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State of New York

VITO J. FOSSELLA, NICHOLAS A. LANGWORTHY, JOSEPH BORRELLI, NICOLE MALLIOTAKIS, ANDREW LANZA, MICHAEL REILLY, MICHAEL TANNOUSIS, INNA VERNIKOV, DAVID CARR, JOANN ARIOLA, VICKIE PALADINO, ROBERT HOLDEN, GERARD KASSAR, VERALIA MALLIOTAKIS, MICHAEL PETROV, WAFIK HABIB, PHILLIP YAN, HING WONG, NEW YORK REPUBLICAN STATE COMMITTEE, and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Respondents,

(caption continued on next page)

BRIEF OF *AMICUS CURIAE* NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF DEFENDANT-APPELLANT AND DEFENDANTS-INTERVENORS-APPELLANTS

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

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Dated: December 13, 2024
New York, New York

-against-

CITY COUNCIL OF THE CITY OF NEW YORK,

Defendant-Appellant,

-and-

HINA NAVEED, ABRAHAM PAULOS, CARLOS VARGAS GALINDO, EMILI PRADO, EVA SANTOS VELOZ, MELISSA JOHN, ANGEL SALAZAR, MUHAMMAD SHAHIDULLAH and JAN EZRA UNDAG,

Defendants-Intervenors-Appellants,

-and-

ERIC ADAMS, in his official capacity as Mayor of New York City, and BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendants.

DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

The New York Civil Liberties Union hereby discloses that it is a non-profit, 501(c)(4) organization, and is the New York State affiliate of the American Civil Liberties Union.

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PRELIMINARY STATEMENT

In the decision under review, the Appellate Division incorrectly held that the municipal voter law at issue violates Article II, Section 1 of the New York State Constitution, which establishes the qualifications of voters. The New York Civil Liberties Union submits this brief to assist this Court in its interpretation of that constitutional provision, focusing specifically on the meaning of the term "citizen." The Appellate Division concluded that "citizen" in this section exclusively refers to citizens of the United States. Yet, the term "citizen" in the State Constitution is not—and has never been—tethered to U.S. citizenship, except where expressly qualified.

This is evident, first, from the text of the State Constitution itself. The use of the term "citizen" throughout the State Constitution shows that when the framers intended to limit its application to citizens of the United States, the text does so expressly.

Second, records of the relevant constitutional conventions reveal a considered and repeated choice not to tie the definition of "citizen" to federal citizenship.

And third, historical evidence shows that, in the period between the Supreme Court's decision in *Dred Scott v Sanford* (60 US 393 [1857], *superseded* [1868]) and ratification of the Fourteenth Amendment to the U.S. Constitution, a time when the federal government deemed Black men not to be U.S. citizens, New York allowed thousands of property-owning Black men to vote—as citizens of this state. Notably,

in response to this evidence presented by the NYCLU below, the Appellate Division mistakenly asserted that New York simply nullified the decision in *Dred Scott*, giving short shrift to one of the most celebrated decisions in this Court's history—*Lemmon v People*, 20 NY 562 [1860]. In the decade between *Dred Scott* and the ratification of the Fourteenth Amendment, this Court in the famous *Lemmon* case deftly distinguished *Dred Scott* to hold only that New York, like Missouri, had sovereign authority to "determine and regulate the *status* or social and civil condition of her citizens, and every description of persons within her territory." (*Lemmon*, 20 NY at 616). *Lemmon*'s circumscription of *Dred Scott* allowed New York to continue to extend voting rights to Black men, whom *Dred Scott* had stripped of their status as citizens of the United States, as citizens of New York State. *Id.*

The Appellate Division's constitutional ruling misunderstands both the text and history of the New York State Constitution. It should be reversed.

