Index No. 85007/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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

Plaintiffs,

-against-

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

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MAYOR ADAMS AND NEW YORK CITY COUNCIL'S MOTION FOR SUMMARY JUDGMENT

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May 9, 2022
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Eric Phillips
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On the Brief

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PRELIMINARY STATEMENT

Defendants MAYOR ERIC ADAMS AND NEW YORK CITY COUNCIL ("City Council") (collectively, the "City Defendants") by their attorney, HON. SYLVIA O. HINDS-RADIX, Corporation Counsel of the City of New York, submit this memorandum of law in support of their motion for summary judgment in favor of the City Defendants on all claims. Plaintiffs challenge Local Law 11 of 2022 ("L.L. 11") which enfranchises lawful permanent

residents and green card holders who are residents of the City to vote for municipal officers. They claim, relying on selective reading of portions of the New York State Constitution ("Constitution"), Election Law ("E.L."), and Municipal Home Rule Law ("MHRL"), that L.L. 11 violates each of these laws. On the contrary, L.L. 11 is entirely lawful. First, the Constitution as a whole, its legislative history, and judicial decisions interpreting the relevant articles, reflect an expansive vision of voting rights and of municipal home rule powers wherein the City is empowered to enact laws to manage its own over municipal elections. Second, the E.L. specifically yields to other laws that may conflict with it, and therefore the City may define eligible voters differently than the E.L. Third, L.L. 11 is not among the types of law for which a referendum is required under the MHRL. Finally, Board of Elections in the City of New York's ("City BOE") counter-claim fails because it has no basis in fact or law.

STATEMENT OF FACTS

L.L. 11 was approved by vote of City Council on December 9, 2021. It passed into law on January 9, 2022. L.L. 11 provides that individuals who are lawful permanent residents or authorized to work in the United States ("U.S.") can vote in City elections for municipal office provided that they met all criteria, other than U.S. citizenship, to register to vote in New York State ("NYS").[1] Section 1 of L.L. 11 adds Chapter 46-a to the New York City Charter ("Charter"). City BOE is directed to carry out the provisions of Chapter 46-a. Charter § 1057-cc. L.L. 11 does not permit Municipal Voters to "vote for any state or federal office or political party position or on any state or federal ballot question." Charter § 1057-rr. Section 2 of L.L. 11 sets a deadline by which the City BOE must submit a report regarding its plan for

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

timely implementation of the law to the City. Section 3 of L.L. 11 provides that the law takes effect December 9, 2022 and applies to municipal elections beginning after January 9, 2023.

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

STANDARD OF REVIEW

Pursuant to Civil Practice Law and Rule ("CPLR") 3212(b), a defendant moving for summary judgment must "show … that the cause of action [] has no merit. The motion shall be granted if, upon all the papers and proof submitted, the … defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

Summary judgment is an appropriate vehicle for the prompt and efficient disposition of cases and "should be granted without hesitation" when there is no genuine issue of material fact surrounding a cause of action. See Blake v. Gardino, 35 A.D.2d 1022 (3d Dep't 1970), aff'd, 29 N.Y.2d 876(1972); see also Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Gibbons v. Hantman, 58 A.D.2d 108, 111 (2d Dep't 1977), aff'd, 43 N.Y.2d 941 (1978). When the movant has "tender[ed] sufficient evidence to eliminate any material issues of fact from the case," the Court should grant summary judgment. See Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Meth v. Kokler, 39 A.D.2d 651, 652 (1st Dep't 1972), aff'd, 33 N.Y.2d 78 (1973); Long Island R.R. v. Northville, 41 N.Y.2d 455, 461 (1977).

