Time Requested: 15 Minutes
To Be Argued by: Michael Y. Hawrylchak

Richmond County Clerk's Index No. 85007/2022

STATE OF NEW YORK – SUPREME COURT
APPELLATE DIVISION – SECOND DEPARTMENT
Docket No. 2022-05794

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,

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.

BRIEF OF PLAINTIFFS-RESPONDENTS

Dated: December 19, 2022

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

New York State Cases

Out-of-State Cases

United States Constitution

New York State Constitution

Federal Statutes

New York State Statutes

Other

PRELIMINARY STATEMENT

The Municipal Voting Law is "impermissible simply and solely for the reason that the Constitution says that it cannot be done." *See Protect the Adirondacks! Inc. v. New York State Dep't of Env't Conservation*, 37 N.Y.3d 73, 84 (2021). The New York State Constitution establishes the State's voter eligibility requirements and expressly defines voting as a right granted only to *citizens*. Likewise, the State Election Law clearly and unambiguously prohibits non-citizens from participating in statewide or municipal elections. The City of New York ("the City") enacted its Municipal Voting Law in defiance of these constitutional and statutory barriers.

The City's defense of the Municipal Voting Law ultimately relies on a series of supposed exceptions and loopholes that nullify the limits imposed by the Constitution and the Legislature. But these defenses do not hold up to scrutiny. If the City wants to alter the rules of voter eligibility in this State, the proper course of action is to seek changes to the State Constitution and the Election Law, not to ask the courts to contort their various provisions to allow the City to evade its legal obligations.

In addition to these substantive problems, the Municipal Voting Law was also adopted in a procedurally improper manner under the Municipal Home Rule Law.

Finally, the motion by Intervenors to dismiss the complaint based on Plaintiffs' alleged lack of standing is without merit.

Accordingly, the order and judgment appealed from, granting summary judgment in Plaintiffs' favor and denying Intervenors' motion to dismiss, should be affirmed, with costs.

LEGAL STANDARD

Where an "issue is one of statutory interpretation, and there is no question of fact or factual interpretation, summary judgment is therefore appropriate as only questions of law are involved." *Hertz Corp. v. Corcoran*, 137 Misc. 2d 403, 404 (Sup. Ct. NY. Cty. 1987); *see also Andre v. Pomeroy*, 35 N.Y.2d 361, 364 (1974).

Upon a motion to dismiss a complaint pursuant to CPLR § 3211, "a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff." *Morris v. Gianelli*, 71 A.D.3d 965, 967 (2d Dep't 2010). On a defendant's motion pursuant to CPLR § 3211 (a)(3) to dismiss a Complaint based upon an alleged lack of standing, "the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law." *Bank of New York Mellon v. Chamoula*, 170 A.D.3d 788, 790 (2d Dep't 2019) (quoting *New York Cmty. Bank v. McClendon*, 138 A.D.3d 805, 806 (2d Dep't 2016)).

ARGUMENT

POINT I

PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

Intervenors suggest that dismissal of this action on the basis of standing would leave Plaintiffs' grievances to be "vindicated through the political process." Intervenors' Br. 8. Nothing could be further from the truth. In fact, preventing a pre-election challenge virtually guarantees that the Municipal Voting Law will be subject to a *post-election* challenge, where a losing candidate would indisputably have standing to bring a claim alleging that the election's outcome was affected by an unconstitutional and invalid law. Intervenors' attempt to dismiss this action would, at most, only postpone a determination on the merits to the worst possible time — when the law's effects would be difficult or impossible to undo and a court's decision finding the law invalid would undermine the legitimacy of an already conducted election.

The Court may reach the merits of Plaintiffs' motion for summary judgment if "at least one plaintiff" has standing. *See Empire State Chapter of Associated Builders & Contractors, Inc. v. Smith*, 21 N.Y.3d 309, 315 (2013); see also *Florida*

ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1243 (11th Cir. 2011); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Sec'y of the Interior v. California*, 464 U.S. 312, 319, n.3 (1984) (no need to examine whether other plaintiffs also have standing when the same constitutional challenge is raised).

A plaintiff has standing if he establishes an injury in fact and that his injury is "capable of judicial resolution." *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 772 (1991). For statutory purposes, the injury-in-fact requirement is satisfied if the injury "fall[s] within the zone of interests protected by the statute invoked." *Id.* at 773. Although New York courts often look to federal caselaw for guidance on questions of standing, *see, e.g.*, *id.* at 772–73, the Court of Appeals has adopted a more liberal approach to standing that rejects the imposition of "an impenetrable barrier to any judicial scrutiny of legislative action[s] which are alleged to have violated the highest organ of law, the State Constitution itself." *Schulz v. State*, 81 N.Y.2d 336, 345 (1993) (internal quotation marks omitted).

This action was brought by a diverse collection of Plaintiffs who are adversely affected by the Municipal Voting Law in a variety of ways — as voters whose electoral power will be diminished by an influx of new voters; as candidates for office who will have to compete for the ballots of these new voters; and as political

parties and party officers who will have to expend resources campaigning for the votes of these new voters. Intervenors nevertheless argue that none of these Plaintiffs has standing to challenge the Municipal Voting Law. But if none of these Plaintiffs has standing, then who would? Intervenors' cramped interpretation of standing doctrine would effectively interpose a "cloak of immunity that would preclude access to judicial review" for actions that threaten the integrity of our electoral system in violation of the State Constitution and State statutory law. *See Schulz*, 81 N.Y.2d at 346.

This Court should reject Defendant-Intervenors' standing arguments and resolve Plaintiffs' claims on the merits.

A. Voter Plaintiffs have standing to challenge the Municipal Voting Law.

Individual Plaintiffs Vito J. Fossella, Joseph Borelli, Michael Reilly, Michael Tannousis, Robert Holden, Gerard Kassar, and Phillip Yan Hing Wong are United States citizens who are registered voters in the City of New York. (R.1454, 1461, 1465, 1468–69, 1473, 1476, 1480.) These Plaintiffs have regularly voted in past New York City municipal elections and intend to continue doing so in the future. *Id.*

"Voter standing arises when the right to vote is eliminated or votes are diluted." *Saratoga Cty. Chamber of Com. Inc. v. Pataki*, 275 A.D.2d 145, 156 (3d Dep't 2000), *aff'd*, 100 N.Y.2d 801 (2003). "The right of suffrage . . . can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Landes v. Town of N. Hempstead*, 20 N.Y.2d 417, 421 (1967) (cleaned up). Accordingly, voters have standing to challenge laws that cause "dilution by a false tally, or by a refusal to count votes from arbitrarily selected precincts, or by a stuffing of the ballot box." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (cleaned up).

