To be argued by:
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New York Supreme Court
Appellate Division: Second Department

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

Plaintiffs-Respondents,

against

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

Defendants-Appellants,

Docket No. 2022-05794

(caption continued inside)

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

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October 11, 2022

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.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

PRELIMINARY STATEMENT

New York City is uniquely diverse. Over three million New Yorkers are foreign born, and nearly half of local businesses are owned by immigrants. In five city council districts, non-U.S. citizens make up about a third of the adult population. These New Yorkers pay billions in taxes and yet have no say in local policies on policing, garbage collection, or zoning—all matters that affect their day-to-day lives. To address this anomalous situation and make the City more democratic, the City Council enacted Local Law 11 of 2022, which allows New Yorkers with green cards or work authorizations to vote in the City's elections.

This Court should reverse the order of Supreme Court, Richmond County (Porzio, J.), which found that Local Law 11 violates the State Constitution, the Election Law, and the Municipal Home Rule Law. To make local self-government more effective, the Constitution gives municipalities significant power to experiment with local elections, and it expressly requires courts to construe that power liberally. Supreme Court failed to obey this directive, interpreting the Constitution in a limiting way when it is

reasonably susceptible to a construction that promotes effective local governance by enabling cities to expand local voting pools to capture people who have a real stake in local policies.

Nor is the Election Law a barrier to Local Law 11. To be sure, the Election Law, in contrast to the State Constitution, explicitly provides that only citizens may vote—a rule that unquestionably holds sway in federal and state elections in New York. But the Election Law also gives localities leeway to adjust its default rules within constitutional bounds in local elections, where home rule authority is at its apex. Thus, the Election Law expressly yields to "any other law" that specifically addresses a particular matter, as Local Law 11 does regarding whether non-citizens may vote in New York City elections. Supreme Court's ruling that the local law does not qualify as "any other law" flouts both the Election Law's plain language and established home rule principles. What is worse, the court's mistaken reasoning has significance beyond this case, potentially calling into question other city-specific election measures—from ranked-choice voting to various laws governing candidate petitions—that have been implemented over decades.

Finally, the Municipal Home Rule Law did not require the City to hold a referendum before acting. While laws that change the "method" of electing officers are subject to referendum, Local Law 11 does not make such a change. Local officers will still be elected the same way, by secret ballot where voters rank their choices in primaries and special elections, and by traditional means in general elections. A change in the composition of the voter pool does not change the "method" of election.

The cornerstone of democracy is the right to vote. By permitting New Yorkers with green cards or work authorization to vote, Local Law 11 strengthens our City's democracy and ensures that our neighbors have a voice in the policies that affect them.

QUESTIONS PRESENTED

1. Is Local Law 11 constitutional, where (a) the text of article IX of the State Constitution empowers local governments to make themselves more democratic and effective; (b) those powers must be read liberally; and (c) it is reasonably possible to read the text to allow the City to expand the local voter pool?

2. Does Local Law 11 supersede the Election Law, where (a) the Election Law itself says that it yields to "any other law" in this situation, absent a specific statement to the contrary, and (b) recognizing that local laws governing local elections fall within that phrase honors not just the Election Law's plain text, but also the deeply rooted principle that local autonomy is at its peak in the area of elections for local office?

3. Was the City authorized to increase the local voter pool without holding a referendum, where the personal characteristics of eligible voters do not relate to the "method" of electing office-holders?

STATEMENT OF THE CASE

A. Our nation's long tradition of non-U.S. citizen voting

Immigrants who were not U.S. citizens have been permitted to vote through much of our nation's history. As many as 40 states and territories permitted non-U.S. citizens to vote for a century and a half after the Founding, even in federal elections (Record on Appeal ("R") 373). Such a policy was fully in line with the principle that government becomes legitimate through the consent of the governed.[1] Only in 1996 did the federal government bar non-U.S. citizens from voting in federal elections. 18 U.S.C. § 611.

In New York State, citizenship was not mentioned in the State Constitution until 1821. And long after that, non-U.S. citizens who had children in New York City schools were permitted to vote in local school board elections (for over 30 years, from 1969 to 2002) until the structure for school governance fundamentally changed. L. 1969, ch. 330.

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[1] Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PENN. L. REV. 1391, 1441-42 (1993).