INTEREST OF AMICUS CURIAE

The New York Civil Liberties Union is a non-profit, non-partisan organization with more than 85,000 members and supporters and is the New York State affiliate of the American Civil Liberties Union. The NYCLU is dedicated to the principles of liberty and equality enshrined in the United States and New York State Constitutions. In support of those principles, the NYCLU has litigated on behalf of

voters in cases involving the right of electoral suffrage under New York state law, including *Palla v Suffolk County Bd. of Elections* (31 NY2d 36 [1972]); *Amedure v State of New York* (210 AD3d 1134 [3d Dept 2022]); *People by James v Schofield* (199 AD3d 5 [3d Dept 2021]); *Spring Valley Branch of the N.A.A.C.P. v Rockland County Bd. of Elections* (Sup Ct, Rockland County, Oct. 29, 2020, Thorsen, J., index No. 035092/2020); and *League of Women Voters of New York State v New York State Bd. of Elections* (2019 WL 4899034 [Sup Ct, NY County, Oct. 4, 2019, No. 160342/2018]), and in cases involving the proper interpretation of the New York State Constitution, such as *Hernandez v State of New York* (173 AD3d 105 [3d Dept 2019]). Amicus curiae brings expertise in the New York State Constitution and a strong interest in ensuring the correct analysis of the term "citizen" as used in Article II, Section 1.

ARGUMENT

I. A PLAIN READING OF "CITIZEN" THROUGHOUT THE STATE CONSTITUTION SHOWS THAT THE TERM IS NOT SYNONYMOUS WITH "CITIZEN OF THE UNITED STATES."

Article II, Section 1 of the New York State Constitution provides that "[e]very *citizen* shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election" (NY Const art

II, § 1) (emphasis added). A plain reading of the term "citizen" in this provision—particularly in the context of the State Constitution as a whole—shows that it does not impose a federal citizenship requirement. When the State Constitution limits its application to citizens of the United States, it uses the express phrase "citizen of the United States." Conversely, when there is no intent to limit prescribed rights and privileges to U.S. citizens, the State Constitution does not add this qualifier.

The term "citizen" appears twelve times in the State Constitution.[1] In three instances, the State Constitution makes express reference to United States citizenship or immigration status and in nine instances, it does not. The State Constitution qualifies the term "citizen" with reference to the United States when setting the qualifications for members of the legislature, governor and lieutenant governor, and for certain appointments to civil service (NY Const art III, § 7 ["[n]o person shall serve as a member of the legislature unless he or she is a *citizen of the United States* and has been a resident of the state of New York for five years"] [emphasis added]; *id*. art IV, § 2 ["[n]o person shall be eligible to the office of governor or lieutenant-governor, except a *citizen of the United States*"] [emphasis added]; *id*. art V, § 6 [providing specific qualifications for certain veterans who may qualify for civil service appointments]).

[1] NY Const art I, § 1; art I, § 8; art II, § 1 (twice); art II, § 5; art II, § 7; art III, § 5; art III, § 7; art III, § 19; art IV, § 2; art V, § 6; art XIV, § 5.

It is a well-established and “basic tenet of constitutional and statutory interpretation that the clearest and ‘most compelling’ indicator of the drafters’ intent is the language itself” (*Hernandez v State of New York*, 173 AD3d 105, 111 [3d Dept 2019]; *see also Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d 184, 191 [2019] [“[T]he clearest indicator of legislative intent is the statutory text . . . .]). The drafters of the State Constitution make clear when the word “citizen” is qualified by reference to the United States and use express language to accomplish this result. Pursuant to the cannon of construction of *expressio unius est exclusio alterius*, “an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (McKinney’s Cons Laws of NY, Book 1, Statutes § 240). The term “citizen” in Article II, Section 1 does not have this qualifier— “of the United States” — and thus leads to the inference that it was intentionally excluded (*see Matter of Jose R.*, 83 NY2d 388, 394 [1994]; *Kirshtein v AmeriCU Credit Union*, 65 AD3d 147, 151 [4th Dept 2009] [using this cannon to distinguish the terms “capacity” and “legal capacity” in the UCC]). If “citizen,” standing alone, were enough to mean only a U.S. citizen, it would be redundant and superfluous to qualify the term with the reference, “of the United States,” in Articles III and IV (*see* McKinney’s Cons Laws of NY, Book 1, Statutes § 231 [“In the construction of a statute, meaning and effect should be given to all its language…words are not to be rejected as superfluous

when it is practicable to give to each *a distinct and separate meaning*"] (emphasis added)).

