SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

VITO J. FOSSELLA, NICHOLAS A. LANGWORTHY, JOSEPH BORRELLI, NICOLE MALIOTAKIS, 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 STATE 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

Notice of Motion of Immigration Reform Law Institute to File an Amicus Curiae Brief in Support of Plaintiffs-Respondents

Second Dept. Docket No. 2022-05794

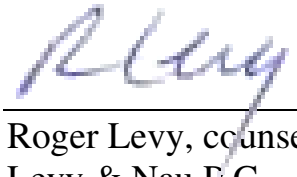
Richmond County Index No. 85007/2022

PLEASE TAKE NOTICE that, upon the annexed affirmation of Roger A. Levy Esq. dated December 29, 2022, and the exhibits annexed thereto, a motion will be made at a term of this Court to be held at 45 Monroe Place, Brooklyn, New York, 11201 on January 9, 2023, at 10:00 a.m., or as soon thereafter as counsel can be heard, for an order granting the Immigration Reform Law Institute leave to file the proposed Brief of Amicus Curiae in Support of Plaintiffs-Respondents, attached hereto as Exhibit A. Pursuant to 22 NYCRR §§670.4 and 1250.4, this motion will

be submitted on the papers and personal appearance in opposition to the motion is neither required nor permitted.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214 [b], answering papers, if any, shall be served upon the undersigned counsel at least two days prior to the return date of this motion.

Respectfully submitted,



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Dated: December 29, 2022

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

VITO J. FOSSELLA, NICHOLAS A. LANGWORTHY, JOSEPH BORRELLI, NICOLE MALIOTAKIS, 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 STATE 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

Affirmation in Support of Motion for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Respondents

Second Dept. Docket No. 2022-05794

Richmond County Index No. 85007/2022

Roger A. Levy Esq., being an attorney admitted to practice law before the courts of the State of New York, affirm the truth of the following in accordance with CPLR §2106. I make this affirmation upon personal knowledge, except as otherwise noted.

1. I am a member of Levy & Nau P.C., counsel to proposed *amicus curiae* the Immigration Reform Law Institute ("IRLI") in this action. I make this affirmation in support of IRLI's motion for leave to file a brief as *amicus curiae* in support of the Plaintiffs (the "Motion").

2. The Proposed *amicus curiae* is the Immigration Reform Law Institute ("IRLI"). IRLI is a not-for-profit IRC §501(c)(3) public interest law firm incorporated in the District of Columbia, dedicated to litigating immigration-related cases on behalf of United States citizens. IRLI is referred to below as the "Proposed *Amicus*".

3. The Proposed *Amicus* has filed *amicus curiae* briefs in many immigration-related cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); and *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016).

4. The Proposed *Amicus* has an interest in strong borders and the protection of United States sovereignty, and thus has an interest in the continuation of the United States as a democracy in which U.S. citizens are sovereign.

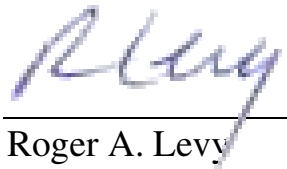
5. The Proposed *Amicus* seeks to ensure that only American citizens are permitted to vote in Federal elections. It also is concerned about incursions on the sovereignty of American citizens by non-citizen voting in local elections.

6. The Proposed *Amicus* believes that these concerns are closely linked. Upon information and belief, if non-citizen voting is allowed in a jurisdiction as important as New York City, that example may drive efforts to open even Federal elections to non-citizen voting.

7. The Proposed *Amicus* argues in its brief, annexed hereto as Exhibit A, that the law challenged in this case violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The annexed brief may aid this Court by adding to the state-law grounds for striking down that law set forth by the Plaintiffs, and gives a basis in the Constitution, previously not articulated, for also rejecting any possible, future attempt to allow non-citizens to vote in state and Federal elections.

8. I therefore respectfully request that the Court grant the Proposed *Amicus* leave to file its annexed proposed *amicus curiae* brief.