The Muslim Advocates amicus brief takes offense at Plaintiffs' reliance on ballot-stuffing cases in support of its vote dilution injury. Muslim Advocates Br. 16, 18. They argue that the comparison is inapt because unlike ballot-stuffing, this case involves no allegations of criminal fraud. *Id.* at 16. But for purposes of standing, the relevant analogy is not the *intent* of those casting votes, but the nature of the *injury*. And the injury to an eligible and duly registered voter from 1,000 fraudulent ballots stuffed into a ballot box is exactly the same as the injury from 1,000 constitutionally or statutorily ineligible voters casting ballots in an election.

Intervenors characterize Plaintiffs' injury based on the Municipal Voting Law's expanded voter pool as a "hypothetical, future injury." Intervenors' Br. 10. The express purpose of the Municipal Voting Law, however, is to expand the electorate to include hundreds of thousands of newly eligible voters. There is nothing remotely speculative or implausible about the expectation that the law will have the very effect it was designed to bring about. By adding 900,000 non-citizens to the eligible electorate, the Municipal Voting Law will necessarily dilute the votes of citizens.

Furthermore, these Plaintiffs' claims are plainly "within the zone of interests" protected by the Municipal Home Rule Law's referendum requirement, which was enacted to "to ensure that electors have a voice" regarding any significant changes to local governance. *Gizzo v. Town of Mamaroneck*, 36 A.D.3d 162, 168 (2d Dep't 2006), *lv denied*, 8 N.Y.3d 806 (2007).

Intervenors argue that because Plaintiffs' alleged injuries due to the Municipal Voting Law are shared by "the eligible voting public at large," they are "insufficient to confer standing upon the Individual Voters." Intervenors' Br. 12–13. But such widespread impacts are inherent in the nature of claims alleging injury due to an improperly constituted electorate and are not a barrier to judicial resolution of these

claims. *See, e.g.*, *Landes*, 20 N.Y.2d at 421 (holding that restriction on eligibility for elective town office impaired "plaintiff's right of franchise, as well as that of all other voters"); *Phelan v. City of Buffalo*, 54 A.D.2d 262, 265 (4th Dep't 1976) ("plaintiff's status as a qualified voter in the City of Buffalo gives him standing to seek declaratory relief" against candidate residency requirement).

Indeed, the Court of Appeals has consistently recognized that voters have standing to challenge a government action when the injury flows directly from their status as voters. *See 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). In the *Schulz* line of cases, the Court of Appeals found voter standing when plaintiffs alleged injury due to alleged failures to hold voter referenda, despite the fact that this alleged injury would be shared by every voter in the state. Here, Plaintiffs' claim under the Municipal Home Rule Law alleges precisely the same injury — denial of "their right to vote in a referendum." *Schulz v. State*, 81 N.Y.2d at 343.

Although it is certainly true that there is no voter standing where plaintiffs can "point to no specific constitutional provision having a connection to the franchise and no statute even tangentially related to the right to vote," *Rudder v. Pataki*, 93 N.Y.2d 273, 281 (1999), Plaintiffs' alleged injuries — under the State Constitution,

the Election Law, and the Municipal Home Rule Law — all derive directly from their status as voters and thereby establish voter standing.

B. Municipal officeholder Plaintiffs have standing to challenge the Municipal Voting Law.

Individual Plaintiffs Vito J. Fossella, Joseph Borelli, and Robert Holden are current municipal officeholders in the City of New York. (R.1453, 1460, 1472.)

A candidate for office "suffers a consequent present harm" if he is "forced to structure his campaign to offset [a] potential disadvantage" created by an election law. *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 (1st Cir. 2000). The Municipal Voting Law, by significantly altering the electorate of the City of New York, will require candidates to alter the way they campaign for reelection to attempt to attract, or to offset the effects of, the influx of new voters. An officeholder and future candidate for reelection suffers injury sufficient to confer standing where "the rules of the game" are set "in violation of statutory directives," giving an electoral advantage to opposing candidates. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 85 (D.C. Cir. 2005). Here, 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.

Intervenors engage in rhetorical sleight of hand, arguing that Plaintiffs suffer no real injury because expansion of the electorate is "an incontrovertible fact of the political process, not a cognizable injury," and that "[c]ampaign strategies will always shift to garner public support." Intervenors Br. 16. But Plaintiffs' injury derives not from any supposed "right to control the composition" of the electorate, but from a right to compete before a *legally-constituted* electorate. As several recent federal cases have held in cases involving challenges to votes allegedly cast in violation of state law, "[a]n inaccurate vote tally is a concrete and particularized injury to candidates." *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020); *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020).

Intervenors rely on *Brennan Center for Justice at NYU School of Law v. New York State Board of Elections*, 159 A.D.3d 1301, 1304 (3d Dep't 2018), for the proposition that candidates for reelection suffer no redressable injury. Intervenors Br. 15. But in *Brennan Center*, the court held that the plaintiffs' claims involved nonjusticiable political questions that "revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches," which were "closely interconnected" with standing. *Id.* at 1304, 1306 (internal quotation marks omitted). The court concluded that "[i]t is

precisely because petitioners' claims raise broad policy questions that affect all of the state's voters, citizens and legislators that petitioners cannot establish injury-in-fact." *Id.* at 1306. In the process, the court specifically distinguished cases in which standing was found based on a "claim of unlawfulness." *Id.* at 1305 n.3.

Here, Plaintiffs do not raise broad questions of policy and values, but rather specific claims that the Municipal Voting Law directly violates the express language of the State Constitution and State statutory law. Those are precisely the types of "claim[s] of unlawfulness" contemplated by *Brennan Center*. If Plaintiffs' legal arguments are correct, the Municipal Voting Law will force candidates to compete in an "*illegally* structured competitive environment," giving them standing to challenge the law. *Id.* (emphasis in original).

Intervenors further cite *Hassan v. United States*, 441 F. App'x 10, 11 (2d Cir. 2011), in support of the proposition that Plaintiffs' injury is "conjectural or hypothetical." Intervenors Br. 14. *Hassan* involved a plaintiff who alleged an intention to run for President of the United States but had done "virtually nothing in support of this ostensible intention to run for office" apart from registering a domain name, "an act that takes just moments to complete." *Id.* The Officeholder Plaintiffs here, by contrast, are actual current holders of municipal offices that will be subject

to the Municipal Voting Law. When a current municipal officeholder — one who has already competed for and won election in the City of New York — alleges an intent to seek reelection, this satisfies any reasonable plausibility pleading standard. These are not mere "'some day' intentions." Intervenors Br. 14 (quoting *Ass'n for a Better Long Island, Inc. v. N.Y, State Dep't of Env't Conservation*, 23 N.Y.3d 1, 7 (2014)).

