APL 2024-00058

To be argued by:
JEFFREY W. LANG
Time requested:
15 MINUTES

Court of Appeals of the State of New York

ELISE STEFANIK, et al.,

Plaintiffs-Appellants,

v.

KATHY HOCHUL, in her official capacity as Governor of New York, et al.,

Defendants-Respondents,

DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE, et al.,

Intervenors-Defendants-Respondents.

(*Caption continues inside front cover.*)

BRIEF FOR RESPONDENTS GOVERNOR KATHY HOCHUL AND STATE OF NEW YORK

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Supreme Court, Albany County, Index No. 908840-23; Third Dept. No. CV-24-0281

(*Caption continues from front cover.*)

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Plaintiffs-Appellants,

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 STATE OF NEW YORK,

Defendants-Respondents,

KIRSTEN GILLIBRAND, YVETTE CLARK, GRACE MENG, JOSEPH MORELLE, RITCHIE TORRES, JANICE STRAUSS, GEOFF STRAUSS, RIMA LISCUM, BARBARA WALSH, MICHAEL COLOMBO, and YVETTE VASQUEZ,

Intervenors-Defendants-Respondents.

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PRELIMINARY STATEMENT

The New York Early Mail Voter Act permits all registered voters to apply to vote early by mail in any election in which the voter is eligible to vote. The Legislature passed the Act in 2023 and it took effect on January 1, 2024. Since then, three special elections, multiple village elections, and presidential and legislative primaries have taken place under the Act's regime.

Plaintiffs are a coalition of Republican officials, voters, and elected representatives of various jurisdictions, including one state Assemblyman who is a member of a "losing faction of legislators." *Cohen v. State of New York*, 94 N.Y.2d 1, 16 (1999). Plaintiffs maintain that the Act violates the New York State Constitution and seek an injunction against its implementation and enforcement. Plaintiffs thus attempt to "secure from the courts the very result they failed to achieve in their one House of the Legislature, through legitimate debate and political persuasion." *Id.*

As both Supreme Court and the Appellate Division, Third Department, correctly held, the Act is constitutional. The Constitution *formerly* contained a provision that was generally understood to mandate that all voting be done in person at the polling place. Critically, however, that

provision was repealed in 1966. Without any constitutional provision mandating in-person voting, there is no longer any restriction on the Legislature's plenary power to regulate the manner of casting ballots. The Act is a permissible exercise of the Legislature's authority in that respect, and this Court should affirm.

QUESTION PRESENTED

Whether the Early Mail Voter Act, Election Law §§ 8-700 *et seq.*, is constitutional.

STATEMENT OF THE CASE

A. Constitutional Background and History

Three constitutional provisions are relevant to this appeal: a now-obsolete version of article II, section 1; the current version of article II, section 2; and the current version of article II, section 7. These sections are reprinted in an addendum to this brief for the Court's convenience.

As explained below, from 1846 to 1966, article II, section 1 contained a provision that was construed to require that votes be cast in

person in the election district where the voter resided.[1] Until the repeal of that section in 1966, remote voting away from one's polling place was permitted only pursuant to constitutional amendments—now contained in section 2[2]—that authorized departures from the default rule of in-person voting. Since the 1966 repeal, however, authority to vote remotely has been repeatedly extended to categories of voters by statute rather than by constitutional amendment, with the Legislature acting under its preexisting plenary power to regulate elections, a power now codified in section 7.[3]

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[1] The full text of former section 1 is reprinted in the addendum to this brief. The relevant sentence provides that an otherwise eligible person "shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere."

[2] Section 2 currently reads as follows: "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."

[3] As relevant here, section 7 provides: "All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved."

1. 1846-1966: The Constitution contains a provision generally understood to require in-person voting, and all deviations from this rule are accomplished by constitutional amendment.

Beginning in 1846, article II, section 1 of the Constitution required that an eligible voter vote "in the election district of which he shall at the time be a resident, and not elsewhere." As plaintiffs agree (Br. 17), this provision (referred to here as the "Election District Provision") was generally understood, throughout its existence, to mandate that all voting be carried out in person at the polling place. As the Appellate Division in this case observed, "At all times since the NY Constitution was first amended during the Civil War to allow for absentee voting, and during each expansion of that power in article II, § 2 through 1963, the Election District Provision was generally understood as requiring in-person voting." (R. 750.)

The Election District Provision was invoked to significant effect during the Civil War. In 1863, a military-voting bill was introduced in the Legislature that would have permitted soldiers to vote wherever they were stationed, even if outside the State of New York. *See* 2 Charles Z. Lincoln, The Constitutional History of New York 236 (1906). Governor

Horatio Seymour doubted the bill's constitutionality and recommended that the Legislature instead propose a constitutional amendment to permit absentee voting. *Id.* at 237. In a "special message" to the Legislature, Governor Seymour explicitly cited the Election District Provision in expressing his view that the Constitution permitted only in-person voting within one's election district: because "[t]he Constitution of this state requires the elector to vote in the election district in which he resides," "[i]t is clear to me that the Constitution intends that the right to vote shall only be exercised by the elector in person." *Id.* at 237-38.

Governor Seymour's view carried the day. The Legislature failed to override his veto of the military-voting law and instead submitted to the voters a proposed constitutional amendment, which passed in 1864. *Id.* at 238-39. It is this amendment that forms the basis of modern-day article II, section 2. Originally appended as a proviso to Section 1's Election District Provision, it stated:

> Provided, that in time of war no elector in the actual military service of the United States, in the Army or Navy thereof, shall be deprived of his vote by reason of his absence from the state; and the legislature shall have power to provide the manner in which, and the time and place at which, such absent electors may vote, and for the canvass and return of their votes in the election districts in which they respectively reside, or otherwise.

