To be Argued by:
MICHAEL Y. HAWRYLCHAK
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

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,

(For Continuation of Caption See Inside Cover)

Case No.: CV-24-0281

BRIEF FOR PLAINTIFFS-APPELLANTS

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Intervenors-Defendants-Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

New York State Cases

Out-of-State Cases

New York State Constitution

New York State Statutes

Newspaper Articles

Other

QUESTION PRESENTED

Question 1: Does the Mail-Voting Law violate the New York State Constitution by permitting mail voting by persons other than those for whom absentee voting is authorized under Article II, Section 2?

Answer Below: The Court below held that the Mail-Voting Law does not violate the New York State Constitution.

Plaintiffs-Appellants respectfully submit this brief in support of their appeal of the Decision/Order and Judgment of Supreme Court, Albany County, dated February 5, 2024, dismissing Plaintiffs-Appellants' complaint. (R.6–16.) Plaintiffs-Appellants ask this Court to reverse the court below and to grant summary judgment in favor of Plaintiffs-Appellants, declaring that the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York (the "Mail-Voting Law"), is void as violative of the New York State Constitution and enjoining Defendants-Respondents from taking any action to implement or enforce the Mail-Voting Law. The Mail-Voting Law purports to allow all qualified voters to vote by mail despite the restrictions of Article II, Section 2 of the New York State Constitution, which limit absentee voting to only those qualified voters who "may be absent from the county of their residence or, if residents of the city of New York, from the city" and those who "may be unable to appear personally at the polling place because of illness or physical disability."

PRELIMINARY STATEMENT

For more than 150 years, New York lawmakers, officials, and legal commentators universally understood the state Constitution to impose limits on the Legislature's ability to authorize absentee voting. Before the Mail-Voting Act, *every* effort to expand absentee voting in New York, without exception, required a

constitutional amendment. In 2021, consistent with this well-settled understanding, the Legislature proposed a constitutional amendment to remove these limitations and allow the authorization of universal, no-excuse absentee voting. But the people of New York felt differently and decisively rejected the proposed amendment.

But the voters' express rejection and the lack of constitutional authority proved no deterrent to today's Legislature, which unceremoniously and dramatically parted ways with both the will of the people and the *unbroken* line of constitutional authority. Undaunted by the constraints of either democracy or the Constitution, the Legislature simply went ahead and passed the Mail-Voting Law — the very universal absentee voting law that the voters had refused to grant the Legislature the constitutional authority to enact. The Mail-Voting Law's defenders now contend that the current Legislature, unlike every previous Legislature and legal commentator in the history of this state, suddenly discovered in the Constitution inherent authority to authorize absentee voting as far and as wide as it likes, without any constitutional constraint. And they invite the courts to join the Legislature in rejecting and nullifying *150 years* of New York's constitutional history. Remarkably, Supreme Court accepted this invitation.

On September 20, 2023, the day the law was signed, Plaintiffs-Appellants brought this action challenging the constitutionality of the Mail-Voting Law. On

February 5, 2024, Supreme Court ordered this action dismissed, holding that the Mail-Voting Law does not violate the New York State Constitution. (R.6–16.) Supreme Court did so on the basis of an erroneous reading of the Constitution, generally, and Article II, Section 2, specifically, that fails to consider the Constitution's language in context — either now, or at the time of its adoption; fails to consider the structural relationship between different provisions of Article II; and completely ignores more than 150 years of constitutional amendments, legislative history, and constitutional practice that demonstrate a consistent understanding of the Constitution's limitations on absentee voting, which Supreme Court casts aside without comment.

This Court should reverse Supreme Court's dismissal and grant summary judgment to Plaintiffs-Appellants, declaring the Mail-Voting Law unconstitutional and enjoining its enforcement.

BACKGROUND

Although the constitutional text and structure alone are enough to require reversal of Supreme Court's decision, the unconstitutionality of the Mail-Voting Law is unmistakably clear when viewed in light of the full constitutional history, including 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, and the Legislature's subsequent enactment in 2023 of the Mail-Voting Law nevertheless purporting to authorize it.

I. The Legislature ignored the will of the people and enacted a law authorizing universal, no-excuse absentee voting.

In 2021, the people of New York soundly rejected the proposed "Authorizing No-Excuse Absentee Ballot Voting" constitutional amendment, which would have removed the existing limits in Article II, Section 2 on the Legislature's power to authorize absentee voting. *See 2021 Statewide Ballot Proposals*, Board of Elections, perma.cc/4FDZ-YPMK (emphasis added). Despite the amendment's failure, 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 precisely the same rights as the two categories of absentee voters identified in Article II, Section 2 of the Constitution. That is, it enables them to vote without showing up to the polls in person. 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).

Throughout the rest of the Election Law, 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 Legislature's only attempt to distinguish the Mail-Voting Law from the one that its proposed (but rejected) amendment would have authorized is semantic — *i.e.*, to call the identical procedure "early mail voting" instead of "absentee voting." These word games did not fool observers, however, who immediately understood that the Legislature was "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. Punctuating its scorn for the popular will and constitutional limits on its authority, the Legislature then waited more than 100 days — until the next election season appeared on the horizon — before sending the bill to Governor Hochul for signature.

Joining the defiant and constitutionally unmoored Legislature, on September 20, 2023, the Governor signed the bill into law.

