Index No. 85007/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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,

-against-

ERIC ADAMS, in his official capacity as Mayor of New York City, BOARD OF ELECTIONS IN THE CITY OF NEW YORK, CITY COUNCIL OF THE CITY OF NEW YORK, HINA NAVEED, ABRAHAM PAULOS, CARLOS VARGAS GALINDO, EMILI PRADO, EVA SANTOS VELOZ, MELISSA JOHN, ANGEL SALAZAR, MUHAMMAD SHAHIDUALLAH, and JAN EZRA UNDAG,

Defendants.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

Defendants MAYOR ERIC ADAMS AND NEW YORK CITY COUNCIL ("City Council") (collectively, the "City Defendants") by their attorney, HON. SYLVIA O. HINDS-RADIX, Corporation Counsel of the City of New York, submit this memorandum of law in opposition to plaintiffs' motion for summary judgment. Plaintiffs challenge Local Law 11 of 2022 ("L.L. 11") which enfranchises lawful permanent residents and green card holders who are

residents of the City to vote for municipal officers. They claim, relying on selective reading of portions of the New York State Constitution ("Constitution"), Election Law ("E.L."), and Municipal Home Rule Law ("MHRL"), that L.L. 11 violates each of these laws. On the contrary, L.L. 11 is in line with both the spirit and letter of those laws. First, the Constitution as a whole, its legislative history, and judicial decisions interpreting the relevant articles, reflect an expansive vision of voting rights and of municipal home rule powers wherein the City is empowered to enact laws to manage its own municipal elections. The City determined that enfranchising non-citizen residents will permit the City to better manage its own affairs, ensure local officials are representative of the actual population, and improve the well-being of all City residents. This legislative judgment is entirely consistent with the Constitution and State law and should be upheld. To reach the contrary conclusion, plaintiffs ignore key provisions of the Constitution and rely on outdated precedents. Second, as repeatedly confirmed by New York courts, the E.L. specifically yields to other laws that may conflict with it, and therefore the City may define eligible voters differently than the E.L. Third, a plain reading of MHRL demonstrates that L.L. 11 is not among the types of laws for which a referendum.

STATEMENT OF FACTS

L.L. 11 was approved by vote of City Council on December 9, 2021. It passed into law on January 9, 2022. L.L. 11 provides that individuals who are lawful permanent residents or authorized to work in the United States ("U.S.") can vote in City elections for municipal office provided that they met all criteria, other than U.S. citizenship, to register to vote in New York State ("NYS").[1] Section 1 of L.L. 11 adds Chapter 46-a to the New York City Charter ("Charter"). City BOE is directed to carry out the provisions of Chapter 46-a. Charter §

[1] These voters are identified as "Municipal Voters" in the law.

1057-cc. L.L. 11 does not permit Municipal Voters to "vote for any state or federal office or political party position or on any state or federal ballot question." Charter § 1057-rr. Section 2 of L.L. 11 sets a deadline by which the City BOE must submit a report regarding its plan for timely implementation of the law to the City. Section 3 of L.L. 11 provides that the law takes effect December 9, 2022 and applies to municipal elections beginning after January 9, 2023.

The purpose of L.L. 11 is to enfranchise the 800,000 to 1,000,000 residents who are in the U.S. legally and live, work, and pay taxes in the City, but were not previously permitted to vote for municipal representatives because they are not U.S. Citizens. More than half of those eligible to vote under L.L. 11 have lived in the City for ten years or more. Ex. F at 24:16-24. These new voters pay taxes and contribute to the economy through employment, purchasing, and owning businesses. Id. at 23:04-14, 24:16-25:03, 28:23-19:08, 38:04-13, 40:23-41:18, 173:04-09, 179:02-11, 184:10-185:10, 200:02-23, 203:13-23, 205:15-206:15, 207:23-209:25, 225:02-25, 227:04-20, and 229:18-230:05. They attend schools, live in housing, and use public facilities, and are employed in the City, or, even, by the City itself. Id. at 28:23-19:08, 40:23-41:03, 209:07-25, 211:10-20, 216:21-217:19, and 223:09-24. Notably, one in five of those deemed "essential workers" during the COVID-19 pandemic were not citizens of the U.S, but were heavily relied upon by City residents to maintain necessary services and infrastructure during the emergency. Id. at 22:23-23:03, 25:18-26:12, 29:09-16, 36:02-10, 176:02-14, and 180:20-181:10. Even so, immigrants are less likely to receive necessary social and public services due to language barriers and lack of outreach, and more likely to experience food and housing insecurity and inability to access appropriate healthcare. Ex. E at Testimony by the Arab-American Family Support Center, and Testimony of Crystal Hudson, Democratic Nominee for the 35th City Council District. Scores of potential municipal voters testified regarding the

disenfranchisement attendant in being unable to participate in choosing municipal representatives, notwithstanding the important ways in which they contribute to the community over many years. Ex. F.