C. Political party and party chair Plaintiffs have standing to challenge the Municipal Voting Law.

Plaintiffs New York Republican State Committee and Republican National Committee are state and national political parties that directly support Republican candidates in New York City municipal elections, through developing and selecting candidates, fundraising, coordinating election strategy, political advertising, and organizing voter turnout efforts. (R.1456, 1484–85.) An organization may bring suit to vindicate its own rights to the same extent as any other "person . . . seeking to vindicate a legal right." *N.Y. Civil Liberties Union v. N.Y.V. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012). It is well established that political parties have "standing to challenge" election laws that affect their ability to "campaign for office." *Green Party of Tennessee v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014).

New York courts have repeatedly held that the "diversion [of] organizational resources" constitutes an injury that confers standing. *See, e.g.*, *Animal Legal Def. Fund, Inc., v. Aubertine*, 119 A.D.3d 1202, 1205 (3d Dep't 2014). Thus, an increased need to raise and spend money for political campaign purposes is a quintessential economic injury that creates direct standing for a political party. *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006). Here, the alteration of the electorate caused by the Municipal Voting Law will require the Plaintiff political parties 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 resources to register these new would-be voters, recruiting volunteers from non-citizen communities for canvassing and voter turnout efforts, and informing non-citizens about which ballots they are purportedly allowed to cast on Election Day (e.g., municipal election ballots) and which ballots they aren't (e.g., statewide election ballots). (R.1456, 1485.) And, of course, the addition of nearly one million people to the voter pool by itself necessarily forces parties to spend additional resources to help their candidates obtain a plurality of votes. All these requirements will drastically increase the bottom line for parties that wish to compete in City elections.

Harm to the election prospects of a party's candidates is another basis for direct standing by a political party. *Benkiser*, 459 F.3d at 586 (party had standing to challenge action that would affect "its congressional candidate's chances of victory" in an upcoming election); *see also Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998) (political party has standing to challenge election law that decreases electoral prospects of party's candidates). The Municipal Voting Law may materially affect the likelihood of electoral victory by Republican candidates in New York City municipal elections. (R.1456–57, 1485.)

Plaintiffs Nicholas A. Langworthy and Gerard Kassar are the chairs of the New York Republican State Committee and the New York State Conservative Party, respectively. (R.1456, 1475.) The New York State Conservative Party, like the New York Republican State Committee is directly involved in supporting its candidates for municipal elections in the City of New York, including through developing and selecting candidates, fundraising, coordinating election strategy, political advertising, and organizing voter turnout efforts. (R.1475–76.) The New York State Conservative Party will be similarly injured by the Municipal Voting Law's alteration of the electorate. (R.1476.)

Courts have routinely held that chairs of political parties have standing to bring actions on behalf of the interests of their parties. *See Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994) (chairman of Conservative Party of the State of New York has standing to challenge actions that "adversely affect the interests of the Conservative Party"); *Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998) (party chairman has standing); *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981) (party chairman has standing). Because their parties suffer injuries sufficient to give them standing, the Plaintiff chairmen necessarily have standing to the same extent.

Contrary to Intervenors' characterization, the injuries to Plaintiff political parties are not merely hypothetical. To find that Plaintiffs have standing, this Court only needs to accept (1) that a law intended to substantially expand the electorate will have the predictable result of substantially expanding the electorate; and (2) that Plaintiff political parties will take obvious steps to account for these new voters in their campaigns. In short, there is nothing speculative about Plaintiffs' injuries. Plaintiffs have made plausible representations about the actions they themselves will take in response to the Municipal Voting Law.

POINT II

THE MUNICIPAL VOTING LAW VIOLATES THE NEW YORK STATE CONSTITUTION

Multiple constitutional provisions — Article II, Section 1; Article II, Section 5; Article II, Section 7; Article IX, Section 1; and Article IX, Section 3 — individually and together confirm that voters in local elections must be United States citizens. "The courts should not strain for distinctions to avoid the plain and simple provisions of the Constitution." *Wendell v. Lavin*, 246 N.Y. 115, 127 (1927). Because the Municipal Voting Law flouts these requirements, it is unconstitutional.

A. Article II, Section 1 exclusively reserves voting rights for citizens.

The New York State Constitution expressly establishes voting qualifications. Under Article II, Section 1, voting is defined as a right of citizens:

> 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.

N.Y. Const. Art. II, § 1.

By positively declaring that "[e]very citizen shall be entitled to vote," it necessarily follows that non-citizens are not permitted to vote. "Where a statute

describes the particular situations in which it is to apply and no qualifying exception is added, 'an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.'" *Matter of Jose R.*, 83 N.Y.2d 388, 394 (1994) (quoting N.Y. Statutes § 240). And "[t]he same rules apply to the construction of a Constitution as to that of statute law." *Wendell v. Lavin*, 246 N.Y. 115, 123 (1927). Thus, Article II, Section 1's enumeration of particular characteristics of voters — i.e., citizens who meet the minimum age and residency requirement — necessarily excludes those who do not meet these criteria. As a result, "[t]he qualifications of voters are prescribed by section 1 of article 2 of the Constitution, and those qualifications are exclusive." *Hopper v. Britt*, 203 N.Y. 144 (1911). Indeed, the Court of Appeals long ago held in respect to the corresponding provision of an earlier version of the State Constitution that the voter eligibility requirements are exclusive. "It follows that none others than those possessing these qualifications can lawfully vote." *People v. Pease*, 27 N.Y. 45, 53 (1863).

This same approach to Constitutional construction was taken by this Court in *Hoerger v. Spota*, 109 A.D.3d 564 (2d Dep't 2013), *aff'd*, 21 N.Y.3d 549 (2013). That case involved a county's attempt to impose term limits on the office of district attorney that were less than the maximum length provided by the Constitution. *Id.*

at 565. But this Court declined to read the Constitution as permitting a more restrictive term, holding instead that "in light of the fact that the New York Constitution and state law speak to the duration and term of office of the District Attorney, there is an irrefutable inference that the imposition of any limit on the duration of that office was intended to be omitted or excluded." *Id.* at 568. *See also Hopper*, 203 N.Y. at 150 ("[I]t is well settled that legislation contravening what the Constitution necessarily implies is void equally with the legislation contravening its express commands.").

This understanding of Article II, Section 1 is confirmed by the language of Article II, Sections 5 and 7, which provide that "[l]aws shall be made for ascertaining, by proper proofs, *the citizens who shall be entitled to the right of suffrage hereby established*, and for the registration of voters," N.Y. Const. Art. II, § 5 (emphasis added), and that "*[a]ll elections by the citizens*, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law." N.Y. Const. Art. II, § 7 (emphasis added). This language makes clear that the Constitution's drafters understood the right to vote to inhere only in citizens. *Cf. Ginsberg v. Purcell*, 51 N.Y.2d 272, 276

(1980) (construction of constitutional provision was "warranted by its compatibility with . . . other provisions" of the New York State Constitution).