II. Plaintiffs-Appellants brought this action challenging the constitutionality of the Mail-Voting Law.

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.[1] Plaintiffs-Appellants span every segment of New York society that will be affected by the Legislature's unconstitutional override of voters' decisions, including candidates for local, state, and federal elections in New York, political party committees at the state and national level, commissioners of county boards of elections in New York, and registered voters and taxpayers in the State of New York.

On September 29, 2023, Intervenors-Defendants-Respondents moved to intervene in the action, and on October 11, 2023, they filed a proposed motion to dismiss Plaintiffs-Appellants' complaint. (R.48.) Defendants-Respondents Governor Hochul and the State of New York followed with their own motion to

[1] Simultaneously with the filing of their complaint, 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. Supreme Court later denied this motion, and Plaintiffs-Appellants appealed to this Court. The appeal of the denial of a preliminary injunction is now moot following Supreme Court's dismissal of the underlying action.

dismiss on October 16, 2023. (R.80.) On November 13, 2023, Plaintiffs-Appellants cross-moved for summary judgment. (R.101.)

III. Supreme Court, ignoring 150 years of constitutional history and practice, declared the Mail-Voting Law constitutional and ordered this action dismissed.

On February 5, 2024, Supreme Court issued a Decision/Order and Judgment granting Defendants' motions to dismiss and denying Plaintiffs-Appellants' cross-motion for summary judgment. (R.15–16.) Supreme Court held that the Legislature possesses inherent plenary power to enact laws allowing universal absentee voting absent an express or implied restriction in the Constitution and that Article II, Section 2 was neither. (R.14) Without addressing the obvious redundancy with the alleged inherent authority in which Supreme Court grounded its opinion, it opined that Article II, Section 2 simply permits the Legislature to enact special accommodations allowing absentee voting for certain categories of persons who are physically unable to appear at their designated polling place on election day. (R.14.)

The court further relied on language in Article II, Section 7 of the Constitution, which allows the Legislature to enact laws governing the "method" of voting. According to Supreme Court, this language independently grants the Legislature a plenary power over elections that allows it to freely authorize absentee voting as it sees fit. (R.12, 14.) At no point did the court contend with the history

of Article II, Section 7, which demonstrates that *everyone* involved in the convention debate that led to its adoption understood the provision's reach to be limited to the physical mechanics of voting and that *no one* suggested it had anything to do with absentee voting or the place of election. Nor did the court so much as acknowledge the constitutional imperative to read constitutional provisions in harmony rather than adopt an interpretation of one provision that renders another meaningless or irrelevant.

Moreover, the court's suggestion that universal mail voting is constitutional because "an express in-person voting requirement formerly existed in the NY Constitution but was long ago removed" fails several times over. (R.14.) It cannot be reconciled with the analyses of other New York courts that reached the opposite conclusion. *See, e.g.*, *Amedure v. State*, 77 Misc. 3d 629, 636 (N.Y. Sup. Ct. Saratoga Cty. 2022). It does not explain, as a matter of basic textual interpretation, how an amendment to Article II, Section 1 in 1966 has any relevance to whether "the language of article II, §2" restricts who can be allowed to vote absentee. (R.14.). And it is flatly contradicted by the sponsor of the 1966 amendment and every other contemporaneous source. *See infra*, Part II.B.

In making these many errors, the court completely ignored the long and consistent constitutional practice spanning more than 150 years, including

legislative statements, attorney general opinions, and numerous constitutional amendments, that recognized constitutional limits on the Legislature's authority to expand absentee voting. The concept of inherent authority is not new and dates to the founding. Yet no one, until 2023, understood the Legislature to possess inherent authority to authorize or expand absentee voting. To the contrary, as recently as late 2022, everyone understood that the Legislature's power to authorize absentee voting was constrained by Article II, Section 2. Nor did the Court even acknowledge the electorate's recent rejection at the polls in 2021 of a proposed constitutional amendment to allow "no excuse" absentee voting, or the numerous public representations by the Legislature, the Attorney General, and others concerning this proposed amendment.

Notice of Entry was served on February 5, 2024, (R.4,) and on February 6, 2024, Plaintiffs served their Notice of Appeal. (R.1.) Plaintiffs-Appellants now ask this Court (1) to reverse Supreme Court's Decision/Order and Judgment dismissing the case and (2) to instead grant summary judgment in favor of Plaintiffs-Appellants, declaring the Mail-Voting Law unconstitutional and enjoining Defendants-Respondents from taking any action to implement or enforce it.

ARGUMENT

The Mail-Voting Law is inconsistent with the text, structure, and history of both Article II, 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 Legislature cannot blithely rewrite the Constitution and history, the Mail-Voting Law exceeds the Legislature's limited grant of authority under Section 2 to allow absentee voting by certain defined classes of voters.

I. SUPREME COURT IGNORED AN UNBROKEN CENTURY AND A HALF OF CONSTITUTIONAL PRACTICE DEMONSTRATING A CONSISTENT AND UNIVERSAL UNDERSTANDING OF THE CONSTITUTION'S LIMITS ON ABSENTEE VOTING.

