SUPREME COURT OF NEW YORK
COUNTY OF WARREN

Richard Cavalier, et al.,

Plaintiffs,

v.

Warren County Board of Elections, et al.**,**

Defendants.

Index No. EF2022-70359

MEMORANDUM
in support of motion for
a Preliminary Injunction

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PRELIMINARY STATEMENT

The New York Constitution creates important safeguards that protect the integrity of New York's elections by regulating the circumstances under which the Legislature may authorize absentee voting. Thus, the Constitution today reads: "The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from their county of residence or, if residents of the city of New York, from the city, and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness or physical disability, may vote and for the return and canvass of their votes." N.Y. Const. art. II, § 2.

This provision makes a limited grant of authority to the Legislature, which may authorize absentee voting only when a voter is absent, ill, or physically disabled. *See id.* On November 2, 2021, the people of New York spoke resoundingly in favor of retaining these safeguards to absentee voting. By a 55 to 45 percent margin, New Yorkers rejected Proposal 4 to amend the state constitution in favor of no-excuse absentee access.[1]

Nonetheless, for this fall's elections, the Legislature has decided to transgress the boundaries of its limited grant of authority and to purport to authorize absentee voting in circumstances not allowed by the Constitution. S.7565 allows absentee voting in the fall 2022 election for voters who are not absent, ill, or physically disabled. The legislation at issue amended New York Election Law § 8-400(1)(b) to

[1] Elections.ny.gov/2021electionresults.html.

specify that "for purposes of this paragraph, 'illness' shall include, but not be limited to, instances where a voter is unable to appear personally at the polling place of the election district in which they are a qualified voter because there is a risk of contracting or spreading a disease that may cause illness to the voter or to other members of the general public."

This law contravenes the Constitution. Plaintiffs are voters, one candidate, and one county political party from counties across New York whose legitimate ballots will be diluted or cancelled by unconstitutional ballots cast under S.7565. Last fall, when a similar law was in effect, "tens of thousands of New Yorkers [] availed themselves of the expanded absentee ballot eligibility." Statement of Assemblyman Jeffrey Dinowitz (Jan. 21, 2022).[2] Plaintiffs will see their legal votes diluted or cancelled by another wave of illegal ballots this fall, and potentially the candidates they oppose elected by illegal ballots. As explained more fully below, this looming irreparable harm entitles them to preliminary injunctive relief.

PLAINTIFF FACTS

Plaintiff Richard Cavalier is a registered voter in Warren County. He is also a retired Navy veteran. He regularly casts legal votes in elections and will do so again in November. Cavalier Aff. §§ 2-5.

[2] Governor.ny.gov/news/governor-hochul-signs-legislation-allow-voting-absentee-ballot-due-covid-19-pandemic-through.

Plaintiff Anthony Massar is a registered voter in Broome County and a former president of the Brighamton City Council. He regularly casts legal votes in elections and plans to cast an in-person ballot in November. Massar Aff. §§ 2-5.

Plaintiff Christopher Tague is a registered voter in Schoharie County and the elected Assemblyman for District 102. He is a candidate for reelection this fall. Tague Aff. §§ 2-6.

Plaintiff Schoharie County Republican Committee is a civic association whose members include candidates for state and local offices on the ballot this November whose races will be affected by illegal absentee votes. Tague Aff. §§ 7-9.

PRELIMINARY INJUNCTION STANDARD

"The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v. Fine Arts Housing, Inc*., 4 N.Y.3d 839, 840 (2005).

ARGUMENT

I. The Plaintiffs are likely to succeed on the merits of their legal claim.

There is no general right to vote absentee in the federal or New York State Constitution so long as other methods of exercising the fundamental right to vote are available. *See McDonald v. Bd. of Election Comm'rs of Chicago,* 394 U.S. 802 (1969). In New York, absentee balloting is a privilege, an exception to the normal rule of in-person voting, enshrined in a limited grant of authority under the Constitution. *Wise v. Bd. of Elec. of Westchester County*, 43 Misc. 2d 636, 637 (Sup.

Ct. Westchester Cnty. 1964) ("The privilege of absentee voting depends primarily upon the provisions of the Constitution."). Unless the Legislature specifically authorizes absentee voting based on this limited grant of constitutional authority, voters must vote in person. 2006 N.Y. Op. (Inf.) Att'y Gen. 1, 2006 N.Y. AG LEXIS 51 (Jan. 23, 2006).

