To be Argued by:
NICHOLAS J. FASO, ESQ.
(Time Requested: 10 Minutes)

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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 OF DEFENDANT-RESPONDENT PETER S. KOSINSKI

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– 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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to section 500.1(f) of the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.), no corporate disclosure statement is required because Respondent Peter S. Kosinski is an individual.

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), Respondent states that he is not aware of any related litigation as of the date of filing of this brief.

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QUESTION PRESENTED

1. Does the Early Mail Voter Act violate the New York State Constitution by permitting universal mail voting by persons other than those who are authorized to vote absentee under Article II, § 2?

The Appellate Division erroneously held that the Early Mail Voter Act does not violate the New York State Constitution on the basis that the Constitution does not require voters to cast their ballots in person at the polls.

Respondent Peter S. Kosinski, in his official capacity as Co-Chair of the New York State Board of Elections ("Commissioner Kosinski"), respectfully submits this brief in support of Appellants' appeal from the Opinion and Order of the Appellate Division, Third Judicial Department (Lynch, J.), dated May 9, 2024, affirming the judgment of Supreme Court, Albany County (Ryba, J.) entered February 5, 2024, holding that the New York Early Mail Voter Act is constitutional and granting Defendants' motions to dismiss.

Commissioner Kosinski joins in, and incorporates herein, Appellants' arguments, and respectfully requests that this Court reverse the court below and grant summary judgment in favor of Plaintiffs-Appellants, declaring that the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York (the "Mail-Voting Law"), is void as contrary to the plain text and historical understanding of the New York State Constitution (the "Constitution").

PRELIMINARY STATEMENT

The central issue in this appeal is whether the Constitution requires in person voting by default. Both Supreme Court and the Appellate Division reasoned that because the Constitution does not "expressly" state that voting must be "in person," the Legislature may authorize any manner of voting it sees fit. In this case, that means by mail. Affirming the lower court, however, would invite a dangerously emboldened Legislature to extend its newfound authority to more casual means of

"voting" such as by phone, text, or email. Surely, technology will offer the Legislature even more seemingly absurd options for garnering votes. Voting via Facebook or Twitter would not just be permissible but foreseeable. The significance of exercising the franchise will be diminished. While alternative means of voting may prove useful and appropriate, that determination lies with the People. The Legislature's power over voting is not, and cannot be, unlimited.

The lower courts' holdings fly in the face of nearly 250 years of constitutional jurisprudence, understanding of what it means to vote "at" an election, and the voters' overwhelming rejection of the 2021 referendum. As explained below, this Court should reverse the Appellate Division for multiple reasons.

First, the lower court arbitrarily diminished the Constitution's express statement that qualified voters "shall be entitled to vote at every election" (emphasis added). Since New York's first constitution was ratified in 1777, this simple language has established that voting occurs, by default, in person. The Appellate Division ignored this history, stating that "we decline to interpret the word 'at' so narrowly and instead conclude that this language merely envisages the right of a qualified elector to cast a vote in every election" (R. 753 [emphasis added]). So, we are told, "at" now means "in." The lower court offers no logical basis for this blatant rewrite.

Second, the court completely misinterprets the constitutional history underlying Article II, § 1 of the Constitution as it existed beginning in 1846. Before the 1966 Amendment, this provision required eligible voters "to vote . . . in the election district of which [they] shall at the time be a resident, and not elsewhere" (1846 Const, art II, § 1). According to the court, this "Election District Provision" was the source of the Constitution's in-person voting requirement. But that's demonstrably wrong. The Constitution required in-person voting long before 1846 and since the State's first Constitution was ratified in 1777. Indeed, every prior version of the Constitution included some version of the Election District Provision, which was always intended to require voters to establish residency within the State and vote where they actually live. In all its iterations, the Election District Provision has had nothing to do with in-person voting.

Third, the court's holding that in-person voting has not been required since 1967 retroactively renders the entire section on absentee balloting (Article II, § 2) a needless superfluity. As this Court has repeatedly cautioned, basic canons of construction command that all parts of the Constitution must be harmonized. An affirmance would leave the Constitution hopelessly inconsistent and upend this Court's jurisprudence on constitutional interpretation. It cannot stand.

Accordingly, as detailed below, this Court should give meaning to the clearly expressed will of the People at the ballot box, and the plain, unambiguous text and

history of the Constitution, by reversing the order below and holding that the New York Early Mail Voter Act is unconstitutional and void.

BACKGROUND

I. The People are Sovereign.

The fundamental principle underlying this litigation is that the People of New York are self-governing. The People's sovereignty depends upon their right to control the democratic process in this State—a right that the Legislature has brazenly wrested away by enacting the Mail-Voting Law over the People's vote. Only this Court can restore the proper balance of power.

