To be argued by: Fulvia Vargas-De Leon and Cesar Ruiz
(Time Requested: 15 Minutes)

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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VITO J. FOSSELLA, NICHOLAS A. LANGWORTHY, JOSEPH BORRELLI, NICOLE MALLIOTAKIS, ANDREW LANZA, MICHAEL REILLY, MICHAEL TANNOUSIS, INNA VERNIKOV, DAVID CARR, JOANNA RIOLA, 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,

Docket No. 2022-05794

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,

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,

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendant.

REPLY BRIEF FOR DEFENDANTS-INTERVENORS-APPELLANTS

Richmond County Clerk's Index No. 85007/2022

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PRELIMINARY STATEMENT

Plaintiff-Respondents have not met their burden to demonstrate standing to challenge the Municipal Voting Law. They have not demonstrated that the Municipal Voting Law violates the State Constitution or State Election Law, nor have they shown that passage of the Municipal Voting Law required a referendum. This appeal should be granted.

POINT I: THE TRIAL COURT ERRED IN FINDING THAT THE PLAINTIFFS-RESPONDENTS HAVE STANDING TO COMMENCE THIS ACTION.

A. INDIVIDUAL VOTER PLAINTIFFS-RESPONDENTS DO NOT HAVE STANDING TO CHALLENGE THE MUNICIPAL VOTING LAW.

The law is clear: "[V]oter standing arises when the right to vote is eliminated or votes are diluted." *Saratoga Cnty. Chamber of Com., Inc. v. Pataki*, 275 A.D.2d 145, 156 (3d Dep't 2000), *aff'd*, 100 N.Y.2d 801 (2003). For the individual voter Plaintiffs-Respondents ("Individual Voters") to have standing, the Court would have to accept two allegations as facts: first, that the expansion of the electorate through the Municipal Voting Law is an injury that dilutes Individual Voters' vote, and second, that such injury is personal to Plaintiffs and not a generalized grievance suffered by all voters. Plaintiffs-Respondents argue that Individual Voters' standing arises as "voters whose electoral power will be diminished by an influx of new voters[.]" Opp. at 4. Nothing in the Municipal Voting Law in fact consists of an injury that confers standing.

Plaintiffs-Respondents articulate their injury as vote dilution, but vote dilution is typically analyzed under Equal Protection doctrine. "Vote dilution in the one-person, one-vote cases refers to the idea that each vote must carry equal weight." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). In *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 355 (3d Cir. 2020), *vacated as moot*, 141 S.Ct. 2508 (2020), a case vacated on mootness grounds but nonetheless persuasive as to voter standing, the Third Circuit analyzed standing for voters seeking to enjoin the counting of mail-in ballots received after a state court ordered an extension. The Court held that plaintiffs lacked standing because they could not demonstrate that the tallying of mail-in ballots received during the extension period was a "concrete and particularized" injury. Specifically, the Court stated that "'voters who allege facts *showing disadvantage to themselves*' have standing to bring suit to remedy that disadvantage, but "a disadvantage to the plaintiff exists only when the plaintiff is part of a group of voters whose votes will be weighed differently compared to another group." *Bognet*, 980 F.3d at 358 *(*quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). (emphasis added in *Bognet*).

There is no Equal Protection claim here, nor can there be, because the Municipal Voting Law does not seek to weigh or tally votes differently or make any invidious or other distinction among groups of eligible voters. Nonetheless *Bognet* is instructive because Plaintiffs-Respondents rely so heavily on the Equal Protection

vote dilution cases. Individual Voters define themselves as voters who "voted in past New York City municipal elections and intend to continue doing so in the future." Opp. at 5. They allege that their vote is being diluted because there is now an "expanded voter pool" but do not explain how this expansion represents a cognizable injury; the "dilution" here is no different from the way redistricting, or for that matter, population growth might impact the weight of a vote. Individual Voters' access to the franchise remains untouched by Municipal Voting Law.

Individual Voters' reliance on the Equal Protection line of cases is especially dangerous when they contend that their injury is analogous to "'dilution by a false tally, or by a refusal to count votes…or by a stuffing of the ballot box.'" Opp. at 6 (quoting *Baker v. Carr*, 369 U.S. at 208). Enfranchising new voters under the Municipal Voting Law and the subsequent casting of votes by the new members of the electorate bears no resemblance to the criminal act of ballot stuffing. "[I]t is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity[.]" *Gray v. Sanders*, 372 U.S. 368, 386 (1963) (Harlan, J., dissenting). Where the state seeks to prosecute criminal fraud in voting, it need not show standing. Plaintiffs-Respondents here have identified no case where individual voters demonstrated standing or harm to their individual votes because of a vote cast

by someone else in the same election. "[T]he notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing." *Moore v. Circosta*, 494 F. Supp. 3d 289, 312-13 (M.D.N.C. 2020)).