Id. at 239.

Governor Seymour's view was later echoed by the Committee on Suffrage in 1867, when discussing a constitutional amendment to permit soldiers engaged in military service on behalf of the State, like their counterparts engaged in military service on behalf of the United States, to vote absentee when not present in their election district (even if present in the State). As the committee explained, "The proposed amendment further protects the right of suffrage when the elector may be so engaged in the military service of the *state*, and when absent, on either service, not merely from the state, but from his own *election district*." *Id.* at 479 (emphasis in original). The committee believed the amendment necessary to enfranchise those in state military service because, otherwise, "[t]heir inability to cast their votes *at the polls* would be as absolute if they were thus serving within the state, as if they were beyond its bounds." *Id.* at 479-80 (emphasis added).

This settled understanding—that the Election District Provision set a default requirement of in-person voting that could be overcome only by constitutional amendment—persisted over the next century. During

that time, the Constitution was amended to create additional exceptions to the default in-person voting rule:

- A 1919 amendment authorized voters to vote absentee if they would be unavoidably absent from their place of residence on Election Day because their duties, occupation, or business (not limited to military service) required them to be elsewhere within the United States. N.Y. Const. (1919), art. II, § 1-a.
- A 1947 amendment authorized absentee voting in all "elections" (not just general elections), and also allowed voters to vote absentee if they would be unavoidably absent from their place of residence on account of their own business *or* that of a family member. N.Y. Const. (1947), art. II, § 2.
- A 1955 amendment authorized absentee voting by those who may be unable to appear personally at the polling place because of illness or physical disability. N.Y. Const. (1947), art. II, § 2.
- A 1963 amendment specified that voters may vote absentee if will be absent from their *county* of residence on Election Day, or, if residents of New York City, absent from the city. N.Y. Const. (1963), art. II, § 2.

These enumerated categories of voters were permitted to vote in an alternative manner because they were "unable to appear personally at the polling place on Election Day," as then required. *See* Rep. of Joint Legis. Comm. to Make a Study of the Election Law and Related Statutes, 1954 Legis. Doc. No. 43 at 18.

2. 1894: The Constitution is amended to expressly grant the Legislature the authority to prescribe methods of voting.

From 1821 to 1894, article II, section 7 (then numbered section 5) provided that all elections "shall be by ballot." *See* Robert Allan Carter, New York State Constitution: Sources of Legislative Intent 16 (2d ed. 2001). In 1894, that section was amended to provide that all elections "shall be by ballot *or by such other method as may be prescribed by law*, provided that secrecy in voting be preserved." *Id.* (emphasis added).

This amendment was a response to the growing popularity of lever voting machines to record votes at polling places, and its adoption insulated the machines from constitutional challenge. *See* 3 Charles Z. Lincoln, The Constitutional History of New York 108-09 (1906). But while the amendment responded to the discrete problem of voting machines, it employed open-ended language to do so. Indeed, the constitutional convention rejected a version of the amendment that would have specifically required voting to be done "by ballot, or by the use of a voting apparatus," in favor of broader language confirming the Legislature's power to prescribe other unenumerated methods of voting. *Id.* at 109.

That was a deliberate choice: delegates to the convention spoke in favor of "giv[ing] the Legislature a permission to act on its own judgment" to prescribe "some other method of balloting," such as "methods of voting by envelope." 3 Rev. Rec., 1894 N.Y. Constitutional Convention at 89, 92, 94. One delegate explained, "it seems to me there can be no harm, and that some benefit may arise, from the adoption of an amendment which permits some other method, whether now known or hereafter to be discovered, to be adopted in voting at elections." (R. 560.) The delegate urged the convention not to "bind the Legislature," and instead advocated for a system that would permit "moving forward at all times." (R. 561.)

3. 1966: The Election District Provision is repealed.

In keeping with that spirit of progress, the Election District Provision was repealed by constitutional amendment in 1966 as part of a larger effort to liberalize election laws and "achieve an increase in voter participation." Rep. of Joint Legis. Comm. to Make a Study of the Election Law and Related Statutes, 1966 Legis. Doc. No. 30 at 11. The 1966 amendment substantially streamlined article II, section 1: whereas Section 1 had previously prescribed different durational requirements for

a voter's residence in the State, county, and election district, the amended Section 1 set forth a unitary residency requirement of three months. *See* Senate Concurrent Resolution No. 5519, L. 1965 at 2783-84. It also deleted from Section 1 any reference to voting "in the election district." *Id.*

To be sure, the limited legislative record of the 1966 amendment does not shed much light on the reasons for deleting the Election District Provision in particular. Nonetheless, its removal eliminated the foundation for the consensus that had prevailed up to that point regarding the Constitution's default in-person voting rule.

4. 1967-present: The Legislature repeatedly expands remote voting without any constitutional amendments.

With the Election District Provision excised from the Constitution, the Legislature proceeded to enact a number of statutes allowing certain categories of voters to vote remotely, without having to be present at the polling place. And the Legislature did this without a preceding constitutional amendment. This history undercuts plaintiffs' central claim that "whenever" the Legislature has sought to expand remote voting, it has first sought a constitutional amendment permitting it to do so. (Br. 16.)

