

1 COURT OF APPEALS

2 STATE OF NEW YORK

3 -----
4 FOSSELLA,

5 Respondent,

6 -against-

NO. 15

7 ADAMS,

8 Appellant.
9 -----

20 Eagle Street
Albany, New York
February 11, 2025

10 Before:

11 CHIEF JUDGE ROWAN D. WILSON
12 ASSOCIATE JUDGE JENNY RIVERA
13 ASSOCIATE JUDGE MICHAEL J. GARCIA
14 ASSOCIATE JUDGE MADELINE SINGAS
15 ASSOCIATE JUDGE ANTHONY CANNATARO
16 ASSOCIATE JUDGE SHIRLEY TROUTMAN
17 ASSOCIATE JUDGE CAITLIN J. HALLIGAN

18 Appearances:

19 CLAUDE PLATTON, ESQ.
20 NEW YORK CITY LAW DEPARTMENT
21 Attorney for Appellant
22 100 Church Street
23 New York, NY 10007

24 CESAR Z. RUIZ, ESQ.
25 LATINOJUSTICE PRLDEF
Attorney for Intervenors-Appellants
475 Riverside Drive
Suite 1901
New York, NY 10115

MICHAEL Y. HAWRYLCHAK, ESQ.
O'CONNELL & ARONOWITZ
Attorney for Respondent
54 State Street
Albany, NY 12207

Brandon Deshawn
Official Court Transcriber



1 CHIEF JUDGE WILSON: Good afternoon, everyone.
2 First case on today's calendar is Fossella v. Adams.

3 Counsel?

4 MR. PLATTON: May it please - - - am I there?
5 May it please the court. Claude Platton on behalf of the
6 New York City Council. I'd like to request three minutes
7 for rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MR. PLATTON: When the City of New York enacted
10 Local Law 11 extending the right to vote in local elections
11 to qualified noncitizens, it engaged in a core act of self-
12 governance in the exercise of its Home Rule powers. This
13 court should hold that the Constitution permits the city to
14 make that choice and reverse the Appellate Division's
15 declaration of unconstitutionality. The court should also
16 reverse the Appellate Division's declaration that Local Law
17 11 required a referendum under the Municipal Home Rule Law,
18 and the court should decline to reach the Election Law
19 claim because plaintiffs failed to cross-appeal from the
20 Appellate Division's - - -

21 JUDGE TROUTMAN: And what impact does Article II,
22 Section 1, which is entitled Qualifications of Voters have?

23 MR. PLATTON: Well, our view, Your Honor, is that
24 the - - - this case is really about Home Rule, and it rises
25 or falls on the interpretation of Article IX of the

1 Constitution. And so we haven't really focused on Article
2 II, Section 1 - - -

3 JUDGE GARCIA: Doesn't it cross-reference that
4 section?

5 MR. PLATTON: It does. And I'd be happy to
6 explain why the - - - the cross-reference is significant.
7 I mean, the first piece is Article IX has its own
8 provisions about who can vote in local elections. The
9 first two provisions of the bill of rights of local
10 governments, which are to foster effective self-governance,
11 say that local offices are to be voted on by the people of
12 the local government.

13 JUDGE GARCIA: If we were to agree with that
14 interpretation, would there be any limit on how any
15 individual municipality could define who could vote?

16 MR. PLATTON: Certainly, there are limits. I
17 mean - - - so - - -

18 JUDGE GARCIA: What would it be?

19 MR. PLATTON: Well, one is, we're talking about
20 only voting for local offices, of course.

21 JUDGE GARCIA: No. I'm not talking about the
22 office. I'm talking about who can vote.

23 MR. PLATTON: Right. Well, so I mean, again,
24 it's the people of the local government, so it's residents
25 of the city.

1 JUDGE HALLIGAN: But could you, for example,
2 authorize individuals who wouldn't be qualified, so for
3 example, under age eighteen to vote?

4 MR. PLATTON: I think under our interpretation,
5 that would be possible.

6 JUDGE HALLIGAN: I don't see any - - - perhaps
7 this is what Judge Garcia is asking. I don't see any
8 cabining principle. So for example, you note, I think that
9 the - - - that the statute authorizes those that have a
10 green card or work authorization to vote, but I presume,
11 under your theory, there would be no reason why the
12 franchise couldn't be extended to those without such
13 authorization; is that right?

14 MR. PLATTON: I - - - That's correct. And I
15 don't think that's a problem in the sense that the - - -
16 the question here is whether local governments have the
17 power to do it. It's not, in this instance, whether
18 they'll use it in one way or another. It's - - - we're not
19 talking about the wisdom of the choices that the - - - the
20 local government might make in a particular case.

21 CHIEF JUDGE WILSON: So what about the cross-
22 reference to Article II?

23 MR. PLATTON: So - - - right. So again, the - -
24 - the - - - this arises in the definition of people, which
25 is - - -

1 CHIEF JUDGE WILSON: Yeah.

2 MR. PLATTON: - - - the people who can vote in
3 for local offices. It's - - - the definitions are - - -
4 are described as the - - - that these terms shall mean or
5 include, which, I think it's common ground that that phrase
6 is ambiguous. It means is a term of equivalence. It
7 includes suggests - - -

8 CHIEF JUDGE WILSON: Well, but - - - yeah. But
9 if you read mean or include to mean it must include these
10 things but could include anything else, when you look at
11 the other things that are listed under that means and
12 includes prefatory language, it would mean that, you know,
13 for example, a local government means a town, village,
14 county, or anything else. I mean, I think - - -

15 MR. PLATTON: Well - - -

16 CHIEF JUDGE WILSON: - - - if you read include
17 that way, the whole definitional section becomes
18 meaningless.

19 MR. PLATTON: Well, that isn't how we read. Our
20 view is that the phrase means or includes suggests that
21 some of those definitions - - - one or more of those
22 definitions has a restrictive meaning or equivalence and
23 one or more could be defined more expansively. And in our
24 view, people is the most likely candidate for the term
25 there.

1 JUDGE RIVERA: But why is that? Why - - -

2 MR. PLATTON: Well - - -

3 JUDGE RIVERA: Why is that the one that - - - I
4 assume you're arguing that the other ones are subject to
5 what you're calling the equivalence of means.

6 MR. PLATTON: I - - -

7 JUDGE RIVERA: But this one is of a different
8 ilk, right?

9 MR. PLATTON: Right.

10 JUDGE RIVERA: It's more expansive.

11 MR. PLATTON: Yes. It's different for three
12 reasons. And we're not actually asking you to resolve with
13 the others, but - - -

14 JUDGE RIVERA: I understand.

15 MR. PLATTON: - - - but people is most plausible
16 candidate for an expansive reading for three reasons in our
17 view. The first is that the liberal construction
18 requirement of Article IX applies, we think, with most
19 force in defining this term, which goes directly to the
20 heart of - - - of local self-governance. The question of -
21 - - of self-definition of who can - - - has a voice in
22 local governance - - -

23 JUDGE CANNATARO: I'm not sure - - -

24 MR. PLATTON: - - - hence - - -

25 JUDGE CANNATARO: - - - what your answer was to

1 the Chief's prior question, though. If that's - - - if
2 that's the term that's most amenable to interpretation,
3 what is the purpose of the cross-reference back to Article
4 II?

5 MR. PLATTON: Right. Well, we think that that
6 the the direct - - - the use of the word include means that
7 anyone who's guaranteed the right to vote under Article II,
8 Section 1 must be allowed to vote for local offices, but
9 that the local government, by local law, can - - -

10 CHIEF JUDGE WILSON: Also put it - - -

11 MR. PLATTON: - - - chose to vote - - -

12 CHIEF JUDGE WILSON: Let's - - - let's suppose
13 that there were no - - - we eliminated from the definitions
14 there people, right? So would you think then that Article
15 II has no application to the Home Rule statute - - - the
16 prior?

17 MR. PLATTON: Well, I think that the - - - you -
18 - - you would still have to read Article II in light of
19 Article IX, and you know, the - - - try to reconcile the -
20 - - that - - - Article II with the broad grant of power to
21 local governments. But I think this will clarify - - -

22 CHIEF JUDGE WILSON: Well, I guess that maybe - -
23 - maybe I didn't ask my question precisely. So suppose
24 that cross-reference didn't exist in the definitional
25 section in Article IX. Could New York City decide that I

1 couldn't vote?

2 MR. PLATTON: Well - - -

3 CHIEF JUDGE WILSON: Would Article II guarantee
4 me the right to vote regardless of what New York City
5 thought it could do under the Home Rule provision? I live
6 in New York City, right.

