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 FURTHER SUPPORT OF THE STATE OF NEW YORK AND GOVERNOR KATHY HOCHUL'S MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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Defendants, the 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 further support of their Motion to Dismiss pursuant to CPLR 3211(a) and in opposition to Plaintiffs' Motion for Summary Judgment.

**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.

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 filed a Motion to Dismiss on November 16, 2023. *See* NYSCEF Nos. 73 et seq. Plaintiffs opposed Defendants' Motion and filed a Cross-Motion for Summary Judgment on November 13, 2023. *See* NYSCEF Nos. 80 et seq. For the reasons initially stated in Defendants' Motion to Dismiss, Plaintiffs' Complaint should be dismissed as it fails to state a claim that EMVA is unconstitutional. Also, the Complaint should be dismissed as to County Election Commissioner Plaintiffs, Organizational Plaintiffs, and Candidate Plaintiffs because they lack standing, as further

set forth below. Finally, Plaintiffs' Motion for Summary Judgment should be denied because it fails to establish that EMVA is unconstitutional beyond a reasonable doubt. *See Samuels v. New York State Dept. of Health*, 29 A.D. 3d 9, 12 (3d Dept. 2006). As Plaintiffs are not entitled to summary judgment, the Court should declare the rights of Defendants, including, but not limited to, EMVA being constitutional.[1]

## ARGUMENT

### POINT I

### PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS FAILS TO ESTABLISH THAT COUNTY ELECTION COMMISSIONER PLAINTIFFS, ORGANIZATIONAL PLAINTIFFS, OR CANDIDATE PLAINTIFFS' HAVE STANDING

County Election Commissioner Plaintiffs advance a superficial argument that they have standing. Without citing any supporting authority, County Election Commissioner Plaintiffs argue that they have standing solely from the allegation that EMVA will force them to conduct elections in an unconstitutional manner. "In order to establish standing to challenge the constitutionality of a statute, a plaintiff must demonstrate that he has suffered some actual or threatened injury to a protected interest by reason of the operation of the unconstitutional feature of the statute." *Cherry v. Koch*, 126 A.D. 2d 346, 351 (2d Dept. 1987). Plaintiffs fail to allege an injury-in-fact, only speculating that EMVA "will impose substantial new administrative burdens on election personnel, including Plaintiff county election commissioners" by processing additional mail-in ballots, as well as impose "substantial new financial burdens" on local boards of elections to pay for postage and processing of the mail-in votes. *See* Compl. ¶¶ 52, 55. Plaintiffs' opposition and cross-motion papers provide no other grounds for standing. Additionally, County Election

[1] Pursuant to C.P.L.R. 3211(c), the Court may treat Defendants' Motion to Dismiss as a motion for summary judgment, and Defendants would not oppose if the Court so chose to treat Defendant's Motion as a Motion for Summary Judgment.

Commissioner Plaintiffs fail to show how EMVA affects a protected interest. *See Cherry*, 126 A.D.2d at 351.

Organizational and Candidate Plaintiffs rely on *Schultz v. Williams*, 44 F. 3d 48 (2d Cir. 1994) and *Shays v. Federal Election Commission*, 414 F. 3d 76 (D.C. Cir. 2005) to argue that they have standing.[2] However, those cases do not support Organizational or Candidate Plaintiffs' arguments for standing, as there is no evidence, or credible argument, that their chances of victory have been altered by EMVA or that the EMVA affects the competitive environment of elections.

*Shultz* addressed constitutional challenges to certain New York voting laws regarding the placement of independent candidates on the ballot, and more specifically whether a Conservative Party candidate could intervene. *Schultz*, 44 F.3d at 50, 52-53. The Court held that the Conservative Party candidate had standing to intervene under the "well-established concept of competitors' standing" because the candidate "stood to suffer a concrete, particularized, actual injury—competition on the ballot from candidates that [did not comply with the Election Laws] and a resulting loss of votes." *Id.* at 53. There is no analogous injury in the instant matter that would entitle Organizational or Candidate Plaintiffs to standing.

