APL-2024-00033

State of New York
Court of Appeals

VITO J. FOSSELLA, NICHOLAS A. LANGWORTHY, JOSEPH BORRELLI, NICOLE MALLIOTAKIS, ANDREW LANZA, MICHAEL REILLY, MICHAEL TANNOUSIS, INNA VERNIKOV, DAVID CARR, JOANN ARIOLA, VICKIE PALLADINO, 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,

Defendants-Appellants,

- 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.

BRIEF FOR AMICI CURIAE LEGAL SCHOLARS RICHARD BRIFFAULT, NESTOR DAVIDSON, JOSHUA DOUGLAS, CLAYTON GILLETTE, AND RODERICK HILLS IN SUPPORT OF DEFENDANTS-APPELLANTS AND DEFENDANTS-INTERVENORS-APPELLANTS

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PRELIMINARY STATEMENT

Amici urge a simple but fundamental principle of statutory construction: Where state law does not plainly specify otherwise, municipal law presumptively controls the selection of municipal officers and legislators. This principle—which we call the "local elections presumption"—is deeply rooted in precedent, state constitutional text, and the structure of home rule.

Courts in New York and numerous other states have long adopted this presumption, acknowledging that, absent a clear indication of legislative intent to the contrary, state law empowers local governments to set their own rules for local elections. The New York Constitution itself reflects this presumption in Article IX, §3(c), which commands that local powers be liberally construed. This requirement serves as an interpretive tiebreaker: For matters of predominantly local concern, courts must resolve statutory and constitutional ambiguities in favor of local control. The regulation of elections for local offices unquestionably falls within the ambit of this constitutional requirement.

This presumption protects not only local self-governance but also the text and purpose of the New York Constitution. Municipal laws must make way when the state speaks clearly about its intent to displace local authority. But where state law is ambiguous, then the New York Constitution, by its terms, favors local control over

judicial speculation about any unwritten preemptive effect of such an ambiguous state law, especially where a decision predominantly affects local residents with no spillover effect to other localities.

The Appellate Division ignored the local elections presumption when it construed Article II, §1 of the New York Constitution to supplant Local Law 11 of 2022. The decision by the City of New York to extend voting rights to noncitizens for local elections falls squarely within the subject matter to which the local elections presumption applies. In failing to read state law in light of this presumption, the lower court substituted judicial fiat for constitutional text, usurping the decision-making authority that the New York Constitution and state law have left to the City of New York.

INTEREST OF AMICUS CURIAE

Amici curiae are professors of local government law. Specifically, the amici are:

- Richard Briffault, the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. He is the coauthor of a major casebook, *State and Local Government Law,* and has published numerous law review articles on state and local government issues.

- Nestor M. Davidson, the Albert A. Walsh Chair in Real Estate, Land Use, and Property Law at Fordham University School of Law and the Faculty Director of the Urban Law Center. Professor Davidson's scholarship focuses on state and local government law, with an emphasis on local constitutional law and governance.

- Joshua Douglas, the Ashland, Inc-Spears Distinguished Research Professor of Law at University of Kentucky Law School. He is the author of numerous articles on local government law, including municipal powers to define the franchise for local elections.

- Clayton P. Gillette, the Max E. Greenberg Professor of Contract Law at New York University School of Law. He is the author of a major casebook, *Local Government Law: Cases and Materials*, and numerous articles on state and local government law issues, including the proper scope of local government authority and the allocation of powers between state and local governments.

- Roderick M. Hills, Jr., the William T. Comfort III Professor of Law at New York University Law School.

Amici do not have a direct personal stake in this litigation. Instead, they have a scholarly interest in explaining and defending the appropriate allocation of powers between state and local governments, based on decades of teaching, researching, and

authoring leading articles, books, and casebooks on local government law. Although each amicus has focused on different legal issues in their individual writing, all amici endorse the principle that the officials presumptively best suited to regulate the process of selecting local officials are those who are elected by residents of the local jurisdiction most affected by that process. This brief advances amici's scholarly interest in defending this principle as a basis for home rule in New York and other states.