Respectfully submitted,



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Dated: December 22, 2022
Brooklyn NY

Exhibit A

Proposed Brief of
Immigration Reform Law Institute
In Support of
Plaintiffs-Respondents

Supreme Court of the State of New York
APPELLATE DIVISION: SECOND DEPARTMENT

VITO J. FOSSELLA, NICHOLAS A. LANGWORTHY, JOSEPH BORRELLI, NICOLE MALIOTAKIS, 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 STATE 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

Brief of *Amicus Curiae* Immigration Reform Law Institute in Support of Plaintiffs-Respondents

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Richmond County Index No. 85007/2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(c) of the New York State Court of Appeals Rules of Practice, 22 NYCRR Part 500, *amicus curiae* Immigration Reform Law Institute makes the following disclosures:

(1) For non-governmental corporate parties please list all parent corporations: None.

(2) For non-governmental corporate parties, please list all publicly held companies that hold 10% or more of the party's stock: None.

Respectfully submitted,

Roger A. Levy Esq.

Dated: December 22, 2022

INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Immigration Reform Law Institute ("IRLI") is a not for profit 501(c)(3) public interest law firm incorporated in the District of Columbia, and is dedicated to litigating immigration-related cases on behalf of United States citizens. IRLI has filed *amicus curiae* briefs in many immigration-related cases, including *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); and *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016).

Given its interest in strong borders and the protection of United States sovereignty, *amicus* has an interest in the continuation of the United States as a democracy in which the people of the United States—that is, U.S. citizens—are sovereign. Accordingly, *amicus* seeks to ensure that only American citizens are permitted to vote in federal elections, and also is concerned about incursions on the sovereignty of American citizens by non-citizen voting in local elections. These concerns are closely linked. If non-citizen voting is allowed in a city as important as New York City, the example of it may drive efforts to open even federal elections to non-citizen voting.

[1] Consistent with FED. R. APP. P. 29(a)(4)(E), counsel for movant authored the motion and brief in whole, and no counsel for a party authored the motion or brief in whole or in part, nor did any person or entity, other than the movant or its counsel, make a monetary contribution to preparation or submission of the motion or brief. IRLI's brief also meets the formatting requirements of 22 NYCRR 500.1.

Also, this brief, in which *amicus* argues that the law challenged in this case violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, not only may aid this Court by adding to the state-law grounds for striking down that law set forth by Plaintiffs-Respondents, but gives a basis in the Constitution, previously not articulated, for also rejecting any possible, future attempt to allow non-citizens to vote in federal elections.

INTRODUCTION

In December 2021, the New York City Council passed Int. No. 1867-A, entitled "Allowing lawful permanent residents and persons authorized to work in the United States in New York City to participate in municipal elections" (hereinafter, the "Noncitizen Voting Law" or "NCVL"). The Noncitizen Voting Law created a new class of voters called "municipal voters," defined as

> a person who is not a United States citizen on the date of the election on which he or she is voting, who is either a lawful permanent resident or authorized to work in the United States, who is a resident of New York city and will have been such a resident for 30 consecutive days or longer by the date of such election, who meets all qualifications for registering or pre-registering to vote under the election law, except for possessing United States citizenship, and who has registered or pre-registered to vote with the board of elections in the city of New York under this chapter.

(R1344). The NCVL permits these new municipal voters to cast ballots for "municipal offices," which are "the offices of mayor, public advocate, comptroller,

borough president, and council member." *Id.* The Noncitizen Voting Law was enacted by the Council with full knowledge that it would weaken the votes of the existing pool of eligible voters in New York City, specifically, both American citizens and a subgroup of American citizens, persons of American national origin. In fact, proponents of the law advocated for its passage precisely because it would expand the relative electoral power of various other national origin groups.

Plaintiffs-Respondents are "state and national political parties, as well as United States citizens belonging to several different political parties who are either elected officials, qualified and registered voters in the City of New York, or state party officials." (R1403-1406). Defendants-Appellants are Mayor Eric Adams (in his official capacity as Mayor of New York City), the Board of Elections of the City of New York, and the New York City Council. Defendants-Intervenors-Appellants are individual non-citizen residents of New York City who would be eligible to vote in municipal elections under the Noncitizen Voting Law.