The City argues that because Article II, Section 1 is phrased in the affirmative, and does not expressly prohibit non-citizens from voting, it provides only a constitutional floor, not a ceiling. This interpretation, however, is impossible to reconcile with the other sections in Article II. If the City were correct, then Section 5 would require eligible citizen voters to prove their identities before voting but impose no such requirement on "eligible" non-citizen voters. That outcome cannot plausibly be attributed to the Constitution's drafters. And Section 7's reference to "elections by the citizens" would be meaningless if elections in New York were not, in fact, limited to citizens. On the other hand, every section in Article II is perfectly consistent if the framers understood Section 1 to grant the franchise to citizens alone.

The courts have long understood the requirements of Article II, Section 1 to be exclusive. "The obvious purpose of that article was to prescribe the general qualifications that voters throughout the state *were required to possess* to authorize them to vote for public officers or upon public questions relating to general governmental affairs." *Spitzer v. Vill. of Fulton*, 172 N.Y. 285, 289 (1902) (emphasis added). This provision was intended "to protect *otherwise qualified*

voters from electoral discrimination," and those voters were identified as "citizen[s], qualified by age and residence." *Blaikie v. Power*, 13 N.Y.2d 134, 140 (1963) (emphasis added).

"Where a law 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." N.Y. Statutes § 240. *See also Kimmel v State*, 29 N.Y.3d 386, 394 (2017) ("Where the legislature has addressed a subject and provided specific exceptions to a general rule — as it has done here — the maxim expressio unius est exclusio alterius applies"); *Matter of Wendell v. Lavin*, 246 N.Y. 115, 123 (1927) ("(t)he same rules apply to the construction of a Constitution as to that of statute law"). Thus, Article II, Section 1 clearly identifies voting as a right that attaches by virtue of citizenship.

B. Article II, Section 1 applies to local elections.

The plain text of Article II, Section 1 clearly applies to local elections. First, it applies in sweeping terms to "every election for all officers elected by the people." By its own terms, it neither limits its scope to statewide elections nor provides any exception for local elections.

Second, Article II, Section 1 includes an express reference to localities, guaranteeing a right to vote to citizens who "shall have been a resident of this state, and of *the* county, city, or village for thirty days next preceding an election" (emphasis added). The reference to "the county, city, or village" is explicable only if Article II, Section 1 applies to county, city, and village elections.

Article II, Section 5 further demonstrates that Section 1 applies to local elections. Section 5, mandates laws ascertaining "the citizens who shall be entitled to the right of suffrage hereby established," as well as laws for the registration of voters. A specific carve-out, however, states that "[s]uch registration shall not be required for town and village elections except by express provision of law." If Article II applied only to statewide elections, this carve-out for town and village elections would be wholly superfluous. *Cf. Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 7 (2019) (noting that it is "well-established" that courts should "avoid[] a construction that treats a word or phrase as superfluous"). Moreover, the exemption applies only to Section 5's registration requirement, and not the ascertainment of "the citizens who shall be entitled to the right of suffrage" established under Article II, Section 1. Finally, the carve-out exempts only towns and villages, which implies that city and county elections are

not exempt from Article II, Section 5's registration requirement, or, by extension, from Article II, Section 1's voter qualifications.

Article II, Section 7 similarly demonstrates that the citizenship requirement in Article II, Section 1 applies to local elections by specifically excluding elections for "such town officers as may by law be directed to be otherwise chosen." The obvious implication is that elections for town officers *are* covered where the law has not directed that they be otherwise chosen. And this carve out is limited to town officers, not officers of cities, villages, or counties, implying that they are within its coverage.

C. Article II, Section 1 limits the franchise to citizens of the United States.

Although the City argues that Article II, Section 1 does not apply to local elections, it has not contested that the provision refers to United States citizenship. By contrast, Intervenors and several amici argue that the term "citizen" in Article II, Section 1 does not refer to a citizen of the United States, but rather refers to New York State citizenship, which extends to non-U.S. citizen residents of the state.

The theory would mark a radical departure from long historical practice. Although it is presented as an argument in support of the constitutionality of the Municipal Voting Law, the inescapable implication of this theory is that the State Election Law and the voter registration requirements applicable to *every single*

municipality in the State of New York are in fact unconstitutional. Article II, Section 1, *guarantees* the right to vote to citizens meeting the age and residency requirements. If, as Intervenors argue, the class of New York State citizens includes at least some New York residents who are not citizens of the United States, and if the word "citizen" in Article II, Section 1 refers to these New York State citizens, then State Election Law § 5-102 which prohibits voting by any person who is not a citizen of the United States would be flatly in violation of the State Constitution by excluding this subset of New York citizens.[1]

Indeed, the implication of this position is not that the City is *permitted* to allow non-U.S. citizens to vote, but that every other municipality in the state is *required* to do so. It is not even clear that the City's own law would be constitutionally firm under this interpretation. The Municipal Voting Law extends the right to vote only to those non-U.S. citizens with permanent resident status or work authorization. Intervenors make no attempt to show that New York State citizenship tracks these

[1] Indeed, this interpretation would create additional problems under federal law. Federal law expressly prohibits aliens from voting in federal elections. 18 U.S.C. § 611. The United States Constitution, on the other hand, bases voter eligibility on state voting requirements, without reference to citizenship. U.S. Const. Art. I, § 2, Amend. 17. If Article II of the New York Constitution guarantees non-U.S. citizens the right to vote, these federal provisions are placed in direct conflict.

particular categories, and under their argument that citizen should be interpreted as coextensive with domiciliary, even the Municipal Voting Law is unconstitutionally narrow.

Intervenors' argument would not only cast constitutional doubt on the State Election Law and the practices of every municipality in the state; it would also overturn longstanding historical practice under which the right to vote has been limited to United States citizens. The connection of the vote to citizenship dates from the Constitution of 1821 and has been carried forward in modified form in every subsequent constitution. In an 1863 case, the Court of Appeals discussed the appropriate standard for assessing a challenge to voter eligibility, making clear that an alien who had not been naturalized was ineligible to vote.[2] *Smith v. Pease*, 27 NY 45, 63 (1863); *see also People ex rel. Juarbe v. Bd. of Inspectors of Twenty-Fourth Election Dist. of Twenty-Fifth Assembly Dist. of Borough of Manhattan*, 32

[2] Amicus NYCLU notes that between the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and the passage of the Fourteenth Amendment in 1868, Black men were permitted to vote in New York. NYCLU Br. 16–18. Amicus argues that this demonstrates that "citizen" in Article II cannot mean United States citizen, since the *Dred Scott* decision denied U.S citizen status to these men. Given that the Court of Appeals during this same time period expressly recognized that voting was limited to United States citizens, *Smith v. Pease*, 27 NY 45, 63 (1863), this history can be more easily explained by New York officials' refusal to acquiesce to *Dred Scott*'s holding.