Supreme Court's superficial reading of constitutional text divorced from context and history contravenes the Court of Appeals' clear instruction that courts interpreting the constitution must look "to circumstances and practices which existed at the time of the passage of the constitutional provision." *New York Pub. Int. Rsch. Grp., Inc. v. Steingut*, 40 N.Y.2d 250, 258 (1976); *see also In re Bd. of Rapid Transit Comm'rs for City of New York*, 147 N.Y. 260, 266–67 (1895) ("[A] constitution must be also supposed to have been prepared and adopted with reference, not only to existing statutory provisions, but also to the existing constitution, which is to be amended or superseded."). Because the constitutional provisions at issue in this case

were enacted through a series of amendments adopted from the 1860s through the 1960s, to understand these provisions in the context in which they were adopted, it is necessary to examine this history, an obligation Supreme Court simply did not fulfill.

The State's constitutional and electoral history shows that mail voting must be expressly authorized by the Constitution. The longstanding default constitutional requirement is that voters cast their ballots "at" the election itself. N.Y. Const., Art. II, § 1. That is in person and not from afar. "[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 voting from afar for certain persons — first soldiers, then commercial travelers, then all travelers and the physically ill or disabled — it has first needed a constitutional amendment to confer upon it the power to authorize such voting. This understanding was unbroken until last year, when the Legislature determined that it was bound by neither the text, the structure, nor the history of the Constitution and that it could, in an exercise of raw power, override the will of the people as expressed at the ballot box only a year earlier and dare the courts to tell it otherwise. This Court has a

constitutional obligation and duty to remind the Legislature that it must, at all times, operate within the bounds of New York's supreme law.

A. The creation of absentee voting in New York required a constitutional amendment.

Absentee voting in New York originated during the Civil War, when the Legislature wanted to enable voting by 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. *See* 2 Lincoln, *supra*, at 235. But they soon realized they could not yet enact it because Constitution as it existed at that time expressly provided that an eligible person would vote "in the election district of which he shall at the time be a resident, and not elsewhere." Article II, Section 1; 2 Lincoln, *supra* at 239.

Nearly everyone was in favor of establishing a means for soldiers to vote while they were fighting the Civil War. As Governor Seymour explained, he supported the bill, but it would be unconstitutional absent constitutional amendment. *Id.* At 238. Members of the Legislature expressed the same concern. *Id.* at 237. Unlike today's Legislature, the Civil War-Era Legislature did not simply plow forward. Rather, as responsible statesmen, 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 may vote," if "in the actual military service of the United States." *Id.* at 239. The Legislature quickly

passed the proposed amendment, adding this language to Article II, Section 1. *Id.* at 238–39. It 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 its bill authorizing soldiers to vote in absentia. *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 unlike the current Legislature, the Civil War-era Legislature understood that its requirements could not be ignored. Thus, even the most deserving of voters were not 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). Notably, this consensus prevailed *long after* the ratification of what is now Article II, Section 7.

B. Each subsequent expansion of absentee voting required another constitutional amendment.

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 absent commercial travelers to vote remotely. *Id.* But everyone agreed that doing so required that they first "*make* absentee voting constitutional." *Id.* (emphasis added). There was no talk of the Legislature's supposed authority under Article II, Section 7. 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, there was again no resort to the Legislature's supposed plenary authority under Article II, Section 7. Rather, the Legislature again put forth a constitutional amendment to allow the expansion. Poletti et al., *supra*, 169.[2]

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). Again, there was no talk of plenary authority under Article II, Section 7. After the 1963 amendment — but not before — "the legislature was authorized to grant absentee voting privileges to any persons who, for any reason, may be absent from their place of residence." Galie, *The New York State Constitution: A Reference Guide* 70 (1991); *Wise v. Bd. Of*

[2] The exception created in 1919, and subsequently expanded in 1923 and 1929, was codified as the new Section 1-a of Article II. Section 1-a was renumbered as Section 2 following the constitutional convention of 1938.

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 current language of Section 2 of Article II of the State Constitution dates from the 1963 amendment and 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.

C. The Legislature proposed, and the people rejected, a constitutional amendment to authorize universal, no-excuse absentee voting.

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. And again, unsurprisingly, there was no talk of the Legislature's plenary authority under Article II, Section 7 or its inherent plenary legislative authority. 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, in accordance with Article XIX, Section 1 of the Constitution, 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.* at 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." Attorney General Br., Doc. No. 13, at 24, Oct. 28, 2022, *Cavalier v. Warren Cty. Bd.*, No. 536148 (3d Dep't) ("*Cavalier* Brief") (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). None of these commentators purported to find a power to expand absentee voting in either Article II, Section 7 or the plenary legislative power.

The proposed amendment submitted to the people was called "Authorizing No-Excuse Absentee Ballot Voting." The official ballot language, prepared by the Board of Elections with the advice of the Attorney General, *see* N.Y. Election Law § 4-108, explained that the proposed amendment "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 this 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.

After the failed amendment, and less than a year before the adoption of the Mail-Voting Act, the State acknowledged these longstanding precedents in court.

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 Cavalier* Brief, at 24–25 (characterizing COVID absentee voting statute as "much narrower than" a general law authorizing "universal 'no excuse' absentee voting"). Although the extent of the State's authority to enact universal mail-voting was directly at issue in these cases, never once did the State assert the broad authority it now claims to possess under Article II, Section 7 or the Legislature's plenary legislative authority.

