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

Court of Appeals
of the
State of New York

ELISE STEFANIK, NICOLE MALLIOTAKIS, NICHOLAS LANGWORTHY, CLAUDIA TENNEY, ANDREW GOODELL, MICHAEL SIGLER, PETER KING, GAIL TEAL, DOUGLAS COLETY, BRENT BOGARDUS, MARK E. SMITH, THOMAS A. NICHOLS, MARY LOU A. MONAHAN, ROBERT F. HOLDEN, CARLA KERR STEARNS, JERRY FISHMAN, NEW YORK REPUBLICAN STATE COMMITTEE, CONSERVATIVE PARTY OF NEW YORK STATE, NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE AND REPUBLICAN NATIONAL COMMITTEE,

Plaintiff-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 THE PUBLIC INTEREST LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

PUBLIC INTEREST LEGAL FOUNDATION INC.
Maureen Riordan, Esq.
Joseph Nixon, Esq.
107 S. West St, Ste. 700
Alexandria, Virginia 22314
703-745-5870
Attorneys for Amicus Curiae

Date Completed: July X, 2024

- and -

DCC, Kirsten GILLIBRAND, YVETTE CLARKE, GRACE MENG, JOSEPH MORELLE, RITCHIE TORRES, JANICE STRAUSS, GEOFF STRUASS, RIMA LISCUM, BARBRA WALSH, MICHAEL COLOBO, AND YVETTE VASQUEZ,

Intervenors-Defendants-Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Public Interest Legal Foundation, Inc. ("Foundation") is a non-partisan, public interest 501(c)(3) organization whose mission includes working to protect the fundamental right of citizens to vote and preserving election integrity across the country. For over a decade, the Foundation has sought to advance the public's interest in having elections free from unconstitutional burdens and discrimination. At the state level, the Foundation works to ensure that state laws enacted by each state's legislative branch are constitutional and harmonious with the state's constitution.

This case is of interest to the Foundation as it is concerned with protecting the sanctity and integrity of American elections and preserving the supremacy of the New York State Constitution. This appeal concerns challenges to the State of New York's Early Mail Voter Act.

The Foundation has extensive experience in election law litigation and is involved in such cases throughout the nation. The Foundation has filed *amicus curiae* briefs in cases on various election-related issues. *See, e.g.*, Brief of Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellants, *Merrill v. Milligan*, Case Nos. 21-1086, 21-1087, 142 S. Ct. 879 (2022); Brief of Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellants, *Rucho v. Common Cause*, Case No. 18-422, 139 S. Ct. 2484 (2019); Brief of Public Interest

Legal Foundation as Amicus Curiae in Support of Petitioners, *Brnovich v Democratic Natl. Comm.*, Case Nos.19-1257 and 19-1258, 594 US 647 (2021); Brief of Public Interest Legal Foundation as *Amicus Curiae* in Support of Appellees, *Lichtenstein, et al., v. Hargett, et al.*, Case No. 22-5028, Dkt. Entry 39 (6th Cir. 2022); Brief of Public Interest Legal foundation as *Amicus Curiae* in Support of Defendant-Appellants, *League of Women Voters of Florida, Inc., et al. v. Florida Secretary of State, et al.*, Case No. 22-11133, 66 F.4th 905 (11th Cir. 2023). The Foundation has also been represented a plaintiff in a case finding illegality and unconstitutionality of state election practices similar to the practices before the Court now. *See, e.g.*, *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022).

INTRODUCTION

The New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York, (the "Act"), violates the New York Constitution. Article II, Section 2 of the New York Constitution limits the scope of the legislature's power to authorize absentee voting. *See* N.Y. Const., Art II § 2. Article II, Section 2 only allows the legislature, if it acts, to "provide a manner in which, and the time and place at which" two narrowly defined classes of qualified voters may vote without being present on election day: (1) those "who, on the occurrence of any election, may be absent from the county of their residence or, if the residents of the city of New York, from the city" or (2) those "who, on the occurrence of any election,

may be unable to appear personally at the polling place because of illness or physical disability." N.Y. Const., Art II § 2. Granting all voters absentee status would render this text of the New York Constitution superfluous, redundant and without purpose.