Today, a number of municipalities across the country permit non-U.S. citizens to vote in certain elections (R374-85). Most famous is perhaps Takoma Park, Maryland, which re-instituted non-U.S. citizen voting for local elections in 1992.[2] That policy has since spread throughout Maryland and to two towns in Vermont (R375). Chicago and San Francisco permit non-U.S. citizens to vote in certain school-related elections (*id.*).

B. The enactment of Local Law 11, which permits New Yorkers with green cards and work authorizations to vote in local elections

New York City is home to nearly a million lawfully present adults who are not U.S. citizens (R303). That's well over 10% of the voting-age population.[3] Many of these New Yorkers cluster in particular neighborhoods, meaning a U.S. citizenship requirement prevents huge percentages of the population from voting in certain city council districts. In district 21, for example, which includes parts of East Elmhurst and Jackson Heights, approximately 45% of

[2] Raskin, note 1 at 1396.

[3] *See* 2020 Census Results for New York City: Key Population & Housing Characteristics.

adults are not U.S. citizens.[4] In district 20, which includes Flushing, about 39% of adults are not U.S. citizens.[5] Districts 25 (also Jackson Heights), 26 (Sunnyside and Astoria), and 38 (Sunset Park) all have similarly high proportions of non-U.S. citizens.[6] No other place in the state has such a large number of lawfully present adults who cannot vote. The problem is inherently local and the result is decidedly undemocratic.

These New Yorkers are integral to our community. They work as doctors, nurses, teachers, clerks, and deliverymen, contributing enormously to the economy and paying billions in taxes (R301, 303, 309). Their children attend our schools. During the darkest days of the pandemic, these New Yorkers helped keep the City going: 20% of the City's essential workers are not U.S. citizens (*id.*). Yet they have no voice in local policies on public safety, sanitation, or housing—all issues critical to day-to-day life in the City.

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[4] U.S. Census Bureau, 2016-2020 American Community Survey; *see also* Mayor's Office of Immigrant Affairs, State of Our Immigrant City (2018), https://perma.cc/2PAB-UJK7.

[5] U.S. Census Bureau, 2016-2020 American Community Survey.

[6] *Id.*

To address this acute problem, the City Council exercised its home rule powers to enact Local Law 11 of 2022 (R279-89). Designed to promote effective local self-government by better aligning the voter pool with the people who have a legitimate stake in local policies, the law allows New York City residents who hold green cards or work authorizations and who have lived in the City for at least 30 days before the election to vote in municipal elections only, including for mayor, public advocate, comptroller, borough president, and councilmembers (R279-89). They cannot vote for any federal or statewide office, consistent with the law's focus on enhancing local self-governance.

C. This lawsuit and Supreme Court's decision invalidating the law

Plaintiffs—politicians, political entities, and residents—claim that Local Law 11 violates the State Constitution, the Election Law, and the Municipal Home Rule Law (R1400-12). Several individuals who would be entitled to vote in municipal elections under the law intervened as defendants (R1528).

On motions for summary judgment, Supreme Court invalidated the law (R10-22). The court ruled that the State Constitution and Election Law permit only U.S. citizens to vote (R16-20). The court further concluded that Local Law 11 changed the "method" of electing municipal officers, requiring a referendum (R20-21). The court declared the law void and permanently enjoined the City from implementing it (R22).

ARGUMENT

POINT I

LOCAL LAW 11 IS CONSTITUTIONAL

Municipal legislation like Local Law 11 is presumed constitutional. *People v. Stephens*, 28 N.Y.3d 307, 312 (2016); *Neuman v. City of N.Y.*, 186 A.D.3d 1523, 1526 (2d Dep't 2020). Plaintiffs bear the heavy burden of proving beyond a reasonable doubt that the law suffers "wholesale constitutional impairment." *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 443, 448 (2003).

In fact, the Court of Appeals has warned that, when the City experiments with new election procedures, courts "should be very slow in determining that the act is unconstitutional." *Johnson v. New York*, 274 N.Y. 411, 430 (1937). Where reasonable doubt exists,

the law must be upheld. *Id.* at 433 (Lehman, J. concurring); *see also White v. Cuomo*, 38 N.Y.3d 209, 216 (2022). As shown below, Local Law 11 presents no constitutional problem, and plaintiffs certainly have not established one beyond a reasonable doubt.

A. The local law is well within the City's established authority to experiment and innovate with regard to local elections.

