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New York Supreme Court
Appellate Division Second Department

In the Matter of

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 MILLIOTAKIS, MICHAEL PETROV, WAFIK HABIB, PHILLIP YAN HING WONG, NEW YORK REPUBLICAN STATE COMMITTEE, and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Respondents,

-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,

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

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BRIEF OF *AMICI CURIAE* MUSLIM ADVOCATES, MUBANY, MCN, NLG-ROCHESTER, BLAC, ONEAMERICA, JETPAC, ISC-BERKLEY, AND THE UNDOCUBLACK NETWORK IN SUPPORT OF DEFENDANTS-INTERVENORS-APPELLANTS

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PRELIMINARY STATEMENT

Amici curiae support the inclusion and engagement of all people in decisions that impact their daily lives such as the election of their local officials who make decisions about their roads, their homes, their mental health facilities, and so much more. The law at bar grants to certain legally present individuals the right to vote in local elections. All of these individuals stand to face direct and immediate harm if they are deprived of this right to vote that was granted to them by the City's own elected officials and authorized by the State's constitutional and statutory laws.

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Muslims compose a significant portion of the New York City population. Out of the 3.45 million Americans who identify as Muslim in the United States, 22.3% live in New York City alone, making up 8.96% of New York City's total population.[1] Many of those are Americans in waiting, having resided in the City for decades but are not citizens due to our impaired immigration system which does not provide pathways to citizenship for many groups, including people who were brought to the United States as children with their parents.[2] Others are Lawful Permanent Residents

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[1] INST. SOC. POL'Y & UNDERSTANDING, AN IMPACT REPORT OF MUSLIM CONTRIBUTIONS TO NEW YORK CITY 2, https://www.ispu.org/wp-content/uploads/2018/08/MAP-NY-Key-Findings-Web.pdf

[2] Certain people who came to the United States as children and meet several guidelines may request consideration of deferred action (DACA), subject to renewal. Deferred action does not provide lawful status. For more information, *see* USCIS "Consideration of Deferred Action for Childhood Arrivals," https://www.uscis.gov/DACA.

with a pathway to citizenship but are unable to naturalize due to the prohibitive cost of the application or for fear of being targeted and denaturalized.[3]

Building a robust and inclusive democracy for all is a foundational commitment of our nation, the struggle for which has shaped our entire political process. Without a true democracy, the people's right to equal participation is eviscerated, and what may seem like a dispute over logistics today can become precedent to exclude classes of people tomorrow. *Amici* are committed to the protection of everyone's ability to engage in the political process, and submit this brief asking this Honorable Court to respect the decision of the elected officials of the City of New York and strike the decision that excluded lawfully present taxpayers from equal participation in our democracy.

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[3] *See* Jamie B. Raskin*, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 1393 (1993); *see also* Tom McKay, *U.S. Government Is Using an Algorithm to Flag American Citizens for Denaturalization: Report*, GIZMODO (Aug. 26, 2021). *https://gizmodo.com/u-s-government-is-using-an-algorithm-to-flag-american-1847565703* (flagging how citizenship applications can trigger intense scrutiny of a lawful permanent resident's background that can turn innocent mistakes into status-stripping and deportation); Emily Ryo and Reed Humphrey, *The importance of race, gender, and religion in naturalization adjudication in the United States*, PROCEEDINGS OF THE NAT'L ACAD. OF THE SCIENCES (Feb. 22, 2022), https://www.pnas.org/doi/10.1073/pnas.2114430119 (revealing disparities in naturalization approvals by race/ethnicity, gender, and religion; "all else being equal, non-White applicants and Hispanic applicants are less likely to be approved than non-Hispanic White applicants, male applicants are less likely to be approved than female applicants, and applicants from Muslim-majority countries are less likely to be approved than applicants from other countries. In addition, we find that race/ethnicity, gender, and religion combine to produce a certain group hierarchy in terms of approval probabilities. For example, Blacks from Muslim-majority countries are much less likely to be approved than Whites from other countries. These findings underscore the continuing importance of race, gender, and religion in the making of US citizens.").

