To be Argued by:
MICHAEL Y. HAWRYLCHAK
(Time Requested: 30 Minutes)

APL-2024-58
Albany County Clerk's Index No. 908840-23
Appellate Division–Third Department Case No. CV-24-0281

Court of Appeals
of the
State of New York

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)

BRIEF FOR PLAINTIFFS-APPELLANTS

O'CONNELL AND ARONOWITZ,
ATTORNEYS AT LAW
Cornelius D. Murray, Esq.
Michael Y. Hawrylchak, Esq.
54 State Street, 9th Floor
Albany, New York 12207
Tel.: (518) 462-5601
Fax: (518) 462-2670
nmurray@oalaw.com
mhawrylchak@oalaw.com
Attorneys for Plaintiffs-Appellants

Date Completed: June 6, 2024

CP COUNSEL PRESS (800) 4-APPEAL • (513687)

– 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,

Intervenors-Defendants-Respondents.

STATUS OF RELATED LITIGATION

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(a), Appellants state that they are not aware of any related litigation as of the date of filing of this brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.1(f), the New York Republican State Committee states that no such corporate parents, subsidiaries or affiliates exist; the Conservative Party of New York State states that no such corporate parents, subsidiaries or affiliates exist; the National Republican Congressional Committee states that no such corporate parents, subsidiaries or affiliates exist; and the Republican National Committee states that no such corporate parents, subsidiaries or affiliates exist.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

New York State Cases

New York State Constitution

New York State Statutes

Newspaper Articles

Other

QUESTION PRESENTED

Does the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York, 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?

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this case pursuant to CPLR § 5601(b)(1). This appeal is from an order of the Appellate Division, Third Department, which held that the New York Early Mail Voter Act does not violate the New York State Constitution. (R.745–58.) This order disposed of all claims between the parties, thereby finally determining the action. A Notice of Appeal was timely filed by Appellants from the decision of the Appellate Division. (R.742.)

The constitutional question is preserved. It was the sole cause of action raised in the complaint. (R.36–38.) It was briefed and decided in Supreme Court (R.6–16) and in the Appellate Division. (R.745–58.)

Appellants respectfully submit this brief in support of their appeal from the Opinion and Order the Appellate Division, Third Department, dated May 9, 2024, affirming the dismissal of Appellants' complaint. (R.745–58.) Appellants ask this Court to reverse the decision below and to grant summary judgment in favor of 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 Respondents from taking any action to implement or enforce the Mail-Voting Law.

PRELIMINARY STATEMENT

Today, as in 1963 when last amended, Article II, Section 2 defines the two groups whom the Legislature may authorize to vote absentee: (1) 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 (2) those who "may be unable to appear personally at the polling place because of illness or physical disability." The question in this case is whether Article II, Section 2 continues to limit the scope of the Legislature's power to authorize absentee voting, or whether something has happened in the last 60 years to eliminate those restrictions.

The New York State Constitution has historically limited the Legislature's authority to authorize absentee voting. The Legislature lacked any such authority until 1864, when the Constitution was first amended to empower the Legislature to

allow certain categories of people to vote absentee. Even after 1894, when New Yorkers ratified an amendment expanding the Legislature's powers to regulate the method of elections, when the Legislature sought to further expand the scope of absentee voting, it could do so only after first amending the Constitution.

For more than 150 years, New York lawmakers, officials, and legal commentators universally understood the Constitution to impose limits on the Legislature's ability to authorize absentee voting. In the course of this litigation, Appellants have noted the inability of the Mail-Voting Law's defenders to identify one single person — neither judge, legislator, State official, nor legal commentator — who publicly endorsed their understanding of Article II, Section 2 before 2023. This silence is telling.

By contrast, Appellants' position — that Article II, Section 2 defines the exclusive categories of voters for whom the Legislature may permit voting other than in-person at the polling place — has been the well-settled understanding for generations. It appears, for example, in the leading legal treatise on the New York Constitution. Galie, *The New York State Constitution: A Reference Guide* 70 (1991). It was the official position of the State Board of Elections in 2021 when voters were asked in a ballot proposition whether they wanted to eliminate restrictions on the legislature's power to authorize no-excuse absentee voting. *2021 Statewide Ballot Proposals*, Board of Elections, perma.cc/4FDZ-YPMK (emphasis added). It was

also the position of the *current Attorney General* as recently as October 2022. *See* Attorney General Br., Doc. No. 13, at 24, Oct. 28, 2022, *Cavalier v. Warren Cty. Bd.*, No. 536148 (3d Dep't) ("*Cavalier* Brief"). Throughout this litigation, the Law's defenders have offered a variety of shifting, novel, and internally inconsistent arguments to salvage the Law. But they have never even tried to explain how every relevant legal authority in this state got the Constitution so wrong for so long.

At this final juncture, there is only one remaining contender for what might have altered the constitutional status quo after 1963. According to the Law's defenders and the Third Department below, a subsequent constitutional amendment in 1966, just three years after Article II, Section 2 was last amended, completely upended the Constitution's century-old framework for absentee voting. Strangely, this revolution went unnoticed by anyone at the time. Not one person said anything about it. Authoritative commentators insisted that the amendment affected *only* Article II, Section 1 and not *any other* provision of the Constitution. And this revolution remained unknown up to the present day when the idea appeared *for the very first time* in legal filings in this very case.

This theory makes a mockery of the constitutional practitioners who for generations have completely missed this supposed hidden significance of the 1966 Amendment, and it runs directly contrary to this Court's authoritative teachings about constitutional interpretation. It ignores constitutional history. It reads

constitutional amendments out of context. It imputes constitutional significance to silence. And it refuses to read constitutional amendments and provisions harmoniously.