This plain reading is further supported by the presumption of consistent usage—that "a term generally means the same thing each time it is used" (*United States v Castleman*, 572 US 157, 174 [2014] [Scalia, J., concurring]). All nine other uses of "citizen" in the State Constitution are not qualified by reference to the United States. If, as the Appellate Division concluded, "citizen" in Article II, Section 1 means "U.S. citizen," the presumption of consistent usage would require this interpretation to apply to *every* constitutional provision that uses the term. But it could not and none of the uses of "citizen" in the State Constitution that are currently not qualified by "of the United States" have *ever* been held to mean U.S. citizenship.

Reading "U.S. citizen" into each of the nine standalone uses of "citizen" would contravene the historical application of such rights to all New Yorkers. It also would lead to absurd and untenable results (*See People v Badji*, 36 NY3d 393, 407 [2021] *citing* McKinney's Cons Laws of NY, Book 1, Statutes §§ 141, 143, 145, 146 ["A construction of a statute will be rejected… if it renders the statute absurd or produces objectionable, anomalous, or unjust results"]).

For example, Article I, Section 8 establishes that "*[e]very citizen* may freely speak, write and publish his or her sentiments on all subjects…" (NY Const art I, § 8 [emphasis added]). The free speech protection is understood to be—and has

historically been—applied to New Yorkers generally, without regard to whether they are U.S. citizens (*see, e.g.*, *Holmes v Winter*, 22 NY3d 300, 307 [2013] [referencing New York's "long tradition, with roots dating back to the colonial era, of providing the utmost protection of freedom of the press"]; *O'Neill v Oakgrove Constr., Inc.*, 71 NY2d 521, 531 [1988] [Kaye, J. concurring] [contemplating free press with respect to "the citizens of this State under the State Constitution"]). Indeed, the free speech provision of the State Constitution is known to provide broader protections than the First Amendment, which protects non-U.S. citizens (*see Underwager v Channel 9 Australia,* 69 F3d 361, 365 [9th Cir 1995] ["the speech protections of the First Amendment at a minimum apply to all persons legally within our borders"]; *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 249 [1991], citing *O'Neill*, 71 NY2d at 529 n 3 ["[T]he 'protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by' the Federal Constitution"]).

Another example is Article XIV, Section 5, which states, "A violation of any of the provisions of this article may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of *any citizen*" (NY Const art XIV, § 5 (emphasis added)). Article XIV governs stewardship of the environment—specifically forest and wildlife conversation in New York State—and Section 5 gives "citizens" standing to sue for

a violation of any provision therein. It would be absurd to suggest that only U.S. citizens can file lawsuits on behalf of the environment.

Based on the text of the New York State Constitution, it is clear the word "citizen" in Article II, Section 1 without qualification or restriction reflects a deliberate choice not to limit it to U.S. citizens. The Appellate Division's support for declining to interpret the term "citizen" in this way is an observation that Article III, Section 19 contains a reference to the term "citizens of this state." (Joint Record on Appeal ["R"] 1833–34).[2] But the reference to "citizens" in Article III, Section 19 does not pertain to their civic or social status, but rather their legal status as natural persons who are parties in litigation, in contrast to the state itself as a party to litigation. *See* NY Const art III, § 19 ("No claim against the state shall be audited, allowed or paid which, as between citizens of the state, would be barred by lapse of time.") Accordingly, the Appellate Division's determination that "the reference to "citizen[s]" in article II, section 1, pertains to United States citizens" is unsupported and should be rejected.