Misc. 584, 585 (Sup. Ct. N.Y. Cty. 1900) (holding that only a citizen of the United States can be eligible to vote under the state constitution and implementing statutes).

In support of the argument that "citizen" in Article II, Section 1 does not refer to United States citizens, Intervenors look to the use of the term elsewhere in the State Constitution. They note that of the Constitution's twelve uses of the term "citizen," three of them expressly use the language "citizen of the United States." Art. III, § 7; Art. IV, § 2; Art. V, § 6. This difference in terminology is significant, they argue — had the Constitution's framers meant Article II, Section 1 to apply to citizens of the United States, they would have said so expressly.

The problem with this argument is that the Constitution elsewhere expressly refers to State citizenship. Article I, Section 1 refers to a "member of this state" and "citizen thereof." Article III, Section 19 expressly refers to "citizens of the state." Intervenors' argument could just as easily be reversed — if the Constitution's framers had intended to guarantee the right to vote to State citizens, they would have said so, as they did elsewhere in the Constitution. Any argument based on consistent usage of terminology throughout the Constitution necessarily fails.

Intervenors note that courts have interpreted the term "citizen" in Article I, Section 8 to encompass non-U.S. citizens. That interpretation is grounded in the fact

that it follows Article I, Section 1, which expressly references state citizenship. Article II, by contrast, contains no explicit reference to state citizenship, and there is no similar history in practice or caselaw of interpreting it to grant a right to non-U.S. citizens.

A final factor weighing against Intervenors' interpretation is the lack of a clear definition of New York State Citizen. Neither the State Constitution, nor any state statute defines who is a citizen of New York State. Intervenors themselves describe the term citizen as "amorphous." Intervenor Br. 22. One of the cases upon which Intervenors rely, *Halaby v. Board of Directors of University of Cincinnati*, in noting that "citizen" is sometimes "loosely" used as a synonym for domiciliary,[3] observes that it is susceptible to a "variety of meanings."[4] 162 Ohio St. 290, 293 (1954).

Although Intervenors and amici argue that state citizenship encompasses persons who are not U.S. citizens, and that it is broad enough to include those classes

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[3] Voting qualifications in every version of New York's constitution since the term "citizen" was introduced in 1821 have included both citizenship and residency requirements. If citizenship for purposes of Article II is taken to be synonymous with New York domicile, then the residency requirements would render the citizenship requirement entirely superfluous.

[4] In contrast to this "loose" usage, that court recognized that the term "applies ordinarily to one's relationship to a national government and a state of domicile *within such government*." *Halaby v. Bd. of Directors of Univ. of Cincinnati*, 162 Ohio St. 290, 293 (1954) (emphasis added). In other words, that court viewed state citizenship, in its strict sense, as a subset of national citizenship.

of non-citizens subject to the Municipal Voting Law, they do not offer a precise definition of the contours of state citizenship, nor is it even clear that they all agree on its scope. The fact that state citizenship remains so poorly defined is reason to doubt that the framers of the State Constitution defined such an important right in those terms.

D. Under Article IX, only citizens may vote in local elections.

Even assuming — contrary to its plain language — that Article II, Section 1 could be construed to permit non-citizens to vote in local elections, Article IX independently limits voting in local elections to citizens. Article IX, Section 1 provides that "[e]very local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof," and "[a]ll officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law." N.Y. Const. Art. IX, § 1. Under these provisions, officers and city council members must be elected by "the people" of the City of New York. Article IX, Section 3(d)(3) of the New York State Constitution defines the term "People" to mean "Persons entitled to vote as provided in section one of article two

of this constitution." N.Y. Const. Art. IX, § 3(d)(3). Together, these provisions unambiguously state that "the people" of New York City who "shall" elect municipal officeholders are those *citizens* eighteen years of age or over who have resided in the City for thirty days preceding the election.

By expressly incorporating the voter qualifications of Article II, Section 1 into the definition of "the people" making up the local electorate, Article IX limits local elections to citizens regardless of the effect of Article II, Section 1 alone. In other words, even if this Court were to hold that Article II, Section 1 directly applies only to statewide elections and that Article II, Section 1 only guarantees but does not limit the franchise to citizens, Article IX would nevertheless limit local elections to citizens by expressly requiring that local legislators and officeholders be elected by "[p]ersons entitled to vote as provided in section one of article two."

To avoid this outcome, Defendants put great weight on the introductory language of the definition section, which provides that the listed terms "shall *mean or include*" the provided definitions. Article IX, Section 3 (emphasis added). According to this argument, because "include" is a word of enlargement, "mean or include" should be interpreted as nonexclusive. City Br. 16–17. This interpretation,

however, fails to give meaning to the entire phrase, ignores the constitutional context, and renders the constitutional protection indeterminate.

For starters, "mean" and "include" have significantly different definitions. The United States Supreme Court has contrasted these words as follows: "The natural distinction would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934). The two words are to some degree incompatible, with one denoting equivalency while the other introduces representative examples. The City resolved this tension by simply rendering the term "mean" entirely superfluous and construing "mean or include" to be synonymous with "include".

But this phrase can be given meaning in its entirety by understanding the context in which the phrase "mean or include" appears in the Constitution. It is not contained within a single definition, but as an introduction to a list of several defined terms. Each listed term either "means" or "includes" the associated definition. With this understanding, context makes the appropriate interpretation clear.

The word "People" is associated with "Persons entitled to vote as provided in section one of article two of this constitution." Art. IX, § 3(d)(3). This definition does not consist of representative instances of a general class, but rather specifically cross-references another constitutional provision, expressly incorporating its requirements by reference. Such cross-references are ubiquitous in legal definitions and are understood import a definition elsewhere as an "interchangeable equivalent." The Court of Appeals has held that even when the phrase "mean or include" introduces "a list of named special classes" within a general class, it may nevertheless "evidence[e] an intention to restrict the application . . . to the categories listed." *U.S. Steel Corp. v. Gerosa*, 7 N.Y.2d 454, 459 (1960). Here, where there is no textual suggestion that the cross-reference is intended to be a representative example, only the exclusive reading is plausible.

Under the City's interpretation, by contrast, the meaning of the term "people" in Article IX is rendered indeterminate. It "includes" those persons entitled to vote under Article II, Section 1, but it also includes some unspecified class of persons who are *not* entitled to vote under Article II, Section 1. Defining a word in such unbounded terms defeats the purpose of including a definition section.

The City's construction opens a Pandora's box of additional problems. First, if "the people," as a matter of constitutional meaning, includes some class of non-citizens, then this runs into the same problem created by the expansive reading of citizen in Article II — every other municipality in the state is necessarily violating the Constitution by excluding those non-citizens from participating in local governance.