The People's sovereignty is reflected in the First Constitution of New York. Adopted in a 1777 convention by representatives from around New York, the first Constitution unequivocally stated that all authority to govern flows from the People of this State:

> This convention, therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that no authority shall, on any presence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them (1777 Const, art I).

Of course, all subsequently adopted Constitutions of the State embodied this principle. The preamble of the current Constitution, approved by a vote of the People in 1938, likewise provides that "We the People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH

THIS CONSTITUTION" (NY Const, Preamble). Thus, the People of New York are Sovereign. Legislative, Executive, and Judicial powers flow from a grant of authority by the People.

The will of the People may only be expressed through voting. For this reason, the framers of the Constitution held most precious the fundamental right of suffrage, ensconcing voting in Article II, second only to New York's Bill of Rights. To further protect this right, Article XIX, § 1 of the Constitution imposes a burdensome amendment procedure upon the Legislature that mandates approval and ratification by a vote of the People.

Consistent with these requirements, in 2021, the Legislature acknowledged that an amendment was necessary to enact the Mail-Voting Law. The Legislature dutifully passed a proposed constitutional amendment and sent it to the people for ratification. In doing so, the Legislature expressly conceded that "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 for [sic] physical disability" (2019 NY Senate-Assembly Bill S 1049, A778). Until 2023, this fact was undisputed.

The People overwhelmingly rejected the proposed amendment. Undeterred, the Legislature disregarded the will of the People and enacted the Mail-Voting Law in what can only be described as a cynical power grab.

The Appellate Division blessed this legislative overreach by holding that the Constitution does not mandate in-person voting. This conclusion is belied by the Constitution's text and the undisputed intent of its framers, as detailed below.

II. Since 1777, New York's constitutions have required voting in person, "at" an election

The Court need not delve into the election practices of Athens and Rome to confirm that, for centuries, an election has been understood to be an event at which citizens personally appear to cast their votes. "In the U.S., showing up in person to cast one's ballot on Election Day has always been the standard way of exercising that fundamental right" (*see* Olivia B. Waxman, *Voting by Mail Dates Back to America's Earliest Years. Here's How It's Changed Over the Years*, TIME [Sept. 28, 2020], https://time.com/5892357/voting-by-mail-history/). This has long been the widely accepted norm, reflective of the practical and technological limitations of the era in which democracy emerged, and persists today, despite modern technology, as a matter of tradition and reliability.

Thus, the framers of New York's first Constitution, and all those that followed, saw no need to include detailed language specifying that voters must cast their votes physically, "in person." Instead, the Constitution simply states that "[e]very citizen shall be entitled to vote at every election" (Const, art II, § 1 [emphasis added]). A need for more detail than "at every election" would not have occurred to the framers, who presumed—as everyone else did until 2023—that the

act of voting in New York is exercised in person at the polls. As shown below, since 1777, this simple language has sufficed to lead every observer to conclude that voting is, by default, in person.

A. New York's first Constitution

New York's first Constitution, adopted in 1777 (the "1777 Constitution"), is the origin of the very language, which persists today, requiring that voters cast their vote in person "at" an election. Specifically, Article VII of the 1777 Constitution set forth the qualifications necessary for voting, stating (anachronistically) that "every male inhabitant of full age, who shall have personally resided within one of the counties of this State for six months immediately preceding the day of election, shall, at such election, be entitled to vote for representatives of the said county in assembly" ([emphasis added]). This very language has been sustained through multiple constitutions and remains in the NY Constitution today.

There is no question that voting "at such election" was an in-person mandate because the 1777 Constitution reflected the then-present practice of casting votes orally, *i.e.*, "*viva voce*," which necessarily required a voter's presence at an election. Notably, the 1777 Constitution reflects a debate among the framers as to whether they should modernize the practice of *viva voce* voting by allowing citizens to cast their vote "by ballot." In an apparent compromise, the 1777 Constitution directed

the Legislature to conduct an "experiment" to determine whether voting by ballot would be preferable to *viva voce*. Section VI of the 1777 Constitution provided:

> And whereas an opinion hath long prevailed among divers of the good people of this State that voting at elections by ballot would tend more to preserve the liberty and equal freedom of the people than voting *viva voce*, To the end, therefore, that a fair experiment be made, which of those two methods of voting is to be preferred—
>
> *Be it ordained*, That as soon as may be after the termination of the present war between the United States of America and Great Britain, an act or acts be passed by the legislature of this State for causing all elections thereafter to be held in this State for senators and representatives in assembly to be by ballot, and directing the manner in which the same shall be conducted. And whereas it is possible that, after all the care of the legislature in framing the said act or acts, certain inconveniences and mischiefs, unforeseen at this day, may be found to attend the said mode of electing by ballot:
>
> *It is further ordained*, That if, after a full and fair experiment shall be made of voting by ballot aforesaid, the same shall be found less conducive to the safety or interest of the State than the method of voting viva voce, it shall be lawful and constitutional for the legislature to abolish the same, provided two-thirds of the members present in each house, respectively, shall concur therein. And further, that, during the continuance of the present war, and until the legislature of this State shall provide for the election of senators and representatives in assembly by ballot, the said election shall be made viva voce.