Even the Constitution's narrow grant of authority to permit absentee voting "was not without controversy" when first adopted. *Gross v. Albany Cy. Bd. of Elections,* 3 N.Y.3d 251, 255 n.2 (2004). The current version was finalized by amendment in 1963: "The legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who, on the occurrence of any election, may be absent from the county of their residence or, if residents of the city of New York, from the city, *and qualified voters who, on the occurrence of any election, may be unable to appear personally at the polling place because of illness* or physical disability, may vote and for the return and canvass of their votes." N.Y. Const. art. II, § 2 (emphasis added).

Thus, the Legislature may authorize absentee voting only in the "limited circumstances" when the voter is absent, ill, or physically disabled. *Gross,* 3 N.Y.3d at 255. Any expansion beyond this limited list "would require an amendment to the Constitution." *Applications of Austin*, 165 N.Y.S.2d 381, 391 (Sup. Ct., Jefferson Cy.

1956). Such an amendment was attempted last year—and was resoundingly rejected by the people of New York.[3]

This case pivots on a simple question with a simple answer: does the existence of a communicable disease at large in society or fear of contracting a communicable disease fall within the meaning of "illness" as that term is used in Article II? No.

The Court of Appeals recently illustrated the proper way to analyze that question in *White v. Cuomo*, 2022 NY Slip Op 01954, 22WL837573 [2022]. The Court recognized "[l]egislative enactments are entitled to a strong presumption of constitutionality," but also reminded itself that "the Constitution does not delegate the legislature unfettered authority to determine whether particular activities" fall within a constitutional term, which the Court alone must determine. *Id.* at 3, 5.

To determine whether the legislature has acted beyond the scope of the Constitution, "we must look to the plain language, history, and purpose of the constitutional provision, as well as relevant precedent, contemporaneous statutes, and dictionary definitions." *Id.* at 5 (internal citations omitted). *See Silver v. Pataki,* 3 A.D.3d 101 (2003), asf'd 4 N.Y. 3d 75 (in determining constitutionality of legislature's conduct judicial analysis relies on language and purpose of state constitution).

[3] *See New York Proposal 4, Allow for No-Excuse Absentee Voting Amendment (2021)*, https://ballotpedia.org/New_York_Proposal_4,_Allow_for_No-Excuse_Absentee_Voting_Amendment_(2021).

Here, the plain language, history, purpose, precedent, and dictionary definitions confirm that S.7565 exceeds the Legislature's limited authority in Article II.

Plain language. The "obvious long-recognized meaning" of the language of the Constitution "is entitled to great weight and will not be disregarded… merely to meet a critical situation." *See Bd. of Educ. of City of Rochester v. Van Zandt*, 119 Misc. 124, 126 (Sup. Ct., Monroe Cty. 1922), *aff'd* 204 A.D. 856 (4th Dept. 1922*), aff'd* 234 N.Y. 644 (1923). A court ought not "reject the plain meaning of the words used, and to understand them in a newly invented sense; in a sense in which they were never understood" by the drafters. *Newell v. People*, 7 N.Y. 9, 89 (1852). Rather, "[w]hen language of a constitutional provision is plain and unambiguous, full effect should be given to the intention of the framers as indicated by the language employed and approved by the People." *King v. Cuomo*, 81 N.Y.2d 247, 253 (1993). Here, the plain language of "illness" means an actual sickness specific to the voter, not a broader disease present in society. *See, e.g.,* "Illness," Cambridge Dictionary (2022).[4]

That reading is reinforced by reading the term "illness" as part of the overall sentence: "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." The voter must be "unable to appear personally at the polling place." Fear of a communicable disease may cause a voter to be hesitant to appear, or even unwilling

[4] https://dictionary.cambridge.org/us/dictionary/english/illness.

to appear, but it does not render him or her *unable* to appear. Second, the coupling of "illness" to "physical disability" indicates that it is not the general existence of these concerns but how they relate to the individual voter that determines whether the voter qualifies for an absentee ballot. A physical disability is necessarily unique to the voter; it is the voter's personal, individual disability that causes him to qualify. In the same way, it must be the voter's personal, individual illness, not a general illness present in society at large, to qualify.