In a case addressing a challenge to a state directive requiring ballots to be mailed to every voter in the State's registry, the federal district court for the District of Vermont spelled this principle out. *Martel v. Condos*, 487 F. Supp. 3d 247, 249 (D. Vt. 2020). The plaintiffs in *Martel* argued their vote would be diluted if ballots were incorrectly mailed to individuals who had died or were no longer living in Vermont and thereafter casted by an ineligible voter. *Id.* at 250-51. The Court held:

> State legislation which *unfairly restricts* a voter's right to vote is subject to review by the courts… These cases lead the court to be cautious in this case about extending standing to any registered voter – such as the five who have sued here – who alleges an injury common to all other registered voters. If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury.

Martel, 487 F. Supp. 3d at 252-53.

Even Individual Voters' reliance on *Phelan v. City of Buffalo* is misplaced. In *Phelan*, a declared candidate and voter had standing to challenge a law disqualifying potential candidates and impeding voters from electing candidates of their choice. *Phelan v. City of Buffalo*, 54 A.D. 2d 262, 2655 (1976). But here there is no denial or infringement on Individual Voters' right to vote; they have pointed to concrete

ways in which their vote is diluted in a manner that is not a generalized injury suffered by the public at large. And injury-in-fact does not encompass generalized policy grievances. *See* *Rudder v. Pataki*, 93 N.Y.2d 273, 280 (1999). Rather, "'something more than the interest of the public at large is required to entitle a person to seek judicial review.'" *Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 N.Y.2d 428, 433 (1990) (quoting *Sun-Brite Car Wash v. Bd. of Zoning & Appeals*, 69 N.Y.2d 406, 413 (1987)).

Further, Individual Voters inaptly rely on the *Schulz* line of cases to support their argument that their claims fall within the zone of interest requirement. Opp. at 8 (citing *Schulz v. New York State Exec.*, 92 N.Y.2d 1, 7 (1998); *Schulz v. State*, 84 N.Y.2d 231, 240 (1994); *Schulz v. State*, 81 N.Y.2d 336, 345 (1993)). The zone of interest requirement ensures that Courts do not become venues for public grievances. In *Schulz v. State*, the Court of Appeals found that voter plaintiffs had standing to challenge several laws dealing with the State's credit and long-term debt, because the legislature had the laws passed in contravention of Article VII, Sec.11 of the New York Constitution, which requires that the State may borrow money only when a majority of the voters at a general election approve. *Schulz*, 81 N.Y.2d at 337. Voter standing, the Court held, stemmed from the constitutional mandate. *Id*. at 337. Here, Individual Voters argue that their claim "under the Municipal Home Rule Law

alleges precisely the same injury – denial of "their right to vote in a referendum." Opp. at 8. But there is no constitutional mandate here for a referendum.

At most, *Schulz* may support standing for Individual Voters under the Municipal Home Rule Law, because they claim – wrongly, see Point IV *infra* – that the Municipal Voting Law should have been subject to a referendum. But even if they do have standing under Municipal Home Rule Law, that standing does not extend to their claims under Election Law or the state Constitution. As the Court of Appeals in *Schulz v. New York State Executive*, makes clear, its holding is limited to rights to vote in referenda:

> Although voters may have standing to challenge the constitutionality of the Bond Act on the ground that a voter protection dictated by article VII, § 11 was denied, it does not follow that they also can challenge the Bond Act under the very different provisions of article III, § 16. Indeed, the purpose of article III, § 16 *is not related in any way to the exercise of referendum rights*….

Schulz, 92 N.Y.2d at 11 (emphasis added).

Schulz thus has no bearing on Individual Voters' standing to bring state Election Law and Constitutional claims. The Municipal Voting Law does not deny any individual the protections of state Election law or the Constitution or impede any individual's vote. Individual Voters continue to have uninhibited access not diminished, or inhibited. They do not have standing.

B. MUNICIPAL OFFICEHOLDER PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE THE MUNICIPAL VOTING LAW.

Municipal Officeholder Plaintiffs argue that "a law allowing non-citizens to vote in direct violation of the Election Law and the State Constitution will place candidates who depend on citizen voters for their electoral support at a decided disadvantage." Opp. at 9. This is baseless. First, Municipal Officeholders depend on votes as a general matter to win elections. Second, Municipal Officeholders already support communities in their electoral districts that are composed of citizens and non-citizens. Elected officials do not serve constituents or design campaigns based on whether community members they encounter identify themselves as citizens. Municipal Officeholders have not named any concrete way that the Municipal Voting Law will change their strategies for reelection.

