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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)

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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), *Amici Curiae* state that they are not aware of any related litigation as of the date of filing 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), *Amici Curiae* state that no such corporate parents, subsidiaries or affiliates exist.

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QUESTION PRESENTED

Whether the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York, is constitutional.

INTEREST OF *AMICI CURIAE*

Amici, listed below, are six New York-based legal scholars with nationally recognized expertise in state constitutional law, state and local government law, and the law of democracy. They have researched, published, and taught extensively in these areas, and they share a professional interest in promoting a proper understanding of the constitutional and democratic principles at issue in this case.

- Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School.
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[1] Institutional affiliations are listed for identification purposes only.

PRELIMINARY STATEMENT

The New York Early Mail Voter Act is constitutional. Respondents, as well as both courts below, have offered compelling explanations of this point. *Amici* write separately to identify another interpretive consideration that powerfully supports the Act's constitutionality: namely, the New York Constitution's structural commitment to democracy. This "democracy principle" permeates the Constitution, finding expression in both text and history. As explained further below, it calls upon courts to interpret the Constitution with a presumption in favor of democracy-expanding legislation.

Applied here, the Constitution's democracy principle decisively reinforces the case for upholding the Act. To be clear, this is not a case in which anyone claims a violation of their fundamental right to vote—or a violation of any right at all. Rather, Appellants challenge the Act on the theory that the Constitution bars the Legislature from easing the burdens of voting by giving New Yorkers the option to vote by mail. The democracy principle counsels skepticism of that claim. As a democracy-facilitating document that gives the Legislature broad democracy-facilitating responsibilities, the Constitution should not be read to bar legislative efforts to expand electoral participation unless the text clearly compels that result. Because no provision of the Constitution expressly bars voting by mail, this Court should affirm

the courts below and take the opportunity to reaffirm the Constitution's democratic character.

ARGUMENT

From stem to stern, the New York Constitution embraces democracy. Through the primacy of place that it affords the right to vote, its devotion to suffrage, and its promise of fair, accessible, and popular elections, the Constitution fosters broad-based democratic participation and safeguards the rule of the people. It also empowers the Legislature to accomplish that goal. Fairly applied, this democracy principle supports the constitutionality of the Act, which makes voting accessible to many New Yorkers who would otherwise be burdened or disenfranchised.

I. THE NEW YORK CONSTITUTION EVINCES A DEMOCRACY PRINCIPLE

As it interprets the Constitution, this Court has long sought to ensure that its provisions "operate harmoniously" in accordance with the document's overarching structure and objectives. *People ex rel. McClelland v. Roberts*, 148 N.Y. 360, 367 (1896); *see also Delgado v. State*, 39 N.Y.3d 242, 271 (2022) (Wilson, C.J., concurring) (analyzing the "structure of the New York Constitution"). This mode of analysis confirms that the New York Constitution is, at its core, a democracy-facilitating document, committed to popular sovereignty, access to the franchise, and broad public engagement. Taken together, the Constitution's myriad democratic

features reflect a structural democracy principle that properly guides constitutional interpretation. By virtue of this principle, courts should interpret the Constitution with a presumption in favor of expanding rather than restricting democratic participation—especially in the context of voting. When the Legislature enacts laws that help New Yorkers exercise their right to vote, courts should uphold them absent a compelling basis for invalidation.

A. Structure, Text, and History Reveal the Constitution's Democratic Character

The Constitution is a democracy document. "We the people," the document begins, "do establish this constitution." N.Y. Const. pmbl. As this Court emphasized a century and a half ago, the Constitution represents "the voice of the people speaking in their sovereign capacity, and it must be heeded." *Matter of New York El. R.R. Co.*, 70 N.Y. 327, 342 (1877).

