

## NEW YORK COURT OF APPEALS ROUNDUP

### BEYOND THE BALLOT: VOTING RIGHTS AND THE LAW

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April 8, 2025

In *Fossella v. Adams*, the Court of Appeals struck down a New York City law permitting noncitizens to vote in local elections. In a decision written by Chief Judge Rowan D. Wilson and joined by Associate Judges Garcia, Singas, Cannataro, Troutman and Halligan, the court found that the New York State Constitution limits voting to citizens.

Associate Judge Jenny Rivera, in a lone dissent, also would find the New York City law null and void, but for a reason rejected by the majority and she would find no constitutional barrier to a law permitting noncitizens to vote in local elections as long as that law was enacted via a local referendum.

The New York City Council passed Local Law 11 on Dec. 9, 2021 during the mayoral term of Bill de Blasio who left office shortly thereafter without signing or vetoing it. Mayor Eric Adams also neither signed nor vetoed the law after taking office on Jan. 1, 2022 and, accordingly, it became effective on Jan. 9, 2022 pursuant to section 37(b) of the New York City Charter.

Local Law 11 allows what it refers to as “municipal voters” to vote in New York City elections for the offices of mayor, public advocate, borough president and city council member. “Municipal voter” is defined as someone who is not a United States citizen and who:

- i) is a lawful permanent resident or is lawfully authorized to work in the United States;
- ii) has been a resident of New York City for at least the 30 consecutive days before the election at issue;
- iii) “meets all qualifications for registering or preregistering to vote under the election law, except for possessing United States citizenship, and who has registered or preregistered to vote with the board of elections in the City of New York under this chapter.” New York City Charter §1057-aa(a).

A group of current and former elected officials, individuals and entities associated with the Republican Party, and a group of New York City registered voters commenced an action against the New York City Council, Mayor Eric Adams and the New York City Board of Elections in Supreme Court, Richmond County challenging Local Law 11 on the grounds that:

- i) Article II, section 1 of the New York State Constitution limits voting to citizens;
- ii) Election Law §5-102(1) similarly limits voting to United States citizens and cannot be superseded by a local law, and iii) Local Law 11 violates Municipal Home Rule Law §23(2)(e) because it represents a change to the “method” of voting that requires a public referendum.

A group of noncitizens who qualified as municipal voters under the law intervened as defendants to support its constitutionality.

The Supreme Court granted plaintiffs’ motion for summary judgment on all three grounds and permanently enjoined New York City from implementing Local Law 11. *Fossella v. Adams*, 2022 NY Slip Op. 34700(U) (Sup. Ct. Richmond Cnty. 2022).

The Appellate Division, Second Department modified the judgment as to the Election Law claim but otherwise affirmed with one judge dissenting. *Fossella v. Adams*, 206 N.Y.S.3d 611 (2d Dep’t 2024). The City Council and the intervenors appealed to the Court of Appeals as of right pursuant to CPLR 5601(b)(1).

The Court of Appeals rejected the argument that Local Law 11 violated the Municipal Home Rule Law requiring a referendum but otherwise affirmed the Second Department and struck down Local Law 11 as unconstitutional.

The majority noted that, while courts are reluctant to strike down state and local laws as unconstitutional, section 1 of Article II of the New York State Constitution clearly states that:

Every citizen shall be entitled to vote at every election for all officers elected by the people and upon all questions submitted to the vote of the people provided that such citizen is eighteen years of age or over and shall have been a resident of this state, and of the county, city, or village for thirty days next preceding an election.

The court rejected the appellants’ argument that this provides just a floor—rather than a ceiling—that guarantees that all citizens of legal age can vote while not prohibiting voting by others. The court explained that this interpretation is incompatible with other provisions of Article II that similarly refer to voting by “citizens.”

For example, section 7 provides that “all elections by the citizens . . . shall be by ballot.” Accordingly, if the franchise could be extended to noncitizens we would be left with an anomalous result where municipalities must require citizens to vote by ballot but would not be similarly limited in the ways they permit noncitizens to vote. The court therefore found that Article II provides for voting only by citizens.

This finding, however, did not end the court’s inquiry. The majority also considered whether Article IX of the State Constitution, which grants extensive home rule powers to local governments and was enacted after Article II, created an exception to Article II’s restriction of the franchise to citizens.

Article IX contains references to elections by the “people,” including section 1(a) (“[e]very local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof”) and section 1(b) (“[a]ll officers of every local government whose election or appointment is not provided for by th[e] constitution shall be elected by the people of the local government”).

But the majority explained that Article IX’s use of the word “people” rather than “citizen” does not eliminate Article II’s restriction of voting to citizens. The language in sections 1(a) and (b) of Article IX merely imposes a geographic limitation prohibiting individuals from voting for a local official if they do not live in that locality.

It would not have made sense to use the word “citizen” instead of “people” in that context because one cannot be a citizen of a locality. Moreover, the majority noted, section 3 of Article IX defines “People” as “[p]ersons entitled to vote as provided in section one of article two of this constitution.”

According to the majority, this makes clear that Article II “states a finite definition of who may vote” rather than “just a floor above which localities can enfranchise other voters.”

As noted above, Judge Rivera was the lone dissenter. While she would have affirmed the Second Department’s ruling striking down Local Law 11 on the grounds that it represented a change in the method of voting that required a referendum under Municipal Home Rule Law §23(2)(e), she disagreed strongly with the majority that the extension of the franchise to noncitizens for local elections is unconstitutional.

Rivera’s analysis focused on the New York State Constitution’s recognition of “the primacy of home rule control over this core issue of local autonomy.”

In Rivera’s view, Article II, section 1’s guarantee that “every citizen shall be entitled to vote” does indeed set a floor rather than a ceiling, and if the drafters of that section had intended such a drastic limitation on home rule, they would have done so expressly by stating that “only citizens” are entitled to vote.

Although Rivera would permit New York City to extend the ability to vote in local elections to noncitizens if the law is subsequently enacted through a referendum rather than City Council vote, given the 6 to 1 nature of the majority’s opinion, that does not appear likely to happen.

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