STANDARD OF REVIEW

Summary judgment is appropriate if the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Blake v. Gardino, 35 A.D.2d 1022 (3d Dep't 1970), aff'd, 29 N.Y.2d 876(1972); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974).

ARGUMENT

POINT I

PLAINTIFFS OFFICEHOLDERS, POLITICAL PARTY, AND POLITICAL PARTY CHAIR LACK STANDING

To establish standing, a plaintiff must satisfy a two-part test. First, plaintiff must show "injury in fact," meaning that plaintiff will actually be harmed by the challenged administrative action; the injury must be more than conjectural. N.Y. State Ass'n of Nurse Anesthetists, 2 N.Y.3d 207, 211 (2004). Second, the injury must fall within the "zone of interests" or "concerns sought to be promoted or protected" by the challenged statutory provision. Id. (citing Society of Plastics Indus. v. County of Suffolk, 77 N.Y.2d 761, 763 (1991)). The injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." See Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013) (quoting Monsanto Co. v. Geerston Seed Farms, 561 U.S. 139, 149 (2010)). "'Tenuous' and 'ephemeral' harm . . . is insufficient to trigger judicial intervention." N.Y. State Ass'n of Nurse Anesthetists, 2 N.Y.3d at 211 (quoting Rudder v. Pataki, 93 N.Y.2d

273, 279 (1999)). Here, plaintiffs fail to identify any concrete and particularized injury to political officeholders, political parties, or the political party chairs. Any alleged injury related to funding or political strategy is speculative, and there is no legal authority for the idea that a candidate or party is injured because they must adjust their strategy in seeking office. Unlike the cases cited by plaintiffs, which are all federal cases from other federal circuits, L.L. 11 does not prevent any candidates from being able to run for office. The most plaintiffs allege is that candidates may change their campaign strategy or resource allocation, but their core mission – election of their chosen candidates -- would remain the same. This is insufficient to demonstrate an injury in fact. See Matter of Animal Legal Def. Fund, Inc. v. Aubertine, 119 A.D.3d 1202, 1205 (3rd Dep't 2014) ("Standing has been recognized in a narrow line of cases where an organization that helps a particular group of people must expend funds and divert organization resources because of conduct that directly interferes with the services that the organization provides to its clients.") There is also no entitlement to hold office or maintain political power, and plaintiffs have not identified any such entitlement under State law. Saratoga Cnty. Chamber of Com., Inc. v. Pataki, 275 A.D.2d 145, 156-57 (3d Dep't 2000) (finding that alleged loss of political power was not a cognizable injury for legislator plaintiffs because it was not something to which they were personally entitled.) Accordingly, plaintiff officeholders, political party, and party chair lack standing to challenge L.L. 11.

POINT II

LOCAL LAW 11 DOES NOT VIOLATE THE NEW YORK STATE CONSTITUTION

Contrary to plaintiffs' claims, L.L. 11 is entirely consistent with the New York State Constitution as demonstrated by its text as a whole and its legislative and constitutional history. Plaintiffs rely on a narrow reading of certain portions of text, divorced from the

legislative history and judicial interpretation, to urge that the drafters of the current Constitution intended to preclude municipalities from permitting non-citizens to vote for municipal offices. (Pl. MOL at pp. 9-12.) This assertion is contrary to the language and meaning of the Constitution. In particular, plaintiffs fail to properly consider the full text and legislative history of Article ("Art.") IX, which explicitly grants localities broad rights to, inter alia, establish their own democratic processes for selecting local officers. A proper reading of the Constitution reflects a more expansive vision of voting rights and municipal home rule powers over municipal elections. Accordingly, L.L. 11 does not violate the Constitution.

Article II, Section 1 ("Qualification of voters") directs:

> Every 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.