The text of the revised version of 8-400 itself also shows the plain meaning: a "risk" that something "may cause illness" is not the same as an "illness." *See* New York Election Law § 8-400(1)(b). The fact that the statute differentiates the *risk* of illness from the reality of illness shows these are two separate concepts.

History & Purpose. The people of New York have carefully circumscribed absentee balloting since at least 1920. The New York Court of Appeals discussed why in *Gross*. The Court said New York is one of "many states that 'built in elaborate provisions to safeguard voter privacy and the integrity of the ballot.'" 3 N.Y.3d at 255. The Court said the narrow circumstances for absentee balloting "were adopted in recognition of the fact that absentee ballots are cast without secrecy and other protections afforded at the polling place, giving rise to greater opportunities for fraud, coercion and other types of mischief on the part of unscrupulous partisans." *Id. Accord In re Canvass of Absentee Ballots of Nov. 4, 2003 General Elec.*, 843 A.2d 1223, 1232 (Pa. 2004).

This purpose of careful "safeguards" to minimize unnecessary absentee voting is undermined rather than advanced by permitting a massive explosion in absentee balloting ("tens of thousands" of absentee votes, according to the bill sponsor). *Accord Tenney v. Oswego Cnty. Bd. of Elec.*, 70 Misc. 3d 680, 683 (Sup. Ct., Oswego Cty. 2020) (change prompted an "extraordinary surge in absentee voting."). A "risk of contracting or spreading a disease that may cause illness" is always present in the world, not just during the COVID-19 pandemic. The Legislature could just as easily declare the flu especially dangerous to elderly voters, and allow any voter over age 50 unlimited access to an absentee ballot. Accordingly, this construction would turn article II, section 2 from a grant of "limited" authority, *Gross*, 3 N.Y.3d at 255, into a source of unlimited and permanent power to permit absentee voting. Such an open-ended reading would gut the purpose of the provision and make meaningless the recent vote of the people to retain it as is. The Court of Appeals has "long and consistently ruled against any construction which would render a [constitutional] provision meaningless or without force or effect." *See Ronnen v. Ajax Elec. Motor Corp.*, 88 N.Y.2d 582, 589 (1996). This Court should not render the illness safeguard on absentee voting meaningless by allowing the Legislature to define it into irrelevance.

<u>*New York Precedent*</u>. Other authorities interpreting "illness" in other contexts are in accord. For instance, Criminal Procedure Law § 670.10(1) allows for prior testimony of a witness to be used at a subsequent proceeding when "the witness is unable to attend the same by reason of death, illness or incapacity." This provision

requires an illness specific to the witness. *See, e.g., People v. Del Mastro*, 72 Misc. 2d 809, *813 (County Ct., Nassau Cty. 1973). Criminal Procedure Law § 270.15(3) allows a juror already sworn to be excused for "illness or other incapacity." The Appellate Division has said the words in "the phrase 'illness or other incapacity' . . . should be given their common, everyday meaning." *People v. Wilson*, 106 A.D.2d 146, 150 (4th Dept. 1985). Reading the Workmen's Compensation Law, the Appellate Division looked to Webster's Third to define illness as "an unhealthy condition of the body; [a] malady." *Fullerton v. General Motors Corp., Rochester Products Div.*, 46 A.D.2d 251, 252 (3d Dept. 1974). These other interpretations of "illness" all indicate the ordinary meaning that it is a sickness specific to the individual, not a communicable disease present in society at large.

Precedent from other states. This plain meaning interpretation is confirmed by recent cases from the high courts of five of New York's sister states. The Supreme Courts of Missouri, Wisconsin, Tennessee, Mississippi, and Texas have struck down broader interpretations of their respective state absentee voting provisions as they relate to a general fear of COVID-19 rather than the illness itself.[5]

The Supreme Court of Missouri struck down a similarly broad interpretation of "illness" in *Missouri State Conference of the NAACP v. State,* stating, "in plain and ordinary speech, 'confinement due to illness' does not refer to voluntarily remaining in one's own home to avoid 'contracting or spreading' a pathogen." 607 S.W.3d 728,

[5] Admittedly, Connecticut's high court adopted a broader interpretation, but it lacks the unique history of New York regarding absentee balloting. *Fay v. Merrill*, 256 A.3d 622 (Conn. 2021).