Municipal Officeholders argue that votes cast under the Municipal Voting Law "will force candidates to compete in an 'illegally structured competitive environment,' giving them standing to challenge the law." Opp. at 11, quoting *Brennan Ctr. for Just. at NYU Sch. of L. v. New York State Bd. of Elections*, 159 A.D.3d 1301, 1305 (3d Dep't 2018). But the Municipal Voting Law does not provide for votes in their favor to be counted as less than votes cast for other candidates. Current municipal officeholders will continue to be elected through a ranked-choice voting system during primaries and a general election – with no preference or distinction as to who is casting the ballot. Simply put, Municipal Officeholders

cannot, with specificity, demonstrate how the law will change their future campaigns. The Fifth Circuit has held that "while changing one's campaign plans or strategies in response to an allegedly injurious law can itself be a sufficient injury to confer standing, the change in plans must still be in response to a reasonably certain injury imposed by the challenged law." *See, e.g.*, *Zimmerman v. City of Austin, Texas,* 881 F.3d 378, 390 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 639 (2018). The Municipal Voting Law will increase the number of voters who have a say in elections for local office, but that is not a cognizable injury to any current or prospective officeholder. Municipal Officeholders' injuries are conjectural, because they already serve electoral districts composed of the newly enfranchised voters, and they have not pointed to any likely outcome that constitutes an injury.

C. POLITICAL PARTY AND PARTY CHAIR PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE THE MUNICIPAL VOTING LAW.

Plaintiff-Respondents New York Republican State Committee, Republican National Committee, New York Conservative Party Chair Gerard Kassar and New York Republican Party Chair Nicholas Langworthy (the "Political Party Plaintiff-Respondents") have not demonstrated they have standing. All their brief alleges is that the "[t]he Municipal Voting Law *may* materially affect the likelihood of electoral victory by Republican candidates." Opp. at 14 (emphasis added). They provide no factual basis for such a conclusion. In any case, possible harm to an organization's generalized partisan preferences describes only "a setback to [its]

abstract social interests," which is insufficient to establish a concrete injury in fact. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Following this principle, federal courts around the country have found no standing for political parties in similar disputes. For example, in *Jacobson v. Florida Secretary of State*, the Eleventh Circuit Court of Appeals held that "an organization's general interest in its preferred candidates winning as many elections as possible is still a 'generalized partisan preference[ ]' that federal courts are 'not responsible for vindicating,'" no less than when individual voters assert an interest in their preferred candidates winning elections. *Jacobson v. Florida Sec'y of State*, 974 F.3d 1236, 1250 (11th Cir. 2020) (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018); *see also id.* at 1932 (a voter's "hope of achieving a Democratic majority in the legislature" as "a collective political interest" that cannot establish standing). Political Party Plaintiff-Respondents similarly seek to base their standing on generalized partisan preferences rather than particularized injury.

Political Party Plaintiff-Respondents continue to hinge their standing on a purported injury to campaign strategy. Specifically, they argue that the expansion of the electorate under the Municipal Voting Law will require them to "change the way they conduct their activities with respect to New York City municipal elections, including creating more non-English language advertising to target non-citizen communities, expend [*sic*] resources to register these new would-be voters,

recruiting volunteers from non-citizen communities for canvassing and voter turnout efforts." Opp. at 13. No elections have taken place, and Plaintiff-Respondents provide no facts at all to support their hypothesis. Moreover, there are no specific "non-citizen communities" in New York City. Noncitizens live in every neighborhood and borough; nearly 62 percent of New Yorkers live in a household with at least one immigrant.[1]

Additionally, Political Party Plaintiff-Respondents' reliance on *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994) misreads that federal case. In *Schulz v. Williams*, the Court found standing because "improper placing of an additional party, in this case the Libertarian Party of New York, on the state-wide ballot for Governor could siphon votes from the Conservative Party line and therefore adversely affect the interests of the Conservative Party." *Williams*, 44 F.3d at 53. The Court specified that "competitor standing" applied where Plaintiff lost the "opportunity to compete equally for votes in an election." *Id.* (citing *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir. 1989)). Unlike in *Schulz*, here there has been no change in the mechanism for winning an election. That Political Party Plaintiff-Respondents may design campaigns responsive to everyone in their electoral districts and not just "citizens" is a strategic decision they may choose to make for

[1] New York City Mayor's Office of Immigrant Affairs, *State of Our Immigrant City: Annual Report* (March 2018).

political gain. Their claim amounts to a political grievance this Court is not meant to address.

POINT II: THE TRIAL COURT ERRED IN FINDING THAT THE MUNICIPAL VOTING LAW VIOLATES THE STATE CONSTITUTION.