Even worse, it makes a mockery of elections and sends New Yorkers a strong signal that they would be foolish to ever rely on the representations of their elected officials. If, as the Third Department held, the 1966 amendment empowered the Legislature to authorize no-excuse absentee voting, then why were the people again asked to grant *exactly* that authority in 2021?

By contrast, Appellants offer a view that is much simpler, coherent, and consistent with the rule of law: The Constitution is not radically altered *sub silentio* and broad expansions of legislative power do not lie dormant in decades-old constitutional amendments waiting for clever lawyers to seize on them. Rather, the Constitution's language and each of its many amendments must be construed as it was understood by the voters who adopted it. Article II, Section 2 is still the sole source of the Legislature's limited authority to authorize expanded absentee voting.

BACKGROUND

Less than three years ago, New York's voters rejected a constitutional amendment that would have granted the Legislature the power to enact universal mail voting. Respondents contend that this exercise was pointless, and that no amendment was ever needed. The voters' overwhelming rejection of that ballot

referendum provides the context for this lawsuit and Respondents' *post hoc* efforts to justify the Law's constitutionality.

I. The people of New York declined to empower the Legislature to authorize 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. Accordingly, it proposed an amendment to Article II, Section 2, extending the Legislature's power to authorize absentee 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 absentee 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"). Unsurprisingly, there was no suggestion from any legislator or official that all of this was a waste of time, energy, and effort because the Legislature had already secured this authority through a constitutional amendment nearly 60 years earlier. Rather, the Legislature worked to pass 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." *Cavalier* Brief, at 24 (emphasis added). "*[W]ithout any constitutional limitations*, the Legislature would" then be "free to allow all voters to apply for absentee ballots for any reason for all future elections." *Id.* (emphasis added). Despite their fervent desire for no-excuse absentee voting to become part of New York's elections, none of these legal

commentators thought that the Legislature already possessed the power to make it so.

The proposed amendment submitted to the people was called "Authorizing No-Excuse Absentee Ballot Voting" — an odd title if such voting was already authorized. 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. *See 2021 Statewide Ballot Proposals*, perma.cc/4FDZ-YPMK (emphasis added).

The people rejected this proposed amendment: New Yorkers "overwhelmingly" voted not to empower their Legislature to expand absentee 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 authority.

After the failed amendment, and less than a year before the adoption of the Law, the State acknowledged the longstanding understanding of the Constitution's limits on absentee voting in defending against a legal challenge to its temporary expansion of absentee voting privileges to all registered voters during the pandemic. 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.). According to the State, the temporary rules were permissible because the pandemic caused all voters to fit within one of Article II, Section 2's enumerated categories. *Id.* at 6–7 ("The Legislature has made use of the Constitution's authorization to allow absentee voting."); *see also Cavalier* Brief, at 24–25 (characterizing the pandemic rules 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, it never once asserted the broad authority it now claims to have possessed for nearly 60 years.

II. The Legislature enacted universal absentee voting by statute anyway.

Despite the 2021 proposed 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 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 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 then-existing 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); 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)); 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); 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)); 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); 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 functionally identical. *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 Legislature's only attempt to distinguish the Law from its proposed (but rejected) amendment is semantic — *i.e.*, to call the identical procedure "early mail voting" instead of "absentee voting."[1] 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

[1] Although the Mail-Voting Law's defenders have continued to invoke this supposed distinction, neither Supreme Court nor the Third Department endorsed this argument.

horizon — before sending the bill to Governor Hochul for signature. On September 20, 2023, the Governor signed the bill into law.

III. 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, 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.[2] 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-Appellants moved to intervene in the action, and on October 11, 2023, they filed a proposed motion to dismiss Appellants' complaint. (R.48.) Respondents Governor Hochul and the State of New York followed with their own motion to dismiss on October 16, 2023. (R.80.) On November 13, 2023, Appellants cross-moved for summary judgment. (R.101.)

[2] Simultaneously with the filing of their complaint, 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 Appellants appealed that denial. That appeal became moot following Supreme Court's dismissal of the underlying action.

IV. Supreme Court upheld the Mail-Voting Law and dismissed Appellants' complaint. The Third Department affirmed.

On February 5, 2024, Supreme Court issued a Decision/Order and Judgment granting Respondents' motions to dismiss and denying Appellants' cross-motion for summary judgment. (R.15–16.) Supreme Court held that the Mail-Voting Law was a constitutional exercise of the Legislature's power. (R.14)

Appellants promptly appealed Supreme Court's decision to the Appellate Division, Third Department. On May 9, 2024, the Third Department affirmed Supreme Court's dismissal. (R.745–58.) Respondents now appeal to this Court.

As explained below, the Third Department's decision is legally erroneous. This Court should reverse the decision and grant summary judgment in favor of Appellants, declaring the 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 the New York Constitution. Article II, Section 2 exists for the express purpose of empowering the Legislature to authorize absentee voting for a few, narrowly defined categories of voters. In 2021, the people of New York rejected a proposed amendment that would have empowered the Legislature to authorize absentee voting for *all* voters. The Mail-Voting Law purports to do precisely what the voters

rejected. Because the Legislature cannot overwrite the Constitution or its history, the Mail-Voting Law exceeds the Legislature's limited grant of authority under Section 2.

Where, as here, the Legislature acts in "gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein," its handiwork must be invalidated. *Harkenrider v. Hochul*, 38 N.Y.3d 494, 509 (2022).

The Law's defenders and the Third Department emphasize Appellants' burden to prove the law's invalidity "beyond a reasonable doubt." *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022). But that standard is easily met here. All the Court must decide is whether Article II, Section 2 means anything, or whether it has been rendered meaningless by the 1966 amendment of a different section of the constitution. And Article II, Section 2 *does* mean something; it is the sole exception to the background requirement of in-person voting that inspired its ratification. And, under any standard of review, the Law does not fit within this exception.