Significantly, the framers of the 1777 Constitution found it necessary to expressly authorize the Legislature to abolish voting by ballot, should the experiment be unsuccessful. In doing so, the framers recognized that, absent Constitutional authorization, the Legislature could not unilaterally abandon the ballot experiment because the power over voting rested solely with the People.

Ultimately, the experiment worked. According to the Historical Society of the New York Courts:

> The first act under this clause was passed March 27, 1778, and introduced the practice of Legislature authorized voting by ballot for governor and lieutenant-governor only, but retained the viva voce method for senators and assemblymen. By an act of February 13, 1787, the mode of young [*sic*][1] by ballot for the latter was introduced. The boxes containing the ballots for governor, lieutenant-governor, and senators were returned by the sheriffs to the secretary of state, to be canvassed by a joint committee of the legislature, until March 27, 1799, when the system of inspection and canvassing by local wards was introduced.

(1777 Constitution, n 9, available at https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_1777-NY-Constitution-compressed.pdf).

Notably, while the Legislature adopted ballot voting, there is no evidence that it contemplated an amendment to remove the Constitutional requirement that qualified voters cast their ballot in person, "at such election."

B. New York's subsequent Constitutions continued to require in-person voting

The framers of subsequent NY Constitutions carried forward the requirement voting occur in person in one form or another. The People adopted new constitutions in 1821, 1846, 1894, and 1938.

Since 1821, the Constitutions' suffrage provisions have been housed in Article II, and the provisions establishing voters' qualifications—including the location of

[1] Error in original. Likely should be read as "voting."

voting—have resided in section 1 of Article II (*see* 1821 Const, art I, § 1;1846 Const, art I, § 1; 1894 Const, art I, § 1; 1938 Const, art I, § 1).

III. The "Election District Provision" is not the source of the in-person mandate

The Appellate Division erroneously conflated the Election District Provision with the default requirement for in person voting. As shown below, the Election District Provision was born of a concern that citizens must establish residency before exercising the right to vote, and that they vote only where they actually live. It had nothing to do with in-person voting.

Beginning with the 1777 Constitution, the NY Constitution prescribed, in addition to other qualifications, that voters must establish a period of residency within a governmental unit to qualify to vote for representatives of that unit. It required, for example, that one "shall have personally resided within one of the counties of this State for six months . . . [to] be entitled to vote for representatives of the said county in assembly" (1777 Const, art VII). Those who satisfied this residency requirement were entitled to vote "at such election" (*id.* at art VII [emphasis added]). Thus, the 1777 Constitution imposed a minimum period of residency and limited voting to elections held within the county where the voter resides.

Following the creation of towns as governmental units within the State's then-existing counties (*see* 1788 Rev L of NY, 9th Session, ch 64 [2 Weed Parsons and

Company 1886] at 748 ["AN ACT for dividing the counties of this State into towns, Passed the 7th of March, 1788"]), the 1821 Constitution required residency for at least six months within "the town or county where he may offer his vote" (1821 Const, art II, § 1). A voter who satisfied this residency period was "entitled to vote in the town or ward where he actually resides, and not elsewhere" (*id.* at art II, § 1 [emphasis added]). Thus, the specific language of the Election District Provision originated in 1821 Constitution, long after New Yorkers had been voting in person.

The debate at 1821 Constitutional Convention confirms this reading. As one delegate put it:

> The principle of the scheme now proposed is, that those who bear the burdens of the state, should choose those that rule it.—There is no privilege given to property, as such; but those who contribute to the public support, we consider as entitled to a share in the election of rulers. The burdens are annual and the elections are annual, and this appears proper. To me, and the majority of the committee, it appeared the only reasonable scheme that those who are to be affected by the acts of the government, should be annually entitled to vote for those who administer it (Clarke, J.H., Report of the Debates and Proceedings of the Convention of the State of New York [printed by J. Seymour, Nov. 1821] at 97 [emphasis added] ["Proceedings of the 1821 Convention"]).

Quite tellingly, not a single delegate suggested that "and not elsewhere" was intended to mandate in-person voting.