The City seems instead to be arguing the term "people" is constitutionally indeterminate such that the City's interpretation is a permissible, though not mandatory, interpretation. The idea that specific language in the Constitution — constitutionally defined language, no less — may be assigned different meanings by different municipalities throughout the state is utterly unprecedented and runs afoul of the principle that "it is the province of the judicial branch to define the rights and prohibitions set forth in the State Constitution." *White v. Cuomo*, 38 N.Y.3d 209, 216–17 (2022) (cleaned up). The meaning of the Constitution's language should not be left up for grabs in a state with more than a thousand local jurisdictions, each of which may have a different interpretation.

Finally, the City argues that "the people" should be interpreted as broad enough to include non-citizens because Article IX states that the "[r]ights, powers,

privileges and immunities granted to local governments by this article shall be liberally construed." Art. IX, § 3(c). But Article IX places local governance in the hands of "the people." A broad construction of those rights, powers, privileges, and immunities enhances the scope of local governance. By contrast, a constitutional construction that expands the meaning of "the people" 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.

POINT III

THE MUNICIPAL VOTING LAW VIOLATES THE ELECTION LAW

"[T]he strongest indication of [a] statute's meaning is in its plain language." *People v. Badii*, 36 N.Y.3d 393, 399 (2021). Like the State Constitution, the Election Law limits voting rights to citizens. It categorically states that "[n]o person shall be qualified to register for and vote at any election unless he is a citizen of the United States." Election Law § 5-102(1). Notably, the law applies to "all elections at which voters of the state of New York may cast a ballot for the purpose of electing an individual to any party position or nominating or electing an individual to any federal, state, county, city, town, or village office." Election Law § 1-102 (emphasis

added). The law is clear: voting in "any" public election in New York is limited to U.S. citizens. *Cf. Kimmel v. State*, 29 N.Y.3d 286, 401 (2017) ("It is not for this Court to engraft limitations onto the plain language of the statute.").

Defendants argue, however, that another clause in § 1-102 grants local jurisdictions the almost unlimited power to override this clear statutory language declaring that the Election Law's numerous requirements apply fully to local elections. But Defendants have misread the language of § 1-102 in a way that is at odds with its history and function.

A. The plain text of § 1-102 limits its carve-out to state law.

The only issue in dispute is whether the Election Law's allowance that it may be overridden by "any other law which is inconsistent with the provisions of this chapter," Election Law § 1-102 (emphasis added), includes local laws like the Municipal Voting Law.

The City and Intervenor-Defendants' argument is straightforward: the Municipal Voting Law qualifies as "any other law" inconsistent with provisions of the Election Law and therefore under the terms of Election Law § 1-102, the Municipal Voting Law provides the applicable law. But this argument is superficial

at best, depends on a contextless interpretation of the words "any other law," and ignores relevant legislative history.

First, the word "law" standing alone is susceptible to an incredibly broad interpretation that would include, for example, regulations enacted by administrative agencies. *See* LAW, Black's Law Dictionary (11th ed. 2019) ("the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them"). Applying such a broad definition to Election Law § 1-102 would allow the State Board of Elections to override the statute. That is untenable.

The City Defendants point to Section 2 of the Municipal Home Rule Law, which defines "Law" to mean "[a] state statute, charter or local law," as evidence that that the Election Law's reference to the term may include local laws. City Br. 25. But that observation weighs *against* Defendants. The Legislature's decision to clearly define the word "law" in the Municipal Home Rule Law only illustrates that the term is far from unambiguous and must be interpreted in accordance with the context, purpose, and history of a particular statute. And unlike the Municipal Home Rule Law, the Election Law does not expressly include local law.

Nor does the phrase "any other law" render the meaning of "law" unambiguous. For example, a Texas court interpreting this exact same phrase held that "any other law" in a statute concerning guardianship procedures referred only to other laws regarding guardianship. *Gauci v. Gauci*, 471 S.W.3d 899, 902 (Tex. App. 2015). A recent decision by the First Department, *Makhani v. Kiesel*, No. 1420/21, 2022 WL 16984186, at *8 (N.Y. App. Div. 1st Dep't Nov. 17, 2022), considered the meaning of the phrase "any other department, authority, division or agency of the state," and held that it should be read as limited to executive branch agencies after reading "other" to mean "other such like" and defining its scope by reference to the specific agencies enumerated in the statute. Here, the phrase "any other law" can be properly interpreted only in its full statutory context.

To determine the intended scope of the term "law," therefore, it is necessary to give close attention to the precise language of Election Law § 1-102, which does not simply give preference to any provision of law inconsistent with the Election Law, but rather refers to an inconsistent "specific provision of law [that] exists in any other law" (emphasis added). Key to a proper interpretation of this phrase is referent of the word "other." Here, it refers to the Election Law itself. Section 1-102 provides that the Election Law yields to a provision in any law other than the

Election Law that is inconsistent with "provisions of *this chapter*" (*i.e.*, the Election Law). In this context, the most natural reading of "any other law" is any other state statutory law outside of this chapter.

Guidance can also be found in the "familiar canon of construction that the intent with which statutes have been enacted is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view." *People v. Bell*, 306 N.Y. 110, 113 (1953) (internal quotation marks omitted). Here, at the time § 1-102 was enacted as part of the 1976 recodification of the Election Law, another body of state law governing elections for schools and libraries existed in the Education Law. Unlike conflicts between state and local law, which are governed by well-established preemption principles, *see, e.g.*, *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377 (1989), conflicts between different provisions of state statutory law create unique difficulties in determining the applicable law. Section 1-102 addresses this problem by ensuring that specific election provisions elsewhere in state law, for example, the Education Law's provisions for school district elections, will prevail over the general provisions of the Election Law.

The carve-out clause should also be considered in the context of the entirety of § 1-102. The first sentence establishes that the Election Law is fully applicable to local elections, including "electing an individual to any federal, state, county, city, town or village office, or deciding any ballot question submitted to all the voters of the state or the voters of any county or city, or deciding any ballot question submitted to the voters of any town or village at the time of a general election." N.Y. Elec. § 1-102. According to the City, however, the broad uniform applicability of the Election Law is immediately undercut by the second sentence, which, under the City's interpretation, allows any local jurisdiction to unilaterally exempt itself from nearly every requirement of the Election Law, including several provisions that specifically govern the operations of local elections. This makes no sense.

Finally, other provisions of the Election Law are rendered ineffectual or superfluous by the City's interpretation. For example, certain provisions of the Election Law impose additional requirements on particular localities. *See, e.g.*, N.Y. Elec. Law § 3-506. According to the City, however, § 1-102 allows these localities to disregard and override these statutory requirements by simply enacting a contrary local law. Other provisions of the Election Law expressly allow localities to override the Election Law's default rule through local law. *See, e.g.*, N.Y. Elec. Law § 3-

200(2) (county legislature may increase number of commissioners through local law). Under the City's interpretation, these provisions are entirely superfluous, as localities have a general power under § 1-102 to freely override the Election Law by enacting local laws. *See Branford House, Inc. v. Michetti*, 81 N.Y.2d 681, 688 (1993) ("A construction rendering statutory language superfluous is to be avoided." (cleaned up)). Under normal principles of statutory construction, the express inclusion of local overrides in certain provisions implies that such overrides are not available when not so provided for.