ARGUMENT

I. THE APPELLATE DIVISION ERRED IN IGNORING THE PRINCIPLE THAT MUNICIPALITIES' POWERS OVER THE SELECTION OF THEIR OWN OFFICERS AND LEGISLATORS MUST BE BROADLY CONSTRUED.

In concluding that state law preempted Local Law 11, the Appellate Division ignored the local elections presumption—the home rule principle that municipalities' powers to define the rules for their own officers' elections must be broadly construed.

Amici urge this Court to reaffirm the local elections presumption for three reasons. First, the principle reflects the structure of local government law reflected in not only New York state courts' precedents but also the broader consensus on local government law throughout the nation. Second, the presumption allows courts to avoid judicial inquiries into unwritten constitutional or statutory purposes while

maintaining the appropriate balance between state and local interests. Finally, the principle is the soundest reading of the command in Article IX, §3(c) of the New York Constitution that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."

A. Courts have long adopted the presumption that the selection of municipal officers is a predominantly local concern operating at the heart of home rule.

Cases in New York and numerous other states make clear that, under home rule, local governments enjoy especially strong authority over local elections. The New York Court of Appeals has repeatedly rejected arguments that the New York's Constitution or Election Law preempts local governments' election rules. In fact, for at least 120 years, New York law has accorded to local governments the power to depart from statewide rules in regulating local elections because of the inherently local character of such elections. These precedents protect local control over a wide variety of rules governing the selection of local officers, including decisions about how local legislators should be replaced, whether to adopt a council-manager form of government, and whether to elect a local legislature through a system of proportional representation. See, e.g., *Resnick v. County of Ulster*, 44 N.Y.2d 279, 285 (1978) (recognizing as a "guiding legal principle" that local law controls selection of county officers and construing broadly power of county to create rule for filling vacancies occurring in the county legislature different from that provided

by state constitution); *Bareham v. City of Roches*ter, 246 N.Y. 140, 148-49, (1927) (holding that city can adopt council-manager form of government, despite conflicting provisions in N.Y. Election Law, because of the requirement that local power over local elections be liberally construed); *Johnson v. City of New York*, 274 N.Y. 411, 430 (1937) (upholding system for election through proportional representation in New York City Council against argument that it was inconsistent with popular election under Article II, §1).

Particularly relevant here, the New York Court of Appeals recognized 120 years ago that the qualifications to vote on local matters need not follow lockstep the qualifications to vote for state office. *Spitzer v. Village of Fulton*, 172 N.Y. 285, 289-90 (1902). The *Spitzer* Court explained that qualifications to vote in village elections need not follow those in Article II, §1 of the New York Constitution because state law "is general, relating to the whole state" whereas provisions defining local suffrage are, "in effect local, relating only to the cities and villages of the state." *Id.*

As amici's scholarship has documented, these precedents reflect a home rule principle that specifically cautions against state preemption of local laws governing the selection of local officers. The basis for this local elections presumption is twofold: First, the predominance of local residents' interests over statewide concerns, and second, the absence of spillover effects on other local governments. As Professor Richard Briffault has explained in his survey of home rule caselaw

from across the United States, state courts have repeatedly recognized that "local control of local governance or politics is both of central importance to the local self-determination that is home rule while simultaneously posing little or no threat or cost to the localities or the state beyond local borders." Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 19 (2006); see also NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 62 (2020) (stating that the structuring of local governments "is a purely local matter, having little or no extralocal effect, and it is one that local people are best suited to determining"); Joshua A. Douglas, *Local Democracy on the Ballot*, 111 NW. U. L. REV. ONLINE 173, 175 (2017) (highlighting local democracy reforms and explaining that "local laws that enhance democratic participation by expanding the electorate or reducing campaign finance barriers to running for office epitomize the benefits of local democracy and deserve judicial deference").