To be blunt, the Mail-Voting Law makes a mockery of the constitutional history of absentee 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* New York Department of State, *Votes Cast for and Against Proposed Constitutional Conventions and also Proposed Constitutional Amendments* (2019), perma.cc/57SH-2GAW ("*Proposed Amendments*"). There was no need to waste everyone's time and resources in 2021. 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 — indeed, every single constitutional actor to address this issue for over 150 years, including the

current Attorney General as recently as late 2022 — had to be wrong. Supreme Court failed to give consideration to any of this lengthy and decisive history.[3]

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. Supreme Court had nothing at all to say about this critical moment in the constitutional history of the state. But the Court of Appeals has held that courts cannot so cavalierly brush aside constitutional history that is directly on point, recently denouncing a similar move after another failed constitutional amendment. In *Harkenrider v. Hochul*, 38 N.Y.3d 494, 516 (2022), "the Legislature had attempted to amend the Constitution to add language authorizing it to introduce redistricting legislation" under certain conditions. 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

[3] The sole exception to the Supreme Court's studious avoidance of any discussion of history is the court's brief reliance on the removal of certain language from Article II, Section 1. (R.14–15.) As discussed in detail in Part II.B, *infra*, the inference Supreme Court draws from this change is refuted by the historical record, which Supreme Court ignored entirely.

vote would "render the constitutional . . . process inconsequential." *Id.* at 517 (cleaned up). So too, here.

II. SUPREME COURT'S READING OF ARTICLE II, SECTION 2 STRIPS ITS LANGUAGE FROM ITS CONSTITUTIONAL CONTEXT.

Supreme Court concluded that Article II, Section 2 does not limit the Legislature's authority. This is wrong. Article II, Section 2 empowers the Legislature, if it so chooses, 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. By its own terms, and especially when read against the extensive history detailed above, Article II, Section 2 empowers the Legislature to authorize exceptions from the constitutional default rule of voting "at the polling place." Further, contrary to Supreme Court's conclusions, Article I, Section 1 confirms, rather than undercuts, this conclusion.

A. The plain language of Article II, Section 2 necessarily limits the Legislature's authority to expand absentee voting.

The history of constitutional authorization of absentee voting, recounted in Part I, *supra*, from the original Civil War amendment through the 1963 amendment that provided the current language of Section 2, demonstrates that the most natural reading of this provision is the correct reading. Section 2 is a narrow grant of authority to permit absentee voting by two defined categories of voters, against a backdrop requirement of in person voting. Indeed, it would make no 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 also already possessed inherent authority to allow absentee voting for everyone else. It would make even less sense to repeatedly expand that authority by constitutional amendment.

This understanding is reinforced by the longstanding interpretive 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).

A recent Court of Appeals decision illustrates how this principle applies. In *Town of Aurora v. Village of East Aurora*, the Court considered a provision of the Village Law that establishes a method by which a village "*may* assume the control" of bridges within its boundaries. 32 N.Y.3d 366, 371–72 (2018) (emphasis added). The village had argued that this permissive provision was not the sole method by which it might assume control of bridges, citing broader language of another nearby provision as authority. *Id.* at 372. The Court of Appeals, applying the *expressio unius* canon, rejected this argument, holding that the statute "by establishing specific procedures" by which a village *may* assume control necessarily "limited the methods by which a village may assume control" to only those specific procedures. *Id.* at 373. *See also Jackson v. Citizens Cas. Co. of New York*, 252 A.D. 393, 396 (4th Dep't 1937) (when a statute designates the persons to whom it applies "with great particularity," the "fundamental principle" of *expressio unius* "implies the exclusion of all others"), *aff'd sub nom. Jackson v. Citizens Cas. Co.*, 277 N.Y. 385 (1938).

Notably, although Supreme Court asserted that no limitation on absentee voting can be implied from the positive grant of authority in Article II, Section 2, (R.14,) the court does not even hint at the *expressio unius* canon, let alone explain why it failed to apply it here. There is no doubt that the canon applies to constitutional interpretation. Both the Court of Appeals and the Appellate Division have applied the *expressio unius* 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*).

To be sure, courts should be cautious about using the canon in certain circumstances. For example, where the law enacts a list of one form or another, courts should confirm that the listed words are not merely illustrative examples before applying the canon. Here, however, the absent, the ill, and the disabled are not *examples* of those who might benefit from Article II, Section 2 — they are the sole beneficiaries of that provision. Similarly, while a provision *requiring* the Legislature to act in a certain way under certain circumstances may not necessarily imply a prohibition on such action in other circumstances, that is not the case here. Article II, Section 2 does not impose upon the Legislature any requirement to offer absentee voting at all.[4]

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[4] *See Colaneri v. McNab*, 90 Misc. 2d 742, 744 (Sup. Ct. Suffolk Cty. 1975); *Eber v. Bd. of Elections of Westchester Cty.*, 80 Misc. 2d 334, 337 (Sup. Ct. Westchester Cty. 1974); *Savage v. Bd. of Ed., City of Glen Cove Sch. Dist.*, 29 Misc. 2d 725, 726–27 (Sup. Ct. Nassau Cty. 1961); *see also* 1983 N.Y. Op. Att'y Gen. (Inf.) 1018 (1983).

In short, it is not only obvious and natural to read Article II, Section 2 as establishing the exclusive categories of voters for whom absentee voting may be authorized — as evidenced by decades of commentators and constitutional actors uniformly interpreting in just that way — this interpretation is also required under longstanding and established principles of legal interpretation.