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[2] The Appellate Division also cites to this Court's decision in *People v Pease* (27 NY 45 [1863]) to support its claim that 'citizen[s]' in Article II, Section 1 refers exclusively to United States citizens. But in that case, this Court was not interpreting the definition of "citizen" in the New York State Constitution. As Delegate to the 1867 New York State Constitutional Convention Alvah Worden later observed, to the extent that rights and privileges of New York state citizenship were defined in terms of U.S. citizenship at that time, it was a "creature of statute," not a product of the State Constitution. *See infra*, Section II(C).

II. THE CONSTITUTIONAL CONVENTIONS THAT FRAMED ARTICLE II, SECTION 1 CONFIRM THAT "CITIZEN" WAS—AND CONTINUES TO BE—INTENTIONALLY DIVORCED FROM U.S. CITIZENSHIP.

Given the plain language of the State Constitution, this Court need not look further to determine that "citizen" in Article II, Section 1 is not limited to U.S. citizens. But if there were any doubt, the records of the constitutional conventions of 1821, 1846, and 1867 that introduced and interpreted the term "citizen" further support this reading and show a considered and repeated choice by the framers for the word *not* to be tied to U.S. citizenship. In discussing amici's brief below, the Appellate Division ignored the 1821 and 1847 constitutional conventions and acknowledged, but failed to grapple meaningfully with, the records of the 1867 convention. (R. 1833–34). Read together and in full, this constitutional history supports the interpretation that the term "citizen" was always meant to maintain New York State's authority to determine the social and civic status of people within its borders.

A. In 1821, Delegates to the Constitutional Convention Chose to Ascribe State Citizenship to Article II, Section 1.

The term "citizen" was first introduced in the 1821 Constitution and the legislative intent is traced to that convention[3] (Affirmation of Veronica Salama

[3] The first New York State Constitution of 1777 enfranchised "every male inhabitant" who met specific residence and land ownership requirements to vote for assemblymen (NY Const art VII [1777]). It was not until the 1821 State Constitution that the term "citizen" was introduced (*See* NY Const art II, § 1 [1821]; *id.* art III, § 2).

[“Salama Affirmation”], Exhibit H, Robert Allen Carter, *New York State Constitution: Sources of Legislative Intent* [“Carter”] 13 [2d Ed, 2001]).[4] At the time, there was a widespread understanding of two distinct citizenships: state citizenship and federal citizenship. The Convention Act of 1821, which recommended holding a constitutional convention, was passed on March 13, 1821. All eligible persons who cast a ballot for the convention were administered an oath that required them to state, in part, “I ___________, do solemnly swear or affirm (as the case may be), that I am a natural born, or naturalized citizen of the state of New York, or of one of the United States (as the case may be), of the age of twenty-one years, or upwards…” (Salama Affirmation, Exhibit J, *Manual for the use of the Convention to revise the Constitution of the State of New York, convened at Albany, June 1, 1846, Convention Act of 1821* 25-26 NEW YORK STATE LIBRARY DIGITAL COLLECTIONS [1846], https://perma.cc/7TS6-NCHA).

At the same constitutional convention, the phrase “native citizen of the United States” was added to the gubernatorial qualifications provision in Article III, Section 2, making clear that the framers knew how to qualify the term “citizen” when they

[4] The Court of Appeals has repeatedly cited this treatise on the New York State Constitution as the authoritative source on legislative intent (*see LeadingAge New York, Inc. v Shah*, 32 NY3d 249, 279 n 2 [2018] (citing Carter); *Maron v Silver*, 14 NY3d 230, 251 [2010] [same]).

so intended (*compare* NY Const art III, § 2 [1821] *with id*. art II, § 1).[5] The juxtaposition of the unqualified word "citizen" in the voter qualifications provision of the 1821 Constitution against the phrase "native citizen of the United States" in the gubernatorial qualifications provision reveals that the delegates to the 1821 Constitution understood a distinction between the two terms.

