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Voting in New York

By [Jerry H. Goldfeder](#)

While most Americans are focused upon trials and court rulings impacting the 2024 presidential election, let's take a moment to review two significant New York-related developments. In both cases, the goal was to expand voting rights. As of now, one succeeded and one did not.

Early Mail-In Voting

Congressman Tom Suozzi won his special election replacing George Santos for a variety of reasons, not the least of which was his experience, message and hard work. But election lawyers and practitioners should note that [his team focused on early mail-in voting](#) and banked about 80,000 votes *before* Election Day out of a total of about 170,000 ballots cast. After all, the special election occurred in mid-February, and it was certainly possible that a winter storm could impact or disrupt voting on that day—which, in fact, actually occurred.

Until last year, New York required a reason for voters to cast their ballot by mail—one either had to be ill or outside the county in which they lived. It had been thought that a state constitutional amendment was necessary for “no-excuse” absentee voting to be allowed and, therefore, [two successive legislatures, in 2019 and 2021, passed a proposed amendment](#) that would have permitted Albany to enact an open-ended opportunity to vote by mail. It was presented to the voters of the state in 2021.

The amendment failed, 55% to 45%, and New York remained an outlier, only one of [14 states](#) that restricted mail-in voting to a certain few who qualified. Thirty-six states permit a vote-by-mail option, with [eight conducting elections only by mail](#).

Proponents of more expansive voting options went back to the drawing board, and concluded that the “early voting” statute (rather than the provision governing absentee ballots) could be amended to include no-excuse mail-in voting. Accordingly, on June 6, 2023, the Legislature enacted the [Early Mail Voter Act](#), authorizing all registered voters to vote by mail during the early voting period.

Governor Kathy Hochul signed the bill into law Sept. 20, 2023, and [an action challenging the law was commenced](#) by various public officials and voters that very day in Albany Supreme

Court. They sought a declaratory judgment that the law was unconstitutional and a permanent injunction prohibiting its enforcement or implementation. A motion to dismiss and cross-motion for summary judgment were filed, and the Supreme Court (Ryba, J.), on Feb. 5, 2024, held the law constitutional. In that plaintiffs' request for a stay of enforcement of the law had been denied by both the Supreme Court and the Appellate Division, the Suozzi campaign was able to prepare a vote-early-by-mail campaign for the Feb. 13 special election.

The Supreme Court held that the law was a proper exercise of the legislature's plenary power, and, more to the point, was within its specific authority pursuant to [Article II, §7](#) of the New York Constitution to establish "the method of elections for all voters":

All elections by the citizens...shall be by ballot, or by such other method as may be prescribed by law...

The court continued: The state constitution does not "contain any express language prohibiting the Legislature from enacting laws that permit all eligible voters to vote by mail."

Thus, not only did the Supreme Court find that the expanded early-voting-by-mail statute constitutional, but its holding opens the door for New York, should Albany so desire, to join other states that conduct its elections entirely by mail.

Ryba's decision is being [appealed](#).

Non-Citizen Voting in NYC Municipal Elections

In December 2021, City Council adopted an amendment to the New York City Charter to allow certain residents who were not United States citizens to vote for mayor, public advocate, comptroller, borough president and city council. The [local law](#) created a new class of voter, the [municipal voter](#), defined as "a person who is not a United States citizen [but is] either a lawful permanent resident or authorized to work in the United States" and is otherwise eligible to vote.

Then-Mayor Bill DeBlasio declined to sign or veto the bill, as did Mayor Eric Adams upon taking office. Pursuant to the [Charter, §37\(b\)](#), the bill was deemed adopted.

A group of public officials, political party committees and voters immediately commenced an action against the mayor, City Council and NYC Board of Elections to have the new Charter amendment declared invalid on a number of grounds. (I appeared as one of the attorneys representing the Board of Elections, which took no position on the merits).

Various motions for summary judgment were brought, and, on June 27, 2022, [Supreme Court, Richmond County, ruled](#) the law was invalid on the grounds that it violated the New York state constitution and Election Law, which both provide voting by "citizens," and on the further ground that under the [New York Municipal Home Rule Law §23](#), a voter referendum was required because the law changed the method of electing public officials.

An appeal was brought (the Board did not appear), and on Feb. 21, 2024, the [Appellate Division, Second Department, in a 3-1 decision, affirmed](#) the Supreme Court's order that the law was invalid. The appellate court held that the law ran afoul of the state constitution's provisions that

only United States citizens could vote, and that a voter referendum was required under the Municipal Home Rule Law (it rejected the Supreme Court’s view that the New York Election Law barred the law).

Specifically, on the constitutional issue, the Appellate Division relied on [Article II, §1](#), which provides:

“Every citizen shall be entitled to vote at every election for all officers elected by the people...provided that such citizen is 18 years of age or over and shall have been a resident of this state, and of the county, city or village for 30 days next preceding an election” (emphasis added).

Rejecting the city’s argument that this provision was a “‘floor, not a ceiling,’ as to who is entitled to vote in elections,” the court explained that such argument “could not be reconciled” with [Article II, §5](#) that “[l]aws shall be made for ascertaining, by proper proofs, *the citizens* who shall be entitled to the right of suffrage hereby established, and for the registration of voters’ (emphasis added).”

The court continued: [Article IX, §1\(a\)](#) provides that “ ‘[e]very local government...shall have a legislative body elective *by the people* thereof” (emphasis added), and “[p]eople’ is defined under the same article as ‘[p]ersons entitled to vote *as provided in section one of article two of this constitution*” (emphasis added).

“Thus,” the court concluded, “article IX provides that the elected officials of ‘local governments shall be elected by ‘the people,’ which incorporates by reference the eligibility requirements for voting under article II, section 1, applying exclusively to ‘citizens.’”

As such, the non-citizen voting law violated the New York state constitution according to the court.

The Appellate Division affirmed the invalidation of the law on the further and independent ground that the city failed to conduct a referendum, and, therefore, was not operative unless and until approved by the voters. The court relied on Municipal Home Rule Law §23(2)(e), which provides, in pertinent part:

[e]xcept as otherwise provided by or under authority of a state statute, a local law shall be subject to mandatory referendum if it ‘among other things, ‘changes the method of nominating, electing or removing an elective officer’ (emphasis added).

Acknowledging that “[t]he term ‘method’ is not defined by the Municipal Home Rule Law,” the court opined that creating a “new class of voters entitled to vote in municipal elections” did in fact change the method of the electoral process—especially in that [§1057-bb\(a\)](#) of the City Charter provides that “eligible municipal voters...*shall be entitled to the same rights and privileges as U.S. citizen voters with regard to municipal elections*” (emphasis added).

The court reasoned that, inasmuch as those rights and privileges include the “right to be elected to and hold [New York City] offices...it necessarily follows that the [law] would permit noncitizens to be eligible to be elected to and hold those offices.” Thus, the law “would

dramatically reshape the process of municipal elections by enabling noncitizens to hold elective office.

“In view of such far-reaching implications,” the court concluded, a referendum by New York City voters was required.

Courts in New York have expressed a variety of interpretations of the Municipal Home Rule Law’s provision relating to when a voter referendum is required, and this opinion adds to the discussion.

It is reasonable to assume that an appeal to the Court of Appeals is forthcoming.

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