7 MR. PLATTON: Yeah, right. I mean, I think the
8 cross-reference confirms that it's - - - that the - - -

9 CHIEF JUDGE WILSON: No. But I'm asking - - -

10 MR. PLATTON: Yeah.

11 CHIEF JUDGE WILSON: - - - a different question -
12 - -

13 MR. PLATTON: Yes.

14 CHIEF JUDGE WILSON: - - - right? Suppose the
15 cross-reference wasn't there.

16 MR. PLATTON: I think it'd be a harder question.
17 The - - - Article II, Section 1 is a nondiscrimination
18 question.

19 CHIEF JUDGE WILSON: I try to ask harder
20 questions.

21 MR. PLATTON: Of course. I think if the
22 definition was the people with no cross-reference to
23 Article II, I don't think - - - is that your - - -

24 CHIEF JUDGE WILSON: Without that.

25 MR. PLATTON: Without that cross-reference.

1 CHIEF JUDGE WILSON: There's no cross-reference
2 in there now. Your view is that Article IX gives the
3 municipalities the right to define its own electorate. And
4 I'm asking, could it define me out of the electorate given
5 the existence of Article II?

6 MR. PLATTON: No. I don't - - -

7 CHIEF JUDGE WILSON: Why?

8 MR. PLATTON: Well, because I think that the - -
9 - our argument relies on the fact that the - - - the
10 drafters of Article IX brought in the - - - the protection
11 of Article II, Section 1, but did it in a way that was
12 meant to allow the local government to broaden it. And I
13 think that's the - - - what would be the - - -

14 JUDGE CANNATARO: If section - - - if - - -

15 MR. PLATTON: - - - the affirmative grant.

16 JUDGE CANNATARO: If Article IX deals generally
17 with the distinction between elective and appointive
18 offices, isn't this interpretive argument you're making
19 putting a lot of weight on this word people or the phrase
20 mean and include? It - - - it seems as if, to me, that if
21 they wanted to allow the approach that you're advocating
22 for here, they would have affirmatively said something
23 about who the people are or who the people can be.

24 MR. PLATTON: No. I think what our argument is -
25 - - trying to give meaning to all the words in the

1 provision. The - - - as I said, there are two specific
2 provisions in Article IX about who can vote for local
3 offices. And they use the word people, but it's a key word
4 in those grants of authority. And there's a definition,
5 and the definition incorporates the protections of Article
6 II, Section 1, the guarantee of citizens to be able to
7 vote. But it also uses expansive language. So I think
8 we're - - -

9 JUDGE GARCIA: But just to go back to the Chief
10 Judge's question, and maybe I missed the answer here. But
11 if those protections would apply without the cross-
12 reference, why do you need it?

13 MR. PLATTON: I'm saying that we read this cross-
14 reference as - - - with the word include as an affirmative
15 grant of authorization to go beyond those protected by
16 Article II, Section 1 to extend the opportunity to vote
17 more broadly.

18 JUDGE RIVERA: Well, is - - -

19 JUDGE HALLIGAN: So - - -

20 JUDGE RIVERA: Is your view that Article II,
21 Section 1 otherwise applies to local elections or only
22 applies to state general election?

23 MR. PLATTON: Right. So our view is that - - -
24 and this is historically true, and I think it reflected in
25 the cross-reference, is that Article II generally applies

1 to all elections in the state, but that historically, local
2 elections have, at times, had different voting provisions.

3 JUDGE HALLIGAN: How do you distinguish between
4 state and local elections? What falls into each category?

5 MR. PLATTON: Well, I think it's the offices - -
6 -

7 JUDGE HALLIGAN: Right. But - - - so for
8 example, presumably an election for a state, an official
9 who was elected statewide would qualify as a state
10 election, but what about, for example, an election for a
11 member of the assembly. Is that a statewide - - -

12 MR. PLATTON: That's a - - - that's a state
13 office as well. And Local Law 11 doesn't purport to change
14 the voting provision of that.

15 JUDGE HALLIGAN: But why is that? Why is it a
16 statewide election given that the official - - - is it
17 because the official serves in a body that governs the
18 whole state? I'm just trying to look for the defining
19 principle.

20 MR. PLATTON: I think that's right. And it may
21 be that - - - and I'm not sure of this - - - that the - - -
22 the charter or New York City charter addresses who the
23 local officers are. I think it probably almost certainly
24 does. And so we're talking about just about the executive
25 and various officials of local government and the local

1 legislature, so - - -

2 JUDGE CANNATARO: Is that limited definitionally
3 by statute, or is that open to the same sort of
4 interpretation? What is a statewide office, and what is a
5 local office?

6 MR. PLATTON: I don't believe there's any - - -
7 there's been any dispute about that. I don't - - - it
8 depends - - -

9 JUDGE CANNATARO: So you couldn't come back later
10 and say, you know, upon further reflection, assembly
11 members are actually local - - - representatives of local
12 populations and the voter pool can be different. That's
13 not a - - -

14 MR. PLATTON: No. I don't believe that we could.
15 I think that those are clearly defined categories. I
16 acknowledge that I haven't looked into it too closely, but
17 I don't think that there's any possibility for slippage.
18 We're talking about a well-defined category of local
19 offices. And just - - - I want to be clear that just - - -
20 a reference to history. I think since the 19th century,
21 it's been clear that the legislature could set different
22 qualifications for local office. And this was my third
23 reason going back to earlier that this codification that
24 the use of include is reflective of the historical
25 practice. And so you know, this court upheld one such law

1 in the Spitzer case, recognizing that although Article II,
2 Section 1 applies to the general affairs of the state, it
3 has to be read in light of other provisions of the
4 Constitution that concern local governance. In that case,
5 it was Article XII, a former provision the Constitution had
6 to - - -

7 JUDGE RIVERA: So in the same way you're arguing
8 that the council had the authority as a local municipality
9 to pass Local Law 11 that enfranchises, they could also
10 have decided not to grant it and to specifically say that
11 only - - - let's make it simple - - - only U.S. citizens
12 can vote in local election; is that correct? Ratchet
13 swings both ways, yeah?

14 MR. PLATTON: That's true. The - - - and our
15 position, fundamentally, is that that's why this is a
16 question of Home Rule. Each local government has the power
17 to make that choice. New York City has made it, others
18 don't need to. And it flows directly from the text that we
19 have the authority to do that.

20 JUDGE HALLIGAN: May I ask one additional - - -

21 CHIEF JUDGE WILSON: Of course.

22 JUDGE HALLIGAN: - - - question, Chief? Do you
23 have concerns with respect to the Article IX question, do
24 you have concerns about whether there are broader
25 ramifications for Home Rule power? I didn't really see

1 that in your brief, but is there a question about whether
2 if your adversary had the better of the Article IX
3 argument, it would somehow impinge in other respects on
4 your Home Rule authority? Where is the cabin to the
5 question before us?

6 MR. PLATTON: Well, I guess - - - I mean, the
7 first point, I think, is that we're at - - - we're - - -
8 what we're offering, I think, is the liberal construction
9 of Article IX. And I think to redefine Home Rule would - -
10 - would raise - - -

11 JUDGE HALLIGAN: I understand, but it - - - but
12 it - - - it - - -

13 MR. PLATTON: - - - raise questions - - - I'm
14 sorry.

15 JUDGE HALLIGAN: No. Go ahead.

16 MR. PLATTON: No. It would raise questions about
17 sort of whether - - - what the meaning of liberal
18 construction is. I don't off the top of my head think that
19 there are - - - I'm not aware of other provisions that
20 specifically use the term people. So if you were to give
21 it a narrow construction, I think it would be more the
22 presidential effect of giving this term a narrow meaning,
23 which I think would - - - would change the whole rules of
24 the game for how the powers of local governments are
25 construed under Article IX.

1 JUDGE RIVERA: I know your red light is on, but
2 could you please explain why - - - let's assume we agree
3 with everything else you've said. Why is this not a method
4 that requires a referendum?

5 MR. PLATTON: Sure. So the referendum
6 requirement under the Municipal Home Rule Law is triggered
7 only when there's a change in the method of electing a
8 local officer. The - - - this - - -

9 JUDGE RIVERA: But why is this not a method?

10 MR. PLATTON: Well, this court has - - -

11 JUDGE RIVERA: They have to change the ballots.
12 They've got to change the way they count. They've got to
13 change the way they tally. They've got to educate people.
14 They've got to be careful about the mail-in ballots. It
15 strikes me there's a lot of process going on there.

16 MR. PLATTON: Well, fundamentally, the process
17 hasn't changed in any way. I mean, what this does is
18 extend the - - - the - - -

19 JUDGE RIVERA: How is that?

20 MR. PLATTON: - - - the opportunity to vote.

21 JUDGE RIVERA: How is that? Aren't there now
22 going to be - - - if - - - again, if this was upheld,
23 wouldn't there then be a particular type of rule regarding
24 - - - and regulations and procedures regarding the kinds of
25 proof that would be submitted by one elector versus

1 another? That sounds like a change in process.