In 1982, the Legislature passed a law permitting election workers to vote by "special ballot," which may be returned to the local board of elections by mail. *See* Election Law § 11-302. The Legislature did the same for victims of domestic violence in 1996 and for emergency responders in 2016.[4] *See id.* §§ 11-306, 11-308. None of these statutes has ever been challenged, reflecting a prevailing understanding that the Legislature enjoys the power to regulate the manner of voting, including by allowing voting by mail.

B. The New York Early Mail Voter Act

Consistent with that prevailing understanding, the New York Early Mail Voter Act that is the subject of this litigation was signed into law in September 2023. The Act permits all registered voters to apply to vote early by mail in any election in which the voter is eligible to vote. *See*

[4] While the statutes pertaining to election workers and emergency responders provide that cast ballots may be "delivered" to local boards of elections to be counted, Election Law §§ 11-302, 11-308(3), the State Board of Elections has interpreted the word "delivered" to mean that ballots may be returned either in person at the local board of elections or by mail. *See, e.g.*, New York State Bd. of Elections, *New York State Special Ballot Application for Emergency Responders*, https://www.vote.nyc/sites/default/files/pdf/Absentee_voting/SpecialBallotAppEmergencyResponders.pdf (last visited June 28, 2024).

generally Election Law § 8-700. Voters who duly submit applications will be provided with an "early mail ballot" to be marked and mailed back to their local board of elections. *Id.* § 8-708. The Act took effect on January 1, 2024, and as of the filing of this brief, at least 30,000 applications to vote early by mail have been filed, and early mail ballots have been cast in three special elections, multiple village elections, and the presidential and legislative primaries.

C. This Litigation

Plaintiffs are a group of Republican elected representatives—including a member of the New York State Assembly who voted against the Act and lost—as well as Republican commissioners of local boards of elections, voters, party officials, and party committees, plus the Conservative Party of New York. (R. 21-26 ¶¶ 8-27.) Plaintiffs' complaint alleges that the Act violates article II, section 2 of the New York State Constitution, which authorizes the Legislature to provide a manner in which certain (but not all) voters may vote absentee. (R. 36.)

Supreme Court, Albany County (Ryba, J.), granted defendants' motion to dismiss the complaint, declared the Act constitutional, and entered judgment in favor of defendants. (R. 6-16.)

The Appellate Division, Third Department affirmed. (R. 745-758.) In a thorough and persuasive decision, the court held that plaintiffs failed to satisfy their burden of demonstrating the Act's unconstitutionality beyond a reasonable doubt. (R. 758.) The court reasoned that the Constitution does not have an express or implied in-person voting requirement and has not had one since the Election District Provision was repealed in 1966. (R. 750-753.) The court further observed that article II, section 7 of the Constitution grants the Legislature "broad, plenary power" to prescribe the manner in which votes shall be cast, such as by mail. (R. 758.) The court concluded that upholding the Act's constitutionality "comports with the NY Constitution's embrace of broad voting rights for the state electorate, the history and language of article II, and the fundamental right to vote." (R. 758.)

This appeal followed. (R. 742.)

ARGUMENT

THE EARLY MAIL VOTER ACT IS CONSTITUTIONAL

The Constitution formerly required in-person voting, with exceptions made only by constitutional amendment. That in-person voting requirement was removed by constitutional amendment in 1966, and since

then statutes, rather than constitutional amendments, have been used to authorize remote voting for various categories of voters. There is thus no constitutional impediment to a statute that permits all voters to cast their ballots by mail in accordance with specified procedures. Any doubt regarding that conclusion should be resolved by the "strong presumption of constitutionality" that attaches to this duly enacted law. *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022).

Plaintiffs have failed to marshal the "proof beyond a reasonable doubt" required to rebut this presumption. *Matter of Walt Disney Co. v. Tax Appeals Trib.*, 2024 N.Y. Slip Op. 02127, at 11 (N.Y. Apr. 23, 2024) (internal quotation marks omitted). They primarily rely on the "negative implication" that they say arises from the text of article II, section 2, which enumerates categories of voters whom the Legislature may permit to vote absentee. But those enumerated categories are exceptions that were each added to the Constitution at a time when the Constitution contained a requirement of in-person voting, and thus any exceptions to that requirement could be created only by constitutional amendment. Accordingly, article II, section 2 sheds little light on the scope of the Legislature's power to authorize remote voting after the constitutional

requirement of in-person voting was repealed in 1966. More than a negative implication from a constitutional provision adopted against the background of a repealed requirement is needed to nullify "the product of the democratic lawmaking process." *Cohen*, 94 N.Y.2d at 8.

As explained below, the Act falls within the heartland of the Legislature's plenary power over elections and does not run afoul of any countervailing prohibition on voting remotely, now that the Election District Provision has been repealed. And even if that were subject to any uncertainty, "all doubts should be resolved in favor of the constitutionality of [the] act." *White*, 38 N.Y.3d at 229 (internal quotation marks omitted). Because it is by no means "impossible" to reconcile the Act with the constitutional text and history, this Court should do so and affirm. *Id.* at 216.

A. The Constitution does not contain an express in-person voting requirement.

1. The Election District Provision established an in-person voting requirement.

It has long been undisputed that the Election District Provision established a default rule requiring that all voting be done in person at the polling place. (*See* Br. 17 [acknowledging as much].) As explained at

pages 4-7 *supra*, and as the Appellate Division correctly observed, "At all times since the NY Constitution was first amended during the Civil War to allow for absentee voting, and during each expansion of that power in article II, § 2 through 1963, the Election District Provision was generally understood as requiring in-person voting." (R. 750.)