Meanwhile, *Shays* is also distinguishable because that case addressed standing in the context of laws governing the competitive landscape of political campaigning. *See Shays*, 414 F. 3d at 79. *Shays* considered challenges to Federal Election Commission ("FEC") rulings regarding the Bipartisan Campaign Finance Reform Act ("BCFR"). *Id.* The plaintiffs, sponsors of the

[2] Organizational and Candidate Plaintiffs only cite federal case law that is not binding authority on this Court in support of their argument. *See People v. Garvin*, 30 N.Y. 3d 174, 182-83 (2017) (recognizing that the interpretation of a federal constitutional question by the lower federal courts is not binding on state court); *Suffolk Housing Services v. Town of Brookhaven*, 91 Misc. 2d 80, 87-88 (Sup. Ct., Suffolk County 1977) ("The federal standing law responds to concerns that are peculiarly federal in nature is not binding upon state courts" (internal quotations and citations omitted)).

BCFR, alleged that the FEC permitted certain practices through regulations that the BCFR eradicated; specifically, the use of unregulated political party activities to influence federal elections and "ostensibly issue-related advocacy functioning in practice as unregulated campaign advertising." *Id.* The D.C. Circuit addressed a challenge to the plaintiffs' standing. *Id.* at 83-95. The Court held that the plaintiffs had standing because what was being challenged—the FEC rulings—directly affected the competitive environment of political campaigns in which the plaintiffs were involved. *Id.* at 85-86. In the instant matter, the purpose of EMVA is not to affect the competitive landscape of Organizational and Candidate Plaintiffs' campaigns, and it has no direct impact on campaigning or its environment. *Cf. id.* at 85 ("when a statute 'reflects a legislative purpose to protect a competitive interest, an injured competitor has standing to require compliance with that provision" (quoting *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 6 (1968)).

Organizational and Candidate Plaintiffs also fall outside the zone of interests of EMVA. To their detriment, Organizational and Candidate Plaintiffs cite *De Dandrade v. United State Department of Homeland Security*, 367 F. Supp. 3d 174 (S.D.N.Y. 2019), for the proposition that diversion of resources can establish standing. But a complete reading of *De Dandrade* establishes that a diversion of resources, alone, is not sufficient to establish standing unless the plaintiffs also fall within the zone of interests of the challenged legislation. *De Dandrade*, 367 F. Supp. 3d at 188-89.

In *De Dandrade*, the Southern District determined that the organizational plaintiffs had Article III standing pursuant to the diversion of resources but held that the organizational plaintiffs were not within the zone of interest of the challenged legislation, and, therefore, lacked standing to sue. *De Dandrade*, 367 F. Supp. 3d at 181-183, 187-190. Thus, even if, arguendo, Organizational and Candidate Plaintiffs could establish an injury-in-fact for standing through the

purported diversion of resources in the instant matter, they are not within EMVA's zone of interest that would provide standing to sue.

Pursuant to the foregoing, County Election Commissioners lack standing because they fail to establish injury-in-fact and have failed to allege how EMVA affects a protected interest, and Organizational and Candidate Plaintiffs lack standing because they fail to establish an injury-in-fact and that they are within EMVA's zone of interests. Therefore, the Complaint should be dismissed as to the aforementioned Plaintiffs.

## POINT II

## PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT

### A. Standard of Review

When there is no genuine issue to be resolved at trial, the case should be summarily decided. *Andre v. Pomeroy*, 35 N.Y. 2d 361, 364 (N.Y. 1974). "[S]ummary judgment is appropriate where there exists no genuine issue of material fact and, based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *D'Amico v. City of N.Y.*, 132 F. 3d 145, 149 (2d Cir. 1998). "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented." *Forrest v Jewish Guild for the Blind,* 3 N.Y. 3d 295, 314 (2004), *superseded by statute on other grounds* (citing *Glick v. Dolleck, Inc. v. Tri-Pac Exp. Corp.,* 22 N.Y. 2d 439, 441(1968)). "Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable." *Id.* (citing *Glick,* 22 N.Y. 2d at 441).

"The hurdle for one attacking the constitutionality of laws duly enacted by the elected representatives of the people is high." *Samuels v. New York State Dept. of Health*, 29 A.D. 3d 9, 12 (3d Dept. 2006). "Legislative enactments are presumed valid and one who challenges a statute bears the burden of proving the legislation unconstitutional beyond a reasonable doubt." *Id.*

(quoting *Rochester Gas & Elec. Corp. v. Public Serv. Commn.,* 71 N.Y. 2d 313, 319-20 (1988)). "Courts strike a statute down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Kowal v. Mohr*, 216 A.D. 3d 1472 (4th Dept. 2023) (quoting *White v. Cuomo*, 38 N.Y. 3d 209, 216 (2022)).