The Court of Appeals long ago declared that "local problems … can best be handled locally." *Baldwin v. City of Buffalo*, 6 N.Y.2d 168, 172 (1959). We could hardly put it better ourselves. New York City has a representation problem of a scope that exists nowhere else in the state. Huge numbers of New Yorkers lawfully live and work here but have no say in the local policies that govern their daily lives. This is a uniquely local problem, and the City is constitutionally empowered to solve it. *See City of N.Y. v. Patrolmen's Ben. Ass'n*, 89 N.Y.2d 380, 287 (1996) (cities have "significant autonomy" to act on "local matters").

Indeed, even before municipal home rule powers were expanded with 1963 constitutional amendments, courts were clear that local governments had the right to experiment and innovate in

local elections. *See, e.g.*, *Blaikie v. Power*, 13 N.Y.2d 134, 144 (1963) (approving the City's "latest experiment" with elections); *Baldwin*, 6 N.Y.2d at 173-74 (alteration of election districts was "an affair of the municipality" in which "the State has no paramount interest"); *Johnson v. New York*, 274 N.Y. 411, 430 (1937) (City entitled to "experiment" with proportional voting); *see also Cort v. Smith*, 249 A.D. 1, 3 (4th Dep't 1936) (county's "experiment" with election "example of genuine home rule").

In *Bareham v. City of Rochester*, 246 N.Y. 140 (1927), for example, the Court of Appeals determined that Rochester had the power to completely revamp its government, including adopting a system of non-partisan elections and changing the way the head of the executive branch was selected. Such a change, the Court noted, concerned the "government or affairs of the municipality" because it affected the election of local officers. *Id.* at 149.[7]

[7] The *Bareham* Court also expressly recognized Rochester's authority to supersede the Election Law. *See pages 25-26*, *infra*. It simply held that the city had to make such an intent explicit, and it had not done so. 246 N.Y. at 150. Local Law 11 clearly indicates its intent to supersede the Election Law, and plaintiffs have never alleged otherwise.

Similarly, in *Blaikie v. Power*, 13 N.Y.2d 134 (1963), the Court of Appeals approved New York City's enactment of a councilmember-at-large system, which was intended to make local government more effective by promoting minority representation. When it came to local elections, the City was empowered to act on the "widespread feeling that [minority] representation can play an important role in democracy." *Id*. at 144.

If anything, these principles of local flexibility and autonomy with regard to local elections became only clearer with the constitutional expansion of municipal home rule powers in 1963. *See, e.g.*, *Resnick v. Ulster County*, 44 N.Y.2d 279, 286 (1978) (cities have "great autonomy in experimenting" with election practices); *McDonald v. NYC Campaign Fin. Bd.*, 40 Misc. 3d 826 (N.Y. Cnty. 2013) (local governments have "room to experiment" with election systems), *aff'd*, 117 A.D.3d 540 (1st Dep't 2014); *Roth v. Cuevas*, 158 Misc. 2d 238 (N.Y. Cnty.) (cities have power to fashion "almost any form of government … for the achievement of good for their community"), *aff'd*, 82 N.Y.2d 791 (1993). The City has the power

to experiment with local elections to make local self-governance more effective. And that is all it has done.

B. Nothing in the State Constitution prevents the City from enfranchising non-U.S. citizens for the purpose of local elections.

Supreme Court ignored these foundational principles when interpreting the State Constitution. Indeed, the court went astray at the outset by beginning its analysis with the wrong constitutional provision, focusing on a section that governs statewide elections rather than the relevant municipal home rule powers (R16-17).

The proper starting point is article IX, which was added to the State Constitution in 1963 in its present form with the intention of significantly expanding municipal rights. *Black Brook v. State*, 41 N.Y.2d 486, 487-88 (1977); Bill Jacket, Public Papers of Nelson A. Rockefeller, 1962 at 824. Section 1—which includes the operative provisions here—is commonly referred to as the "Bill of rights for local governments," and consistent with that label it does not purport to constrain the authority and autonomy of local governments, but rather enumerates various "rights, powers,

privileges and immunities" granted to them. N.Y. Const. art. IX, § 1.