733 (Mo. 2020). "The phrase 'confinement due to illness' connotes the situation of an individual who expects to be confined because of a developed and experienced health condition or sickness. This does not include an individual who expects to be confined to avoid the risk of contracting or spreading a pathogen." *Id.*

The Missouri legislature also enacted a new provision to expand un-notarized absentee voting to at-risk voters who had not yet contracted COVID-19—implying that such voters were not previously authorized to do so under the definition of "confined due to illness." "Healthy, at-risk voters who wish to stay home to avoid contracting or spreading COVID-19 may be confining themselves, but they are not confined 'due to illness' as that phrase is used in subdivision (2). If they were, the legislature would not have needed to enact subdivision (7)." *Id.*

Applying ordinary meaning in *Jefferson v. Dane County*, the Supreme Court of Wisconsin held that "indefinitely confined due to illness" for purposes of absentee voting qualification did not include those quarantining due to the Governor's Emergency Order, and could only be based upon the age, physical illness, infirmity or disability of the voter, not the age, physical illness, or infirmity of another person. 951 N.W.2d 556, 564 (Wis. 2020).

In *Fisher v. Hargett*, the Supreme Court of Tennessee held that the chancery court erred in issuing a temporary injunction mandating the state to allow absentee ballots for all voters. 604 S.W.3d 381 (Tenn. 2020). Tennessee Code § 2-6-201(5)(C) and (D) allows absentee voting for those who are unable to appear because they are "hospitalized, ill or physically disabled" or are "a caretaker of a hospitalized, ill or

disabled person." The court distinguished between two groups at issue, (1) voters who have a special vulnerability to COVID-19, or are caregivers of such individuals, and (2) voters who do not have a special vulnerability to COVID-19, nor are caregivers of such individuals. *Id*. The first group does qualify for absentee voting under Section (C) and (D) without the need for a special injunction. *Id.* The second group does not qualify for absentee voting, because they are neither ill nor physically disabled. Under a similar analysis a court may determine that the "illness" classification in N.Y. Constitution art II, § 2 includes voters who have preexisting medical conditions which make them especially vulnerable to COVID-19, but does not include a healthy member of the general public who merely fears COVID-19 or wishes to avoid its spread.

In *Watson v. Oppenheim*, the Supreme Court of Mississippi affirmed that voters are not permitted to vote absentee merely to avoid public gatherings based on guidance from the CDC or public health authorities. 301 So. 3d 37, 42 (Miss. 2020).

Finally, in *In re State*, the Supreme Court of Texas held that the lack of COVID-19 immunity is not a "sickness or physical condition" under its absentee voting statute based upon the ordinary meaning of "disability." 602 S.W.3d 549, 560 (Tex. 2020). The parties agreed that "physical" as employed by the statute would "exclude mental or emotional states, including a generalized fear of a disease" and the court consulted dictionary definitions of the words used in the statute, in conjunction with the Legislature's historical intent to limit mail-in voting in reaching its conclusion. *Id.*

Statutory usage. Until the amendment of § 8-400, "illness" that qualifies for absentee balloting was understood to be limited to the voter's experience of illness, not the mere existence of a communicable illness in the community. The plain meaning of "illness," when one is physically too ill to vote in person, was so obvious that the term was not defined. Only during this pandemic did the Legislature add a definition of illness to account for fear of a communicable disease. The fact that the Legislature thought such an amendment even necessary shows that "illness" traditionally did not include fear or risk of a communicable disease.

Additionally, prior to a 2010 amendment, § 8-400 required a voter seeking a permanent absentee ballot to include in his application information "showing the particulars of his illness or disability." N.Y.L. 2010, c.63. The provision was presumably amended to protect voters' medical privacy and avoid having election officials collect or retain private medical information subject to federal laws like HIPAA. Regardless, the prior statutory usage shows the Legislature's longstanding understanding that the illness is particular to the voter ("his illness or disability"). No one would read "his illness" to mean "his fear of / the possibility of contracting someone else's illness."

