

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

STEFANIK, et al.,

Appellants,

-against-

NO. 86

HOCHUL, et al.,

Respondents.

20 Eagle Street
Albany, New York
July 30, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

MICHAEL Y. HAWRYLCHAK, ESQ.
O'CONNELL & ARONOWITZ, P.C.
Attorney for Appellants
54 State Street
9th Floor
Albany, NY 12207

NICHOLAS J. FASO, ESQ.
CULLEN & DYKMAN LLP
Attorney for Respondent Kosinski
80 State Street
Suite 900
Albany, NY 12207



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JEFFREY W. LANG, ESQ.
OFFICE OF THE NEW YORK ATTORNEY GENERAL
Attorney for Respondents Hochul et al.
350 Main Street
Suite 300A
Buffalo, NY 14202

ARIA C. BRANCH, ESQ.
ELIAS LAW GROUP LLP
Attorney for Respondents DCCC et al.
250 Massachusetts Avenue NW
Suite 400
Washington, DC 20001

Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: The case on today's calendar
2 is number 86, Stefanik v. Hochul.

3 Counsel?

4 MR. HAWRYLCHAK: Thank you, Your Honors. May it
5 please the court, I'm Michael Hawrylchak of O'Connell and
6 Aronowitz, representing the plaintiffs-appellants. I would
7 like to reserve three minutes for rebuttal.

8 CHIEF JUDGE WILSON: Yes, sir.

9 MR. HAWRYLCHAK: Thank you.

10 Respondents' arguments for the validity of the
11 mail voting law hinge critically on the supposed effect of
12 the 1966 amendment to Article II, Section 1. But this
13 supposed effect is a fiction. It's a post hoc
14 rationalization to justify the mail voting law, and there
15 is simply no contemporaneous evidence whatsoever that this
16 amendment of Section 1 was supposed to have any effect
17 whatsoever on absentee voting.

18 JUDGE RIVERA: But counsel, don't we have to take
19 on its face the deletion of the only words that establish
20 in-person voting?

21 MR. HAWRYLCHAK: So I - - - I think I - - - I
22 would address that in a - - - in a few different ways. And
23 - - - and I think the - - - on just to - - - one - - - one
24 thing, I - - - I think one of the - - - the counsel for the
25 Commissioner Kosinski is going to address specifically the

1 - - - the historical background of that phrase. And - - -
2 and we'll address that at more length. But I want to
3 specifically talk about the change in 1966 and what meaning
4 we can take from that.

5 And I think, first of all, we're not talking
6 about a deletion of one specific phrase. We're talking
7 about a - - - basically, a comprehensive rewrite of the
8 entire section. And it was a simplification of the
9 language that, you know, before that time had various
10 different provisions setting different time limits for
11 different residents in - - - different - - -

12 JUDGE RIVERA: Well, in part, that intent and the
13 purpose is to ensure greater access and to simplify the
14 process; that, I think, cuts against your argument.

15 MR. HAWRYLCHAK: Well, if - - - I think, if you
16 look at the legislative history and - - - and not just - -
17 -

18 JUDGE RIVERA: Well, do we have to even look at
19 legislative history? The language is what the language is.

20 MR. HAWRYLCHAK: Right. But I'm saying if we
21 look - - - and not just at the legislative history of this
22 provision, but how the legislature looks at elections and
23 access to elections in general, absentee voting has always
24 been treated differently than other - - -

25 JUDGE RIVERA: But this is not absentee voting,

1 right? You - - - you think this is a - - - if - - - if we
2 don't think it's absentee voting, do you lose?

3 MR. HAWRYLCHAK: Well, is the - - - is the - - -
4 just to make sure I understand your question. Is - - - is
5 the question that - - - that voting by mail is not a form
6 of absentee voting? Is that the - - -

7 JUDGE RIVERA: Yes, that's what I'm asking.

8 MR. HAWRYLCHAK: Well, you know, that - - -
9 that's not an argument that the respondents have pressed
10 before this court. They had made that argument below. We
11 just don't think that it stands up to historical scrutiny.

12 CHIEF JUDGE WILSON: So if I'm - - - if I'm at my
13 home and I get a mail-in ballot and I mail it in from my
14 home, I'm not absent.

15 MR. HAWRYLCHAK: I think - - - so the - - - the
16 Constitution does not speak in term of - - - in terms of
17 absentee voting. Right? Section 2 applies to two
18 categories, some of whom are people who are absent, and
19 others are people who are ill or disabled, and but for that
20 reason cannot personally - - -

21 JUDGE TROUTMAN: Is there anywhere expressly in
22 the Constitution, after the - - - excluding the prior
23 language before 1966 that says in-person voting is
24 required?

25 MR. HAWRYLCHAK: Not in those words, but we - - -

1 we think there are - - -

2 JUDGE TROUTMAN: In - - - in other words?

3 MR. HAWRYLCHAK: We think there are textual
4 indications that this is a background - - -

5 JUDGE TROUTMAN: Explicitly, not implicitly.

6 MR. HAWRYLCHAK: Well, the language we would
7 point to is that the Section 1 does say, at the election,
8 it uses the phrase "at the election", which we think
9 presupposes a physical place.

10 JUDGE HALLIGAN: So - - - so is that - - - is
11 that the sole textual hook?

12 MR. HAWRYLCHAK: The - - - the other piece is if
13 we look at Section 2 itself. Section 2 refers to - - -
14 it's people who - - - who are unable to appear personally
15 at the polling place. And that reflects the understanding
16 that the normal way of voting is personally at the - - - at
17 the polling place and an exception had to be made to enable
18 people to vote other than - - -

19 JUDGE RIVERA: Yeah. But that - - -

20 JUDGE HALLIGAN: Okay.

21 JUDGE RIVERA: - - - section - - - that section
22 was an exception to the prior language that did indeed - -
23 - I don't - - - I don't think really anyone can disagree
24 that prior to the 1966 amendment, and this court had said,
25 the understanding of some of the language in Section - - -

1 Article II, Section 1 was that it required voting at an
2 election district.

3 MR. HAWRYLCHAK: So I - - - I think that brings
4 us back. And again, I think that is the critical point.

5 JUDGE RIVERA: But - - - but my point is, if that
6 was an exception to that rule and that rule is no longer in
7 place, what - - - Section 2 cannot possibly tell us whether
8 or not in-person voting continues to be mandated when
9 there's no language anywhere in the Constitution.

10 MR. HAWRYLCHAK: So I think - - - I think we need
11 to understand it in the context of the history and the
12 historical development of this language. And so if we - -
13 - assuming as the premise that that is the language that
14 was the express requirement of in-person voting, the - - -
15 there was a historical development starting in 1919, when
16 additional amendments were made to allow additional
17 categories of people to vote absentee. This is after the
18 original 1864 amendment for military voters. But starting
19 in 1919, a new section was created. It was then Section 1-
20 a. It was amended multiple times; six separate times. It
21 was eventually renumbered to the current Section 2, and
22 over the course of fifty years there were six separate
23 amendments amending this provision. And by the time you
24 get to 1966, you've had - - - you've had a half a century
25 of amendments to Section 2, where that was the focus of the

1 legislature's efforts at absentee voting. Every time they
2 looked at absentee voting, wanted to expand absentee voting
3 they were looking at Section 2. In - - -

4 JUDGE SINGAS: But they were also looking at
5 Section 1, because I don't think we can look at it in
6 isolation because 1 and 2 interplay together. 1 says you
7 have to vote at the polling place, and 2 says there's an
8 exception for these situations. But now 1 eliminates that,
9 whether that was their intent or not, those words are no
10 longer there.

11 MR. HAWRYLCHAK: Just to be clear, 1 still does
12 say, "at" the election. It says you must vote at the
13 election, it just doesn't - - -

14 JUDGE SINGAS: In person.

15 JUDGE RIVERA: But not district.

16 MR. HAWRYLCHAK: It - - - it doesn't - - - it
17 doesn't say in the district. That - - - that's the - - -

18 JUDGE RIVERA: But at the election. So you're
19 voting at the election.

20 MR. HAWRYLCHAK: Right. But if you - - - if you
21 look - - - if you - - - if you compare the language
22 immediately preceding the 1966 amendment with the language
23 that was enacted in 1966, and you see what - - - the - - -
24 the - - - the entire phrase that that was the - - - the end
25 of. You - - - you have a - - - you have a long list of the

1 requirements of residence and citizenship, different
2 lengths of time. And then it concludes saying, in - - - in
3 that district and not - - - no other district. And a - - -
4 a legislator that was seeking to simplify and - - - and
5 streamline and basically make more comprehensible that
6 language in 1966, rewording that into a simpler
7 phraseology, you can see how those - - - those words, if
8 the - - - if they weren't attuned to legislative debates
9 that had happened a hundred years earlier - - -

10 JUDGE RIVERA: Well, since it doesn't say
11 election district, would you then read it to mean that one
12 could vote somewhere else? Why couldn't that be at my home
13 when I fill out the ballot?

14 MR. HAWRYLCHAK: Well, the - - - what - - - what
15 I would say is that the - - - what the - - - the
16 Constitution has always defined as the - - - as the - - -
17 the - - - the - - - the critical line in every - - - every
18 time that the Constitution was amended to expand absentee
19 voting, the critical distinction has always been in-person
20 versus through some other method, whether that method is
21 proxy voting - - -

22 CHIEF JUDGE WILSON: How do you - - -

23 MR. HAWRYLCHAK: - - - or mail voting or setting
24 up special polling places for - - -

25 JUDGE HALLIGAN: So - - -



1 MR. HAWRYLCHAK: - - - military bases.

2 JUDGE HALLIGAN: Counsel, it seems to me you're
3 asking us - - - this - - - this strikes me as of a piece
4 with your negative implication expressio unius argument; is
5 that right?