And one cannot begin to interpret article IX without first acknowledging its explicit rule of liberal construction. The article is intended to further "[e]ffective local self-government," and it specifies that local governments' "rights, powers, privileges and immunities," including those enumerated in § 1, "shall be liberally construed." *Id.*, art. IX, §§ 1 & 3(c); *see also Resnick*, 44 N.Y.2d at 287-88. In other words, if an interpretation of a provision favoring effective local self-governance and home rule is reasonably available, it must be adopted—even if it may not be the only, or even the best, interpretation available. *Cf. Albunio v. City of New York*, 16 N.Y.3d 472, 478 (2011) (explaining liberal construction of the New York City Human Rights Law).[8]

[8] *Cf. DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 662-63 (2006) (liberal construction of Lemon Law required pro-plaintiff reading); *Matter of Old Post Rd. Assoc. v. LRC Constr.*, 177 A.D.3d 658, 659-60 (2d Dep't 2019) (liberal construction of Lien Law required expansive reading of the definitions); *see also Amsterdam Tobacco Co. v. Harold Levinson Assoc.*, 201 A.D.3d 846, 848-49 (2d Dep't 2022) (liberal construction of pleading requires the court to give plaintiff "every possible favorable inference").

Supreme Court ignored this backdrop, but article IX cannot be properly understood without it. Enumerating the rights, powers, privileges, and immunities of local governments, § 1 provides that "[e]very local government … shall have a legislative body elective by the people thereof," N.Y. Const. art. IX, § 1(a), and that local officers who are not appointed "shall be elected by the people of the local government," *id.* § 1(b). The question here is whether these provisions—and in particular, the use of the term "people"—can only be read to *constrain* local autonomy and self-governance by requiring that local voting pools always be made up of U.S. citizens and no one else; or, instead, are susceptible to a liberal construction that *promotes* article IX's core principles of local autonomy and self-governance by enabling cities to expand local voting pools beyond U.S. citizens.

The answer is that an autonomy-promoting reading is available. Article IX's list of definitions indicates what several terms used in the article "mean or include." Among those terms is "the people"—those who select local legislators and other local elected officials—which is defined to "mean or include" the

"[p]ersons entitled to vote as provided in section one of article two of this constitution." *Id.* § 3(d)(3). And the cross-referenced provision, which governs statewide elections,[9] simply states that "[e]very citizen shall be entitled to vote," subject to certain age and residency requirements. *Id.* art. II, § 1.

Taken together, these provisions certainly can be read to signify that the body of citizens meeting age and residency requirements represents a floor but not a ceiling on whom localities may authorize to vote. Whatever the phrase "mean or include" may signify in other contexts, a liberal but reasonably available

[9] A long line of appellate authority supports the view that Article II itself applies to statewide elections and not to local ones. *See Spitzer v. Fulton*, 172 N.Y. 285 (1902) (article II not intended to apply to elections "relating to the financial interests or private affairs of the various cities or incorporated villages of the state."); *Blaikie v. Power*, 13 N.Y.2d 134, 144 (1963) (Burke, J., concurring) (article II "is limited in its application to elections involving state officers or state issues"); *Matter of Carrick*, 183 A.D. 916 (4th Dep't 1918) (article II "applies only to such propositions as relate to the general governmental affairs of the State, and not to local affairs of municipalities"). The State repeatedly imposed qualifications for local elections that were different from those set out in article II, demonstrating that it, too, believed local elections were not governed by its terms. *See, e.g.*, L. 1832 ch. 217 § 12 (providing only "a taxable inhabitant" could vote for certain propositions in the Village of Genesco); see also L. 1837 ch. 435 § 6 (same with regard to Village of Sing-Sing); L. 1833 ch. 288 § 12 (only freeholders could vote on matters of taxation in Penn-Yan); *see also* Temporary Commission on the Revision and Simplification of the Constitution: First Steps Toward a Modern Constitution at 35-36 (1959) (noting the "status quo" that article II applied only to statewide elections and not local ones).

interpretation of that phrase, as used in article IX, is that the term "people" in article IX *includes but is not necessarily limited to* citizens. After all, "include" is a term of enlargement, not limitation. *Cahill v. Rosa*, 89 N.Y.2d 14, 21 (1996). *See also Matter of Juarez v. NYS Office of Victim Srvs.*, 36 N.Y.3d 485, n.4 (2021) (Wilson, J. concurring) (noting that the word "include" in a definition is often meant to be expansive); *Empire Mut. Ins. Co. v. Applied Sys. Dev. Corp.*, 121 A.D.2d 956, 960 (1st Dep't 1986) (the word "include" is generally a "term of enlargement"). Reading "include" in that liberal manner here—where local autonomy and self-governance are directly at stake—honors article IX's express rule of construction.[10]

Contrary to Supreme Court's view, the mere fact that article IX cross-references language in article II does not require one to import all of the latter's historical baggage to impose a restrictive,