This Court should uphold the decision of the Supreme Court, which granted summary judgment to Plaintiffs-Respondents and permanently enjoined the implementation of Local Law No. 11 (the "Noncitizen Voting Law"). (R23). The Supreme Court correctly held that the Noncitizen Voting Law, which enfranchised noncitizens with respect to New York City municipal elections, violated the New York State Constitution, New York State Election Law, and the Municipal Home

Rule Law. As Judge Porzio opined, "[t]he New York State Constitution explicitly lays the foundation for ascertaining that only proper citizens retain the right to voter privileges." (R17). Importantly, the court below found it "clear . . . that voting is a right granted to citizens of the United States. Local governments, including city governments, must be elected by the *people*, which is defined as *citizens* under Article II, § 1" of New York's constitution. (R18) (emphasis original). Accordingly, any inclusion of noncitizens directly interferes with and thus dilutes the votes of U.S. citizen voters.

IRLI submits this brief as *amicus curiae* to argue that the Noncitizen Voting Law violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because, both on its face and intentionally, it dilutes the votes of two protected classes, United States citizens and those of American national origin, and cannot withstand the strict scrutiny such a discriminatory law must receive.

ARGUMENT

In *Reynolds v. Sims*, 377 U.S. 533, 554-55 (1964), the Supreme Court held that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (accord). Indeed, "the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box." *United States v. Mosley*, 238 U.S. 383, 386 (1915). *See also Baker*

v. Carr, 369 U.S. 186, 208 (1962) (explaining that voters have a "plain, direct and adequate interest in maintaining the effectiveness of their votes.") (internal quotation marks omitted); *Reynolds*, 377 U.S. at 567 (explaining that vote dilution occurs when "[a]n individual's right to vote . . . is unconstitutionally impaired [because] its weight is in a substantial fashion diluted [] compared with the votes of citizens in other parts of the State.").

The Noncitizen Voting Law allows residents of New York City who are not American citizens to vote in City elections. An expansion of the franchise, such as the NCVL, automatically weakens the votes of those who were eligible to vote before that expansion. Accordingly, claims of vote dilution made by those whose votes have been weakened by an expansion of the franchise, such as residents of a city challenging the expansion of the franchise to nonresident property owners, are facially discriminatory against an identifiable group, and thus are analyzed under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *See, e.g., Brown v. Bd. of Comm'rs*, 722 F. Supp. 380, 398 (E.D. Tenn. 1989) (striking down an expansion of the franchise to nonresidents of a city under the Equal Protection Clause); *Duncan v. Coffee Cty.*, 69 F.3d 88, 94 n.3 (6th Cir. 1995) (observing that, "[n]aturally, any time voters are added to the rolls . . . those already on the rolls have had their votes diluted," though not all instances of vote dilution are "*per se* . . . unconstitutional").

Usually, expansions of the franchise have received rational-basis review. *See Brown*, 722 F. Supp. at 398 ("[T]he equal protection analysis which should be applied here is the traditional 'rational basis' test."); *Day v. Robinwood W. Cmty, Improvement Dist.*, 693 F. Supp. 2d 996, 1005 (E.D. Mo. 2010) ("Courts confronting equal protection claims asserting vote dilution resulting from expansion of the voter base have generally employed . . . rational basis [review]"); *May v. Town of Mt. Vill.*, 944 F. Supp. 821, 824 (D. Colo. 1996) ("Where a law expands the right to vote causing vote dilution, the rational basis test has been applied by the vast majority of courts.").