ARGUMENT

POINT I

LOCAL LAW 11 DOES NOT VIOLATE THE NEW YORK STATE CONSTITUTION

Plaintiffs assert that "[b]y purporting to allow non-citizens to vote in municipal elections on the same basis as United States Citizens, the Non-Citizen Voting Law directly conflicts with the voting qualifications enshrined in the New York State Constitution." Compl. at ¶ 51. In support, plaintiffs rely on a narrow reading of a small portion of text of the Constitution to argue that it permits only U.S. citizens to vote in elections, including local elections. Plaintiffs fail to consider the text and meaning of the Constitution as a whole, its

legislative history, and the effect of Article IX on the powers of the City. In addition, plaintiffs' interpretation of Article II, sec. 1 disregards constitutional amendments and the judicial decisions interpreting such amendments, which reflect a more expansive vision of voting rights and municipal home rule powers over municipal elections. Accordingly, L.L. 11 does not violate the Constitution.

Article II, Section 1, as amended in 1995, directs: [2]

> 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.[3] This provision must be read in conjunction with the rest of the Constitution, most notably Article IX, which grants localities broad rights to, inter alia, establish their own democratic processes for selecting local officers.

Art. IX, § 1, "Bill of rights for local governments," makes clear that the State legislature intended to expand and emphasize local home rule authority as benefiting the State's citizens:

> Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:

[2] Prior versions of Art. II, Sec. 1 were considerably more restrictive regarding those who were eligible to vote, and there was a progression toward expanding the right of suffrage. Thus, early decisions interpreting Art. II, sec. 1 must be read with the understanding that its text was dissimilar to the current version and often excluded a large portion of U.S. residents, including non-white, non-male, and non-property owning citizens. See Matter of Gage, 141 N.Y. 112 (1894); People ex rel. Smith v. Pease, 27 N.Y. 45 (1863). These decisions also generally predate the modern constitutional home rule scheme in Article IX.

[3] Art. IX, § 3(d)(3) defines "people" as "persons entitled to vote as provided in section one of article two of this constitution."

> (a) Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. Every local government shall have power to adopt local laws as provided by this article.
>
> (b) All officers of every local government whose election or appointment is not provided for by this constitution shall be elected by the people of the local government, or of some division thereof, or appointed by such officers of the local government as may be provided by law.

Additionally, Art. IX, § 2 states, in pertinent part:

> a. The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.
>
> ***
>
> b. In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government:
>
> (1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees...
>
> (2) In the case of a city, town or village, the membership and composition of its legislative body.
>
> ***
>
> (10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

In repeatedly framing home rule authority as a "bill of rights" for localities within the State, granting localities "rights, powers, privileges and authority" and specifically granting these "rights… and powers" with regard to the municipality's affairs and government, Article IX grants localities broad rights to establish their own democratic processes for selecting local officers. See, e.g., Roth v Cuevas, 158 Misc. 2d 238, 242 (N.Y. Co. 1993), aff'd, 197 A.D.3d 369 (1st Dep't 1993), aff'd for reasons stated in Sup. Ct. op., 82 N.Y.2d 791 (1993). L.L. 11's constitutionality is supported by Art. IX's grant of broad powers to municipalities over local property, affairs, and government, Art. IX, § 2(c), the mode of selection of municipal officers and employees, Art. IX, § 2(c)(1), and the government… safety, health and well-being of persons in the municipality, Art. IX, § 2(c)(10). L.L. 11, which provides that individuals who are residents of the City, but not U.S. citizens, may participate in choosing the City officials whose decisions will impact all aspects of their day-to-day lives, falls squarely within the ambit of the City's affairs and government, the mode of selection of municipal officers, and the government, safety, health and well-being of those persons who reside in the City. See Charter Chapter 46-a; McDonald v. N.Y.C. Campaign Fin. Bd., 965 N.Y.S.2d 811, 830 (N.Y. Co. 2013), aff'd & mod., 117 A.D.3d 340 (1st Dep't 2014) (holding the City's campaign finance laws "were properly promulgated pursuant to the grant of legislative authority to local governments to pass laws relating to the 'property, affairs or government'…and the laws relating to the 'mode of selection . . . of its officers.'")