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[10] In *U.S. Steel v. Gerosa*, 7 N.Y.2d 454, 459 (1960), the Court read the term "mean or include" restrictively in the particular context of a tax provision in the General City Law. The City did not argue for a different reading in that case. Nor, in any event, did *Gerosa* involve a statutory context presenting the unique confluence of a rule of liberal construction and an expressed constitutional purpose—here, "[e]ffective local self-government"—that would support adopting the enlarging construction of "include."

autonomy-denying construction on article IX itself. To be sure, the drafters who initially inserted the word "citizen" into article II in 1821 were motivated by anti-immigrant sentiment, and some courts said that it permitted only citizens to vote. *See People ex rel. Smith v. Pease*, 27 N.Y. 45 (1863) (assuming non-citizens could not vote). But this Court is not interpreting article II, but rather article IX. And there is no need to impute the animus of earlier years to the drafters of article IX in 1963.[11] That is especially true given that article IX, unlike article II, explicitly demands a liberal, autonomy-promoting construction.

The State Constitution gives the City broad power to legislate regarding its own "government," "membership and composition of

[11] Indeed, the "the literal language" of article II does not compel a restrictive reading of that article either. *Anderson v. Regan*, 53 N.Y.2d 356, 361-62 (1981). Taken purely at face value, article II is phrased as an affirmative right: "Every citizen shall be entitled to vote at every election for all officers elected by the people," subject only to age and residency requirements. N.Y. Const., art. II § 1. In fact, several states have recently amended their constitutions after recognizing that phrases like "every citizen can vote" do not prohibit non-citizens from voting. In 2020, for example, Florida changed "every citizen … shall be an elector" to "[o]nly a citizen … shall be an elector." Fla. Const. Art. VI, § 2. Alabama and Colorado did the same in 2020, while Arizona and North Dakota made the same change in 2019. Patty Nieberg, *Three States Pass Amendments that "Only Citizens" Can Vote*, ASSOCIATED PRESS Nov. 7, 2020, https://perma.cc/2KY2-QPSY. Such amendments would be unnecessary if the text "every citizen" necessarily meant "only citizens."

its legislative body," and the "government" and "well-being of persons" within its boundaries. N.Y. Const. art. IX, § 2(c)(i), 2(c)(ii)(2), & 2(c)(ii)(10). These powers must be "liberally construed." N.Y. Const. art. IX, § 3(c). Allowing New Yorkers with green cards or work authorizations to vote in local elections—and thus have a say in how they are governed and promote the efficacy of local self-governance—easily falls within the ambit of the City's powers. Local Law 11 relates to the government of the City, and the government and well-being of the persons who live here.

POINT II

LOCAL LAW 11 PERMISSIBLY VARIES THE DEFAULT RULE SET BY THE ELECTION LAW

Supreme Court also erred in finding that Local Law 11 violates Election Law § 5-102. Unlike the State Constitution, Election Law § 5-102 is framed as a prohibition: it says that "[n]o person" may vote "unless he is a citizen of the United States." But § 1-102, titled "Applicability of chapter," provides that the Election Law yields to "any other law" that specifically addresses a matter covered therein, unless a particular provision of the Election Law

explicitly says otherwise. Section 5-102 does not say otherwise, so it must yield to "any other law," which by its plain terms includes a local law regulating local elections. Accordingly, the City has the power to depart from § 5-102's default rule in local elections, within the bounds of the federal and state constitutions.

A. The Legislature followed a well-worn path in setting default rules and allowing local governments to supersede them.

This result may initially seem surprising, but a deeper look will show that it is not. Local governments have long been authorized to supersede state law under certain circumstances. The Vehicle and Traffic Law, for example, permits the City to supersede state law on a variety of important traffic-related matters. VTL § 1642; *People v. Torres*, 37 N.Y. 256, 268 (2021). And more broadly, local governments are permitted to supersede special state laws—that is, laws that do not apply alike to all municipalities in the same category—where they relate to local property, affairs, or government. *See, e.g.*, *Murray v. Town of N. Castle*, 203 A.D.3d 150, 160-61 (2d Dep't 2022) (town law on police officer discipline superseded state law); *Overton v. Town of Southampton*, 50 A.D.3d

1112, 113-14 (2d Dep't 2008) (town authorized to supersede state law regarding police).