RELEVANT FACTS AND PROCEDURAL HISTORY

On December 9, 2021, the New York City Council recognized the rights of its non-U.S.-citizen residents to vote in municipal elections by passing Intro 1867-A, later adopted as Local Law 2022/011 ("Municipal Voting Law"). With this adoption, the right to vote in municipal elections was extended to any person "who is either a lawful permanent resident or authorized to work in the United States . . . and who is a resident of New York City and will have been such a resident for 30 consecutive days or longer . . ." Local Law 2022/011.

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Petitioners-Respondents challenged the Municipal Voting Law the day after its enactment, claiming, among other things, that the expansion of the electorate diluted the votes of U.S. citizens and put some number of elected officials and their party backers at a disadvantage in future elections. *See* Compl. ¶¶ 41-45, NYSCEF Doc. No. 1. Defendants-Intervenors-Appellants are New York City residents enfranchised by the Municipal Voting Law and were permitted to intervene on April 13, 2022, to defend their right to vote. *See* Decision & Ord. on Mot., April 13, 2022, NYSCEF Doc. No. 51. All parties cross-motioned for dismissal and/or summary judgment. No evidence was introduced to support the claim that Plaintiffs-Respondents' votes would be diluted or that their campaigns would be disadvantaged by the Municipal Voting Law.

On June 27, 2022, the Supreme Court, County of Richmond (hereinafter "Supreme Court"), granted Plaintiffs-Respondents' motion for summary judgment, holding that the Municipal Voting Law violated the New York State Constitution, the New York State Election Law, and the Municipal Home Rule Act. *See* Decision & Ord. on Mots. #004, 005, 006, June 27, 2022, NYSCEF Doc. No. 174. The Supreme Court concurrently denied Defendants-Appellants' and Defendants-Intervenors-Appellants' motions to dismiss and for summary judgment based on lack of standing, among other theories. *Id.*

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This brief urges this Court to reverse the decision described above because Plaintiffs-Respondents lack standing to challenge the Municipal Voting Law and because the Supreme Court misinterpreted the New York State Constitution.

INTEREST OF *AMICI CURIAE*

Muslim Advocates ("MA") is a national legal advocacy and educational organization working on the frontlines of civil rights to guarantee freedom and justice for people of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the Muslim community in America, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case directly relate to Muslim Advocates' work fighting for civil rights protections for Muslims and other marginalized communities.

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The Muslim Bar Association of New York ("MuBANY") is one of the nation's largest and most active professional associations for Muslim lawyers. One of its missions is to improve the position of the Muslim community in American society. The Muslim Bar Association of New York seeks to advance and protect the rights of Muslims in America, and create an environment that helps guarantee the full, fair and equal representation of Muslims in American society.

The Muslim Community Network ("MCN") uses civic education and leadership development to shape the public narrative about what it means to be Muslim in the United States of America. It does this through diversity education on our faith and community, building partnerships for peace across all faiths, and facilitating the civic leadership of the Muslim community.

The UndocuBlack Network is a multigenerational organization of currently and formerly undocumented Black migrants. The UndocuBlack Network has members across the country, with many in New York.

OneAmerica builds power in immigrant and refugee communities through democracy campaigns and voting rights among other issues.

The Islamophobia Studies Center ("ISC-Berkley") is an educational not-for-profit research project dedicated to countering the pernicious rise of Islamophobia in society through use of applied research, publication, social media campaigns, workshops, conferences and media engagement. The Center's mission is focused on challenging the basic assumptions that are utilized to "otherize" Islam and Muslims while at the same time providing a counter narrative that is rooted in evidence and empirical research.

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The Black Leadership and Action Coalition ("BLAC") uses the political process to shape public discourse and impact public policy uniquely from a Black perspective.

Jetpac is committed to helping make the government more representative of the diversity of our country. Policy decisions on education, housing, climate, civil rights, and more are shaped by local politics every year – these decisions directly impact the lives of all residents within such jurisdictions and expanding suffrage to

include non-immigrants with legal immigration status will ensure that local governments better reflect the values of their residents.

The National Lawyers' Guild, Rochester Chapter ("NLG-Rochester") is a local chapter of a national association of progressive legal workers and attorneys. The National Lawyers' Guild recognizes that the law has long been used as a tool to perpetuate white supremacist settler colonialism. It should not be. The National Lawyers' Guild, Rochester Chapter is deeply opposed to any conflation of expanded enfranchisement with fraudulent voting activity or voter dilution.