The legislative record of L.L. 11 demonstrates the City's interest in ensuring that the estimated 800,000 to 1,000,000 individuals who are lawful residents of the U.S. and residents and taxpayers in the City, are enfranchised. Ex. F at 24:16-24. This enfranchisement is inextricably linked to the City's affairs and government, selection of public officials, and

management of the safety, health and well-being of the City's residents. See Art. IX, sec. 2(c). Municipal voters pay taxes and contribute to the economy, attend schools, live in housing, and use public facilities. Ex. F at 28:23-29:08, and 40:23-41:03. Indeed, it is difficult to identify any area of local law or regulation that affects U.S. Citizens, but not non-citizen residents. The City's legislative judgment that enfranchising those who are legally in the U.S. will permit the City to better manage its own affairs and government, ensure local officials are representative of the actual population, and provide for the health, safety, and well-being of all City residents, is entirely consistent with Art. IX's grant of municipal home rule authority. This is particularly true in the wake of the COVID-19 emergency, during which a large proportion of the "essential workers" upon whom the City relied for necessary services were not U.S. Citizens, but were City residents. Id. at 22:23-23:03 and 25:18-26:12. Permitting community members relied upon in emergencies to have a say in choosing local representatives promotes the City's management of its own affairs and provides for the health and safety of residents, by retaining these community members and ensuring their voices are heard. The enfranchisement of non-citizen immigrants may be particularly appropriate in the City, widely considered a "city of immigrants," uniquely shaped by foreign-born residents. Ex. E; Ex. F at 6:18-8:10 and 132:21-133:11. Thus, the City has done exactly what was intended in Article IX by enacting a law that meets its unique circumstances to ensure more representative and effective local representation.

Further, New York courts have historically construed Article IX to maximize local control over elections of local officers. Beginning with Bareham v. City of Rochester, 246 N.Y. 140 (1927), a case brought shortly after the enactment of the first Home Rule amendment, the Court of Appeals affirmed the broad grant of home rule power to local governments in shaping local elections. See also Resnick v. Ulster County, 44 N.Y.2d 279, 286 (1978)

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

The Court of Appeals further supports the adoption of an expansive view of Article II, § 1 in the context of local experimentation with systems of proportional and limited voting. For example, in Matter of Blaikie v. Power, 13 N.Y.2d 134, 140 (1963), the Court described the purpose of the section as being "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. In other words, section 1 of article II was designed not to regulate the mode of selection of elective officers but rather to regulate the status of voters and to protect otherwise qualified voters from electoral discrimination." More recently, in the context of reviewing whether votes were validly cast, the Court described Article II, § 1 as guaranteeing "the rights of a voter to cast a vote free from undue restriction..." Panio v. Sunderland, 4 N.Y.3d 123, 129 n.3 (2005).

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

Viewed in this context, the reference to Article II, § 1 in the definition of "the people" was not an attempt to restrict the voting rights of individual voters, but rather, to clarify and expand the constitutionally protected right granted to local governments to have local officers elected through direct democratic elections. See Art. IX, § 1 (opening par.). The plain language of Article IX evinces this intent. Contrary to the Plaintiff's attempts to cite the

language of Article IX, § 1 out of context, Compl. at ¶¶ 27-33, the title and opening sentences of Article IX make clear that the legislative purpose was to expand the powers of local governments rather than contract them. Art. IX, § 1. Further, the use of the phrase "in addition to" underscores the legislature's intent to frame the provisions that follow in §§ 1(a) and (b) as a broad delegation to local governments expanding upon their rights of self-governance. "The purpose of home rule provisions of the Constitution is to secure the right of cities to choose their officers without hindrance from the State and to preserve their privilege of continuing to administer those powers of self-government which they enjoyed before the adoption of the Constitution, provided such powers remain local in nature." Roth, 158 Misc 2d at 242. To further emphasize this point, the legislature added a liberal construction provision in Article IX, Sec. 3(c): "Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed."