2 MR. PLATTON: Well, so the process remains
3 election by secret ballot. The - - - what the local law
4 does is essentially extend the opportunity to vote to
5 noncitizens on the same terms that citizens vote now.

6 JUDGE CANNATARO: What about the - - -

7 CHIEF JUDGE WILSON: Well - - -

8 JUDGE CANNATARO: - - - voter registration
9 process? Surely that would change. You have - - -

10 MR. PLATTON: Well - - -

11 JUDGE CANNATARO: It's a different set of proofs
12 to be - - - to register.

13 MR. PLATTON: There'll be a different
14 registration list. There'll be a different ballot that
15 only has local elections on it. But I think if you extend
16 the term method that broadly, you're running right into the
17 warnings this court has said about the referendum
18 requirement being an exception to the rule of
19 representative democracy.

20 JUDGE RIVERA: But this is not like the - - -
21 there is something exceptional about this particular law,
22 right? I mean, this is the argument in the brief that this
23 is going to expand - - - on both sides. This is going to
24 expand the franchise to a very large number of individuals.
25 It may indeed change the political representation in

1 particular districts.

2 MR. PLATTON: It - - - yes.

3 JUDGE RIVERA: This is not like some other little
4 process.

5 MR. PLATTON: The inquiry, though, is not whether
6 it's going to have the - - - enable a large number of
7 people to vote or make a change potentially in policies if
8 - - -

9 JUDGE RIVERA: No. But the fact that it does
10 that means you have to calibrate or recalibrate your
11 procedures to accommodate for that.

12 MR. PLATTON: I think that there are going to be
13 accommodations to the process to enable noncitizens to
14 vote. But I - - - if you drill down - - - if changes at
15 that level of - - - will be one ballot versus another or
16 one ledger of registrants versus another, then really, I
17 think, your - - - your - - - it's a recipe for any change
18 being - - - triggering a referendum. And you've - - - this
19 court has - - - has warned that we'd end up with more
20 referendums than any municipality could reasonably bear if
21 changes on that level triggered the referendum requirement.
22 Well, fundamentally, what this local law does is it allows
23 non-citizens to vote on the same terms that citizens can
24 vote. The ballots may be slightly different, but it's met
25 - - - it's by secret ballot, and fundamentally, the method

1 has not changed in any way.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. PLATTON: Thank you.

4 MR. RUIZ: Good afternoon. Cesar Ruiz, appearing
5 for LatinoJustice and intervenor-appellants. I'd like to
6 request one minute for rebuttal.

7 CHIEF JUDGE WILSON: You may.

8 MR. RUIZ: I wanted to begin by addressing a few
9 of the questions that the judges raised. Judge Garcia
10 asked, what is the limiting principle here? I want to
11 begin by discussing why Article II, Section 1 is about
12 guarantees. It is the guarantee of the right to vote. And
13 it's not meant to limit - - -

14 JUDGE GARCIA: But - - - okay. Let's even assume
15 that's true. Would expanding the franchise, along the
16 lines of what Judge Rivera was talking about, not in some
17 way limit the right to vote for those covered under Article
18 II?

19 MR. RUIZ: So the right to vote under the
20 Constitution is limited by Article II, Section 3 - - -

21 JUDGE GARCIA: Right.

22 MR. RUIZ: - - - which details who is - - -

23 JUDGE GARCIA: Right.

24 MR. RUIZ: - - - not eligible to vote. And so -
25 - -

1 JUDGE GARCIA: But let's say you expand the vote
2 to 900,000, 10 million more people. Doesn't that dilute
3 the right to vote of the people protected in the earlier
4 article?

5 MR. RUIZ: Granting a positive right to a group
6 that was formally disenfranchised is not the same as
7 diluting the vote because it - - - all of the voters are
8 similarly situated. The result may be very well different,
9 but in the vote dilution context, fundamental principles of
10 equal protection of one person, one vote is still withheld.
11 It's just a newly enfranchised group, similar when
12 individuals reach the age of majority, there's an expansion
13 and not necessarily a dilution of that rule.

14 JUDGE HALLIGAN: Can I ask, is your position that
15 Article II, Section 1 is a floor for statewide elections or
16 only for local elections?

17 MR. RUIZ: So I - - - that's an important
18 question. So Article II - - - and this addresses Judge - -
19 - Chief Judge Wilson's question. Article II is only
20 relevant to the extent that Article IX incorporates it - -
21 -

22 JUDGE HALLIGAN: No. But - - - but - - -

23 MR. RUIZ: - - - into its definition of people.

24 JUDGE HALLIGAN: But - - -

25 MR. RUIZ: And - - -

1 JUDGE HALLIGAN: You - - - I thought - - - I
2 thought you were making the argument that Article II,
3 Section 1, correct me if I'm wrong, doesn't apply to local
4 elections and we look to Article IX; is that right?

5 MR. RUIZ: Yes. And there's - - -

6 JUDGE HALLIGAN: Okay.

7 MR. RUIZ: - - - two arguments.

8 JUDGE HALLIGAN: But - - - but with respect to
9 Article II, Section 1, what's your view about how it
10 applies to state elections? Is it a floor? Is it a
11 ceiling? How does it operate there?

12 MR. RUIZ: So it operates the same - - - so for
13 state elections, it applies in full force, so - - -

14 JUDGE HALLIGAN: And so it - - - it - - - it is a
15 - - - it is a ceiling. And so your view is that - - -

16 MR. RUIZ: It's not a ceiling because Article II,
17 Section 3 dictates who's not entitled to vote. And so it
18 functions as a floor to establish basic guarantees, not to
19 explicitly take away or - - -

20 CHIEF JUDGE WILSON: So your view then is, by
21 statute, the state could allow thirteen-year-olds - - -
22 year-olds to vote for governor?

23 MR. RUIZ: Whether - - - whether the state could?
24 Is it - - -

25 CHIEF JUDGE WILSON: That's my question.

1 JUDGE HALLIGAN: Yeah.

2 MR. RUIZ: Okay. So to be - - -

3 CHIEF JUDGE WILSON: Could the state under - - -
4 under the Constitution as it is now, could the state allow
5 my thirteen-year-old daughter and other thirteen-year-olds
6 to vote for governor in the next election?

7 MR. RUIZ: Yes. And that is so long as they
8 guarantee individuals - - -

9 JUDGE HALLIGAN: Well - - -

10 MR. RUIZ: - - - who are eighteen years old - - -

11 JUDGE RIVERA: I thought - - -

12 JUDGE HALLIGAN: But then - - - then don't you
13 have a federal problem? I mean, Article I, Section 2, I
14 think, says that the house is chosen by whomever qualifies
15 to elect the members of the largest body in the state,
16 which I think is the assembly. So how could that be done
17 without running straight into a difference between who can
18 vote for - - - who can vote for federal election and who
19 can vote in a state election?

20 MR. RUIZ: So the question here is whether the
21 localities are entitled under the current state of the
22 state constitution to - - -

23 CHIEF JUDGE WILSON: No. I wasn't asking about
24 localities.

25 MR. RUIZ: Sure.

1 CHIEF JUDGE WILSON: I was asking about the state
2 government.

3 MR. RUIZ: So the state government creating
4 eligibility requirement that would conflict - - - I just
5 want to make sure I understand the question correctly - - -
6 with - - -

7 CHIEF JUDGE WILSON: Could the state enfranchise
8 thirteen-year-olds to vote for state offices?

9 MR. RUIZ: Under the current state constitution?

10 CHIEF JUDGE WILSON: Yeah. Yes.

11 MR. RUIZ: It could not because it would be
12 barred by the state constitution which says eighteen. But
13 with regard to how localities can interpret, so long as
14 they respect what Article II guarantees, which Local Law 11
15 does, it does - - - it passes constitutional muster in
16 that.

17 JUDGE CANNATARO: Can I just drill a little - - -

18 JUDGE RIVERA: Could the state say thirteen-year-
19 olds can vote in local elections?

20 MR. RUIZ: Could the state? Yes.

21 JUDGE RIVERA: Yes.

22 MR. RUIZ: Through its - - - through its
23 constitutional general law powers.

24 JUDGE RIVERA: Yes. But then I assume you would
25 argue - - -

1 MR. RUIZ: But it would create a conflict with -
2 - -

3 JUDGE RIVERA: - - - you would argue that if the
4 locality decided we don't want thirteen-year-olds to vote -
5 - -

6 MR. RUIZ: There would - - -

7 JUDGE RIVERA: - - - that nevertheless the
8 locality would be able to - - -

9 MR. RUIZ: So the state has to act consistent
10 with what is in the state constitution, Article II, Section
11 1. It could act the general law to - - - to - - - and that
12 would be a limiting principle on the municipalities power
13 because through the state Constitution, they have the power
14 to act the general law to circumscribe. And they did that
15 in 5-102, which says that only U.S. citizens. The only
16 issue that is not restrictive there is that 5-102, through
17 its applicability provision 1-102, does not carve that law
18 out. And so that's why Local Law 11 is presently
19 constitutional. Now, could the state legislature change
20 its mind and make that change? Yes. But that's facts that
21 are not before the court currently.