6 MR. HAWRYLCHAK: Well, I - - - I think they're
7 related.

8 JUDGE HALLIGAN: But - - - but, I guess, my
9 concern is this. I take it that you are - - - are asking
10 us to infer from what you describe as, I think, the broader
11 context of the 1966 amendment and what you say the
12 legislature was trying to do, that there is a continued
13 constraint on the legislature's plenary power that - - -
14 that isn't set forth explicitly in the text. And so my
15 question for you is, what case can you point us to where we
16 have taken that sort of approach and taken a bite out of
17 the legislature's power without some pretty explicit text
18 in - - - in the Constitution itself?

19 MR. HAWRYLCHAK: Well, I think the - - - the - -
20 - the Killeen case is a case where - - - where the court
21 read in a implicit - - - you know, using - - - applying
22 expressio unius and read in an implicit limitation on the
23 legislature's power based on the expressio unius principle.
24 That's one case. There's also the - - -

25 JUDGE HALLIGAN: I think the - - - the - - - your

1 - - - your - - - your colleagues on the other side tried to
2 distinguish Killeen. But - - - but is that the best case
3 you would point us to?

4 MR. HAWRYLCHAK: I think the two cases from this
5 court that are examples of specifically limiting
6 legislative authority to some degree are that case and also
7 the Sill case, which was - - - you know, early case - - -
8 1854, I believe. And again, that case, the - - - the - - -
9 the particular legislative act that was at issue in that
10 case, they upheld, but both the majority and the dissent in
11 that case, it was unanimously the - - - the court - - - all
12 of the - - - the judges agreed that the - - - applying
13 expressio unius there were implicit limits on the
14 legislature's power that were not reflected by any express
15 prohibition in the text of the Constitution.

16 JUDGE HALLIGAN: And one other specific question
17 if I can. I believe that in 2019, the legislature amended
18 the election law provision regarding domestic violence
19 victims to allow them to vote by special ballot. I don't
20 think that was done, although, correct me if I'm wrong by
21 constitutional amendments. So is that a sign that the
22 legislature's view about whether or not any exception had
23 to be done by constitutional amendment had shifted?

24 MR. HAWRYLCHAK: So what - - - what I would say
25 is there's - - - there's a few provisions and that's one of

1 them. There's these a couple special ballot provisions
2 that the respondents have identified as - - - as - - - you
3 know, they're saying they're examples of the legislature
4 exercising power beyond the Section 2 categories. What we
5 would say to those is, is we don't think - - - you know,
6 these are provisions that affected a very small numbers of
7 people. And they were - - - they were - - - there was no
8 indication in their enactment. And you can go back to the
9 first of these.

10 JUDGE HALLIGAN: But it seems to me either the
11 legislature has the view that any exception has to be done
12 by constitutional amendment, because there's not any
13 residual power, or it doesn't. So I'm not sure how - - -
14 but - - - but tell me, how does the size of the group
15 affected factor into that analysis?

16 MR. HAWRYLCHAK: Well, that - - - that just - - -
17 I - - - I think what we would say is, there's no indication
18 of what the legislature thought its source of power was for
19 enacting those provisions. So - - -

20 JUDGE HALLIGAN: It wasn't a constitutional
21 amendment because there wasn't one that was proposed. I
22 mean, this was done, I think, by statute instead of - - -
23 of a concurrent resolution aimed at an amendment.

24 MR. HAWRYLCHAK: Right. Right. No, it - - - it
25 - - - it was done by statute. But - - - but there's no - - -

1 - there was no - - - there's no statement. So - - - you
2 know, coming back again to - - - you know, 1966 again - - -

3 JUDGE RIVERA: But the only possible source would
4 be Article II, Section 7. We've said that's the sole
5 enactment that gives plenary power to the legislature over
6 the methods of elections.

7 MR. HAWRYLCHAK: Well - - - well, I - - - so I -
8 - - I would give - - - so for - - - so I - - - I'm not
9 standing here to - - - to - - - to, you know, defend or - -
10 - or not the constitutionality of those other special
11 ballot provisions. But I think, you know - - -

12 CHIEF JUDGE WILSON: But - - - but I do want to
13 drill down on those a little bit because there's four
14 different ones. Right? Election workers, caretakers of
15 disabled people who themselves are not disabled. Right?
16 Domestic violence victims that Judge Halligan referred to,
17 and emergency responders. And correct me if I'm wrong, but
18 after - - - those all happened after 1966, is that so far
19 right?

20 MR. HAWRYLCHAK: Yes. That's correct.

21 CHIEF JUDGE WILSON: And that there are no
22 constitutional amendments to expand - - - you know,
23 absentee voting or mail-in voting or - - - or anything like
24 that after 1966, excepting the failed 19 - - - sorry - - -
25 2021 ballot initiative.

1 MR. HAWRYLCHAK: So - - -

2 CHIEF JUDGE WILSON: Right?

3 MR. HAWRYLCHAK: That is - - - that is correct.

4 And what - - - what I - - - what I would say though is - -
5 - is we can look at when - - - when the legislature has
6 specifically spoken to the issue of its power to - - - to
7 authorize absentee balloting. For example, in the 2021
8 proposed constitutional amendment, when the legislature
9 talked specifically to that issue, they were very clear,
10 crystal clear, that they did not believe they had that
11 power. And they - - - they said that they needed this
12 constitutional amendment to give the power.

13 Now, there are examples of times where arguably
14 maybe they - - - they - - - they acted in excess of their
15 constitutional power. But in none of those cases was there
16 any engagement with the constitutional issue.

17 Now, the one single piece we - - - you know, we
18 looked through the legislative history on those special
19 provisions. The very first one, this is in 1982 when that
20 was enacted, the only piece of legislative history that
21 speaks at all, that alludes to the constitutional issue is
22 a letter from the Board of Elections. That's in the - - -
23 in the legislative history, where they say in very explicit
24 language they distinguish this and say, this is not
25 absentee ballot, this is not absentee voting, because this

1 must be cast in person and cannot be cast by mail. And
2 they say, this is - - - so this is not absentee balloting.

3 Clearly, at least some people in the Board of
4 Elections felt that there was a constitutional infirmity,
5 and they were trying to distinguish it, to protect it. Now
6 subsequently over - - - you know, those provisions have
7 been added to a little bit by little bit, and - - - and
8 they've changed over time. But the legislature has never
9 spoken to the source of its authority. And so I think when
10 the legislature has been directed to the issue of what is
11 your power under absentee voting, they were crystal clear,
12 you know, all the way up to 2021 and 2022. It was only
13 when they wanted to forego the amendment process and just
14 pass a statute to do what they couldn't do, get the voters
15 to approve by amendment, that suddenly the legislature's
16 opinion changes and now they have this power that they
17 previously said they didn't. And we think that that's - -
18 -

19 JUDGE TROUTMAN: So is it your argument that
20 whether what they did was contrary to the Constitution is
21 based on what they believed they had their powers as
22 opposed to what the court determines is - - -

23 MR. HAWRYLCHAK: Well - - -

24 JUDGE TROUTMAN: - - - or is not
25 unconstitutional?

1 MR. HAWRYLCHAK: Well - - - well, those special
2 ballot provisions, none of them had ever been challenged.
3 So there's no court determination that any of those are or
4 are not legal exercises of the legislature's authority. So
5 we don't have a judicial determination on any of those.

6 CHIEF JUDGE WILSON: Well, that's true with the
7 2021 referendum as well. Right? There's no judicial
8 resolution - - -

9 MR. HAWRYLCHAK: Right. But I'm - - - I'm saying
10 if we're trying to - - - to look at how the - - - what - -
11 - what the Constitution and both Article II, what the - - -
12 you know, what Article II continues to - - - means - - -
13 means today, does that impose any constraints on the
14 legislature? What is it - - - does it have any continuing
15 vitality or is it just completely superfluous? What is the
16 meaning of - - - of - - - of Section 2? And also what was
17 the - - - you know, impact of the - - -

18 JUDGE TROUTMAN: Does - - - does traditional
19 rules of statutory construction apply?

20 MR. HAWRYLCHAK: I - - - I think - - - I think
21 they certainly do. Yes. And - - - and there's - - -
22 there's a number of different - - -

23 JUDGE RIVERA: Well, let - - - let me ask you
24 this. Do you read Article II, Section 2 to require the
25 legislature to provide for other than in-person voting for

1 those designated subcategories?

2 MR. HAWRYLCHAK: No. And - - - and - - - and it
3 does not by its - - - by its language. It - - - it says
4 the legislature may; it's a permissive power. And there
5 are also several court decisions over the years. And in an
6 opinion by the Attorney General that has said that this is
7 permissive, and the legislature is not required to provide
8 for any of those people through Section 2.

9 CHIEF JUDGE WILSON: So going back to Section 7,
10 I guess, in the 1894 amendment.

11 MR. HAWRYLCHAK: Yes.

12 CHIEF JUDGE WILSON: Would - - - is your
13 interpretation that - - - that the legislature could allow
14 voting by internet? Assuming it was secure, and - - - you
15 know, met the other requirements.

16 MR. HAWRYLCHAK: So again, right? As - - - as
17 far as - - - we think that - - - we believe Section 7 spoke
18 only to the method. So could you set up a computer
19 terminal in the election polling place and have people use
20 that computer terminal to enter their votes? I think that
21 would, you know, probably be within their authority to set
22 the method of election.

