SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY
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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,

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.

Index No. 908840-23

Hon. Christina L. Ryba

COMBINED REPLY BRIEF IN SUPPORT OF INTERVENORS' MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The New York Legislature enacted the Early Mail Voter Act ("the Act") pursuant to its inherent, plenary authority to enact election laws, which is "absolute" so long as it does not add to the qualifications required of voters by the Constitution. *Ahern v. Elder*, 195 N.Y. 493, 500 (1909). The Act also falls squarely within the Legislature's broad power to provide for voting by "ballot or such other method as may be prescribed by law" as set forth in Article II, Section 7 of the Constitution. Plaintiffs claim that the Act violates Article II, Section 2 of the Constitution, but nothing in the language of that provision requires voters to cast their ballots in person or even remotely suggests that the Legislature cannot allow voters to universally vote by mail. And the language some lawmakers once read as imposing an in-person voting requirement—which stated that voters were qualified to vote "in the election district of which [they] shall at the time be a resident and *not elsewhere*"—was removed from the Constitution by amendment in 1966.

Article II, Section 2 serves a distinct purpose: it expressly allows the Legislature to provide *different* methods of voting for certain voters than the general population if it so chooses—specifically, for those who are absent on election day or who may be unable to appear at the polls because of illness or disability. It says nothing about voting by mail. While the Legislature has used its authority under Section 2 to permit absentee voters to vote by mail, it has also enacted completely different systems of voting under earlier versions of Section 2 and remains free to do so in the future. Plaintiffs rely on *expressio unius* and other canons of construction to argue otherwise, but canons of construction cannot supply constitutional text that simply is not there.

Plaintiffs' and Defendant Kosinki's remaining arguments distort New York's constitutional history, improperly attempt to restrict the Legislature's plenary authority, and erroneously accuse the Legislature of reversing popular sovereignty by passing a law that makes

it *easier* for New Yorkers to vote. But statutes enacted by the Legislature are presumptively constitutional, and to succeed in this litigation, Plaintiffs must demonstrate "beyond a reasonable doubt" that the Constitution conflicts with the Act. *Cnty. of Chemung v. Shah*, 28 N.Y.3d 244, 262 (2016). Plaintiffs fail to overcome that high burden. Their Complaint should be dismissed.

ARGUMENT

I. Plaintiffs misstate the relevant legal standard.

As a threshold matter, Plaintiffs misstate the pleading standard. While the *facts* alleged in the complaint are presumed to be true, the Court owes no deference to Plaintiffs' legal conclusions. *Cardinale v. N.Y.C. Dep't of Educ.*, 204 A.D.3d 994, 998 (2d Dep't 2022). And as Plaintiffs acknowledge, "the facts are not in doubt." Doc. 81 at 11. This case presents a pure question of law: whether the Act conflicts with the New York Constitution "beyond a reasonable doubt." *Chemung*, 28 N.Y.3d at 262. In this context, "beyond a reasonable doubt" is a legal standard reflecting that "[a]n arrangement made by law for enabling the citizen to vote should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable," with "every presumption . . . in favor of the validity of such a law." *People ex rel. Lardner v. Carson*, 155 N.Y. 491, 501 (1898).

Rather than attempting to carry their burden of showing beyond a reasonable doubt that the Act conflicts with the New York Constitution, Plaintiffs argue they need not make any showing, because the lack of express authorization in the Constitution for "mail voting" alone renders the Act invalid. *See* Doc. 81 at 8 (arguing that "mail voting, like all other forms of absentee voting, must be expressly authorized by the Constitution"); *see also id*. at 14, 18.

But the Legislature does not need express authorization to enact "mail voting" laws; its power to enact election legislation is "absolute and unlimited, except by the express restrictions of the fundamental law." *Bank of Chenango v. Brown*, 26 N.Y. 467, 469 (1863); *see also Ahern*, 195

N.Y. at 500 ("Subject to the restrictions and limitations of the Constitution the power of the legislature to make laws is absolute and uncontrollable."). Accordingly, the question before this Court is not whether the Constitution *authorizes* the Act, but whether it *prohibits* it. To succeed, Plaintiffs must identify a constitutional prohibition that forecloses the Act. *See Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022) (statute may be held unconstitutional only "after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." (quotation omitted)).

Because, as a matter of law, the Act does not conflict with the Constitution beyond a reasonable doubt, Plaintiffs' complaint must be dismissed.