22 JUDGE CANNATARO: Can I ask you to expand just a
23 little bit more on the argument that Article II, Section 1
24 is a guarantee? Is it something about the language about
25 its placement in the scheme that makes it a guarantee?

1 Because when I read it, it just looks like a definitional
2 provision to me. It just - - - this is what a voter is.
3 So what am I misreading there?

4 MR. RUIZ: So the plain language in Article II
5 says every citizen shall be entitled to vote. Entitled
6 creates positive rights. It does not restrict or prohibit.

7 JUDGE TROUTMAN: How do you define citizen?

8 MR. RUIZ: So citizen - - - first, I want to - -
9 - I want to point out that regardless of how this court
10 interprets citizen in Article II, Local Law 11 guarantees
11 those people the right to vote. Local Law 11 guarantees
12 U.S. citizens under plaintiff-respondent's view the right
13 to vote, and thus it's constitutionally permissible. And I
14 want to shift to address your question. The - - - there
15 are three reasons why, at best, that term is ambiguous.

16 JUDGE CANNATARO: Which term?

17 MR. RUIZ: Citizen in Article II.

18 JUDGE HALLIGAN: But does it mean U.S. citizen or
19 state citizen? Is there some meaningful distinction in - -
20 -

21 MR. RUIZ: It's ambiguous. And - - - and I want
22 to address why. The state constitution drafters twice
23 rejected a U.S. citizenship requirement in Article II. The
24 first time was in - - -

25 JUDGE TROUTMAN: So even if you would otherwise

1 define - - - how would you define it?

2 MR. RUIZ: There's not enough evidence to support
3 a conclusive reading. What we know it's at least U.S.
4 citizen, but that doesn't mean that there's formulations.
5 And that's a question best left to the legislature which is
6 in the best position - - -

7 JUDGE TROUTMAN: So you say - - -

8 JUDGE RIVERA: I'm sorry. It's at least a U.S.
9 citizen?

10 MR. RUIZ: It's at least, yes.

11 JUDGE TROUTMAN: So as to - - - what definition
12 would you ask this court to give?

13 MR. RUIZ: I would say that the legislature is in
14 the best position to define citizen because it is
15 ambiguous, and the reasons why are because the state
16 constitution drafters - - -

17 CHIEF JUDGE WILSON: Well, how can - - - how can
18 the legislature do that? This is a constitutional
19 provision.

20 MR. RUIZ: So there's a constitutional provision
21 with an ambiguous term.

22 CHIEF JUDGE WILSON: Right.

23 MR. RUIZ: And there's not enough evidence before
24 this court to support a more restrictive or a broader
25 reading.

1 JUDGE GARCIA: But isn't that our role to
2 determine what this language is? A state constitution - -
3 -

4 MR. RUIZ: Where there is sufficient evidence to
5 support one reading over another.

6 JUDGE GARCIA: Otherwise it just goes to the
7 legislature to determine what the state constitution means?

8 MR. RUIZ: Well, when a provision is ambiguous
9 and there's not enough evidence from this court - - -

10 JUDGE GARCIA: Have we ever said that?

11 MR. RUIZ: Well, I want to be clear. There's not
12 enough evidence, and I want to address why. What we know
13 is that the drafters twice rejected the U.S. citizenship
14 requirement - - -

15 JUDGE TROUTMAN: But normally, it is this court's
16 function to define - - - to make the determination as to -
17 - -

18 MR. RUIZ: Yes. Where there is sufficient - - -

19 CHIEF JUDGE WILSON: What - - -

20 MR. RUIZ: - - - evidence for - - -

21 CHIEF JUDGE WILSON: What are the - - -

22 JUDGE HALLIGAN: I know, but - - -

23 CHIEF JUDGE WILSON: What are the dates on which
24 you're referring to the two incidents?

25 MR. RUIZ: So 1867 was - - -

1 CHIEF JUDGE WILSON: Yeah.

2 MR. RUIZ: - - - the first time where they
3 rejected U.S. citizenship.

4 CHIEF JUDGE WILSON: Okay. At that point, U.S.
5 citizenship, we don't even know what it means, right?
6 Civil War is over.

7 MR. RUIZ: And then a hundred years later - - -

8 CHIEF JUDGE WILSON: 14th amendment is not
9 ratified yet.

10 MR. RUIZ: Apologies.

11 CHIEF JUDGE WILSON: Right? At that point, the
12 14th Amendment is not ratified.

13 MR. RUIZ: That is correct.

14 CHIEF JUDGE WILSON: And so we don't really know
15 what U.S. citizenship means.

16 MR. RUIZ: That's correct.

17 CHIEF JUDGE WILSON: Okay? And the other date?

18 MR. RUIZ: 1967, a hundred years later.

19 CHIEF JUDGE WILSON: And what's - - - what's the
20 reference there?

21 MR. RUIZ: So that is where they tried to import
22 a U.S. citizenship requirement into Article II, and it was
23 rejected. Additionally, New York State's - - -

24 JUDGE HALLIGAN: But I guess I'm confused, you
25 know. When it comes to interpreting a statute, you know,

1 maybe the - - - the role that ambiguity plays might be a
2 little different, but if there's a constitutional provision
3 and a party argues that a statute violates it, it seems to
4 me it's our obligation to decide what constitutional
5 provision means. And if it's ambiguous, that might make
6 our task more challenging, but we still have to decide what
7 it means.

8 MR. RUIZ: This - - -

9 JUDGE HALLIGAN: So what I'm trying to understand
10 is, if that's right and we have to decide what citizen
11 means, where do we look to see if there's some concept of
12 state citizenship that is distinct from - - - and perhaps,
13 you know, doesn't require all that it takes to be a U.S.
14 citizen?

15 MR. RUIZ: For that, we can look at the 1821
16 state constitutional drafters oath. And that oath required
17 that drafters of the state constitution either be a citizen
18 of the State of New York or a citizen of the United States.
19 And so - - -

20 JUDGE HALLIGAN: Well, it probably also required
21 that they all be male and probably other restrictions as
22 well that we would not embrace today, I would hope. But
23 maybe my question better put is, how would you define what
24 a state citizen is as distinct from a U.S. citizen?

25 MR. RUIZ: And that's - - - we keep getting back

1 to the key point that there isn't enough evidence to
2 support a conclusive reading one way or another. That's
3 why we didn't offer - - -

4 JUDGE TROUTMAN: But the question - - -

5 JUDGE CANNATARO: What is a state citizen?

6 JUDGE TROUTMAN: - - - is what - - - and - - -
7 and I asked the same question before, but how would you
8 define it?

9 MR. RUIZ: If I had sufficient evidence to
10 support a reading - - - and I mentioned - - -

11 JUDGE TROUTMAN: No, no, no.

12 MR. RUIZ: - - - at least U.S. - - -

13 JUDGE TROUTMAN: Let's say that - - -

14 MR. RUIZ: - - - at least U.S. citizen.

15 JUDGE TROUTMAN: Let's say that public comment is
16 being requested by the legislature. How would you define
17 it?

18 MR. RUIZ: At least U.S. citizenship. It may
19 expand beyond that class.

20 CHIEF JUDGE WILSON: Thank you.

21 JUDGE RIVERA: But - - -

22 CHIEF JUDGE WILSON: Oh.

23 JUDGE RIVERA: I'm sorry. I'm just - - - I'm - -

24 -

25 CHIEF JUDGE WILSON: Yeah.

1 JUDGE RIVERA: - - - maybe missing this argument
2 that you're making. How does defining it as U.S. citizen
3 help your cause?

4 MR. RUIZ: So defining it as U.S. citizen would
5 not restrict Local Law 11 because Local Law 11 guarantees
6 U.S. citizen the right to vote unless there would be no
7 constitutional conflict under article II. And so because
8 local law enables U.S. citizens the right to vote, it does
9 not present a conflict that would prevent it or bar it.
10 And that's consistent with this court's - - -

11 JUDGE TROUTMAN: So are you - - -

12 MR. RUIZ: - - - decision in - - -

13 JUDGE TROUTMAN: - - - arguing that as long as
14 those who have the - - - are guaranteed a right, their
15 right is protected, there is no preclusion of expanding it
16 to others?