I. The 1966 AMENDMENT DID NOT ALTER AN UNBROKEN, UNIFORM 150 YEARS OF CONSTITUTIONAL PRACTICE ESTABLISHING LIMITS ON THE LEGISLATURE'S POWER TO AUTHORIZE ABSENTEE VOTING.

This Court has explained that in interpreting the Constitution, it is necessary to 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."). The constitutional provisions at issue in this case were enacted through a series of amendments adopted from the 1860s through the 1960s. That history illustrates the Mail-Voting Law's radical departure from the accepted meaning of 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 State's history, 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 could reject the settled understanding, override the will of the

people as expressed at the ballot box only two years earlier, and dare the courts to tell it otherwise.

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 permit deployed Union soldiers to vote. The Legislature in 1863 drafted a bill to allow soldiers in the battlefields to cast ballots. *See* 2 Lincoln, *supra*, at 235. But they soon realized they could not yet enact it because the 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 required a constitutional amendment. *Id.* At 238. Members of the Legislature expressed the same concern. *Id.* at 237. As responsible statesmen, the Civil War-Era Legislature 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 argued that it would be unjust to effectively deny absent Civil War soldiers 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 agreed with those sentiments. *See supra*. But the Constitution was clear, and the Civil War-era Legislature understood that its requirements could not be ignored. For sixty years, this special exception for soldiers stood in contrast to the Constitution's default requirement of in-person voting.

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

In 1894, a constitutional amendment first added the language now found in Article II, Section 7, stating that elections "shall be by ballot, or by such other method as may be prescribed by law." As late as the 1915 constitutional convention, however, the prevailing view was that beyond the military 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.[3]

A few years later, when the Legislature wanted to extend absentee voting rights to commercial travelers, another constitutional amendment was required. 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. The Legislature sought to fix this problem by allowing these absent commercial travelers to vote remotely, but everyone agreed that they needed to first "*make* absentee voting constitutional." *Id.* (emphasis added). So the Legislature passed a proposed amendment providing that "the Legislature may, by general law, provide a manner in which, and the time and place at which," those unavoidably absent "because of their duties, occupation, or business" could vote by mail. Poletti et al., *supra*, 169.

Again, the proposed amendment was put before the people, and again the people ratified it. *Id.*; *see also Voters to Pass on Four Amendments*, N.Y. Times

[3] The theory put forth by the Mail-Voting Law's defenders and accepted by the court below that this language in Section 7 is the source of the Legislature's power to enact universal absentee voting is discussed further in Part II.C, *infra*.

(Oct. 14, 1919), *available at* perma.cc/JVZ2-SAKS. Indeed, only after the amendment was ratified did the Legislature enact a bill authorizing absent businesspersons to vote by mail. And when the Legislature sought to expand mail-voting rights to residents of soldiers' homes in 1923 and patients in veterans' hospitals in 1929, the Legislature once again put forth a constitutional amendment to allow the expansion. Poletti et al., *supra*, 169.[4] 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.").

Likewise, when the Legislature wanted to marginally expand mail-voting rights again in 1947, 1955, and 1963, it had to propose to amend the constitution — and obtain the people's ratification — each time. *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). Only after the 1963 amendment was ratified, for instance, was the Legislature "authorized to grant absentee voting privileges to any persons who, for

[4] 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.

any reason, may be absent from their place of residence." Galie, at 70; *Wise v. Bd. Of Elections of Westchester Cnty.*, 43 Misc. 2d 636, 637 (Sup. Ct. Westchester Cty. 1964) (noting "a person away from home for vacation purposes was not qualified to vote as an absentee" prior to 1963, but under the amendment, "[u]navoidable absence from one's place of residence . . . ceased to be a requirement").

The 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 1966 Amendment of Article II, Section 1 did not render Section 2 meaningless.

All this history leaves 1966 as the only constitutional juncture at which anything could have changed with respect to the Legislature's authority to authorize no-excuse absentee voting. According to the lower courts, that's exactly what happened. As they see it, the omission of language requiring voting to occur "in the election district . . . and not elsewhere" from a rewrite of Article II, Section 1 conferred upon the Legislature a power to authorize absentee voting. That, of course, is *precisely* what a series of amendments did from 1864 to 1963. The only difference is that the power *expressly* conferred in those amendments was limited, whereas the power allegedly conferred via *omission* is unlimited. The necessary implication of all of this would be that there is nothing left for Article II, Section 2 to accomplish. It would be a dead letter.

The question, then, that must be answered is whether the 1966 amendment effected a seismic restructuring of constitutional authority in this state. In answering yes, the Third Department made several mistakes. As shown above, it ran roughshod over the bedrock rules that, where possible, constitutional provisions must be read 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"). But it also offered an interpretation of the amendment of Section 1 that is not only unsupported by the historical record, but entirely at odds with it. There is not a shred of evidence, anywhere, that the people of New York intended their action in 1966 to confer upon the Legislature any authority whatsoever with respect to absentee voting, let alone limitless authority that it had never before possessed.

The language expressly requiring voting "in the election district" was omitted as part of a 1966 major revision of Section 1 that greatly simplified its language. Specifically, prior to the 1966 Amendment, Section 1 read as follows:

> Every citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this state for one year next preceding an election, and for the last four months a resident of the county, city, or village and for the last thirty days a resident of the election district in which he or she may offer his or her vote, shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided, however, that no elector in the actual military service of the state, or of the United States, in the army, navy, air force or any branch thereof, or in the coast guard, or the spouse, parent or child of said elector, accompanying or being with him or her, if a qualified voter and a resident of the same election district, shall be deprived of his or her vote by reason of his or her absence from such election district, and the legislature shall provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvas of their votes and provided, further, that in any election district in which registration is not required to be personal, no

> elector who is registered and otherwise qualified to vote at an election, shall be deprived of his or her right to vote by reason of his or her removal from one election district to another election district in the same county within the thirty days next preceding the election at which he or she seeks to vote, and every such elector shall be entitled to vote at such election in the election district form which he or she has so removed.