Put another way, popular sovereignty is the beating heart of the Constitution. Along with notions of majority rule and political equality, it represents a substantive constitutional commitment to democratic rule and practice. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 879-94 (2021). This commitment suffuses the Constitution's structure, text, and history, perhaps most palpably in its provisions safeguarding the right to vote and guaranteeing civil liberties that enable the people to govern themselves.

i. Structural Support for the Constitution's Democracy Principle

By creating an expansive electorate endowed with robust civil liberties, the Constitution's structure promotes and preserves democratic self-government. This is nowhere clearer than in the Constitution's attention to suffrage. The right to vote is a "fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see also Matter of Friedman v. Cuomo*, 39 N.Y.2d 81, 85-86 (1976) ("[T]he fundamental right to vote guaranteed by our State and Federal constitutions [is] antecedent to the modern evolution of equal protection and due process analysis."). Accordingly, the Constitution gives it pride of place. The very first sentence of the Constitution's first operative provision safeguards the franchise, art. I, § 1, which, as this Court has declared, "is of the most fundamental significance under our constitutional structure," *Hoehmann v. Town of Clarkstown*, 40 N.Y.3d 1, 6 (2023) (quoting *Matter of Walsh v. Katz*, 17 N.Y.3d 336, 343 (2011)), and "may not be taken away or diminished except under certain extraordinary circumstances," *Matter of Esler v. Walters*, 56 N.Y.2d 306, 314 (1982); *see also* Peter J. Galie & Christopher Bopst, The New York State Constitution 47 (2d ed. 2012) (explaining that "[i]t is appropriate that the first substantive right mentioned in the constitution is the right of suffrage").

So important was voting to the drafters of the Constitution that the document's second Article, the one immediately following the State's bill of rights, is dedicated entirely to "[s]uffrage." N.Y. Const. art. II. Article II begins by guaranteeing that "*[e]very citizen*" who meets basic age and residency requirements "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." N.Y. Const. art. II, § 1 (emphases added). New York's expansive electorate, and the multitude of offices and questions on which these electors vote, manifest what Article I makes plain: access to democracy is essential to the Constitution's basic plan and purpose.

Just as democratic rule depends on the right to vote, so too does it depend on civil liberties, which ensure a free and informed electorate and secure democratic institutions. To that end, Article I guarantees an array of rights essential to democratic participation. Among these protections are the freedoms of speech and the press, liberty of conscience, the right to assemble and petition the government, equal protection under the law, a guarantee of due process, and the right to a trial by a jury of one's peers. *See* N.Y. Const. art. I, §§ 2, 3, 6, 8, 9, 11. These freedoms are essential to an informed electorate capable of reaching reasoned consensus on complex ideas and issues; they are essential to that electorate's ability to freely communicate ideas to their representatives without fear of official discrimination or

reprisals; and they are essential to equal access to the polls. Through these liberties, the Constitution undergirds and sustains democratic self-rule.

An array of other prominent constitutional provisions carry forward this same basic democracy principle. Provisions such as those establishing regular popular elections for selecting the legislature and governor, *see* N.Y. Const. art. III, §§ 2, 8; art. IV, § 1; requiring transparency in lawmaking, *see, e.g.*, *id.* art. III, §§ 10, 14; calling upon lawmakers to serve the public interest, *id.* art. III, § 17; art. VII, § 8(1); and giving the people regular opportunities to call a convention to revise the Constitution itself, *id.* art. XIX, § 2, all facilitate popular sovereignty by making New York's entire system of government accountable to the people.

Indeed, some of the Constitution's most recent additions are squarely democracy focused. The people have created an independent redistricting commission, *id.* art. III, § 5-b, and barred district maps "drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," *id.* art. III, § 4(c)(5).

Through such provisions, both old and new, the people have continually secured their ability to participate easily and effectively in the state's affairs and to keep their government responsive and accountable.

ii. Article II's Textual and Historical Support for the Constitution's Democracy Principle

The specifics of Article II's text and history evince a similar commitment to democracy. The Constitution endows the Legislature with considerable discretion to broaden access to the franchise. Section 7 declares that the state's elections "shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." N.Y. Const. art. II, § 7. This language "could scarcely be less stringent" in terms of the constraints it places on the Legislature. *Matter of Burr v. Voorhis*, 229 N.Y. 382, 385 (1920). It reflects an almost plenary authority, subject to the important caveat that the Legislature may not "disfranchise constitutionally qualified electors" or "unnecessarily prevent[] the elector from voting," *Matter of Hopper v. Britt*, 203 N.Y. 144, 150 (1911); *see also People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 242 (1912) (same).

