To be argued by:
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15 minutes requested

Richmond County Clerk's Index No. 85007/2022

New York Supreme Court
Appellate Division: Second Department

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

Plaintiffs-Respondents,

against

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

Defendants-Appellants,

(caption continued inside)

Docket No. 2022-05794

REPLY BRIEF FOR THE MAYOR AND THE CITY COUNCIL OF THE CITY OF NEW YORK

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January 9, 2023

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Defendants-Intervenors-Appellants,

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendant.

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PRELIMINARY STATEMENT

Plaintiffs' challenges to Local Law 11 under the State Constitution, Election Law, and Municipal Home Rule Law fall flat. On their constitutional challenge, plaintiffs have not come close to meeting their heavy burden of showing that there is no reasonable reading of the Constitution compatible with Local Law 11. Instead, plaintiffs double down on Supreme Court's threshold error, treating article IX—the part of the Constitution that concerns local control over local elections—as an afterthought. Plaintiffs hardly engage with our actual constitutional argument.

When article IX is confronted head-on, with due consideration for its rule of liberal construction in favor of effective local self-governance, there is no doubt that it can reasonably be read to allow the City of New York to expand the voter pool for local elections beyond U.S. citizens. Plaintiffs never really argue otherwise, and that is basis enough to reject their constitutional challenge. The notion that there may be another way to read article IX does not change the outcome, especially when plaintiffs'

reading would undermine rather than advance the article's autonomy-promoting rule of construction.

Plaintiffs' Election Law argument is similarly devoid of merit. The Election Law's plain language provides that it yields to "any other law" unless otherwise specified, authorizing the City to supersede its terms with regard to the election of local officials absent a specific bar. This Court should reject plaintiffs' invitation to find ambiguity where there is none. And plaintiffs fail to grapple with the broader ramifications of their argument, which seemingly calls into question other measures the City has enacted to promote local democracy, some of which have been upheld and others which have long stood unchallenged.

Nor have plaintiffs shown that a referendum was required under the Municipal Home Rule Law. An increase to the voter pool does not change the "method" of any election. Local officers will still be elected by the same method: secret ballot that varies depending on the type of election.

ARGUMENT

PLAINTIFFS OFFER NO PERSUASIVE DEFENSE OF SUPREME COURT'S DECISION

A. Plaintiffs fail to show that there is no reasonable way to reconcile Local Law 11 with the Constitution.

1. Plaintiffs misstate or ignore the relevant legal standards.

Plaintiffs seem to suggest that, at this stage, they are entitled to have all inferences taken in their favor (Brief of Plaintiffs-Respondents ("Resp. Br.") 2). But when confronting purely legal arguments like those here, this Court not only presumes that duly enacted laws are constitutional, it takes every reasonable step possible to reconcile such laws with the Constitution. *White v. Cuomo*, 38 N.Y.3d 209, 216 (2022). Plaintiffs bear the heavy burden of proving that such reconciliation is "impossible." *Id*. They don't even argue that they met this standard.

In the same vein, plaintiffs barely acknowledge that article IX—the operative part of State Constitution here—must be "liberally construed" to enhance local self-governance. They only

mention this mandatory legal construction in the very last paragraph of their argument (Resp. Br. 31-32). Their proffered interpretation of the Constitution does not take it into account at all. And reading article IX liberally, as the article itself requires, makes clear that plaintiffs' arguments have no merit.

2. Plaintiffs make the same mistake Supreme Court did by barely addressing the relevant provision: article IX.

It is article IX of the State Constitution, not article II, that is the starting point for understanding the City's powers, since that is the article that explains the "rights" of local governments. As we explained in our opening brief (Brief for City Appellants ("App. Br.") 10-19), the City has broad powers to experiment when it comes to the election of local officials. *See, e.g.*, *Resnick v. Ulster County*, 44 N.Y.2d 279, 286 (1978) (cities have "great autonomy in experimenting" with election practices); *McDonald v. NYC Campaign Fin. Bd.*, 40 Misc. 3d 826, 839 (Sup. Ct., N.Y. Cnty. 2013) (local governments have "room to experiment" with election systems), *aff'd*, 117 A.D.3d 540 (1st Dep't 2014). Plaintiffs don't

dispute that at all, nor could they. In fact, they wait to the end of their constitutional argument to even address article IX.