The 1966 Amendment deleted 331 words of this section in their entirety, and replaced them with the following 62 words:

> 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 twenty-one years of age or over and shall have been a resident of this state, and of the county, city, or village for three months next preceding an election.

Article II, Section 1.[5] The Third Department's references to the "excision" or the "repeal" of the election district language, (R.752,756,) misleadingly suggest the deliberate surgical removal of the specific language at issue. In fact, the 1966 Amendment was a wholesale rewrite in which nearly the entirety of the previous version was eliminated and not even a single clause of the amended paragraph survived without alteration. That reality alone should counsel strongly against assuming that the silent omission of a few words was intended to entirely upend the Constitution's longstanding allocation of power over absentee voting.

The driving motivation behind the 1966 Amendment was to replace a series of different requirements for duration of citizenship and residence with a streamlined

[5] This provision has had subsequent minor amendments not relevant here.

single requirement of three-months' residence. 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). Notably, the memorandum makes no mention whatsoever of absentee voting.

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." Report of the Joint Legislative Committee to Make a Study of the Election Law and Related Statutes 13 (1966). Again, this report makes no mention of any other legislative purpose or any effect of the amendment on absentee voting.

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) (emphasis added). 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, Neither the lower courts nor Respondents have offered, and Appellants 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 let alone that it authorized the expansion of absentee voting *without limit*.

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) (emphasis added). 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. Conversely, the Attorney General's opinion 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 v. State*, 77 Misc. 3d 629, 636 (Sup. Ct. Saratoga Cty. 2022) (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 discussing the effect of the amendment when it was enacted or in the five decades afterwards — gave any sign of even noticing the unexplained disappearance of this purportedly significant language.

Although the legislative record is utterly silent about the removal of the election district language, it is not silent about the 1966 amendment itself. This Court is not faced with a blank historical record requiring it to infer the purpose of a decades-old legal enactment. Rather, the Law's supporters ask this Court to infer a secret objective at odds with the stated purpose of those who drafted the amendment and presented it to the voters.

The Third Department criticizes this characterization, stating that the removal of the election district language was "hardly done in secret" because the Concurrent Resolution proposing the 1966 Amendment included the full text of the existing Section 1 and its replacement. (R.752.) This misses the point. It is, of course, impossible to hide an omission from two public documents that can be readily compared. But the supposed *effect* of this amendment on absentee voting is what matters. If any such effect occurred, it remained entirely hidden until motivated lawyers miraculously unearthed it in 2023. If the removal of the election district language was deliberate and *intentional*, as opposed to the inadvertent byproduct of a housekeeping amendment, then this intention certainly was a secret, revealed to the public for the first time in 2023.

Importantly, the Constitutional limits on the Legislature's ability to authorize absentee voting was not an obscure point in 1966. In the half-century preceding the 1966 amendment, the Constitution had been amended a half dozen times to empower the Legislature to extend absentee voting, including just three years earlier in 1963. If any part of the 1966 amendment had been designed to eliminate this longstanding approach to absentee voting in order to restore some long dormant plenary power, surely *someone* would have said *something*.[6] It is simply not credible that the

[6] Indeed, the Third Department's rejection of the continued relevance of Section 2 because "article II,§ 1 has stood without the Election District Provision for more

wholesale elimination of these constitutional limits would have been silently made in such an obscure way or that such a change would pass without notice for almost 60 years, including during the high-profile, statewide constitutional process in 2021 designed to eliminate those very same restrictions. Nor is it credible that the Attorney General would have provided an official opinion that "the proposed amendment, if adopted, will have no effect upon the other provisions of the Constitution," when the amendment, as we are now told, actually rendered Section 2 superfluous and expanded the Legislature's authority over elections under Section 7. Journal of the Senate of the State of New York, 189th Session, Vol. II, 1937 (1966).

In *Kuhn v. Curran*, 294 N.Y. 207, 217 (1945), this Court forbade precisely the approach the Third Department adopted here. In *Kuhn*, this Court forcefully rejected Plaintiff's argument that the omission of certain words from an amendment to Article VI, Section 1 effected a significant constitutional change even though there was no "discussion in the Convention of a proposal to eliminate the words" and the substance of the purported change was never presented to voters:

> It is the approval of the People of the State which gives force to a provision of the Constitution drafted by the convention, and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter. A grant of an enlarged

---

than half a century," (R.756,) is darkly ironic given that the first time anyone accorded any significance to the omission was 2023.

> power by the People should not rest upon doubtful implication arising from the omission of a previous express limitation, at least unless it appears that the omission and its significance was called to the attention of the People.

Id. at 217.

Indeed, in *Kuhn*, the legislative history revealed that the deletion was originally introduced for the express purpose of expanding the Legislature's authority, but this Court nevertheless refused to give weight to the deletion where "there may be doubt as to whether the significance of the change was fully realized even by the members of the Convention." *Id.* Here, by contrast, there is not even the slightest evidence that the removal of language was intentional as opposed to an inadvertent omission as part of a comprehensive overhaul of the entire section.[7]

Finding no contemporaneous support in 1966, the Third Department instead reaches to a *1963* Report. Report of the Joint Legislative Committee to Make a Study of the Election Law and Related Statutes (1963). The Third Department suggests that an isolated reference to a proposal to "liberaliz[e] absentee balloting"

[7] The Third Department distinguishes *Kuhn* on the ground that a later constitutional amendment confirmed that the deletion was not a grant of power. (R.756.) This is unconvincing for two reasons. First, this Court in *Kuhn* held that the "doubtful implication" of the silent record was reason not to infer a "grant of an enlarged power" — the later amendment only reinforced this holding by "remov[ing]" any "[p]ossible doubt." *Id.* at 217, 220. Second, to the extent the subsequent amendment is significant, here the Legislature's 2021 passage of a proposed constitutional amendment should similarly dispel any doubt.