Plaintiffs assert that the text of Art. II, § 1's direction that "every citizen shall be entitled to vote," Art. II, § 5's direction that voter registration processes be implemented, and Art. IX's use of Art. II, § 1 in defining "People," necessarily means that local governments are precluded from using their Art. IX home rule authority to allow non-citizens to vote in local elections. (Pl. MOL at pp. 9-12.) However, plaintiffs' proposed interpretation relies upon a narrow reading of certain Constitutional provisions and over-one hundred year old legal precedent interpreting an old version of Art. II prior to the addition of Art. IX to the Constitution. Id. Reading more recent iterations of Art. II in conjunction with the rest of the Constitution, in particular Art. IX, later decisions have found that its purpose is "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), app. dism'd, 375 U.S. 439 (1964) (describing analysis in Johnson v New York, 274 NY 411 (1937) and supporting the adoption of an expansive view of Art. II, § 1 in the context of local experimentation with systems of proportional and limited voting.) "In other words, 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 Panio v. Sunderland, 4 N.Y.3d 123, 129 n.3 (2005) (describing Art. II, § 1 as guaranteeing "the rights of a voter to cast a vote free from undue restriction....")

Specifically, Art. IX of the Constitution grants localities broad rights to, inter alia, establish their own democratic processes for selecting local officers. Art. IX, § 1, "Bill of rights for local governments," makes clear that the State legislature intended to expand and emphasize local home rule authority. as benefiting the State's citizens:

> Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:
>
> (a) Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. Every local government shall have power to adopt local laws as provided by this article.
>
> (b) All officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law.

In repeatedly framing home rule authority as a "bill of rights" for localities within the State, granting localities "rights, powers, privileges and authority" and specifically granting these "rights… and powers" with regard to the municipality's affairs and government, Art. IX

grants localities broad rights to establish their own democratic processes for selecting local officers. See, e.g., Roth v Cuevas, 158 Misc. 2d 238, 242 (N.Y. Co. 1993), aff'd, 197 A.D.3d 369 (1st Dep't 1993), aff'd for reasons stated in Sup. Ct. op., 82 N.Y.2d 791 (1993).

The constitutional history of Art. IX further demonstrates a legislative intent to endow local governments with a broad right to local representative self-government, and to expand democratic options and powers related to the selection of local officers. In construing the language of the Constitution, courts look to the intent at the time of adoption, including the constitutional history of the provision, and give to the language used its ordinary meaning. See, e.g., White v Cuomo, 2022 NY Slip Op 01954, *5 (2022); Burton v N.Y. State Dept. of Taxation & Fin., 25 N.Y.3d 732, 739 (2015). The current language in Art. IX §§ 1 and 3 was adopted by voters in the 1963 General Election. These amendments to the Constitution were the culmination of a multi-year effort, beginning in 1956, to strengthen and clarify the Home Rule powers of localities across NYS, including broadening the existing Home Rule powers of cities and extending them to towns and smaller villages. See, e.g., Announcement by the Governor of the Introduction in the Legislature of a Concurrent Resolution Proposing a New Article Nine of the State Constitution Relating to Local Government, State of New York-Executive Chamber Albany, Feb. 25, 2962 (Bill Jacket p. 825) ("The Bill of Rights expressly recognizes that the 'expansion of powers for effective local self-government' is a· purpose of the People of the State. The Bill of Rights also gives constitutional status to specific rights and powers which it vests in the local governments of the State and their inhabitants, including the right to elect local legislative bodies, adopt local laws, elect and appoint all local officials…").

Viewed in this context, the reference to Art. II, § 1 in the definition of "the people" was not an attempt to restrict the voting rights of individual voters, but rather, to clarify

and expand the constitutionally protected right granted to local governments to have local officers elected through direct democratic elections. See Art. IX, § 1 (opening par.). The plain language of Art. IX evinces this intent. Contrary to plaintiffs' attempts to cite the language of Art. IX, § 1 out of context (Pl. MOL at pp. 9-10), the title and opening sentences of Art. IX make clear that the legislative purpose was to expand the powers of local governments rather than contract them. Art. IX, § 1. Further, the use of the phrase "in addition to" in the first paragraph of Art. IX, § 1 underscores the legislature's intent to frame the provisions that follow in §§ 1(a) and (b) as a broad delegation to local governments expanding upon their rights of self-governance. "The purpose of home rule provisions of the Constitution is to secure the right of cities to choose their officers without hindrance from the State and to preserve their privilege of continuing to administer those powers of self-government which they enjoyed before the adoption of the Constitution, provided such powers remain local in nature." Roth, 158 Misc 2d at 242. To further emphasize this point, the legislature added a liberal construction provision in Art. IX, § 3(c): "Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed." Thus, plaintiffs' arguments that Art. IX limits voters to U.S. citizens fails because they are contrary to the text and intent of Art. IX. Ginsberg v. Purcell, 51 N.Y.2d 272, 276 (1980) ("The Constitution is to be construed… to give its provisions practical effect, so that it receives 'a fair and liberal construction, not only according to its letter, but also according to its spirit and the general purposes of its enactment.'").