Courts throughout the nation have similarly endorsed the proposition that local elections primarily implicate local, not statewide, interests, and have therefore applied the local elections presumption to favor municipal laws on election matters. *See, e.g.*, *Cook-Littman v. Board of Selectmen*, 328 Conn. 758, 771, 778, 184 A.3d 253, 261, 265 (2018) (permitting a town charter provision for filling a vacancy on the town governing board to prevail over conflicting state law and recognizing local government as a "matter of purely local concern"); *Nutter v. Dougherty*, 595 Pa. 340,

361, 938 A.2d 401, 414 (2007) (upholding Philadelphia's campaign finance law against preemption and stating that "[w]e cannot stress enough that a home rule municipality's exercise of its local authority is not lightly intruded upon, with ambiguities regarding such authority resolved in favor of the municipality"); *Johnson v. Bradley*, 4 Cal.4th 389, 14 Cal Rptr. 2d 470, 841 P.2d 990 (Cal 1992) (holding that California's ban on public funding of candidates did not preempt a Los Angeles program of public funding for municipal election candidates); *Strode v. Sullivan*, 72 Ariz. 360, 368, 236 P.2d 48, 54 (1951) ("We can conceive of no essentials more inherently of local interest or concern to the electors of a city than who shall be its governing officers and how they shall be selected."); *State* ex rel. *Hackley v. Edmonds*, 150 Ohio St. 203, 215, 80 N.E.2d 769, 774 (1948) ("It seems to us that there could not be a more forthright statement to the effect that the selection of municipal officers is a matter of purely local concern"); *State v. Callahan*, 1923 OK 1010, 96 Okla. 276, 221 P. 718 (finding that the nomination and election of municipal officers is a matter of purely municipal concern).

Importantly, recognizing the centrality of local election matters to local governance, the New York Court of Appeals has warned that "even in the era when a very narrow interpretation was given to the home rule provisions, municipalities were accorded great autonomy in experimenting with the manner in which their local officers, including legislative officers, were to be chosen." *Resnick*, 44 N.Y.2d at

286 (rejecting a narrow reading of two counties' powers to overhaul significantly their method of filling vacancies in county legislatures). This longstanding tradition of home rule autonomy over local elections, which has spanned more than a century and survived shifting policies on the powers of local governments, further supports the presumption against preemption of local autonomy in this area. See *Town of Aurora v. Village of East Aurora*, 32 N.Y.3d 366, 375 (2018) ("[I]t is a cardinal principle of statutory interpretation that the intention to change a long-established rule or principle is not to be imputed to the legislature in the absence of a clear manifestation" (quoting *In re Delmar Box Co.*, 309 N.Y. 60, 66 (1955)).

The local elections presumption aligns with New York courts' more general skepticism about state laws preempting "core powers of local governance." *Wallach v. Town of Dryden*, 23 N.Y.3d 728, 743 (2014). Local elections are not the only subject for which New York courts have adopted a presumption against state preemption. For instance, in *Wallach*, the New York Court of Appeals held that New York's Oil, Gas and Solution Mining Law did not preempt a town's zoning law prohibiting oil and gas drilling within the town's jurisdiction despite an apparently sweeping clause stating that the law "supersed[es] all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries." ECL §23-0303(2). In rejecting preemption, the *Wallach* Court emphasized that zoning was one of the town's "core powers of local governance," the preemption of which would

require a plain statement from the state legislature. 23 N.Y.3d at 743. *Wallach* noted that "we do not lightly presume preemption where the preeminent power of a locality to regulate land use is at stake," requiring instead "a clear expression of legislative intent to preempt local control over land use." *Wallach*, 23 N.Y.3d at 743 (citation and internal quotation marks omitted).