in the 1963 Report supports the inference that the 1966 Amendment intentionally eliminated the Constitution's limitations on absentee voting. (R.752.) The 1963 Report is clear, however, that the "proposal" to which it referred was the then-pending proposed constitutional amendment that resulted in the current version of Article II, *Section 2*, which "liberaliz[ed] absentee balloting" to the extent that it expanded the eligibility criteria to include any ill or physically absent voter. *Id.* The Report provides no support for the idea that the Legislature was then contemplating eliminating constitutional limits on absentee balloting altogether. Rather, the Report's discussion of both this proposed constitutional amendment and several proposed changes to statutory absentee ballot requirements demonstrates that when the Legislature intended to liberalize absentee voting, it did so openly and expressly.

The 1966 amendment simply cannot bear the weight the Law's defenders try to place on it. To conclude otherwise requires two equally implausible assumptions: first, that the amendment secretly or accidentally repealed or altered the longstanding, settled meaning of Article II, Section 2; and second, that no one noticed this change before 2023. New York's constitutional jurisprudence cannot be so capricious.

Appellants have provided a far more plausible explanation for the elimination of the election district language. When the original military absentee voting provision was adopted in 1864, it was incorporated directly into Section 1 as an

exception to the election district provision. But when the Constitution was again amended to expand absentee voting, first in 1919 and then in five subsequent amendments, these expansions were placed in the new Section 1-a (later renumbered as Section 2). By the time this language reached its current form in 1963, the separate Section 2 had long been understood — through six separate amendments — as the locus of the Constitution's regulation of absentee voting.

The 1966 amendment "substantially streamlined and overhauled" the language of Section 1. (R.751.) The most thorough contemporaneous description of the amendment comes from the sponsor's memorandum. It describes the amendment's purpose as establishing a three-month residency requirement, states that the amendment leaves the then-existing literacy requirement in Section 1 untouched, and then notes the deletion of three provisions — 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. New York State Legislative Annual 130–31 (1966). Two of these three deletions were obviously directly superseded by the new simplified residency requirement. The third — the military service absentee provision — had been rendered unnecessary by the 1963 expansion of Section 2. The memorandum makes no mention of the allegedly significant elimination of the election district provision because, in fact, it was incidentally swept out of Section 1 along with the

military exception attached to it, in favor of the more recently updated language of Section 2. That left Section 1 solely focused on voter qualifications.[8] It went unnoticed and uncommented upon because it was an unremarkable piece of housekeeping.

Indeed, by 1966, after more than a century 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 Respondents now deny: 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. And, as explained further in the discussion of the language of Section 2 below, by 1966, there was simply no longer any need for Section 1's "in the election district" language, because the negative implication created by Section 2's specific carve outs to the Constitution's general rule was self-evident and widely understood.

[8] The Third Department fights this interpretation by relying on Section 1's informal heading, "Qualifications of voters," which is not part of the enacted text, to characterize the deletion of the election district language as "remov[ing] in-person voting as a voter qualification." (R.752.) This simply cannot bear scrutiny. First, the Constitution has always addressed absentee voting in terms of the "manner", "time", and "place" of election rather than as a voter qualification, even when it was included in Section 1. Second, if absentee voting were a form of voter qualification, then it would be clearly beyond the authority the Mail-Voting Law's defenders claim under Section 7.

The amendment of Section 1 does not alter the meaning of Section 2, including its negative implications.

This understanding of the 1966 amendment has the virtue of adhering to and making sense of *all* the contemporaneous sources, including the sponsor's memo and the ballot abstract presented to the voters. It does not ask the Court to render Section 2 a dead letter or impute to it some novel meaning never presented to the people of this state. And it does not ask this Court to endorse an interpretation of the 1966 amendment that made its first public appearance in 2023 during the litigation of this case. It requires only a single, basic assumption — that the Legislature in 1966 understood Section 2 in the exact same way as every single other constitutional actor or commentator from 1966 until 2022.

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

As explained, above, the 2021 proposed constitutional amendment and its associated legislative history and public commentary demonstrate the continuing understanding that Article II, Section 2 provided both the source of and limits to the Legislature's power over absentee voting. If the Legislature could extend mail voting to everyone without constitutional authorization, then there was no need to waste everyone's time and resources in 2021. The Attorney General's defense of the emergency COVID absentee ballot provision — justified solely on the basis of

Article II, Section 2 — similarly demonstrates this continuing understanding of the limits imposed by Section 2, uninterrupted by the 1966 Amendment.

The Mail-Voting Law also reverses popular sovereignty. This Court recently rejected a similar attempt to cavalierly brush aside constitutional history. 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 vote would "render the constitutional . . . process inconsequential." *Id.* at 517 (cleaned up). So too, here.

The 2021 proposed amendment is a strong, recent example of the longstanding constitutional practice and the well-settled understanding that the Legislature was not empowered to expand absentee voting without an enabling amendment of Article II, Section 2. The Third Department suggests that the Legislature in 2021, in "assum[ing] that a constitutional amendment was necessary to implement universal mail-in voting," (R.757,) was simply mistaken about the Constitution's requirements. If so, then this mistaken belief was shared by every

relevant constitutional actor and legal commentator throughout history and without apparent exception, including at least the 2021 Legislature, the Board of Elections, two Attorneys General (including the current one), multiple pro-absentee voting civil society groups, a special committee of the New York City bar association (including multiple judges), and a leading treatise. Indeed, the very efforts to enact the failed amendment demonstrate the settled understanding of constitutional limits on absentee voting.

The enactment of the unconstitutional Mail-Voting Law in the wake of the failed amendment was an egregious attempt to ignore the voters. This Court should not reinterpret the Constitution to enable the Legislature's cynical ousting of the voters from their place in the constitutional process.