Further, New York courts have historically construed Art. IX to maximize local control over elections of local officers. Beginning with Bareham v. City of Rochester, 246 N.Y. 140 (1927), a case brought shortly after the enactment of the first Home Rule amendment, the Court of Appeals affirmed the broad grant of home rule power to local governments in shaping

local elections. See also Resnick v. Ulster County, 44 N.Y.2d 279, 286 (1978) (explaining that municipalities historically "were accorded great autonomy in experimenting with the manner in which their local officers, including legislative officers, were to be chosen…All the changes made by the 1964 home rule amendment and its contemporaneously adopted implementing statute were expansive"). In rejecting a variety of statutory and constitutional challenges relating to county schemes for filling vacancies in elected officers, the Court of Appeals emphasized that home rule rests on the "deeply felt belief that local problems should, so long as they do not impinge on the affairs of the people of the State as a whole, be solved locally." Id. at 288. See also Blaikie v. Power, 19 A.D.2d 779 (1st Dep't 1963), aff'd 13 N.Y.2d 134, app. dism'd, 375 U.S. 439 (1964) (upholding an innovative limited voting scheme for at-large City Council seats because "express vesting in the city of the broad home rule power to enact laws relating to the method and mode of election or selection of its public officers…is controlling here.")

By contrast, plaintiffs' citations to Hopper v. Britt, 203 N.Y. 144, 147-48 (1911) and Hoerger v. Spota, 109 A.D.3d 564 (2d Dep't 2013), aff'd 21 NY.3d 549 (2013), are unpersuasive. (Pl. MOL at p. 16.) Predating municipal home rule and the current iteration of Art. II, § 1, the Hopper court found a state law unconstitutional because it made it more difficult to vote for certain candidates, thus placing a restriction on some voters that was not placed on others. Id. at 150. Notably, prior versions of Art. II, § 1 were considerably more restrictive regarding those who were eligible to vote, and there was a progression toward expanding the right of suffrage. Thus, early decisions interpreting Art. II, § 1 must be read with the understanding that its text was dissimilar to the current version and often excluded a large portion of U.S. residents, including non-white, non-male, and non-property owning citizens. See Matter of Gage, 141 N.Y. 112 (1894); People ex rel. Smith v. Pease, 27 N.Y. 45 (1863). The

quotation from Hopper used by plaintiffs is dicta for which the Hopper court provided no legal authority or analysis; however, it was likely drawn from these early cases which have limited applicability to the current understanding of Art. II. Local legislative authority over local elections was not at issue in the Hopper case, and the opinion was authored before constitutional home rule authority was expressly granted to local governments in its modern form under Art. IX. Furthermore, LL 11 is not inconsistent with the holding of Hopper, as no voter (as protected under Art. II, § 1 or otherwise) is deprived full and equal access to voting in New York City elections.

The Hoerger decision also involved a Suffolk County law which sought to impose term limits for the office of District Attorney beyond what is stated regarding terms of office for such officers in the Constitution and state law. However, in reaching its decision in Hoerger, the Court of Appeals specifically relied on the state's interest in ensuring statewide uniformity in setting qualifications for District Attorneys, as they are "constitutional officers" responsible for enforcing state criminal laws, noting that the Governor holds the power of removal. Hoerger v Spota, 21 N.Y.3d 549, 552 (2013). The authority of local governments to address the election of the municipal offices covered by L.L. 11 was not at issue in the case. Here, unlike in Hopper and Hoerger, no constitutionally entitled voter is being restricted, and neither the selection nor the qualifications of a "constitutional officer" is at issue; rather, the law represents an expansion of municipal voters in the City in local elections.

Plaintiffs' invocation of Art IX § 3 fares no better. (Pl. MOL at pp. 11-12.) Until 1963, not all localities in New York State had expressly been given the right to select local officers through local elections, rather, certain local officers were appointed or selected by State officials. See, e.g., Fifth N.Y. Const., art. IX § 7 (1938), Third N.Y. Const., art. X § 2 (1846).