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ARGUMENT

I. The Court Below Erred in Finding That Some or All of the Plaintiffs-Respondents Have Standing to Challenge the Municipal Voting Act Because No Plaintiff-Respondent Has Suffered an Injury-in-Fact.

The question of whether a party has standing to challenge a law is a threshold determination that must be made before a court adjudicates a dispute. *Ass'n for a Better Long Island, Inc. v. New York State Dep't of Environmental Conservation*, 988 N.Y.S.2d 115, 119 (2014). Such a determination requires a petitioner to show that the challenged action injures them in some concrete and personal way, an injury-in-fact. *Id.* The Supreme Court's finding of standing for the Plaintiffs-Respondents in this case required acceptance of two claimed injuries: first, that the expansion of the franchise to new voters "dilutes" the votes of existing voters and, second, that the same "affects the ability" of candidates to campaign for office. Not only are these claimed injuries logically unsound, but they also offend the core values of our democratic society by suggesting that existing politicians and voters should be granted an improper veto over the expansion of the franchise. We urge this Court to reject this attempt by some voters to hoard the franchise and by some politicians to choose their voters.

Because the logic of the injuries claimed by the various groups of Plaintiffs-Respondents differs among them, the following sections will discuss them separately. The first section argues that the Plaintiffs-Respondents-Voters lack

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standing because their votes have simply not been diluted by the expansion of the franchise in New York City elections. The second argues that the Plaintiffs-Respondents-Officeholders and Plaintiffs-Respondents-Political Parties lack standing because the expansion of the franchise does not disadvantage their campaigns.

A. The Plaintiffs-Respondents-Voters Have Suffered No Injury-In-Fact Because Expansions of the Franchise Do Not and Cannot Dilute Voter Power.

Doubtless the court below was correct in its conclusion that vote dilution is a cognizable harm. *See Saratoga Cty. Chamber of Comm. Inc. v. Pataki,* 275 A.D.2d 145, 156 (3d Dept. 2000), *aff'd* 100 N.Y.2d 801 (2003) ("Voter standing arises when the right to vote is eliminated or votes are diluted."). It erred, however, in concluding that the Plaintiffs-Respondents-Voters' votes were diluted here. Vote dilution is, at its core, a quantitative claim. Indeed, "one cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth." *Landes v. Town of N. Hempstead*, 20 N.Y.2d 417, 421 (1967) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). The worth of one person's vote is, of course, one. It is only when another person's vote is worth *more than one* that vote dilution occurs. Therefore, it is no surprise that vote dilution claims classically arise, not when new voters attain the franchise, but when district lines are redrawn. *See Reynolds*, 377 U.S.

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Redistricting can dilute votes because the ratio of representatives to voters in one district can differ from that in another, resulting in some voters effectively having more than one vote for the make-up of the legislature. *See id.* at 562.[4] The Municipal Voting Law could not possibly have this effect. The impact of the law on the mathematical analysis necessary to consider vote dilution claims is an increase in the total number of votes cast in New York City municipal elections—this has no effect on the *relative* voting power among council subdivisions. Plaintiffs-Respondents-Voters did not argue, and could not have argued, that these additional votes affected the distribution of seats on the City Council and instead simply asserted that new votes necessarily dilute existing ones.

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Existing votes are diluted no more by non-citizen enfranchisement than by residents turning eighteen or New Jersians moving to New York City. Existing voters cannot claim that every new voter dilutes their vote any more than they could claim 1+1=3. It is *mathematically* incorrect. The impact of a vote on the selection of a councilperson is identical to what it was prior to the law's passage. Not only did Plaintiffs-Respondents-Voters fail to show that their votes were diluted, but it would

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[4] For example, if the boundaries of hypothetical district A were drawn to include 500 voters who would elect a state representative, while hypothetical district B's boundaries were drawn to include 5,000 voters who would elect a state representative, the voters of hypothetical district B would have a valid vote dilution claim because their vote is worth one-tenth of that of a district A voter.

be impossible to show that on these facts. The Supreme Court erred by accepting this claimed injury of vote dilution.