E. The Legislature's enactment of special ballot provisions cannot justify the Mail-Voting Law.

The Third Department points to statutory provisions providing for special ballots for certain classes of voters — poll workers, emergency responders, and victims of domestic violence — as demonstrating that the Legislature possesses the constitutional authority to allow for remote voting by persons other than those defined in Section 2. (R.753.) This Court should accord little weight to these provisions.

First, no court has considered their constitutionality, let alone held that they are authorized by the plenary power that the defenders say now authorizes the Mail-Voting Law. To the extent that the special ballot provisions authorize absentee voting beyond the limits of Section 2, this only suggests that these provisions may suffer from the same infirmities as the Mail-Voting Law.[9] Nor is it surprising at all that these provisions may never have been challenged. Unlike the Mail-Voting Law, which applies to the entire electorate, the special ballot provisions have extremely limited scope, and it is not clear who would even have standing to challenge them.

Moreover, the legislative history accompanying the enactment of these provisions sheds no light on the claimed source of the Legislature's authority, whether that be Section 7, Section 2, or any other constitutional provision. Indeed, the only piece of legislative history that touches on constitutionality, albeit obliquely, casts doubt on claims of plenary authority. The first of these provisions, providing for special ballots for poll workers, was enacted in 1982. Election Law § 11-302. Although the provision itself uses the term absentee ballot, the Board of Elections, in an official opinion letter to the Governor, rejected this characterization:

> Unlike absentee ballots, the special ballots must be cast in person at the office of the board of elections not earlier than the day before the election and not

[9] Because the special ballot provisions are not at issue in this case, Appellants express no opinion as to their ultimate constitutional validity, whether they might be fit in whole or in part within the power granted by Section 2, or whether they might be justified under some other constitutional authority.

> later than the close of polls on election day. These could not be considered as absentee ballots because the person is not absent from the county, the ballot must be cast in person and cannot be mailed to a board of elections.

Memorandum re Assembly Bill No. 9828-B, State Board of Elections, June 4, 1982. Regardless of whether this argument is persuasive, the Board's effort to distinguish special ballots from absentee ballots suggests an understanding that, even after 1966, the Legislature still lacked any plenary power to authorize absentee voting and a concern that these special ballots would be constitutionally vulnerable if they were understood to be absentee ballots.

In short, the mere enactment of these provisions does nothing to establish the legality of the Mail-Voting Law. Indeed, to hold otherwise would enable the Legislature to erode constitutional limits on its own power through a legislative two step. In step one, the Legislature enacts minor and inoffensive provisions that nevertheless exceed constitutional limits. No one challenges them because they are obscure and benefit a small number of sympathetic persons. In step two, the Legislature exceeds constitutional limits in a much more sweeping and controversial way, defending its unconstitutional conduct by pointing to the earlier unchallenged enactments.

The Court should decline to put its imprimatur on such a stratagem. To the extent constitutional limitations at issue here raise doubts about the soundness of these special ballot provisions, that it a matter for another case.

II. THE LANGUAGE AND STRUCTURE OF ARTICLE II DEMONSTRATE THAT SECTION 2 EXCLUSIVELY DEFINES THE SCOPE OF THE LEGISLATURE'S POWER TO AUTHORIZE ABSENTEE VOTING.

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 situates its exceptions against the default assumption that voting occurs "personally at the polling place."

Article II, Section 2, by its express terms, is a limited grant of authority permitting the Legislature to authorize voting at a "place" other than the polling place for certain defined categories of voters. But the Constitution may restrict the power of the Legislature not only through its express terms, but also "by necessary implication." *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001). In this regard, the text of Section 2 itself operates against a default rule, set forth in the provision itself, that in the normal course voting occurs "personally at the polling place."

The structural relationship between Section 2 and other provisions of Article II confirms this understanding. In short, each of the three sections of Article II at issue in this litigation, Sections 1, 2, and 7, was enacted at a different time, for a different purpose, and to govern 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. The plain language of Article II, Section 2 necessarily limits the Legislature's authority to expand absentee voting.

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). *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).

Expressio unius has long been applied to the interpretation of the New York Constitution. For example, in *Sill v. Village of Corning*, 15 N.Y. 297, 299 (1857), the majority and dissent agreed that a constitutional provision authorizing the Legislature to create certain "[i]nferior local courts of civil and criminal jurisdiction," necessarily implied a lack of authority to create certain other courts.

Similarly, this Court 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*.'"). And this Court 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*).

More recently, the First Department invoked *expressio unius* while interpreting Article VII, Section 4 of the Constitution, and this Court 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). The court noted that "the New York Constitution provides for a 10-year term and a maximum duration to age 70" for County Court judges. *Id.* at 568. Accordingly, it held "[t]hat the Constitution imposed a durational limit on County Court judges, but not on District Attorneys,

who are also 'constitutional officers,' indicates that the omission was intentional and that it was intended that there be no durational limit on District Attorneys." *Id.* Although the Constitution contained no express prohibition on term limits for District Attorneys, the Court inferred an implied prohibition because it had expressly provided terms limits for other offices. Once again, this Court affirmed. *See* 21 N.Y.3d 549 (2013).

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.

Moreover, the lack of an express prohibition in the current Constitution is no barrier to the application of *expressio unius*. The Third Department states that "accepting plaintiffs' argument would require us to find that article II, § 2 now perpetuates the very rule that it was enacted as an exception to." (R.756.) But this is not remotely paradoxical. The whole point of *expressio unius* is that certain express language — in particular specific enumerations — carries with it a negative implication. *See Colon v. Martin*, 35 N.Y.3d 75, 78 (2020) ("The maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an

irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded."). The existence of an express prohibition may bolster the force of *expressio unius* arguments, but it is not a necessary condition for the canon's application. The canon has long been applied, including by this Court, whenever the inclusion of specifically enumerated items can fairly be read as exclusive.