Moreover, the delegates to the 1821 constitution convention deliberately chose not to qualify, "male citizen" in the suffrage provision with "of the United States," despite the existence of this language in at least five state constitutions. The manual to the 1821 convention included a digest of the "qualification of electors" provision(s) in the existing state constitutions (Salama Affirmation, Exhibit B, *Convention Manual: A Constitutional Guide to the Objects of the New York State Constitution, Synopsis of the Principal Features of the Constitutions of the United States and the Several States* 25-27 [1821]) and the delegates referenced those existing state constitutions throughout the convention proceedings.[6] Indeed, by this time, the constitutions of Maine, Mississippi, Missouri, Alabama, and Indiana had already limited suffrage to "citizen of the United States" in some form (*id.*). By

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[5] The New York State Constitution of 1846 ("1846 Constitution") then amended the gubernatorial qualifications provision to remove the word, "native" prior to "citizen of the United States" (*compare* NY Const art IV, § 2 [1846] *with* NY Const art III, § 2 [1821]). Still, the word "citizen" in Article II, Section 1 of the 1846 Constitution remained unqualified (*id.*).

[6] *See generally*, *A Report of the Debates and Proceedings Of the Convention Of the State Of New-York: Held At the Capitol, In the City Of Albany, On the 28th Day Of August, 1821* NEW YORK STATE LIBRARY DIGITAL COLLECTIONS [1821], https://perma.cc/2CZM-6WL7.

contrast, the Massachusetts constitution allowed "every male citizen," subject to specific restrictions, to vote (*id.*). Still, the delegates to the 1821 constitutional convention voted to amend the State Constitution's suffrage provision from the 1777 language of "every male inhabitant" to "every male citizen," rather than to "every male citizen *of the United States*" (NY Const art II, § 1 [1821]).

B. In 1846, Delegates to the Constitutional Convention Acknowledged that the State Constitution Did Not Define "Citizen" in Article II, Section 1 to Mean U.S. Citizen and Affirmed That Interpretation.

Records from the Constitutional Convention of 1846 provide a nearly contemporaneous understanding of "citizen" in Article II, Section 1 as introduced in the 1821 Constitution. Delegates to the 1846 constitutional convention expressed both an understanding that the term was purposefully untethered from U.S. citizenship, as well as an intention to maintain that separation.

The delegates to the 1846 constitutional convention proposed and unanimously approved a resolution about citizenship and the right of suffrage entitled, *The Naturalization of Citizens,* which explicitly addressed the issue of United States citizenship. The resolution proposed: "That the committee on the elective franchise inquire into the expediency of providing in the constitution for the exercise of the right of suffrage, *so that in no instance shall the exercise of that right depend on the naturalization laws of congress*" (Salama Affirmation, Exhibit D, *Debates and proceedings in the New-York State Convention, for the revision of the*

Constitution, 74 NEW YORK STATE LIBRARY DIGITAL COLLECTIONS [1846]) (emphasis added).

Alvah Worden, a prominent lawyer and member of the legislature, was the sponsor of this resolution and explained its purpose.[7] In his supporting speech, he specifically noted that, as written, the State Constitution conferred the right of suffrage on "citizens" but "did not say whether persons should be citizens of this state or of the United States" (*id.*). Thus, the New York State Constitution afforded the legislature space to define contours of citizenship. In turn, the state legislature had "held that no person not natural born can become a citizen of this State except through the action of the federal Congress" (*id.*). Delegate Worden acknowledged that, to the extent the rights and privileges of New York state citizenship had been defined in terms of U.S. citizenship, that had been a creature of statute, rather than a result of the framing in the State Constitution. However, to avoid having the federal Congress "legislate against the express will of the people of this state," Worden asserted it would be "expedient" if, in the new constitution, they "should have a fixed rule of suffrage, as applicable to that class of persons called aliens—and that their

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[7]Salama Affirmation, Exhibit F, L.B. Proctor, *Lives of Eminent Lawyers and Statesmen of the State of New York, with Notes of Cases Tried by Them, Speeches, Anecdotes, and Incidents in Their Lives* 594 [1882]. Proctor describes Worden's supporting speech as one of "great power and force" and notes that the resolution "became one of the provisions of the new Constitution" (*id.* at 594). Worden was later appointed as one of three commissioners to simplify the state's legal codes (*id.* at 597-98).

right to vote *should in no case depend on the action of the federal Congress*" (*id.*). Worden's proposed resolution was unanimously approved (*id.*).