Notably, until 1963, not all localities in New York State had expressly been given the right to select local officers through local elections, rather, certain local officers were appointed or selected by State officials. See, e.g., Fifth N.Y. Const., art. IX § 7 (1938), Third N.Y. Const., art. X § 2 (1846). The constitutional history of the 1963 amendment makes clear that part of its intended purpose was to extend the right to elect local officers to all localities throughout the state. Viewed in this light, the phrase "elected by the people" in Article IX § 1 and the corresponding definition of "the people" in § 3 should be read in the context of an expansion of rights of local governments, rather than an intent to restrict the rights of individual voters. In addition, until 1963, there was a substantial argument that the qualifications in Article II, § 1 did not apply to municipal elections. See Blaikie v. Power, 13 N.Y.2d 134, 144 (1963) (Burke, J., concurring). Providing a definition of the "people" prevented localities, with their

newly-expanded powers, from disenfranchising state constitutionally-protected voters – i.e., citizens of age who met the residency criteria – making it clear that the rights granted to localities could not be used to exclude these voters. Thus, the definition of "people" was not intended to prevent localities from expanding the right to vote in municipal elections. Rather, because Article IX is framed as a set of rights granted to local governments, it should be read as allowing local experimentation in furtherance of local democratic values that are more inclusive and more reflective of the City's population in furtherance of the City's exercise of its Article IX home rule powers, while preventing local or State disenfranchisement of municipal residents who meet the standards of Article II. See Roth, 158 Misc. 2d at 242; Resnick, 44 N.Y.2d at 286. This construction of the "linkage" between Article IX and Article II properly reconciles the definition of the "people" in Article IX with the context and purpose of Article IX.

POINT II

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

The New York State Election Law ("E.L.") permits municipalities to enact laws that conflict with the E.L., unless the E.L. provision specifically states that no other law shall supersede it. There is no such statement barring localities from defining "qualified voter" differently than the E.L. Further, the E.L., or provisions thereof, has been treated as a "special law," permitting inconsistent local laws relating to affairs, property, or government. Accordingly, L.L. 11 is an appropriate exercise of local authority and does not violate the E.L.

Plaintiffs claim that L.L. 11 violates the E.L., asserting that the E.L. requires that an individual be a "citizen" to vote and that municipalities "cannot pass election measures that conflict with Section 1-102." See Compl. at ¶ 35. However, plaintiffs reply on a selective reading of E.L. § 1-102, omitting key portions that contradict their argument. Indeed, the E.L.

yields to any other law, including any local law, that is inconsistent with the E.L. unless the section of the E.L. specifically states otherwise. E.L. § 5-102, which sets forth the citizen requirement cited to by plaintiffs, does not contain an instruction that it supersedes any other law. Accordingly, the plain language of the E.L., and the judicial decisions interpreting it, demonstrate that a municipality may enact a local law defining "qualified voter" differently than E.L. § 5-102. Therefore, L.L. 11 does not violate the E.L.

New York State Election Law directs, in pertinent part:

> This chapter shall govern the conduct of 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, 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. Where a specific provision of law exists in any other law which is inconsistent with the provisions of this chapter, such provision shall apply unless a provision of this chapter specifies that such provision of this chapter shall apply notwithstanding any other provision of law.

E.L. § 1-102 (emphasis added). E.L. § 5-102, which sets forth the qualifications of voters for the purposes of the E.L., does not contain a specification that it "shall apply notwithstanding any other provisions of law." It reads, in its entirety, as follows:

> § 5-102. Qualifications of voters; age and residence
>
> 1. No person shall be qualified to register for and vote at any election unless he is a citizen of the United States and is or will be, on the day of such election, eighteen years of age or over, and a resident of this state and of the county, city or village for a minimum of thirty days next preceding such election.
>
> 2. The provisions herein with respect to a durational residency requirement for purposes of qualifying to vote shall not prohibit United States citizens otherwise qualified,

> from voting for president and vice president of the United States.