II. Plaintiffs fail to show that the Act conflicts with the Constitution.

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

1. The phrase "at every election" does not limit the *place* of voting.

Plaintiffs allege that the Act violates the Constitution based on a flawed premise: that the Constitution contains a "default requirement of in-person voting." Doc. 81 at 10. To determine whether the Constitution imposes such a requirement, "our starting point must be the text thereof." *Harkenrider*, 38 N.Y.3d at 445. Plaintiffs' argument relies on a strained and unsustainable reading of Article II, Section 1, which provides, in full: "Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election." N.Y. Const. art. II, § 1 (emphasis added). This language does not require in-person voting.

Plaintiffs' textual argument relies exclusively on the use of the preposition "at" in the phrase "at every election," arguing that this means that voters are to "cast their ballots 'at' the 'election' itself, not merely 'in' the election, and therefore, not from afar." Doc. 81 at 9. Plaintiffs'

argument places far too much weight on a single preposition, reading into it extremely specific and exclusionary language that simply is not there. It further ignores the purpose of the provision and the context in which the phrase appears.

As New York courts have previously and consistently found, Article II, Section 1 was "not intended to regulate the mode of elections, but rather the qualification of voters, and thus does not curtail the Legislature's otherwise broad authority to establish rules regulating the manner of conducting . . . elections." *Moody v. N.Y. State Bd. of Elections*, 165 A.D.3d 479, 480 (1st Dep't 2018) (quotation omitted) (collecting cases). Section 1 merely guarantees the right to vote to any citizen who meets the age and residency requirements. It is simply implausible that the drafters of Section 1 buried an in-person voting requirement in a single preposition appearing in a "voter franchise protection provision[]." *Id.* Constitutional drafters, like legislative bodies, "generally do not hide elephants in mouseholes." *Haar v. Nationwide Mur. Fire Ins. Co.*, 34 N.Y.3d 224, 231 (2019) (quotations omitted).

2. Language that some lawmakers previously viewed as requiring in-person voting is no longer in the Constitution.

Plaintiffs argue that Section 1 has long been understood to require in-person voting and that "[t]hroughout the history of the State, whenever the Legislature has sought to allow absentee voting for certain persons . . . it has first needed a constitutional amendment." Doc. 81 at 9. But at each historical juncture Plaintiffs point to, Article II, Section 1 contained language—since removed—that some lawmakers viewed as requiring voters to cast their ballots in person.

That language provided that a qualified voter "shall be entitled to vote at such election *in the election district* of which he shall at the time be a resident, *and not elsewhere*." Senate 5519, 1965 N.Y. Laws 2783 (concurrent resolution proposing amendment subsequently ratified in 1966). The historical record reflects that to the extent some lawmakers believed that the Constitution

required in-person or in-district voting, their belief was based on the "in the election district . . . and not elsewhere" language in Section 1, and *not* the phrase "at the election." Charles Z. Lincoln, *The Constitutional History of New York*, Vol. II, at 238 (1906) (quoting Governor Seymour's special message to the Legislature in 1863: "The Constitution of this state requires the elector to vote *in the election district* in which he resides . . . [i]t is clear to me that the Constitution intends that the right to vote shall only be exercised by the elector in person.") (emphasis added); *see also* 1946 N.Y. Op. Att'y Gen. No. 10 (Feb. 6, 1946) (observing that previous Attorney General opinions requiring votes to be cast in the district were "apparently relying upon a strict interpretation of the provisions of article II, § 1, of the Constitution to the effect that a voter 'shall be entitled to vote *** *in* the election district *of which* he shall *** be a resident, *and not elsewhere* ***.'") (emphases and alterations in original); *Lardner*, 155 N.Y. at 507 (Vann, J., dissenting) ("The words 'and not elsewhere,' which appear in every constitution except the first, are an express limitation.").[1]

That language was removed from the Constitution when New York voters ratified an amendment in 1966. Plaintiffs are simply wrong that the language was removed in 1945 to accommodate voters who moved; from 1945 until 1966, the Constitution retained the phrase "shall be entitled to vote at such election in the election district" while also stating that a voter who had moved from one district to another within 30 days of an election "shall be entitled to vote at such