Granting the Legislature broad authority to expand democratic access was by design. Section 7's "by such other method" phrasing was added during the State's 1894 Constitutional Convention to allay fears that the Constitution's existing "by ballot" requirement might be construed to prevent the Legislature from adopting innovative voting methods, such as recently created voting machines. But rather than authorize voting machines alone, the drafters chose more general language, seeing the value of "permit[ting] some other method, whether now known or hereafter to

be discovered, to be adopted in voting at elections." New York Constitutional Convention of 1894, Revised Record, Vol. 1 at 924 (M. Warley Platzek); *id.* Vol. IV at 442 (Henry W. Hill) (explaining that the language "does not refer to a voting machine at all," that less "cumbersome and expensive" ways to vote may emerge, and that "this provision in the Constitution will permit the Legislature to adopt such measure"). Section 7 thus manifests "the object of [its] amendment," which was "to empower the Legislature" to pursue "electoral improvements." *Id.* Vol. III at 88-89; *see also id.* at 92-93 (delegate explaining that the amendment was intended "to give the Legislature a permission to act on its own judgment as to the method of voting to be pursued by the people"); *id.* at 102-03 (delegate explaining that the amendment "trust[s] the people, through their representatives . . . to offer facilities for voting which may be advance of present existing conditions").

It is thus unsurprising that, during the 1894 Convention debate on what is now Section 7, an opponent of the "by such other method" language expressed concern that "[a]s long as secrecy is preserved, any method that the Legislature may devise is permissible under this amendment, *such as voting by mail*." *Id.* at 105 (William D. Veeder) (emphasis added). In response, no proponent of Section 7 denied that "any method" of voting could fairly include "voting by mail." Instead, one delegate stated that among the newly authorized "electoral improvements" was "voting by

envelope," which could "supersede the cumbersome and expensive method of voting under the" then "present electoral law." *Id.* at 88-89. The amendment, he explained, "opens the door to all improvements." *Id.* at 88.

The text and history of Article II, Section 1 further reflect the Constitution's democracy principle. Although the terms of Section 7 have been broad enough to allow the Legislature to adopt more accessible voting methods since 1894, Section 1 stood as an obstacle to that authority until the 1960s by virtue of its rule that qualified voters were "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*." N.Y. Const. art. II, § 1 (1938) (emphasis added). This language was understood to require in-person voting at the voter's local polling place. *See, e.g.*, 1946 N.Y. Op. Att'y Gen. No. 10, 1946 WL 49742, at *1 (Feb. 6, 1946); 2 Charles Z. Lincoln, The Constitutional History of New York 237-38 (1905). In 1966, however, Section 1 was overhauled, and its limiting language was removed. Today, Section 1 solely addresses voter eligibility, freeing Section 7 to serve its broader purpose of authorizing the Legislature to adopt democracy- and franchise-expanding legislation.

B. The Democracy Principle Is Crucial to Interpreting Constitutional Provisions

The democratic commitments evinced by the structure, text, and history of the Constitution support interpreting that document with a presumption in favor of

legislative authority to expand and facilitate electoral participation. They counsel against reading the Constitution to prohibit the Legislature from adopting participation-enhancing measures unless the text plainly and inescapably compels that conclusion. In essence, the democracy principle complements and amplifies "the settled rule that a presumption of constitutionality attaches to every statute enacted by the Legislature." *Matter of Fay*, 291 N.Y. 198, 206-07 (1943).