As precedents dating back to the early twentieth century indicate, the Court of Appeals' recognition that local elections are also one of the "core powers of local governance" presumptively controlled by local law. This local elections presumption is at least as well-established as the presumption against preemption of local land use law.

B. The local elections presumption promotes stability in the law and strikes the right balance between competing interests.

The local elections presumption—favoring local regulation over local elections—not only faithfully reflects New York precedents and longstanding home rule principles but also makes practical sense. The rule promotes stability in the law by serving as an interpretive tiebreaker, keeping courts out of the business of guessing about constitutional or statutory purposes based on otherwise ambiguous text. It also successfully protects state supremacy over statewide interests while deferring to localities on issues of core local concern.

Virtually every state court has recognized that state laws sometimes implicitly preempt local laws when the latter frustrate or conflict with the purposes of the former. Paul Diller, *Intrastate Preemp*tion, 87 B.U. L. REV. 1113, 1140-57 (2007) (describing implied preemption doctrine across numerous states). This principle, known as implied preemption, requires a judicial determination about whether the state legislature intended to preempt local law. Such judicial inquiries have produced a notoriously murky body of caselaw guided by few clear principles and resulted in guesswork into unwritten legislative intentions. See Richard Briffault, *Home Rule for the Twenty-first Century*, 36 URB. LAWYER 253, 265 (2004) (noting that "preemption cases on balance seem more ad hoc than principled"); George Vaubel, *Towards Principles of Restraint Upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643, 685-86 (1993) (describing "vehement criticism" and "confusion" generated by implied preemption doctrine).

The local elections presumption limits these difficult inquiries by providing a simple tiebreaking principle for resolving any ambiguities in state law. Where a state statutory or constitutional provision is otherwise ambiguous, courts should presume that it preserves the core powers of local governments such as local governments' power to control their own local elections. Because of the strong local interest in local elections, courts should only find preemption where there is unambiguous evidence of a constitutional or statutory purpose to set aside state law.

The local elections presumption not only simplifies the judicial task but also fully preserves the New York legislature's supremacy over local governments. The New York Constitution places no limit on the state legislature's power to regulate local affairs through general laws. N.Y. Const. Art. IX, §2(b)(2) (conferring on state legislature "power to act in relation to the property, affairs or government of any local government" by general law); see also *City of Amsterdam v. Helsby*, 37 N.Y.2d 19, 26 (1975) (noting that Article IX "makes it abundantly clear that the Home Rule powers will sustain an exercise of local authority . . . only to the extent that such exercise is not inconsistent with any general law enacted by the Legislature"). Recognizing the preeminent role assigned to the state legislature, New York courts have deferred to the state legislature's judgment about what constitutes a statewide concern that is sufficiently weighty to justify even a special law that overrides a local government's power over its own property, affairs, and government. *Greater N.Y. Taxi Ass'n v. State of N.Y.*, 21 N.Y.3d 289, 301-03, 308 (2013) (upholding special law creating taxi medallion for New York City's Outer Boroughs); *Adler v. Deegan*, 251 N.Y. 467, 478 (1929) (upholding Multiple Dwelling Law applicable only to New York City's tenement housing). The local elections presumption preserves this power of implied preemption manifested by unambiguous evidence of a statutory purpose to set aside discordant local laws. See, e.g., *People v. Diack*, 24 N.Y.3d 674, 677 (2015) (holding that state's "comprehensive and detailed statutory and

regulatory framework for the identification, regulation and monitoring of registered sex offenders prohibits the enactment of a residency restriction law" by local government).