ARGUMENT

I. THE NEW YORK CONSTITUTION EXPLICITLY LIMITS THE LEGISLATURE'S POWER TO AUTHORIZE ABSENTEE VOTING

The text of Article II, Section 2 enumerates a power given to the legislature, should they choose to exercise it, to "provide a manner in which, and the time and place at which" two *limited* classes of qualified voters "may vote and for the return and canvass of their votes" without being present on election day: (1) those "who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city" or (2) those "who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability." N.Y. Const., Art II § 2. That's it. No other voters may constitutionally vote absentee. No other circumstances are mentioned.

This Court has long established the importance of upholding the text of the New York Constitution. Chief Justice Ruggles feared scant regard for the text of the state Constitution in 1852 when he reasoned:

[W]ritten constitutions of government will soon come to be considered of little value, if their injunctions may be thus lightly overlooked; and the experiment of setting boundary to power, will prove a failure"… [W]e are not at liberty to presume the framers of the constitution, or the people who adopted it did not understand the force of language. *Newell v. People*, 7 N.Y. 9, 98-99 (1852).

Appellees ask this Court to overlook an established and clearly defined absentee vote limitation in Article II, Section 2 and to give Section 2 a meaning it will not bear, destroy an established boundary of power, and presume the framers of this Constitution did not understand their choice of language.

This Court has held that "'well established rules of statutory construction direct' that the analysis begins 'with the language of the statute.'" *Colon v. Martin*, 35 N.Y.3d 75, 78 (2020) (quoting *People v. Francis*, 30 N.Y.3d 737, 740 (2018). In beginning an analysis of the language of the statute, the words of Article II are clear. Article II, Section 2 is intended to limit the power of the legislature to the words expressed in the text of the New York Constitution. The plain language of Article II requires a plain and ordinary understanding of the text of the Constitution. The plain language of the Constitution offers a clear expression of a defined and intentional limit on legislative power. Because the expression of a defined limit is clear, that which is not expressed is excluded… there is no intention for those things not embraced in the text. Acceptance of the New York Early Mail Voter Act, Chapter 481 of the Laws of 2023 of the State of New York,

renders the text of Article II, Section 2, redundant and superfluous. Again, as this Court reasoned in 1852:

> That which the words declare, is the meaning of the instrument; and neither courts nor legislatures have the right to add or to take-away from that meaning. This is true of every instrument, but when we are speaking of the most solemn and deliberate of all human writings, those which ordain the fundamental law of states, the rule rises to a very high degree of significance.

Newell v. People, 7 N.Y. at 97. The natural and clear reading of Section 2 is required under this Court's established principles of legal interpretation. That natural and clear reading allows only two classes of absentee or mail voters.

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

When a term is not explicitly defined in a statute or other provision, courts are to "give the terms its ordinary meaning." *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The Supreme Court is clear on how such analysis is to proceed, such "ordinary or natural" meanings are construed looking to commonly understood definitions from the time the statutory provision was enacted. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

New York courts also employ this approach, finding that the words of the statute are the best evidence of the legislature's intent. If such language is clear and

unambiguous, courts must follow the plain meaning of the statute. *See Day. Summit Sec. Servs. Inc.*, 53 Misc. 3d 1057, 1063.

This Court similarly employs such an approach to interpreting contractual provisions, which are to be given their "plain and ordinary meaning," with the interpretations of such provisions to be questions of law for the court. *Burlington Ins. Co. v. N.Y.C. Tr. Auth.*, 29 N.Y.3d 313, 321 (2017) (quoting *Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 N.Y.3d 170, 177 (2008)).

There is no ambiguity as to what the text of Article II, Section 2 means. The only two permitted categories of absentee voters are those with excused absences from their place of residence or those unable to vote in person because of illness or physical disability. *See* N.Y. Const., Art II § 2.

Any act of the legislature that runs contrary to Article II, Sec. 2 absent a constitutional amendment, is unconstitutional. "If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last." *Rotkiske v. Klemm*, 589 U.S. 8, 13 (2019). The New York Constitution is clear. Any expansion of the two classes who may use absentee voting requires an amendment to the New York Constitution, which was rejected soundly by the voters of New York when presented to them in 2021.