23 But place of election has always been treated
24 differently. Every time that - - -

25 CHIEF JUDGE WILSON: Well, is there a restrict -

1 - - a constitutional restriction on where polling places
2 can be?

3 MR. HAWRYLCHAK: I - - - I would have to - - - I
4 - - - I - - - I don't believe there's a specific - - -

5 CHIEF JUDGE WILSON: Could my home be a polling
6 place?

7 MR. HAWRYLCHAK: Well, I mean, that - - - that
8 would be adopting a - - - you know, a - - - I - - - it's
9 how far can you stretch a legal fiction? You know, that's
10 - - - that's a question for another case. Can - - - you
11 know - - -

12 CHIEF JUDGE WILSON: Well, what if you were
13 invited to vote there, too? Or the lobby of my building or
14 - - -

15 MR. HAWRYLCHAK: So but you - - - what - - - what
16 I would say is the Constitution has every time it's been
17 amended, every single time it was amended to allow - - -

18 CHIEF JUDGE WILSON: Let me - - - let me ask it
19 this way. When I read the legislative history around the
20 1894 amendment, it looks as if there was quite a lengthy
21 debate about whether the amendment was to be not adopted at
22 all, was to be adopted, to limit it to - - - to voting
23 machines, or instead what they wound up with, which was
24 method of voting. And the discussion around that - - -
25 what was ultimately approved, adopted, was that they

1 couldn't predict what the future would hold in terms of
2 methods, and they were going to leave the method entirely
3 to the legislature. Is that fair or not fair?

4 MR. HAWRYLCHAK: In part, but - - - but what I
5 would say I would distinguish in two different ways. First
6 of all, they - - - you know, if you look at their
7 discussion of other methods, they were - - - there's no
8 indication they were thinking of place of election or
9 absentee voting. Absentee voting already existed at that
10 time. It had already existed since 1864. There's no
11 mention in any of the - - - the discussion about absentee
12 voting or place of election, only about the specific - - -
13 they're talking about voice votes - - -

14 CHIEF JUDGE WILSON: When they're - - -

15 MR. HAWRYLCHAK: - - - or ballots or machine - -
16 -

17 CHIEF JUDGE WILSON: - - - when they're thinking
18 about absentee back in the 1800s, they're thinking about
19 people who are not in the state, basically. Right?

20 MR. HAWRYLCHAK: Well, the 1864 provision applied
21 to people that were outside of the district. They didn't
22 have to be outside of the state to - - - to vote absentee.

23 CHIEF JUDGE WILSON: Yeah. But they were
24 thinking about people fighting for the Union Army, and they
25 were, by and large, not fighting in New York. They were

1 fighting elsewhere.

2 MR. HAWRYLCHAK: Likely, that many of the - - -
3 yeah, that's probably true of many of them, I - - - I'm
4 sure. But - - - but I would also say in 1894, they could
5 not have been authorizing absentee voting or remote voting
6 because, as we - - - you know, we've talked about at that
7 time, that specific language in Section 1 was still in
8 place.

9 So to look at Section 7 as authorizing this
10 remote voting, you have to think, well, it somehow that
11 sprang into effect that Section 7 broadened and gave them
12 this power of absentee voting that they previously didn't
13 have due to the 1966 amendment. I mean, clearly that
14 wasn't what they were contemplating in 1894, because that
15 was - - - that was already - - - that was, you know,
16 Section 1 as it had been interpreted, prohibited that.

17 So I think to - - - to - - - you know, to read
18 backwards and say, well, we think that, you know, that - -
19 - that years later - - - you know, an expanded Section 7
20 power sprang into effect. I - - - I think that's - - -
21 it's hard to - - - hard to read - - - you know, to see how
22 that's plausible.

23 CHIEF JUDGE WILSON: Thank you.

24 MR. HAWRYLCHAK: All right. All right. Thank
25 you.

1 MR. FASO: Good morning, Your Honors. Nicholas
2 Faso from Cullen and Dykman, on behalf of respondent Peter
3 Kosinski.

4 This court should reverse because the lower court
5 erroneously held that the election district provision was
6 the source of the Constitution's in-person voting
7 requirement.

8 JUDGE TROUTMAN: So what is the source of an in-
9 person requirement?

10 MR. FASO: It's the preposition "at". And we
11 know that because before the election district provision
12 was enacted, voting - - - and that was in 1821 - - - voting
13 was always conducted in person. That - - - there's no
14 dispute about that. From 1777, New York's first
15 Constitution, voting was done in person. We know that
16 given the historical realities of the time, but also
17 because at that time voting was done viva voce, by voice.
18 Everyone came - - -

19 JUDGE RIVERA: Yeah. But if it meant what you -
20 - - what you say it means, they would have retained the
21 word, "district". Right?

22 MR. FASO: Retain the word, "district"?

23 JUDGE RIVERA: The word "district". Right? I -
24 - - I - - - I - - - you're saying the - - - the textual
25 support for in-person voting is the phrase "at every

1 election"? Am I understanding you - - -

2 MR. FASO: Correct.

3 JUDGE RIVERA: - - - in Section 1? But if - - -
4 if it meant what you say - - - if it means what you say it
5 means, why would they have deleted the word "district"?

6 MR. FASO: In - - - in 1966 I believe they
7 deleted the election district provision because it had
8 become an administrative impossibility. We - - - you know,
9 we can only speculate because there's no legislative
10 history.

11 JUDGE RIVERA: Well, then why not say at a
12 polling site?

13 MR. FASO: Because there was no need to specify
14 that. Because the only way you could possibly cast a vote
15 was traditionally at a polling site.

16 JUDGE RIVERA: Yeah. But the only time you vote
17 is at an election, one does not vote other than during an
18 election. So I'm - - - I'm not - - - I'm - - - I still
19 don't see how you get to your view of this language.

20 It - - - it seems to me it's like saying to vote
21 in an election. I mean, at the end, you've also got next
22 preceding an election. It - - - it doesn't seem to do the
23 work you - - - you say it does.

24 MR. FASO: "In" and "at" have different meanings.
25 And words should be construed, given - - - to give their

1 ordinary meaning.

2 JUDGE CANNATARO: But Counsel - - -

3 JUDGE HALLIGAN: Can I - - -

4 JUDGE CANNATARO: - - - "at" has multiple
5 meanings. I haven't checked Webster's, but OED defines
6 "at" as a preposition designating the place of a happening
7 of an event, and secondarily as a preposition designating
8 the time of the happening of an event.

9 MR. FASO: Yeah.

10 JUDGE CANNATARO: So what makes you so sure that
11 "at" is being used in its locative sense, as opposed to its
12 temporal sense?

13 MR. FASO: Two reasons. First, the historical
14 tradition of - - - of viva voce voting, and that's what was
15 occurred - - - was occurring with our first Constitution
16 and continued for some time. Secondly - - -

17 CHIEF JUDGE WILSON: But that seems - - -

18 MR. FASO: - - - yes, "at" can - - -

19 CHIEF JUDGE WILSON: - - - that seems to cut
20 against you a little bit, because there wasn't really
21 another way to vote at that time. Right?

22 MR. FASO: Surely there was paper and ink at that
23 time, but that was - - - that was unheard of to use because
24 voting was - - - it was never private; it was done in
25 person and - - - and by voice. And so that's - - - that

1 was the historical tradition. But to go back to your
2 question, Your Honor, "in" and "at" do have - - - can be -
3 - - have similar meanings. But here it's very specific.
4 One could say you were "in" school, or you were "at"
5 school. "In school" means you're currently studying; "at
6 school" means location at a building. One could be "in"
7 prison - - -

8 JUDGE CANNATARO: Yes. But the problem here is
9 that the "at" is being used to - - - the preposition is
10 being used to modify an election, and an election is a huge
11 statewide undertaking. And I think the problem that I'm
12 having with your strictly locative use of the word is that
13 "at" can mean any one of a hundred - - - hundreds of
14 different polling places. It doesn't lend itself very well
15 to your suggested use of it. But when you think of it as a
16 temporal indicator on the occasion of the election, it - -
17 - to me makes a lot more sense.

18 So my - - - my leaning would be to look at it as
19 a temporal fixer and not a location fixer.

20 MR. FASO: Well, we know this is true from the
21 legislative history as well. For example, at the 1821
22 convention, one delegate observed that every man who has
23 property to protect will attend the election. The
24 elections were understood to be events at which citizens
25 came in person to participate. They're in the town center.

1 It was a very raucous scene. You may have seen the
2 painting by Bingham.

3 JUDGE HALLIGAN: Can I ask you to just switch
4 gears for a - - -

5 MR. FASO: Sure.

6 JUDGE HALLIGAN: - - - quick minute and ask you a
7 practical question? Which is, is there a difference in the
8 mechanism that is used? My understanding from the briefs
9 is that there have been mail-in ballots provided already.
10 So is there a difference in the mechanism between absentee
11 and mail-in ballots?

12 MR. FASO: No. I don't think there's any
13 difference. And in fact, the - - - the early mail voting
14 statute says that you should construe every instance of
15 early mail voting to be consistent with absentee - - -

16 JUDGE HALLIGAN: But I just mean in terms of - -
17 - of the - - - the administration of the election itself,
18 do you access and submit an absentee ballot in the same way
19 as a mail-in ballot, if you know?

20 MR. FASO: Yeah. I mean, the statute effectively
21 replaced absentee balloting with early mail voting. And
22 you know, you can compare the two and they're identical
23 except for that semantic difference. So they are
24 functionally the same. And - - - and they operate in - - -
25 in a similar way.

1 JUDGE HALLIGAN: Thank you.

2 JUDGE RIVERA: But they need not be. Right? I
3 mean, under Section 2, could the legislature come up with a
4 different way for those subcategories of voters to exercise
5 the franchise and let everyone else just have early mail-in
6 voting or going to a polling site?