Under this principle of state supremacy, the state constitution or legislature has the power to displace local rules simply by saying so in clear terms or by enacting a comprehensive regulatory scheme that obviously has the purpose of displacing state law. See, e.g., *Diack*, 24 N.Y.3d at 682-83 (inferring field preemption from multiple sources including Governor's Approval Memo in Bill Jacket stating that purpose of state law was to protect affordable housing for sex offenders from "well-intentioned" but overly restrictive local regulations). The local elections presumption merely limits judicial power to set aside local laws based on the court's speculation about unwritten and ambiguous constitutional or statutory purposes underlying ambiguous text. In fact, replacing judicial guesswork on preemptive intent with the requirement of clear textual commands was one of the major purposes of home rule. *See, e.g.*, *City of Oakbrook Terrace v. Suburban Bank & Trust Co.*, 364 Ill. App. 3d 506, 514, 845 N.E.2d 1000, 1007 (2006) ("The intent and purpose of the home rule provisions is to severely limit the judiciary's authority to preempt home rule powers through judicial interpretation of unexpressed legislative intent").

The State Constitution could, of course, expressly bar local governments from extending suffrage in municipal elections to noncitizens. Likewise, the State

Legislature, if it so desired, could expressly prohibit localities from expanding local voting rights to noncitizens. For the court to infer such a prohibition absent such plain indications of preemptive intent, however, would substitute the judiciary's own view of the matter for the plain constitutional or statutory text, thereby upsetting the proper balance between state and local authority. The local elections presumption thus makes for clearer law and appropriately balances significant competing interests.

C. The presumption also reflects the New York Constitution's command that local power over matters of local concern be liberally construed.

The local elections presumption is also part of constitutional text. Article IX, § 3(c) of the New York Constitution provides that the powers conferred by Article IX should be "liberally construed." Read in light of New York's precedents and constitutional text, this broad construction requirement applies with special force to local governments' power to define how their officers are selected.

Article IX specifically guarantees to local governments the power to "adopt local laws," "provid[e] by law" for the selection of local officers, and control the "mode of selection and removal . . . of officers and employees." N.Y. Const. Art. IX, §§1(a), (b), 2(c)(1). Listed as the very first powers of local governments in a provision styled New York's "bill of rights for local governments," these powers are

essential to the constitutional purpose of guaranteeing "[e]ffective local self-government." See *id*.; see also *Resnick*, 44 N.Y.2d at 285 (inferring the "importance of this principle" of local control over local elections from "the specific grant of legislative authority to each local government" over the "mode of selection and removal . . . of its officers" in both the New York Constitution and Municipal Home Rule Law (citations and internal quotations omitted)).

Even prior to the ratification of Article IX in 1963, the Court of Appeals recognized that that this requirement of liberal construction applied with full force to selection of local officials. In *Bareham v. City of Rocheste*r, 246 N.Y. 140, 146 (1927), the Court held that the 1924 Home Rule Law's delegation of power to cities to determine the "mode of selection . . . of all officers and employees" gave the City of Rochester broad power to adopt a council-manager form of government. In rejecting a narrower reading of this power, the *Bareham* Court emphasized that it was "impelled toward a liberal construction" by the provision in the City Home Rule Law requiring municipal powers to be liberally construed. *Id.* at 147.

Importantly, *Bareham* was handed down during a period in New York's history when state courts generally gave municipal powers a narrow construction. See, e.g., *Browne v. City of New York*, 241 N.Y. 96, 124(1925) (Cardozo, J.) (holding that a city-owned bus line was too "notable" an "innovation" to infer from the 1924 statutory grant of home rule power). As *Resnick* held in rejecting a narrow reading

of two counties' power to significantly overhaul their method of filling vacancies in county legislatures, "even in the era when a very narrow interpretation was given to the home rule provisions, municipalities were accorded great autonomy in experimenting with the manner in which their local officers, including legislative officers, were to be chosen." *Resnick*, 44 N.Y.2d at 286. New York's lengthy history of applying the "liberal construction" requirement to local election law requires that Article IX, §3(c) be construed to encompass Local Law 11.

II. THE APPELLATE DIVISION ERRED IN CONSTRUING ARTICLE II §§1 AND 5 TO STRIP NEW YORK CITY OF THE POWER TO CONFER THE RIGHT TO VOTE IN MUNICIPAL ELECTIONS ON NONCITIZENS.