Further support for this view can be found in the Court of Appeals' decision in *People ex rel. Lardner v. Carson*, 155 N.Y. 491 (1898). In addressing a dispute about whether an election district could encompass a polling place located outside of a town's boundaries, the Court observed the following, quoting the Election District Provision: "We are told that the Constitution enacts that the elector must vote 'in the election district of which he shall at the time be a resident and not elsewhere.' So it does." *Id.* at 496. The Court further explained that a voter "must vote *at the polls* of the election district in which, at the time, he resides, and not *elsewhere*." *Id.* at 498 (first emphasis added). "No vote can be registered, cast or counted in this state except *at the polling place* of some election district." *Id.* (emphasis added).

At least one other state constitution, Delaware's, has a similar Election District Provision, which has also been interpreted to require in-

person voting. In *Albence v. Higgin*, 295 A.3d 1065 (2022), the Delaware Supreme Court held that Delaware's vote-by-mail statute violated its state Constitution—a holding that depended in part on the fact that the Delaware Constitution still retains its own version of the Election District Provision. *See* Del. Const. art. V, § 2(a). As support for its conclusion that the Delaware Constitution requires voters to vote "in-person at their regular polling place," the Delaware Supreme Court cited Delaware's analog to the Election District Provision: the provision that voters "shall be entitled to vote at such election in the hundred[5] or election district of which he or she shall at the time be a resident." *Albence*, 295 A.3d at 1074, 1901. According to the court, that provision "seem[s] to take for granted that elections are held in some identifiable place." *Id.* at 1074.

The court in *Albence* also relied on an earlier decision of the Delaware Court of General Sessions from 1939, *State v. Lyons*, 5 A.2d 495 (Del. Gen. Sess. 1939), which held unconstitutional a statute per-

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[5] A "hundred" is a geographic division used by Delaware that is "smaller than counties and roughly equivalent to the division 'townships' in Pennsylvania and New Jersey." Del. Geological Survey, *Delaware 1868 Hundreds Maps*, https://www.dgs.udel.edu/delaware-1868-hundreds-maps (last visited June 28, 2024).

taining to absentee voting. *See Albence*, 295 A.3d at 1074-76. The court in *Lyons* observed that Delaware's Election District Provision constituted "critical words" demonstrating that the Delaware Constitution requires voting to take place in person. *Id.* at 500. The court further noted that the framers of Delaware's constitution intentionally modeled their voting-qualification provision on article II, section 1 of the New York Constitution; however, whereas the New York Constitution had by then been amended to allow for absentee voting in certain cases, Delaware explicitly chose not to include a similar absentee-voting provision in its constitution. *Id.* at 501-02. From that history, the Delaware court inferred that the Delaware constitution, which contained only the Election District Provision but not a provision regarding absentee voting, retained a requirement that all voting be done in person. *Id.* at 502-03.

2. The repeal of the Election District Provision eliminated the in-person voting requirement.

As the Appellate Division correctly concluded, the 1966 repeal of the Election District Provision removed the in-person voting requirement from the Constitution. (R. 753.) "With that operative language deleted from article II, § 1, there has been no express provision in the constitution

mandating in-person voting since January 1, 1967." (R. 753.) The Legislature has acted in accordance with that understanding on multiple occasions since the 1966 repeal, including by permitting remote voting by election workers, victims of domestic violence, and emergency responders. *See* Statement of the Case, Part A.4, *supra*.

Despite agreeing that the Election District Provision established an in-person voting requirement (Br. 17), plaintiffs insist that the repeal of this critical language was essentially meaningless. That position ignores the settled principle that "[w]hen provisions contained in an original act are omitted from an amendatory act, it is reasonable to presume that they were intentionally omitted." Statutes § 193(a), Comment, 1 McKinney's Cons. Laws of N.Y. Plaintiffs maintain that the omission here was not a "surgical" one, but rather was part of a "wholesale rewrite" of article II, section 1, which, in their view, independently justifies not giving effect to the omission. (Br. 24.) But whether surgical or not, "the very purpose and effect of an amendment is to amend the relevant portion of the Constitution, effectively repealing and voiding any prior version of the particular section so amended." *Matter of Baldwin Union Free Sch. Dist. v. County of Nassau*, 22 N.Y.3d 606, 625 (2014). Plaintiffs provide

no basis to resuscitate the substance of the repealed Election District provision.

Plaintiffs also justify their refusal to give any effect to the repeal of the Election District Provision on the ground that the legislative history of the 1966 amendment does not mention its impact on remote voting. But, in fact, there is "[v]ery little evidence of legislative intent" of any kind available. Carter, *supra* at 13. Unlike the amendment at issue in *Matter of Kuhn v. Curran*, 294 N.Y. 207 (1945), on which plaintiffs rely, the 1966 amendment was not discussed at a constitutional convention, nor was it the subject of any recorded legislative debate. There appear to be only two pieces of legislative history of the amendment: (i) a less-than-one-page introducer's memorandum that simply describes the proposed amendment, with no analysis or discussion, *see* Mem. of Sen. Warren Anderson, 1966 N.Y. Legis. Ann. at 130-31, and (ii) one paragraph in a committee report that discussed a suite of proposed reforms designed to achieve a "[l]iberalization of laws pertaining to registration and voting" and "an increase in voter participation"; the report advocated for the amendment at issue here (which, among other things, reduced the length of the residency requirement that was a prerequisite to voting in a

particular jurisdiction) due to "[t]he great advancement in communications and the rapidly shifting population." Rep. of Joint Legis. Comm. to Make a Study of the Election Law and Related Statutes, 1966 Legis. Doc. No. 30 at 11, 13. This thin and inconclusive record does not alter the fact that language that undisputedly established an in-person voting requirement was deleted from the Constitution, a deletion that must be presumed to be intentional.