Perhaps understanding that no mathematical analysis can show voter dilution under the traditional theory, Plaintiffs-Respondents-Voters implied in their summary judgment motion that their votes are diluted not by maldistribution but "'by a stuffing of the ballot box.'" Pls.' Mot. Summ. J. 11, NYSCEF Doc. No. 98 (quoting *Baker v. Carr*, 369 U.S. 186, 208 (1962)). This comparison is as offensive as it is inapt. As an initial matter, enfranchisement of new voters is not the equivalent of stuffing a ballot box with pre-selected votes—a criminal act of fraud. *See Donohue v. Brd. Of Elections of the State of N.Y.*, 435 F. Supp. 957, 967 (1976) (listing ballot-stuffing with "fraudulent registration or voting [and] other illegal means"). Regardless, considering this logic more closely reveals that a ballot-stuffing theory is no more persuasive than a maldistribution one.

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Claims of ballot-stuffing arise when there is alleged *fraudulent* voting activity designed to secure victory for a particular candidate or party. In *Donohue*, a group of voters sought to have a presidential election in New York re-done, alleging that their votes were "diluted by the illegal votes cast by thousands of unqualified voters." *Id.* at 961. It was not, however, their allegation that some votes were invalid that gave rise to their claim of dilution by ballot-stuffing. Indeed, invalid votes are cast in every election, and they do not give rise to claims of vote dilution for every

other voter. Rather, the plaintiffs in *Donohue* claimed that their votes were diluted *because* those invalid votes were fraudulently solicited by partisan groups to ensure the victory of Jimmy Carter. *See id.* at 961-62. Even if that were true, vote dilution would still only have occurred *if the outcome of the election was altered*. *See id.* at 968 (ordering an evidentiary hearing to determine if any invalid votes changed the election's outcome). In short, vote dilution by ballot-stuffing is, like vote dilution by re-districting, a highly technical and mathematical concept, and a claim of such does not arise whenever someone cries "unqualified."

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The math does not work for Plaintiffs-Respondents-Voters. Ballot-stuffing dilutes the votes for candidate A by putting a thumb on the scale for candidate B. No dilution occurs, however, if the "stuffed" ballots are given to candidates A and B in proportion to the votes they receive in that election. Plaintiffs-Respondents-Voters have provided no evidence in support of their summary judgment motion to show that non-U.S. citizens in New York City vote any differently than their U.S.-citizen neighbors. Even assuming that there is some legal problem with the votes of non-U.S.-citizens, it does not follow that they would have diluted the votes of U.S. citizens if the non-U.S. citizens' votes are distributed among candidates along the same lines as U.S.-citizen votes. Without any such evidence, there is no basis to conclude that Plaintiffs-Respondents-Voters' votes are at risk of dilution. Indeed,

we do have a concept encapsulating Plaintiffs-Respondents-Voters' theory of "vote dilution by enfranchisement": democracy. That is all that is happening here.

Technicalities aside, it bears repeating that it is wholly inappropriate to compare the enfranchisement of tax-paying residents of New York City to fraudulent attempts to steal elections by manufacturing ballots. It demeans the importance of voting in our democracy, and it reduces our neighbors to mere tools of the powerful. To state the obvious: extending the franchise is not fraudulent ballot stuffing.

Plaintiffs-Respondents-Voters do not have standing under the theory that their votes are diluted because of the simple fact that they cannot twist the math to make it so. The court below failed to engage with the logic of Plaintiffs-Respondents' voter standing theory and should have dismissed Plaintiffs-Respondents-Voters' claims.

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B. The Plaintiffs-Respondents-Officeholders and Plaintiffs-Respondents-Political Parties Have Suffered No Injury-In-Fact Because the Necessity to Earn Votes in a Democratic Election Is Not an Injury.

The Supreme Court's finding of standing on the part of Plaintiffs-Respondents-Officeholders and Plaintiffs-Respondents-Political Parties is perhaps more surprising than that of Plaintiffs-Respondents-Voters' standing—but it was equally in error. The injury recognized by the court was, at bottom, the fact that candidates and their party-backers will have to convince people to vote for them. That is not a change, let alone an injury. Candidates must win elections by winning votes. Parties must have their candidates elected by helping them to win votes. To

conceptualize this requirement as an injury is to place the desire of a candidate to win over the will of the people they seek to represent. Candidates must not be permitted to use the courts to choose their electorate.

Regardless, the Supreme Court's reasoning was erroneous, to the extent that any was provided at all. Citing *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 (1st Cir. 2000), the Supreme Court declared that candidate (and by extension, party) standing exists whenever a law "force[s that candidate] to structure [their] campaign to offset a potential disadvantage." With no further comment on how this is the case here, the Supreme Court concluded that new voters "affect [the candidates'] ability to run for office." Decision & Ord. on Mots. #004, 005, 006, at 7, NYSCEF Doc. No. 174.