A legislative enactment "should not be declared unconstitutional unless it clearly appears to be so; all doubts should be resolved in favor of the constitutionality of an act." *Johnson v. City of New York*, 274 N.Y. 411, 430 (1937). Respondents have failed to meet their burden to defeat the strong presumption of constitutionality that is accorded to the Municipal Voting Law. *See White v. Cuomo*, 38 N.Y.3d 209, 216 (2022).

A. ART. II, § 1 OF THE STATE CONSTITUTION DOES NOT APPLY TO MUNICIPAL ELECTIONS.

Article II, Section 1 does not apply to local elections, nor does it dictate the applicable voter pool in such elections. The New York Court of Appeals has held that Section 1 applies only to elections concerning "*general* governmental affairs" "relating to the whole state" and does not reach local affairs "relating only to the cities and villages of the state." *Spitzer v. Vill. of Fulton*, 172 N.Y. 285, 289-90 (1902). Indeed, the New York Court of Appeals has allowed cities and municipalities to modify local elections and has held that such modifications do not violate the State Constitution. *See, e.g.*, *Bareham v. City of 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."); *Johnson*, 274 N.Y. at 430 ("If the people of the city of New York want to try [a proportional voting] system, make the experiment, and have voted to do so, we as a court should be very slow in determining that the act is unconstitutional[.]"); *see generally* City Br. at 10-12 (discussing how local governments were allowed to "experiment and innovate" in local elections well before municipal home rule powers were written into the State Constitution in 1963). There is clear judicial precedent empowering municipalities to modify the rules for elections relating to matters of local interest.

Respondents fail to address any of the foregoing cases. Rather, Respondents simply argue that the mention of localities in Article II, Sections 1, 5, and 7 of the State Constitution necessarily demonstrates that Section 1 encompasses local elections. Not so. Section 1's reference to localities pertains to the provision's residency requirements, not the *type* of elections to which the Section applies. N.Y. Const. art. II, § 1. Section 5 pertains to the registration of voters, and does not clarify the type of elections covered by Section 1. *Id.* art. II, § 5. Likewise, Section 7 contains the general decree that "secrecy in voting be preserved" in "all elections by the citizens"—again, this Section does not cast light on the type of elections Section 1 applies to. *Id.* art. II, § 7.

Moreover, Article II must be read in conjunction with Article IX, which empowers local governments to adopt local election laws and provide for the selection of local officers by "the people thereof." N.Y. Const. art. IX, § 1. As Article IX explicitly assures municipal home rule to local governments, Article II, Section 1 should be read in the way that best comports with that fundamental principle.

B. ART. II, § 1 OF THE NEW YORK STATE CONSTITUTION DOES NOT PRECLUDE LEGISLATION EXTENDING THE RIGHT TO VOTE TO NONCITIZENS.

Even if Article II, Section 1 were found to apply to local elections, nothing in that Section limits suffrage to citizens alone. A mandate that "every citizen" is guaranteed a right to vote does not foreclose the legislature from extending that right to other groups. Had the drafters of the Constitution intended to exclude noncitizens from voting, they could have expressly said so. For instance, they might have substituted the expansive phrase "every citizen" with the words, "only citizens."[2] Or, they might have listed "noncitizens" under Article II, Section 3, which describes "Persons excluded from the right of suffrage." They have done neither.

Nonetheless, Respondents argue that "it necessarily follows" that "[e]very citizen shall be entitled to vote" means that noncitizens are not entitled to vote. Opp. at 16. Respondents argue that Article II, Sections 5 and 7, by referring to "the citizens who shall be entitled to the right of suffrage" and "[a]ll elections by the citizens,"

[2] A bill proposing that very language was recently rejected. *See* 2021 New York Assembly Bill No. 9095, New York Two Hundred Forty-Fourth Legislative Session.

further support a reading that the right to vote inheres only to citizens. In so doing, Respondents misconstrue the word "citizen" as a restriction similar to the age and residency qualifiers in Section 1, though the latter are set apart by the preceding words "provided that." Unlike those explicit conditions, the phrase "every citizen" denotes a constitutional floor, not a ceiling.

To support their reading, Respondents rely on the proposition, set forth in *Hoerger v. Spota*, that where the State Constitution "expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." 109 A.D.3d 564, 568 (2d Dep't 2013), *aff'd*, 21 N.Y.3d 549 (2013). That case, concerning Article XIII, Section 13's express limitation that District Attorneys "shall" be elected "once in every three or four years as the legislature shall direct," is inapposite. As an initial matter, the term "citizen" in Article II, Section 1 is analogous to the term "District Attorneys" rather than the "three or four years" specification in Article XIII, Section 13—that is, it describes the subject of the provision, not the applicable limitations thereunder. In any case, the specific durational language in Article XIII, Section 13 is a far cry from the expansive descriptor "every citizen" at issue here.