B. The expression of a clearly defined scope of legislative power is the exclusion of all else.

This Court has said "[w]hether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is, the thought which it expresses." *Newell v. People*, 7 N.Y. at 97. New York courts and the Supreme Court have used the interpretive canon of *expressio unius est exclusio alterius* understanding that the expression of one item of an associated group or series excludes another left unmentioned. *See N.L.R.B. v. SW General, Inc.*, 580 U.S. 288 (2017). Further, "[t]he inclusion of a particular thing in a statute implies an intent to exclude other things not included." *DiNigris v. Smithtown Central School District*, 193 N.Y.S.3d 175, 180 (2023). This canon of construction "appl[ies] to the construction of a constitution as to that of statute law." *See Wendell v. Lavin*, 246 N.Y. 115, 123 (1927).

The canon of *expressio unius* has been a part of judicial interpretation of the New York Constitution for centuries. *See Still v. Village of Corning*, 15 N.Y. 297, 299 (1857). This Court has long posited "[t]he same rules apply to the construction of a Constitution as to that of statute law." *Wendell*, 246 N.Y. at 123. In *Kimmel v. State*, this Court held that, "[w]here the legislature has addressed a subject and provided specific exceptions to a general rule, the maxim *expressio unius est exclusio alterius* applies. *Kimmel v. State*, 29 N.Y.3d 386, 394 (per DiFiore, J.) (Plurality Opinion). The maxim is applied in deciding cases so that "where a law expressly describes a particular act, thing or person to which it shall apply, an

irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded. *Colon*, 35 N.Y.3d at 78 (2020). A clear prohibition of groups left unmentioned by the text is not necessary to apply the canon.

Article II, Section 2 establishes categories intended by the Constitutional drafters. Appellee's meaning of Section 2 to encompass all voters when two specific categories are listed in the text defies the well-established maxim of *expressio unius*. Further, "a statute must be construed as a whole and . . . its various sections must be considered together and with reference to each other." *Colon*, 35 N.Y.3d at 78 (2020) (quoting *Matter of Walsh v. New York State Comptroller*, 34 NY.3d 520, 522 (2019). Here, Section 2 exceptions are explicitly held against the default standard and assumption of voting which occurs "personally at the polling place." N.Y. Const., Art II § 2.

C. Upholding the Act would render Article II, Section 2 redundant.

The Rule Against Surplusage, also called the Rule Against Redundancy, "[d]irects that the proper interpretation of statutory language is the one in which every word, phrase, section, etc. has independent meaning; nothing is redundant or meaningless." Stat. Interp. In the Fed. And State Courts § 7.03 (2024). In using the Rule Against Surplusage, no words should be ignored, or "needlessly be given an interpretation that causes it to duplicate another provision or to have no

consequence." Scalia, Reading Law, at 150. This concept, known as the Rule Against Surplusage/Redundancy is viewed amongst legal scholars, judges, and justices as the "cardinal rule of statutory interpretation." *See Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019) (citing *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.). Courts are tasked to interpret statutory and constitutional text so that each of its provisions is doing something rather than doing something redundant or something without effect. The supposed power invoked in support of the Act would render all of Section 2, at the very least, redundant; and consequently, a nullity.

D. Upholding the Act would render Article II, Section 2 superfluous.

Section 2 authorizes a narrow permission of absentee voting for those in two specific categories – those "absent from the[ir]" homes and unable to appear due to "illness or physical disability." N.Y. Const., Art II § 2. If Section 2 was construed to allow absentee voting for every voter, this would render Section 2 superfluous and meaningless.

This Court has "long and repeatedly held" when interpretating the language of a statute the courts should look for the intention and give to the language its ordinary meaning. *See Hoffman v. New York State Independent Redistricting Commission*, No. 90, 2023 WL 8590407, at *7 (N.Y. Ct. of App. Dec. 12, 2023). Further, this Court held "[a]ll parts of the constitutional provision or statute 'must

be harmonized with each other as well as with the general intent of the whole state, and effect a meaning must, if possible, be given to the entire statute and every part and word thereof'" *Id.* at *7. (quoting *People v. Pabon*, 28 N.Y.3d 147, 152 (2016). This Court just months ago stated that "our well settled doctrine requires us to give effect to each component of the provision or statute to avoid 'a construction that treats a word or phrase as superfluous'" *Hoffman*, No. 90, 2023 WL 8590407, at *7-8 (quoting *Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253, 271 (2022).

Holding that the New York legislature possesses unbounded power to authorize absentee voters for all voters treats Section 2 as superfluous. Appellees lack a valid reason to suggest a construction that would render Section 2 expendable.