The framers were also concerned that, absent residency requirements, voters could improperly influence the outcomes of elections by voting in jurisdictions where they did not actually live. As one delegate argued, "in addition to the residence

of one year in the state, he wished that a residence of six months should be required in the town or county in which the vote is to be given, in order to prevent contiguous counties from pouring their population into another for a special purpose" (Proceedings of the 1821 Convention at 111 [emphasis added]). In response, other delegates raised concerns that residency requirements could disenfranchise those who move between towns and counties. One argued that he "thought best not to require a residence of six months in the ward or town in which the vote is given, principally out of consideration to the cities, where it is frequently the habit to move from ward to ward—and by a residence of six months in the town or ward, such persons would lose their votes" (*id.* at 112).

The actual historical record proves, contrary to the Appellate Division's holding, that the Election District Provision was not the source of the Constitution's default requirement for in-person voting, which, as of 1821, had long been the norm and only means of casting a vote.

The 1846 Constitution replaced the inflexible "town or ward" residency requirement with a four month residency within a county, and permitted one to vote "at such election in the election district of which he shall *at the time be a resident, and not elsewhere*" (1846 Const, art II, § 1 [emphasis added]). This change addressed the concern raised during the 1821 convention that six-months' residency

within a town or ward may disenfranchise those who move between municipalities within a county (*see* Proceedings of the 1821 Convention at 112).

The 1846 Constitutional Convention revisited this concern. In a debate over the residency requirements, one delegate "illustrated the harsh operating of this requisition by the case of his own county, where the county line run [*sic*] through a village, and where a removal from one side of a street to the other would disqualify a voter" (Croswell, S. and Sutton, R., Debates and Proceedings in the New-York State Convention for the Revision of the Constitution [The Albany Argus, 1846] at 1036 ["Proceedings of the 1846 Convention]). Similarly, in support of a motion to amend Article II, § 1 to strike a sixty-day residency proposal, one delegate argued that "[h]e could see no reason why a person who had become a citizen, after five years' probation, should be compelled to wait 60 days longer before he could vote" (*id.* at 1036). Another delegate agreed, "saying that it would operate to disenfranchise thousands of laboring men, who were compelled often to change their residence" (*id.* at 1036).

Yet, still, others opposed striking the residency requirement. One argued it was "one of the most wholesome provisions in the whole section" and he "dwelt at some length on the struggle by both parties to get foreigners naturalized on the eve of an election, and on the bad effect which this struggle had upon the foreigner himself, in improperly influencing his first vote" (*id.* at 1036). Another delegate

argued that "[h]e could not believe that removals from one ward to another in the city would be likely to deprive many citizens of their votes" and that "[h]is only desire was to prevent the great amount of colonizing, which was known to be carried on at every election, and the bribery and corruption that was practised openly to a great extent," concluding that the residency requirement "was a principle which the safety of the several counties call for" (*id.* at 1043). Similarly, another delegate raised concerns about "double voting" (*id.* 1044).

As this debate makes clear, the 1846 Constitution's requirement that people vote within the election district where they "actually reside[], and not elsewhere," was not enacted to mandate in person voting—which, again, was the norm—but to ensure the integrity of elections. As Charles Z. Lincoln explained, "[t]he suffrage provisions of the Constitution had been framed for residents, and the electors were to exercise the right of suffrage <u>at home among their neighbors, who knew their qualifications, and under conditions which rendered fraud difficult, if not impossible</u>" (2 Lincoln at 235 [emphasis added]).

Surely, in the midst of this debate, the delegates so fervently concerned with fraud in elections would have proposed detailed requirements for in-person voting had they not already believed it was mandated by the Constitution. Tellingly, however, the record of the 1846 Constitutional Convention is silent on this issue. Voting by any other means was unfathomable.

The 1894 Constitution included more stringent residency requirements, namely, that a voter be a citizen for ninety days, an inhabitant of the state for one year, a resident of the county for four months, and a resident of the election district for thirty days (1894 Const, art II, § 1). Carrying forward the language of the 1821 and 1846 Constitutions, under the 1894 Constitution, a voter satisfying these criteria was "entitled to vote at such election in the election district of which he shall at the time be a resident, and not elsewhere" (*id.*).

As the history of the Election District Provision makes clear, since it first appeared in the 1821 Constitution (then framed as the "town or ward" where the voter resides), the Election District Provision was not the source of New York's long tradition of in-person voting. Rather, the Election District Provision was always intended to ensure that citizens vote where they actually live.

IV. The 1966 Amendment

Article II, § 1 of the current Constitution was amended several times. As of 1966, it contained a confusing mix of residency requirements—a citizen for ninety days, an inhabitant of the state for one year, a resident of the county, city, or village for at least four months, and a resident of the election district for at least thirty days. Persons satisfying these complicated criteria 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 . . . ." (Const, art II, § 1). In 1966, through a ballot referendum, the People amended Article II, § 1 to read:

> 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.