Moreover, the *Hoerger* court noted that under existing law, "the authority to promulgate such a restriction is vested with and retained by the State," and County

Law accordingly provided for a four-year term of office for District Attorneys outside of New York City. *Id.* at 567. As such, "the New York Constitution and state law, *together*, so expansively and comprehensively regulate the office, that a county government's ability to place restrictions on a District Attorney's terms of office has been preempted." *Id.* (emphasis added). The same cannot be said here. Nothing in Article II, Section 1 limits the authority of local governments to promulgate laws pertaining to groups not expressly mentioned in the provision. And, as argued in Point III *infra*, the State Election Law explicitly provides room for local election laws to depart from state law.

Moreover, legislative history makes clear that at the core of Article II, Section 1 is the intent to secure the right of suffrage for as many in the state as possible, rather than to provide courts with a means of restricting the franchise. *See Kashman v. Bd. of Elections of Onondaga Cnty.*, 54 Misc. 2d 543, 545 (N.Y. Sup. Ct. Onondaga Cnty. 1967) (recounting legislative history and noting that the effect of the amendments to Section 1 was to "greatly broaden[] and liberalize[] the general qualifications [of voters]"). Respondents contend, against the arc of history, that courts have understood Section 1 to be exclusive, therefore restricting the right of suffrage to citizens only. Opp. at 20. In support of this reading, Respondents quote selectively from a few cases, while obscuring how those cases—and others—uphold

the inclusive intent behind the provision. For instance, in *Blaikie v. Power*, the Court of Appeals held that

> the purpose of the constitutional provision was *solely to remove the disqualifications* which attached to the person of the voter in earlier times and thereby *assure* to a citizen, qualified by age and residence, the same right to vote as every other similarly qualified voter possessed.

13 N.Y.2d 134, 140 (1963) (emphasis added); *see also Hopper v. Britt*, 203 N.Y. 144, 150 (1911) ("exclusive" qualifications in Section 1 did not mean, as Respondents aver, that they were intended to *exclude* voters, but that the legislature could not impose *additional* qualifications so as to disenfranchise voters). These examples make clear that the spirit of the enactment is to provide a guarantee to citizens "qualified by age and residence," not to prevent the enfranchisement of others. This Court should uphold a reading of the State Constitution that comports with this purpose.

C. ART. II, § 1 OF THE STATE CONSTITUTION DOES NOT IMPOSE A FEDERAL CITIZENSHIP REQUIREMENT.

In any case, the term "citizen" in Article II, Section 1 does not restrict the franchise to federal citizens. Respondents' arguments are contrary to the plain meaning and legislative history of Article II Section 1.

First, Respondents' artificially constrained reading subverts the broad and encompassing plain meaning of the term "citizen"—that is, "a *member of a political community*, owing allegiance to the community and being entitled to enjoy all its

civil rights and protections; a member of *the civil state*, entitled to all its privileges." Black's Law Dictionary (11th ed. 2019) (emphasis added). Where the legislature intended for "citizen" to refer to federal citizen, it made sure to do so by employing express limiting phrases. *See, e.g.*, N.Y. Const. art. III, § 7 (only "a citizen of the United States" may serve as a member of the legislature); *id.* art. IV, § 2 (only "a citizen of the United States" is eligible to the office of governor or lieutenant-governor). And where it did not, the term by default refers to citizens of the state. *See, e.g.*, *id.* art. I, § 8 (guaranteeing the right to free speech to "every citizen").

Respondents do not deny that interpreting the general term "citizen" as limited to federal citizens as a default would defeat the legislature's goal of affording the free speech protection to all persons within the State's borders. They simply argue that any interpretation based on consistent usage fails because the Constitution in two other instances refers to "citizens of the state." Opp. at 25. Not so. The first example Respondents cite—the *very first* article and section of the State Constitution's Bill of Rights—explicitly links the term "citizen" and the franchise right to "member[s] of this state," buttressing the notion that the term is to be read consistently in Article II, Section 1, which addresses the same. N.Y. Const. art. I, § 1. The second example compares claims "against the state" with claims "between citizens of the state," making evident that the reference exists to juxtapose the registers of claims barred by lapse of time. *Id.* art. III, § 19.