[1] As previously explained, Plaintiffs' claim that there was consensus that the Constitution required in-person voting is significantly overblown, and the better interpretation is that it never has. *See* Doc. 60 at 12-15; Doc. 70 at 11-14. In 1863, a majority of the Legislature disagreed with Governor Seymour's constitutional interpretation. *See* 2 Lincoln at 238-39. And what Plaintiffs describe as "the prevailing view" at the 1915 constitutional convention, Doc. 81 at 10, was the view of a single individual, who said: "it will be a long time *in my opinion* before any Constitution ever permits any such thing as absentee voting." Constitutional Convention of 1915, *Revised Record* at 1815 (emphasis added).

election *in the election district* from which he or she has so removed." Senate 5519, 1965 N.Y. Laws 2783. The current language does not support that the Constitution requires voters to cast their ballots in person.[2]

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

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

In the absence of an express limitation on the Legislature's power to enact mail voting, Plaintiffs rely on *expressio unius* to *imply* a constitutional requirement of in-person voting from Section 2's authorization of "absentee" voting for enumerated categories of voters. But this is inconsistent with the constitutional text, structure, and history of the provision. As discussed *supra* section II.A.2, historically, Article II, Section 1 was the provision that some lawmakers viewed as creating an in-person voting requirement. Section 2 did not place *limitations* on absentee voting; it created *exceptions* to Section 1's perceived in-person voting requirement. Section 2 was never intended to be a prohibition on absentee voting; Plaintiffs' attempt to rewrite it should be rejected.

Moreover, as Intervenors have explained, courts are generally hesitant to use *expressio unius* to infer limitations on plenary legislative authority by negative implication, and the cases Plaintiffs rely on are inapposite. Doc. 70 at 4, 9-11. *Silver v. Pataki*, 3 A.D.3d 101 (1st Dep't 2003), interpreted Article VII, Section 4, which provides: "The legislature *may not* alter an appropriation bill submitted by the governor," except in three enumerated ways. (emphasis added). Section 2 does not contain any express prohibition at all. Similarly, in *Killeen v. Angle*, 109 N.Y. 564 (1888), the Court of Appeals considered *express* constitutional language requiring that "persons employed

[2] The failure of the Legislature's proposed constitutional amendment to expand absentee voting in 2021 does not undermine this conclusion. As Intervenors explained in their Memorandum of Law in Support of their Motion to Dismiss, the Court of Appeals has rejected attempts to infer voter intent from the failure of a referendum. *See* Doc. 70 at 14-16. Plaintiffs do not engage with—much less rebut—any of the authorities cited by Intervenors.

in the care and management of the canals" "shall be appointed by the superintendent of public works and shall be subject to suspension and removal by him." 109 N.Y. at 569. Two other provisions *of the same amendment* provided for legislative supervision over some of the superintendent's constitutionally-delegated functions; based on this language, the Court held that the Legislature was not empowered to constrain the superintendent's constitutional power to "appoint," "suspend," or "remove" canal workers, *id.* at 574-576. There is no similar language here. Finally, *Hoerger* applied *expressio unius* to an act of the Legislature—not the Constitution. The question was whether a *county* legislature—which has only enumerated powers—could set term limits for district attorneys when the *state* legislature had declined to do so. *Matter of Hoerger v. Spota*, 109 A.D.3d at 564, 567 (2d Dep't 2013). The court reasoned that, because the Constitution explicitly authorized the state legislature to set term limits and it had not done so—though it *had* specified the length of the district attorney's term—*expressio unius* led to an "irrefutable inference" that the state legislature "intended" to "omit[]" or "exclude[]" term limits for district attorneys and that legislative judgment necessarily preempted any inconsistent municipal law. *Id.* at 568. None of the cases cited by Plaintiffs applied *expressio unius* to infer a limitation on the Legislature's authority.

2. Intervenors' interpretation does not render Section 2 superfluous.

Plaintiffs' contention that Intervenors' interpretation would render Section 2 superfluous relies on the mistaken premise that absentee voting and mail voting are one and the same. Doc. 81 at 23. They are not. Section 2 allows the Legislature to provide a different manner of voting for voters absent on election day or who may be unable to appear at the polls because of illness or disability, but it does not mention or reference voting by mail. Mail voting is one *form* of absentee voting, but that does not mean that the Legislature is forbidden from allowing any voters other than absentee voters to use mail voting. The Legislature has now decided that mail voting should

be generally available, *and* that mail voting should be the method used by absentee voters. Section 2 still allows future legislatures to create special forms of absentee voting for the enumerated categories of absentee voters—which Section 2 indicates need not be available to all other voters.