Contrary to plaintiffs' claim, *Kuhn* does not stand for the proposition that a deletion may be presumed to be *un*intentional and therefore meaningless when the effect of that deletion was "never presented to voters." (Br. 29.) While plaintiffs argue, quoting *Kuhn*, 294 N.Y. at 217, that "in construing the Constitution [courts] seek the meaning which the words would convey to an intelligent, careful voter" (Br. 29)—and emphasize that the 1966 ballot abstract presented to voters did not mention absentee voting (Br. 25-26, 34)—that part of *Kuhn* is no longer good law. The Court subsequently "abandon[ed]" the "intelligent, careful voter" standard "in favor of a more realistic approach" that recognizes that few voters actually read educational materials on proposed constitutional amendments (such as ballot abstracts). *Golden v. Koch*,

49 N.Y.2d 690, 694 (1980). The Court thus held in *Golden* that "publicly approved provisions of law should be interpreted by applying the traditionally accepted standards of statutory construction." *Id.* As mentioned, one of those traditionally accepted standards is that omissions are presumed to be intentional. *See* Statutes § 193, 1 McKinney's Cons. Laws of N.Y.

Kuhn also does not stand for the proposition that deletions of constitutional text can be ignored when their effects might not have been "fully realized" by the amendment's framers. (*See* Br. 30 [quoting *Matter of Kuhn*, 294 N.Y. at 217].) While the Court in *Kuhn* observed that the record of the relevant constitutional convention did not reflect any discussion about eliminating the particular clause in question, the Court found that the legislative history gave rise only to "[c]onflicting inferences" and did not carry the day. 294 N.Y. at 218. In concluding that the omission at issue was not meaningful, the Court instead relied on a subsequent constitutional amendment that spoke directly to the issue at hand (the Legislature's power to create new judicial districts).[6] *Id.* at 219.

[6] Plaintiffs wave away this distinguishing feature of *Kuhn*, asserting that it is still analogous to this case because the Legislature here also passed a pro-

(footnote continues on next page)

Finally, plaintiffs miss the mark in arguing that the Election District Provision was deliberately removed because it was "widely understood" to have been rendered superfluous by the negative implication of article II, section 2 (*i.e.*, that the section's purportedly exhaustive list of permissible instances of absentee voting precludes all other instances), and thus its removal was inconsequential. (Br. 33.) As an initial matter, this account is at odds with plaintiffs' theory that the Election District Provision's removal was only "inadvertent." (Br. 28.) In any event, the argument gets it backwards. The general rule of in-person voting was not rendered superfluous by its exceptions; rather, as discussed in Point B.2 below, even assuming that section 2 ever gave rise to a conclusive negative implication (which it did not), the repeal of the Election District Provision extinguished any such implication.

posed constitutional amendment in 2021. (Br. 30 n.7.) But, unlike in *Kuhn*, that proposal was not adopted; a failed amendment that was never made part of the Constitution cannot inform the meaning of other constitutional provisions, nor do plaintiffs even argue as much.

B. In the absence of an in-person voting requirement, the Legislature may prescribe alternative manners of casting ballots.

The repeal of the Election District Provision removed a key limitation on the Legislature's otherwise plenary power over elections. Because "the legislative power is unlimited, except as restrained by the Constitution," *Matter of McAneny v. Board of Estimate & Apportionment of City of N.Y.*, 232 N.Y. 377, 389 (1922), a successful challenge to an allegedly ultra vires statute must show that the Constitution does in fact restrain the Legislature in a particular way. Plaintiffs here have not proven the existence of any prohibition that prevents the Legislature from enacting the Early Mail Voter Act. Nor does the Act render any constitutional provision superfluous.

1. The Legislature has both plenary authority over elections and specific authority to prescribe the manner of casting ballots.

It is well settled that the Legislature has "plenary power over the whole subject of elections." *Lardner*, 155 N.Y. at 502; *see also, e.g.*, *Matter of Davis v. Board of Elections of City of N.Y.*, 5 N.Y.2d 66, 69 (1958) (holding statute constitutional and noting "the plenary power of the Legislature to promulgate reasonable regulations for the conduct of

elections"). Thus, "[a]n arrangement made by law for enabling the citizen to vote"—like any other law—"should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be unanswerable." *Lardner*, 155 N.Y. at 501.

More than just reserving plenary power to the Legislature over the conduct of elections, the Constitution also specifically provides, in article II, section 7, that all elections "shall be by ballot, or by such other method as may be prescribed by law," with no further qualifications other than that voting shall be secret. Although the Constitution neither defines the term "ballot" nor specifies the manner in which ballots may be cast, the Legislature has inherent authority to give meaning to undefined constitutional terms. *See, e.g.*, *Matter of Barie v. Lavine*, 40 N.Y.2d 565, 570 (1976) (holding that Legislature may determine by statute who qualifies as "needy" within the meaning of article XVII, section 1). Thus, in commanding that elections shall be "by ballot," section 7 authorizes the Legislature to prescribe the form of such ballot and the manner of casting it. And indeed, this Court has referred to section 7 as "[t]he sole enactment concerning the ballot or method of voting," observing that its "restriction upon the exercise of legislative wisdom and provision in the

matter of elections could scarcely be less stringent." *Matter of Burr v. Voorhis*, 229 N.Y. 382, 395 (1920).