The Noncitizen Voting Law, however, automatically dilutes the votes of two groups of New York voters: American citizens and those who were born in this country. In contrast to the affected groups in the nonresident voter cases, both of these groups, as shown below, are protected classes. Accordingly, because the NCVL—on its face, and, indeed, also intentionally—burdens protected classes, it should receive not rational-basis review, but strict scrutiny. *See United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996) ("The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin"); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (internal citation omitted) ("Classifications based on race or national origin . . . are given the most exacting scrutiny."); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) ("The classifications involved in the instant

cases . . . are inherently suspect and are therefore subject to strict judicial scrutiny."); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."). Because the Noncitizen Voting Law cannot pass such scrutiny, the decision of the Supreme Court in favor of Plaintiffs-Respondents should be upheld.

I. Both U.S. Citizens and Persons Born in America are Protected Classes.

Aliens—that is, noncitizens—form a protected class for most purposes under the Equal Protection Clause. *See Graham*, 403 U.S. at 371-72 ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Brennan, J., dissenting) ("The highly suspect character of classifications based on race, nationality, or alienage is well established."); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) ("Alienage classifications by a State that do not withstand this stringent examination cannot stand."); *Juarez v. Nw. Mut. Life Ins. Co.*, 69 F. Supp. 3d 364, 372 (S.D.N.Y. 2014) ("[T]he Court has repeatedly applied strict scrutiny to statutes discriminating on the basis of alienage.").

Because aliens—that is, persons without United States citizenship—form a protected class, United States citizens should also form a protected class. Otherwise, a paradox would be created: the United States citizens who established our Constitution would have given lesser protection to themselves, as a group, than to those of foreign citizenship. But even if American citizens do not receive at least the same level of protection under the Equal Protection Clause as non-American citizens (aliens) do, and thus, in the rare event that a law burdens citizens on its face, that law does not receive the strict scrutiny that laws burdening noncitizens receive, the NCVL also, on its face, dilutes the votes of American-born New York City voters. It does so because its addition of noncitizens to the voter rolls automatically adds only persons of non-American birth.

Persons of American birth or ancestry, like those of birth or ancestry in any other country, are a national origin group, and thus a protected class even if American citizens somehow are not. *See Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973) ("The term 'national origin' on its face refers to the country where a person was born, or more broadly, the country from which his or her ancestors came."); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) ("The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment."); *Tippie v. Spacelabs Medical, Inc.*, 180 Fed. App'x 51, 55 (11th Cir. 2006) (finding a prima facie case of

national origin discrimination where American citizen plaintiff was denied employment in favor of a non-American citizen); *Chaiffetz v. Robertson Research Holding Ltd.*, 798 F.2d 731, 733 (5th Cir. 1986) ("We agree that employment discrimination based only on one's country of birth, whether that birthplace is the United States or elsewhere, contradicts the purpose and intent of Title VII."); *Malina v. Makitso United States LLC*, No. 4:19-01808, 2019 U.S. Dist. LEXIS 213113, at *7-8 (S.D. Tex. Oct. 18, 2019) (permitting plaintiff to "assert Title VII discrimination and harassment claims based on her 'American' national origin."); *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669, 675 (N.D. Ill. 1984) (holding that an employment discrimination claim based on American national origin was legally cognizable).

II. Because the Noncitizen Voting Law Burdens, on its Face and also Intentionally, Both American Citizens and the American-Born, it Must Receive Strict Scrutiny.

Laws burdening protected classes on their face are discriminatory, with no need to inquire into legislative purpose, and are subject to strict scrutiny. *See Shaw v. Reno*, 509 U.S. 630, 632, 643 (1993) ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."). "Express racial classifications are immediately suspect because 'absent searching judicial inquiry . . . . there is simply no way of determining what classifications are benign or remedial and what classifications are in fact motivated by illegitimate

notions of racial inferiority or simple racial politics.'" *Id.* (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)); *Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991) ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (superseded by statute on other grounds) (internal citations omitted) (explaining that facial classifications based on race, alienage, and national origin "are so seldom relevant to the achievement of any legitimate state interest," that they "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."); *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006) (explaining that facial discrimination occurs "[w]hen the government expressly classifies persons on the basis of race or national origin.").

