Case No. A165899

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

JAMES V. LACY ET AL.,
Plaintiffs and Respondents,
v.

CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Defendants and Appellants.

San Francisco County Superior Court
No. CPF22517714
Hon. Richard B. Ulmer, Jr.

APPLICATION FOR LEAVE TO FILE BRIEF OF OAKLAND AND SAN DIEGO UNIFIED SCHOOL DISTRICTS AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND BRIEF OF AMICI CURIAE

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CERTIFICATE OF INTERESTED PARTIES

There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE[1]

Amici are the Oakland and San Diego Unified School Districts, two of California's largest and most diverse districts that support, and are supported by, noncitizens:

> **Oakland Unified School District** is California's 11th largest district, where close to 2,500 teachers instruct approximately 35,000 students. Half of the district's students are bilingual, and 72% of them qualify for the free and reduced meals that the district provides every day. The district's contributions to the Oakland community extend past the classroom: It also operates 80 extracurricular programs, 74 after-school programs, and 16 school-based health centers. Noncitizens are students, teachers, employees, and community members who contribute to, and benefit from, Oakland Unified School District.
>
> **San Diego Unified School District** is California's second-largest district, where 6,300 teachers instruct over 121,000 students at more than 226 educational facilities. The district's students speak over 60 languages and dialects. In full, 60,000 students are eligible for a free and reduced lunch that the district's schools offer daily. The district's $1 billion operating budget supports its curricular and extra-curricular programming. Noncitizens are students, teachers, employees, and community members who contribute to, and benefit from, San Diego Unified School District.

[1] No individual or entity monetarily contributed to the preparation or submission of this brief.

Both districts support San Francisco's ability to enfranchise noncitizens in school board elections. In fact, last November, 62% of Oakland voters passed Measure S, which authorizes the Oakland City Council to enfranchise noncitizens in school board elections. Though San Diego does not have a similar law, it supports San Francisco's and Oakland's right to enfranchise noncitizens. This brief explains the school districts' specific interests in enfranchising noncitizens under the Elections Code and home rule.

Dated: March 7, 2023

Respectfully submitted,

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BRIEF OF OAKLAND AND SAN DIEGO UNIFIED SCHOOL DISTRICTS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

INTRODUCTION

In 2016, San Francisco voters passed Proposition N, joining a national movement to enfranchise noncitizen voters in local school board elections.[2] Since Proposition N's passage, noncitizen voters have participated in five school board elections with no issue. Pleased with noncitizen voting's impact on the San Francisco community, in 2021, the Board of Supervisors passed Ordinance 206-21, which permanently codified Proposition N as law.

As with any policy, noncitizen voting has its critics—here, two public policy groups lead that charge. But rather than attempting to convince the public that noncitizen voting is bad, Respondents have taken the debate to the courts. They ask the judiciary to overturn an expression of the will of the people, enshrined through the political process as part of San Francisco's city charter in accordance with the laws of California, that noncitizens should have a voice in local school governance. The Superior Court obliged. That decision was anti-democratic and incorrect as a matter of law.

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[2] Hernández, *Cities want noncitizens to vote on local matters. GOP sees a target* (Nov. 22, 2022) The Center for Public Integrity, https://tinyurl.com/ycx3w5d8.

This case presents a straightforward and narrow question: Can a charter city enfranchise noncitizens in local school board elections? The answer, unequivocally, is yes. (See also *Ferry v. City of Montpelier* (Jan. 20, 2023, No. 22-AP-125) 2023 Vt. 4, 2023 WL 1461835 (*Ferry*) [holding that cities may enfranchise noncitizens in local elections even though the state constitution permits only citizens to vote in statewide elections].) A decision to enfranchise residents in local elections goes to the very purpose of home rule. It is also consistent with the Education Code and the Legislature's acknowledgment that local communities know best how to govern their schools. This is so for two reasons.

First, the Education Code—not the Election Code—is the relevant statutory scheme in this case. That is because the Education Code explicitly defers to charter city laws that regulate school board elections; this deferral renders the Election Code inapplicable. This prerogative is consistent with a charter city's constitutionally conferred home rule power, under article XI, section 5, to regulate school board elections.