That the Appellate Division ignored the 1821 and 1847 constitutional conventions—and thereby disregarded the intent of the framers of the term "citizen" in the State Constitution—cannot be squared with the Appellate Division's recognition that, "it must be presumed that the framers [of the constitutional provisions] understood the force of the language used and, as well, the people who adopted it." (R. 1833). Here, it is evident that the framers of the State Constitution understood there to be a distinction between the term "citizen of the United States" and the standalone "citizen" and intentionally applied the latter.

C. In 1867, Delegates to State Constitutional Convention Rejected Tethering "Citizen" in Article II, Section 1 to U.S. Citizenship to Avoid Disenfranchising Black Men Who Were Stripped of U.S. Citizenship by the Dred Scott Decision.

Constitutional framers reaffirmed that "citizen" in Article II, Section 1 was not limited to U.S. citizenship at the 1867 convention. The 1867 New York State constitutional convention took place at a critical juncture for the meaning of citizenship and voting rights in both the state and federal constitutions. In the abhorrent *Dred Scott* decision of 1857, the U.S. Supreme Court ruled that Black people were incapable of being U.S. citizens but could nonetheless be citizens of a state with "rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State" (*Dred Scott v Sandford*, 60

US 393, 404-05 [1857], *superseded* [1868]). *Dred Scott* remained the law of the land until the ratification of the Fourteenth Amendment in 1868. The records of the 1867 New York State constitutional convention make clear that the delegates understood, explicitly debated, and reaffirmed their desire to maintain a separation between "citizen" and "U.S. citizen" in Article II, Section 1 of the State Constitution, just as they had done in 1846.

An amendment to add "of the United States" after "citizen" in Article II, Section 1 was proposed—and failed—for the first time at the 1867 constitutional convention (Salama Affirmation, Exhibit G, *Proceedings and Debates of the Constitutional Convention of the State of New York Held in 1867 and 1868* ["1867 Convention Proceedings"], 517-18 HATHI TRUST DIGITAL LIBRARY). The amendment's sponsor, a Mr. Fuller, viewed this change as a powerful way to affirm the U.S. citizenship of Black New Yorkers, in a forceful and defiant response to *Dred Scott.* He stated, "I am not in favor of making any such concession . . . in deference to [*Dred Scott*] that a colored man is not a citizen of the United States . . . I am unwilling to admit or concede that there is any such doubt" (*Id.* at 517).

However, Charles J. Folger, a delegate to the convention who was also a Republican member of the state senate and later Chief Judge of the Court of Appeals

(1880-81)[8] spoke forcefully against the proposed amendment (1867 Convention Proceedings, 517-18). He noted that declining to insert the phrase "citizen of the United States" offered a more legally defensible position to ensure that Black men would continue to be able to vote in New York (*id*.). That there was "an express decision" on the judicial records of this country and on the records of the executive department "to the effect that the colored man is not a citizen of the United States," was not something that could be ignored. According to Folger, while there were principled reasons to push back against the *Dred Scott* decision, attempting to do so in this manner—namely, by qualifying "citizen" with the phrase "of the United States"—could have the adverse effect of disenfranchising Black men, who were already considered citizens of this state and enjoyed the suffrage guaranteed to them by the State Constitution and the laws of this state. (*Id*.) Folger stated:

> "If it be true—I do not say it is or is not—but it may by possibility be true, that the colored man is not a citizen of the United States. And then if we put that phrase into our Constitution and say that because he is a citizen of the United States, he shall be a voter here—while we have come together with that subject in our minds among others, and with the desire to give the colored citizens of this State the right to vote, *we are using language which may defeat the exercise of that right.*"

(*Id.* (emphasis added).)