Nor is there any indication in the rest of Article 5, Title I of the E.L. that the legislature intended it to be one of the specific provisions that does not yield to "any other law." To the contrary, Article 5 of the E.L. directly states that it will not supplant "any other statute[] which is inconsistent with the provisions of this article" relating to voter registration. E.L. § 5-100. Further, courts agree that "[t]he Election Law gives way to inconsistent local law provisions." City of N.Y. v. N.Y. City Board of Elections, 1991 N.Y. Misc. LEXIS 895, *4 (N.Y. Co. Apr. 3, 1991), aff'd 1991 App. Div. LEXIS 18134 (1st Dep't Apr. 5, 1991), app. den'd 1991 N.Y LEXIS 6169 (1991) (citing Bareham v. Rochester, 246 N.Y. 140, 149 (1927) ("The municipality is empowered to modify an election law in so far as that law affects the property, government or affairs of the municipality, i.e., in so far as it affects the election of the local officers.") Courts have upheld local laws related to municipal elections that were inconsistent, or arguably inconsistent, with the E.L. based upon E.L. § 1-102's direction that the E.L. must yield to any other law unless specifically noted in the provision. See, e.g., City of N.Y., 1991 N.Y. Misc. LEXIS *4 (finding that Charter § 25(b)(7), which prohibits party nominations in a special election for City office, did not violate the E.L. and that local laws are "laws" as contemplated by E.L. § 1-102); Castine v. Zurlo, 938 F. Supp. 2d 302, 313 (N.D.N.Y. 2013), vacated on other grounds 756 F.3d 171 (2d Cir. 2014) (finding that a law local law providing different qualifications for public officers than the E.L. did not violate the E.L. because "[i]t must be presumed that the State Legislature meant what they wrote [in § 1-102]"); but see Castine v. Zurlo, 46 Misc. 3d 995, 999 (Clinton Co. 2014) (a contrary decision reflecting no awareness of the Appellate Division decision in City of N.Y. cited above); see also McDonald v. New York City Campaign Finance Board, 40 Misc. 3d 826, 837-838 (Sup. Ct. N.Y. Co. 2013), aff'd, 117

A.D.3d 540 (1st Dep't 2014) (finding no conflict between the City's campaign finance laws and the E.L., but noting "if it were necessary for its decision to interpret the impact of Election Law §1-102, it would find that Election Law § 1-102 means what it says it means, and must be accorded its plain meaning.") Further, it is not unusual for a statute such as § 1-102 that refers to a "law" to include a local law. See MHRL § 2(6).

The language in E.L. § 1-102, and the decisions finding that local laws supersede provisions of the E.L. unless the E.L. states otherwise accords with certain decisions treating the E.L., or portions of the E.L., as a special state law. Treating the E.L. as a special, rather than general, state law permits municipalities to enact inconsistent local laws relating to the municipality's property, affairs or government unless the local law is related to a "matter of substantial state concern." See N.Y. Const. art IX § 2(c); Matter of Ricket v. Mahan, 97 A.D.3d 1062 (3d Dep't 2012); Empire State Ch. of Associated Bldrs. & Contrs., Inc. v. Smith, 21 N.Y.3d 309 (2013). This approach is bolstered by the E.L. itself, not only because of the inclusion of § 1-102, but also the inclusion of various E.L. provisions that apply only to certain municipalities or that permit differing requirements among municipalities. See, e.g. E.L. § 4-124 (imposing special publication requirements on New York City); § 4-130 (different requirements for delivery of registration supplies in New York City, Buffalo and Rochester); § 7-116 (additional ballot requirements in New York City); § 7-200 (different voting machine requirements for primary elections in New York City); § 8-100(2) (different voting hours for primaries in certain counties).

As described by Bareham, 246 N.Y. at 148, "[t]he Legislature has enacted several local statutes, applicable only to certain cities, whereby nominations and elections of city officers are authorized or regulated in a manner different from the general scheme defined in the Election

Law. That law, therefore, is not a statute applicable alike to all the cities of the State in respect to nominations and elections of city officers." This statement from 1927 remains true today: two cities in NYS administer nonpartisan election procedures that are markedly different from those in the E.L., demonstrating that there is no interest in uniformity of city election procedures in NYS. See Chapter 247 of the Laws of 1993 (Watertown); Title XIV of City of Sherrill Charter[4] (originating in Chapter 172 of the Laws of 1916); Procaccino v. Bd. of Elections, 73 Misc. 2d 462, 468 (Sup. Ct., N.Y. Co. 1973) (holding E.L. § 131-a to be special). Thus, even without the plain language in E.L. § 1-102 deferring to other laws if inconsistent, L.L. 11 does not violate the E.L. because it regulates the City's own property, affairs, and government, and because it does not impact a matter of substantial state concern. Procaccino, 73 Misc. 2d at 468.