On its face, the NCVL, by expanding the franchise to noncitizens, dilutes the votes of citizens, a protected class. Also on its face, it adds only foreign-born (because noncitizen) voters to the rolls, and thus dilutes the votes of non-foreign-born—that is, American-born—voters, also a protected class.

But even if legislative purpose is inquired into here, that purpose was intentionally discriminatory. Even "[a] facially neutral law . . . warrants strict scrutiny . . . if it can be proved that the law was motivated by a racial purpose or

object." *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (internal quotation marks omitted); *Rogers v. Lodge*, 458 U.S. 613, 617 n.5 (1982) (affirming the invalidation of an at-large voting system because it was maintained with the purpose of diluting the votes of blacks; "[p]urposeful racial discrimination invokes the strictest scrutiny"). Even if it is accepted that the purpose of this law was the benign one of aiding, by giving the vote to, resident noncitizens who pay taxes and contribute to the City, the benign motive for a law that burdens a protected class is irrelevant. *Johnson v. California*, 543 U.S. 499, 505 (2005) ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"). For example, the benign motive of helping a given racial group by favoring its members, based on their race, in admissions to a public university, is discriminatory because pursuing it involves disfavoring members of other racial groups. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (applying strict scrutiny to a law school admissions process that considered race and national origin in the admissions process); *Fisher v. Univ. of Tex.*, 570 U.S. 297, 300-01 (2013) (requiring strict scrutiny of the University of Texas's practice of "consider[ing] race as one of various factors in its undergraduate admissions process."). *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995) (internal citation and quotation marks omitted) (requiring strict scrutiny for race-based preferences in government contracts "despite the surface appeal of holding 'benign' racial classifications to a

lower standard because it may not always be clear that a so-called preference is in fact benign."); *Shaw*, 509 U.S. at 650 (requiring strict scrutiny for race-based districting that was intended to improve representation of minority groups). So, too, here. The professedly benign motive of aiding noncitizens by giving them the vote is discriminatory because pursuing it by those means involves diluting the votes of American citizens and of the American-born.

Indeed, a more disturbing picture than this emerges from the record—that this law is simply the product of ethnic politics. The record is replete with statements by council members that the NCVL was intended to expand the collective voting strength of various national origin groups, and diminish that of American-born voters. *See, e.g.,* Transcript of the Minutes of the Stated Meeting of the New York City Council, Dec. 9, 2021, Statement of Council Member Cumbo, (R824-827) (explaining that the NCVL will "shift the power dynamics in New York City in a major way" and that it will "be a great win for the ethnic groups that are going to be the highest number in the City of New York . . . this is going to be a huge win numerically for the Dominican Republic community . . . . We're all here to support our ethnic groups"); *id.* (R879) (explaining that "the top three ethnic groups that will benefit from this is the Dominican Republic, China, as well as Mexico."); *id.*, Statement of Council Member Rodriguez (R869) ("We are on track to write a new chapter in our city history, one that will finally include a voice of all immigrants");

id. (R870) (stating that the goal is "to change New York City history by giving [noncitizen] immigrant New Yorkers the power of the ballot."); *id*. Statement of Council Member Cornegy (R821) ("I'm reminded of the tremendous amount of work that continues for black communities across any eroding impact of our votes in the very districts that we serve in . . . . and that's not being heard or represented in this bill."). Needless to say, this bald motive of ethnic or national origin favoritism toward some national origin groups, and disfavor toward other such groups,[2] is intentionally discriminatory. *See Shaw*, 509 U.S. at 642-43 (decrying motives of "simple racial politics") (internal quotation marks omitted).

The NCVL, then, places a discriminatory burden on both American citizens and on the American-born, both on its face and intentionally. Like expansions of the municipal franchise to nonresidents, it should be analyzed under the Equal Protection Clause. Unlike those expansions, however, the NCVL, both on its face and intentionally, burdens protected classes, and thus must receive strict scrutiny.