7 MR. FASO: The only suggestion of a different way
8 is to compromise secrecy in balloting. And so I don't
9 think that's a very plausible rationale for Section 2
10 remaining in the Constitution. And that's the only
11 rationale that's been offered.

12 JUDGE RIVERA: So that's the point of the
13 flexibility. That - - - perhaps you are correct now, but
14 next year, who knows. There may be something that - - -
15 that the legislature feels comfortable with and wants to
16 provide specifically to that group. There are already
17 special procedures that apply to people who cannot
18 physically go to a polling site.

19 MR. FASO: We know that the legislature
20 understood that it was constrained by the Constitution to
21 allow mail voting. We know that because they passed the
22 referendum in 2021.

23 JUDGE RIVERA: Well, let me - - - well, let me
24 ask you this. Are you in agreement with the other attorney
25 for the other plaintiffs, that Article II, Section 2 is

1 discretionary, not mandatory?

2 MR. FASO: Yeah. It's - - - it's clear. It says
3 - - -

4 JUDGE RIVERA: Okay. So the legislature,
5 theoretically tomorrow, right? Could require that the
6 subcategories that are in Section 2, go to a polling site.

7 MR. FASO: I - - - I suppose that's possible, but
8 I don't think - - -

9 JUDGE RIVERA: Why they would do it politically,
10 I don't know. But - - - but my point is one of theoretical
11 exercise.

12 MR. FASO: There's no dispute that the
13 legislature has acknowledged that in-person voting was
14 required. And I point to this court's decision last month
15 in United Jewish Community of Blooming Grove; a unanimous
16 decision. In that decision, the court noted that where the
17 legislature fails to act, that there can be an acquiescence
18 by the legislature to a commonly understood interpretation
19 of a statute.

20 I submit that the reverse is equally acceptable.
21 That where the legislature takes action in reliance on a
22 widely understood interpretation of the Constitution, that
23 that context constitutes an express recognition.

24 JUDGE HALLIGAN: Well, some - - - something that
25 constrains the legislature's otherwise plenary power we

1 might think about differently than the way in which we
2 apply those canons to a statute; don't you - - - don't you
3 think?

4 MR. FASO: And we think the Constitution does
5 constrain the legislature in enacting any type of voting
6 mechanism - - -

7 JUDGE HALLIGAN: So you think that independent of
8 application of - - - of any canons of construction?

9 MR. FASO: Yes.

10 JUDGE HALLIGAN: Because of "at" in - - - in - -
11 -

12 MR. FASO: Yes.

13 JUDGE SINGAS: Is that your best argument the
14 "at" versus "in", and do you think that's sufficient to
15 sustain the high burden of beyond a reasonable doubt?

16 MR. FASO: I do think it's sufficient. I mean,
17 we - - - we also agree with the appellants on the negative
18 implication of - - - of Section 2. But this court is very
19 clear that we have to give meaning and effect to words used
20 in the Constitution and in statutes. And the Appellate
21 Division's decision only worked if they construed "at" to
22 mean "in".

23 JUDGE HALLIGAN: Do you agree with - - - with
24 your colleague that - - - that Sill and Killeen are the two
25 examples in which, he argues - - - I - - - I realize the

1 other side has a different view, but he argues that this
2 court has found a constraint on the legislature by virtue
3 of negative implication, as opposed to explicit text.

4 MR. FASO: Yeah. I mean, our briefing didn't
5 focus on those issues as extensively as appellants. But I
6 do agree - - -

7 JUDGE HALLIGAN: But there's nowhere else you
8 would point us, I take it?

9 MR. FASO: Killeen and Sill, yeah, do have that
10 effect.

11 CHIEF JUDGE WILSON: Thank you, Counsel.

12 MR. FASO: Thank you, Your Honor.

13 MR. LANG: Good morning, Your Honors. Jeffrey
14 Lang, on behalf of the State and - - - and the governor.

15 The - - - the Early Mail Voting Act promotes
16 important state interests, allowing voters to exercise the
17 franchise more easily. And plaintiffs haven't met their
18 heavy burden to show that it is invalid as an - - - as an
19 exercise of the legislature's plenary power.

20 This court has said on many occasions that - - -
21 that the legislature has plenary power to pass reasonable
22 voting laws.

23 JUDGE TROUTMAN: What do you say with respect to
24 their argument about "at" the election versus "in" the
25 election?

1 MR. LANG: Well, I think that's plainly wrong. I
2 mean, when - - - so they're trying to say that the in-
3 person requirement for voting preceded the - - - the
4 addition of the - - - what we've called the election
5 district provision, the specific reference to an election
6 district. Based on the simple fact that the Constitution
7 Section 1 - - - Article II, Section 1 used the term "at"
8 such election. But, in fact, when the drafters of the
9 Constitution wanted to refer to a location, they said "at
10 the polling place". In Article II, Section 2, it's if
11 you're not able to personally appear, not at the election,
12 at the polling place.

13 The - - - the term "election" just refers to a
14 process of selecting an officeholder and the - - - the
15 Supreme Court decision in the Love case, I think, is very
16 clear about this. I would also say that in Article II,
17 Section 3, this just confirms my point. If you take a
18 bribe for a vote, or if you wager on the outcome of an - -
19 - of an election, then you are not allowed to vote. And
20 the language literally is "at such election". And you
21 could not get around that rule by saying, oh, I voted
22 absentee, I didn't vote at such election.

23 And when the drafters of the original - - -
24 Governor Seymour, who had proposed the - - - the original
25 amendment because he thought it was required, what he

1 pointed to was not the bare use of the phrase, "at such
2 election" or now it's "at every election". He specifically
3 pointed to the election district provision.

4 JUDGE CANNATARO: So Counsel, with respect to the
5 election district provision, your briefs - - - most of the
6 respondents' briefs sort of use this hedging kind of
7 language that it's commonly understood or was - - - you
8 know. It doesn't say that it - - - it actually requires
9 in-person voting. It says that was the understanding that
10 grew over the years. So have - - - have you, for purposes
11 of this argument, conceded that the election district
12 provision is - - - was an in-person voting requirement or
13 is that still open to debate?

14 MR. LANG: I - - - I think it is. I think it was
15 - - - I think it was reasonably interpreted as an in-person
16 requirement. And, in fact, that's how it was, in fact,
17 interpreted.

18 CHIEF JUDGE WILSON: Was it?

19 JUDGE HALLIGAN: So - - -

20 CHIEF JUDGE WILSON: If you look at the
21 legislative history for it, is it - - - is it a different
22 reasonable interpretation that it was intended to make sure
23 that people were voting for the candidates who were going
24 to serve them, and not for candidates in the neighboring
25 town or village or county?

1 MR. LANG: Sure. I mean, that was plainly the
2 intent, but I think the effect of that which people
3 understood, that's what Governor Seymour said, was to
4 impose an in-person requirement.

5 CHIEF JUDGE WILSON: Right. But the question is,
6 why? Is it because - - - is it because you wanted to make
7 sure people were voting for their representatives and not
8 somebody else's, crossing over to - - - to throw an
9 election; that sort of thing? Or because there was some
10 public purpose in having people get together at a polling
11 place who were neighbors and seeing each other and for
12 fostering some sense of civic responsibility because
13 they're in the right place, as opposed to voting for the
14 right people?

15 MR. LANG: No. I think - - - I think it was - -
16 - I think it was probably the - - - the - - - the first.
17 But at the time, the only way to satisfy that requirement
18 that you vote in the election district was conceived to
19 appear personally at the - - - at the polls and cast your
20 vote.

21 JUDGE GARCIA: Wasn't there a general concern - -
22 -

23 MR. LANG: But - - -

24 JUDGE GARCIA: - - - wasn't there a general
25 concern then beyond this? And I think it's expressed by

1 Governor Seymour and certainly by Seward later that - - -
2 about fraud? I mean, it was fraud that drove some of these
3 - - - this consensus or however you describe it in various
4 filings. But you - - - so isn't that the balance that's
5 being struck? It's between fraud and the potential for
6 fraud. And, by the same token, confidence in the process
7 and universal suffrage.

8 MR. LANG: I mean, there - - - there may have
9 been some concern. I mean, I guess, I haven't - - - I
10 haven't seen that. I mean, the - - - the concern with
11 absentee and I - - - I think the better term would be
12 remote voting. It just - - - all - - - and all I mean by
13 that is you're not personally appearing in person at the
14 polls. It was noted by - - - by Governor Seymour, but then
15 that - - - that specific language about appearing at - - -
16 in the - - - voting in the election district in the 1867
17 committee on suffrage, which wanted to add to the
18 Constitution, there was already the provision for - - -

19 JUDGE CANNATARO: If I could just - - -

20 MR. LANG: - - - soldiers and - - -

21 JUDGE CANNATARO: - - - if I could just pick up
22 on a thread that the Chief Judge put out there? Your - - -
23 your colleague for Kosinski makes the argument that the
24 election district provision is really a residency
25 requirement, that there's nothing to be interpreted in

1 there to - - - to come to the - - - the generally accepted
2 historical position that that's an in-person voting
3 requirement. And that's sort of consistent, I think, with
4 the Chief Judge's point that it's - - - it's to avoid - - -
5 it's to make sure that voters are voting for the people who
6 represent them and not - - - you know, to help some
7 candidate in some other district.

8 So do you reject that interpretation out of hand,
9 or might that also be possible?

10 MR. LANG: No. I mean, that - - - that might be
11 correct. I guess what I would say is our - - - our
12 position doesn't stand or fall on - - - on whether the
13 election district, in fact, required in-person voting.