[8] *See Charles James Folger*, HISTORICAL SOCIETY OF THE NEW YORK COURTS, https://history.nycourts.gov/biography/charles-james-folger/.

So, rather than adding a phrase that is not in the State Constitution at all "and never was from 1777," keeping "the language of the Constitution of 1846," would require the delegates to give nothing up. The understanding of "citizen," as it currently stood in the voter qualifications provision, had already been settled. Folger concluded: "I say, it is part of the wisdom to eliminate all such doubts from our Constitution and plant ourselves on certainties, which we surely do plant ourselves upon when we adhere to the *language which has been settled for twenty years."* (*Id*. [emphasis added].) Fuller's proposed amendment failed, (*id*.), and "Citizen of the United States" was not included in the proposed Constitutional amendment.

Importantly, that the 1867 constitutional convention refused to adopt the qualifier "of the United States" to the word "citizen" was *not*—as the Appellate Division seems to suggest[9]—a decision to *give* Black men the right to vote in New York but rather a decision to *maintain* that right through the continued use of the "well settled" language of "citizen" in the State Constitution.

In 1967, an amendment to qualify "citizen" by reference to U.S. citizenship was proposed once more (*See Official Text of the Proposed Constitution to the State of New York*, 7 [Nov. 7, 1967]). This amendment was also rejected, this time by the

[9] (R. 1834) (Misquoting Folger's opposition to the proposed constitutional amendment in 1867 as a concern that adding the qualifier "of the United States…might defeat the exercise of *giving* black men the right to vote in New York" (*id*.).) But a review of Folger's speech as excerpted above reveals that he was concerned the proposed qualifier might "defeat the exercise of that right [to vote]." (1867 Convention Proceedings, 517-18).

voters of New York State.[10] Thus, since the term's first appearance in Article II, Section 1 of the New York State Constitution in 1821, "citizen," has never been qualified by reference to the United States.

The Appellate Division makes a distinction without a difference in noting that the 1867 constitutional convention's "decision not to adopt the amendment [limiting the term "citizen" to "citizen of the United States]" was . . . due to concerns over disenfranchising black males" as opposed to an intent to "refer[] only to New York State citizens." (R. 1833–34.) Indeed, it is *only* by ensuring that the State Constitution's reference to "citizen" in its suffrage article was more expansive than "citizen of the United States" that New York was able to protect Black male enfranchisement against *Dred Scott*.

The 1867 constitutional convention recognized that the potential impact of *Dred Scott* on New York's democracy was real. So did this Court in the *Lemmon* case discussed in the following section. Both institutions understood that the State Constitution protects—and must protect—New York's ability to provide for a pluralistic democracy against the threat of discriminatory federal authority.

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[10] *See Votes Cast For and Against Proposed Constitutional Conventions and Amendments* NYCOURTS.GOV 37, https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_Votes-Cast-Conventions-Amendments-compressed.pdf (reflecting that the proposed 1967 Constitution was rejected on November 7, 1967 by a vote of 3.5 million against to 1.3 million in favor).

III. AFTER THE *DRED SCOTT* DECISION, BLACK MEN VOTED IN NEW YORK STATE BETWEEN 1857 AND 1868 AS CITIZENS OF THIS STATE.

Between 1857 and 1868—a time when the United States Supreme Court denied Black people their status as U.S. citizens—thousands of Black men still cast ballots in New York State, as citizens of this state.

It is widely understood that the shameful *Dred Scott* decision in 1857 "stripped the citizenship of free Blacks born in the United States whom Northern states considered to be citizens" (Rose Cuison-Villazor, *Rejecting Citizenship*, 120 Mich. L Rev 1033, 1052 [2022], *citing* Martha S. Jones, *Birthright Citizens* [2018]). Notwithstanding this ruling, Black men continued to vote in New York between 1857 and 1868 ("the *Dred Scott* period").