When they do finally get to it, plaintiffs put forward a more limited reading of article IX (Resp. Br. 27-32), which may very well be a permissible reading. But it is not the *only* permissible reading. And where two interpretations are readily available, the Constitution commands the adoption of the one that advances article IX's core purpose of promoting "[e]ffective local self-governance" Art. IX, §§ 1, 3(c); *cf. Albunio v. City of New York*, 16 N.Y.3d 472, 478 (2011) (explaining liberal construction of the New York City Human Rights Law). The article's autonomy-promoting purpose—and thus its rule of liberal construction—are squarely implicated here, where the City has acted to address an acute local representation problem by giving numerous non-citizen New Yorkers who lawfully live and work here a say in local policies that affect their daily lives.

Against this backdrop, plaintiffs don't even claim their interpretation is the *only* reasonable way to read article IX. To the contrary, they admit that "mean" and "include" can have

"significantly different definitions" that are "to some degree incompatible" (Resp. Br. 29). As the very case they cite explains, "it hardly can be said that the words plainly and without ambiguity import" one meaning "to the exclusion of" another. *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934). Thus, while plaintiffs cite *U.S. Steel Corp. v. Gerosa*, 7 N.Y.2d 454 (1960), in support of their more restrictive reading of "mean or include," they virtually concede that the restrictive reading is not the only permissible one, as required for them to prevail in the distinctive circumstances of this case.

Indeed, plaintiffs readily acknowledge that "include" can be used to introduce a non-exhaustive set (Resp. Br. 29). *See also* App. Br. 17 (collecting cases). The term "people" is plainly susceptible to such a construction, since it can be understood to identify a set of persons who must be included—citizens—without precluding the addition of others.[1] Whatever "mean or include"

[1] This is especially so given that noncitizen voting is hardly a departure from American tradition. As one amicus put it, "Noncitizen voting is as American as apple pie and older than baseball." Amicus Brief of Professor Hayduk at 6.

may signify in other contexts, reading "include" in the liberal manner required by the particular context here—where article IX's core principles of local autonomy and self-governance are directly at stake—is the only approach that honors article IX's express rule of construction.

Meanwhile, plaintiffs are mistaken in accusing us of rendering the term "mean" in the phrase "mean or include" entirely superfluous (Resp. Br. 29). Our reading easily gives import to each word in the article. The word "mean" naturally fits, for example, the term "special law," another of the defined terms in the series. As plaintiffs themselves assert, the word "means" is particularly apt where a term and its definition are "interchangeable equivalents" (Resp. Br. 29). And "special law" is precisely such a concept, as it is defined as a law that "applies to one or more, but not all, counties, counties other than those wholly included within a city, cities, towns or villages." Art. IX, § 3(d)(4). The City's reading introduces no surplusage.

Nor does the City's reading open "Pandora's box," as plaintiffs claim (Resp. Br. 31). The City does not contend that

article IX *requires* municipalities to expand the franchise, only that it *allows* them to do so. As is true of many laws, it sets a floor but not a ceiling. And the idea that different localities may come to different conclusions as to how to best effectuate self-governance is hardly "unprecedented" (Resp. Br. 31). That's the whole point of municipal home rule. When it comes to the affairs of the municipality, localities can decide for themselves how to do things. *See City of N.Y. v. Patrolmen's Ben. Ass'n*, 89 N.Y.2d 380, 287 (1996) (cities have "significant autonomy" on "local matters").

3. Article II does not help plaintiffs either, since section 1 does not directly apply to the election of local officials.

Instead of addressing the constitutional provisions that govern the City's power, plaintiffs misplace their focus on article II. But as we explained in our opening brief, article II, section 1 does not independently apply to the election of local officers (App. Br. 13-16). *See Spitzer v. Fulton*, 172 N.Y. 285 (1902); *Blaikie v. Power*, 13 N.Y.2d 134, 144 (1963) (Burke, J., concurring); *Matter of Carrick*, 183 A.D. 916 (4th Dep't 1918). Plaintiffs cite these cases in passing (Resp. Br. 19-20), but have no answer to them.