Respondents further argue that the "lack of a clear definition" of state citizen is an impediment to the idea that Article II, Section 1 does not proscribe enfranchisement of state citizens other than federal citizens. Opp. at 26-27. This argument too fails. As the legislative history and records surrounding the provision make evident, the use of an amorphous term was by design, in that it left the state legislature room to define the contours of the right. *See* Brief of Amicus Curiae New York Civil Liberties Union ("NYCLU Br.") at 11. Indeed, an amendment inserting "of the United States" after "citizen" was proposed and rejected in 1867, in large part because the proposed legislation would have the effect of lending to the disenfranchisement of Black men in the wake of *Dred Scott*. *See id.* at 13-15 (discussing delegate Charles J. Folger's arguments in support of leaving the word "citizen" unqualified as is and thereby preserving "language which has been settled for twenty years" so that Black men could continue voting as citizens of the state). The same proposal was rejected again in 1967. In short, the legislature opted time and time again to preserve language that would be expansive of the right of suffrage. What is clear is that it did not intend to restrict the term "citizen" to federal citizenship alone.

While Respondents take issue with an expansive reading of the term "citizen," they do not offer any plain language argument in support of their preferred definition of "citizen" as referring to federal citizens only. They resort to the argument that

under "longstanding historical practice," the right to vote was limited to United States citizens.[3]

Respondents' characterization of a deep-rooted exclusionary practice is contradicted by the legislative intent and history surrounding Article II, Section 1. The understanding that Section 1 did not limit the right to vote to federal citizens alone was borne out during the *Dred Scott* era, when thousands of Black men cast their ballots as citizens of New York. NYCLU Br. at 16. Respondents characterize this historical fact as a fluke rather than a product of legislative intent, suggesting that it "can be more easily explained by New York officials' refusal to acquiesce to *Dred Scott*'s holding." Opp. at 24 n.2. But the state legislature itself expressly debated—and rejected—an amendment limiting the term "citizen" to federal citizens in light of that decision, demonstrating that this history was facilitated under the aegis of the State Constitution, not in spite of it.

Respondents further argue that accepting the term "citizen" to mean New York State citizens would render every other law limiting voting to U.S. citizens unconstitutional. Opp. at 23. But the question here is not whether all other election laws are unconstitutional; it is whether municipalities have the right to extend the

[3] The lone Court of Appeals decision that Respondents cite in support of this putative exclusionary historical practice is an 1863 opinion rendered during the era of *Dred Scott*, which analyzed an outdated version of Article II, Section 1 that secured the right of suffrage only for "male citizen[s]." *People v. Pease*, 27 N.Y. 45, 53 (1863). (The other opinion Respondents reference is not binding on this Court.)

franchise to non-citizens in elections dealing with local affairs. The answer is certainly yes. Respondents are wrong to suggest that finding the Municipal Voting Law permissible will unravel the entire election law space is New York. The Constitution sets the *minimum* standard municipalities must adhere to in enfranchising its residents. As explained by Delegate Folger above, there was a strong desire to avoid disenfranchising rightful citizens from accessing the ballot. However, should municipalities seek to go beyond the requirements set forth in Article II, then they have the right to do so.

D. ART. IX OF THE NEW YORK STATE CONSTITUTION DOES NOT IMPOSE A FEDERAL CITIZENSHIP REQUIREMENT

Just as Article II, Section 1's use of the term "citizen" does not restrict the franchise to federal citizens, Article IX also does not impose a federal citizenship requirement. Respondents incorrectly argue that Article IX, Sections 1 and 3 of the New York State Constitution expressly incorporate the voter qualifications of Article II, Section 1 into the definition of "the people" making the local electorate, and thus Article IX limits local elections to U.S. citizens. Respondents choose to ignore key language of the section, language that necessarily upholds the primary intent of the Article to expand municipal power.

Article IX, § 1 of the New York State Constitution states:

> 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 the power to adopt local laws as provided by this article.

(emphasis added). The "people" is defined within Article IX, §3(d)(3) as "persons entitled to vote as provided in section one of article two of this constitution." Section 3(d)(3) also states: "Whenever used in this article the following terms shall mean ***or include***…." and goes on to list a series of terms, among them, the term "People." N.Y. Const. art. IX, § 3(d)(3) (emphasis added).

Article IX is considered a "Bill of Rights for local governments" and enumerates various "rights, powers, privileges and immunities" granted to them. N.Y. Const. art. IX, § 1; City Br. at 13-14. Additionally, Article IX acknowledges a rule of liberal construction where local governments' "rights, powers, privileges and immunities," including those enumerated in § 1, "shall be liberally construed." *Id.*, art. IX, §§ 1 & 3(c); *see also* *Resnick v. Cnty. of Ulster*, 44 N.Y.2d 279, 287-88 (1978). The use of the term "people" should not be read to constrain local government but if an interpretation of a provision favoring local self-governance is available, it must be adopted to allow for furtherance of local self-government. Respondents refute this by stating that an expanded meaning of "people" to noncitizens "has the effect of diluting and thereby reducing the control over local governance by those persons specifically identified in the constitution as responsible for local governance." Opp. at 32. Respondents' argument relies on the erroneous

belief that only United States citizens are identified in the constitution as responsible for local governance.

