APL-2024-00033

To be argued by:
MACKENZIE FILLOW
15 minutes requested

Court of Appeals
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,

against

CITY COUNCIL OF THE CITY OF NEW YORK,

Defendant-Appellant,

(caption continued inside)

BRIEF FOR THE CITY COUNCIL OF THE CITY OF NEW YORK

MURIEL GOODE-TRUFANT
Acting Corporation Counsel of the City of New York
Attorney for City Council
100 Church Street
New York, New York 10007
Tel: 212-356-4378 or -0817
mfillow@law.nyc.gov

RICHARD DEARING
DEVIN SLACK
MACKENZIE FILLOW
of Counsel

July 10, 2024

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

Defendants-Intervenors-Appellants,

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

Defendants.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

PRELIMINARY STATEMENT

New York City is uniquely diverse. Over three million New Yorkers are foreign born, and nearly half of local businesses are owned by immigrants. In five city council districts, non-U.S. citizens make up about a third of the adult population. These New Yorkers pay billions in taxes and yet have no say in local policies on public safety, garbage collection, or housing—all matters that affect their day-to-day lives. To address this anomalous situation and make the City more democratic, the City Council enacted Local Law 11 of 2022, which allows New Yorkers with green cards or work authorizations to vote in the City's municipal elections.

This Court should reverse the order of the Appellate Division, Second Department, to the extent the three-justice majority found and declared that Local Law 11 violates the State Constitution and the Municipal Home Rule Law. To make local self-government more effective, the Constitution's article IX gives municipalities significant home-rule power to experiment with local elections, and it expressly requires courts to construe that power liberally to effectuate the article's core purposes of promoting autonomy and

self-governance at the local level. The Appellate Division majority explicitly refused to follow this directive, interpreting the Constitution in a limiting way when it is reasonably susceptible to a construction that promotes effective local governance by enabling cities to expand local voting pools to capture people who have a real stake in local policies.

The Appellate Division majority also erred in finding that the Municipal Home Rule Law required the City to hold a referendum before implementing the local law. While laws that change the "method" of electing officers are subject to referendum, Local Law 11 does not make such a change. Local officers will still be elected the same way, by secret ballot where voters rank their choices in primaries and special elections, and by traditional means in general elections. A change in the composition of the voter pool does not change the "method" of election.

The cornerstone of democracy is the right to vote. By permitting New Yorkers with green cards or work authorizations to vote, Local Law 11 strengthens our City's democracy and ensures that our neighbors have a voice in the policies that affect them.

QUESTIONS PRESENTED

1. Is Local Law 11 constitutional, where the text of article IX of the State Constitution (a) grants local governments broad home-rule authority to regulate their own government and affairs; (b) further commands that those powers must be read liberally to effectuate article IX's core purpose of promoting effective local self-government; and (c) may reasonably be construed to permit the City to expand the local voter pool to enhance democratic accountability in municipal elections?

2. Was the City authorized to increase the local voter pool without holding a referendum, where the personal characteristics of eligible voters do not relate to the "method" of electing office-holders?

STATEMENT OF THE CASE

A. Our nation's long tradition of non-U.S. citizen voting

Non-U.S. citizens have been permitted to vote through much of our nation's history (Record on Appeal ("R") 373).[1] As one scholar

[1] Only in 1996 did the federal government bar non-U.S. citizens from voting in federal elections. 18 U.S.C. § 611.

explained in an amicus curiae brief below, as many as 40 states and territories permitted non-U.S. citizens to vote for a century and a half after the Founding, even in federal elections (Amicus Brief for Professor Ron Hayduk ("Hayduk Br.") 5-6). Such a policy was fully in line with the principle that government becomes legitimate through the consent of the governed (*id*. at 13).[2]

In New York State, citizenship was not mentioned in the State Constitution until 1821. And long after that, non-U.S. citizens who had children in New York City schools were permitted to vote in local school board elections (for over 30 years, from 1969 to 2002) until the structure for school governance fundamentally changed. L. 1969, ch. 330.

Today, a number of municipalities across the country permit non-U.S. citizens to vote in certain elections (R374-85; Hayduk Br. 11-12). Most famous is perhaps Takoma Park, Maryland, which re-instituted non-U.S. citizen voting for local elections in 1992.[3] That

---

[2] *See also* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PENN. L. REV. 1391, 1441-42 (1993).

[3] Raskin, note 2 at 1396.

policy has since spread throughout Maryland and to the District of Columbia and Vermont (R375). *See* Marisa Iati, *Judge Throws Out Challenge to D.C.'s Noncitizen Voting Law*, WASHINGTON POST, Mar. 21, 2024. Chicago and San Francisco permit non-U.S. citizens to vote in certain school-related elections (R375).