The Court of Appeals' decision in *Lardner* further illustrates the Legislature's authority to reasonably interpret constitutional terms to accomplish its objectives. *Lardner*, decided in 1898 when the Election District Provision was still part of the Constitution, addressed a losing candidate's claim that votes cast by residents of the town of Lockport were invalid because they were cast at a polling place that, while authorized by the Legislature, was located outside the town's boundaries. 155 N.Y. at 495. The plaintiff alleged that these votes were invalid because they were not cast within the election district in which the voter resided. *Id.*

The Court acknowledged the constitutional requirement that votes be cast in the election district of the voter's residence, but asked, "what is an election district, and by what power is it made, changed, or abolished?" *Id.* at 496. It then answered: "The Constitution has left all that to the legislature, and, hence, an election district is just what the legislature chooses to make it." *Id.* In that respect, the Court stated, the Legislature is "supreme." *Id.* The Court went on to explain that, if there

is no convenient polling place within a given election district, "there is nothing in the constitution that prohibits the legislature from authorizing the local authorities to locate the polling place on the other side of the imaginary line which bounds the district, where there may be such a place." *Id.* at 497. "In a word, the whole subject of creating election districts, and locating the polling places where the residents of the district may vote, is with the legislature." *Id.*

Just as the Constitution's reference to an "election district" implicitly authorizes the Legislature to regulate the boundaries of such districts, so, too, does Section 7's reference to elections being "by ballot" implicitly authorize the Legislature to regulate the form of such ballot and the manner in which it may be cast. And, as in *Lardner*, "there is nothing in the constitution that prohibits the legislature from authorizing" mail ballots. 155 N.Y. at 497; *see also Matter of Ahern v. Elder*, 195 N.Y. 493, 498 (1909) (upholding constitutionality of law requiring certain voters to sign election register, reasoning that "[t]here is nothing in the Constitution to forbid the enactment of such a statute"). These authorities permit the Legislature to prescribe generally applicable manners of voting, including voting by mail.

Indeed, the Act is not the first time in recent history that the Legislature has drawn upon its plenary authority to regulate the manner of casting ballots. For example, in 2019, the Legislature passed a law allowing for early in-person voting. *See* Election Law §§ 8-600, 8-602, 8-604. Like the Act, the early-voting law gives meaning to general constitutional terms, and prescribes a manner for casting a "ballot," N.Y. Const. art. II, § 7, at an "election," *id.* art. II, § 1. The constitutionality of the early-voting law has not been challenged.

Because the Act comfortably fits within both the Legislature's plenary power over elections and its more specific authority to define what it means for elections to be "by ballot," the Court need not reach the tertiary question whether article II, section 7's reference to "such other method as may be prescribed by law" also encompasses voting by mail. But if the Court does reach that question, it should follow the recent decision of the Pennsylvania Supreme Court, which held that a similar provision in Pennsylvania's constitution authorizes voting by mail.

In *McLinko v. Department of State*, 279 A.3d 539 (2022), the Pennsylvania Supreme Court addressed a provision that is virtually identical to New York's section 7, explaining that "[i]t is plain that

Section 4 endows the General Assembly with the authority to enact methods of voting subject only to the requirement of secrecy." *Id.* at 576. The word "method" in this context, the court held, refers to a "general or established way or order of doing or proceeding in anything," and casting votes by mail is a method of voting. *Id.* at 577 (internal quotation marks omitted). The court concluded that Pennsylvania's Constitution "does not restrain the legislature from designing a method of voting in which votes can be delivered by mail by qualified electors for canvasing." *Id.* at 579.

Neither does New York's. As discussed above (Statement of the Case, Part A.2, *supra*), the delegates to the 1894 constitutional convention rejected a version of article II, section 7 that would have explicitly required voting to be done "by ballot, or by the use of a voting apparatus," in favor of an open-ended provision that would permit future innovation. Plaintiffs argue that this open-ended language could not have overridden the Election District Provision's express in-person voting requirement that was then in effect. (Br. 53.) True enough. But the removal of that requirement in 1966 "free[d] the hand of the Legislature" to experiment

with methods that were no longer prohibited, as contemplated by section 7's framers.[7] 3 Rev. Rec., 1894 N.Y. Constitutional Convention at 93.

2. Neither article II, section 2, nor any other constitutional provision prohibits the Legislature from authorizing mail voting.

As explained above, because the Legislature has plenary power over elections, a successful challenge to an allegedly ultra vires statute must show that the Constitution does in fact restrain the Legislature in a particular way. Here, however, nothing in the Constitution prohibits the Legislature from authorizing voting by mail, either expressly (since the repeal of the Election District Provision) or by implication.

The Massachusetts Supreme Judicial Court recently rejected plaintiffs' primary argument: that, according to the *expressio unius* maxim, a provision in the constitution that sets forth circumstances in which the legislature may authorize absentee voting precludes, by nega-

[7] *People ex rel. Deister v. Wintermute*, 194 N.Y. 99 (1909), is not to the contrary. As plaintiffs themselves recognize (Br. 54), the Court's statement regarding the scope of section 7 was merely dictum, and particularly cursory dictum at that. *Deister* addressed a dispute over election results after a voting machine malfunctioned; the Court held only that the 1894 amendment to section 7 regarding secrecy was not intended to outlaw the well-established practice of allowing testimony regarding how ballots were cast in an action to determine the winner of the election. 194 N.Y. at 104.

tive implication, all other instances of voting by mail. *See Lyons v. Secretary of the Commonwealth*, 490 Mass. 560, 575-78 (2022). In upholding the challenged vote-by-mail statute, the court found that "it is reasonable to assume that the drafters would have included language expressly foreclosing the Legislature's authority to further expand voting opportunities if that was the result they intended." *Id.* at 577. Accordingly, the court concluded that "the framers' silence in this instance is not enough to rebut the presumption of constitutionality of legislation" and thus rejected the plaintiffs' "novel constitutional 'negative implication' argument." *Id.* at 575, 578.