As detailed in Appellants' brief, the purpose of this amendment was to simplify and reduce the residency requirement to a period of three months (Appellants' Br. at 24-25 [citation omitted]). The legislative history of the 1966 amendment conspicuously omits any suggestion that the amendment was intended to eliminate New York State's longstanding tradition and requirement that voting take place in person. Indeed, there is absolutely no evidence of this imagined intent.

Rather, the intent of the 1966 Amendment was solely to simplify the varying residency requirements of Article II, § 1 to a uniform three months. This much is confirmed by the debates at the constitutional convention in 1967, less than one year after the 1966 Amendment was ratified. Despite the amendment's recency, the 1967 convention revisited this issue and the delegates considered reimposing the requirement of thirty days' residency within an election district (*see* Proceedings of the Constitutional Convention of the State of New York, Vol. 2, pg. 299 ["Proceedings of the 1967 Convention"] [discussing "amendments to the Suffrage Article" including "the residency qualification for voting" of "three months in the

State and three months in the county, city, or village, and thirty days in the election district"]).

One convention delegate described the intent and effect of the 1966 Amendment as to "reduce the general, overall residency requirement from one year in the State, four months in the county, to three months for everybody, so that every resident was governed by the same residency requirement" (*id.* at 302). Speaking against further changes, the delegate explained that the 1966 Amendment was "acceptable" to voters because "it put everybody on an equal footing for all elections" and that, "since the three-month residency was so recently passed, in 1966, it would be confusing to the people to change the rules again . . . ." (*id.* at 302-303).

Unsurprisingly, throughout the lengthy debate, not a single delegate suggested that removal of the "Election District Provision" had the effect of eliminating the default requirement for in person voting. To the contrary, in fact, one delegate argued that at least thirty days of residency is necessary for the administration of absentee ballots, noting that "I don't see how the Board of Elections can do what they have to do on an application for an absentee ballot in less than thirty days" (*id.* at 423). Had anyone at the 1967 Convention believed that the 1966 Amendment, enacted less than one year before, eliminated any requirement for in person voting by default,

there surely would have been a discussion of removing or, at a minimum, revising the absentee ballot provisions of Article II, § 2. It occurred to no one.

Critically, the 1966 Amendment retained the Constitution's express statement that qualified citizens may "vote at every election" and refers to the elections in which they may vote, *i.e.*, state, county, city, or village, whatever the case may be. And, obviously, removal of the language "and not elsewhere" does not mean voters may now choose to vote in any county, city, or village election within the state. Rather, the removal of this language simply allowed the Legislature to set the minimum residency period for voting in any county, city, or village election (*see* Election Law § 5-102 [2] [requiring residency "of the county, city or village for a minimum of thirty days next preceding such election"]).

Since there is no textual or historical basis for the Appellate Division's holding that removal of the Election District Provision was intended to eliminate the requirement for in person voting "at" an election, this Court should reverse.

ARGUMENT

I. The Appellate Division erred in ignoring the Constitution's express language that voting occurs "at" an election

The Appellate Division's decision is premised on the fundamentally flawed notion that the Constitution's in-person voting requirement derived from the "Election District Provision." In the absence of any evidence of this intent, the

Appellate Division nonetheless cavalierly inferred the amendment "effectively removed in-person voting as a voter qualification, opening the door for alternative methods of voting" (R. 752). According to the Appellate Division, "[w]ith 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 Appellate Division's conclusion is belied by the Constitution's text and New York's constitutional history, which, as detailed above, conclusively establishes that the purpose and intent of the Election District Provision was not to require in person voting, but to ensure that citizens vote only where they actually reside.

As Appellants argue, in *Kuhn v Curran*, this Court has already rejected the proposition that an amendment to the Constitution could have any effect other than the ordinary "meaning which the words would convey to an intelligent, careful voter" (294 NY 207, 217 [1945]). More recently, in *Matter of Hoffman*, this Court reiterated that "[w]e have long and repeatedly held that in construing the language of the Constitution as in construing the language of a statute, the courts should look for the intention of the People and give to the language used its ordinary meaning" (41 NY3d 341, 2023 NY Slip Op 06344, *7 [2023] [cleaned up]). "The starting point for discerning legislative intent is the language of the statute itself" (*Matter of Lynch v City of NY*, 40 NY3d 7, 13 [2023]).