B. The enactment of Local Law 11, which permits New Yorkers with green cards and work authorizations to vote in local elections

New York City is home to nearly a million lawfully present adults who are not U.S. citizens (R303). That's well over 10% of the voting-age population.[4] Many of these New Yorkers cluster in particular neighborhoods, meaning a U.S. citizenship requirement prevents huge percentages of the population from voting in certain city council districts. As of 2020, for example, approximately 45% of adults in district 21—which includes parts of East Elmhurst and Jackson Heights—were not U.S. citizens.[5] In district 20, which

---

[4] *See* NYC Planning, *2020 Census Results for New York City: Key Population & Housing Characteristics*, https://perma.cc/XUU9-3XBW.

[5] U.S. Census Bureau, 2016-2020 American Community Survey, https://perma.cc/BKR6-Q8NL; *see also* Mayor's Office of Immigrant Affairs, State of Our Immigrant City (2018), https://perma.cc/2PAB-UJK7.

includes Flushing, about 39% of adults were not U.S. citizens.[6] Districts 25 (also Jackson Heights), 26 (Sunnyside and Astoria), and 38 (Sunset Park) all had similarly high proportions of non-U.S. citizens.[7] No other place in the state had such a large number of lawfully present adults who could not vote. The problem that the City faced then—and continues to face today—is inherently local and the result is decidedly undemocratic.

These New Yorkers are integral to our community. They work as doctors, nurses, teachers, clerks, and delivery workers, contributing enormously to the economy and paying billions in taxes (R301, 303, 309). Their children attend our schools. During the darkest days of the pandemic, these New Yorkers helped keep the City going: 20% of the City's essential workers are not U.S. citizens (*id.*). Yet they have no voice in local policies on public safety, garbage collection, or housing—all issues critical to day-to-day life in the City.

---

[6] U.S. Census Bureau, 2016-2020 American Community Survey, https://perma.cc/BKR6-Q8NL.

[7] *Id.*

To address this acute problem, the City Council exercised its home rule powers to enact Local Law 11 of 2022 (R279-89). Designed to promote effective local self-government by better aligning the voter pool with the people who have a legitimate stake in local policies, the law allows New York City residents who hold green cards or work authorizations, and who have lived in the City for at least 30 days before an election, to vote in municipal elections only, including for mayor, public advocate, comptroller, borough president, and councilmembers (R279-89). Non-citizens cannot vote for any federal or statewide office, consistent with the law's focus on enhancing local self-governance. Nor can they seek or hold any office at any level.

Green cards are generally difficult to obtain and require sponsorship by a family member—usually a spouse—or an employer.[8] The most common work authorizations are H visas. H-1Bs require a job offer from a U.S. employer, proof of a bachelor's degree in a specialized field, and evidence of a lack of qualified local

[8] U.S. Citizenship & Immigration Services, *Green Card Eligibility Categories*, https://perma.cc/8NN6-6PKD.

applicants.[9] H-2A and H-2B work visas are for seasonal temporary workers and also require proof that the employer cannot find enough workers locally.[10] Asylum seekers must wait at least 180 days after applying for asylum before they can obtain work authorization.[11]

C. This lawsuit and the rulings below

Plaintiffs—politicians, political entities, and residents—brought suit claiming that Local Law 11 violates the State Constitution, the Election Law, and the Municipal Home Rule Law (R1400-12). Several individuals who would be entitled to vote in municipal elections under the law intervened as defendants (R1528). On motions for summary judgment, Supreme Court, Richmond County, agreed with plaintiffs that the local law violated the State Constitution, the Election Law, and the Municipal Home Rule Law, and issued three separate declarations to that effect

---

[9] U.S. Citizenship & Immigration Services, *Working in the United States*, https://perma.cc/QUY8-BM4V.

[10] *Id.*

[11] U.S. Citizenship & Immigration Services, *Asylum*, https://perma.cc/63ZX-5DN5.

(R10-22). The court also declared the law void and permanently enjoined the City from implementing it (R22).

The Appellate Division, Second Department, modified Supreme Court's order. On the one hand, all four members of the Appellate Division panel agreed that Supreme Court's declaration regarding the Election Law should be vacated, and that the City was instead entitled to a declaration that Local Law 11 does *not* violate the Election Law (R1838-39, 1853-58). Plaintiffs have not sought to cross-appeal from that aspect of the ruling.