Further, Respondents incorrectly argue that, regardless of how courts hold Article II, Section 1 to apply regarding "citizenship," reading "shall mean *or include*" in Section 1 to include noncitizens fails to give meaning to the entire phrase, ignores constitutional context, and renders the constitutional protection indeterminate. Opp. at 28-29.

First, Respondents state that because "mean" and "include" have "significantly different definitions[,]" the tension should be resolved by understanding the context of the phrase as applied to the list of enumerated definitions. Respondents argue that the City incorrectly resolved the tension between "mean or include" by "rendering the term "mean" entirely superfluous." Opp. at 29. However, their response is entirely contrary to their own argument, in that they then argue that "include" is superfluous as it applies to the term "People."[4] Respondents' argument ignores the spirit and context of the Article itself, which is meant to act as a "Bill of Rights" and, as the City describes, is "intended to further "[e]ffective local self-government," and it specifies that local governments' "rights, powers, privileges and immunities," including those enumerated in § 1, "*shall be liberally construed*."

[4] Respondents reference the Supreme Court's interpretation of these terms in *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934). However, *Helvering* discusses these terms as they are applied in the Revenue Act of 1926, and ignores the context of Section IX as a whole.

Id., art. IX, §§ 1 & 3(c) (emphasis added); *see also* *Resnick*, 44 N.Y.2d at 287-88. City Br. at 14. A liberal construction, applying the full phrase of "to mean or include," promotes Article IX's core principles of local autonomy and self-governance.

Second, Respondents argue that interpreting "include" as a word of enlargement and thus the phrase "mean or include" as nonexclusive, ignores the constitutional context. They argue that in relation to the term "people," defined as "Persons entitled to vote as provided in section one of article two of this constitution" (Art. IX, §3(d)(3)), it expressly incorporates the requirements by reference, and is not a general class which deserves the application of the term "includes." Opp. at 30. They add that without any specific textual suggestion otherwise, only the exclusive reading is plausible. *Id*. Respondents suggest that "mean" and "include" should apply differently to the various terms stated in Art. IX. However, simply ignoring "include" for some terms defeats the purpose of the phrase as a whole as applied in the context of Article IX. Respondents ignore that Article IX was added to the State Constitution in 1963 with the intention of expanding municipal rights. City Br. at 13; *Black Brook v. State*, 41 N.Y.2d 486, 487-88 (1977); Bill Jacket, *Public Papers of Nelson A. Rockefeller*, 1962 at 824. The combination of the term "mean or include" as applied to all terms listed in Section 3, with the historical context of the Article, clearly signifies that the term "people," if understood to mean

United States citizens, is simply the floor, not an exclusive ceiling to limit municipalities' rights in determining local elections.

Lastly, Respondents argue that interpreting the meaning of the term "people" in Article IX as indeterminate means that "every other municipality in the state is necessarily violating the Constitution by excluding those non-citizens from participating in local governance." Opp. at 31. Respondents argue that this leaves the Constitution's language "up for grabs in a state with more than a thousand local jurisdictions[.]" *Id.* Respondents fail to understand the City's argument that Article IX, which was added to expand municipal rights, simply states that the definition of people in Article IX *may* include non-U.S. citizens, not that a municipality *must* include them.

In sum, because Article IX, Sections 1 and 3 do not limit voters to "citizens of the United States," the Municipal Voting Law does not violate the New York State Constitution.

POINT III: NEW YORK STATE ELECTION LAW ALLOWS FOR LOCAL LAWS TO CONFLICT.

In the face of the plain language, statutory context, and legislative history, Plaintiff-Respondents argue that the legislature cannot have meant to grant localities the flexibility and autonomy when they enacted the "any other law" language in N.Y. Election Law § 1-102 (hereinafter "§ 1-102"). Such a reading, they contend, would allow localities to override state election law as a general matter. They are incorrect.

First, Plaintiff-Respondents' analysis views the word "law" in isolation, erasing the inclusive meaning of the words "*any* other." Opp. at 34. Because "law" is so broad a phrase, they continue, it cannot mean to allow localities flexibility. But this argument ignores the statutory context. Elsewhere in the state code and Constitution, local legislatures have broad abilities to articulate rules on matters of local interest. *See generally* Mun. Home Rule Law § 50; N.Y. Const. art. IX; Point II *supra*. The Municipal Home Rule Law expressly defines the term *"law"* as "a state statute, charter, or local law." Mun. Home Rule Law § 2. There is no basis for Plaintiffs-Respondents' argument that the failure to define the term "law" in N.Y. Election Law § 1-104 would require supplying a limiting definition that can be found nowhere in the state code. The definition found in Municipal Home Rule Law should govern. *See* Mun. Home Rule Law § 2. Section 1-102's allowance for conflicts with "any other law" includes local laws like the Municipal Voting Law.