17 MR. RUIZ: Exactly. Yes.

18 CHIEF JUDGE WILSON: Thank you.

19 MR. RUIZ: Thank you.

20 MR. HAWRYLCHAK: May it please the court. I'm
21 Michael Hawrylchak of O'Connell & Aronowitz representing
22 the plaintiff-respondents. I think I would like to start
23 with the relationship between Article II, Section 1 and
24 Article IX since that's something there was quite a bit of
25 question about.

1 JUDGE HALLIGAN: When - - - when you do that - -
2 -

3 MR. HAWRYLCHAK: Sure.

4 JUDGE HALLIGAN: - - - can you explain your
5 response to the following? So if Article II, Section 1
6 applies to both state and local elections, which I take it
7 is your position - - -

8 MR. HAWRYLCHAK: Yes.

9 JUDGE HALLIGAN: - - - then why do you need the
10 definition in Article IX? Why isn't it redundant?

11 MR. HAWRYLCHAK: So I think part of the reason
12 maybe just to make clear because while Article II, Section
13 1 has referred to the people and there it's referring to
14 the people of the state, the entire state, when - - - the
15 beginning of when Article IX defines officers - - - local
16 officers, it refers to - - - it refers to the people of the
17 local government and - - -

18 JUDGE HALLIGAN: So it sounds like maybe
19 surplusage, but in your view - - -

20 MR. HAWRYLCHAK: It's just - - -

21 JUDGE HALLIGAN: - - - helpful surplusage?

22 MR. HAWRYLCHAK: - - - clarifying that we're
23 talking about the same subclass - - - it's those people of
24 Article II, Section 1 who are within the local government.

25 JUDGE CANNATARO: So it's the same - - - it's the

1 same group of people, but a smaller - - -

2 MR. HAWRYLCHAK: Geographic subset, yes.

3 JUDGE CANNATARO: - - - sample of them?

4 MR. HAWRYLCHAK: Yes. Yes. So I think that
5 makes, you know, sense of it. But I think, you know, I - -
6 -

7 JUDGE RIVERA: And Article II, Section 1 only
8 applies to state elections?

9 MR. HAWRYLCHAK: No. We believe Article II,
10 Section 1 applies to state and local elections.

11 JUDGE RIVERA: So then I don't understand your
12 prior answer.

13 MR. HAWRYLCHAK: I think it just clarifies - - -
14 I think it's clarifying language. I don't - - - I think -
15 - - I don't think it was - - - they used the word people
16 and wanted to - - - and people had been used in Article IX
17 to define who is going to vote in these local elections.
18 It says the elector - - - people shall - - - the officers
19 shall be elected by the people. So they wanted to find who
20 are we talking about when we're talking about people?
21 Well, we're talking about those same people we referred to
22 in Article II, Section 1, there's no difference in here
23 from what - - - what we had already defined previously.

24 JUDGE RIVERA: Except the people in Article II,
25 Section 1 includes people outside of New York City?

1 MR. HAWRYLCHAK: Right. Because - - -

2 JUDGE RIVERA: So it can't - - - right?

3 MR. HAWRYLCHAK: Right.

4 JUDGE RIVERA: It's not making sense.

5 MR. HAWRYLCHAK: Because Article IX says people
6 of the local government. So it's - - - so it's - - - so
7 it's kind of saying - - - and it says people - - -

8 CHIEF JUDGE WILSON: Part of what you're saying,
9 I guess - - - and I don't want to put words in your mouth -
10 - - is it couldn't have said citizens of local government
11 because they weren't really citizens of New York City. You
12 don't think of yourself as a citizen of municipality.

13 MR. HAWRYLCHAK: Yeah. I think citizenship only
14 has - - - you know, citizenship could mean state
15 citizenship. It could mean U.S. citizenship, but there's
16 no such thing as citizenship of a municipality.

17 JUDGE RIVERA: It could say resident.

18 JUDGE HALLIGAN: But is there - - -

19 MR. HAWRYLCHAK: What's that?

20 JUDGE RIVERA: It could say resident.

21 MR. HAWRYLCHAK: It could - - - it could have
22 said resident, but - - -

23 JUDGE RIVERA: Then they didn't choose that word
24 either, right?

25 MR. HAWRYLCHAK: They didn't - - - no. They

1 chose to incorporate the definition from Article II,
2 Section 1 to pull that directly in as to define the term
3 people in Article IX.

4 JUDGE HALLIGAN: What's your view about whether
5 there's a distinct concept of state citizenship that - - -
6 that somehow diverges or has independent meaning from U.S.
7 citizenship?

8 MR. HAWRYLCHAK: So we - - - we've kind of
9 surveyed the opinions on this. It's very - - - the
10 definition - - - just speaking generally and not
11 specifically to these provisions, there's a lot of kind of
12 ambiguity about what is meant by state citizenship, and a
13 lot of times it's described as being a subset of national
14 citizenship. So state citizenship is a U.S. citizen who
15 resides in a particular state, and it's a subset. But some
16 have defined it to say, well, state citizenship could
17 potentially be more broad. In this context, I think the -
18 - - the reason why in Article II, Section 1 citizen cannot
19 mean something broader than U.S. citizen is that it would
20 mean - - - it would - - - that would not permit New York to
21 allow certain noncitizens to vote. It would mean that
22 every single election in the State of New York was
23 violating constitutional rights by not extending the
24 franchise to some class of noncitizens because everyone
25 agrees that - - -

1 JUDGE RIVERA: No. Because their argument is
2 that it's a floor.

3 MR. HAWRYLCHAK: But - - -

4 JUDGE RIVERA: It's a floor. It doesn't require
5 any locality to do anything more than Article II, Section
6 1.

7 MR. HAWRYLCHAK: I'm answering a slightly
8 different question. It's the question of if citizen in
9 Article II, Section 1 means something broader than U.S.
10 citizenship.

11 JUDGE RIVERA: Yeah.

12 MR. HAWRYLCHAK: Everyone agrees that that - - -
13 that Article II, Section 1, at the very least, it creates a
14 floor. So that would mean that all of those people who are
15 beyond states - - - or beyond U.S. citizens but are somehow
16 state citizens under there would then be guaranteed the
17 right that is guaranteed in Article II, Section 1. If
18 citizen in Article II, Section 1 means something broader
19 than U.S. citizen, then those people, by the direct purpose
20 in terms of Article II, Section 1 would be guaranteed a
21 right to vote in all state elections. And that is just - -
22 -

23 JUDGE RIVERA: Well, unless they're not a state
24 citizen. I mean, we're back to that question.

25 MR. HAWRYLCHAK: Right. But I'm saying under the

1 presumption that state citizenship is broader than U.S.
2 citizenship. So I'm saying, if you adopted that
3 interpretation - - -

4 JUDGE RIVERA: Well, the counsel obviously is of
5 the position that the groups of - - - the classes of non-
6 U.S. citizens that they are enfranchising or attempting to
7 enfranchise with Local Law 11 are not New York citizens. I
8 mean, it - - - it's the only way one can understand that
9 law.

10 MR. HAWRYLCHAK: They have argued in interveners
11 briefs, argued that citizen in Article II, Section 1 means
12 something broader than U.S. citizen, and it's - - - and
13 it's broad enough to encompass the - - - the noncitizen
14 voters.

15 JUDGE RIVERA: And so my point is that the City
16 cannot possibly believe that the people they are
17 enfranchising with local 11 fall within that category
18 because then you would need local 11, right?

19 MR. HAWRYLCHAK: Well, I mean, that - - - that's
20 what I'm saying. If you take that argument seriously for
21 Article II, Section 1, it has absurd results. It - - - it
22 would - - - it would mean that the - - - all of the
23 elections conducted across the whole State of New York have
24 been disenfranchising people in violation of the state
25 constitution for as long as that provision has existed.

1 And that's just - - -

2 JUDGE RIVERA: I'm not - - - I'm not - - - well,
3 I don't really understand your argument. I'm sorry. I'm
4 not trying to be difficult, but I'm just not understanding
5 your argument that that means all these other elections are
6 - - - are null and void.

7 MR. HAWRYLCHAK: The argument is that Article II,
8 Section 1 guarantees - - -

9 JUDGE RIVERA: Yes.

10 MR. HAWRYLCHAK: - - - all citizens the right to
11 vote.

12 JUDGE RIVERA: Okay.

13 MR. HAWRYLCHAK: So it's - - -

14 JUDGE RIVERA: Which you understand to be U.S.
15 citizens - - -

16 MR. HAWRYLCHAK: Yes.

17 JUDGE RIVERA: - - - regardless of whether - - -

18 MR. HAWRYLCHAK: Yes.

19 JUDGE RIVERA: - - - or not it means New York
20 State citizen?

21 MR. HAWRYLCHAK: We understand it to mean U.S.
22 citizens. That is what that means. And my only argument
23 is, if that meant some class that's broader than U.S.
24 citizens - - -

25 JUDGE RIVERA: And this applies both to state and

1 local elections?