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As an initial matter, the disadvantage in *Becker* was the possibility, under a regulation, of corporate sponsorship of debates. This resulted in a "competitive disadvantage" for Ralph Nader because, having pledged not to accept any such donations, he would have been forced to decline participation. *Becker*, 230 F.3d at 385-86. The injury was Nader's forced choice against the background principle that the law in question was concerned "with ensuring that corporate funds do not undermine the fairness of federal elections." *Id.* at 389. As such, Nader claimed "sufficient unfairness to his campaign to establish standing." *Id.*

Candidate injury by the operation of election law, according to the case the Supreme Court used to find it here, arises from "disadvantage" or "unfairness." No such disadvantage or unfairness exists here. The pool of possible votes is expanded by this law. These votes are available—and indeed must be won—by any candidate seeking office in New York City. Plaintiffs-Respondents do not—and could not—allege that *they* in particular are at a disadvantage because their opponents will be in the same boat. There is no "disadvantage" to offset here which is perhaps why the Supreme Court's language loosened from "offset a potential disadvantage" to "affect their ability to campaign." *Compare* Decision & Ord. at 6, *with* Decision & Ord. at 7.

At the end of the day, Plaintiffs-Respondents did not allege any disadvantage or unfairness. They merely asserted that the availability of new voters will force them to try to earn their votes. Of course, it will. The relevant question is not whether the law will impact their campaigns—all election laws do that; it does not follow that candidates always have standing—but whether the challenged law puts them at a "competitive disadvantage" that they will need to offset. There is no such evidence here and, indeed, because these new votes are available to all candidates, none could be provided. For all they, and the court below, know, these new voters are counting the days until the next election when they can cast their vote for Plaintiffs-Respondents. There is no injury here.

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II. The Supreme Court Erred in Concluding that the State Constitution Limits Voters in Municipal Elections to Citizens of the United States.

The Supreme Court struck down the Municipal Voting Law because it found that the new law violates the New York State Constitution, the New York State Election Law, and the Municipal Home Rule Law. Below, we argue that the court below erred in granting summary judgment to the Plaintiffs-Respondents because the Municipal Voting Law is permissible under the New York State Constitution.

A. The U.S. Immigration System Is Steeped in Racism Contrary to the Values of the State of New York and New York City

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The history of U.S. naturalization and immigration law illustrates that U.S. citizenship is a synonym for whiteness.[5] Much literature exists on the racist roots of immigration law, and caselaw confirms it. "In all of the naturalization acts from 1790 to 1906, the privilege of naturalization was confined to white persons." *Takao Ozawa v. United States*, 260 U.S. 178, 192 (1922). And decades later, the Supreme Court of the United States affirmed the exclusion of Black people, enslaved or free, from U.S. citizenship because "[the negro] had no rights which the white man was bound to respect." *Dred Scott v. Sandford,* 60 U.S. 393, 407 (1857), *superseded* (1868).

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[5] Steven Sacco, *Abolishing Citizenship: Resolving the Irreconcilability Between "Soil" and "Blood" Political Membership and Anti-Racist Democracy*, 36 GEO. IMMIGR. L.J. 693, 698-700 (2022).

Muslims were among the many peoples excluded from accessing U.S. citizenship for generations as insufficiently white or Christian. *See e.g., In re Ahmed Hassan*, 48 F. Supp. 843, 843 and 845 (E.D. Mich. 1942) (denying citizenship application of an Arab man from Yemen on the grounds that his skin was "dark brown in color" and he came from "the Mohammedan world"). The Supreme Court of the United States has upheld that approach, insisting that the whites eligible for naturalization under federal law were generally limited to Europeans. *United States v. Thind,* 261 U.S. 204 (1923). Thus, U.S. citizenship developed as a tool of racial exclusion to subordinate people of color. *See United States v. Muñoz-De La O*, 586 F. Supp. 3d 1032 (E.D. Wash. 2022).