One other statute should not be a barrier to this Court's faithful application of Article II's plain terms: that allowing a caregiver of an ill or disabled person to vote absentee. New York permits absentee voting by a person who is unable to appear in person because of "duties related to the primary care of one or more individuals who are ill or physically disabled." Election Law § 8-400(1)(b). The

simple explanation is that the caregiver provision meets the constitutional standard: a voter is unable to vote in person "because of illness or physical disability." This is markedly different from this instance, where a voter is unwilling to vote because of risk of catching an illness. In the first instance, the traditional meaning of illness is maintained, as are the traditional safeguards on the ballot box. In the second instance, the traditional meaning is cast aside, as are the safeguards on the ballot box. This latter approach this Court cannot permit.

Dictionary Definitions. "It is a common practice of New York courts to refer to dictionaries to determine the plain and ordinary meaning of the words." *See Violet Realty Inc. v. Amigone, Sanchez & Mattrey LLP*, 183 A.D.3d 1278, 1280 (4th Dept. 2020). The Merriam-Webster dictionary definition of illness includes "an unhealthy condition of body or mind." *Illness*, Merriam-Webster.com. Black's Law Dictionary similarly defines illness as a "sickness, disease or disorder of body or mind." *Illness*, *Black's Law Dictionary* 748 (6th ed. 1990). Both these definitions, which are the primary definitions for each word, indicate that in common and legal usage an "illness" is particular to a person's body, and not a disease rampant in society at large. Indeed, we have other words for that concept, such as pandemic.

In sum, all of the tools of construction used by New York courts—plain language, textual and contextual clues, history and purpose, precedent, statutory usage, and dictionaries—confirm the Plaintiffs' reading of Article II: the Legislature may not redefine the term "illness" beyond the boundaries of the limited grant of authority conferred in the Constitution.

II. This Court must independently determine this claim.

Last year, the Niagara County Supreme Court rejected a similar challenge to a previous version of this legislation (which governed the fall 2020 election). *Ross v. State of N.Y.*, 2021 NY Slip Op. 32094(U) (Sup. Ct.). The Appellate Division, Fourth Department, affirmed in a two-paragraph order without any in-depth or independent reasoning. *Ross v. State of N.Y.*, 198 A.D.3d 1384 (4th Dept. 2021). Normally, a trial-level sitting of Supreme Court is bound by the determination of a question of law by a department of the Appellate Division, even if not its own geographically assigned department. *Phelps v. Phelps*, 128 A.D.3d 1545, 1547 (4th Dept. 2015) (quoting *D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dept. 2014)). However, that rule does not apply to summary dispositions. In *GHVHS Medical Group, P.C. v Cornell*, 69 Misc. 3d 611 (2020), the Supreme Court sitting in Orange County acknowledged the usual rule but said "caution must be applied" in its use. The *GHVHS* Court said the usual rule of stare decisis must be read together with another well-established principle, that "conclusory assertions should be carefully scrutinized." *Id.* (*citing People v Hobson*, 39 N.Y.2d 479, 489-90, [1976]). In that case, the Supreme Court decided it was not bound by a "two paragraph summary disposition" from a different department of the appellate division than its own. This Court should similarly conclude it is not bound by a two-paragraph summary disposition from the *Ross* Court, but instead exercise its own judgment as to the constitution and law.

In doing so, this Court should reject the reasoning of the Supreme Court, Niagara County, in its *Ross* decision. In an oral ruling from the bench, the *Ross* Court concluded that the expanded absentee ballot access passes muster because fear of catching COVID-19 has "created legitimate concern and even anxiety among many people about being in the presence of others" to the point where such fear "has been labeled recently as COVID-19 Anxiety Syndrome."[6]

"[S]uch interpretation amounts to a strained reading of the plain language" of the constitutional provision. *Trepp, LLC v. McCord Dev., Inc.*, 100 A.D.3d 510, 510 (1st Dept 2012.). There is no indication that "COVID-19 Anxiety Syndrome" renders voters "unable to appear personally at the polling place." N.Y. Const. art. II, § 2 (perhaps a voter with a diagnosed case of agoraphobia, which is fear of crowds, would qualify). Moreover, S.7565 is not limited to persons who have an actual anxiety syndrome, but extends to those who merely "fear" contracting an illness, however remote and regardless of any ability or inability to appear in person. The trial court in *Ross* tried to force a square peg into a round hole in order to uphold the law contrary to the plain meaning, purpose, and precedent for this clause.