The constitutional history of the 1963 amendment makes clear that part of its intended purpose was to extend the right to elect local officers to all localities throughout the state. Viewed in this light, the phrase "elected by the people" in Art. IX § 1 and the corresponding definition of "the people" in § 3 should be read in the context of an expansion of rights of local governments, rather than an intent to restrict the rights of individual voters. In addition, until 1963, there was a substantial argument that the qualifications in Art. II, § 1 did not apply to municipal elections. See Blaikie, 13 N.Y.2d at 144 (Burke, J., concurring). Providing a definition of the "people" prevented localities, with their newly-expanded powers, from disenfranchising state constitutionally-protected voters – i.e., citizens of age who met the residency criteria. Thus, the definition of "people" was not intended to prevent localities from expanding the right to vote in municipal elections. Rather, because Art. IX is framed as a set of rights granted to local governments, it should be read as allowing local experimentation in furtherance of local democratic values that are more inclusive and more reflective of the City's population in furtherance of the City's exercise of its Art. IX home rule powers, while preventing local or State disenfranchisement of municipal residents who meet the standards of Art. II. See Roth, 158 Misc. 2d at 242; Resnick, 44 N.Y.2d at 286. This construction of the "linkage" between Art. IX and Art. II properly reconciles the definition of the "people" in Art. IX with the context and purpose of Art. IX.

Thus, L.L. 11's constitutionality is supported by the text, history, context, and prior judicial interpretations of the Constitution. It is an appropriate use of the City's home rule authority through Art. IX's grant of broad powers to municipalities over local property, affairs, and government, the mode of selection of municipal officers and employees, and the government… safety, health and well-being of persons in the municipality. Art. IX, § 2(c)(i), §

2(c)(ii)(1), & § 2(c)(ii)(10). L.L. 11, which provides that individuals who are residents of the City, but not U.S. citizens, may participate in choosing the City officials whose decisions will impact all aspects of their day-to-day lives, falls squarely within the ambit of the City's affairs and government, the mode of selection of municipal officers, and the government, safety, health and well-being of those persons who reside in the City. See Charter Chapter 46-a; McDonald v. N.Y.C. Campaign Fin. Bd., 965 N.Y.S.2d 811, 830 (N.Y. Co. 2013), aff'd & mod., 117 A.D.3d 340 (1st Dep't 2014) (holding the City's campaign finance laws "were properly promulgated pursuant to the grant of legislative authority to local governments to pass laws relating to the 'property, affairs or government'…and the laws relating to the 'mode of selection . . . of its officers.'")

The legislative record of L.L. 11 demonstrates the City's interest in ensuring that the estimated 800,000 to 1,000,000 individuals who are lawful residents of the U.S. and residents and taxpayers in the City, are enfranchised. Ex. F at 24:16-24. This enfranchisement is inextricably linked to the City's affairs and government, selection of public officials, and management of the safety, health and well-being of the City's residents. See Art. IX, § 2(c). Municipal voters pay taxes and contribute to the economy, attend schools, live in housing, and use public facilities. Ex. F at 28:23-29:08, and 40:23-41:03. Indeed, it is difficult to identify any area of local law or regulation that affects U.S. citizens, but not non-citizen residents.[2] The

[2] Defendants note that noncitizen voting is not novel but rather has a long history. Certain noncitizens were permitted to vote in community school board elections in New York City until 2002, when school boards were replaced by the current community district education councils. This practice was not definitively adjudicated, but was in place for over 30 years. See Ambach v. Norwich, 441 U.S. 68, 81n. 15 (1979). Noncitizens are permitted to vote in certain local elections in a number of municipalities, including for example in parts of Maryland (see https://takomaparkmd.gov/news/city-election-information/register-to-vote/ and http://www.townofchevychase.org/DocumentCenter/View/3499/Non-US-Citizen-Resident-Voter-Registration-Application?bidId=, both last viewed on May 27, 2022), and San Francisco

City's legislative judgment that enfranchising those who are legally in the U.S. will permit the City to better manage its own affairs and government, ensure local officials are representative of the actual population, and provide for the health, safety, and well-being of all City residents, is entirely consistent with Art. IX's grant of municipal home rule authority. This is particularly true in the wake of the COVID-19 emergency, during which a large proportion of the "essential workers" upon whom the City relied for necessary services were not U.S. citizens, but were City residents. Id. at 22:23-23:03 and 25:18-26:12. Permitting community members relied upon in emergencies to have a say in choosing local representatives promotes the City's management of its own affairs and provides for the health and safety of residents, by retaining these community members and ensuring their voices are heard. The enfranchisement of non-citizen immigrants may be particularly appropriate for the City, which is widely considered a "city of immigrants" and is uniquely shaped by foreign-born residents. Ex. E; Ex. F at 6:18-8:10 and 132:21-133:11. Thus, the City has done exactly what was intended in Art. IX by enacting a law that meets its unique circumstances to ensure more representative and effective local representation.