B. The legislative history of § 1-102 proves that its exception is limited to state law.

In interpreting statutory language, a court must give weight to "the spirit and purpose of the legislation, which requires examination of the statutory context of the provision as well as its legislative history." *Nostrom v. A.W. Chesterton Co.*, 15 N.Y.3d 502, 507 (2010). "[L]egislative history buttresses the conclusion that is evident from the [Election Law's] plain language." *Badii*, 36 N.Y.3d at 399.

Section 1-102 was introduced in the 1976 recodification of the Election Law, enacted through a pair of bills, Chapters 233 and 234. Notably, in the first of these bills, the carve out language was different, specifying only that "[w]here a specific provision of law exists in *the education law* which is inconsistent with the provisions

of this chapter, such provision shall apply." L. 1976, ch. 233 (emphasis added). As noted above, school district and library elections are governed by the Education Law, and the carve out in § 1-102 aimed to prevent the newly recodified Election Law from usurping the Education Law's role with respect to those elections. Most significantly, this original language demonstrates that when the Legislature was first crafting the carve out provision of § 1-102, its focus was on other provisions of *state* law that might come into conflict with the Election Law.

The second bill, Chapter 234, enacted on the same day as Chapter 233, modified the new § 1-102 by changing "the education law" to "any other law." L. 1976, ch. 234. The purpose of this bill was to make "many technical and typographical corrections in the recodification," as well as certain more substantive amendments including new changes from existing law and reversions to existing law by undoing changes in the first recodification bill. Bill Jacket, Memorandum of Support, at 1.

Although the Memorandum of Support includes explanations of numerous provisions in the bill, including various "Additional Changes in Existing Law Made by Chapter Amendment to Recodification of Election Law" and "Reversions to Existing Law Effected by Chapter Amendment to Recodification," the change to

§ 1-102 is not explained or even listed in the memorandum. *Id.* at 2–4. The clear implication is that the change to § 1-102 was considered neither a significant substantive change to the Election Law nor the reversion of a significant change to the Election Law, but rather only one of the "many technical and typographical corrections" to the original recodification in Chapter 233. In other words, the replacement of "the education law" with "any other law" was not intended to effect a major change in the recodification.

Allowing not only the state Education Law, but also the laws of any of New York's more than one thousand local governments, to displace almost the entirety of the Election Law would have been a major alteration of the relationship between the Election Law and local law. But if "any other law" refers to state law, then the change is easily understood as a minor technical correction recognizing that provisions of state law that conflict with the Election Law may not be confined to the Education Law.

That the Legislature's focus was on conflicts with other state laws is demonstrated by the next amendment to § 1-102 in 1978. This bill, enacted as Chapter 374, modified the application clause of § 1-102 for the specific purpose of completely exempting certain elections governed by other bodies of state law from

the coverage of the Election Law, including school district elections governed by the Education Law, fire district elections governed by the Town Law, and special town elections governed by the Town Law and the Municipal Home Rule Law. *See* Bill Jacket, Letter from Association of Towns. Although the recodification provided that the Election Law would yield to inconsistent provisions of "any other law", its language left open the possibility that, for example, school district elections would be subject to the requirements of *both* the Education Law and the Election Law where the two did not conflict, imposing unnecessary burdens on local officials. Bill Jacket, New York State Assembly Memorandum in Support of Legislation. The statements of support in the bill jacket repeatedly emphasize that this bill was intended as a *clarification* of the recodification, which was always intended to exempt these special district elections from the Election Law's coverage. In other words, this amendment confirms that the "any other law" language was intended to govern the interplay between the Election Law and other bodies of state law that govern certain elections.

C. Caselaw provides little support for Defendants' interpretation of § 1-102.

Defendants point to a handful of cases that allegedly support their interpretation of § 1-102. None of them are persuasive.

Several of these cases provide superficial, conclusory declarations about the meaning of § 1-102, without any substantive analysis. For example, the court in *N.Y.P.I.R.G.—Citizen's All. v. City of Buffalo*, 130 Misc. 2d 448, 449 (Sup. Ct. Erie Cty. 1985), simply assumed that local law could displace the Election Law under § 1-102 without any discussion or analysis whatsoever. Likewise, in *McDonald v. New York City Campaign Fin. Bd.*, 40 Misc. 3d 826, 850 (Sup. Ct. N.Y. Cty. 2013), *aff'd as modified*, 117 A.D.3d 540 (1st Dep't 2014), the court, in dicta, stated simply that it "suspects" that "Election Law § 1-102 means what it says it means," without any further analysis. As noted above, the phrase "any other law" is not self-defining. These courts, however, did not even consider the range of meanings that this language might bear, much less the statutory context, purpose, or legislative history.

Similarly, in *Castine v. Zurlo*, 938 F. Supp. 2d 302, 313 (N.D.N.Y. 2013), *aff'd in part, vacated in part, remanded*, 756 F.3d 171 (2d Cir. 2014), the court simply declared, without further analysis, that the phrase "any other law" was not limited to state law. The court bolstered its decision by citing an informal opinion of the Attorney General stating that under § 1-102, a village charter provision could control over an inconsistent provision of the Election Law. *Id.* But this Attorney General opinion in fact involved not a local law, but rather a state statute — a village

charter enacted by the State Legislature in the Laws of 1860, *see* 1980 N.Y. Op. Att'y Gen. (Inf.) 109 (1980) — and therefore provides no support for the idea that a local law can similarly control over the Election Law.

In *City of N.Y. v. N.Y. City Board of Elections*, No. 41450/91, 1991 N.Y. Misc. LEXIS 895, at *4 (Sup. Ct. N.Y. Cty. Apr. 3, 1991), the court similarly held that the carve out in § 1-102 applies to local laws. In reaching this conclusion, the court first relied on *Bareham v. City of Rochester*, 246 N.Y. 140, 149 (1927), for the proposition 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; *i.e.*, in so far as it affects the election of the local officers." The Court's decision in *Bareham*, however, turned on a specific provision of the then-in-effect Constitution, which expressly granted authority to cities to adopt local laws concerning, among other things, the "mode of selection" of all city officers. *Bareham*, 246 N.Y. at 146. The current constitution contains no such commitment of this authority to local government, but instead provides simply that local officers shall be elected or appointed "as may be provided by law." Article IX, Section 1(b).