On the other hand, the three-justice majority affirmed Supreme Court's two other declarations, over a dissent. The majority first found that article II, section 1 of the Constitution precludes the City from enfranchising non-citizens, even though section 1's plain language does not prohibit anyone from voting and this Court has held that it does not apply to local elections (R1832-36). In finding that the local law also violates article IX, the majority explicitly refused to read that provision in a liberal, autonomy-promoting manner and instead adopted a more restrictive reading (R1836-37). As to the Municipal Home Rule

Law, the majority found that the law changes the "method" of electing an officer (R1840). This holding was based, in part, on the majority's incorrect belief the local law permits non-citizens to seek and hold elective office (R1840-41).

The partial dissent determined that there was at the very least reasonable doubt about the local law's constitutionality, given this Court's precedent holding that article II, section 1 does not apply to local elections and the fact that article IX must be interpreted liberally and can plausibly be read to permit the City to enfranchise non-citizens (R1846-53). The dissent also found that no referendum was required since the local law did not change the method for electing officers but rather just increased number of people who could vote (R1858-61). The dissent thus would have declared that the local law does not violate the Constitution or the Municipal Home Rule Law (R1861-62).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal because the Appellate Division's February 21, 2024, order finally determined

the proceeding and directly involves a substantial constitutional issue (R1832-38, 1842, 1846-53). *See* CLPR 5601(b)(1).

ARGUMENT

POINT I

LOCAL LAW 11 IS CONSTITUTIONAL

Municipal legislation like Local Law 11 is entitled to a presumption of constitutionality. *People v. Stephens*, 28 N.Y.3d 307, 312 (2016). Indeed, plaintiffs bear a heavy burden here: they must establish that it is "impossible" to reconcile Local Law 11 and the State Constitution. *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022). This Court, in reviewing plaintiffs' claim, must take every reasonable step possible to reconcile the two. *Id.*

When it comes to municipal experimentation with elections specifically, this Court has warned that courts "should be very slow in determining that [a law] is unconstitutional." *Johnson v. New York*, 274 N.Y. 411, 430 (1937). Where reasonable doubt exists, the law must be upheld. *Id.* at 433 (Lehman, J. concurring). As shown below, Local Law 11 presents no constitutional problem at all, and plaintiffs certainly have not established that it is "impossible" to reconcile the law with the Constitution.

A. The local law is well within the City's established authority to experiment and innovate with regard to local elections.

This Court long ago declared that "local problems … can best be handled locally." *Baldwin v. City of Buffalo*, 6 N.Y.2d 168, 172 (1959). That is our point exactly, and the Appellate Division majority ignored it. New York City has a representation problem of a scope that exists nowhere else in the state. Huge numbers of New Yorkers lawfully live and work here but have no say in the local policies that govern their daily lives. This is a uniquely local problem, and the City is constitutionally empowered to solve it. *See City of N.Y. v. Patrolmen's Ben. Ass'n*, 89 N.Y.2d 380, 287 (1996) (cities have "significant autonomy" to act on "local matters").

Indeed, even before constitutional amendments expanded municipal home rule powers in 1963, courts were clear that local governments had the right to experiment and innovate in local elections. *See, e.g.*, *Blaikie v. Power*, 13 N.Y.2d 134, 144 (1963) (approving the City's "latest experiment" with elections); *Baldwin*, 6 N.Y.2d at 173-74 (alteration of election districts was "an affair of the municipality" in which "the State has no paramount interest");

Johnson v. New York, 274 N.Y. 411, 430 (1937) (City entitled to "experiment" with proportional voting); *see also Cort v. Smith*, 249 A.D. 1, 3 (4th Dep't 1936) (county's "experiment" with election "example of genuine home rule").

In *Bareham v. City of Rochester*, 246 N.Y. 140 (1927), for example, this Court held that Rochester had the power to supersede State law and completely revamp its government, including adopting a system of non-partisan elections and changing the way the head of the executive branch was selected. Such a change, the Court noted, concerned the "government or affairs of the municipality." *Id*. at 149.

Similarly, in *Blaikie v. Power*, 13 N.Y.2d 134 (1963), this Court approved New York City's enactment of a councilmember-at-large system, which was intended to make local government more effective by promoting minority representation. When it came to local elections, the City was empowered to act on the "widespread feeling that [minority] representation can play an important role in democracy." *Id*. at 144.