**B. Plaintiffs Fail to Establish that EMVA is Unconstitutional Beyond a Reasonable Doubt**

Defendants addressed the constitutionality of EMVA in their Memorandum of Law in Opposition to Plaintiffs' Application for a Preliminary Injunction and Memorandum of Law in Support of State Defendants' Motion to Dismiss. *See* NYSECF Nos. 52, 75. For purposes of judicial economy, those arguments are incorporated herein and not repeated. Defendants only address issues raised by Plaintiffs that have not yet been addressed or not yet been addressed in full.

Plaintiffs cannot establish beyond a reasonable doubt that EMVA is unconstitutional. The foundation of the analysis must begin with the recognized doctrine that, "Subject to the restrictions and limitations of the Constitution the power of the Legislature to make laws is absolute and uncontrollable." *Ahern v. Elder*, 195 N.Y. 493, 500 (1909); *see also Silver v. Pataki*, 96 N.Y. 2d 532, 537 (2001) ("Except as restrained by the constitution, the legislative power is untrammeled and supreme"); *Ingersoll v. Heffernan*, 188 Misc. 1047, 1049 (Sup. Ct., New York County 1947) ("the scope of legislative power is absolute and unlimited except as restrained by the Constitution, and that every act of the Legislature must be presumed to be consonant with the fundamental law until the contrary is clearly established"). Under this purview, EMVA is constitutional to the extent it proscribes a "method" of voting as permissible under art. II, § 7.

Section 7 expressly provides: "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." N.Y. Const. art. II, § 7. Plaintiffs argue that Section 7 should be interpretated narrowly, such that the "methods" should be limited only to the "mechanics" of voting. Plaintiffs' Memorandum of Law in Opposition to Motions to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment, NYSCEF No. 81 (hereinafter "Plf. Memo.") 16. Plaintiffs cite to *People ex rel. Deister v. Wintermute*, 194 N.Y. 99, 104 (1909), in support of this position. *Id.* However, *Deister* does not support this position.

In *Deister*, the Court of Appeals considered in what manner and to what extent an official voting canvass can be impeached, including the admissibility at trial of the testimony of electors to show how they voted in an election. *See Deister*, 194 N.Y. at 102-04. Section 7 was considered by the Court for its "privacy" provision. *Id.* at 104-06. The Court found that language added in the Constitution of 1895—"or by such other method as may be prescribed by law, provided that secrecy in voting be preserved"—did not provide any further safeguards for the secrecy in voting. *Id.* at 104. In dicta, the Court buttressed its position by recognizing that the purpose of the additional language was not associated with privacy in voting, but to enable the use of voting machines. *Id.* To read such dicta as dispositive of Section 7 relating only to the "mechanisms" of voting would be improper. It would be contrary to the legislative history of the relevant amendment to the provision, which was "made to admit of an adjustment of the manner of our elections to the improved methods of voting thus likely to come into use." 3 Charles Z. Lincoln, *The Constitutional History of New York* 111 (1905). Legislative history establishes that the

language of Section 7 was purposely broadened to permit voting through any "manner" or "method" appropriate through the "inventive talent of the age." *Id.* at 109-112.

The reading of art. II, § 7 to permit voting by mail would not render art. II, § 2 meaningless. As previously advanced by Defendants, the absentee voting provision establishes a constitutional minimum that may be afforded to "absentee" voters, for which 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. Also, legislative action under one provision of the Constitution substantively affecting another constitutional provision does not render the legislative action unconstitutional. *Siwek v. Mahon*, 39 N.Y. 2d 159, 164-65 (1976). In *Siwek v. Mahon*, the Court of Appeals considered a challenge to a statute permitting voting registration, enrollment, and transfer by mail. *Siwek*, 39 N.Y. 2d at 162-63. As part of its consideration, the Court analyzed Sections 5 and 6 of art. II of the New York Constitution. *Id.* at 163-65. Section 5 required the establishment of an annual voter registration system, under which each voter was required to reregister prior to each year's general election. *Id.* at 163-64. Section 6, meanwhile, provided that the legislature may establish a system or systems where voters can be permanently registered for such period as the legislature provides. *Id.* at 164. The Court held that the exercise of legislative authority under Section 6 rendered Section 5 "dormant" and "inoperative." *Id.* at 164-65. Thus, an exercise of authority by the legislature under one Constitutional provision can impact another provision without being deemed unconstitutional, such as in the instant matter. *See Id.*