Finally, a reading of E.L. § 1-102 to permit municipalities to enact laws related to municipal elections that are inconsistent with the E.L. accords with the grant of municipal home rule authority and the reluctance to discourage innovation in municipal elections described in Point I, infra. See, e.g., Resnick v. County of Ulster, 44 N.Y.2d 279, 286 (1978); Bareham, 246 N.Y. at 148. This reading does not foster undue divergence from genuine statewide policies and interests, because it is self-limiting: municipalities must act consistent with their home rule powers, which would prevent them, for example, from regulating the process or voter qualifications for state or federal elections. Accordingly, based on the plain reading of the E.L., the legal precedent finding that the E.L. yields to inconsistent local laws, and the overarching public policy of permitting home rule control and innovation in municipal elections, L.L. 11 does not violate the E.L.

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

POINT III

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

The MHRL requires that a local law be subject to a mandatory referendum of electors, in which a majority of the electors vote in favor of the proposed law, to enact local laws making certain specific changes to municipal law. MHRL § 23(1). MHRL § 23(2) sets forth the laws for which a referendum is required. Plaintiffs allege that L.L. 11 violates MHRL § 23(2)(e), which directs:

> 2. Except as otherwise provided by or under authority of a state statute, a local law shall be subject to mandatory referendum if it:
>
> ***
>
> e. Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or changes the term of an elective office, or reduces the salary of an elective officer during his term of office.

(emphasis added.)

While the MHRL provides for mandatory referenda for specific types of local laws, it also clearly mirrors the Constitution's grant of home rule authority that is to be "liberally construed" in favor of the municipality. See MHRL § 51. Specifically, MHRL § 10(1)(i) repeats the Constitution's grant of legislative authority to local governments to adopt and amend local laws not inconsistent with the provisions of the Constitution or any general law relating to the "property, affairs or government," and further designates, as permissible areas of local legislation regardless of whether they relate to the property, affairs or government, laws relating to "the powers, duties, qualifications, number, mode of selection and removal, [and] terms of office … of its officers and employees …." MHRL § 10(1)(ii).

Further, the Court of Appeals has explained that in NYS, public policy is made by elected representatives and referenda are a limited exception that must be grounded in a

particular constitutional or statutory source. "Government by representation is still the rule. Direct action by the people is the exception." McCabe v. Voorhis, 243 N.Y. 401, 413 (1926). No referendum is required unless the challenged law falls within one of the enumerated categories of legislation requiring voter approval. Id.

Plaintiffs argue that L.L. 11 is subject to a mandatory referendum under MHRL § 23(e), asserting that it changes the "method of… electing… an executive officer." This argument fails. L.L. 11 does not change the "method" of electing an officer; rather, it permits additional individuals to vote using the system of electing officers already in place. In other words, it potentially increases the number of individuals in the electorate and sets forth ancillary requirements necessary to ensure that these individuals can vote, but it does not change the method by which the electorate chooses (or nominates or removes) the members of office.[5] While courts have not defined or considered the definition of "method of electing an executive officer" standing alone, there have been some challenges to other categories listed in MHRL § 23(2)(e), or MHRL§ 23(2)(e) as a whole. The decisions indicate that the categories therein relate to systemic or structural changes, particularly those that curtail the grant of authority to an elected officer or legislature. See, e.g., Mayor of the City of N.Y. v. Council of the City of N.Y., 9 N.Y.3d 23, 33 (2007) (considering whether affected powers are conferred as part of the "framework of government").