B. The history of Article II, Section 1 confirms the meaning of Section 2.

Supreme Court observes that Article II, Section 1 at one point contained "an express in-person voting requirement," and wrongly concludes that "the removal of such language evinces the intent that in-person voting no longer be required." (R.14–15.) Because Supreme Court fails to examine the history of this change, it draws an erroneous conclusion that is utterly unsupported by the historical record. A review of the full historical record exposes this error. In fact, the discussion of the 1966 amendment that removed this language — both contemporaneously with its adoption and in subsequent commentary — is explicable only if the authority granted in Article II, Section 2 is exclusive.

Under Supreme Court's apparent theory, while constitutional amendments may have once been necessary to allow individuals not specified in Section 2 to vote absentee, that ceased to be the case after the amendment of Section 1 to remove language requiring voting "in the election district . . . and not elsewhere." On this

account, the amendment of Section 1, which post-dated the addition of Section 2 and its various amendments, rendered Section 2 the constitutional equivalent of a human appendix — still part of the anatomy, but without function or purpose. The theory amounts to a claim that this amendment to Section 1 repealed Section 2 by implication.

Supreme Court's account of the amendment of Section 1 is ahistorical, lacking even a scintilla of evidentiary support, and runs afoul of bedrock principles of constitutional construction — that constitutional provisions must be read, where possible, to be harmonious; and that repeals by implication are strongly disfavored. *See Loc. Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp.*, 2 N.Y.3d 524, 544 (2004) (describing the "fundamental tenet" that the "implied repeal or modification of a preexisting law is distinctly disfavored").

The language expressly requiring voting "in the election district" was removed as part of a 1966 amendment that greatly simplified the language of Section 1. The driving motivation behind this amendment was to replace a series of different requirements for duration of citizenship and residence with a streamlined single requirement of three-months residence in the applicable county, city, or village. The sponsor's memorandum of Senator Warren Anderson introducing this amendment, titled "Voters' residence requirements," describes its function as establishing a right

to vote for all citizens twenty-one years of age or older who have been a resident "for *three months* next preceding an election." New York State Legislative Annual 130–31 (1966) (emphasis in original). The memorandum then describes, without explanation, three provisions deleted from the existing Section 1: the existing citizenship and residency requirements; the military service absentee provision; and a provision relating to persons who move between election districts within a county shortly before an election. *Id.* Notably, the memorandum makes no mention whatsoever of the deletion of language requiring that votes be cast "in the election district."

The contemporaneous report of an advisory committee established by the Legislature to examine the state's election laws, in discussing various proposed changes, urged the Legislature's passage of the then-pending proposed amendment, describing it as enacting a "reduction of residency requirements to a period of three (3) months," without mentioning any other effect of the amendment. Report of the Joint Legislative Committee to Make a Study of the Election Law and Related Statutes 13 (1966).

Indeed, the official ballot abstract for this amendment explained that "[t]he purpose and effect of this proposed amendment is to provide that every citizen twenty-one years of age or over 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 if such citizen has been a resident of this state, and of the county, city, or village for three months next preceding an election." Abstract of Proposed Amendment Number Six (1966). The League of Women Voters in its description of the proposed amendment and arguments for and against it similarly described its effect solely in terms of the three-month residence requirement. Courier and Freeman, *League of Women Voters prepares Description of Nov. 8 Ballot Issues*, 13 (Oct. 20, 1966). This is consistent with how the amendment was understood by commentators after its passage. *See* Galie, at 69–70 (referring to the 1966 amendment only in the context of the residence requirement and describing the *1963* amendment to Section 2 as the source of the legislature's absentee voting authority). Indeed, we are not aware of a single statement in the legislative history or public commentary about the 1966 amendment that suggests *any* effect on absentee voting.

Further evidence of the limited effect of the 1966 amendment comes from the then-Attorney General, who, pursuant to the duty imposed by Article XIX, Section 1 of the Constitution to render an opinion on the effect of a proposed constitutional amendment, declared that "the proposed amendment, if adopted, will have no effect upon the other provisions of the Constitution." Journal of the Senate of the State of New York, 189th Session, Vol. II, 1937 (1966). Section 2, was unquestionably an

"other provision[] of the Constitution" when the Attorney General rendered his opinion. This opinion would be difficult to understand if the 1966 amendment had eliminated constitutional restrictions on absentee voting and thereby rendered Section 2 a meaningless vestige. On the other hand, it is entirely consistent with the fact that by 1966, a century of practice, through seven constitutional amendments, had defined the scope and limits of the Legislature's authority over absentee voting through constitutionally defined categories — most recently expanded just three years earlier in 1963 — which were left in place by the 1966 amendment. *Cf. Amedure*, 77 Misc. 3d at 636 (the Constitution "retain[ed] the implicit preference for 'in person' casting of ballots in elections" after the amendment of Section 1).

Indeed, *no one* — neither the amendment's sponsor, nor the Attorney General, nor any of the commentators considering the effect of the amendment at the time or in the five decades following — gave any sign of even noticing the unexplained deletion of this seemingly significant language. By 1966, after more than one hundred years of consistent constitutional history and yet another explicit constitutional expansion of absentee voting authorization just three years earlier, the entire state of New York understood that which Supreme Court and the Legislature now deny: namely, that other than those categories expressly identified by the constitution, voting was to take place "at the polling place." N.Y. Const., Art. II, §2.