Plaintiffs' reliance on *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022) in arguing that EMVA renders art. II, § 2 meaningless is misplaced. *Harkenrider* is not supportive of Plaintiffs' "meaningless" argument because, in that case, express procedural requirements enunciated by the Constitution were not followed when the legislature attempted congressional redistricting.

*Harkenrider*, 38 N.Y.3d at 508-17. Specifically, the legislative enactment of 2022 redistricting congressional maps occurred without complying with express Constitutional procedures. *Harkenrider*, 38 N.Y.3d at 509. There is no such violation of express Constitutional language in this case, whether procedural or otherwise. Therefore, *Harkenrider* is distinguishable from the instant matter and does not support Plaintiffs' argument that EMVA renders art. II, § 2 "meaningless."

Plaintiffs' revisionist history of Constitutional Amendments for absentee voting is equally unpersuasive and does not establish that EMVA is unconstitutional. Plaintiffs cursorily argue that the legislature's ability to enact mail voting erases historical "need" for Constitutional amendments to allow voting by mail. This is not so. From the very beginning of absentee voting for soldiers during the Civil War, at least a portion of the legislature believed that providing absentee soldiers an opportunity to vote did not require a constitutional amendment. 2 Charles Z. Lincoln, *The Constitutional History of New York* 236-37 (1905) (discussing the passage of legislation by the senate being sent to the assembly for consideration). A Constitutional Amendment was eventually passed following Governor Seymour's objection to proposed legislation that was previously passed by the senate. *Id.* at 238-39. Importantly, at no time was there a judicial determination that the legislature lacked the constitutional authority to establish vote by mail without a constitutional amendment. *See id.* at 236-39. Simply because the legislature historically chose to utilize constitutional amendments to effectuate absentee voting rights does not foreclose the current legislature from instituting an entirely different system of early mail voting under its plenary power pursuant to art. II, § 7 of the Constitution. *See Forti v. New York State Ethics Commission*, 147 A.D. 2d 269, 277 (3d Dept. 1989) ("one Legislature is not bound by the acts of any previous one").

In conclusion, given the broad authority granted to the legislature, express authority granted under art. II, § 7 to proscribe the manner and method of elections, EMVA's reconciliation with the rest of the New York Constitution, and legislative history, Plaintiff cannot prove beyond a reasonable doubt that EMVA is unconstitutional. Therefore, Plaintiffs' Motion for Summary Judgment should be denied.

## POINT III

## THE COURT SHOULD DECLARE THE RIGHTS OF DEFENDANS FOLLOWING DENIAL OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Because Plaintiffs are not entitled to a declaratory judgment on their constitutional claim, and for the reasons stated herein, and in Defendants prior papers, the Court should declare that EMVA is constitutional. "[W]hen the plaintiff in an action for a declaratory judgment is not entitled to the declaration sought, the remedy is not dismissal of the complaint, but a declaration of the rights of the parties, whatever those rights may be." *La Lanterna, Inc. v. Fareri Enterprises, Inc.*, 37 A.D.3d 420, 422-23 (2007) (citing *200 Genesee St. Corp. v. City of Utica*, 6 N.Y.3d 761, 762 (2006)). Plaintiffs seek a declaratory judgment that EMVA is unconstitutional. As set forth in Defendants' prior papers and herein, EMVA is constitutional. Thus, Plaintiffs are not entitled to a declaratory judgment. Therefore, the Court should declare that EMVA is constitutional, along with a declaration of whatever the rights of the parties may be. *See Hirsch v. Lindor Realty Corp.*, 63 N.Y.2d 878, 881 (1984) ("In an action for declaratory judgment, where the disposition is on the merits, the court should make a declaration, even though the plaintiff is not entitled to the declaration he seeks.").

## CONCLUSION

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

Dated: December 7, 2023

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