These principles of local flexibility and autonomy with regard to local elections became only clearer with the constitutional expansion of municipal home rule powers in 1963. *See, e.g.*, *Resnick v. Ulster County*, 44 N.Y.2d 279, 286 (1978) (cities have "great autonomy in experimenting" with election practices); *McDonald v. NYC Campaign Fin. Bd.*, 40 Misc. 3d 826, 838 (Sup. Ct. N.Y. Cnty. 2013) (local governments have "room to experiment" with election systems), *aff'd*, 117 A.D.3d 540 (1st Dep't 2014); *Roth v. Cuevas*, 158 Misc. 2d 238, 244 (Sup. Ct. N.Y. Cnty.) (cities have power to fashion "almost any form of government … for the achievement of good for their community"), *aff'd*, 197 A.D.2d 369 (1st Dep't 1993), *aff'd*, 82 N.Y.2d 791 (1993). The City has the power to experiment with local elections to make local self-governance more effective. And that is what it has done here.

B. Nothing in the State Constitution prevents the City from enfranchising non-U.S. citizens for the purpose of local elections.

The Appellate Division majority ignored these foundational principles when interpreting the State Constitution. Indeed, the majority went astray at the outset by beginning its analysis with

the wrong part of the Constitution, focusing on article II, section 1, which governs statewide elections, and treating article IX, which governs municipal home rule powers, as an afterthought (R16-17).

1. Article IX can reasonably be read to permit the City to expand the local electorate.

Article IX addresses the rights and powers of local governments and is therefore the starting point for considering the City's legislative powers. Article IX was added to the State Constitution in 1963 in its present form with the intention of significantly expanding municipal rights. *Black Brook v. State*, 41 N.Y.2d 486, 487-88 (1977); N.Y. Legis. Servs., Constitutional History: Article IX, § 1, Public Papers of Nelson A. Rockefeller, 1962 at 824. Section 1—which includes the operative provisions here—is commonly referred to as the "Bill of rights for local governments," and consistent with that label it does not purport to constrain the authority and autonomy of local governments, but rather enumerates various "rights, powers, privileges and immunities" granted to them. N.Y. Const. art. IX, § 1.

Article IX also contains an explicit rule of liberal construction. The article is intended to further "[e]ffective local self-government," and it specifies that local governments' "rights, powers, privileges and immunities," including those enumerated in section 1, "shall be liberally construed." *Id.*, art. IX, §§ 1 & 3(c); *see also Resnick*, 44 N.Y.2d at 287-88. In other words, if an interpretation of a provision favoring effective local self-governance and home rule is reasonably available, it must be adopted—even if it may not be the only, or even the best, interpretation available. *Cf. Albunio v. City of New York*, 16 N.Y.3d 472, 478 (2011) (explaining liberal construction of the New York City Human Rights Law); *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 662-63 (2006) (holding liberal construction of Lemon Law required pro-plaintiff reading).

The matter addressed by Local Law 11—defining the local electorate to whom local officials are democratically accountable—is a foundational question of self-governance where article IX's express rule of liberal construction should operate at the apex of its strength. To be sure, article IX establishes an important floor: all citizens who meet certain age and residency requirements must be

permitted to vote in local elections. But the article's text can reasonably be interpreted to allow local governments to exercise a degree of self-determination as to whether to *expand* the voter pool beyond that floor, and therefore it must be so construed under article IX's rule of liberal construction.

As noted, the overarching thrust of article IX is empowering "[e]ffective local self-government." N.Y. Const. art. IX. To that end, article IX broadly empowers local governments to manage their own "property, affairs, or government," as well as the well-being of "persons" within their jurisdiction. *Id*. § 2(c).

Against that backdrop, the pertinent provisions of article IX here are as follows. First, section one provides that the local government's legislative body, as well as any local officers who are not appointed, shall be elected "by the people thereof." *Id.* § 1(a) & (b). Second, article IX's list of definitions indicates what several terms used in the article "mean or include." Among those terms is "the people"—those who select local legislators and other local elected officials—which is defined to "mean or include" the "[p]ersons entitled to vote as provided in section one of article two

of this constitution." *Id.* § 3(d)(3). And article II (which governs statewide elections) simply states that "[e]very citizen shall be entitled to vote," subject to certain age and residency requirements. *Id.* art. II, § 1.[12]

The Second Department held that these provisions together can only be read to *constrain* local autonomy and self-governance by requiring that local voting pools always be made up of U.S. citizens and no one else. But as we will show, the provisions are instead susceptible to a liberal construction that *promotes* article IX's core principles of local autonomy and self-governance by enabling cities to expand local voting pools beyond U.S. citizens.