Since it was first adopted in 1846, article II of the Constitution has begun with the express statement that "[e]very citizen shall be entitled to vote at every election . . . ." (1846 Const, art II, § 1 [emphasis added]). Of course, "at" is a commonly used preposition understood as a "function word to indicate presence or occurrence in, on, or near" (Merriam-Webster Online Dictionary, *at*, https://www.merriam-webster.com/dictionary/at [last accessed July 1, 2024] [emphasis added]). As noted in the Oxford English Dictionary, the meaning of "at" is often derived from context: "*At*, as distinguished from *in* or *on*, is sometimes used to express some practical connection with a place, as distinguished from mere local position: cf. *in* school, *at* school; *in* or *on* the sea, *at* sea; *in* prison, *at* the hotel" (Oxford English Dictionary, s.v. "at [*prep.*]," I.i.5 [emphasis in original]).

Here, the use of "at" in connection with "election" should be construed as meaning presence at the polls. Not only is this the ordinary and natural meaning, but it is also consistent with the use of the phrase "at such election" since the 1777 Constitution, when votes were still cast *viva voce* and in person.

While the Appellate Division "declined to interpret the word 'at' so narrowly" (R. 753), in the same breath it concluded that removal of language "requiring voting to take place 'in the election district'" intended a sweeping abandonment of the longstanding in person voting requirement (R. 751 [emphasis added]). The court cannot explain why it accorded more significant weight to the preposition "in,"

which referred to the governmental unit where a vote is cast, than the preposition "at," which refers to a voter's physical presence at the polls. Indeed, this arbitrary distinction cannot be justified, and the Appellate Division revealingly contradicts itself by asserting that "at" actually means "in": "we decline to interpret the word 'at' so narrowly and instead conclude that this language merely envisages the right of a qualified elector to cast a vote in every election" (R. 753 [emphasis added]).

The language of the Constitution cannot be ignored, and words—even simple prepositions—must be given meaning and effect. As this Court recently noted in *Matter of Hoffman*, "[t]here is no reason the Constitution should be disregarded" (41 NY3d 341, 2023 NY Slip Op 06344, *1 [2023]).

The Appellate Division also ignores that the State itself has expressly admitted the need for amendment to the Constitution to enlarge absentee and mail voting. For example, in 2020, against the backdrop of the unprecedented COVID health pandemic, the Legislature amended Election Law § 8-400 to temporarily permit all voters to vote by mail based on the potential for widespread illness. Multiple legal challenges were brought against the enactment. Of critical importance here, in these litigations, the State admitted that Article II, § 2 controls absentee balloting, and the Legislature relied upon an expansive interpretation of the word "illness" to legally support temporary mail voting. At no point, however, did the Legislature claim for itself a "plenary power" under Article II, § 7 to expand the categories of voters who

may vote by mail. Indeed, such a claim would be contrary to long-standing precedent and understanding of the purpose of Article II, § 7, which this Court has held was "solely to enable the substitution of voting machines" for paper ballots (*People ex rel. Deister v Wintermute*, 194 NY 99, 104 [1909] ["*Wintermute*"]).

The State also made repeated admissions in *Ross v State* (198 AD3d 1384 [4th Dept 2021]) and *Amedure v State* (210 AD3d 1134 [3d Dept 2022]) that contradict its position in this litigation. Specifically, in *Ross*, the State expressly conceded that the Constitution requires in-person voting except where a voter qualifies as absentee under Article II, § 2:

> For a time, the Constitution expressly required that qualified individuals wishing to vote had to do so in person at a polling place located in the "town or ward," and later the "election district," in which they resided, "and not elsewhere." That express requirement no longer exists. But the Constitution has generally been regarded as continuing to retain the requirement implicitly" (R. 441-442).

The State doubled down on this position as recently as October of 2022, conceding, yet again, that "the Constitution has generally been regarded as continuing to retain the requirement [of in-person voting] implicitly" (R. 312).[2]

With respect to the expansion of absentee balloting or mail in voting, the 2021 Legislature acknowledged the requirement for constitutional amendment by first passing a proposed amendment and then sending it to the People for ratification. In

[2] Significantly, the State did not assert, as it now does, that statutory provisions authorizing special ballots for certain limited classes of voters abrogated this requirement (*see* Appellants' Br. at 36-38).

doing so, the Legislature explained, "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 for [sic] physical disability" (2019 NY Senate- Assembly Bill S 1049, A778).

Even if these admissions do not give rise to a judicial estoppel, as held by the Appellate Division, they should be given great weight by this Court in interpreting the meaning and intent of the Constitution.

II. The 1966 Amendment did not implicitly eliminate the requirement for default in-person voting

The Appellate Division also erred in finding that the 1966 Amendment implicitly eliminated the Constitution's long held default rule that voting must be in person. As detailed above, the language deleted by the 1966 Amendment—that voting take place "in the election district of which [the voter] shall at the time be a resident, and not elsewhere"—was not the source of the in person voting requirement.