It makes complete sense that the Legislature would designate the Election Law as an area where local governments may supersede state rules when it comes to local elections. Municipalities have long had "great autonomy in experimenting" with election practices. *Resnick*, 44 N.Y.2d at 286. Indeed, § 1-102 simply codifies long-standing case law holding that a "municipality is empowered to modify an election law in so far as that law affects the property, government or affairs of the municipality." *Bareham*, 246 N.Y. at 149. Under this precedent, the City could supersede the Election Law as to local election matters even without § 1-102's express authorization.

But this power is not limitless. The default rule of Election Law § 1-102 is subject to key constraints as it regards local enactments. First, local lawmaking power does not reach federal or state elections, as those do not involve a locality's "property, affairs or government." So the rules of the Election Law will govern federal and state elections, absent contrary federal or state law.

Second, as § 1-102's plain text provides, the Legislature may specify that certain provisions of the Election Law will not give way to local enactments as to local elections where that is its intention. Thus, § 1-102 does not allow the City to supersede the parts of the Election Law that the Legislature has indicated apply notwithstanding any other law. *See, e.g.*, Election Law § 14-120(3) (campaign contributions of LLCs); § 17-220 (voting rights). And federal law, including the Voting Rights Act, also cabins local discretion by, for example, prohibiting political subdivisions from engaging in voter suppression tactics. *See, e.g.*, 52 U.S.C. § 10301.

Subject to those limits and applicable constitutional constraints, the City may depart from the Election Law's default rules in local elections. That state of affairs make good sense: control over local elections is a core principle of home rule. *See, e.g.*, *Resnick*, 44 N.Y.2d at 286; *Blaikie*, 13 N.Y.2d at 144. In authorizing municipalities to supersede the Election Law with regard to local elections, the Legislature merely recognized this longstanding principle.

B. The plain text allows local governments to supersede the Election Law's default rules unless expressly prohibited.

In ruling otherwise, Supreme Court effectively rewrote the law. While the Election Law says that it yields to "any other law," the court below found that the Legislature meant to write "any other *state* law." But courts may not "change the plain language of a statute to make it conform to an alleged intent." *Matter of Branford House v. Michetti*, 81 N.Y.2d 681 (1993); *Prego v. N.Y.*, 147 A.D.2d 165, 170 (2d Dep't 1989) ("[A] court should not attempt to cure an omission in the statute by supplying what it believes should have been put there by the Legislature."). The phrase "any other law" is plain and broadly encompasses any local law. *Kimmel v. State of N.Y.*, 29 N.Y.3d 386, 393 (2017) ("any civil action" means exactly that); *Prego*, 147 A.D.2d at 170 (same, as to "any substance").

The only Department of the Appellate Division to consider § 1-102 found that it means exactly what it says. In *City of New York v. Board of Elections*, Supreme Court expressly upheld a local law governing City Council vacancies, even though it was inconsistent

with the Election Law, explaining that "the Election Law gives way to inconsistent local law provisions." 1991 N.Y. Misc. LEXIS 895 (N.Y. Cnty. 1991). The court noted some ambiguity in the legislative history of § 1-102 but found that it could not ignore the plain and clear language of the statute. *Id*. The First Department affirmed for the reasons given by Supreme Court. 1991 N.Y. App. Div. LEXIS 18134 (1st Dep't 1991).[12]

And just six months later, the Legislature added the exact same language from § 1-102 to General City Law § 8, the Municipal Home Rule Law § 28, and County Law § 105, all of which provide that the Election Law governs the conduct of certain local elections unless a provision of "any other law" says otherwise. L. 1991, ch. 727. The insertion of this language into laws that specifically address local elections makes it even clearer that "any other law" includes any local law. Nor is it unusual for the Legislature to treat

[12] A federal court came to the same conclusion, finding § 1-102 "unambiguous" and presuming legislators "meant what they wrote." *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). A Supreme Court decision out of Clinton County came to a different conclusion without mentioning the contrary precedent or acknowledging the plain language. *Castine v. Zurlo*, 46 Misc. 3d 995, 999-1001 (Clinton Cnty. 2014).

the word "law" broadly. *See* Mun. Home Rule Law § 2 (defining the word "law" to include a "charter or local law").