2 MR. HAWRYLCHAK: Yes.

3 JUDGE RIVERA: Okay.

4 MR. HAWRYLCHAK: And the reason for that - - - I
5 can give - - - there's several reasons for that. And - - -
6 and one of the reasons we know there is we can look to
7 other provisions of Article II which clearly refer back to
8 - - - to - - - that clearly apply to state elections. So
9 we can look, for example, to Article II, Section 5; Article
10 II, Section 7; Article II, Section 8, all which have
11 references which indicate that they apply to local
12 elections. And it would be an anomaly to say that Article
13 II, Section 1 is somehow the only provision of Article II
14 that, for some reason, doesn't apply to local elections.
15 There's been - - - an argument has been made - - -

16 JUDGE RIVERA: What do you make of Article IX, is
17 the Home Rule, and that applies to whatever localities want
18 to do? And so now you've got these separate provisions
19 that are perhaps cabining that authority. Why isn't that
20 what - - - the way one would harmonize those various
21 provisions?

22 MR. HAWRYLCHAK: Well, so - - - so I mean, I
23 guess the argument would be that somehow - - - that Article
24 IX is somehow abrogating Article II, Section 1 with respect
25 to local elections. And I just - - - I don't think there's

1 - - - there's nothing textually in Article IX that would
2 tell you that. And the cross-reference in the definitional
3 section, I think, tells you exactly the opposite. The
4 entire - - -

5 JUDGE RIVERA: What about Article III that
6 defines who cannot vote?

7 MR. HAWRYLCHAK: So that - - - that's - - -
8 Article II, Section 3, it says, persons otherwise qualified
9 to vote who meet certain things, so the - - - the - - - you
10 know, certain - - - convicted felons, things like that,
11 persons otherwise qualified to vote are then carved out of
12 that.

13 JUDGE RIVERA: It says persons, not citizens.
14 Doesn't that suggest that it's a broader category of
15 individuals?

16 MR. HAWRYLCHAK: No. I think its - - - its
17 definition is referring back to those who are qualified
18 under Section 1 and then saying those otherwise - - -

19 JUDGE RIVERA: Section 1 says citizen.

20 MR. HAWRYLCHAK: What's that?

21 JUDGE RIVERA: It says citizen.

22 MR. HAWRYLCHAK: And so - - -

23 JUDGE RIVERA: One would anticipate that article
24 III would - - - excuse me, section 3 would say citizen.

25 MR. HAWRYLCHAK: Well, it's referring broadly - -

1 - because it's - - - it's not just citizens, it's citizens
2 who meet the age and residency requirements. So it refers
3 to persons qualified - - - otherwise qualified meaning
4 persons who fall - - -

5 JUDGE RIVERA: Again, why doesn't it say citizens
6 otherwise qualified? I'm not - - - I'm not understanding -
7 - -

8 MR. HAWRYLCHAK: Well - - - well - - -

9 JUDGE RIVERA: - - - that - - - that strikes me -
10 - -

11 MR. HAWRYLCHAK: I don't - - - I don't see what
12 that would - - -

13 JUDGE RIVERA: - - - as intention.

14 MR. HAWRYLCHAK: I don't see what that would add
15 because - - - because it's - - - we've - - - Section 1 has
16 already defined the qualifications.

17 JUDGE RIVERA: Well, all I'm saying is it
18 suggests that it's not limited to citizens. That - - -
19 that's the point. Otherwise, one would use the word
20 citizen.

21 MR. HAWRYLCHAK: I - - - I don't see how citizen
22 adds anything there. And again, there are other places
23 where citizen is used. Let me give a couple of examples.

24 JUDGE RIVERA: Why does it have to add anything?

25 MR. HAWRYLCHAK: Well - - - so I don't see - - -

1 I don't see - - -

2 JUDGE RIVERA: It's defining the category of
3 individuals who, by a constitutional provision, cannot
4 vote.

5 MR. HAWRYLCHAK: Persons who are otherwise
6 qualified - - -

7 JUDGE RIVERA: Yes.

8 MR. HAWRYLCHAK: - - - who cannot - - -

9 JUDGE RIVERA: And if the only people who can
10 vote are U.S. citizens, one would anticipate it would say
11 if - - - if it's not going to say U.S. citizens or citizens
12 of the United States, it would at least say citizen.

13 MR. HAWRYLCHAK: I - - - I just - - - I don't
14 understand the - - - the logic of what - - -

15 JUDGE RIVERA: What's the point of using persons?
16 Let's try it the other way.

17 MR. HAWRYLCHAK: Because - - - because it's
18 referring to people who meet all of the qualifications of
19 Article II, Section 1, not just the citizenship. That's
20 only one qualification. This is persons who are otherwise
21 qualified that brings in citizenship - - -

22 JUDGE RIVERA: But Article - - -

23 MR. HAWRYLCHAK: - - - and residency and - - -

24 JUDGE RIVERA: But Article II, Section 1 - - - it
25 - - - it's only the class of citizens who satisfy all those

1 other requirements. So you're still back to the citizens,
2 right?

3 MR. HAWRYLCHAK: Well, yes. It's saying of those
4 people who - - -

5 JUDGE RIVERA: Why does - - - why does people
6 mean anything - - - why does people mean what you say it
7 means? I'm not understanding that.

8 MR. HAWRYLCHAK: What is in - - - in Section 3,
9 you're talking about?

10 JUDGE RIVERA: Yes. Yes. Of course.

11 MR. HAWRYLCHAK: People in Section 3 is referring
12 to people who are otherwise qualified, and the
13 qualifications were set out in Article I. So it's
14 referring you back to Section 1.

15 JUDGE RIVERA: Okay.

16 MR. HAWRYLCHAK: And then it carves out
17 subclasses of those.

18 JUDGE RIVERA: Okay.

19 MR. HAWRYLCHAK: But it doesn't need to speak to
20 noncitizens because they were never qualified under Section
21 1 in the first place.

22 JUDGE RIVERA: Okay.

23 JUDGE HALLIGAN: Can I ask - - -

24 JUDGE SINGAS: What about their argument about
25 including in Article IX? How do you answer that?

1 MR. HAWRYLCHAK: So what I would say is, first,
2 you have to recognize that that - - - that language says,
3 the following terms shall mean or include. That is kind of
4 a standard formula that appears throughout statutory law in
5 New York in various places to introduce a list of
6 definitions. And it - - - and as counsel - - - apparently
7 they agree today that it mean - - - it doesn't necessarily
8 mean that everyone on - - - every item on that list
9 includes. It means you have to make a contextual
10 determination, were they trying to give a definition here
11 or were they giving, you know, representative examples
12 where this would be an inclusive list. And what I would
13 say is this court has explained that when language - - -
14 when the language includes is used with a definition, it is
15 generally meaning to pull in other things of a similar
16 type. So usually there'll be, like, a list of things that
17 are included within a definition, maybe types of corporate
18 structure or types of agencies or things like that,
19 including, and then it gives a list, that that means other
20 things of a similar type. But that's not what they're
21 asking for here. Here, they're saying it's - - - defined
22 people means people who are entitled to vote under Article
23 II, Section 1. And they're saying - - - and it also
24 includes some group of people who are not entitled to vote
25 under Article II, Section 1. So they're using include to

1 pull in the exact opposite of the definition that's been
2 incorporated. And that's just a kind of a bizarre - - -

3 JUDGE RIVERA: Well, it includes those as defined
4 in Article II, Section 1 for purposes of enfranchising
5 them. It's definitional, right? That's - - -

6 MR. HAWRYLCHAK: Yeah.

7 JUDGE RIVERA: - - - the point. It's a
8 definition.

9 MR. HAWRYLCHAK: It's a definition. And - - -
10 and so - - -

11 JUDGE RIVERA: Well, what purpose the definition
12 serves may be different in Article II, Section 1 from an
13 Article IX. I think that's their argument.

14 MR. HAWRYLCHAK: The purpose - - - well, in
15 Article IX, it's specific - - -

16 JUDGE RIVERA: Otherwise, it does seem odd in a
17 constitutional provision to have that kind of - - - what
18 you are suggesting is a useless term - - - meaningless
19 term.