The negative-implication argument is even weaker here in light of the unique historical context. As plaintiffs recognize, the constitutional amendments that became section 2 were not enacted against a blank slate, but rather as exceptions to what was then an "express prohibition" on absentee voting.[8] (Br. 31-32, 44.) And, as everyone agrees, that express

[8] Recall that article II, section 2 currently provides: "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."

prohibition is no longer part of the Constitution. Thus, in addition to section 2's silence as to whether it is exhaustive, the repeal of the express prohibition that prompted the adoption of section 2 in the first instance is yet another reason not to draw any negative implications from section 2. Even if there were any ambiguity on this score, that ambiguity alone would demonstrate that section 2 does not clearly restrain the Legislature's plenary power over elections.

In any event, plaintiffs' proposal for resolving the ambiguity—finding that the negative implication was "baked into" section 2 at the time of its enactment (Br. 45)—is unconvincing for at least two reasons. *First*, as the Appellate Division reasoned, it is implausible that section 2 "now perpetuates the very rule requiring in-person voting that it was enacted as an exception to." (R. 756.) As an analogy, imagine a constitutional provision that prohibits the sale of alcoholic beverages but allows the Legislature to make an exception for scotch. If the prohibition were repealed but the exception retained, it would not be reasonable to infer that the exception for scotch continues to prohibit the Legislature from authorizing the sale of all other alcoholic beverages. Just like the situation here, that was not the original intent of the exception.

Second, even if section 2 was originally intended to preclude remote voting in all other situations—and there is no evidence that it was—that is not its current meaning. Plaintiffs' insistence that section 2's purported unwritten implication is impervious to subsequent constitutional amendments (such as the 1966 repeal) is inconsistent with this Court's recognition that structural changes may indeed alter the meaning of other provisions, even if the text of those provisions remains unchanged.

For example, in *People ex rel. Carter v. Rice*, 135 N.Y. 473 (1892), the Court considered a challenge to a legislative apportionment plan; the argument was that, once "persons of color not taxed" were excluded, as article III, section 4 then textually required, the reapportioned Senate districts were impermissibly imbalanced. *Id.* at 492. The Court, however, declined to give effect to that express constitutional command in light of subsequent amendments to other sections that removed property- and tax-related restrictions on the voting rights of people of color. *Id.* at 495-96. The Court reasoned that "the continued existence of the provision in the 4th section of article 3, has been wholly taken away by the amendment already made" to another section. *Id.* at 496. Insofar as section 4 had been "left without reason or excuse for its existence," the Court held

that it had been implicitly abrogated by subsequent amendments. *Id.* at 497.

More recently, in *Matter of Siwek v. Mahoney*, 39 N.Y.2d 159 (1976), the Court found that the entirety of article II, section 5—requiring that voter registration be done in person on an annual basis—had been rendered "inoperative" by the subsequent adoption of article II, section 6, which authorized the Legislature to establish a permanent system of voter registration. *Id.* at 165.

Carter and *Siwek* thus show that structural changes to the Constitution *can* change the meaning of other provisions left textually intact; the meaning of those provisions is not permanently "baked in" at the time of their enactment, as plaintiffs would have it. And if subsequent amendments can render *entire sections* of written text inoperative, then surely they can also affect any unwritten implication that arises from the text. After all, "[t]he force of any negative implication . . . depends on context." *Marx v. General Revenue Corp.*, 568 U.S. 371, 381 (2013). The repeal of the Election District Provision in 1966 materially altered the relevant context, and dispelled any negative implication that might have once existed.

To support their argument that the meaning of section 2 was unaffected by the repeal of the Election District Provision, plaintiffs rely on *Town of Aurora v. Village of E. Aurora*, 32 N.Y.3d 366 (2018). Plaintiffs cite that case as an example of the Court declining to give effect to the deletion of particular language from a statutory scheme. However, the deleted language at issue in *Town of Aurora* was merely "prefatory language" from the original 1897 version of the statute establishing a time-limited exception to the general procedures for villages to take control of bridges. *Id.* at 374.

The specific statutory language was: "If *at the time this chapter takes effect,* the board of trustees of a village has the supervision and control of a bridge therein, it shall continue to exercise such control under this chapter." *Id.* at 374 (quoting Village Law § 6-604) (deleted language in italics). The Court concluded that "it is likely that the legislature omitted the reference to 1897 in light of the significant passage of time—75 years—deeming a reference to the effective date of the predecessor statute no longer necessary." *Id.* at 376. The Court accordingly declined to read the omitted language as effecting a substantive change to the way that villages assume control over bridges. *Id.*

Here, by contrast, the omitted language was not merely prefatory language made inapplicable by the passage of time. Rather, the Election District Provision constituted an express substantive rule that continued to require in-person voting absent constitutional exception. In light of the material alteration to the constitutional scheme effected by the 1966 repeal, it is no longer tenable to infer a negative implication from the text of section 2, if it ever was. Section 2 thus does not prevent the Legislature from authorizing mail voting for unenumerated categories of voters.[9]