POINT III

LOCAL LAW 11 DOES NOT VIOLATE THE NEW YORK STATE ELECTION LAW

The E.L. permits municipalities to enact laws that conflict with the E.L., unless the E.L. provision specifically states that no other law shall supersede it. There is no such statement barring localities from defining "qualified voter" differently than the E.L. Further, the

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School Board elections (see https://sfelections.sfgov.org/non-citizen-registration-and-voting, last viewed on May 27, 2022)). And legal scholarship indicates that certain aliens were allowed to vote in colonial times and in states across the country during the 19th century, even in presidential elections. Jamie B. Raskin, *Legal Aliens, Local Citizens: The Historical Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PENN. L. REV. 1391, 1397 (1993).

E.L., or provisions thereof, has been treated as a "special law," permitting inconsistent local laws relating to affairs, property, or government. Plaintiffs' argument that the E.L. does not yield to inconsistent local laws ignores the majority of judicial decisions on the issue and relies upon one lower-court decision that does not explain its departure from precedent. (Pl. MOL at pp. 12-13.) Accordingly, the plain language of the E.L., and legal precedent, demonstrate that L.L. 11 does not violate the E.L.

Plaintiffs agree that the E.L. yields to other, inconsistent laws; however, they argue that "any other law" includes only state laws. (Id.) In making this argument, they rely on Castine v. Zurlo, 46 Misc. 3d 995, 999 (Clinton Co. 2014). However, they ignore multiple other cases in which courts agree that "[t]he Election Law gives way to inconsistent local law provisions." City of N.Y. v. N.Y. City Board of Elections, 1991 N.Y. Misc. LEXIS 895, *4 (N.Y. Co. Apr. 3, 1991), aff'd 1991 App. Div. LEXIS 18134 (1st Dep't Apr. 5, 1991), app. den'd 1991 N.Y LEXIS 6169 (1991) (citing Bareham v. Rochester, 246 N.Y. 140, 149 (1927) ("The municipality is empowered to modify an election law in so far as that law affects the property, government or affairs of the municipality, i.e., in so far as it affects the election of the local officers."); Castine v. Zurlo, 938 F. Supp. 2d 302, 313 (N.D.N.Y. 2013), vacated on other grounds 756 F.3d 171 (2d Cir. 2014) (finding that a law local law providing different qualifications for public officers than the E.L. did not violate the E.L. because "[i]t must be presumed that the State Legislature meant what they wrote [in § 1-102]"); see also McDonald, 965 N.Y.S.2d 811, 837-38 (finding no conflict between the City's campaign finance laws and the E.L., but noting "if it were necessary for its decision to interpret the impact of Election Law §1-102, it would find that Election Law § 1-102 means what it says it means, and must be accorded its plain meaning."). Notably, the Clinton Co. Castine court did not mention City of N.Y., a

contradictory holding affirmed by the Appellate Division which the Court of Appeals declined to review. Thus, the Clinton Co. Castine decision is an outlier and provides no legal precedent for a finding, contrary to the plain language of the statute, that the E.L. does not yield to inconsistent local law. Further, it is not unusual for a statute such as § 1-102 that refers to a "law" to include a local law, see MHRL § 2(6), and it has been held that "[t]he facial plainness of Election Law § 1-102 precludes consideration of its history," City of N.Y., 1991 N.Y. Misc. LEXIS 895, *6; see also Castine v. Zurlo, 938 F. Supp. 2d at 313 ("[i]t must be presumed that the State Legislature meant what they wrote [in § 1-102]").

The holding of the majority of courts that the E.L. yields to local laws is also consistent with certain precedent treating the E.L., or portions of the E.L., as a special state law. A "special law" is one that applies to some, but not all, localities and is distinct from a "general law," which applies to all localities statewide. N.Y. Const. art IX § 3(d). Treating the E.L. as a special, rather than general, state law permits municipalities to enact inconsistent local laws relating to the municipality's property, affairs or government unless the local law is a "matter of substantial state concern." See N.Y. Const. art IX § 2(c); Matter of Ricket v. Mahan, 97 A.D.3d 1062 (3d Dep't 2012); Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith, 21 N.Y.3d 309 (2013). This approach is bolstered by the E.L. itself, not only because of the inclusion of § 1-102, but also the inclusion of various E.L. provisions that apply only to certain municipalities or that permit differing requirements among municipalities. See, e.g. E.L. § 4-124 (imposing special publication requirements on New York City); § 4-130 (different requirements for delivery of registration supplies in New York City, Buffalo and Rochester); § 7-116 (additional ballot requirements in New York City); § 7-200 (different voting machine

requirements for primary elections in New York City); § 8-100(2) (different voting hours for primaries in certain counties).