---

[12] The "literal language" of article II does not compel a restrictive reading of that article either. *Anderson v. Regan*, 53 N.Y.2d 356, 361-62 (1981). Taken purely at face value, article II is phrased as an affirmative right: "Every citizen shall be entitled to vote at every election for all officers elected by the people," subject only to age and residency requirements. N.Y. Const., art. II § 1. In fact, several states have recently amended their constitutions after recognizing that phrases like "every citizen can vote" do not prohibit non-citizens from voting. In 2020, for example, Florida changed "every citizen … shall be an elector" to "[o]nly a citizen … shall be an elector." Fla. Const. Art. VI, § 2. Alabama and Colorado did the same in 2020, while Arizona and North Dakota made the same change in 2019. Patty Nieberg, *Three States Pass Amendments that "Only Citizens" Can Vote*, ASSOCIATED PRESS Nov. 7, 2020, https://perma.cc/2KY2-QPSY. Such amendments would be unnecessary if the text "every citizen" necessarily meant "only citizens."

The crux of the matter is that, as the dissent below recognized, the phrase "mean or include" in article IX's definitional provision is "inherently ambiguous" (R1850). *See Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934). While "mean" is more limiting, the word "include" is a term of enlargement that "contemplates the addition of something else." *Bank of America v. Kessler*, 39 N.Y.3d 317, 325 (2023); *see also Cahill v. Rosa*, 89 N.Y.2d 14, 21 (1996) (refusing to read "include" in a limiting way); *Matter of Juarez v. NYS Office of Victim Servs.*, 36 N.Y.3d 485, 500 n.4 (2021) (Wilson, J., concurring) (noting that the word "include" in a definition is often meant to be expansive). Thus, article IX's definition of "the people" who select local elected officials can reasonably be read to require that it "include" all citizens entitled to vote under the terms of Article II, but not to compel that local governments limit the franchise only to those persons for local elections.

Plaintiffs have all but conceded the key points in this argument. Below, they openly admitted that "mean" and "include" can have "significantly different definitions" that are "to some degree incompatible" (Appellate Division Respondents' Brief 29). To

be sure, plaintiffs argued for a more restrictive reading of "mean or include," but they nonetheless recognized that a restrictive reading is not the only permissible one, readily acknowledging that "include" can be used to introduce a non-exhaustive set (Appellate Division Respondents' Brief 29). Plaintiffs' argument therefore withers under article IX's express rule of liberal construction.

In short, the term "people" is plainly susceptible to a liberal construction, since it can be understood to identify a set of persons who must be included—citizens—without precluding the addition of others. Whatever "mean or include" may signify in other contexts, reading "include" in the liberal manner required by the particular context here—where article IX's core principles of local autonomy and self-governance are directly at stake—is the only approach that honors article IX's express rule of construction.[13]

---

[13] The legislative history of article IX provides no information about the intent behind the cross-reference to article II. But the provision was added during the civil rights era, two years before the federal government enacted the Voting Rights Act to prohibit race discrimination in voting. This context provides support for the idea that the reference to article II was intended to prevent municipalities from disenfranchising Black voters. And while the drafters who initially inserted the word "citizen" into article II in 1821 were motivated by anti-immigrant sentiment, *see* Charles. Z. Lincoln, 2 Constitutional History of N.Y. at 124 (1906), there is no need to impute the animus of earlier years to the drafters of article IX in 1963.

Without finding that this reading is "impossible," *White*, 38 N.Y.3d at 216, the Appellate Division majority rejected it (R1836). The court explicitly refused to construe the City's powers liberally, and instead adopted a more restrictive interpretation (R1836-37). Relying on *United States Steel v. Gerosa*, 7 N.Y.2d 454, 459 (1960), the majority held that "mean or include" is restrictive, such that "the people" *means* the citizens referred to in article II and no one else—effectively erasing the word "include" from article IX (R1836). But *Gerosa* involved a tax statute, and municipal taxing powers must be strictly construed. *Expedia, Inc. v. City of N.Y. Dep't of Fin.*, 22 N.Y.3d 121, 126-27 (2013). So it made sense to adopt a more restrictive reading of the phrase "mean or include" in that case. The opposite holds here, where article IX mandates a liberal autonomy-promoting construction, which supports the adoption of a more expansive interpretation of the phrase to further the constitutional purpose of effective local self-government.

The Appellate Division majority also justified its refusal to read article IX liberally by citing *Matter of Baldwin Union Free School District v. County of Nassau*, 105 A.D.3d 113 (2d Dep't 2013),

aff'd, 22 N.Y.3d 606 (2014) (R1837), where the court held that a county could not supersede a State tax law. But as just discussed, municipal tax powers are construed narrowly, not liberally. This case does not involve taxation, and *Baldwin* does not justify ignoring the Constitution's direction that municipal powers under article IX must be liberally construed.