The other canons referenced by Defendant Kosinski are similarly inapplicable. *See* Doc. 114 at 24-26. Because Intervenors' reading does not render Section 2 superfluous, Kosinski is incorrect that the canon of superfluity precludes Intervenors' position. *Id.* at 25-26. Because Section 2 does not contain any "catch-all provision following a list of specific items," the canon of *ejusdem generis*, which informs the interpretation of such a list is also inapplicable here. *See, e.g.*, *Tverskoy v. Ramaswami*, 920 N.Y.S.2d 803, 806 (2011). Finally, the general/specific canon, which "avoids . . . the superfluity of a specific provision that is swallowed by the general one," similarly has no import because there is no contradiction between any specific and general constitutional provision here. *See Doc. 114* at 25; *see also United States v. Carter*, 696 F.3d 229, 233 (2d Cir. 2012) (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)).

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

Where the highest courts of other states that have similar provisions in their own constitutions have been presented with similar arguments, they have found—as this Court similarly should—that the legislature's plenary authority to regulate elections allowed them to enact universal vote-by-mail laws. This was the case in Pennsylvania, where its Supreme Court upheld that state's universal vote-by-mail statute by relying in part on "broad language" in the Pennsylvania Constitution that is *identical* to New York's Article II, § 7. *McLinko v. Dep't of State*, 279 A.3d 539, 577 (Pa. 2022). And it was true in Massachusetts, where its Supreme Judicial Court rejected an attempt to apply *expressio unius* to a constitutional provision that, like New

York's Article II, Section 2, gave the Legislature the "power"—but not the obligation—to "provide by law for voting by qualified voters of the commonwealth who, at the time of an election, are absent from the city or town of which they are inhabitants." *Lyons v. Sec'y of Commonwealth*, 490 Mass. 560, 569 (2022) (quoting Mass. Const. amdt. 45).

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

III. The Act falls within the Legislature's broad power under Article II, Section 7.

Any remaining doubt as to the scope of the Legislature's broad, largely unfettered power to establish election rules is resolved by the plain language of Article II, § 7. Though not *necessary* to reject Plaintiffs' claim, Section 7—which is the Constitution's "sole enactment concerning the ballot or method of voting"—confirms and reinforces the Legislature's broad authority to provide for voting by "ballot, or by such other method as may be prescribed by law." *Burr v. Voorhis*, 229 N.Y. 382, 395 (1920). This "broad language" authorizes the Legislature to "prescribe any process by which electors may vote," including mail voting. *McLinko*, 279 A.3d at 577 (discussing identical language in the Pennsylvania Constitution). It is not, as Plaintiffs argue, limited to the "mechanics" of voting. Doc. 81 at 22. And in any event, Plaintiffs do not explain why voting by mail is not a "mechanic of voting."

The plain text and history of Section 7 refute Plaintiffs' argument that the phrase "such other method" in Section 7 refers only to "voting machines." *Id*. If Section 7 were limited to voting machines, it would presumably say so. Instead, the language is much broader: the Legislature can provide for voting "by ballot" or by any "*other method*." (emphasis added). To the extent the history is relevant, the Constitutional Convention of 1894 *rejected* several proposed amendments that would have specified "voting machines" as the only allowable alternative to voting "by ballot" in favor of the broader language that appears today. Charles Z. Lincoln, *The Constitutional History of New York*, Vol. III, at 109-111 (1906). And the phrase "provided that secrecy in voting be preserved" was added to ensure the Legislature would not return to the *viva voce* method of voting—a provision that would have been unnecessary if the phrase "such other method" was limited to voting machines. *Id.* at 113.[3]

Plaintiffs are wrong to assert that *Deister v. Wintermute*, 194 N.Y. 99 (1909), limits the scope of Section 7 to "voting machines." The specific issue addressed in *Wintermute* was whether allowing voters to testify at trial to show how they voted at an election violated the ballot secrecy requirement. *Id.* at 104. One of the candidates argued that the 1894 Constitution, which added the phrase "provided that secrecy in voting be preserved" to what is now Section 7, rendered such testimony inadmissible. *Id.* at 105. The Court of Appeals rejected that argument, because "the object of this addition in the last Constitution was not to create any greater safeguards for the secrecy of the ballot than had hitherto prevailed, but solely to enable the substitution of voting machines, if found practicable." *Id.* at 104. That is entirely consistent with the history of Section 7, which shows that the 1894 amendment was brought about by the advent of voting machines but