[2] The group comprising persons of American national origin, particularly in New York City, includes many other national origin groups that at this point in history have few non-citizen members, and whose votes accordingly are diluted by the NCVL. Persons of Dutch, Irish, Italian, Japanese, British, and French Canadian ancestry, to list a few examples, have voting power intentionally "shift[ed]" away from them by this law. Black Americans whose ancestors have lived in America for centuries also lose voting strength. Ironically, though this group is neither a national origin group nor a race, and thus might seem not to qualify as a "protected class" under judicial precedents, *but see Freeman v. Dep't of Envtl. Prot.*, 2013 U.S. Dist. LEXIS 31079, *2 (2013) (recognizing "the protected class of a black-American who is non-Caribbean"), it is, of course, the very group the Fourteenth Amendment was originally enacted to protect. That would seem a strong reason for considering it a protected class.

III. The Noncitizen Voting Law Cannot Withstand Strict Scrutiny.

The NCVL cannot pass strict scrutiny. As the Supreme Court has explained, "[s]trict scrutiny is a searching examination, and it is the government that bears the burden to prove that the reasons for any [national origin] classification [are] clearly identified and unquestionably legitimate." *Fisher*, 570 U.S. at 310 (internal citation and quotation marks omitted). *See also Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) ("To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admission program employs narrowly tailored measures that further compelling governmental interests.") (quoting *Adarand*, 515 U.S. at 227)); *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) ("In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available."); *Serna v. Tex. Dep't of State Health Servs.*, No. 1:15-cv-446, 2015 U.S. Dist. LEXIS 140919, at *23 (W.D. Tex. Oct. 16, 2015) ("Under strict scrutiny, the challenged law must be narrowly tailored to be the least restrictive means of achieving a compelling government interest" (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010)). As the Supreme Court has stated, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of [suspect classifications] by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Croson*, 488 U.S. at 493.

No claimed government interest in expanding the franchise to noncitizens who pay taxes and contribute to the City can stand against the fundamental interest of all American citizens in governing the country, including all of its constituent parts and their subdivisions, of which they are the sovereign. As the Supreme Court has held, "[t]he exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a *necessary consequence* of the community's process of political self-definition." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-440 (1982) (emphasis added). American citizens, including foreign-born American citizens, comprise the body politic of the United States. *See id.* ("Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community."); *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) ("The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized a State's historical power to exclude aliens from participation in its democratic political institutions as part of the sovereign's *obligation* to preserve the basic conception of a political community.") (internal citation omitted) (emphasis added); *id.* at 296 ("[A] democratic society is ruled by

its people. Thus, it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions."); *id.* (holding that such restrictions "represent[] the choice, and *right*, of the people to be governed by their citizen peers.") (emphasis added); *id.* at 297 ("[A]lthough we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.").

Of course, this restriction of the body politic to citizens has the "practical consequence" that restricting municipal jobs that involve governing functions, and the vote in municipal elections, to citizens does not offend the Equal Protection Clause. *Id.* at 296. But this fundamental, compelling interest of citizens in self-government, as repeatedly articulated by the Supreme Court, also makes it hard to imagine that any conflicting interest served by the NCVL could be considered "compelling." On the contrary, the fundamental sovereign interest of American citizens, the "polity" of this country, *id.* at 295, in maintaining democratic control over it outweighs any governmental interest—certainly any interest stemming from ethnic favoritism—that may be asserted in putting part of that control in the hands of noncitizens, and indeed precludes such a transfer of control. *See In re Duncan*, 139 U.S. 449, 461 (1891) (recognizing that "a republican form of government is guaranteed to every State" and that such government's "legitimate acts may be said

to be of the people themselves"); *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972) (explaining that states must "preserve the basic conception of a political community"). As the Supreme Court has repeatedly made clear, America must be governed by Americans, whether born in this country or elsewhere—that is, by American citizens.

CONCLUSION

For the above reasons, the Court uphold the decision of the Supreme Court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing *amicus curiae* brief was prepared on a computer using Microsoft Word software. A proportionally spaced typeface was used, as follows:

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