Second, Plaintiff-Respondents have little response to the legislative history and practical precedent of permitting localities to authorize conflicting local election laws. They simply insist that § 1-102 cannot apply to local laws, because that would allow municipalities to "simply override the state election law." Opp. at 34. As discussed in detail by amici as well as Defendants-Appellants, New York State has a long history of allowing local legislatures to experiment with term limits and other areas of local rule, as codified in the Constitution and state law. *See* N.Y. Const. art.

IX, § 2(b)(2); *see also* N.Y. Const. art. IX, § 3(a)(3); *see generally* Mun. Home Rule Law § 50*;* City Br. at 26-29; Brief of Amicus Curiae Legal Scholars at 5-10; Brief of Amicus Curiae Common Cause at 7-11. In response to this history, the State Legislature has not exercised its power to restrict the ability of municipalities to enact laws like Municipal Voting Law. Nor have most state courts found otherwise; aside from *Castine v. Zurlo*, 46 Misc. 3d 995, 1001 (N.Y. Sup. Ct. Clinton Cnty. 2014), Plaintiff-Respondents have not found binding or precedential cases to counter the several examples of New York courts finding that "any other law" includes local laws. Opp. at 42-44; *N.Y.P.I.R.G.—Citizen's All. v. City of Buffalo*, 130 Misc. 2d 448 (N.Y. Sup. Ct. Erie Cnty. 1985); *City of New York v. New York City Bd. of Elections,* No. 41450/91, 1991 N.Y. Misc. LEXIS 895 (N.Y. Sup. Ct. Apr. 3, 1991), *aff'd*, 1991 N.Y. App. Div. LEXIS 18134 (1st Dep't Apr. 5, 1991).

Finally, the Municipal Voting Law does not interfere with the state's right to dictate eligibility in state elections. The Municipal Voting Law enables individuals to participate in New York City municipal elections only, not state or federal elections. *See* Local Law 11 of 2022 § 1057-bb (a) ("[E]ligible municipal voters have the right to vote in municipal elections and shall be entitled to the same rights and privileges as U.S. citizen voters with regard to municipal elections.") The statute further notes that "[m]unicipal voting… shall be governed by applicable provisions of the election law," specifying that "Section 5-102 of the election law shall apply

to municipal elections, except that the qualification of United States citizenship shall not apply." Local Law 11 of 2022 §§ 1057-aa (b), 1057-bb (b). The Municipal Voting Law does not affect eligibility to vote in state elections in any way.

POINT IV: THE CITY COUNCIL VALIDLY ENACTED THE MUNICIPAL VOTING LAW, BECAUSE STATE LAW DOES NOT REQUIRE A REFERENDUM.

"Local governments have broad power to enact local laws, and direct democracy in New York is the exception, not the rule." *Molinari v. Bloomberg*, 564 F.3d 587, 609 (2d Cir. 2009), citing *McCabe v. Voorhis*, 243 N.Y. 401, 413 (1926). Section 23(2) of the Municipal Home Rule Law requires a referendum pertaining to elections only when a local law seeks to "change the method of nominating, electing or removing an elective officer." Municipal Home Rule L. § 23(2)(e),(f). Plaintiff-Respondents argue that the City Council effectively changed the method by which municipal offices are elected by replacing the "existing electorate" with a "differently constituted population." Opp. at 47. But changes in voting population do not change methods of electing municipal officials as do changes from "appointment by the Mayor to election by the people." Opp. at 48 (quoting 1966 Op. Att'y Gen. 71 (Apr. 6, 1966)). Rather, they more closely resemble changes to district boundaries, which New York courts have found do not require referenda pursuant to Municipal Home Rule Law. *See, e.g.*, *Calandra v. City of New York*, 90 Misc. 2d

487, 395 N.Y.S.2d 995 (Sup. Ct. N.Y. Cnty. 1977); *Baldwin v. City of Buffalo*, 6 N.Y.2d 168 (1959).

The Municipal Voting Law does not make any change to methods of electing or tallying votes. Thirty days of New York City residency and reaching the age of majority are still required to register to vote, and no citizen voter has been restricted from casting a ballot. The passage of the Municipal Voting Law did not trigger the referendum requirement, and the City Council validly enacted the law.

CONCLUSION

For all these reasons, Intervenor-Appellants respectfully request that this appeal be granted.

Respectfully submitted,

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