Article IX gives the City broad power to legislate regarding its own "government," "membership and composition of its legislative body," and the "government" and "well-being of persons" within its boundaries. N.Y. Const. art. IX, § 2(c)(i), 2(c)(ii)(2), & 2(c)(ii)(10). Allowing New Yorkers with green cards or work authorizations to vote in local elections—and thus have a say in how they are governed and promote the efficacy of local self-governance—easily falls within the ambit of the City's powers. Local Law 11 relates to the government of the City, and the government and well-being of the persons who live here.

2. Article II, section 1 applies to statewide elections only and is no bar to the local law.

The Appellate Division also wrongly held that the local law is inconsistent with article II, section 1 (R1834-35). But article II's drafters never intended section 1 to apply to local elections, as this Court and others have recognized. *See Spitzer v. Fulton*, 172 N.Y. 285, 288-89 (1902) (section 1 was intended to apply to elections that "affect the public affairs of the state," not those involving the "private affairs" of municipalities). Indeed, if article II, section 1 independently applied to local elections, there would have been no reason for article IX to cross-reference it.

Article II was first enacted in 1821. At that time, section 1 provided that "[e]very male citizen" who met certain other requirements "shall be entitled to vote," with additional restrictions on Black men, who had to own property and pay taxes. We cannot find anything in the convention documents specifically addressing the application of this provision to municipal elections, but the contemporaneous State Legislature consistently acted as though article II, section 1 left room for different voting rules in cities, towns, and villages.

Just six months after article II was enacted, long before home rule, the Legislature passed "An Act respecting the Election of Charter Officers in the City of New-York." L. 1822, ch. 233. Among other things, that law explicitly recognized that the New York City Charter was (at that time) a lawful source of voting rights, apart from the new Constitution. The law acknowledged that there were persons who were "qualified by the charter" to "vote for charter officers," and it provided that those people could continue to vote for charter officers. *See id.* § VI. At the very least, the enactment reflects a legislative understanding that Article II did not set the metes and bounds for local elections.

Consistent with this understanding, the Legislature regularly enacted voter qualifications for local elections around the State that were different from those set out in article II, section 1. In 1823, for example, the Legislature established the Town of Catlin and set out who could vote at that town's meetings. L. 1823, ch. 175. The voter pool was defined to include any "male inhabitants" who "are liable to pay taxes." *Id.* § IV. This is both broader than the constitutional voter pool (it includes inhabitants rather than only citizens, with no

restrictions on the voting rights of Black men) and also narrower (only taxpayers). The Legislature evidently did not believe that article II, section 1 limited its authority when it came to defining the voter pool in local elections.

Over the next decades, the Legislature continued to impose local voting qualifications that differed from those set out in the Constitution. These laws often did not limit the vote to citizens and imposed other requirements not found in article II. *See, e.g.*, L. 1832, ch. 217 § 12 (providing only "a taxable inhabitant" could vote for certain propositions in the Village of Genesco); L. 1842, ch. 127 § 1 (person must have paid road tax to vote for elected officers in Village of Lansingburgh); L. 1857, ch. 148 § 5 (every "inhabitant" of certain age who owned property or paid taxes could vote for elected officers in town of Newport). All of these laws would have been unconstitutional if article II, section 1 applied to local elections.

But in fact, this Court has recognized that laws restricting or expanding the local voter pool were permissible because section 1 was intended to apply to statewide elections, not to local elections. In *Spitzer v. Fulton*, 172 N.Y. 285 (1902), the Court affirmed the

constitutionality of a state law (L. 1889, ch. 787) that authorized only property owners to vote on certain propositions in the Village of Fulton. That law did not violate the Constitution because, the Court explained, article II merely defined the "general qualifications" for elections or questions that "affect the public affairs of the state." 172 N.Y. at 289. It was not intended to apply to elections "relating to the financial interests or private affairs of the various cities or incorporated villages of the state." *Id*. The Court noted that the Legislature had consistently passed laws addressing who could vote in local elections, and no one had ever claimed that such laws violated the Constitution. *Id*. at 290.