By 1966, there was simply no longer any conceivable need for the "in the election district" language, because the self-evident negative implication created by the specific carve outs to the Constitution's general background rule was so firmly embedded in the understanding of Section 2.

C. The Mail-Voting Law violates the limits set by Article II, Section 2.

The Mail-Voting Law violates the narrowly drawn limits of Article II, Section 2, by purporting to authorize absentee voting for "*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," in an unconvincing attempt to distinguish the two. The 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. The key feature of both is that they are accomplished without appearing at the polls in person.

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."). The Constitution's text tracks this definition, bifurcating the world into "absentee voting" and "at the polling place" voting. All voting not done "at the polling place" is "absentee voting." That is why the ill or disabled are said to engage in "absentee voting" even when they are not actually "absent from the county of their residence." The key point is that they vote other than "at the polling place." By direct implication from the Constitution, therefore, mail voting is absentee voting for the simple reason that it does not occur "at the polling place."[5] Further, 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

[5] Supreme Court recognized that the Legislature has chosen to implement absentee voting through mail voting. (R.13 n.1.)

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.

The Mail-Voting Law is universal absentee voting masquerading under another name. It exceeds the limits of authority conferred upon the Legislature by Article II, Section 2 and is, therefore, unconstitutional.

III. THE STRUCTURE OF ARTICLE II CONFIRMS THE ROLE OF SECTION 2 IN ESTABLISHING THE SCOPE OF THE LEGISLATURE'S POWER TO AUTHORIZE ABSENTEE VOTING.

Although the history and language of Article II, Section 2 conclusively demonstrate its meaning, the structural relationship between Section 2 and other provisions of Article II confirm this understanding. In short, each of the three sections of Article II at issue in this litigation, Sections 1, 2, and 7, was enacted for a different purpose and governs a different sphere. *See Orange Cnty. v. Ellsworth*, 98 A.D. 275, 279 (2d Dep't 1904) ("constitutional or statutory provisions which relate to the same subject, being in pari materia, shall be construed together").

As discussed above, Section 1, as amended in 1966, establishes voter eligibility requirements, and Section 2 governs the Legislature's authority to allow absentee voting. As explained below, Section 7 gives the Legislature authority over the physical mechanics of the voting process.

A. Supreme Court erred in holding that Article II, Section 7 grants plenary authority to authorize absentee voting.

Although Supreme Court argues that The Mail-Voting Law was constitutionally enacted under the Legislature's inherent plenary power as to all matters of legislation, it attempts to bolster its position by arguing that the law is independently justified under Article II, Section 7, which, according to the court, gives the Legislature plenary authority to regulate voting in any manner it sees fit. (R.12.) This is a gross misreading of Section 7.

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." The history of this provision, originally enacted as Article II, Section 5 following the Constitutional Convention of 1894, is well known. *See, generally,* New York Constitutional Convention of 1894, *Record* ("*1894 Record*"), at 483–89.

At the time of its adoption, jurisdictions within New York had begun experimenting with the use of the mechanical voting machines that later became a

fixture of New York elections. Concern arose that the Constitution's reference to voting "by ballot," read literally, might preclude the use of these machines. *Id.* at 484. The Convention debate over this provision focused solely on the physical mechanics of voting — whether by paper ballot, voting machine, or voice vote — and contained not the slightest mention of absentee voting or the place of voting, generally. *See id.* at 484–89.

In 1909, only 15 years after the adoption of this language, the Court of Appeals 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 "solely to enable the substitution of voting machines" for paper ballots. *People ex rel. Deister v. Wintermute*, 194 N.Y. 99, 104 (1909). Although the Court in *Wintermute* was focused on a different issue — the effect of the "secrecy in voting" language — the Court's reasoning, that a constitutional amendment should not be interpreted to make changes beyond "the object of this addition in the last Constitution," is equally applicable here. *Id.*

Turning to the language of Article II, Section 7, the Court of Appeals has explained that under the canon of *ejusdem generis*, a general term — like "such other method" — "though susceptible of a wide interpretation, becomes one limited in its effect by the specific words which precede it; in the vernacular, it is known by the

company it keeps." *People v. Illardo*, 48 N.Y.2d 408, 416 (1979); *see also Ampco Printing-Advertisers' Offset Corp. v. City of New York*, 14 N.Y.2d 11, 22 (1964) (applying *ejusdem generis* to interpret the Constitution). Under this principle, "such other method" must be understood to refer to methods of the same type as "by ballot" — in other words, the physical means of recording a person's vote, not the place at which such a recording could occur. This interpretation is further confirmed by the convention delegates' explanations that the provision would authorize, for example, "the devices now being perfected, or possibly some electrical voting device," *1894 Record*, at 485, and "a machine or other appliance." *Id.* at 488.

A comparison of Section 7 and Section 2 shows that the scope of the authority granted by each is decidedly different. The original 1864 absentee voting amendment — and each of the six subsequent amendments that resulted in the current Section 2 — expressly empowers the Legislature to set the "*place*" from which votes may be cast. Notably, Section 7 refers only to the "method" of voting, not the place where it can occur. *Cf. People ex rel. E.S. v. Superintendent, Livingston Corr. Facility*, 40 N.Y.3d 230, 237–38 (2023) ("[W]hen the Legislature uses unlike terms in different parts of a statute it is reasonable to infer that a dissimilar meaning is intended." (cleaned up)).