20 MR. HAWRYLCHAK: Which part is meaningless?

21 JUDGE RIVERA: Includes.

22 MR. HAWRYLCHAK: Well, I - - - includes is not
23 associated specifically with that definition. It's just
24 standard boilerplate that's used to introduce a list of
25 terms. So I don't think there's any reason to think that

1 people on that list was made to - - -

2 JUDGE RIVERA: They think the constitutional
3 drafters did the same. It's just boilerplate. We'll throw
4 it in. It doesn't matter.

5 MR. HAWRYLCHAK: I'm saying this exact phrase,
6 you can find in various places in the code as a standard
7 phraseology that's used - - -

8 JUDGE RIVERA: The code or the Constitution?

9 MR. HAWRYLCHAK: The code. It's this - - - this
10 is the only place it appears in the Constitution, but it's
11 the exact phrase, the following term shall mean or include.

12 JUDGE RIVERA: Does that suggest perhaps it
13 really does have some particular meaning if it's used in
14 this particular provision - - -

15 MR. HAWRYLCHAK: I don't see - - -

16 JUDGE RIVERA: - - - about expanding the
17 authority of localities?

18 MR. HAWRYLCHAK: I don't see any reason to - - -

19 JUDGE RIVERA: It's not a mere throw away?

20 MR. HAWRYLCHAK: I don't think it's a throwaway.

21 I think it is a introduction of a list of terms with the
22 knowledge that constitutional provisions are - - - are
23 periodically amended and revised. And if - - - when you
24 have a list of items, it's foreseeable that in the future
25 additional things may be added on the list. So you want to

1 give kind of - - -

2 JUDGE RIVERA: Can I ask you if you would address
3 the argument about method?

4 MR. HAWRYLCHAK: About - - - I'm sorry. I didn't
5 hear.

6 JUDGE RIVERA: The argument about why it's not a
7 method.

8 MR. HAWRYLCHAK: Oh, a method for - - -

9 JUDGE RIVERA: Yes, please.

10 MR. HAWRYLCHAK: - - - for purposes of the
11 referendum - - -

12 JUDGE RIVERA: Yes. Yes.

13 MR. HAWRYLCHAK: - - - provision.

14 JUDGE RIVERA: Yes.

15 MR. HAWRYLCHAK: So I think there's - - - what I
16 would say is - - - is who is able to use some sort of - - -
17 some method or able to exercise a certain power. Who
18 exercises that power is fundamentally a part of how that
19 power is exercised. And just to give - - - just to - - -
20 it's, you know, an extreme example. You know, there'd be
21 other constitutional issues with it, I'm sure. But imagine
22 you had a provision where some particular provision was
23 only elected by some subset of the population of a certain
24 place. So it's only people who are in, you know, these
25 particular residential district or whatever have the power

1 to elect this particular officer. And then you changed it,
2 so now it was people in a completely different part of the
3 - - - you know, the district that had that power to elect.
4 And you'd say, well, no, now it's no longer people in - - -
5 you know, in district 1 who get to vote for the - - - this
6 person. Now it's people in district 2 voting for that same
7 office. Now, I know there'd be other problems with that,
8 but you - - - the method - - - the same - - - there is - -
9 - votes being cast and those ballots are being tallied.
10 It's still an elected position. But by changing who is
11 exercising it is fundamentally - - -

12 JUDGE TROUTMAN: How do you distinguish that from
13 simple redistricting?

14 MR. HAWRYLCHAK: So redistricting in that - - -
15 redistricting has been addressed in the case law. And
16 there, each person is casting a ballot for one
17 representative covering their area. And that doesn't
18 change. Even if you move the boundaries, still every
19 person is voting for one representative out of that set of
20 positions on it. So the only - - - you've adjusted
21 boundaries, but who is doing the - - - the voting, the
22 people, and - - - and - - - and what they're voting for,
23 one out of a body of elected people, those things have not
24 changed. So the - - -

25 JUDGE HALLIGAN: Can I ask you to - - -

1 CHIEF JUDGE WILSON: The use of the word method
2 is not really the way we use it in common parlance. So if
3 I take the bus to work and there's a different bus driver,
4 the who is different, but it's still a bus. If I go by
5 subway, I don't know who the subway conductor is, but the
6 method is the same. It's just the who is different.

7 MR. HAWRYLCHAK: Well, let - - - let me give a
8 different example. If we were talking - - - instead of
9 electing, we were talking about appointed positions, so you
10 had an appointed position, and the law says that the mayor
11 gets to appoint some person to this city position. And
12 then they want to, you know, change that and - - - and say,
13 oh, now it's going to be instead the, you know, chief of
14 police who appoints that particular position, not the mayor
15 anymore. Would that be a change in the method? Or because
16 they're both appointing, you know, the physical act of - -
17 - you know, of either, you know, making a statement or - -
18 - or signing some commission or doing some physical act has
19 not changed, but the person who does it changed. That's a
20 fundamental change to the method of appointing that
21 position, just as if you change the electorate - - - the
22 people who are actually able to cast the votes to a
23 differently constituted electorate, you've changed the
24 method of how the - - -

25 JUDGE HALLIGAN: Can I ask you to clarify your

1 read of Spitzer? So - - - so - - -

2 MR. HAWRYLCHAK: Sure.

3 JUDGE HALLIGAN: - - - Spitzer and its progeny
4 Johnson, and I think it's Blakey, if I'm pronouncing - - -

5 MR. HAWRYLCHAK: Yes.

6 JUDGE HALLIGAN: - - - it right, they carve out
7 something clearly, right? And you suggest with Spitzer
8 that it's about taxpayer protection. And I take it you're
9 suggesting with Johnson and Blakey that because there was
10 only a one-vote margin, that somehow, I don't know, they
11 don't - - - they don't weigh as heavily. So if we're not
12 persuaded by the four - - - three decisions, you know, are
13 not so binding point, what do we make of the parameters of
14 whatever exception? You say it's not something that - - -
15 that, you know, subsumes all local elections, which is what
16 your adversary says. How do we read those and why?

17 MR. HAWRYLCHAK: All right. And I do want to
18 clarify because I - - - that was not my intention as far as
19 Blakey about the one justice. I'll explain what I meant by
20 that.

21 JUDGE HALLIGAN: It's just that it had the
22 position of only one thing.

23 MR. HAWRYLCHAK: Yeah. And - - - and I'll - - -
24 I'll explain what - - - what - - - what I meant by that.
25 But - - -

1 JUDGE HALLIGAN: Okay.

2 MR. HAWRYLCHAK: - - - I would like to
3 distinguish between - - - you said Spitzer and its progeny,
4 but its progeny, Johnson and Blakey cases are very
5 different from Spitzer. And I'll explain why that's
6 significant. Spitzer - - - you could read Spitzer, some of
7 the broadest language in Spitzer to support something like
8 an idea that Article II, Section 1 didn't apply to local
9 elections. Though, Spitzer, when you read it, is kind of
10 merging together Article II, Section 1 and Article XII.
11 And it says we have to read both of these together. It's
12 very significant. This is more than - - -

13 JUDGE HALLIGAN: So what do we make of that? I -
14 - -

15 MR. HAWRYLCHAK: Okay.

16 JUDGE HALLIGAN: I take that point, but - - - but
17 then where does that leave us, do you think?

18 MR. HAWRYLCHAK: So what I would say is, we look
19 at the later cases, they have not followed Spitzer's - - -
20 they have - - - they not interpreted Spitzer with that
21 broad reading. So if we look at Johnson, the next case
22 that came down, now Johnson block quotes a chunk of Spitzer
23 at the beginning, but that's in its background section
24 where it's laying out the history. And it lays - - - it
25 block - - - and it quotes from a couple cases and lays out,

1 like, changes that have been made to the election law over
2 time. That's in the background section. When it gets to
3 its analysis, it doesn't even mention Spitzer again, much
4 less say anything that would suggest that Article II,
5 Section 1 just doesn't apply to local elections. Instead,
6 what it does is it gives a detailed analysis of the
7 election structure that was being implemented.

8 JUDGE HALLIGAN: Uh-huh.

9 MR. HAWRYLCHAK: This was for proportional
10 representation system. And it says that this comports with
11 the requirements of Article II, Section 1. So they're
12 applying Article II, Section 1 to this novel form of local
13 election system.