14 JUDGE HALLIGAN: I want to press you on that
15 point, if I - - - if I can, Counsel. I - - - I went and
16 looked at your briefs in Cavalier and Amadure and Ross and
17 - - - and just reading from the brief in Cavalier, which
18 was just two years ago, you said the Constitution has
19 generally been regarded as continuing to retain the
20 requirement implicitly. And I think it's fair to say those
21 briefs proceed on the assumption that that is, in fact, an
22 accurate reading.

23 And you say something very different here. Here
24 you tell us that the in-person voting requirement was
25 removed, and thus there is no constitutional impediment to

1 a statute that permits all voters to cast their ballots by
2 mail.

3 I guess what I'm grappling with is if, in fact,
4 there is no constraint to passing a statute along the lines
5 of what your adversaries argue, why wasn't that the crux of
6 the argument in Cavalier and Amadure and Ross that you
7 presented?

8 MR. LANG: Well, because that wasn't the - - - I
9 mean, the issue in Cavalier and Ross had to do with the
10 legislature's statutory authority to clarify the meaning of
11 sick.

12 JUDGE HALLIGAN: You don't think there's any
13 inconsistency?

14 MR. LANG: Could we - - - sorry.

15 JUDGE HALLIGAN: Go ahead. Sorry.

16 MR. LANG: I mean, could we have made an
17 alternative argument that the argument that we - - - we are
18 making today? Sure, I suppose so. But that's not what we
19 were focused on. We were - - - I mean, the issue before
20 the court was, was - - - was that a proper interpretation
21 of what it meant to be sick within the - - - you know,
22 within - - - under Section 2 of the Constitution - - -
23 Article II, Section 2.

24 JUDGE HALLIGAN: So you think - - - you think
25 there's no inconsistency between your reading of what the

1 impact of deleting that language is, which today, I think
2 you say is significant, and the - - - the approach in those
3 other three cases.

4 MR. LANG: Well, it's - - - I - - - I - - - I
5 don't think there's - - - there's an inconsistency. And
6 the reason that we say it's significant is because the
7 election district provision, again, whether this was
8 ultimately correctly read or not, historically, just as a
9 matter of fact, it was read by multiple parties: the
10 governor, the legislature, the committee on suffrage that I
11 mentioned too, it was taken as requiring an in-person vote
12 as - - - as requiring in-person voting at the polls.

13 And that explains why the legislature went down
14 the path of - - - the constitutional path of a - - -
15 enacting - - -

16 JUDGE HALLIGAN: Just - - - I guess it just
17 strikes me that if - - - if this was a solution to the
18 question, that - - - that that would have been presented to
19 the - - - to the Third Department in those other cases.

20 MR. LANG: Well, I mean, we - - - if - - - had we
21 undertaken the historical analysis that we've now done, we
22 - - - we could have made that argument. I mean, I can tell
23 you I participated in those cases, that we were simply
24 focusing on the statutory construction argument and not the
25 argument we're making today.

1 JUDGE SINGAS: What about here, the will of the
2 people? If we adopt your position, aren't we ignoring the
3 will of the people which spoke pretty emphatically when
4 they rejected the amendment? How do - - - how should we
5 grapple with that? How do we reconcile that?

6 MR. LANG: Well, I'll say two things. I mean,
7 this court has repeatedly said that very little can be
8 inferred from any type of failed enactment, and that would
9 include a failed constitutional amendment. I mean, what I
10 would say is - - -

11 JUDGE SINGAS: Do you think this is different
12 than a legislative enactment, like a failed bill versus an
13 amendment that was put to the people? I would imagine that
14 it costs a lot of money to put this to the people on the
15 ballot; millions of dollars, and the people spoke pretty
16 clearly. Legislation gets passed or attempted to get
17 passed for any variety of reasons. I - - - I don't think
18 they're the same. Do you?

19 MR. LANG: I - - - I understand there's a
20 difference, but I don't think it should be dispositive in
21 this case. In other words, I don't think this case should
22 turn on the failure of that 2021 amendment. What I would
23 say about it is there certainly was a view at the time by
24 many that a constitutional amendment was required to enact
25 universal no-excuse voting, and some may have thought,

1 well, maybe, if not strictly speaking necessary, it would
2 be the prudent course to take. They attempted to pass it.
3 It failed at the - - - at the polls, and a new legislature
4 took a fresh look at the issue and determined that it had
5 the authority to enact remote voting.

6 And that, I would add, is consistent with the
7 four statutes that Chief Judge Wilson had noted earlier.
8 None of those statutes are consistent with an in-person,
9 at-the-polls voting requirement.

10 JUDGE GARCIA: Can I ask you about specifically
11 one of those? Let's start in 1982, I believe. And in '82,
12 the law said - - - election law revision said a written
13 statement is necessary that he or she will be unable to
14 appear at the polling place for such election district on
15 the day of the election, which pretty much seems to track
16 the language in Section 2, which says they can do this for
17 those that may be unable to appear personally at the
18 polling place. Right? So did they even change the
19 absentee ballot?

20 MR. LANG: But - - - but you're unable to appear.
21 Sorry.

22 JUDGE GARCIA: I'm sorry. Go ahead.

23 MR. LANG: No, you're unable to appear. In - - -
24 under Section 2, if you're unable to appear at the polling
25 place, it has to be because either you're sick or you're

1 disabled, right? Those are the two conditions in Section
2 2. And so being unable to appear because you're a polling
3 worker, that - - - that wouldn't fit Section 2. The same
4 for domestic - - -

5 JUDGE GARCIA: So did they change the ballot - -
6 - the absentee ballot form after they passed '82
7 legislation? Did they have to change the forms? So when I
8 mail in my ballot and I'm a polling worker - - - you know,
9 or I request an absentee ballot, I guess it would be, do I
10 have to say something different?

11 MR. LANG: I - - - I don't know what the
12 application currently includes. I - - - my - - - my only
13 point is that those four laws cannot - - -

14 JUDGE GARCIA: Well, now it's very different,
15 right? I mean, that's why we're here. But back then did
16 it - - - did - - - did an election worker have to say - - -
17 you know, I - - - I'm not going to be there, or did they
18 just put that on the regular absentee ballot?

19 MR. LANG: Your - - - Your Honor, I simply - - -
20 I don't know the answer to that question, but even if they
21 had to say that they couldn't be there because they were
22 working at the polls, that still would not fall under the
23 Section 2 - - -

24 JUDGE GARCIA: Well, you seem to make - - -

25 MR. LANG: - - - Article II amendment.

1 JUDGE GARCIA: - - - a very different argument
2 about stretching Section 2 in the COVID case, right?

3 MR. LANG: I - - - I - - -

4 JUDGE GARCIA: I mean, that was so expansive it
5 covered that. I mean, when you were challenged on, could
6 you do COVID - - - let's call it the COVID legislation. I
7 mean, then Section 2, well, the argument on the other side
8 was technically does not apply to this. The position of
9 the Attorney General's office, I think we just heard was
10 no, no, no, this fits within Section 2. So it seemed
11 pretty elastic back then.

12 MR. LANG: Well, I mean, we had a reasonable
13 interpretation of what it meant to be sick, which was that
14 if you were a - - - if you were afraid that you were - - -
15 you would either catch an illness, you were at risk of
16 catching an - - - at risk of catching an illness, that that
17 fell under the exception for being unable to appear because
18 you're sick. That was obviously prompted by the pandemic.
19 I don't see that as inconsistent with - - -

20 JUDGE GARCIA: Well, I'm working in a polling
21 place that isn't my own, and I can't leave. Isn't that I
22 physically can't appear?

23 MR. LANG: Yes. But - - - but - - - but my point
24 is, it's not just you physically can't appear for any
25 reason whatsoever. In order to invoke Article II, Section

1 2, which - - - you know, on their theory, there's an - - -
2 you know, there's an in-person requirement to appear and
3 it's only subject to the exceptions in Article II, Section
4 2. And one of those is unable to appear because you are
5 disabled or because you are sick. And if you cannot appear
6 because you are working - - -

7 JUDGE GARCIA: So you're - - -

8 MR. LANG: - - - you don't fit.

9 JUDGE GARCIA: - - - but your view in that case
10 was being afraid of getting sick fit under the language of
11 Section 2, though?

12 MR. LANG: That - - - that was what we argued in
13 those cases. And - - - and it's what the Fourth Department
14 ultimately - - -

15 JUDGE HALLIGAN: Can I ask you - - -

16 MR. LANG: - - - held.

17 JUDGE HALLIGAN: - - - your - - - your adversary
18 argues that your reading renders Section 2 superfluous and
19 you argue, I think, correct me if I'm wrong, that Section 2
20 would authorize some different kind of mechanisms perhaps -
21 - - you know, that - - - that don't adhere to secrecy. Are
22 there any laws that have been passed that, in your view,
23 are authorized only by Section 2, but wouldn't be
24 authorized under - - - under your reading now of what the
25 legislature's power is that allows the mail-in ballots for

1 everybody else?

2 MR. LANG: Not - - - not that - - - not that I'm
3 aware of. And it - - - it could well be that, you know,
4 Section 2 becomes largely redundant. But at the end of the
5 day, I think you have to give effect to the deletion of
6 that very key language.

7 JUDGE HALLIGAN: Can you - - - I know your
8 light's on.

9 Chief, can I just briefly follow-up?

10 CHIEF JUDGE WILSON: Of course.

11 JUDGE HALLIGAN: Are there any other - - - I - -
12 - I really don't know the answer to this question, but you
13 might. Are there any other constitutional provisions you
14 can point us to where a reading of a different provision
15 essentially renders some other provision, if not totally
16 superfluous, then - - - then, as you say, largely
17 redundant?