As described by Bareham, 246 N.Y. at 148, "[t]he Legislature has enacted several local statutes, applicable only to certain cities, whereby nominations and elections of city officers are authorized or regulated in a manner different from the general scheme defined in the Election Law. That law, therefore, is not a statute applicable alike to all the cities of the State in respect to nominations and elections of city officers." This statement from 1927 remains true today: two cities in NYS administer nonpartisan election procedures that are markedly different from those in the E.L., demonstrating that there is no interest in uniformity of city election procedures in NYS. See Chapter 247 of the Laws of 1993 (Watertown); Title XIV of City of Sherrill Charter[3] (originating in Chapter 172 of the Laws of 1916); Procaccino v. Bd. of Elections, 73 Misc. 2d 462, 468 (Sup. Ct., N.Y. Co. 1973) (holding E.L. § 131-a to be special). These enactments, combined with E.L. § 1-102, imply that the E.L. does not apply uniformly to all local elections across the state. Therefore, it remains true that the E.L., "in so far as it regulates the nomination and election of city officers," is not a general law, and that a "municipality is empowered to modify [the E.L.] in so far as that law affects the property, government or affairs of the municipality, i.e., in so far as it affects the election of the local officers." Bareham, 246 N.Y. at 148-149. Thus, even without the plain language in E.L. § 1-102 deferring to other laws if inconsistent, L.L. 11 does not violate the E.L. because it regulates the City's own property, affairs, and government, and because it does not impact a matter of substantial state concern. Procaccino, 73 Misc. 2d at 468.

[3] Available at: (https://sherrillny.org/wp-content/uploads/2012/06/City-Charter.pdf) (last visited May 5, 2022).

Finally, a reading of E.L. § 1-102 to permit municipalities to enact laws related to municipal elections that are inconsistent with the E.L. accords with the grant of municipal home rule authority and the reluctance to discourage innovation in municipal elections described in Point I, infra. See, e.g., Resnick, 44 N.Y.2d at 286; Bareham, 246 N.Y. at 148. This reading does not foster undue divergence from genuine statewide policies and interests, because it is self-limiting: municipalities must act consistent with their home rule powers, which would prevent them, for example, from regulating the process or voter qualifications for state or federal elections. Accordingly, based on the plain reading of the E.L., the legal precedent finding that the E.L. yields to inconsistent local laws, and the overarching public policy of permitting home rule control and innovation in municipal elections, L.L. 11 does not violate the E.L.

POINT IV

LOCAL LAW 11 IS NOT INVALID UNDER THE MUNICIPAL HOME RULE LAW

L.L. 11 is not subject to a mandatory referendum because it does not change the method of nominating, electing or removing an elective officer. The Court of Appeals has explained that in NYS, public policy is made by elected representatives and referenda are a limited exception that must be grounded in a particular constitutional or statutory source. "Government by representation is still the rule. Direct action by the people is the exception." McCabe v. Voorhis, 243 N.Y. 401, 413 (1926). No referendum is required unless the challenged law falls within one of the enumerated categories of legislation requiring voter approval. Id. Further, while the MHRL provides for mandatory referenda for specific types of local laws, it also clearly mirrors the Constitution's grant of home rule authority that is to be "liberally construed" in favor of the municipality. See MHRL § 51. Specifically, MHRL § 10(1)(i) repeats the Constitution's grant of legislative authority to local governments to adopt and amend

local laws not inconsistent with the provisions of the Constitution or any general law relating to the "property, affairs or government," and further designates, as permissible areas of local legislation regardless of whether they relate to the property, affairs or government, laws relating to "the powers, duties, qualifications, number, mode of selection and removal, [and] terms of office … of its officers and employees …." MHRL § 10(1)(ii). Plaintiffs have not identified any particular constitutional or statutory source requiring a referendum, nor anything other than the conclusory allegation that L.L. 11 somehow changes the "method" of electing public officials, and, accordingly, their claim that the MHRL has been violated fails.