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Just as the U.S. naturalization and immigration system was shaped by our nation's legacy of racism and slavery, non-U.S.-citizen suffrage was, and continues to be, shaped by our perception of foreign-born residents as threats rather than members of our communities. Non-U.S.-citizen suffrage was widely practiced during the nineteenth century.[6] But it became increasingly contested in struggles between the North and South.[7] Northerners tried to expand the political power of immigrants largely because the newer immigrants were opposed to slavery,

[6] RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE U.S. 17 (1st ed. 2006), https://www.nypl.org/sites/default/files/hayduk_-_chapter_2.pdf.
[7] *Id.* at 24.

prompting Southerners to further oppose non-U.S.-citizen suffrage.[8] With the growing need for new labor after the Civil War, the popularity of non-U.S.-citizen suffrage surged to attract settlers.[9] This trend did not survive the turn of the century. The massive influx of European immigrants during the twentieth century, coupled with competition for limited resources in the wake of World War I, fueled xenophobic nationalism and reversed non-U.S.-citizen suffrage trends.[10]

A century later, in the fall of 2003, New York City's Charter Revision Commission, a group appointed by Mayor Michael Bloomberg to study nonpartisan elections in New York City, recommended that New York State grant Lawful Permanent Residents[11] the right to vote in municipal elections.[12] In fact, former New York City Mayor Rudolph Giuliani has said, “Immigrants constantly infuse new life in economy and culture. As any of the elected officials here today can attest, their cities and counties thrive precisely because of their vibrant immigrant communities. So, this is not just a phenomenon in New York City but a national phenomenon.”[13]

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[8] *Id.*
[9] *Id.*
[10] *Id.* 25-26.
[11] A Lawful Permanent Resident, sometimes known as a “green card” holder, is a non-citizen authorized by the U.S. government to live permanently in the United States. For more information, *see*, e.g., Department of Homeland Security, “Lawful Permanent Residents,” https://www.dhs.gov/immigration-statistics/lawful-permanent-residents.
[12] Gabriela Evia, Note, *Consent by All the Governed: Reenfranchising Noncitizens As Partners in America's Democracy*, 77 S. CAL. L. REV. 151, 163 (2003).
[13] *Id.* at 180-81.

Voter qualification, especially for state and local elections, is a primary example of an area which states have historically occupied. *Oregon v. Mitchell,* 400 U.S. 112, 124-26 (1970); *Carrington v. Rash*, 380 U.S. 89 (1965). Aware of the reality that non-U.S. citizens have been subjected to a history of purposeful unequal treatment, of the advantages that non-U.S. citizens bring to the State of New York, and armed with powers granted to it by the United States Constitution, it is highly plausible that the drafters of the New York Constitution purposefully did not restrict voting to U.S. citizens, when they very easily could have. Courts cannot replace their judgment for that of the drafters and elected officials on suffrage issues.

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Enfranchising non-U.S. citizens is not new to New York. In New York City, non-U.S.-citizen parents could vote in local school board elections from 1968 until 2003 when the city abolished its school boards.[14] According to the School Board Task Force's co-director, Virginia Busti, there had not been any "major problems" from implementing such an initiative in New York City.[15] New York's Education Law authorizes non-U.S. citizens to vote in public school board elections and to serve as elected school board members. Education Law §§ 2590-c(3) and (4) provide that "every registered voter residing in a community district and every parent of a

[14] Tara Kini, *Sharing the Vote: Noncitizen Voting Rights in Local School Board Elections*, 93 CAL. L. REV. 271, 311 (2005).
[15] Elise Brozovich, *Prospects for Democratic Change: Non-Citizen Suffrage in America*, 23 HAMLINE J. PUB. L. & POL'Y 403, 440 (2002).

child attending any school under the jurisdiction of the community board of such district who is a citizen of the state . . . shall be eligible to vote at such election for the members of such community board" and "shall be eligible for membership on such community board." That statute has been officially construed by the New York City Board of Elections and by the New York City Board of Education to require *state citizenship*, but not federal citizenship. *Coal. for Ed. in Dist. One v. Bd. of Elections of City of New York,* 370 F. Supp. 42, 46 n.7 (S.D. N.Y. 1974) ("such parents must be citizens of New York State, but not necessarily of the United States"), *aff'd,* 495 F.2d 1090, 1092 (2d Cir. 1974) ("New York allows parents of students to participate in school board elections even when they are not otherwise eligible to vote in the district").