While ignoring the case law, plaintiffs claim that references in other sections of article II to cities, counties, and villages proves that section 1 applies to local elections (Resp. Br. 20-22). But of course, elections for statewide office take place in cities, counties, and villages, and article II, section 1 certainly applies to those elections. *See Hoerger v. Spota*, 109 A.D.3d 564 (2d Dep't 2013) (municipalities have no power to change terms of statewide office). But that does not mean that article II, section 1 independently applies to the election of local officials.[2] The City's powers with regard to purely local elections are governed by article IX.

None of the cases plaintiffs cite suggest otherwise. While *People v. Pease*, 27 N.Y. 45, 53 (1863), noted that only citizens were authorized to vote, that was in fact true at that time. But *Pease* was decided long before article IX's enactment in 1963 and says nothing about municipal powers in the present day. Whatever the state of affairs was in 1863, today it is undisputed that article IX now gives cities "significant autonomy" to act on

[2] This Court need not decide whether article II, §§ 5 and 7 apply to elections for purely local office. Those provisions are not relevant here.

"local matters." *City of N.Y. v. Patrolmen's Ben. Ass'n*, 89 N.Y.2d 380, 387 (1996).[3]

B. The mental gymnastics required by plaintiffs' Election Law argument are not necessary.

The Election Law could not be clearer. It yields to "any other law" that specifically addresses a matter covered by it, unless a particular provision of the Election Law explicitly says otherwise. § 1-102. Plaintiffs go to great lengths to make this phrase mean something other than what it says. This Court need only read the statute. There is no mystery here. *See Kimmel v. State of N.Y.*, 29 N.Y.3d 386, 393 (2017) ("any civil action" means exactly that); *Prego v. N.Y.*, 147 A.D.2d 165, 170 (2d Dep't 1989) (same, as to "any substance"). Thus, the City's local law permissibly overrode the Election Law provision stating that only citizens may vote.

Plaintiffs claim that the word "law" is ambiguous and should be read to mean "state law" (Resp. Br. 34-36). This argument is

[3] Plaintiffs cite other cases that have seemingly no relevance here (Resp. Br. 17-18). *See Ginsberg v. Purcell*, 51 N.Y.2d 272 (1980) (judge convicted of felony and disbarred not entitled to salary); *Hopper v. Britt*, 203 N.Y. 144 (1911) (striking down state law governing how candidates appear on ballot).

based on the premise that statutory term "law" could be read to cover administrative agency regulations, which they claim would be "untenable" (Resp. Br. 34). This fear is unwarranted, since an administrative regulation "has the force of law, but it is not a law." *Garcia v. NYC Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 610 (2018). That is because administrative regulations by executive agencies and legislative enactments by elected officials—whether state or local—are categorically distinct.

The bottom line is that the Election Law broadly authorizes local departures from its default rules via the enactment of local laws, and plaintiffs have no answer for the cases holding that courts are not supposed to add qualifications to such broad language. *Matter of Branford House v. Michetti*, 81 N.Y.2d 681 (1993); *Prego v. N.Y.*, 147 A.D.2d 165, 170 (2d Dep't 1989). In *Matter of Comptroller v. City*, 7 N.Y.3d 256 (2006), for example, the Court of Appeals interpreted a statute that applied to City-owned "property." The Court found that the word "property" unambiguously covered all kinds of property—real, personal, tangible, and intangible. *Id.* at 264-65. The Court saw "no reason

to limit 'property' any more than the drafters have." *Id.* at 265. And the Court came to this conclusion even though the legislative history suggested the drafters intended a narrower meaning. *Id.* at 264. Rather than trying to read the minds of all legislators, the Court interpreted the statute "in accordance with the clear legislative language." *Id.* If the legislature meant something other than what it wrote, it was free to amend the statute. *Id. See also Auerbach v. Bd. of Educ.*, 86 N.Y.2d 198, 204 (1995) (statute applicable to retirement system "members" included all members, not just nonmanagerial employees).