The most famous recorded example of non-U.S. citizen voting in New York during the *Dred Scott* period occurred when Frederick Douglass, the renowned abolitionist and New York State citizen, cast his ballot in Rochester, New York in the presidential election of 1864 (*see* Salama Affirmation Exhibit C, David W. Blight, *Frederick Douglass: Prophet of Freedom* 445 [2018]). Douglass was hardly the only Black man to cast a ballot in New York during the decade in which Black people could not be U.S. citizens. In a speech in September 1858, William J. Watkins, an African American abolitionist and minister, addressed the New York State Suffrage Association and advised the "eleven thousand colored voters of this

State" to vote for the Republican party (Salama Affirmation, Exhibit I, Van Gosse, *The First Reconstruction: Black Politics in America from the Revolution to the Civil War* 435 [2021]; *see also id*. at 477 ["In 1858, [B]lack New Yorkers occupied a momentarily privileged position, which internal disagreement only strengthened; no one could take for granted their 'eleven thousand votes'"]). Indeed, it is well-documented that between 1832 and 1860, Black voters in New York consistently played either an active or influential role in the presidential elections (Salama Affirmation Exhibit E, Hanes Walton, Jr., *The African American Electorate: A Statistical History* 129-30 [2012]).

Black New Yorkers voted during the *Dred Scott* period as "citizens" within the meaning of the voter qualifications provision of the State Constitution. Importantly, New York did not nullify *Dred Scott* in permitting Black men to vote, as the Appellate Division asserts without any citation (see R. 1833 ("New York State understood before the enactment of the Fourteenth Amendment that the Dred Scott decision was a blight that should not be followed"). Instead, this Court managed to navigate New York on a more just course between *Dred Scott*'s abhorrent, dehumanizing holding and the anti-Union approach of simply refusing to follow a Supreme Court decision. In the famed *Lemmon* Slave Case, this Court acknowledged the vitality of *Dred Scott* and its applicability to New York through the Supremacy Clause. (*Lemmon v People*, 20 NY 562 [1860]). Still, this Court did not *overrule*

Dred Scott but distinguished it, noting that the precedent did not altogether impair New York's ability to exercise authority "[a]s a sovereign State [to] determine and regulate the *status* or social and civil condition of her citizens, and every description of persons within her territory" (*Lemmon*, 20 NY at 616). In allowing Black men to vote during this time, New York State was exercising its authority as a sovereign state to determine the status of its own citizens, and to interpret its own constitution.

If the Appellate Division's unsupported and ahistorical conclusion that "citizen" in Article II, Section 1 refers only to "United States citizen" were correct—which it is not—it would stand to reason that this Court, when it decided *Lemmon*, as well as this State, when it allowed Black men to vote during the Dred Scott period, brazenly violated the New York State Constitution. Article II, Section 1 of the New York State Constitution does not bar the legislature from enacting non-U.S. citizen voting. And any holding that "citizen" in the State Constitution means U.S. citizenship is inconsistent with the historical record.

CONCLUSION

The Appellate Division's interpretation of "citizen" is contradicted by the plain text of the New York State Constitution, the records of the constitutional conventions that framed the term "citizen" in Article II, Section 1, this Court's rationale in the celebrated *Lemmon* decision, and the historical practice of Black male suffrage in New York State during the *Dred Scott* period. Article II, Section 1

of the New York State Constitution does not bar a legislature from enfranchising non-U.S. citizens to vote in municipal elections because the term "citizen," is not—and has never been—tethered to U.S. citizenship. For the reasons articulated in this brief, the Appellate Division's decision cannot hold constitutional muster. It should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to the State of New York, Court of Appeals Rules of Practice, 22 NYCRR Part 500.1(j) and Part 500.13(c)(1) and (c)(3), I hereby certify that the foregoing brief was prepared on a word processor using Times New Roman, a proportionally spaced typeface, with a point size of 14 for the body (double-spaced), 14 for block quotations (single-spaced), and 12 for footnotes (single-spaced). The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the disclosure statement, table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules and regulations, etc. is 5,522.

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