Even if the Election Law did not specifically authorize inconsistent laws, the City would retain independent authority to enact Local Law 11. Article IX and the Municipal Home Rule Law expressly authorize municipalities to supersede special laws. *Murray v. Town of N. Castle*, 203 A.D.3d 150, 161 (2d Dep't 2022). And the Election Law is a special law, since it does not apply alike to all municipalities. *Bareham v. Rochester*, 246 N.Y. 140, 148 (1927) (Election Law is "not a statute applicable alike to all the cities of the State"). The Election Law itself contains different rules for cities across the State, showing that there is no uniform State policy regarding local elections that should preclude localities from varying the State's default rules. *See, e.g.,* § 3-506 (different publication rule for City); § 3-202 (different terms for commissioners in Schenectady and City); § 4-130 (different rules regarding registration supplies for City, Buffalo, and Rochester). And the elections in the City of Watertown are governed by a separate act entirely. L. 1993 ch. 247 (Watertown Nonpartisan

Primaries and Elections Act). The City would thus be entitled to depart from the Election Law even if § 1-102 did not exist. But, of course, § 1-102 does exist, and these background principles of home rule and constitutional structure provide only further reason to construe the section in accordance with its plain language.

C. The legislative history confirms the point.

While this Court need not look beyond the clear language of § 1-102, Supreme Court misread the legislative history, which contains nothing to suggest that the Legislature intended anything other than what it wrote. To the contrary, the Legislature has long permitted localities to depart from the Election Law.

Section 1-102 has its roots in §§ 130 and 190 of the prior Election Law, and these sections expressly contemplated supersession by other laws. *See* L. 1922, ch. 588. Section 190, for example, provided that the article regarding the conduct of elections applied to general elections and special elections called by the governor. For all other elections that used official ballots, the article applied only "so far as practicable" and only "if other provision for the conduct thereof is not made by law." Section 130,

on the applicability of the article about the nomination of candidates, was even more explicit: it was not intended to repeal or affect any other statute, "general or local, prescribing a particular method of making nominations or candidates for certain school or city offices." This very provision was cited by the Court of Appeals in *Bareham v. Rochester* in support of authority of Rochester to adopt its own innovative election scheme by local law. 246 N.Y. 140, 148.

These provisions were merged into today's § 1-102 in 1976, during a recodification and simplification of the Election Law. L. 1976, ch. 233. The new law initially contained a limiting reference to the Education Law: "Where 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). The legislative history recognized that the bill was rushed and needed to be amended to correct several mistakes. Bill Jacket, Assembly Member Miller, Memorandum in Support. The Legislature did just that before the governor even signed the first bill, changing "education law" to "any other law." L. 1976, ch. 234.

The governor signed both bills the same day. Thus the version of the bill referring to the Education Law was never in effect—not even for a day.

Neither bill jacket says anything about the provision in question, and there is no indication that the Legislature meant to write "any other state law" rather than "any other law." Supreme Court focused on two letters in the bill jacket indicating the amendments were "minor in nature" and "intended to correct defects in the new law" (R19). But the defect here was the reference to the Education Law, which seems to have no basis in any prior law and was apparently included by mistake. The Legislature corrected that defect by deleting the word "education" and explicitly providing that the Election Law yielded to "any other law."

To be clear, Supreme Court's ruling on this point could have dramatic consequences far beyond this case. The freedom of municipalities to innovate in local elections by departing from the Election Law, when not specifically prohibited, has been a foundational principle of local elections for decades. As explained above on pages 10-13, municipalities have long enacted laws for

their local elections that are at least arguably inconsistent with the Election Law. Indeed, while any legal challenge would be time barred, Supreme Court's deeply misguided understanding of the Election Law would seemingly call into question significant measures that the City has enacted over the years to promote local democracy. Just recently, for example, the City enacted a ranked-choice voting system, a cornerstone of the City's local electoral process. In 2010, the City dramatically reduced the number of signatures needed to get on the ballot for local office. And in 1988, the City enacted a non-partisan system to fill vacancies in local offices (a system already upheld in *City of New York v. Board of Elections*, discussed above). All of these measures have promoted the City's self-governance, and all of them differ from the default rules set by state law.

Whatever the ultimate outcome may be in this case, this Court should make clear that municipalities are free to supersede the Election Law within constitutional bounds when it comes to the election of local officers, unless the Election Law provision in question specifically prohibits that result.

POINT III

LOCAL LAW 11 DOES NOT CHANGE THE METHOD OF VOTING AND THUS DID NOT REQUIRE A REFERENDUM

Supreme Court finally erred in ruling that the City was required to hold a referendum before enfranchising New Yorkers with green cards and work authorizations. While a referendum is required where the City changes the *method* of electing an officer, Local Law 11 makes no such change. It merely expands the pool of voters; it does not change the method by which local officers are elected, which continues to be by secret ballot.