But to the extent that the lack of an express prohibition is relevant, at the time of the adoption of Article II, Section 1-a and the subsequent amendments that resulted in the current Section 2, Article II, Section 1 *did* contain an express prohibition on absentee voting. As this Court has instructed, constitutional language must be interpreted in the context of the "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.").

Indeed, given the express prohibition on voting "elsewhere" than "in the election district" contained in Article II, Section 1 at the times the various absentee voting amendments were adopted, a negative implication — that the enumerated

categories of voters permitted to participate in elections remotely was exclusive — was not only the natural reading, it was inescapable. And this understanding was consistent with how each proposed amendment was described to the voters tasked with adopting it.

The subsequent removal of the expressly prohibitory language in Section 1 did not change the meaning of Section 2. Beyond the reasons discussed above, assigning dispositive weight to that change fails to interpret Article II, Section 2 in the context of the Constitution as it existed at the time it of its adoption and expansion. In other words, Section 2's negative implication is baked into its meaning and must be enforced, unless and until Section 2 is amended or repealed.[10]

A recent decision of this Court illustrates both the proper application of the *expressio unius* canon and the effect of subsequent amendments. In *Town of Aurora v. Village of East Aurora*, this Court considered Village Law § 6-606, which 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). Although nothing in the provision stated that it was exclusive and there was no express prohibition on a village assuming control by other means, this Court, applying the *expressio unius*

[10] In this light, the Third Department's concession that *expressio unius* "may well have been plausible prior to the 1966 amendment," (R.752–53,) supports Appellants case. The negative implication that existed before 1966 continues through to this day.

canon, held 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.

The town argued against this construction, citing language in the nearby Section 6-604 that suggested a bridge might otherwise come under the control of a village. *Id.* at 372. This Court rejected this argument, pointing out that the version of § 6-604 in effect at the time § 6-606 was originally adopted was consistent with the exclusive reading of § 6-606. *Id.* at 374. This Court rejected the idea that it should read the later omission of language from § 6-604 "as intending a substantive change that would, without explanation or proof of intent, drastically alter the statutory scheme." *Id.* at 376.

Here, Article II, Section 2, even standing alone, is most naturally understood as having established the exclusive categories of voters who may be permitted to vote remotely. The existence of an express prohibition in Section 1 at the time of Section 2's adoption only serves to make this exclusive reading inescapable.

B. The Third Department's decision renders Article II, Section 2 entirely superfluous.

As this Court recently reiterated, "[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 holding that the Legislature possesses a plenary power to authorize absentee voting, the Third Department 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.

This Court 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). This Court 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.").

In response, the Third Department first noted that the rule against superfluity is not absolute. (R.755.) True enough, but as explained above, the text of the relevant provisions *is* susceptible to a reading that preserves meaning for each of them. Moreover, there is no indication *anywhere* that any person or legislative body ever intended to nullify Article II, Section 2. Under these circumstances, there is no reason to adopt a construction that renders Section 2 superfluous.[11]

The Third Department next endorsed a baseless argument advanced by the Mail-Voting Law's defenders that the Legislature's plenary power over elections does not render Section 2 entirely superfluous because this plenary power allows only uniform, generally applicable laws, while Section 2 allows specific carve outs for designated categories of voters. (R.755 n.7.) Under this theory, although the

[11] According to the Third Department, this is not a repeal by implication because each provision at issue merely "embrace[s] the authority of the Legislature to adopt alternative methods of voting." (R.757.) But Article II, Section 2 previously set *limits* on legislative authority. If the Third Department is correct, intervening changes to the Constitution have implicitly repealed those limits.

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 concocted solely for the purpose of salvaging the Mail-Voting Law. This supposed uniformity requirement appears nowhere in the Constitution itself and is not found in any constitutional interpretation prior to this case. 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 sole basis for this supposed uniformity requirement appears to be a single use of the word "uniform" *in dicta* in *Burr v. Voorhis*, 229 N.Y. 382, 388 (1920), which has never been quoted in any subsequent case, and which, in context, does not suggest any limitation on the Legislature's ability to legislate in less than universal terms.

The Mail-Voting Law's defenders offer no reason to conclude that the Legislature's otherwise allegedly plenary authority 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 Article II, Section 7 — that is, 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. This is nonsense. Article II, Section 7 has never been understood this way.[12] *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).

Alternatively, the Mail-Voting Law's defenders have advanced the theory that although the Legislature has plenary power to authorize absentee voting, Section 2 provides certain categories of voters with additional constitutional protection. This is wrong for the simple reason that Section 2 is permissive, not mandatory, and provides no additional protection to any voter. 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 possesses plenary power to authorize

[12] 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 the same defects.

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.

Finally, the Mail-Voting Law's defenders and the Third Department, (R.755,) have suggested that Section 2's complete superfluity is of no concern, citing *Siwek v. Mahoney*, 39 N.Y.2d 159 (1976), in which this Court explained that the Legislature's exercise of its permissive authority to establish permanent voter registration made the Constitution's provisions for annual voter registration irrelevant. In *Siwek*, however, each of the constitutional provisions served a distinct purpose, and the annual registration provisions became irrelevant only gradually by virtue of the Legislature's choice to exercise its power to establish permanent registration. Here, by contrast, the mere existence of a plenary power to permit absentee voting, regardless of any further action by the Legislature, immediately renders Section 2 entirely superfluous, as its limited grants of power are entirely subsumed within the plenary power.

