense of the statute, *see supra* — after it has already been allowed to go into effect, the harms that will flow (not just to Plaintiffs-Appellants, but to the entire voting public) will be immense and irreversible. If it is held unconstitutional after ballots have already been distributed, voters will be left unsure whether they can legally cast the ballots they have been provided. Voters who have already cast their ballots will wonder whether they need to vote again in person. Worse still, voters who have already cast their ballots may be disenfranchised if their ballots are challenged. And perhaps worst of all, if the Mail-Voting Law is held unconstitutional after mail-voting ballots have already been counted and have decided elections, the victors may take office under a permanent cloud of illegitimacy.

On the other hand, Supreme Court simply assumes harm from the injunction that has not been proven. First the mail-in voting law was only just enacted in September. There is no reasonable basis to conclude that New York's voters are banking on universal mail-voting when the practice did not exist before 2020, and

then only under the auspices of a pandemic that is no longer a major topic of public discussion. The State 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). If anything, preserving the existing structures for absentee voting will ease administrative burdens on election boards, reduce complexity, and avoid voter confusion. And any harm to the State ultimately depends on the merits of Plaintiffs-Appellants' challenge because, 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.

Finally, to the extent the short time before the law takes effect weighs in the balance of equities, this should be laid at the feet of the Legislature which, after passing the bill, chose to wait more than one hundred days to present the Mail-Voting Law to the Governor for signature. This Court should not reward this type of gamesmanship by allowing the State to use its own deliberate delay as an argument against an injunction.

CONCLUSION

This Court should preliminarily enjoin Defendants-Respondents, their agents, and anyone acting on their behalf from enforcing and/or implementing the Mail-Voting Act, or from hereafter distributing mail ballots to anyone who is not eligible to vote as an absentee voter pursuant to Article II, Section 2 of the New York State Constitution, or from counting votes cast under the provisions of the Mail-Voting Law, pending the determination of this appeal.

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