This approach fits comfortably with the Court's jurisprudence. Indeed, the Court has long considered the Constitution's democratic essentials when deciding constitutional disputes. It has aptly observed, for example, that the Constitution "cannot be read without an awareness of [its] permeating recognition" of the right to vote. *Matter of Friedman*, 39 N.Y.2d at 85. And in describing the Legislature's constitutional duty to establish regulations "in furtherance of the constitutional right [to vote]," it has held that such "enactments are to be construed in the broadest spirit of securing to all citizens, possessing the necessary qualifications, the right freely to cast their ballots." *People ex rel. Goring v. Wappingers Falls*, 144 N.Y. 616, 620-21 (1895). The Court should reaffirm here what it has previously recognized: "An arrangement made by law for enabling the citizen to vote should not be invalidated by the courts unless the arguments against it are so clear and conclusive as to be

unanswerable. Every presumption is in favor of the validity of such a law . . . ." *People ex rel. Lardner v. Carson*, 155 N.Y. 491, 501 (1898).

The Court's application of this democracy principle stands in good stead. For centuries, American courts have applied structural constitutional principles—such as federalism, the separation of powers, and state sovereignty—while interpreting constitutional text. *See* Bulman-Pozen & Seifter, *supra*, at 865 (analogizing the state constitutional democracy principle "to more familiar constitutional concepts, such as federalism or the separation of powers"). Although there is no "Federalism Clause" or "Separation of Powers Article" in the U.S. Constitution, the U.S. Supreme Court has recognized that these principles permeate the constitutional plan, are deeply rooted in history and tradition, and flow from the text of other discrete provisions. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 220-21 (2011); *Alden v. Maine*, 527 U.S. 706, 712-13 (1999). So too here: the New York Constitution is built upon a democracy principle that this Court properly invokes to explain and interpret discrete constitutional provisions—particularly when the question is whether those provisions forbid the Legislature from expanding access to the electoral franchise.

Notably, Appellants do not deny the relevance of structural constitutional principles. In seeking to draw a negative inference from Section 2, they turn to the overall framework of the Constitution to justify that maneuver. Although they reach

the wrong structural conclusions (for reasons well explained by Respondents), their analysis reflects a shared understanding that the Constitution should be interpreted by reference to its overall plan, as well as text and history.

II. THE CONSTITUTION'S DEMOCRACY PRINCIPLE SUPPORTS THE ACT

Appellants assert that the Act is unconstitutional because it conflicts with Article II, Section 2's purported creation of an exclusive list of voters for whom the option of absentee voting is available. Section 2 provides that: "The legislature may . . . 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 . . . 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 . . . ." N.Y. Const. art. II, § 2. As Respondents effectively explain, Appellants' reading cannot be squared with Section 2's text or history. As we have now made clear, Appellants' reading is also inconsistent with another structural consideration: the Constitution's democracy principle.

Viewed through the Constitution's democracy principle, Section 2 is best understood not as a limitation on the Legislature's authority but as one piece of an overarching scheme to ensure broad access to the polls. As a provision within a constitutional article entitled "Suffrage," which itself sits within a document

expressly and structurally devoted to the sovereignty of the people and their democratic will, it defies belief that Section 2 (as Appellants press) actually serves as an anti-democratic trojan horse adopted by the People to limit the Legislature's ability to expand access to the franchise. Absent unambiguous language to that effect, Appellants' reading of Section 2 is contrary to the Constitution's democratic commitments.

Indeed, for the reasons recognized by the courts below, Section 2 is more naturally read in conjunction with Section 7. Under Section 7, the Legislature can adopt a voter-friendly, secrecy-respecting voting method of its choosing. To the extent that its chosen method risks excluding voters who may be absent or ill, Section 2 makes clear that the Legislature can offer such individuals additional accommodations. The Legislature's adoption under Section 7 of more inclusive default voting methods may decrease the need for further absentee voting accommodations, but that by no means renders Section 2 surplusage. Section 2 remains an added layer of protection, assuring voters that absence or illness need not be disenfranchising. *See* Frank P. Grad & Robert F. Williams, State Constitutions for the Twenty-First Century: Drafting State Constitutions, Revisions, and Amendments 83 (2006) (noting that state constitutions commonly specify powers "out of an abundance of caution or out of a desire to remind the legislature of its

responsibilities," rather than to imply a limit on the legislature's broader baseline powers).