II. THE DELAWARE SUPREME COURT CORRECTLY DECIDED LEGISLATIVELY CREATED UNIVERSAL ABSENTEE VOTING VIOLATES ITS STATE CONSTITUTION.

In 2022, the Supreme Court of Delaware declared its Vote-by-Mail statute unconstitutional under the Delaware constitution. Article V, Section 4A of the Delaware Constitution grants that only citizens who are unable to appear in person at their regular polling place for a general election for certain specified reasons may vote by mail. *Albence v. Higgin*, 295 A.3d 1065, 1068 (Del. 2022). The Delaware Supreme Court unanimously held that the Vote-by-Mail statute (which allowed all Delaware voters to cast their ballots by mail) was unconstitutional. *Id.*

The Delaware Supreme Court held the Vote-by-Mail Statute ran counter to a long-held tenant, also recognized in New York, that the General Assembly did not have the power to limit or enlarge categories of citizens specially enumerated in Section 4A. *Id.* at 1069. The text of Section 4A enumerated categories for those allowed to cast a ballot by mail – those "who shall be unable to appear to cast his or her ballot . . . either because of being in the public service of the United States or of this State, or because of the nature of his or her nosiness or occupation, or because of his or her sickness or physical disability, may cast a ballot at such general election to be counted in such election district." *Id.* at 1077. The Delaware General Assembly, like the New York Legislature, scheduled a constitutional amendment referendum which would allow no-excuse voting by mail. *Id.* at 1082. Again, as in New York, the proposed amendment failed. *Id*. at 1083. Despite this, the Delaware Legislature passed a law that granted universal vote by mail. The Delaware Supreme Court struck down the statute and reaffirmed that the text of the Delaware Constitution limiting voting by mail to only voters who fall within one of the categories set forth in Section 4A. *Id.* at 1090.

The Supreme Court of Delaware's analysis is instructive to the Court's analysis here. Utilizing ordinary tools of statutory and constitutional construction the court ultimately concluded that the text did not permit the Vote-by-Mail statute. First, using the statutory canon of *expressio unius* – the Delaware Court held that

"the categories of absentee voters provided in Section 4A suggests the exclusion of others." *Id.* at 1093. The explicit enumeration of Section 4A absentee-voter classifications suggested that other classifications were, by default, excluded. *See id.* at 1094. Any other suggested categories, in accordance with the text of the Delaware Constitution, are excluded.

Second, the Delaware Supreme Court found that the Vote-by-Mail Statute created a "surplusage problem." *Id.* at 1094. "If both Section 4A and the Vote-by-Mail Statute enable citizens to vote without appearing in person, and the Vote-by-Mail Statute is unlimited as to such eligibility, then the Vote-by-Mail statute necessarily would paint over the specific categories of eligible citizens enumerated in Section 4A." *Id.* Ultimately, the Court found that if the Vote-by-Mail statute and Section 4A were put together – the categories of Section 4A would "become superfluous . . . ." *Id.*

The Delaware Supreme Court's decision rested on an important distinction – the role of the Court versus the Legislature. "The Court's role – indeed, our duty – is to hold the challenged statutory enactments up to the light of our Constitution and determine whether they are consonant or discordant with it." *Id.* at 1097. This Court should follow the reasoning of the Delaware Supreme Court and refrain from allowing the Legislature to sidestep the constitutional amendment process and re-write the State's Constitution by contrary and conflicting statutes.

CONCLUSION

For the reasons stated above, *Amicus Curiae* Public Interest Legal Foundation respectfully requests that this Court reverse the Opinion and Order of the Third Department, declaring the Mail-Voting Law void as unconstitutional.

Dated: July 1, 2024

Respectfully submitted,

PUBLIC INTEREST LEGAL FOUNDATION

By: /s/ Maureen Riordan

Maureen Riordan, esq.
Joseph Nixon, esq.
107 S. West Street, Ste. 700
Alexandria, VA 22314
Telephone: 703-745-5870

Attorneys for Amicus Curiae

Printing Certification Statement

This brief was prepared on a computer, using Times New Roman 14-point font for the body (double-spaced) and Times New Roman 12-point font for the footnotes (single-spaced). According to Microsoft Word, the portion of the brief that must be included in a word count contains 3014 words.

s/ Maureen Riordan
Maureen Riordan