18 MR. LANG: Well, I mean, not - - - not even a
19 reading, actually. Since the 1864 Article I, Section 1
20 always had a provision to allow for soldiers to vote
21 absentee, that was actually retained until 1966 when it was
22 deleted. But in 1919, there was a provision for the
23 legislature to allow people to vote absentee if - - - if
24 they were required to be away. And so for a period of
25 almost fifty years, you had a redundancy in the

1 Constitution that wasn't cleaned up.

2 I want to make just one final - - -

3 JUDGE RIVERA: Well, isn't - - - isn't section -
4 - -

5 MR. LANG: - - - point.

6 JUDGE RIVERA: If I can just on this, if I may?
7 Isn't Section 7 the redundancy? Because if Section - - - I
8 assume you agree with the other lawyers that Section 2 does
9 not require that those subcategory of eligible voters be
10 given some other way to vote other than in person, that
11 Section 7 does that job. Is that not correct?

12 MR. LANG: Yes. Section 7. I mean, I think they
13 are just overlapping independent authority for the same
14 thing. And - - - and - - - and - - - you know, again, you
15 could say if the legislature is maybe acting at the limits
16 of its plenary authority, Section 2 would provide a source
17 of independent authority as to the persons covered by
18 Section 2.

19 JUDGE GARCIA: What's the purpose of Section 7?
20 I heard - - - I think, in the brief somewhere, and I
21 thought I heard a question that says it gives the
22 legislative - - - legislature plenary authority. My
23 understanding of plenary authority is that the legislature
24 has that; you don't have to give it to them. You can only
25 limit it. So if they have the plenary authority to do

1 what's in Section 7, why is it there?

2 MR. LANG: Well, I think it just - - - I mean, I
3 think you can look at the plenary authority as either the
4 legislative authority, that's - - - the authority that's
5 given to the legislature in Article III of the
6 Constitution. This is a little bit more specific. It's
7 another - - - and this course is - - - this court has
8 actually said in multiple cases that, you know, Section 7
9 can be seen as giving the court broad authority to enact
10 reasonable voting regulations.

11 JUDGE GARCIA: But why would they need it? I
12 mean, don't they have that? Isn't that their plenary
13 authority?

14 MR. LANG: I think they would have that plenary
15 authority if Section 7 didn't exist in the Constitution.
16 So all I'm saying is it's additional authority. I want to
17 make one final point, which is - - - which is that
18 plaintiffs had said that our - - - our argument about the
19 election district provision and its - - - its deletion and
20 the effect that the deletion should be given was a post hoc
21 argument. But in fact, in a - - - in a document that
22 plaintiffs themselves cite, this very argument is noted,
23 it's the - - - the temporary state commission on the
24 constitutional convention of 1967. It's page 50. And the
25 drafters of that report note this, the very argument we are

1 making. They note that there used to be in the
2 Constitution what we've called the election district
3 provision, and that it was deleted, and that one could
4 infer from that that the legislature now has plenary
5 authority - - - now has full authority to enact remote
6 voting?

7 JUDGE GARCIA: But don't they say at the very end
8 of that quote, this - - - this interpretation, however,
9 makes Article II, Section 2 superfluous, almost as - - - I
10 think they give both interpretations.

11 MR. LANG: Yes. I agree with that.

12 JUDGE GARCIA: With the second one they say,
13 however, the second interpretation - - - your
14 interpretation, makes Section 2 superfluous.

15 MR. LANG: I - - - I - - - they - - - they give a
16 counterargument. So - - - and - - - and I don't think they
17 conclude one way or the other. All I'm saying is that the
18 - - - the - - - the - - - the notion that the deletion of
19 this language had no effect, it's not something that was
20 thought of for the first time in 2023. And then the
21 legislature proceeded to act consistently with that
22 understanding on no less than four occasions.

23 For these reasons, we would - - - we would ask
24 the court to affirm.

25 CHIEF JUDGE WILSON: Thank you.

1 MS. BRANCH: May it please the court, Aria Branch
2 for the intervenor-respondents.

3 In its current form, the New York Constitution
4 contains no requirement, express or implied, mandating that
5 voting occur in person.

6 I'd like to respond, and so we would ask that
7 this court affirm the decision of the Third Department and
8 uphold the Early Mail Voter Act.

9 JUDGE HALLIGAN: Counsel - - - Counsel, can I ask
10 you your view? It seems to me - - - you know, we've gone
11 back and forth a lot about the text, but it - - - it does
12 seem to me that there was a view that a constitutional
13 amendment was required. And the sponsor's memo for the
14 failed amendment, right? With respect to the resolution
15 says the same thing. It says historically, the New York
16 State Constitution allows absentee voting in
17 extraordinarily narrow circumstances and addresses Section
18 2.

19 So my question is, as an interpretive matter, how
20 does this longstanding understanding that the legislature
21 apparently had - - - I realize we have the four statutes.
22 That I have to think is what motivated the effort to put
23 this on the ballot. Were they just mistaken all this time?
24 How does that bear on - - - on the way we look at the
25 interpretive question?

1 MS. BRANCH: Well, I think the important thing to
2 focus on is that the question before the court is whether
3 or not the Early Mail Voter Act is constitutional? And
4 what the 2021 legislature thought about - - - you know,
5 whether a constitutional amendment was required, is just
6 not legally dispositive.

7 JUDGE HALLIGAN: So if the public and the
8 legislature operate under the premise for a long time that
9 a constitutional provision means X, then I take it your
10 argument is we should sort of put on textual blinders and
11 look only at what the words say. And if the words say not
12 X, that's the end of the discussion. And the - - - and the
13 - - - you know, the - - - the views that the legislature
14 and perhaps the AG proceeded under are not relevant?

15 MS. BRANCH: I don't know if I would say they're
16 not relevant, but they don't control here. I don't think
17 they control the constitutional question, and I don't think
18 there are enough to meet the plaintiffs' burden of proving
19 beyond a reasonable doubt that the act is unconstitutional.

20 JUDGE CANNATARO: That point is well taken. And
21 you know, the precedential effect of - - - of a negative
22 vote is certainly open to debate. And - - - and you have a
23 good argument on that. But - - - and - - - and there was a
24 question before, which was along the lines of how do we
25 deal with it, though? I mean, the ultimate sovereign here

1 is the people. That's where all the power comes from,
2 whether it's given to the legislature or contained in the
3 Constitution. And they did speak not very long ago in a
4 negative manner. And I think it would be sort of - - - I
5 don't know what the word I'm looking for is - - -
6 dismissive of this court to - - - to ignore that happening.
7 So it has to be dealt with on some level.

8 So I'm going to ask the same question that was
9 asked of one of your colleagues before. How do we deal
10 with it? What do we say about the fact that the people - -
11 - you know, kind of decisively, turned down this very
12 thing?

13 MS. BRANCH: I think - - - you know, like you
14 said, we can't draw a negative inference based on what
15 millions of voters - - - you know, rejected or - - - or
16 supported. And so this court has very clearly said that in
17 *Golden v. Koch* that it's that it's basically a fool's
18 errand to try to divine the intent of millions of voters
19 who have rejected a constitutional amendment. What we - -
20 -

21 JUDGE GARCIA: Does that depend on what the
22 amendment is, though? First, in terms of what the subject
23 matter is, and second, in terms of what the people were
24 told and what the change would have been?

25 MS. BRANCH: Well, I think in this case, I mean,

1 what we do know is that the Early Mail Voter Act was passed
2 by the legislature, and it was signed into law by the
3 governor. And we know that the legislature is responsive
4 to voters. And if voters decide that they disagree - - -

5 JUDGE GARCIA: That they know better - - -

6 MS. BRANCH: - - - with what the legislature has
7 - - -

8 JUDGE GARCIA: - - - than the people that voted
9 in the amendment process, the legislature knows better?

10 MS. BRANCH: Well, I think they speak for the
11 voters of New York. Right? They are not an unelected
12 body.

13 JUDGE GARCIA: Just seems, going back to Judge
14 Cannataro's point, the people speak most directly in the
15 Constitution, right?

16 MS. BRANCH: Right.

17 JUDGE GARCIA: I mean, that's direct democracy as
18 you can get.

19 MS. BRANCH: They rejected the amendment, and we
20 - - - we - - - we don't know why they rejected the
21 amendment. What we do know is that the law was passed by
22 people who represent the voters of New York. And if the
23 voters of New York disagree, they have recourse. They can
24 vote those - - -

25 JUDGE HALLIGAN: But to Judge - - -



1 MS. BRANCH: - - - they vote those
2 representatives out.

3 JUDGE HALLIGAN: - - - to Judge Cannataro's point
4 or question, maybe. You know, if you go into the voting
5 booth and you look at all the amendments on the back page
6 of the ballot, and you're a voter and you go through all of
7 them and you check, no. And you read that that amendment
8 was defeated. It's got to be surprising for sure, if you
9 were to learn that the legislature, you know, nonetheless
10 proceeded and that the court said that that was okay. I -
11 - - I guess what I'm asking is, doesn't that erode some
12 public confidence in the process to - - - to take that
13 route?

14 MS. BRANCH: I mean, I don't think it does,
15 because in this - - - in this circumstance, we're talking
16 about legislation that makes it easier for voters to
17 exercise their constitutional right to vote. The express
18 purpose of the Early Mail Voter Act is, quote, "to ensure
19 the ease of participation in elections and to make New York
20 a leader in engaging the electorate" - - -

21 JUDGE TROUTMAN: But going back to the original
22 question, when you put those propositions that are on the
23 ballot, you're asking the voters for their input. And
24 there's a concern that it's said, well, it doesn't matter
25 what you think, we know better. But - - - but they were

1 asked, and they said no. And you're saying that doesn't
2 matter?