Our nation's history demonstrates political shifts in the palatability of non-U.S.-citizen suffrage depending on the perceived benefits or supposed harms of the inclusion of immigrants. Where the drafters of the New York Constitution did not foreclose enfranchisement to non-U.S. citizens, courts must not singlehandedly impose such a prohibition. Especially considering the precedent of including non-U.S. citizens in education-related elections, it would be an impermissible judicial incursion into the democratic process to read into the state's Constitution a prohibition against non-U.S.-citizen voting that does not exist.

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B. The Plain Meaning of the New York Constitution Establishes the Minimum Requirements of Voting as Citizenship [*of the State*], Attainment of Eighteen Years of Age, and Residence in the County, City, or Village for Thirty Days Preceding an Election

In construing a constitutional provision, the function of a court is to ascertain and give effect to the intent of the framers and the people who adopted it. *Canteline v. McClellan*, 282 N.Y. 166, 25 N.E.2d 972 (1940). Courts cannot assume that words in constitutional provisions were inserted for no useful purpose. *Schmidt v. Wolf Contracting Co*., 269 A.D. 201 (App. Div. 1945), *aff'd*, 295 N.Y. 748 (1946). Nor can a court assume that a constitution was drafted without purpose and vision for the interpretation of the words within it. *Judd v. Bd. of Educ. of Union Free Sch. Dist. No. 2, Town of Hempstead, Nassau Cnty.*, 278 N.Y. 200 (1938). The most reliable key to the intention of the framers and adopters of the constitution is to be found in the language of the constitutional provisions themselves. Thus, construction of a constitutional enactment must necessarily be limited by the language of the enactment. *People v. Carroll*, 171 N.Y.S.2d 812 (1958).

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When addressing suffrage in Article II, [Qualifications of voters], the drafters used the term “citizen” without “of the United States”:

> Section 1. 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. (Amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; further amended

> by vote of the people November 2, 1943; November 6, 1945; November 6, 1961; November 8, 1966; November 7, 1995.). N.Y. Const. art. II, § 1.

The drafters of the New York Constitution were not oblivious to the existence of the term "citizen of the United States." In fact, they used it twice. The first use can be seen in Article III, [Qualifications of members; prohibitions on certain civil appointments; acceptance to vacate seat]:

> Section 7. No person shall serve as a member of the legislature unless he or she is a *citizen of the United States* and has been a resident of the state of New York for five years, and… (New. Derived in part from former §§7 and 8. Adopted by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938; amended by vote of the people November 2, 1943.) (emphasis added). N.Y. Const. art. III, § 7.

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The second use can be seen in Article IV, [Qualifications of governor and lieutenant-governor]:

> Section 2. No person shall be eligible to the office of governor or lieutenant governor, except *a citizen of the United States*, of the age of not less than thirty years, and who shall have been five years next preceding the election a resident of this state. (Also adopted by the Constitutional Convention of 1938. Amended by vote of the people November 6, 2001.). N.Y. Const. art. IV, § 2.

Similarly, the term "citizen of the state" appears in Article III, Section 19.[16] So, the drafters recognized state citizenship as distinct from U.S. citizenship.

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[16] No claim against the state shall be audited, allowed or paid which, as between citizens of the state, would be barred by lapse of time. But if the claimant shall be under legal disability the claim may be presented within two years after such disability is removed." N.Y. Const. art. III, § 19.

If the original drafters simply forgot to write "of the United States" in the Qualifications of Voters section, they would have amended, or future amenders would have amended. But no such amendment was made. Even when the legislature amended Section I (which uses the term "citizen" without "of the United States") in 1995, they did not amend the citizenship language, despite the constitution defining eligibility for certain roles as being restricted to "citizens of the United States." A constitution is a carefully drafted document with words that are intended to have specific meanings. In this case, "citizen" and "citizen of the United States" are both used in the state's Constitution. It is therefore evident that the drafters, and amenders, chose to not require "citizen[ship] of the United States" for voters. To conclude otherwise is to ignore their choice and to read words into the text that do not exist.

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The New York Constitution uses different terms in different chapters, all of which deliver precise messages which should not, and cannot, be ignored by courts. Indeed, some provisions of the Constitution grant rights to an even broader group of people, "persons," without reference to their national or state citizenship. The term "person" is used in Section 11 of Article I, [Equal protection of laws; discrimination in civil rights prohibited]:

> "No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state." N.Y. Const. art. I, § 11.