Acknowledging that there was, in fact, no legislative history to support its interpretation, the Appellate Division conclusorily determined that the Election District Provision was the source of the in-person voting requirement. But that is plainly not so, as evidenced by a wealth of legislative history on the meaning and intent of the Election District Provision. As detailed above, the constitutional convention makes clear that this provision was intended to prevent fraud by

requiring voters to cast their ballots in the governmental units where they actually reside (*supra*, Background, section III). It had nothing to do with mandating in-person voting, which long predated the Election District Provision. The Appellate Division erred in failing to consider this extensive legislative history.

The Appellate Division further erred in relying on an unrelated legislative report to infer legislative intent. As the court explained, "[o]nly three years before the [1966] amendment, the Joint Legislative Commission to Make a Study of the Election Law and Related Statutes published a report . . . and spoke about a proposal to 'liberaliz[e] absentee balloting'" (R. 752). It is entirely unclear how a report from three years before could have any bearing on the meaning and intent of the 1966 Amendment, and the Appellate Division offers no authority for this novel proposition. It is far more likely that the 1963 Legislative report (dated March 29, 1963) relates to the ballot referendum (ratified on November 5, 1963) that broadened the language of Article II, § 2 to allow expanded absentee voting (*see* L 1963, Appendix, Proposed Amendments to the Constitution of the State of New York, 3118-3119). If so, the Legislative report about a proposal to "liberaliz[e] absentee balloting" was nothing more than a discussion of the ballot referendum that occurred in the same year and did liberalize absentee balloting.

It is more plausible that the Legislature sought to remove the words because of changes wrought by the seminal U.S. Supreme Court case, *Baker v Carr*, in 1963

(393 US 186 [1962]). In that case, the U.S. Supreme Court held that federal courts had the jurisdiction to review malapportionment claims under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution (*see id.* at 237). After this decision, the States understood that every legislative district in the United States—federal, state, and local—must have districts of equal population under the principle of one person, one vote (*id.*). This resulted in a revolution for state boards of election that had to divide thousands of pre-existing election districts to comply with the Court's equal population mandate. Some election districts were created that had as few as two people, other districts had no people and were used as connectors between groups of populated districts to assemble a legislative or municipal council district, for example, Cedar Grove Cemetery off the Grand Central Parkway in Queens County.

It is thus much more likely that the words "election district" were removed from Constitution because it had become an administrative impossibility to provide a polling site in each election district due to the need to change their composition after *Baker v Carr*. Replacing "election district" with the terms "resident of this state, and of the county, city, or village" would have allowed for greater administrative flexibility in locating polling sites.

The Appellate Division's strained interpretation of the meaning and intent of the 1966 Amendment flies in the face of ordinary principles of constitutional

interpretation, and goes down a deep rabbit hole seeking support for an imagined, implicit meaning of the amendment that bears no relation or reality to the actual text itself. While the end result may be satisfying from a policy standpoint (the court self-reflects that its decision "comports with the NY Constitution's embrace of broad voting rights for the state electorate" [R.758]), it is directly at odds with overwhelming evidence of the intent of the Election District Provision, the State's own admissions, and the very recent political choices of the People. Just as the Appellate Division gives legal effect to the 1966 Amendment, which was approved in a ballot referendum by 2,370,919 voters against 1,354,807 voters opposed, so too must legal effect be given to the results of the 2021 ballot referendum declining to enlarge absentee voting, by 1,677,580 votes against ratification, to 1,370,897 voters in favor (Votes Cast for Constitutional Conventions and Amendments [1821-1987], available at https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_Votes-Cast-Conventions-Amendments-compressed.pdf [last accessed July 1, 2024]).

III. The Mail Voting Law is unconstitutional because a plain reading of the 1966 Amendment does not render the absentee voting provisions of the Constitution superfluous.

As a corollary to its conclusion that the 1966 Amendment implicitly removed the default in-person voting requirement, the Appellate Division also found that a

supposed "interplay" between sections 1, 2 and 7 of Article II had changed, effectively rendering the Constitution's absentee ballot provisions superfluous.

Contrary to basic canons of statutory construction and this Court's command in *Matter of Hoffman* that all parts of a constitutional provision "must be harmonized" (41 NY3d 341, 2023 NY Slip Op, *7 [cleaned up]), the Appellate Division dismisses the impact of its holding on the basis that the canon "is not an absolute rule" and may be overcome by "textual indications that point in the other direction" (R. 755 [cleaned up]). The problem, of course, is that there are no "textual indications" in any part of the Constitution that point in the other direction.

As discussed, *supra*, the plain text of the amendment to Article II, § 1 simply replaced the phrase "election district" with "resident of this state, and of the county, city, or village," apparently to allow for greater administrative convenience in the location of polling sites. There is simply no support for eliminating default in-person voting, particularly since Article II, § 1 retains the language stating that "[e]very citizen shall be entitled to vote at every election" (emphasis added).