3 MS. BRANCH: I think - - - you know, that is an
4 argument that has been made. I just don't think it is
5 enough for plaintiffs to meet their burden of - - -

6 JUDGE RIVERA: Well, legislators - - -

7 MS. BRANCH: - - - proving the - - -

8 JUDGE RIVERA: - - - legislators often act
9 against the desires of their constituents. Is that not the
10 case?

11 MS. BRANCH: That's true. And it's also true we
12 don't why - - -

13 JUDGE RIVERA: And then they pay a price at the
14 ballot, do they not?

15 MS. BRANCH: I'm sorry?

16 JUDGE RIVERA: They pay a price at the ballot.

17 MS. BRANCH: They pay a price at the ballot.

18 JUDGE RIVERA: So if we were to uphold this act
19 and the majority of the people of the State of New York
20 disagree, they have - - - they have their - - -

21 MS. BRANCH: They'll have recourse.

22 JUDGE RIVERA: - - - they'll have their recourse
23 at the ballot. It's a political question.

24 CHIEF JUDGE WILSON: Is there a - - - is there a
25 view, a reasonable view of the Constitution, that it never

1 contained an in-person voting requirement?

2 MS. BRANCH: I think there is, Your Honor. I
3 think there is a reasonable view of the Constitution that
4 it never contained an in-person voting requirement. I
5 certainly don't think it is located in the "at - - - at
6 every election" language, and it's - - -

7 CHIEF JUDGE WILSON: And is it - - - but would
8 you also say that it - - - it's a - - - it would be a
9 reasonable position to take that for 150 years, people
10 believed that there was a restriction like that? And by
11 "people" I mean the legislature, the executive.

12 MS. BRANCH: I think that's correct. I do. I
13 mean, there are numerous - - -

14 CHIEF JUDGE WILSON: So then that's kind of the -
15 - - the conundrum of this case in a way, right? Is that
16 you, on your side, you have the strong presumption of
17 constitutionality of legislative acts, and you have that
18 there really, if you're looking for some clear text in the
19 Constitution that would restrict the legislature's power,
20 it's hard to find. It - - - it requires a lot of - - - you
21 know, twists and turns to get there. And on the other
22 side, you have a pretty common understanding for a century
23 and a half that from somewhere there was a restriction like
24 that.

25 MS. BRANCH: There was a common understanding

1 that there was a requirement to vote in the polling place,
2 or at least that that's how the right to vote was
3 exercised. But once the 1966 amendment was passed and the
4 election district provision was removed from the
5 Constitution, there was no longer a textual basis for an
6 in-person voting requirement.

7 JUDGE GARCIA: Do you think that, in your view,
8 the 1966 amendment was an intentionally an - - - it would
9 intentionally remove that requirement, or it was
10 accidental?

11 MS. BRANCH: It's a good question. And I - - -
12 you know, I think that there - - - there is at least one
13 contemporaneous source that we have that actually came up
14 in plaintiff's brief, in their reply brief, that my
15 colleague just mentioned from the 1967 constitutional
16 convention that recognizes - - -

17 JUDGE GARCIA: That says it could be read either
18 way. And this has the problem, and that is just a post
19 hoc, we don't know what happened kind of statement. But
20 what evidence is there that it was done intentionally
21 contemporaneous with the '66 amendment process?

22 MS. BRANCH: Well, I think - - - I - - - I - - -
23 you know, there is not a lot of legislative history around
24 the 1966 amendment.

25 JUDGE GARCIA: But is there anything at all,

1 anywhere, that says - - - indicates that the - - - other
2 than I understand your argument based on the text, but is
3 there anything outside the text that indicates the
4 intention was to have the people remove that requirement?

5 MS. BRANCH: I think the closest thing we have
6 that's nearly contemporaneous is the report to the
7 delegates of the 1967 constitutional convention.

8 JUDGE GARCIA: So let's say it's accidental,
9 right? There was no intent one way or another. It's just
10 that's the result based on your language, your textual
11 argument. Going to the Chief Judge's point, is that the
12 way to get rid of a 150-year-old rule that people accept as
13 the balance between whatever benefit this legislation may
14 have, and faith in the process because of concern with how
15 it's administered? So is that accidentally stumbling into
16 removing that language? Some - - - something that then we
17 should give that effect to?

18 MS. BRANCH: I think the strongest indicator we
19 have of legislative intent is the text. And what we have
20 here is the fact that there was once language that people
21 thought required voters to exercise their right to vote in
22 a polling place in person, and that language was removed.
23 And now plaintiffs want to engage in this type of - - -

24 JUDGE RIVERA: So that - - - is your position
25 that we do not look at the legislative history? We're

1 bound by the text because the text is clear. There's no
2 requirement in the text of the Constitution.

3 MS. BRANCH: I don't think it's necessary to look
4 at the legislative history here. There certainly isn't
5 anything that says that - - - that in the legislative
6 history that adopts plaintiffs' argument. And I mean,
7 legislative history is important when there is ambiguity.
8 Here, there is no ambiguity. The text once had a
9 requirement, it no longer has it. And therefore there is
10 no requirement to vote in person in New York.

11 JUDGE SINGAS: Isn't there - - - isn't there a
12 difference between interpreting a statute and the
13 Constitution? Shouldn't we be more amenable to looking at
14 purpose and intent when considering the Constitution versus
15 the statute? Do you think that's a significant difference
16 or no?

17 MS. BRANCH: Well, I think here, when you're
18 looking at purpose and intent, you're looking at the
19 historical context of the 1966 amendment. And at that
20 time, the - - - you know, there was a provision that
21 required voting in person in the election district
22 provision. Section 2 provided exceptions to that rule.

23 JUDGE HALLIGAN: But why - - - why - - -

24 JUDGE SINGAS: I might have thought that Section
25 2 covered that?

1 MS. BRANCH: There's no indication anywhere that
2 - - - that people thought that the rule became embodied in
3 the exceptions to the rule in Section 2, and none of the
4 cases that plaintiffs cite where expressio unius is used
5 involve this court relying on exceptions to create a rule.
6 It just hasn't happened.

7 JUDGE HALLIGAN: Why is the - - - the relevant
8 reference point 1966, specifically? You know, the Supreme
9 Court has suggested looking at history and tradition to
10 understand the meaning of various constitutional
11 amendments. Why don't we look, as - - - as the Chief
12 Judge, I think, was - - - was perhaps asking, at the
13 tradition of understanding the scope of the legislature's
14 power for - - - you know, 100 or 150 years before 1966 as
15 well?

16 MS. BRANCH: I - - - I mean, I think that the
17 1966 amendment changed the understanding of the in-person
18 requirement to the - - - like all of the historical sources
19 we have, Governor Seymour, we have the Lardner case, we
20 have the commission report from 1967. And we have a 1946
21 Attorney General's opinion - - -

22 JUDGE GARCIA: What about 2021? You have 2021
23 where I think the person who introduces some of the
24 legislation says we need this because the Constitution
25 prohibits us from doing this.

1 MS. BRANCH: Right. And we do have that. But I,
2 again, I don't think that that is legally dispositive.
3 That standing alone, clearly, is not enough for plaintiffs
4 to meet their burden that the law is unconstitutional.
5 It's simply not legally dispositive. What legislators
6 thought in 2021, sixty years after Section 2 had most
7 recently been amended, it's just not legally dispositive on
8 this question. It is not enough for - - - for plaintiffs
9 to meet their burden. It's possible that the legislature
10 thought, as a political or as a legal matter, that it would
11 have been easier if no-excuse absentee voting became part
12 of the Constitution through constitutional amendment, not
13 through the legislature to foreclose a challenge such as
14 this one.

15 JUDGE RIVERA: Can I ask? What - - - earlier on,
16 in response to the Chief Judge's question, you said yes,
17 there - - - there is or something to this effect. There is
18 an argument that there was never an in-person requirement,
19 and then it just becomes a practice and an understanding.
20 What's the basis for saying there's no in-person
21 requirement?

22 MS. BRANCH: I mean, I - - -

23 JUDGE RIVERA: So if we read the Constitution
24 that way, what - - - what could it possibly be?

25 MS. BRANCH: So I think there is a basis for

1 understanding the election district provision to require
2 people to vote in their election district and not
3 necessarily at a polling place. But that is not how people
4 interpreted it. That's not what Governor Seymour thought
5 when soldiers in the Civil War needed to be authorized to
6 vote remotely. And so if the - - - if the election
7 district provision did not require in-person voting - - -

8 JUDGE RIVERA: Well, I'm sorry. You got to work
9 that one through for me. So what would that mean? That I
10 physically cannot leave the election district, but I need
11 not go anywhere to vote. What - - - what am I doing with
12 the ballot?

13 MS. BRANCH: Yeah. I - - - I mean, I think the
14 best reading - - -

15 JUDGE RIVERA: How would I get the ballot?

16 MS. BRANCH: I think the best reading is that the
17 election district provision did require in-person voting.
18 There is a reading and that is how it was understood. That
19 is what Governor Seymour thought in 1963. That's what
20 numerous historical sources have said. And so I think that
21 once that in-person voting requirement in - - - that's in
22 the election district was removed, there's no longer that
23 requirement.

24 JUDGE HALLIGAN: Do you know what the collection
25 mechanisms were for - - - for the exceptions set forth in

1 Section 2? Do you know how - - - how you would actually
2 deliver your ballot? So if you were a soldier, for
3 example, or - - - or any of the other categories set forth.