MHRL § 23(2) sets forth the categories of laws for which a referendum is required. Plaintiffs allege that L.L. 11 violates MHRL § 23(2)(e), which requires a referendum if a law "changes the method of nominating, electing, or removing an elective officer." However, L.L. 11 does not change the "method" of electing an officer; rather, it permits additional individuals to vote using the system of electing officers already in place. In other words, it potentially increases the number of individuals in the electorate and sets forth ancillary requirements necessary to ensure that these individuals can vote, but it does not change the method by which the electorate chooses (or nominates or removes) the members of office.[4] While courts have not defined or considered the definition of "method of electing an executive officer" standing alone, there have been some challenges to other categories listed in MHRL § 23(2)(e) as well as challenges to MHRL§ 23(2)(e) as a whole.

These courts have consistently construed the referendum requirement as pertaining to laws that relate to systemic or structural changes, particularly those that curtail the

[4] By contrast, when the City did change that method by enacting Charter provisions requiring ranked choice voting in 2019, it did so by a referendum to approve proposals of a charter revision commission.

grant of authority to an elected officer or legislature. Cf., Mayor of the City of N.Y. v. Council of the City of N.Y., 9 N.Y.3d 23, 33 (2007) (finding a referendum was not required under § 23(2)(f)) where the law did not impair a power conferred on a municipal official as part of the "framework of government").Most courts considering MHRL § 23(2)(e) have found that the challenged law does not require a referendum. For example, the category "changes to the term of an elective office" is construed narrowly to apply only to those laws that change the amount of time making up one term of office. It therefore is not interpreted to include laws regarding the number of terms an elective officer is permitted to hold, notwithstanding that these laws directly affect the number of years an individual may potentially hold an office. See, e.g., Golden v. N.Y.C. Council, 305 A.D.2d 598 (2d Dep't 2003), app. den'd, 100 N.Y.2d 504 (2003); Benzow v. Cooley, 12 A.D.2d 162 (4th Dep't 1961) (considering a challenge to a law changing the number of terms permitted to be held by one individual pursuant to predecessor provisions of the City Home Rule Law), aff'd, 9 N.Y.2d 888 (1961). Because "term of an elective office" is construed narrowly to mean the number of years making up one term of office, after which the officer-holder would be required to seek re-election, a referendum is not required to change the number of terms an office-holder may serve. See, e.g., Benzow, 12 A.D. 162; see also Molinari v. Bloomberg, 564 F.3d 587, 614 (2d Cir. 2009) (holding that a law increasing the number of terms officers may serve did not require a referendum under MHRL 23(2)(b)). This is true even though an incumbent is likely to be re-elected, thereby making it more difficult for other candidates to be seated for a longer period of time or reducing the powers of more junior elected officials. Benzow, 12 A.D. 162; Molinari, 564 F.3d at 614.

Similarly, courts considering challenges to laws under other paragraphs of MHRL § 23(2) have also broadly held that the paragraphs should be narrowly construed in line with the

MHRL's broad grant of authority to the municipality in legislating its affairs and those related to municipal elections, and that they are intended to apply to structural changes to the electoral offices or bodies. For example, in considering whether a law "changes the membership or composition of the legislative body" pursuant to MHRL § 23(2)(b), it is not sufficient that the challenged law may result in different individuals being elected to office in the next election. Rather, the "changes in membership or composition" must be "structural" i.e. a change in the number of seats, or a change in the authority of the legislative body. See, e.g., Neils v. City of Yonkers, 237 N.Y.S.2d 245 (Westchester Co. 1962) (holding a change in ward boundary lines did not change the "form or composition of a legislative body" in construing a predecessor to § 23(2)(b)); Mehiel v. Co. Board of Legislators, 175 A.D.2d 109 (2d Dep't 1991) (holding that a law providing for reapportionment of legislative districts did not amount to a "change in form or composition."), app. den'd 78 N.Y.2d 855 (1991); see also Molinari, 564 F.3d at 612 (noting that the decisions in Neils and Mehiel "leads us to conclude that [MHRL] § 23(2)(b) refers to structural changes, and not changes in the identity of the individual members who comprise the legislative body").[5] Therefore, even if the plaintiffs were able to articulate some non-speculative effect of L.L. 11 on who becomes a candidate or who is elected into office, such an effect is insufficient to require a referendum because there has been no change to the method of electing executive officers.

[5] To the extent L.L. 11 changes the "identity" of some of the individuals who comprise the electorate by permitting additional people to vote in municipal elections, these cases suggest that the changes in the "individual members who comprise" the electorate does not rise to a structural change that would require a referendum.

CONCLUSION

For the reasons set forth herein, the Court should deny, as a matter of law, plaintiffs' motion for summary judgment, grant defendants' motion for summary judgment, dismiss the complaint in its entirety, and grant such other and further relief as the Court deems just and proper.

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