Neither does section 1's provision stating that voters have the right to vote "at" an election amount to a restriction of the Legislature's power to allow mail voting, as plaintiffs contend. (Br. 16.) *See* N.Y. Const. art. II, § 1 ("Every citizen shall be entitled to vote *at* every election . . . .") (emphasis added). In arguing that a right to vote "at" an election amounts to a rule that voting be done "in person and not from afar" (Br. 16), plaintiffs mistakenly read the word "election" to mean "polling place." Courts have held, however, that an "election" refers not to a particular

[9] Contrary to plaintiffs' contention (Br. 5, 8), the Attorney General did not take a conflicting position in the 2022 litigation over the pandemic-related absentee-voting statute. As the Appellate Division correctly observed (R. 757), the question presented here was not at issue in those cases.

time or physical location but rather to "the combined actions of voters and officials meant to make a final selection of an officeholder." *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001) (quoting *Foster v. Love*, 522 U.S. 67, 71 [1997]) (upholding state statute providing for early voting). The term "election" thus refers to the act of selecting an office-holder, and does not on its own signify anything about where or how votes must be cast. Plaintiffs provide no reason to deviate from this accepted definition of "election."

3. The Act does not render article II, section 2 superfluous.

Plaintiffs are wrong that upholding the constitutionality of the Act would render section 2 meaningless. (Br. 46-52.) To be sure, since the repeal of the Election District Provision in 1966, there has been substantial overlap between the Legislature's plenary authority under section 7 to prescribe of the manner of voting, on the one hand, and, on the other, its specific authority under section 2 to allow alternative manners of voting for those who may be absent from the jurisdiction and the physically disabled and ill. But it is a natural result of constitutional change that provisions originally endowed with independent force

sometimes become redundant, overlapping, or even superseded by other provisions. *See Matter of Siwek*, 39 N.Y.2d at 165.

Nonetheless, section 2 retains vitality despite the repeal of the Election District Provision by giving the Legislature maximum flexibility to effectuate the franchise for section 2 voters where the Legislature might have otherwise reached the outer limits of its plenary authority. For instance, article II, section 7 provides that elections "shall be by ballot, or by such other method as may be prescribed by law, *provided that secrecy in voting be preserved*." (Emphasis added.) Section 2, though, permits the Legislature to provide for a "manner of voting" for the enumerated categories of voters but does not expressly mandate secrecy—thus suggesting some degree of flexibility where necessary. Section 2 therefore continues to provide independent constitutional authority for statutes such as Election Law § 8-407(10), which permits election workers to oversee on-site voting in nursing homes and to assist residents in marking their ballots as needed, despite the compromise of secrecy.

C. The outcome of the 2021 ballot initiative is not an independent basis for invalidating the Act.

Finally, plaintiffs' appeal to "popular sovereignty" (Br. 35) does not provide a basis to invalidate the Act, and, contrary to plaintiffs' contention, the Court's decision in *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), does not hold otherwise. Plaintiffs string together quotations from that case to suggest that *Harkenrider* invalidated a state statute because of a failed constitutional amendment (Br. 35), but it did no such thing. The Court noted but did not rely on the fact that an earlier proposal to amend the Constitution had failed. The Court's analysis focused instead on the constitutional text and history—factors that support the Act's constitutionality here.

Plaintiffs also cite legislative materials from 2019 (Br. 7-9) in support of their argument that the Legislature that proposed the constitutional amendment regarding no-excuse absentee voting believed that such an amendment was necessary in order to accomplish the Act's ends. But the Legislature's attempt to secure a constitutional amendment did not necessarily reflect a consensus on the necessity for such an amendment. Rather, some legislators may have reasonably thought an amendment desirable without reaching a definitive view on its necessity,

because an amendment would dispel any possible doubts as to the Legislature's authority.

In any event, plaintiffs provide no support for the proposition that the 2019 Legislature that proposed the constitutional amendment was necessarily more correct than the 2022 Legislature that enacted the Act. To the contrary, it is the handiwork of the 2022 Legislature that is entitled to weight: unlike the 2019 proposal, the 2022 Act was signed into law by the Governor and thus bears the imprimatur of both of the branches of government responsible for the passage of legislation.

CONCLUSION

This Court should affirm the judgment in favor of defendants.

Dated: Buffalo, New York
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Brief for Respondents Governor Kathy Hochul and State of New York contains 8,174 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).

SARAH L. ROSENBLUTH

ADDENDUM

Page

N.Y. Const., art. II, § 1 (as of 1846)

Every male citizen of the age of twenty-one years, who shall have been a citizen for ten days, and an inhabitant of this state on year next preceding any election, and for the last four months a resident of the county where he may offer his vote, shall be entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elected by the people; but such citizen shall have been, for thirty days next preceding the election, a resident of the district from which the officer is to be chosen for whom he offers his vote. But no man of color, unless he shall have been for three years a citizen of this state, and for one year next preceding any election shall have been seized and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and incumbrances charged thereon, and shall have been actually rated and paid a tax thereon, shall be entitled to vote at such election. And no person of color shall be subject to direct taxation unless he shall be seized and possessed of such real estate as aforesaid.

N.Y. Const., art. II, § 2 (current)

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, § 7 (current)

All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved. The legislature shall provide for identification of voters through their signatures in all cases where personal registration is required and shall also provide for the signatures, at the time of voting, of all persons voting in person by ballot or voting machine, whether or

not they have registered in person, save only in cases of illiteracy or physical disability.