Finally, it is clear from the different language employed in Section 2 and Section 7 that the two provisions are directed at different issues. Section 7's requirement of "signatures, at the time of voting, of all persons voting by ballot or *voting machine*," fits with the understanding of "method" as referring to the *physical mechanics* of voting — for example, by paper ballot or lever machine. N.Y. Const., Art. II, § 7 (emphasis added). Section 2, on the other hand, is focused entirely on the *location* of voting, with its definition of categories of persons on the basis of their inability to appear "personally at the polling place." N.Y. Const., Art. II, §2. These two provisions can and should be read harmoniously and compatibly as addressing two different issues. *See In re Livingston*, 121 N.Y. 94, 104 (1890) ("[L]anguage the most broad and comprehensive, may be qualified and restricted by reference to other parts of the same statute, and to other acts on the same subject, passed before or after, and to the conditions and circumstances to which the legislation relates."

B. Under Supreme Court's view, the Legislature's plenary authority would render Article II, Section 2 entirely superfluous.

Whether it is said to flow from the Legislature's general plenary power, or from Article II, Section 1, or Article II, Section 7, the theory that the Mail-Voting Law is justified by some plenary power would render Section 2 entirely superfluous, in violation of basic principles of constitutional interpretation. As the Court of

Appeals reiterated only two months 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).

Indeed, in declaring that "[t]he mere fact that the framers specifically authorized the Legislature to establish a different voting method for a specific category of voters does not necessarily signify their intent to restrict the Legislature's power to establish alternative voting methods for *other* voters," (R.14 (emphasis in original),) Supreme Court impermissibly renders Section 2 "functionally meaningless." *Harkenrider*, 38 N.Y.3d at 509. Section 2 does no work at all if the Legislature has inherent authority or separate enumerated authority to authorize and expand absentee voting beyond the two classes of voters specified in that section.

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."). But although Supreme Court clearly understood that its interpretation of this plenary power completely subsumes the narrower grant of power in Section 2, (*see* R.14,) it failed to even acknowledge, let alone apply, this bedrock principle of constitutional interpretation, incorrectly rendering Section 2 meaningless surplusage.

And Supreme Court did not — because it could not — explain why the Legislature and the people repeatedly amended the Constitution over several decades to expand the Legislature's authority with respect to absentee voting in a piecemeal

fashion, and still only partially, if these expansions were entirely superfluous because the Legislature already possessed this plenary authority all along.

C. Post hoc theories advanced to avoid the superfluity problem are baseless.

Although Supreme Court did not even address the issue of superfluity, the Mail-Voting Law's defenders have advanced a theory that the Legislature's plenary power over elections under Section 7 does not render Section 2 entirely superfluous because the Section 7 plenary power allows only uniform, generally applicable laws, while Section 2 allows specific carve outs for designated categories of voters. Under this theory, although the Legislature was powerless to expand absentee voting to particular categories of voters without constitutional amendments, the Mail-Voting Law, precisely because it is universal, is within the plenary power.

This atextual and, ultimately, ridiculous theory is a post hoc invention fabricated solely for the purpose of defending the Mail-Voting Law. This supposed uniformity requirement of Section 7's plenary power appears nowhere in the Constitution itself and is not found in any constitutional interpretation prior to 2023. Indeed, elsewhere, where the Constitution does in fact constrain the Legislature to act in a uniform manner, it is explicit about this limitation. *See, e.g.*, Article II, Section 9 ("The legislature may also, by general law, prescribe special procedures

whereby *every person* who is registered and would be qualified to vote in this state . . ." (emphasis added)).

The Mail-Voting Law's defenders offer no reason to conclude that the otherwise allegedly plenary authority of Section 7 would not, of its own force and absent Section 2, authorize the Legislature to carve out such exceptions as it sees fit. Indeed, plenary authority is just that: plenary. That means it is unqualified and absolute. In other words, plenary authorities — if they are truly plenary, as the Mail-Voting Law's defenders contend — admit of their own power to make such exceptions as may be necessary or appropriate.

It is further implausible that the Legislature believes that legislation enacted pursuant to Section 7 — that is, that all legislation regarding the manner of elections — must be strictly uniform across all classes and categories of elections throughout the state, with the sole proviso that it may exempt the absent, the ill, and the disabled should it enact a law that requires all others to vote at polling places. This is nonsense. Article II, Section 7 has never been understood this way.[6] *See, e.g.*, N.Y. Election Law § 7-205 (establishing different requirements for the use of voting machines within and outside of New York City).

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[6] A theory based on a plenary power flowing from Article II, Section 1 or on the Legislature's general plenary power to legislate would suffer from all of the same defects.

Finally, at points in this litigation, the Mail-Voting Law's defenders have advanced a slightly different theory as to why a plenary power over elections would not render Section 2 superfluous. Under this theory, although the Legislature has plenary power to authorize absentee voting, Section 2 provides certain designated categories of voters with an additional constitutional protection.

This is wrong for the simple fact that Section 2 is permissive, not mandatory. It provides, on its own, no category of voter any additional protection whatsoever. 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). And Section 2 has long been consistently understood to grant no right to absentee voting without subsequent implementing legislation. *See, e.g.*, *Colaneri v. McNab*, 90 Misc. 2d at 744; 1983 N.Y. Op. Att'y Gen. (Inf.) 1018 (1983). If the Legislature possess the plenary power to authorize absentee voting for some or all voters, then Section 2's statement that the Legislature "may" authorize absentee voting for absent or disabled voters is completely redundant.