The constitutional provision "should be read, if it can be without twisting words and rendering plain meanings nugatory, so as to make the scheme of the policy reasonable." *Ira S. Bushey & Sons v. Am. Ins. Co.*, 237 N.Y. 24, 28 (1923). Reading "illness" to cover fear of catching a communicable disease would eviscerate any practical limit in the provision: any voter could at any point vote absentee

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[6] Niagara County Clerk's Index No. E174521/2021.

because of fear of catching any communicable disease. After all, the flu and COVID-19 will always be with us. In other words, having failed to amend the state constitution to permit universal absentee voting, the Legislature cannot accomplish the same end anyway by redefining illness to include anxiety about communicable disease. This court should not countenance an effort "to accomplish by indirection something which the Constitution directly forbids and would violate the spirit of the fundamental law." *Silver v. Pataki, 3 A.D.3d 101 (2003), asf'd 4 N.Y. 3d 75.*

III. The Plaintiffs are subject to irreparable harm in November.

The "right to vote" includes the right to ensure that one's "vote counts with full force and is not offset by illegal ballots." *See League of Women Voters v. Walker*, 357 Wis.2d 360, 385 (2014) (*citing Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Courts and elections officials must "ensur[e] that a constitutionally qualified elector's vote is not diluted by fraudulent votes." *Id*. The U.S. Supreme Court and other courts have long recognized that illegitimate or fraudulent votes dilute the effect of legitimate ballots. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing."); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Not only can this right to vote not be denied outright, it cannot,

consistently with Article I, be destroyed by alteration of ballots or diluted by stuffing of the ballot box."); *Baker v. Carr*, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally; or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box."); *United States v. Saylor*, 322 U.S. 385, 388 (1944) ("[T]he elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted."); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007), aff'd 553 U.S. 181 ("[V]oting fraud impairs the right of legitimate voters to vote by diluting their votes--dilution being recognized to be an impairment of the right to vote."); *Ohio Republican Party v. Brunner,* 544 F.3d 711, 713 (6th Cir.2008), Order Vacated 555 U.S 5.

Vote dilution cannot be undone after the fact. As a result, courts often issue preliminary relief to prevent vote dilution, whether from fraud or other causes. *See, e.g., Brakebill v. Jaeg*er, 905 F.3d 553, 559-60 (8th Cir. 2018) (finding irreparable harm, reasoning: "Voters could cast a ballot in the wrong precinct and dilute the votes of those who reside in the precinct. Enough wrong-precinct voters could even affect the outcome of a local election."). "'[D]ilution of a right so fundamental as the right to vote constitutes irreparable injury.' There is 'no do-over and no redress' once the election has passed." *Richardson v. Trump*, 496 F. Supp. 3d 165, 188 (D.D.C. 2020) (quoting *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992)).

Separate from the voters, both Assemblyman Tague as a candidate for reelection and the County Party (on behalf of its candidates) have an interest: "Every candidate for public office deserves competent and skilled election administration, in accordance with the law." *Tenney v. Oswego Cty. Bd. of Elec.*, 71 Misc. 3d 421, 425 (Sup. Ct., Oswego Cty. 2021).

Additionally, statewide clarity is needed from courts before the election. If challenges are made to the legality of absentee ballots on election day, different local boards of inspectors may accept or reject Plaintiffs' arguments. *See* Election Law § 8-506. Different interpretations in different counties or localities would violate federal and state equal protection principles. *Bush v. Gore*, 531 U.S. 98 (2000). Thus, courts must provide clarity on this major issue affecting "tens of thousands" of votes before election day with a single, statewide rule.

IV. The balance of equities favors the plaintiffs.

The balance of equities here tracks the likelihood of success on the merits, because New York "does not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (quoting *ACLU v. Ashcroft*, 322 F.3d 240, 247 (3d Cir. 2003)). In this case, the balance of equities is especially pronounced because the people of New York have spoken so recently in favor of retaining a robust insistence on same-day, in-person voting.

CONCLUSION

The pandemic has changed many things about life, but it has not changed the meaning of the word "illness." "Illness" still means illness, not the fear of the risk of potentially contracting an illness. Because S.7565 expands the definition of illness beyond the meaning of the word in Article II, as is evident by all tools of interpretation used by New York courts, it is unconstitutional and must be enjoined.

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