Most courts considering MHRL § 23(2)(e) have found that the challenged law does not require a referendum. For example, it is clear that the category "changes to the term of an elective office" is construed narrowly to apply only to those laws that change the amount of

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

time making up one term of office. It therefore is not interpreted to include laws regarding the number of terms an elective officer is permitted to hold, notwithstanding that these laws directly effect the number of years an individual may potentially hold an office. See, e.g., Golden v. N.Y.C. Council, 305 A.D.2d 598 (2d Dep't 2003), app. den'd, 100 N.Y.2d 504 (2003); Benzow v. Cooley, 12 A.D.2d 162 (4th Dept. 1961) (considering a challenge to a law changing the number of terms permitted to be held by one individual pursuant to predecessor provisions of the City Home Rule Law), aff'd, 9 N.Y.2d 888 (1961). Because "term of an elective office" is construed narrowly to mean the number of years making up one term of office, after which the officer-holder would be required to seek re-election, a referendum is not required to change the number of terms an office-holder may serve. See, e.g., Benzow, 12 A.D. 162; see also Molinari v. Bloomberg, 564 F.3d 587, 614 (2d Cir. 2009) (holding that a law increasing the number of terms officers may serve did not require a referendum under MHRL 23(2)(b)). This is true even though an incumbent is likely to be re-elected, thereby making it more difficult for other candidates to be seated for a longer period of time or reducing the powers of more junior elected officials. Benzow, 12 A.D. 162; Molinari, 564 F.3d at 614.

Similarly, courts considering challenges to laws under other subsections of MHRL § 12(2) have also broadly held that the subsections should be narrowly construed in line with the MHRL's broad grant of authority to the municipality in legislating its affairs and those related to municipal elections, and that they are intended to apply to structural changes to the electoral offices or bodies. For example, in considering whether a law "changes the membership or composition of the legislative body" pursuant to MHRL § 12(2)(b), it is not sufficient that the challenged law may result in different individuals being elected to office in the next election. Rather, the "changes in membership or composition" must be "structural" i.e. a change in the

number of seats, or a change in the authority of the legislative body. See, e.g., Neils v. City of Yonkers, 237 N.Y.S.2d 245 (Westchester Co. 1962) (holding a change in ward boundary lines did not change the "form or composition of a legislative body"); Mehiel v. Co. Board of Legislators, 175 A.D.2d 109 (2d Dep't 1991) (holding that a law providing for reapportionment of legislative districts did not amount to a "change in form or composition."), app. den'd 78 N.Y.2d 855 (1991); see also Molinari, 564 F.3d at 612 (noting that the decisions in Neils and Mehiel "leads us to conclude that [MHRL] § 23(2)(b) refers to structural changes, and not changes in the identity of the individual members who comprise the legislative body").[6] Therefore, even if the plaintiffs were able to articulate some non-speculative effect of L.L. 11 on who becomes a candidate or who is elected into office, such an effect is insufficient to require a referendum because there has been no change to the method of electing executive officers.

POINT IV

THE CITY BOE'S CROSS-CLAIMS FAIL TO STATE A CAUSE OF ACTION

The City BOE brought a cross-claim asserting that § 1057-ss and a provision incorrectly described by City BOE as "§ 1057-vv" result in the creation of a "rebuttable presumption that a criminal violation under § 1057-ss has occurred" and that this "rebuttable presumption" "improperly shifts the burden of proof in violation of BOE's due process rights." See BOE Ans. at ¶ 23. This assertion fundamentally misstates and misrepresents the text of L.L. 11, which has not "created a rebuttable presumption that a criminal violation has occurred." The

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

City BOE appears to have misread L.L. 11, and its description of § 1057-vv in entirely incorrect. Section 1057-vv, the last section in Charter Chapter 46-a, states the following, in its entirety:

> Section 1057-vv. Registration confirmation letters.
>
> The board of elections in the city of New York shall, upon request, provide any pre-registered municipal voter, registered municipal voter or formerly-registered municipal voter with a letter confirming the dates during which such individual was registered or pre-registered as a municipal voter, and explaining the rights and privileges afforded to municipal voters pursuant to this chapter.