The court in *City of New York* then declared that the phrase "any other law" was unambiguous and therefore refused to consider the legislative history of § 1-

102. *City of N.Y.*, 1991 N.Y. Misc. LEXIS 895, at *5. But as noted above, the word "law" is not self-defining, and in the full context of § 1-102 it is most naturally interpreted to refer to state statutory law.

In short, the only cases supporting the City's interpretation of § 1-102 rely on conclusory statements about the meaning of "any other law" without any reference to context or legislative history.

On the other side of the ledger are the Supreme Court's decision in this case and *Castine v. Zurlo*, 46 Misc. 3d 995, 1000–01 (N.Y. Sup. Ct. 2014), which similarly held that "any other law" in § 1-102 is properly understood to mean any other *state* law. The *Castine* court considered the carve out provision in light of the Election Law's otherwise uniform statewide application. *Id.* at 1001. The court also noted that the practical effect of the local law interpretation would be to allow localities to override nearly the entirety of the Election Law — a "substantial and controversial change to the Election Law." *Id.* And the court considered the legislative history of § 1-102, which reveals an intention to ensure that the Election Law and the election provisions of the Education Law could coexist. *Id.* at 1000–01.

To the extent that courts have carefully analyzed the text, context, and legislative history of § 1-102, the weight of authority supports interpreting the "any other law" carve out to refer only to state law.

D. The Election Law is not a "special law."

Finally, the City argues that, regardless of the scope of the carve out in § 1-102, the Election Law can be freely overridden by local law because it is a special law, rather than a general law. City Br. 25–26. In support of this argument, the City cites *Bareham v. City of Rochester*, 246 N.Y. 140, 148 (1927), for the proposition that the Election law is not a general law because it is "not a statute applicable alike to all the cities of the State." This quote, however, is truncated to hide the actual scope of the Court's holding. In fact, the Court held that 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*." *Id.* (emphasis added).

In *Bareham*, which involved the validity of a Rochester local law providing for non-partisan city council elections, the Court's analysis turned on the specific aspects of the Election Law that the local law in question purported to supersede. First, the Court relied on an express savings clause in the then-in-effect Election Law preserving local laws that "prescribe[e] a particular method of making nominations

of candidates for certain school or city offices." *Id.* The Court then noted that the Legislature had enacted several statutes specifically providing for non-partisan elections in particular cities. *Id.* In this particular respect, the Election Law was not uniform in its application. The Rochester law, modelled on these non-partisan election statutes, could thus supersede the Election Law's default rule. *Id.*

Here, by contrast, the provision of the Election Law that Municipal Voting Law purports to supersede — Section 5-102, which prohibits voting by non-citizens — is a general law, uniform in its application to all cities in the state. The City cannot point to any provision of the Election Law or any other state law that provides for differential treatment of any city with respect to citizenship as a voter eligibility requirement.

POINT IV

THE MUNICIPAL VOTING LAW VIOLATES THE MUNICIPAL HOME RULE LAW

As noted above, the Municipal Voting Law is substantively incompatible with both the New York State Constitution and the Election Law. But in addition, it was adopted in a procedurally improper manner under the Municipal Home Rule Law. Under § 23 of the Municipal Home Rule Law, any law that "changes the method of

nominating, electing, or removing an elective officer," must be approved by a public referendum held within sixty days after the law's adoption. Municipal Home Rule Law §§ 23(1), 23(2)(e). This provision provides a fundamental check against efforts by municipal officials to entrench themselves by changing the rules of the game without public approval. The Municipal Voting Law was not subject to any such referendum.

The referendum requirement has been interpreted to apply, for example, to "changes including the requirement of enrollment, form of petition, [and] number of signatures required," which "together constitute a change in method of nominating elective officers." 1967 N.Y. Op. Att'y Gen. No. 73 (Apr. 5, 1967); *see also* 1966 N.Y. Op. Att'y Gen. No. 71 (Apr. 6, 1966) (referendum required to "change of method of selection of the Acting City Judge from appointment by the Mayor to election by the people"). Here, in enacting the Municipal Voting Law, the City Council has similarly changed the method by which all municipal elective officers are elected by effectively replacing the existing electorate with a differently constituted population. Under Municipal Home Rule Law § 23(2)(e), this change can be made only by referendum.

"[W]here a local law is subject to mandatory referendum, the failure to conduct the referendum invalidates the law." 1986 N.Y. Op. Att'y Gen. (Inf.) 57 (1986). Because the Municipal Voting Law was never submitted for approval via a public referendum, it is invalid under Section 23(1) of the Municipal Home Rule Law.

Courts have held that no referendum is necessary when a local government merely changes ward boundary lines or reapportions legislative districts. But a redrawing of district lines does not "change the method" of an election. When boundaries are redrawn, the same voter pool casts its votes for the same body of public officials, under the same basic procedures.

The Municipal Voting Law is different in kind. It changes the eligibility criteria for voters, effectively replacing the existing electorate for municipal offices with a differently-constituted electorate. This is more akin to a "change of method of selection of the Acting City Judge from appointment by the Mayor to election by the people," which the Attorney General determined required a referendum, 1966 N.Y. Op. Att'y Gen. No. 71 (Apr. 6, 1966), rather than merely reallocating existing voters between electoral districts.

Similarly, another provision of § 23 requiring a referendum on laws that "change[] the membership or composition of the legislative body," has been held to apply only to "structural changes" that, for example, change the number of seats in the legislature. But in the same way that adding an additional seat to the legislature is a structural change to the composition of that body, adding a large new class of voters to the body of electors is a structural change to the method of electing municipal officeholders.

The City argues that the referendum requirement should be held to apply only to *how* officeholders are selected, and not *by whom* they are chosen. City Br. 32. This distinction does not stand up to scrutiny. The "method" of electing an officer inherently depends on the identity of the electoral pool. Just as changing the identity of the persons who *appoint* a given officer (*e.g.*, a change from appointment by the mayor to appointment by the mayor and city council) would undoubtedly be a change to the *method* of appointment, so a change to the identity of the persons who elect an officer would be a change to the method of election. The power to completely redefine the composition of the electorate is a radical one that amounts to "chang[ing] the method of nominating, electing, or removing an elective officer,"

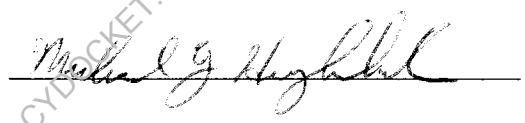
and therefore requires the approval of the existing electorate under the Municipal Home Rule Law.

CONCLUSION

For the foregoing reasons, this Court should affirm the order and judgment of the court below, granting summary judgment in favor of Plaintiffs and denying Intervenors' motion to dismiss, with costs.

Dated: December 19, 2022
Albany, New York

O'CONNELL & ARONOWITZ. P.C.

By: 

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Dated: December 19, 2022

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