New York courts have long held that a constitutional construction that renders even individual words without effect should be avoided. Here, the supposed plenary power invoked in support of the Mail-Voting Law would render all of Section 2 a nullity. Perversely, while the Third Department was unconcerned about its interpretation of the 1966 Amendment rendering Section 2 irrelevant, it found

intolerable the idea that continuing to give meaning to Section 2 "would render the wholesale deletion of that significant constitutional text [*i.e.*, the election district language] meaningless." (R.756.) Speculation over the unexplained omission of a single phrase was thereby elevated in importance over giving meaning to an entire section that remains part of the Constitution to this day.

C. The power granted by Article II, Section 7 does not override Section 2's limits on absentee voting.

The Third Department held that the Mail-Voting Law is within the Legislature's authority under Article II, Section 7, which, according to the court, gives the Legislature plenary authority to regulate voting, including absentee voting.[13] This is yet another ahistorical interpretation that badly misreads the text of Section 7, which 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."

[13] The Third Department conceded that "broadly construing article II, § 7 as authorizing universal mail-in voting does, in effect, render article II, § 2 generally unnecessary relative to this issue." (R.755.) In other words, the same superfluity problem discussed above with respect to the 1966 amendment of Section 1 would be created by this interpretation of Section 7.

It is difficult to see how the 1894 amendment could be relevant. Almost all of the constitutional amendments expanding the Legislature's power to authorize absentee voting were proposed and ratified well after the 1894 amendment. Recognizing this problem, the Third Department offered a remarkable solution. It conceded that Section 7 "was not previously construed as authorizing absentee voting beyond the categories defined" in Section 2. (R.753.) But according to the court, the 1966 amendment "changed" the "entire dynamic . . . between these sections," implicitly amending the scope of the Legislature's Section 7 power. (R.753.) This method of anachronistic constitutional interpretation cannot rescue the Third Department. For one, it is completely contrary to both this Court's consistent teaching that constitutional provisions should be interpreted in context at the time of their enactment, and the then-attorney general's opinion that the 1966 Amendment affected no other provision of the Constitution. But it is also fatally circular. If the 1966 amendment overrode Article II, Section 2 the moment it was ratified, then the 1894 amendment would have similarly overridden Section 1's Election District Provision the moment it was ratified. In fact, the 1966 amendment did not alter the meaning of Section 7 any more than it altered the meaning of Section 2 — which is to say, not at all.

In any event, the Third Department's interpretation is wrong as a textual matter. 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, this Court 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 this 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.*

When the language of Article II, Section 7 was first adopted in 1894, Article II, Section 1 still contained the express prohibition against voting "elsewhere" than

the election district, along with a single exception allowing the Legislature to establish the manner, time, and place of voting for persons absent due to military service. In this context, it is ahistorical to understand the Section 7 power to establish the "method" of election as overriding the express language of Section 1 governing the place of election. Absentee voting was not within the contemplation of the drafters of Section 7 — due to the express prohibition on absentee voting in effect at the time, it could not have been — and as in *Wintermute*, the language of Section 7 should not be wrenched from the context of its adoption to apply to matters beyond its adopters' purpose.

Turning to the specific language of Article II, Section 7, this Court 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 is confirmed by the 1894 constitutional convention debates, which included discussions of current and

hypothetical voting technology and methods of voting. *See 1894 Record*, at 483–89. Although the word "method" was deliberately chosen to provide flexibility for future innovation, the debates reveal that the delegates envisioned such methods as "the devices now being perfected, or possibly some electrical voting device," *Id.* at 485, or "a machine or other appliance," *Id.* at 488, without a single reference to any form of voting remote from the polling place.

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.[14] 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."

III. THE DEFENSE OF THE MAIL-VOTING LAW BETRAYS 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.

[14] Similarly, after the 1966 Amendment, Section 1 was "solely focused on voter qualifications," (R.752,) leaving Section 2 as the sole provision governing absentee voting.

If the Legislature has had the power to authorize absentee voting since the founding, the State has been misleading the people since 1864. If that power came into existence in 1894, then the State misinformed the people in 1919, 1923, 1929, 1947, 1955, and 1963 when it asked them to expand the Legislature's power to authorize absentee voting. And if that power came into existence in 1966, then the State has been misleading the people since then, including, most notably, in 2021, when the people informed the State that they did not wish to empower the Legislature further with respect to absentee voting.

And when, in 1894, in response to express concerns about the legality of mechanical voting machines, the Constitution was amended to give the Legislature power over the *method*, but not the *place*, of election, this amendment secretly overrode the express absentee voting provision then contained in Article II, Section 1, or, perhaps, silently created 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 all public commentary described it as amending residency requirements, this Court is asked to believe that, in fact, it secretly eliminated all constitutional limits on absentee voting, effectively rendering Section 2 a dead letter.

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 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 votes could be cast using mechanical devices, the amendment did as intended and did not *sub silentio* grant the Legislature a new power over absentee voting. 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 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. That is how constitutional democracy is supposed to function. The Constitution is the people's document, and the people's choices — today and in generations past — must be respected.

CONCLUSION

This Court should reverse the Opinion and Order of the Third Department and grant summary judgment in Appellants' favor, declaring the Mail-Voting Law void as unconstitutional and enjoining Respondents from its continued implementation or enforcement.

DATED: June 6, 2024

Respectfully submitted,

O'CONNELL AND ARONOWITZ
By:

Cornelius D. Murray, Esq.
Michael Y. Hawrylchak, Esq.
Attorneys for Appellant
54 State Street
Albany NY 12207-2501
(518) 462-5601

WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief, excluding the material omitted under Rule 500.13(c)(3), is 13,946 words. The foregoing was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point Size: 14

Line Spacing: Double

Dated: June 6, 2024.

O'CONNELL & ARONOWITZ, P.C.

By: Michael Y. Hawrylchak

Cornelius D. Murray, Esq.
Michael Y. Hawrylchak, Esq.
Attorneys for Plaintiffs-Appellants
54 State Street, 9th Floor
Albany, New York 12207
(518) 462-5601