In holding that Article II, §§1 and 5 set aside New York City's extension of voting rights to noncitizens, the Appellate Division ignored the presumption favoring local control over local elections. Instead, the court flipped the presumption on its head, applying the *expressio unius* canon in a way that ignored the affirmative wording of Article II as a guarantee of citizens' voting rights and instead reading it as an implied limit on local governments' power to enfranchise non-citizens.As explained below, this faulty premise led to the erroneous conclusion that Local Law 11 was preempted by N.Y. Const. Art. II, §§1.

A. Article II, §1's guarantee that citizens are entitled to vote, liberally construed to preserve local governments' powers over elections, does not bar New York City from conferring the right to vote on noncitizens in municipal elections.

The Appellate Division ignored the local elections presumption and instead inferred a prohibition on localities' power to authorize noncitizens to vote in municipal elections from Article II, §1's guarantee that "[e]very citizen shall be entitled to vote at every election of all officers elected by the people." The court erroneously reasoned that the enumeration of voting rights for citizens implicitly precluded cities' conferring such rights on non-citizens. *Fossella v. Adams*, 225 A.D.3d 98, 115-116 (2024). The court cited, as further support, N.Y. Const. Article II, §5 which provides that "[l]aws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established…." The court below reasoned that if "noncitizens are not excluded from voting in elections by the New York State Constitution, the requirement in article II, Art. II, § 5, for 'citizens' to provide 'proper proofs' of their entitlement to vote would not extend to noncitizen voters, which would be illogical.' *Id.* at 116. In adopting this narrow reading of local governments' powers, the Appellate Division relied on *Matter of Baldwin Union Free Sch. Dist. v. County of Nassau*, 105 A.D.3d 113 (2d Dep't 2013), quoting *Baldwin* to hold that "'the lawmaking authority of a municipal corporation…is only derived from express grant, never from a general grant of

power.'" *Fossella v. Adams*, 225 A.D.3d 98, 120 (2024) (quoting *Matter of Baldwin Union Free Sch. Dist. v. County of Nassau*, 105 A.D.3d at 117).

The Appellate Division's reading of Article II flatly disregards the local elections presumption against preemption of local election rules. In so disregarding the applicable presumption, the Appellate Division also misreads the relevant case law. *Baldwin Union Free School District*, for instance, did not assert that "the lawmaking authority of a municipal corporation" be authorized by an "express grant." Instead, *Baldwin* stated that "[t]he authority of a municipality *to abrogate State law* is never implied or inferred" but "is only derived from express grant, never from a general grant of power." *Matter of Baldwin Union Free Sch. Dist.*, 105 A.D.3D at 117 (emphasis added). At issue in *Baldwin* was Nassau County's assertion of the power to supersede the state law making counties responsible for property tax refunds. *Baldwin* appropriately held that state law must expressly confer such a supersession power. Nothing in *Baldwin* or any other precedent, however, suggests that local powers to govern local elections must be expressly spelled out when those powers do not abrogate any state law.

The presumption favoring local governments' control over local elections indicates that Article II, §1 of the New York Constitution should be read as a limit only on local governments' power to disenfranchise citizens. Under such a reading, Article II, §1 overrules older cases upholding local laws that barred certain classes

of citizens from voting in local governments' elections such as the property qualifications for village elections upheld in *Spitzer v. Village of Fulton*, 172 N.Y. 285 (1902). At the same time, this reading also liberally construes local governments' power to enlarge the franchise, a liberal construction that is, if possible, required by Article IX, § 3(c) of the New York Constitution. Because it makes best sense of both Article II's text while also preserving local governments' core powers as required by Article IX, § 3(c), this narrow reading is most consistent not only with the interpretative principles governing local government law in New York but also the New York Constitution's plain text.