4 MS. BRANCH: My understanding is that the
5 soldiers actually voted by proxy. And so I think someone
6 delivered.

7 JUDGE HALLIGAN: Do you know if any of them were
8 by mail, any of the other exceptions?

9 MS. BRANCH: I don't know. I know that section -
10 - - what became Section 2 was extended to apply to soldiers
11 and then commercial travelers. There may have been voting
12 by mail. I - - - there is, in the legislative history of
13 Section 7, the 1894 amendment, where the "by ballot or by
14 any other such method" language was added. There is some
15 discussion that that language would allow voting by mail,
16 and no one disagreed when a legislator raised that as
17 something that might be advanced.

18 So I know it has come up in the context of the
19 legislative history of Section 7, I'm not as certain with
20 respect to Section 2.

21 CHIEF JUDGE WILSON: Thank you.

22 MS. BRANCH: Thank you.

23 MR. HAWRYLCHAK: Thank you, Your Honors.

24 There was some discussion about the role of the
25 people in the constitutional process, the role of the

1 voters in being a check on the legislature.

2 I want to talk not about the 2021 failed
3 constitutional amendment, but the 1966 amendment. And the
4 people were told what they were voting on. They were
5 voting on a three-month residency requirement. That was
6 the ballot abstract and the actual language that they voted
7 for to enact.

8 JUDGE RIVERA: But we - - - we've abandoned - - -
9 I think you have this in your brief about the intelligent
10 voter and what they knew. We've abandoned that.

11 MR. HAWRYLCHAK: I want to push back on - - -

12 JUDGE RIVERA: We've abandoned that approach.
13 What applies are our rules of construction.

14 MR. HAWRYLCHAK: I agree. And - - - and your
15 rules of construction do say that we look to the - - -
16 well, I do want to push back on that a little bit, because
17 I don't think Golden goes as far as - - - as - - - as that.
18 It - - - it - - - Golden - - - the - - - the issue in
19 Golden was particular language. And it was saying if we -
20 - - if we have particular language and there's a question
21 of - - - you know, does exactly how this applied to the
22 mayor of New York or the New York charter of the specific
23 language, we're not going to pretend that the voters had
24 this intricate knowledge of statutory interpretation and
25 would have on their own, had some thought on that.

1 But that doesn't say that the voters don't even
2 have some - - - any concept of what issue they're even
3 voting on, what topic. Here, it's a question of are they
4 voting about residency requirements or are they voting
5 about absentee balloting? Totally different subjects.

6 JUDGE RIVERA: Well, they're voting on the reform
7 to the language in Section 1.

8 MR. HAWRYLCHAK: Yes. And it specifically says -
9 - -

10 JUDGE RIVERA: And its whole cloth, as you've
11 already pointed out in your briefing, right?

12 MR. HAWRYLCHAK: It said - - - it said in
13 reference to a three-month residency requirement. That is
14 the language that was on the ballot that they were voting
15 for. Section 1, in reference to a three-month residency
16 requirement. So that's what they were told - - -

17 JUDGE RIVERA: But that's all they were voting
18 about. What about the age?

19 MR. HAWRYLCHAK: What? Age?

20 JUDGE RIVERA: Age? The change in the age.

21 MR. HAWRYLCHAK: Oh, I - - - I - - -

22 JUDGE RIVERA: They didn't understand that?

23 MR. HAWRYLCHAK: Well, it's part of the - - - the
24 - - - the eligibility requirements. It's at least in the
25 same topic - - - you know, is what I would say. But my

1 point is, there - - - there is nothing contemporaneous
2 where anyone - - - we looked to legislative intent, I - - -
3 I - - - you know, if we're going to look at the legislative
4 history, the - - - you know, the two, most they've - - -
5 they've - - - they've said there's not much legislative
6 history, there's not much to look at. But the legislative
7 history that is there, look at the sponsor's memo. If you
8 read that sponsor's memo where it breaks down exactly - - -
9 you know, it comprehensively says what's being changed and
10 makes no mention of absentee voting. It's just hard to
11 conceive how someone if - - - if - - - if the sponsor
12 thought this had anything to do with absentee voting, it
13 wouldn't have even been mentioned.

14 You can also look at the 1966 - - - there was a
15 report of a joint committee on the study of the election
16 law, where they're talking about proposed various ideas of
17 reforms, and they refer to this specific amendment urging
18 the passage of this amendment and refer to it only as
19 involving residency requirement.

20 CHIEF JUDGE WILSON: But if you thought that the
21 1894 amendment would have allowed the legislature to let
22 people who were not absent, who were present in their
23 election district, vote by some other means than going to
24 the polls. If you thought that, then the change worked in
25 1966 is pretty small, if - - - if it - - - if there's any

1 change at all.

2 MR. HAWRYLCHAK: I mean, if you thought that it
3 would - - - it would - - - it would make a number of the
4 amendments to Section 2 over the years prior to 1966
5 meaningless.

6 CHIEF JUDGE WILSON: Really only one of them, I
7 think.

8 MR. HAWRYLCHAK: Okay. Well, I - - -

9 CHIEF JUDGE WILSON: Which then - - - which then
10 fall - - - it's the other side of the four that are done
11 after 1966. Right? Then you have this kind of mess where
12 somebody or the other didn't understand the law.

13 MR. HAWRYLCHAK: So I - - - I would - - - I
14 guess, what I - - - what I would say is, is if - - - if the
15 will of the - - - the - - - you know, the intent of the
16 legislature and the will of the voters matters, then - - -
17 then we need to look at the full context in 1966 and what
18 people thought they were voting on. And - - - and again, I
19 think the question was asked before, was this an
20 intentional change to the absentee voting or was this an
21 accident? I would phrase it differently. I would say, was
22 this a secret change or an accident? Because if it was an
23 intentional, it was hidden from the voters. If you were a
24 voter in 1966 trying to do your constitutional duty of
25 being a check on the legislature and approving of a

1 constitutional amendment, in order to know that this was
2 going to have this effect, you would have had to do a
3 comparison of the text, identify this particular phrase,
4 and know the - - - the - - - you know, interpretation that
5 - - -

6 JUDGE RIVERA: You - - - you didn't know that it
7 meant the end of in-person voting. Let me go down the
8 rabbit hole with you. All it meant that it wasn't mandated
9 by the Constitution. The legislature was free because, of
10 course, Section 7 allows. Right?

11 MR. HAWRYLCHAK: I'm - - - I'm sorry?

12 JUDGE RIVERA: Section 7 allows for the
13 legislature to determine the methods of voting. So all - -
14 - all one would understand, right?

15 MR. HAWRYLCHAK: There had been numerous
16 amendments specifically pertaining to absentee voting. As
17 recently as three years earlier, in 1963, the people had
18 been asked to vote to expand the power to grant legislative
19 or absentee voting. And then in 1966 - - -

20 JUDGE RIVERA: All I'm saying is that if - - - if
21 the deletion means it's not mandatory, it allows the
22 legislature to choose to continue with in-person voting and
23 to make exceptions and to create the opportunity for access
24 to the ballot through different methods. It gives greater
25 flexibility, which at the end of the day is really the

1 wallpaper - - -

2 MR. HAWRYLCHAK: Well, I mean, the same is true -

3 - -

4 JUDGE RIVERA: - - - behind all those choices - -

5 -

6 MR. HAWRYLCHAK: - - - the same was true of - - -

7 JUDGE RIVERA: - - - it expands all.

8 MR. HAWRYLCHAK: - - - 1963 amendment and all the
9 earlier amendments. They were all permissive and didn't -

10 - -

11 JUDGE RIVERA: Yes.

12 MR. HAWRYLCHAK: - - - mandate that anything
13 would be expanded, they gave the power to expand. What I
14 would say is they - - - you know, they - - -

15 JUDGE RIVERA: Well, it could very well be that
16 the in-person voting is deleted. Once you delete that
17 language, it's eliminated the requirement in '66, and the
18 legislature is now free to choose some other method. But
19 decides not to do that for whatever reason other than in
20 particular categories of - - - of - - - for voters.

21 MR. HAWRYLCHAK: We're just saying there's - - -
22 there's - - - there's no reason to believe the legislature
23 actually thought that that's what it was doing in 1966.
24 And what I would say is they've conceded that prior to
25 1966, the - - - this power was retained by the people over

1 absentee voting, and the legislature had to go to the
2 people if they wanted to expand absentee voting. But
3 they're saying that the people gave this power up to the
4 legislature in 1966.

5 JUDGE RIVERA: Well, it is very hard to - - - to
6 read these provisions the way you suggest, given if it - -
7 - if it is this monumental, in-person voting, they should
8 say it expressly. It's very hard. And the language that
9 gets you there is deleted and not put somewhere else,
10 retained in some other way, it's very hard for me to see
11 your argument.

12 MR. HAWRYLCHAK: Well, again, and I would say
13 that - - - that by that time there was a history going back
14 fifty years of Section 2 being the locus of absentee voting
15 in the Constitution, and - - - and people repeatedly coming
16 back to Section 2 to amend it, to expand it, looking to
17 Section 2. So I - - - I think it's - - - it's just the
18 assumption that people in - - - in - - - in 1966 would have
19 put this weight on the change of wording in Section 1 as
20 having this significant effect, is just - - - there's - - -
21 there's no evidence that anybody had that thought at the
22 time. There's no reason to think that the people thought
23 they were giving up this power in 1966, just because of
24 some change of language.

25 CHIEF JUDGE WILSON: Thank you.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. HAWRYLCHAK: Thank you.

(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Stefanik v. Hochul, No. 86 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: August 02, 2024