See Charter § 1057-vv. Clearly, this Charter section does not in any way create a "rebuttable presumption" of criminality. It appears that City BOE actually intended to refer to L.L. 11 § 2, which is not part of Charter Chapter 46-a, and which directs:

> No later than July 1, 2022, the board of elections in the city of New York shall submit to the mayor and speaker of the council a report containing a plan for achieving timely implementation of this local law for applicable elections held on or after January 9, 2023. Failure by such board to submit such a report within 30 days of July 1, 2022 shall create a rebuttable presumption that such board is declining to implement this local law.

See L.L. 11 § 2, Admin. Code App. A, L.L. 2022/011. L.L. 11 § 2 is unconsolidated, and appears in the Appendix of the Admin. Code. It creates a one-time deadline for the City BOE to report to the Mayor and City Council regarding its implementation of the new law to ensure that the law can be timely implemented by the first applicable election. Id.

Contrary to City BOE's assertions, Charter § 1057-ss does not apply to L.L. 11 § 2. Charter § 1057-ss directs, in pertinent part:

> a. Any person who knowingly and willfully violates any provision of this section of the charter which violation is not specifically covered by section 17-168 or any other provision of article seventeen of the election law is guilty of a misdemeanor.

> b. A public officer or employee who knowingly and willfully omits, refuses or neglects to perform any act required of such public officer or employee by this chapter, who knowingly and willfully refuses to permit the doing of any act authorized by this chapter, or who knowingly and willfully hinders, or delays or attempts to hinder or delay the performance of such an act is, if not otherwise subject to section 17-128 of the election law or any other law, guilty of a misdemeanor.

Charter § 1057-ss applies only to the provisions of Charter Chapter 46-a. Id. L.L. 11 § 2 is not a provision of Charter Chapter 46-a. Admin. Code App. A, L.L. 2022/011. The deadline set forth in L.L. 11 § 2 will pass before Charter § 1057-ss even goes into effect. L.L. 11 § 3. Section 1057-ss does not create any "rebuttable presumption" of criminality; it simply incorporates the violations already set forth in E.L., Article 17, indicating that the violations enumerated in the State's E.L. should apply to Charter Chapter 46-a, to the extent they do not already. Charter § 1057-ss; E.L. Article 17. Further, the words "rebuttable presumption" do not appear in Charter Chapter 46-a, while application of Charter § 1057-ss requires a "knowing and willful" violation.

The "rebuttable presumption" arises out of L.L. 11 § 2, which does not relate to criminal violations, and does not overcome or affect the intent standard set forth in Charter § 1057-ss. Because penal provisions must be narrowly construed, an unconsolidated "rebuttable presumption" would not apply to a criminal violation set forth elsewhere in the law. City of N.Y. v. Verizon N.Y., Inc., 4 N.Y.3d 255, 258 (2005). In fact, LL 11 § 2 serves to ensure that the City has timely notification should City BOE fail to timely implement the new law and to permit the City to take action to ensure that municipal voters are able to be registered and vote by the 2023 elections. This is entirely reasonable given the testimony of City BOE Executive Director Michael Ryan during the public hearings regarding L.L. 11. Mr. Ryan was asked about implementation, including what would be an adequate timeline for BOE to implement the law.

Ex. F at 69:12-70:21. He did not set forth any specific amount of time needed or provide the steps that would have to be taken. Id. It was unclear, based on his testimony, what processes or assistance BOE would require to implement this law. Id. Mr. Ryan acknowledged that City BOE would rely on the City's financial support to implement this law. Id. at 65:23-66:06. In this context, the City's need to understand if and how this law is being implemented, and what resources will be required, in a timely manner, is self-evident.

Put simply, L.L. 11 § 2 does not create a "rebuttable presumption" that a criminal violation has occurred and Charter § 1057-ss does not create a criminal violation for failing to meet the deadline set forth in L.L. 11 § 2. City BOE's alleged "due process" claim fails.

CONCLUSION

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

Dated: New York, New York
May 9, 2022

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CERTIFICATION UNDER UNIFORM CIVIL RULE 202.8-b

According to Microsoft Word, the portions of the Memorandum of Law that must be included in a word count contain 6,999 words, and comply with Uniform Civil Rule 202.8-b.

Dated: New York, NY
May 9, 2022

Respectfully submitted,

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