In evaluating this reading of Article II, §1 consider, first, the text's specific wording. This provision is phrased as an affirmative grant of a right to vote, not a negative restriction on the extension of that right. This phrasing most naturally suggests only a prohibition on local laws' disenfranchising citizens, not a prohibition on local laws' extending the franchise to noncitizens. This affirmative wording should, therefore, be read to set a floor, not a ceiling, on voter qualifications. See Joshua A. Douglas, The Right to Vote Under State Constitutions, 67 VAND. L. REV. 89, 105 (2014). As the Court of Appeals has noted in upholding New York City's novel system of proportional representation, "the purpose of the constitutional provision was solely to remove the disqualifications which attached to the person of the voter in earlier times and thereby assure to a citizen, qualified by age and

residence, the same right to vote as every other similarly qualified voter possessed." *Blaikie v. Power*, 13 N.Y.2d 134, 140 (1963) (emphasis added).

In *Blaikie*, the Court specifically held that "section 1 of article II was designed not to regulate the mode of selection of elective officers but rather to regulate the status of voters and to protect otherwise qualified voters from electoral discrimination." *Id.*; see also *Johnson*, 274 N.Y. at 418 (describing Article II, §1 as seeking to "remove the disqualifications which attached to the person of the voter"). The New York Constitution represents a positive guarantee (an "entitlement" to vote if conditions are met) rather than a negative restriction (no voting "unless" conditions are met). A comparison to other states reveals that this wording is hardly accidental: There are numerous state constitutions that expressly prohibit extension of the franchise unless a voter meets the qualifications listed in the state constitution. Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1082-84 (2017) (explaining distinction between state constitutional suffrage provisions phrased as grants as opposed to restrictions). Construing Article II, §1 to preserve local governments' power to enfranchise non-citizens respects New York's long history of allowing non-citizens to vote in local elections.

The narrow reading of Article II to preserve local governments' power over local elections also makes sense of Article II, § 5, which mandates that "[l]aws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the

right of suffrage hereby established…." Because Article II, § 1 gives citizens a constitutional entitlement to vote, Article II, § 5 logically mandates that local governments must implement that right by providing some means by which citizens can prove their citizenship and residency. By contrast, because nothing in the Constitution mandates that local governments allow non-citizens to vote in local elections, it would be illogical to mandate that local governments enact laws to implement non-citizens' voting rights. Far from being "illogical," as claimed by the Appellate Division, this reading of Article II, § 5 makes sense of local government's *duty* to protect citizens' voting rights and *discretion* to deny such rights to non-citizens.

B. New York's longstanding practice of giving local governments the power to expand suffrage reinforces the natural reading of Article II, §1 to preserve local power to give noncitizens the right to vote in municipal elections.

This interpretation of Article II, §1 that liberally construes local power over elections is reinforced by New York's longstanding practice of permitting local governments such as school boards, villages, and towns to adopt voting qualifications different from those used in state elections. As Professor Alexander Keyssar noted in his history of the right to vote, New York, along with several other states, treated elections to local office as "'nonconstitutional' elections" that could be governed by criteria different from those governing elections to state offices.

ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 186 (Basic Books 2000). Thus, in *Spitzer*, the Court upheld a village charter's restriction of the right to vote on certain local matters to property holders, despite the lack of property requirement at the state level. 172 N.Y. at 289-90. The Court described the constitutional provision governing voting in state elections as "general, relating to the whole state" and the provision governing local government as "local, relating only to the cities and villages of the state." *Id*.