The Appellate Division majority misread *Spitzer*, finding that it applied only to local elections involving a municipality's finances and not to local elections for officers (R1835). To be sure, the case involved a challenge to a law providing that only taxpayers could vote on certain propositions that would lead to debt or increased taxation. 172 N.Y. 288-89. But plaintiffs' central contention was that this requirement was unconstitutional because article II, section 1 prescribed "the right to vote for elective officers and upon

all questions which may be submitted to the vote of the people." *Id.* at 289. And this Court rejected that contention in expansive language, finding that the "article was not intended to define the qualifications of voters upon questions relating to the financial interests or private affairs of the various cities or incorporated villages of the state." *Id.* While the Court emphasized that this is "especially" true where a question "relates borrowing money or contract debts," the Court's interpretation of article II was not so limited. *Id.*

Even putting that aside, this Court relied on the language in *Spitzer* when addressing the constitutionality of voting rules for councilmembers in *Johnson v. City of New York*, 274 N.Y. 411 (1937). The Court there quoted *Spitzer's* holding that article II, section 1 applies only to elections that "affect the public affairs of the state." 274 N.Y. at 419-20. The Court relied on *Spitzer* again decades later in *Blaikie v. Power*, 13 N.Y.2d 134, 140-41 (1963), another case involving the election of councilmembers. The concurrence in *Blaikie* said it more directly: article II "is limited in its application to elections involving state officers or state issues."

Id. at 144. The Appellate Division majority was thus wrong to find that *Spitzer*'s logic is inapplicable to the election of city officers.

Article II, section 1 has been amended over the years, but not in any way that suggests an intent to sweep in municipal elections. Rather, the statewide electorate has been broadened by the removal of race- and gender-based voting restrictions. Article II, section 1 continues to apply only to statewide elections. *See* Temporary Commission on the Revision and Simplification of the Constitution: First Steps Toward a Modern Constitution, 1959 N.Y. Legis. Doc. No. 58 at 35-36 (noting the "status quo" that article II applied only to statewide elections and not local ones). This Court should be reluctant to reverse such a longstanding interpretation of the Constitution.

Nor does section 1's plain language require another result, as the majority wrongly found (R1834). While section 1 applies to "every election for all officers elected by the people," *the people* in this context refers to the People of New York State, as the dissent found and even the majority conceded (R1834, 1848). Contrary to

the majority's position, it would be inaccurate to describe New York City voters as "the people of the State of New York."

The majority also erroneously relied on article II, section 7 to find that section 1 applies to local elections (R1834). Section 7 addresses the *manner* of voting, not *who* can vote. It provides that voting must generally be conducted in some way that preserves secrecy (R1849). The fact that section 7 exempts some town elections from the secrecy requirement in no way suggests that section 1 applies to local elections, especially given this Court's extensive precedent holding otherwise. In finding otherwise, the majority disregarded this Court's instructions to be "very slow" in determining that a local election law is unconstitutional. *Johnson v. New York*, 274 N.Y. 411, 430 (1937).

POINT II

LOCAL LAW 11 DOES NOT CHANGE THE METHOD OF VOTING AND THUS DID NOT REQUIRE A REFERENDUM

The Appellate Division majority also erred in ruling that the City was required to hold a referendum before allowing non-citizens to vote. While a referendum is required where the City changes the

method of electing an officer, Local Law 11 makes no such change. It merely expands the pool of voters; it does not change the method by which local officers are elected, which continues to be by secret ballot.

Municipal Home Rule Law § 23 requires a referendum for local laws that make certain changes to the structure of government. *See Mayor of City of N.Y. v. Council of the City of N.Y.*, 9 N.Y.3d 23, 33 (2007); *see also Molinari v. Bloomberg*, 564 F.3d 587, 610-11 (2d Cir. 2009). As this Court explained when interpreting an earlier version of the law, representative government is "the rule" and direct action through referendum is "the exception." *McCabe v. Voorhis*, 243 N.Y. 401, 413 (1926). Otherwise "there would be more referendums than any community could well manage." *Mayor of City of N.Y*, 9 N.Y.3d at 33.

A referendum is required for any local law that changes the "method of nominating, electing or removing an elective officer." Mun. Home Rule Law § 23(2)(e). We can find no case discussing this provision, but the plain language and structure of the statute

indicate it is aimed at the process for choosing and removing officers, not at the personal characteristics of the voter pool.

Starting with plain language, by common usage, a "method" is "a procedure or process for attaining an object." Merriam-Webster Dictionary. The method of election is thus *how* the will of the voters is determined. In New York City, that is by secret ballot, with voters ranking their choices in primaries and special elections and indicating their preferred winner or winners in general elections.