The term "civil rights" was understood by the delegates at the 1938 Constitutional Convention to mean "those rights which appertain to a person by virtue of his citizenship in a state or community" *People v. Kern*, 75 N.Y.2d 638, 651 (1990) (citing 4 Rev. Record of N.Y. State Constitutional Convention, 1938, at 2626 [statement of Delegate H.E. Lewis]). So, here the drafters intended to extend to all persons the civil rights available to citizens of the State of New York. Thus, the Constitution contemplates several categories of rights attaching to different groups of people. "Persons" have all the civil rights of citizens of New York. "Citizens of the United States" have the right to run for office in New York. "Citizens [of New York]" have the right to vote.

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The framers knew how to use words and communicate messages through language. They clearly communicated that a voter in the state needs to be of requisite age and meet the relevant residency requirements but did not communicate that such a voter needs to be a citizen of the United States. To conclude otherwise is to read redundancy, vagueness, and inconsistency into the New York Constitution.

C. <u>State Citizenship Is a Well Recognized Concept and One that Must be Respected</u>

The existence of the aforementioned New York Education Law, Article 52A, Section 2590(c), evidences an interpretation by the New York legislature that non-U.S. citizens may register and vote in school board elections. *See* N.Y. Educ. Law § 2590(c) (McKinney Supp. 1999-2000); N.Y. Elec. Law § 5-106 (Consol. 1998).

Furthermore, the New York State Education Commissioner has interpreted the Education Law to permit non-U.S. citizens who are parents to hold positions on community school boards. *See Ambach v. Norwick*, 441 U.S. 68, 81-82 n.15 (1979).

Citizenship in the State of New York is a familiar concept to state courts, and one that is distinct from U.S. citizenship. *See Varacchi v. State Univ. of New York at Stony Brook*, 62 Misc. 2d 1003, 1005 (Sup. Ct. 1970) ("Certainly plaintiff is more than a citizen of the State of New York. He is a personally aggrieved party."); *Pilcher v. City of New York*, 68 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2020) ("a deliberate indifference to the rights and safety of U.S. citizens and citizens of the State of New York . . . ."). Federal courts in New York agree. Under 28 U.S.C. § 1332(a), a permanent resident alien[17] is deemed a citizen of the state where he or she is domiciled. *Hubei Jingzhou Yizhuo Indus. Co. v. JNJ Rest. Supplies, Inc.*, 2010 WL 5174337, at *2 (S.D.N.Y. Dec. 9, 2010).

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Not only is New York citizenship distinct from U.S. citizenship, but even outside of the New York Constitution, it is not uncommon to find that certain rights turn on whether one is a citizen of the *state* irrespective of national citizenship. For

[17] "Alien" here means non-U.S.-citizen. The term is used because it is the technical immigration law term to refer to non-U.S.-citizens. The author notes, however, that this term is rejected by many non-U.S.-citizens and its usage should be avoided.

example, lawful permanent residents who are citizens of the State of New York can sue in New York federal court on the basis of diversity of citizenship.[18]

The question in this case is not whether citizens of New York should be allowed to vote in municipal elections. Rather, the question is whether the New York legislature was permitted to do so and whether the City of New York's affirmative passing of Local Law 2022/011. The answer is yes.

CONCLUSION

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

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Respectfully submitted,

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[18] § 1332(a) does not change a permanent resident alien's status as an alien; therefore, the presence of aliens on both sides of a controversy will destroy diversity even if one or more of them is a permanent resident alien. *LBA Int'l Ltd. v. C.E. Consulting LLC,* 2010 WL 305355 (S.D.N.Y. Jan. 26, 2010), *subsequent determination*, 2010 WL 778019 (S.D.N.Y. Mar. 5, 2010); *Marcus v. Five J Jewelers Precious Metals Indus. Ltd*., 111 F. Supp. 2d 445, 446 (S.D.N.Y. 2000). In contrast, U.S. citizens who are domiciled in a foreign country may not sue in New York federal court on the basis of diversity of citizenship because they are not citizens of any state. *United Torah Educ. & Scholarship Fund, Inc. v. Solomon Cap. LLC*, 2014 WL 4058486 (S.D.N.Y. Aug. 14, 2014), *aff'd*, 621 F. App'x 64 (2d Cir. 2015).

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