The phrase "any other law" is not ambiguous and means exactly what it says. Indeed, plaintiffs concede that several cases have said as much (Resp. Br. 41-45). But they fail to acknowledge that one of those cases was affirmed by the First Department—representing the only appellate authority on point. *City of New York v. Board of Elections*, 1991 N.Y. Misc. LEXIS 895, at *4 (Sup. Ct., N.Y. Cnty. 1991), *aff'd* 1991 N.Y. App. Div. LEXIS 18134 (1st Dep't 1991), *lv. denied and dismissed*, 1991 N.Y. LEXIS 6169 (1991); *see also 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). And while plaintiffs contend that those cases did not engage in "substantive analysis," there is "nothing left for interpretation" when the law is so plain. *See DeVera*, 32 N.Y.3d at 435.

This Court need not even look at the legislative history given the clarity of the statute. But that history does not help plaintiffs. To the contrary, they concede that the 1976 recodification of § 1-102 was not intended to make a substantive change to the law (Resp. Br. 40). But they ignore the history we pointed to in our opening brief: even before the recodification, localities were permitted to supersede state election law (App. Br. 26-27).

Moreover, it makes perfect sense that the Legislature intended to permit municipalities to supersede the Election Law, given our State's strong tradition of local control and experimentation when it comes to local elections (*see* App. Br. 10-12). Far from a "major alteration" to the status quo (Resp. Br. 40), § 1-102 simply codifies long-standing case law holding that a "municipality is empowered to modify an election law in so far as

that law affects the property, government or affairs of the municipality." *Bareham v. Rochester*, 246 N.Y. 140, 149 (1927).[4]

Plaintiffs cannot understand why the State would bother enacting laws if municipalities are free to override them (Resp. Br. 33, 37-38). But their confusion is based on their refusal to acknowledge longstanding home rule principles. There is simply nothing unusual about the State establishing default rules, and then allowing localities to depart from those rules if they so choose (*see generally* App. Br. 20-23). As plaintiffs themselves note, the Election Law is full of locality-specific rules, like § 3-506's requirement that the City provide voting information in Russian (Resp. Br. 37). But they get the meaning of this backwards. While plaintiffs claim that the existence of locality-specific laws proves

[4] While plaintiffs correctly note that *Bareham* was decided under a prior version of the Constitution (Resp. Br. 43), that hardly helps them. It cannot be seriously disputed that article IX was intended to expand municipal powers, not contract them. *See Wambat Realty Corp. v. State*, 41 N.Y.2d 490, (1977) ("Undoubtedly the 1963 home rule amendment was intended to expand and secure the powers enjoyed by local governments."). And while plaintiffs claim that *Bareham* turned on the earlier constitution's specific authorization to local governments to pass laws concerning the "mode of selection" of local officers, they are plainly mistaken in asserting that this same authorization cannot be found in the current Constitution. *See* art. IX, § 2(c)(1).

that the Legislature would not have intended for local governments to have the power of supersession, a core principle of our constitutional structure is that special laws limited to particular municipalities typically *are* subject to local supersession, even without the express language found in Election Law § 1-102. *Bareham*, 246 N.Y. at 148 (the Election Law is "not a statute applicable alike to all the cities of the state in respect to nominations and elections of city officers"); *see also, e.g.*, *Murray v. Town of N. Castle*, 203 A.D.3d 150, 160-61 (2d Dep't 2022) (town could supersede state law with regard to police officer discipline).

Plaintiffs also fail to acknowledge the City's long history of superseding the Election Law. From the non-partisan system for filling local vacancies to ranked-choice voting, the City has departed from the default rules multiple times over the last 30 plus years. The fact that these measures have stood for so long—or were even challenged and upheld, *City of New York v. Board of Elections*, 1991 N.Y. Misc. LEXIS 895, at *4 (Sup. Ct., N.Y. Cnty. 1991), *aff'd* 1991 N.Y. App. Div. LEXIS 18134 (1st Dep't 1991), *lv.*

denied, 1991 N.Y. LEXIS 6169 (1991)—in itself shows that such supersession is permitted.[5]

Plaintiffs further argue that interpreting § 1-102 to mean what it says would render superfluous a reference to local law in a single clause of a subparagraph of § 3-200 (Resp. Br. 37-38). But the rule against surplusage constructions "is not absolute" and must yield to a law's plain language. *Lamie v. United States*, 540 U.S. 526, 536 (2004). That is particularly true where the form of alleged surplusage is a mere redundancy in statutory language across a broad range of provisions, as opposed to unique statutory text that would be drained of meaning under a given construction. Simply stated, "[r]edundancies across statutes are not unusual events in drafting." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *see also Matter of Seiferheld v. Kelly*, 16 N.Y.3d 561, 567 (2011) (noting redundancies in the Administrative Code).