None of this is to say, of course, that the democracy principle creates an unrebuttable presumption in favor of democracy-expanding legislation. But it does mean that such legislation should not be invalidated unless the Constitution's plain text truly compels that result. Indeed, Article II imposes several clear limitations on legislative authority in the election space. The Legislature, for example, cannot authorize voting by anyone who pays or receives a bribe. N.Y. Const. art. II, § 3. Nor can it alter the residency status of persons absent "while employed in the service of the United States." *Id.* § 4. Nor can it decline to provide a system of voter registration. *Id.* § 5. In stark contrast to these express textual commands, Article II simply does not create the limitation on voting by mail that Appellants propose. The Court should therefore hold that the Act is constitutional and affirm the decisions below.

III. OUT-OF-STATE PERSUASIVE AUTHORITY ALSO SUPPORTS THE ACT

In assessing this case, and ascertaining how to apply the democracy principle, it is also relevant that high courts in New York's sister states have affirmed the constitutionality of similar statutes against similar challenges on similar grounds. The parties to this litigation have effectively briefed recent rulings from the

Pennsylvania Supreme Court and Massachusetts Supreme Judicial Court that rejected claims similar to Appellants'. *See McLinko v. Dep't of State*, 279 A.3d 539 (Pa. 2022); *Lyons v. Secretary of Commonwealth*, 192 N.E.3d 1078 (Mass. 2022). Respondents have also properly explained that the Delaware Supreme Court's recent holding that its legislature lacked the authority to adopt a vote-by-mail law rested on textual and historical considerations unique to Delaware (and thus unavailing here). *See Albence v. Higgin*, 295 A.3d 1065 (Del. 2022).

Rather than rehashing these discussions, *Amici* wish to build on them by highlighting a different case from a neighboring state, New Jersey. That case, *Gangemi v. Berry*, 134 A.2d 1 (N.J. 1957), has close parallels to this one. At issue was a state law that offered mail-in voting to anyone who "expects" to be absent from the state on election day. *Id.* at 4. Challenging the legislature's power to enact the law, the plaintiff contended that it was barred by a New Jersey constitutional provision that stated as follows: "The Legislature may provide for absentee voting by members of the armed forces of the United States in time of peace." N.J. Const. art. II, ¶ 4. As here, the argument advanced against the legislation was that the constitution implicitly prohibited the legislature from allowing anyone other than those specified (*i.e.*, members of the military) to vote by mail.

The New Jersey Supreme Court unanimously rejected that argument as inconsistent with their state constitution's structure and proper interpretative principles. In response to the plaintiff's invocation of *expressio unius*, the court explained that the maxim is "not to be applied with the same rigor in construing a state constitution as a statute." *Gangemi*, 134 A.2d at 6. Instead, the court stressed the need to "consider the whole of the" state constitution, including the fact that the people had vested the "whole lawmaking power" in the legislature and that the constitution affirmatively guaranteed the right to vote. *Id.* at 5-6 (cleaned up). The court found "no good reason to suppose that by this express inclusion of a provision for military absentee voting in time of peace, . . . it was designed to exclude all civilian absentee voting by legislative authority. The one does not [p]er se imply the other." *Id.* at 7. The court added: "So to hold would do violence to reason and logic. Such a curtailment of basic legislative power . . . cannot be made to rest upon vague and uncertain implication." *Id.* The same can equally be said of the claims Appellants advance here.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to apply the Constitution's democracy principle to affirm the Appellate Division and uphold the Act.

Dated: July 3, 2024
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CERTIFICATE OF COMPLIANCE

Pursuant to Court of Appeals Rules of Practice 500.1(j) and 500.13(c)(1), the undersigned certifies that the foregoing brief uses a proportionally spaced typeface (Times New Roman) in 14-point type and contains 3,887 words, exclusive of the contents listed in Rule of Practice 500.13(c)(3).

Dated: July 3, 2024

____
Joseph Posimato