Municipal Home Rule Law § 23 requires a referendum for local laws that make certain changes to the structure of government. *See Mayor of City of N.Y. v. Council of the City of N.Y.*, 9 N.Y.3d 23, 33 (2007); *see also Molinari v. Bloomberg*, 564 F.3d 587, 610-11 (2d Cir. 2009). The list of changes requiring a referendum is construed narrowly.[13]

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[13] *See Mayor of City of N.Y.*, 9 N.Y.3d at 33; *Golden v. NYC Council*, 305 A.D.2d 598 (2d Dep't), *lv. denied*, 100 N.Y.2d 504 (2003); *Mehiel v. Cnty. Bd. of Legislators*, 175 A.D.2d 109 (2d Dep't), *lv. denied*, 78 N.Y.2d 855 (1991); *Benzow v. Cooley*, 12 A.D.2d 162 (4th Dep't), *aff'd*, 9 N.Y.2d 888 (1961).

As the Court of Appeals explained when interpreting an earlier version of the law, representative government is "the rule" and direct action through referendum is "the exception." *McCabe v. Voorhis*, 243 N.Y. 401, 413 (1926). Otherwise "there would be more referendums than any community could well manage." *Mayor of City of N.Y.*, 9 N.Y.3d at 33. And referendums are prohibited unless expressly authorized by statute. *McCabe*, 243 N.Y. at 413.

Any local law that changes the "method" of electing an officer requires a referendum. Mun. Home Rule Law § 23(2)(e). We can find no case discussing this provision. But by common usage, a "method" is "a procedure or process for attaining an object." Merriam-Webster Dictionary. The method of election is thus *how* the will of the voters is determined. In New York City, that is by secret ballot on which voters rank their choices in primaries and special elections and indicate their preferred winner or winners in general elections. When the City makes changes to the method of election, it must hold a referendum, as it did when it switched to ranked choice voting for primary and special elections. *See* Vivian Wang, *NY Election Results: Voters Approve All 5 Ballot Measures*,

N.Y. TIMES Nov. 5, 2019. But an expansion of the pool of persons who are eligible to vote does not change the *method* of election.

By way of analogy, consider CPLR 304, which sets out the "method" of commencing an action or special proceeding. That provision describes how one initiates a case: by summons and complaint or by petition. The personal characteristics of the plaintiff or petitioner do not determine the method of commencement. *See also Columbia Mem. Hosp. v. Hinds*, 38 N.Y.3d 253, 274 (2022) (distinguishing between the method by which an act is done and the persons involved); *Lepkowski v. State*, 1 N.Y.3d 201 (2003) (defining "manner" to mean "the way in which something is done or takes place").

Local Law 11 does not change the way elections are conducted in New York City. It merely expands the voter pool. As such, no referendum was required.

CONCLUSION

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

Dated: New York, NY
October 11, 2022

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

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STATEMENT PURSUANT TO CPLR 5531

NEW YORK SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT

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

Defendant-Appellant,

and

BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendant-Respondent,

and

CITY COUNCIL OF THE CITY OF NEW YORK,

Defendant-Appellant,

and

HINA NAVEED, ABRAHAM PAULOS, CARLOS VARGAS GALINDO, EMILI PRADO, EVA SANTOS VELOZ, MELISSA JOHN, ANGEL SALAZAR, MUHAMMAD SHAHIDULLAH, and JAN EZRA UNDAG,

Defendant-Intervenors-Appellants-Respondents.

Docket No. 2022-05794

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1. The index number in the Court below is 85007/2022.

2. The full names of the original parties appear in the caption above. There have been no changes in the parties.

3. This action was commenced in the Supreme Court, Richmond County.

4. This action was commenced by Summons and Complaint on January 10, 2022. Issue was joined by the Defendant Eric Adams as Mayor of NYC and the City Council's Answer, Dated February 25, 2022, Defendant New York City Board of Elections' Answer, Dated April 11, 2022 and Defendant-Intervenors Proposed Answer on April 11, 2022.

5. Plaintiffs seek a declaratory judgment that the Non-Citizen Voting Law is unconstitutional, violative of New York statutory law, and invalid, as well as an injunction permanently enjoining the Defendants, the Mayor and the New York City Board of Elections, from enforcing or implementing the law in any respect.

6. This appeal is from an order of the Honorable Ralph J. Porzio, Supreme Court, Richmond County, entered on June 27, 2022.

7. This appeal is being taken on a fully reproduced record.