[5] *See also* Amici Brief of Local Government Professors at 5 (noting that local governments have had the power to depart from statewide election rules "for at least 120 years").

While courts should generally "disfavor" interpretations that render language superfluous, that canon of construction is "no more than a rule of thumb." *Connecticut Nat'l Bank*, 503 U.S. at 253. As this Court has put it, the fact that redundancies would otherwise arise does not permit a court "to rewrite a statute in such a way as to change the plain meaning." *Neff v. Zoning Bd. Of Appeals*, 224 A.D.2d 624, 625 (2d Dep't 1996).

By enacting default election rules that localities can supersede for local elections, the State has ensured that local governments have genuine home rule when it comes to the election of local officials, a matter in which "the State has no paramount interest." *Baldwin v. City of Buffalo*, 6 N.Y.2d 168, 173-74 (1959). It is not for plaintiffs to second guess that determination.

C. Plaintiffs fail to explain how an increase in the voter pool changes the method of election.

Plaintiffs have no real answer to our points about the Municipal Home Rule Law. They don't dispute that the list of

changes requiring a referendum is construed narrowly, or that a referendum is the exception to the rule.

Plaintiffs nonetheless claim that a referendum was required because the Local Law changes the "eligibility criteria" for voters (Resp. Br. 48). The Municipal Home Rule Law says nothing about changes to eligibly criteria. Plaintiffs must prove that the City made a change to the "method" of "electing" an "officer. And as we explained in our opening brief (App. Br. 31-32), a method is *how* a voter casts her vote, not *who* can vote.

While we can find no case addressing changes to voter eligibility criteria, this Court has held that changes to candidate eligibility criteria do not require a referendum. In *Holbrook v. Rockland County*, 260 A.D.2d 437, 437 (2d Dep't 1999), a county adopted a "two hat" law prohibiting a person from simultaneously holding two different elected positions. The plaintiff, who was a member of the local legislature and also town supervisor, argued that the law changed the "term" and "power" of an elected officer and thus required a referendum. This Court rejected that argument, stating that a "new eligibility requirement" did not

require a referendum. So too here. Eligibility to vote is distinct from the method of voting, and it did not require a referendum.

To be sure, a referendum is required if the City changes an officer's selection method from appointment to election—two fundamentally distinct and historically established methods of selecting officers—as plaintiffs note (Resp. Br. 47). The fact that such a change would require a referendum has no bearing here, where all officials will continue to be elected in the same manner.

Plaintiffs further claim that a referendum was required here because Local Law 11 supposedly "replac[es] the existing electorate" with "a differently-constituted electorate" (Resp. Br. 47-48). This is incorrect; the law may increase the size of the voter pool by adding new voters, but everyone who could vote before can still vote. No one has been replaced. And plaintiffs concede that changing district boundary lines does not require a referendum (*id.* at 48), and that also changes the composition of a district's voter pool. *See Baldwin v. Buffalo*, 6 N.Y.2d 168, 175 (1959) (change of boundary lines does not change "mode of selection").

Plaintiffs also fail to explain how their proposed reading of the constitution makes sense. The City of New York is constantly growing and changing. People move here and families grow, others move away or die, and certain neighborhoods expand while others contract. The electorate is thus constantly in flux, not frozen in amber. It is never "the same voter pool" from one election to next (Resp. Br. 48). Quite sensibly, the Constitution does not require a referendum based on changes in the pool of voters.

CONCLUSION

This Court should reverse, grant summary judgment to defendants, and deny summary judgment to plaintiffs.

Dated: New York, NY
January 9, 2023

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer, using Century Schoolbook 14 pt. for the body (double-spaced) and Century Schoolbook 12 pt. for the footnotes (single-spaced). According to Microsoft Word, the portions of the brief that must be included in a word count contain 3,713 words.