D. Out-of-State cases provide no reason to question the limitations imposed by Article II, Section 2.

Finally, although Supreme Court confined its constitutional analysis to New York caselaw, the Mail-Voting Law's defenders have attempted to strengthen their position by invoking authorities from Massachusetts and Pennsylvania. 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, even were they correct, are inapposite. In *Lyons v. Secretary of the Commonwealth*, 490 Mass. 560 (2022), 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. 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*, 279 A.3d 539, 580 (Pa. 2022), the Pennsylvania Supreme Court sharply divided over the constitutionality of a mail-voting law, but ultimately upheld it because the Court 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." 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 *Albence v. 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.

IV. THE DEFENSE OF THE MAIL-VOTING LAW RESTS ON A DISTURBINGLY CYNICAL ATTITUDE TOWARD THE CONSTITUTION.

In order to save the Mail-Voting Law, its defenders need the courts to endorse a very ugly portrait of constitutional governance in New York. Implicit in their arguments is the claim that the State of New York and its officials cannot be trusted to inform the People what they are actually voting on.

First in 1864, and then in 1919, 1923, 1929, 1947, 1955, and 1963, when the State told the people that a constitutional amendment was required to allow for the expansion of absentee voting, it was simply wrong on each of these occasions. And when, in response to express concerns about the legality of mechanical voting machines under a constitution that referred to ballots, the constitution was amended to give the Legislature power over the *method* of election — but not the *place* of election, as in the amendments of 1864, 1919, and every subsequent absentee voting amendment — this 1894 amendment was secretly overriding the express absentee voting provision then contained in Article II, Section 1. Or perhaps, given then-Section 1's express prohibition on voting elsewhere than the election district, the

1894 amendment was silently creating a dormant power to allow absentee voting that only sprang into effect 70 years later when Section 1 was amended.

Likewise with the 1966 amendment to Section 1. Although its sponsor, the ballot abstract, and all public commentary described it as implementing a simplified three-month residency requirement, this Court is asked to believe that, in fact, the amendment secretly eliminated all constitutional limits on absentee voting, effectively rendering Section 2 a dead letter, despite the Attorney General's official opinion that this amendment had no effect on any other section of the constitution.

And, when both the legislature proposing the 2021 amendment to Section 2 and the ballot abstract, prepared by the Board of Elections in consultation with the Attorney General, explained to the people that a constitutional amendment was required to allow for universal absentee voting, again they were all wrong. Add to this the consistent public explanations over decades of the constitution's limitations: a respected treatise of New York Constitutional Law; a blue-ribbon bar association committee; and the current Attorney General in multiple court filings in 2022. All of them got it wrong.

Indeed, the Mail-Voting Law's defenders have failed to identify *a single person* who, prior to the Mail-Voting Law's enactment, expounded their current

understanding of the effect — or lack thereof — of Section 2.[7] They have also yet to explain how the Board of Elections and the Attorney General previously got the Constitution so wrong.

Another claim implicit in the arguments of the Mail-Voting Law's defenders is perhaps worse: that in this state all that matters is raw power. What the Constitution says is secondary at best. And what the people have expressed through their votes matters not at all. It does not matter that the Constitution's text, structure, and history all point away from no-excuse mail voting. It does not matter that the people overwhelmingly, decisively, and expressly rejected no-excuse mail voting. All that matters is whether a legislative majority can be formed and a governor's signature can be secured at a particular moment in time. If those conditions are met, the people can be forced to live under a system of democracy they never approved and expressly said they do not want.

Plaintiffs-Appellants position, by contrast, is simple and salutary: the Constitution has been correctly understood for more than 150 years to limit absentee voting to certain expressly identified categories of voters; and these constitutional

[7] The closest they have come is the claim that Governor Seymour's proffered understanding of the Constitution, which prompted the original 1864 amendment, was disingenuous. Speculation about secret motives is far too thin a reed upon which to rest the overturning of 150 years of consistent constitutional practice.

limitations have not been secretly abrogated by amendments purporting to target different issues.

When convention delegates in 1894 proposed a new constitutional provision for the purpose of ensuring that the casting of votes was not limited to paper ballots but could include the use of mechanical devices, the amendment did as intended and did not *sub silentio* grant the Legislature a new power over absentee voting — a separate issue already addressed elsewhere in the Constitution. Likewise, when the Constitution was amended for the express purpose of imposing a streamlined residency requirement, the amendment was not a Trojan Horse smuggling in a hidden expansion of absentee voting, waiting to burst forth inside the Constitution's gates 55 years later.

Rather, each time the State told the voters of New York that a constitutional amendment was needed in order to enable the further expansion of absentee voting — including most recently in 2021 — it was telling the truth and the choice it was giving them was meaningful and not a rubber stamp for some authority the Legislature already secretly possessed. That is how constitutional democracy is supposed to work. The Constitution is the people's document, not the Legislature's, and the people's choices — today and in generations past — must be respected.

CONCLUSION

This Court should reverse the Decision/Order and Judgment of Supreme Court and grant summary judgment in Plaintiffs-Appellants' favor, declaring the Mail-Voting Law void as unconstitutional and enjoining Defendants-Respondents from its continued implementation or enforcement.

DATED: February 15, 2024

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