[3] In contrast, the opponents of the amendment—who did not prevail—were "opposed to letting down the bars of the legislature to make another experiment in ballot reform, either by machine *or otherwise*." 3 Lincoln at 113 (emphasis added).

was not *limited* to voting machines. Indeed, elsewhere in its opinion, the Court recognized that "the Legislature's power to regulate the method of voting is plenary," so long as that method "will enable an elector being without fault or personal misfortune to exercise his constitutional right." *Id.* at 109.

IV. Judicial estoppel does not apply.

Judicial estoppel does not bar Defendants and Intervenors from arguing that the Legislature has authority to enact the Act. Under the doctrine of judicial estoppel, a party that "assumes a certain position in a legal proceeding" and "succeeds in maintaining that position" may not assume a contrary position in future proceedings. *Shapiro v. Butler*, 709 N.Y.S.2d 687, 690 (2000). Judicial estoppel does not apply to Intervenors, who were neither a party to, nor in privity with any party to, the prior litigation described by Plaintiffs.

Courts recognize privity where there is a close relationship between the current party and the previous action; parties potentially in privity include "those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action." *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 277 (1970). Kosinski ignores that in favor of an "adequacy of representation" test—relying on a dissenting opinion in a case about *collateral* estoppel, which was expressly disavowed by the majority, *Buechel v. Bain*, 97 N.Y.2d 295, 309 (2001)—but under either test, Intervenors cannot be barred from making this argument here.

Further, Defendants' prior statements were either consistent with their current position or were never adopted by a court. Doc. 114 at 18-19. Kosinski cites prior statements from Defendants asserting that Section 2 authorizes the Legislature to enact and regulate absentee voting. Doc. 114 at 19-21 (citing Ex. F¶ 37; *id*. ¶ 32; Ex. A ¶ 24; Ex. C at 3; Ex. D at 19). Defendants advance a consistent position here: while Section 2 authorizes the Legislature to enact and regulate absentee

voting methods for the specified categories of voters, the Legislature's plenary power allows the Legislature to determine voting methods for all voters. *See* Doc. 52 (stating that "'absentee voting' and 'early voting by mail,' as prescribed in EMVA, are distinguishable"); Doc. 70 (distinguishing between "absentee voting" under Section 2 and the Legislature's plenary authority to voting methods for all voters). Voting methods for all voters are different than absentee voting methods specific to absentee voters, and Defendants have consistently made this distinction (as even the litigation materials Plaintiff identifies show). *See* Doc. 110 Ex. E at 34:9–11 (stating "no excuse vote by mail is a completely separate and much broader provision for access to voting than simply expanding absentee balloting"); *id.* Ex. F ¶ 31 (explaining the Legislature has plenary authority to promulgate rules for the manner and conduct of elections). Because Defendants do not "assume a contrary position" in this litigation than in prior litigation, they are not estopped from arguing that the Legislature has plenary power to enact mail-in voting. *Shapiro*, 709 N.Y.S.2d at 690.

Nor do Defendants' prior positions about in-person voting provide any basis for judicial estoppel in this case. In every prior brief that Kosinski cites to support this point, Defendants wrote that the Constitution's "express requirement [of in person voting] no longer exists." Doc. 110 Ex. D at 3–4; *id.* Ex. A at 4; *id.* Ex. C at 2. While they also stated that the Constitution historically "may have been regarded" as containing an implicit in-person requirement, Defendants did not argue that the Constitution requires in-person voting, and the courts in those cases did not find that the New York Constitution requires in person voting. This last point—which Kosinski does not contest—is fatal to Kosinski's claims of judicial estoppel. *See Shapiro*, 709 N.Y.S.2d at 690 (stating that "because [the party's] position was not adopted by the court in the [prior] action, the doctrine of judicial estoppel is inapplicable").

CONCLUSION

For the reasons set forth herein and in their motion to dismiss, Intervenor-Defendants respectfully request this Court grant their motion to dismiss and deny Plaintiffs' motion for summary judgment.

Date: December 7, 2023

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Dated: December 7, 2023

/s/ *James R. Peluso*

James R. Peluso