This interpretation is girded by the fact that, in 1966, no changes were made to Article II, § 2—the actual constitutional provision concerning absentee voting. In fact, changes had been made to that section in 1963, which stand today, and which allowed for expanded absentee voting (L 1963, Appendix, Proposed Amendments to the Constitution of the State of New York, 3118-3119). Finally, in 1966, no

changes were made to Article II, § 7, which controls the method of voting. That section had remained unchanged since it was amended in 1938, and also makes no mention of absentee balloting.

In then amending Article II, § 7 (previously Article II, § 5), the Legislature made it abundantly clear that its objective was solely to allow the use of voting machines in addition to paper ballots, not to grant the Legislature plenary authority to allow voting by mail—akin to the 1777 Constitution's introduction of ballots in lieu of *viva voce* voting. In other words, the amendment was intended to alter only the physical mechanism of communicating one's vote, not to do away with the default requirement for in-person voting. The transcript from the 1895 Constitutional Convention Debates is unambiguous:

> The inventive talent of the age is being directed toward the perfection, among other things, of such mechanical devices. The results thus far obtained warrant the assumption that before the lapse of another generation they will have been so perfected, and so generally adopted throughout the country, as to supersede almost entirely the present cumbersome and expensive method of voting by 'ballot.' Provision should now be made to admit of an adjustment of the manner of our elections to the improved methods of voting, thus likely to come into use, and the proposed amendment is considered adequate to the accomplishment of that result. Its phraseology is not novel and its words have a well-defined judicial meaning. The exigency seems to have arisen when the organic law should contain some such a provision, in order that the Legislature may authorize the use of some one of the devices now being perfected, or possibly some electrical voting device (R. 558 [emphasis added]).

The Appellate Division erred in selectively downplaying this legislative history. As this Court has previously instructed, relevant legislative history, "'is not to be ignored'" (*Altman v 285 W. Fourth LLC*, 31 NY3d 178, 185 [2018], *quoting Riley v County of Broome*, 95 NY2d 455, 464 [2000] ["Pertinent also are 'the history of the times, the circumstances surrounding the statute's passage, and . . . attempted amendments'"]). This Court can and should consider the actual legislative history of Article II, § 7 (*see People v Rice,* 44 AD3d 247, 252 [1st Dept 2007]).

In the case of Article II, § 7, the legislative history unmistakably establishes that the intent of the amendment was not to grant the Legislature a broad plenary power, but rather, a limited power to authorize the use of voting machines and other methods of voting in lieu of paper ballots.

Consistent with this legislative history, this Court previously found that the intent of Article II, § 7 was, "solely to enable the substitution of voting machines" in place of paper ballots and that this intent is "too clear for discussion" (*Wintermute,* 194 NY 99 at 104 [emphasis added]).

The Appellate Division dismisses this controlling precedent as "written in an entirely different context over 100 years ago when voting machines were just being introduced" (R. 754). The court instead cites to a proposed amendment that was not adopted by the Committee on Suffrage at the 1894 Constitutional Convention. This failed amendment would have enacted broader changes to Section 7 of Article II of

the Constitution. It is axiomatic that a proposed, but unenacted amendment is irrelevant to the interpretation of an enacted provision, especially when this Court has already interpreted the provision. It matters not that such precedent was issued 100 years ago.

A plain reading of the Constitution clearly indicates that Article II, Section 2 is very much still in play, having been amended by ballot referendum just three years before the 1966 Amendments. Section 2 clearly delineates in what circumstances a voter can apply for an absentee ballot. A desire to enlarge absentee voting or mail in voting to all voters without excuse necessarily requires an amendment to the State Constitution. The 2019 Legislature recognized this legal fact, as did the Attorney General, and submitted it to the People of New York. The People rejected it and only the People—not the Legislature or the Judiciary—can resuscitate it.

CONCLUSION

Simply put, a legislative desire for a particular policy outcome cannot overcome the hard fact that in 2021, the People voted against universal mail voting and against implicitly altering the default in-person voting requirement of their Constitution. The Legislature must go back to basic constitutional principles and attempt to persuade the People, not circumvent them.

Accordingly, for all of these reasons, and those stated in Appellants' brief, this Court should reverse the order below, declare the Mail-Voting Law void as

unconstitutional on its face, and grant such other and further relief as the Court deems appropriate and just.

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WORD COUNT CERTIFICATION

I hereby certify that this document complies with the word limit of Section 500.13 of this Court's rules because the total number of words in the body of this brief, excluding the caption, the statement of status of the related litigation, the corporate disclosure statement, the table of contents, the tables of cases and authorities, the statement of questions presented, the signature block, and this certification is: 7,520.

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