14 JUDGE HALLIGAN: And what about Blakey?

15 MR. HAWRYLCHAK: Now, Blakey does the exact same
16 thing and - - - and says, we're going to - - - this is - -
17 - they say, basically, this is governed by Johnson because
18 this is another similar thing about at-large council
19 positions. So we're going to follow the analysis of
20 Johnson. It doesn't - - - it doesn't follow Spitzer at
21 all, and it never says that it doesn't apply. What I was
22 saying is there was one judge in Blakey who, citing
23 Spitzer, said, oh, Article II, Section 1 doesn't even apply
24 to - - -

25 JUDGE HALLIGAN: You mean - - - you mean Judge

1 Burke's concurrence, I take it?

2 MR. HAWRYLCHAK: The current - - - the currence.

3 JUDGE HALLIGAN: Uh-huh.

4 MR. HAWRYLCHAK: The other six justices - - -

5 JUDGE HALLIGAN: I think - - -

6 MR. HAWRYLCHAK: - - - the four in the majority
7 and the two in the dissent, those six justices all said
8 Article II, Section 1 applies. They just disagreed about
9 whether this comported with Article II, Section 1. So I'm
10 saying between - - - between seven - - - you - - - you
11 know, seven judges in Johnson and six out of seven judges
12 in Blakey who found that Article II, Section 1 applied.
13 You've only got one vote out of those two cases saying that
14 it didn't apply. And by applying Spitzer - - - and I'm
15 saying Spitzer is kind of a weak read, and one single vote
16 in Blakey to rest this whole idea that Article II, Section
17 1 has nothing to do with local elections.

18 JUDGE HALLIGAN: Yeah, that clarification is
19 helpful. Thank you.

20 MR. HAWRYLCHAK: Thank you. Just another - - -
21 this is another point on the application of Article II,
22 Section 1, and reason why it should be seen to apply to
23 local elections is it specifically uses the phrase, all
24 elections for offices elected by the people. And that
25 exact phrase, elected by the people, is used in Article IX

1 to describe offices in Article IX. So it seems like when
2 they're using the exact same language, it's all elections
3 for offices elected by the people. And then they refer in
4 Article IX to these local positions - - -

5 CHIEF JUDGE WILSON: The election - - -

6 MR. HAWRYLCHAK: - - - as being elected - - -

7 CHIEF JUDGE WILSON: The election that was
8 involved in Pease, right?

9 MR. HAWRYLCHAK: Yeah.

10 CHIEF JUDGE WILSON: Was a county election?

11 MR. HAWRYLCHAK: The - - - you're talking about
12 the - - - People v. Pease?

13 CHIEF JUDGE WILSON: Yeah. Uh-huh.

14 MR. HAWRYLCHAK: Yes. So it was a local
15 election.

16 CHIEF JUDGE WILSON: Yeah.

17 MR. HAWRYLCHAK: And - - -

18 CHIEF JUDGE WILSON: And we applied Article II
19 there.

20 MR. HAWRYLCHAK: Yes. The - - - the Pease case -
21 - -

22 CHIEF JUDGE WILSON: I think - - - unless you
23 think that - - - well, correct me if I'm wrong, unless you
24 think that Article IX did something different, I think we
25 have a case holding that Article II applies to county

1 elections.

2 MR. HAWRYLCHAK: Yes. I think the Pease case,
3 granted it's an old case, but it is the - - - it is the
4 only case from this court that is directly on point on all
5 of the issues involved here. It involved - - - it said
6 Article II, Section 1 involved U.S. citizens because it
7 specifically talked about foreign birth and naturalization.
8 It was U.S. citizens, not some broader state citizenship.
9 It applied it directly to a local election. And it
10 expressly said it was exclusive, meaning anyone who is not
11 a citizen or qualified under this provision could not vote,
12 and that was intrinsic and necessary to the holding of that
13 case. It's directly on point on all of those arguments on
14 Article II.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. HAWRYLCHAK: Okay. Thank you.

17 JUDGE RIVERA: Could you respond to his
18 articulation of Pease?

19 MR. PLATTON: Sure. So I mean, Pease - - - my
20 answer on Pease is the same as - - - as I want to clarify
21 on Johnson and Blakey. Those are all cases that long
22 predate, particularly Pease from 1863, the - - - the 1963
23 amendments to Article IX, which radically changed the
24 relationship between local governments and the state.
25 There was no analysis of that issue in Pease, but - - -

1 CHIEF JUDGE WILSON: It seems to me that that
2 answer leads to conclusion that prior to Article IX,
3 Article II read on local elections.

4 MR. PLATTON: As to local power to change local
5 voting qualifications, yes. I mean, as I mentioned in my
6 earlier argument, the state legislature - - - this court
7 allowed the state legislature to depart from Article II,
8 Section 1 for local voting qualifications.

9 JUDGE HALLIGAN: But - - - but if your position,
10 then, as I think you just said, is that prior to Article
11 IX, Article II did control the question and Article IX
12 adjusts that, you would think that there would be some
13 clear indication of that shift in the scope of Article II.
14 So do we see that somewhere?

15 MR. PLATTON: I don't think there needs to be a
16 shift in Article II. I think that the - - -

17 JUDGE HALLIGAN: I thought you just said that
18 your view - - - I might have misunderstood your position,
19 but I thought you said that - - - in response to the
20 Chief's question, that prior to the adoption of Article IX,
21 your view was that Article II would apply to local
22 elections; is that right?

23 MR. PLATTON: It would apply unless the
24 legislature set different qualifications as it did in the
25 Spitzer case using its power under Article XII. But what

1 Article IX did was - - - was clarify that local governments
2 could, as long as they didn't run afoul of the - - - the -
3 - - the protections of Article II, Section 1, could expand
4 the right to vote more broadly. And that was a radical
5 change in - - - in the balance of power between - - -

6 JUDGE RIVERA: And in that sense, I assume your
7 response to Judge Halligan would be - - - so there was no
8 need to change anything in Article II, Section 1 because
9 that's the work being done by Article IX.

10 MR. PLATTON: That's right. And this court has
11 made clear that where there are provisions to the
12 Constitution in question, the later amendment controls.
13 You said that in the Blakey case, for example, and - - -
14 and in Bareham. And that's what we're arguing here.

15 JUDGE SINGAS: And you think the framers would
16 have expanded that to such a degree and then put it in the
17 definitional section?

18 MR. PLATTON: I think what they did is they
19 vested power in local governments to allow voting for local
20 office by the people, and then they defined that term in a
21 way that we think signals an expansive right. And I just
22 want to - - - if I could - - - I now see my light is on,
23 but just address the point about means and includes because
24 I didn't hear my adversary give a definition that would
25 give meaning to both of those terms. You know, he - - - he

1 mentioned that in other contexts - - - statutory contexts,
2 this court has read that phrase to collapse down to mean.
3 I think his - - - the main case on that was the U.S. Steel
4 v. Gerosa, which was a taxation statute where the
5 interpretive principles all cut the other way in favor of
6 taxpayers and in favor of a narrow construction. Here, we
7 have a requirement to construe the Home Rule article
8 liberally. I think it's at its apex when you're talking
9 about the definition of the power to define who can vote,
10 which is the sort of - - - the core of self-governance.
11 And the only way to give meaning to that is to conclude
12 that include has some independent work that it does. And
13 for the reasons I said earlier, I think people is the word
14 that it was intended to - - - to give some expansive
15 meaning to. It has a historical pedigree. It's the - - -
16 the most likely candidate. The others are all fairly
17 constrained. I don't think there are any other types of
18 local governments, for example, general and - - - and
19 special law are both defined in this court's case law, and
20 they are two sides of the same coin. So if one was given
21 an expansive meaning, the other would be constrained. It
22 doesn't make sense. But people is partly - - -

23 CHIEF JUDGE WILSON: Well, there's school
24 districts and water districts and garbage collection
25 districts. There are other kinds of governmental things

1 beyond the ones listed.

2 MR. PLATTON: Well, it may be that that also - -
3 - in another case, you would conclude that that should have
4 a broader definition. We're not asking for that here. The
5 point is that people should be given the broadest
6 definition that it can sustain that this local law has a
7 strong presumption of constitutionality, all of these
8 principles cut in favor of concluding that the - - - that
9 this provision can reasonably be read to uphold Local Law
10 11, and we ask you to do that.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. PLATTON: Thank you.

13 MR. RUIZ: May it please the court. I just
14 wanted to address one particular point. Pease is
15 undermined by the historical practice of reading Article
16 II, Section 1 as a guarantee and not a prohibition. New
17 York has a history of noncitizen voting. In New York City
18 school board elections, individuals who fell outside of the
19 classification of U.S. citizens voted in New York City
20 elections until the school board dissolved those elections
21 or - - - or those elections in 2003. Additionally, black
22 free men were excluded from U.S. citizenship in the
23 abhorrent Dred Scott decision. But we know that New York
24 allowed them to vote in New York elections. And so what
25 these two instances show is that Article II has always

1 functioned as a floor, as a guarantee, and not a
2 prohibition. Thank you.

3 CHIEF JUDGE WILSON: Thank you.

4 (Court is adjourned)

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

RETRIEVED FROM DEMOCRACYDOCKET.COM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Fossella v. Adams, No. 15 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street

Suite 207

Phoenix, AZ 85020

Date: February 16, 2025