The Constitution itself supports this reading: Article II, section 7 addresses the "manner of voting," which "shall be by ballot, or by such other *method* as may be prescribed by law, provided that secrecy in voting be preserved" (emphasis added). *See also Burr v. Voorhis*, 229 N.Y. 382, 395 (1920) (referring to "the ballot or method of voting"); *People ex. Rel Deister v. Wintermute*, 194 N.Y. 99, 108 (1909) (discussing "methods of voting otherwise than by ballot"). When the City makes changes to the method of election, it must hold a referendum, as it did when it switched to ranked choice voting for primary and special elections. *See* Vivian Wang, *NY Election Results: Voters Approve All 5 Ballot Measures*,

N.Y. TIMES Nov. 5, 2019. But an expansion of the pool of persons who are eligible to vote does not change the *method* of election.

By way of analogy, consider CPLR 304, which sets out the "method" of commencing an action or special proceeding. That provision describes how one initiates a case: by summons and complaint or by petition. The personal characteristics of the plaintiff or petitioner do not determine the method of commencement. *See also Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253, 274 (2022) (distinguishing between the method by which an act is done and the persons involved); *Lepkowski v. State*, 1 N.Y.3d 201 (2003) (defining "manner" to mean "the way in which something is done or takes place").

In addition to the plain language, the structure of the statute also indicates it is aimed at how officials are elected and not at the characteristics of the voting public. A referendum is required for changes to the "method of nominating, electing or removing an elective officer." Mun. Home Rule Law § 23(2)(e). These three actions—nominating, electing, and removing—are all aimed at the

how an official gets into, or out of, office. They say nothing about voter attributes.

Moreover, when the Legislature wants to address the makeup of a particular group, it knows how to do it. Municipal Home Rule Law § 23(b) requires a referendum for changes to "the membership or composition of the legislative body." The Legislature could easily have required a referendum for any change to the voter pool, but it never enacted such a law.

The Appellate Division majority disagreed, but it never actually explained how the characteristics of the voter pool relate to the *method* of voting, except to say that the local law changed "the election process" (R1840). But a referendum is not required for every change to "the election process"—only for those changes that are specifically listed in the Municipal Home Rule Law. Requiring a referendum for any change to "the election process" would greatly expand the use of referenda and bog down municipal governments. For similar reasons, this Court has cautioned against adopting overly expansive views of the referendum requirement. *Mayor v. Council*, 9 N.Y.3d 23, 33 (2007); *see also Benzow v. Cooley*, 12 A.D.2d

162 (4th Dep't 1961) (refusing to construe referendum requirement broadly), *aff'd*, 9 N.Y.2d 888 (1961). And in any event, the local law does not actually change the election process in any way, as the dissent recognized (R1859-60). Candidates will be nominated in the same way, they will try to persuade voters in the same way, and voters will choose the winner in the same way. The voter pool will just be slightly larger.

The majority also wrongly believed that the local law somehow authorized non-citizens to hold local elective offices, positing that if non-citizens are authorized to vote in local elections, then it "necessarily follows" that they can hold local elective offices (R1841). No party made such an argument, and for good reason: it's not true. The qualifications to hold office are set out in Public Officers Law § 3. The local law did not purport to amend that State law, nor does the City have the authority to do so.

The majority's misunderstanding about officer qualifications led it to conclude that the local law will have "far-reaching implications" (R1841). But whether a referendum is required does not depend on how far-reaching the law is; that would be an

unworkable standard. Whether a law has "far-reaching implications" is not one of the statutory criteria under the Municipal Home Rule Law. And it is important that the criteria that *are* found in the Municipal Home Rule Law be given an objective meaning in accordance with their terms, rather than one that turns on subjective or free-floating policy views about whether a law makes a large change or something less than that. Local governments need clarity in deciding whether they must hold a referendum or not. They cannot be required to guess whether a court will think the change is a big deal.

Ultimately, distorting the Municipal Home Rule Law to compel a referendum based on changes to the electorate makes no sense. The City of New York is constantly growing and changing. People move here and families grow, others move away or die, and certain neighborhoods expand while others contract. The personal characteristics of the electorate are thus constantly in flux, not frozen in amber. Quite sensibly, the law does not require a referendum based on changes in the electorate.

CONCLUSION

This Court should modify the order below and declare that Local Law 11 does not violate the Constitution or the Municipal Home Rule Law. The Court should grant summary judgment to defendants and deny summary judgment to plaintiffs.

Dated: New York, NY
July 10, 2024

Respectfully submitted,

MURIEL GOODE-TRUFANT
Acting Corporation Counsel
of the City of New York
Attorney for City Council

By: _____
MACKENZIE FILLOW
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-4378
mfillow@law.nyc.gov

RICHARD DEARING
DEVIN SLACK
MACKENZIE FILLOW
of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 7,198 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

MACKENZIE FILLOW