Likewise, New York extended the right to vote to women in school board elections in 1880 and further extended women's right to vote to include village and town tax propositions in 1913, despite the fact that Article II, §1 of the 1846 and 1894 State Constitutions both guaranteed the right to vote only to "[e]very male citizen." *See* SUSAN GOODIER & KAREN PASTORELLO, WOMEN WILL VOTE: WINNING SUFFRAGE IN NEW YORK STATE 14, 18-19 (Cornell University Press 2017). Between 1968 and 2002, New York continued this practice of broadening suffrage by permitting noncitizens to vote in school board elections. See Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CALIF. L. REV. 271, 271 n.1. (2005); Jeffery C. Mays, New York City's Noncitizen Voting Law Is Struck Down, N.Y. TIMES (June 27, 2022), https://www.nytimes.com/2022/06/27/nyregion/noncitizen-voting-ruling-nyc.html . If the phrase "[e]very citizen shall be entitled to vote at every election" means, as

the Appellate Division believed, that all noncitizens are prohibited from voting at every election, then New York never could have allowed noncitizens to vote in school board elections for over thirty years. Nor could it have extended the franchise to women in school district and village elections prior to 1917, at which point Article II, §1 was finally amended to delete the word "male."

The fact that the state legislature has long read Article II, §1 in this way—as a positive guarantee rather than a negative restriction—confirms that the Supreme Court misread the constitutional text. See *Kolb v. Holling*, 285 N.Y. 104, 112 (1941) ("The practical construction put upon a constitutional provision . . . by the Legislature . . . is entitled to great weight, if not controlling influence, when such practical construction has continued in operation over a long period of time."). The most logical reading of the state constitutional language, then, is that at least every citizen must be allowed to vote in state elections, but that localities might expand voter eligibility for their own elections.

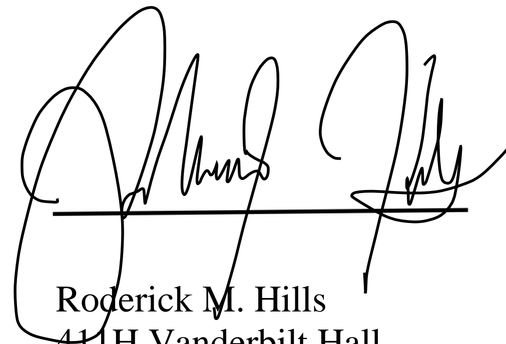
Even if the issue of Article II's and Article IX's meaning were a closer question, the local elections presumption counsels in favor of resolving such doubt in favor of local power. The long history of local experimentation in voting rules demonstrates the importance of such local autonomy in New York's constitutional system. As the Court of Appeals explained in upholding New York City's 1936 experiment with proportional representation for its City Council, "[i]f the people of

the City of New York want to try the system, make the experiment, and have voted to do so, we as a court should be very slow in determining that the act is unconstitutional, until we can put our finger upon the very provisions of the Constitution which prohibit it." *Johnson v. City of New York*, 274 N.Y. 411, 430 (1937). The Appellate Division was far from putting its finger on any constitutional provision banning extension of the right to vote in municipal elections.

CONCLUSION

For the reasons stated above, Amici respectfully request that the Court reverse the Appellate Division's ruling.

Dated: Albuquerque, NM
November 13, 2024



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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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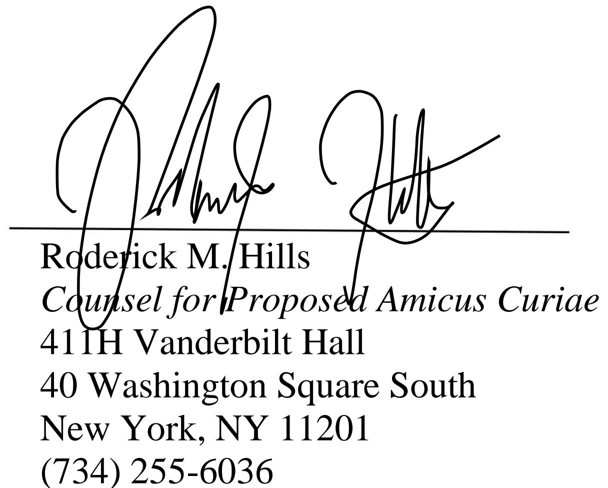

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