Further, local control of school board elections, whether under the Education Code or the constitution, makes sense. The decisions that school boards make are acutely local and impact every resident—regardless of citizenship—while having *no* impact on neighboring communities. Likewise, every San Franciscan—citizens and noncitizens, alike—is

interested and invested in the district's success. The bottom line is that citizenship does not determine whether a person contributes to the district; indeed, noncitizens and citizens are parents, guardians, counselors, coaches, teachers, and students in San Francisco's schools. The Education Code, consistent with the home rule, allows San Franciscans to confer the right to vote on who leads its district to each, and every one of its residents.

Second, article II, section 2 does not prohibit laws that enfranchise noncitizens. It simply provides the floor for who *may* vote. And contrary to Respondents' arguments, (Resp. Br. at p. 16), reversal would not require this Court to hold that noncitizens are *entitled* to vote. The result is much simpler and aligns with California's constitutional scheme: charter cities, like San Francisco, are empowered to confer the franchise to noncitizens through the political process.

In short, the Superior Court incorrectly applied the Education Code and misinterpreted two principles of California constitutional law: self-governance and home rule. Its decision must be reversed.

ARGUMENT

I. Under Their Home Rule Powers, Charter Cities May Enfranchise Noncitizens In School Board Elections.

For over 100 years, the California Constitution has authorized charter cities "to govern themselves, free of state

legislative intrusion, as to those matters deemed municipal affairs." (*State Building & Construction Trades Council of Cal. v. City of Vista* (2012) 54 Cal.4th 547, 555 (*City of Vista*).) This autonomy represents "an affirmative constitutional grant [of] all powers appropriate for a municipality to possess." (*Id.* at p. 556 [quoting *Cal. Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 (*CalFed*)].) At the crux of home rule is self-determination. Indeed, the California Constitution has long recognized that a charter city knows "better what it want[s] and need[s] than the state at large." (*Ibid.* [quoting *Fragley v. Phelan* (1899) 126 Cal. 383, 387].)

Today, home rule resides under article XI, section 5 and protects a charter city's right to "make and enforce all ordinances and regulations in respect to municipal affairs." (Cal. Const. art. XI, § 5, subd. (a).) Consistent with home rule's long history and tradition, courts have "ample power to preserve the core meaning of municipal home rule against legislative inroads." (*CalFed, supra,* 54 Cal.3d at p. 15.)

To ensure that the municipal power is preserved, *CalFed* instructs courts to begin with a threshold inquiry into whether the case presents "an actual conflict" between a "state statute and a charter city measure." (*CalFed, supra*, 54 Cal.3d at p.16.) This preliminary interrogation ensures that courts do not make "unnecessary" choices in a "sensitive area

of constitutional law" where there is no "genuine conflict" between state and local enactments. (*Id.* at pp. 16-17.) And where, as here, local and state law are amicable, the municipal action is upheld as there is no need to choose "between one enactment and the other." (*Id.* at p. 17.)

The Education Code explicitly recognizes that charter cities that pass laws regulating their school board elections are not exempt from any school board election law found in either the Education Code or Elections Code. Thus, contrary to the Superior Court's holding, there is no conflict between ordinance 206-21 and state law: Noncitizen voting in San Francisco Unified School District's school board elections is consistent with the Education Code. This Court can, and should, resolve the case on these grounds.

But even if this Court determines that this case presents an actual conflict, *CalFed*'s framework compels the same conclusion: School board elections are a municipal affair that charter cities have "sovereignty over" under Article XI, section 5. (*CalFed, supra,* 54 Cal.3d at p. 14.) As *CalFed* explains, "where the matter implicates a 'municipal affair' and poses a genuine conflict with state law" the "bedrock inquiry" is whether the "subject of the state statute is one of statewide concern." (*Id.* at p. 17.) And if the statute's subject "fails to qualify as one of statewide concern, then the conflicting charter city measure is a 'municipal affair' and 'beyond the reach of legislative enactment.'" (*Johnson v. Bradley* (1992) 4

Cal.4th 389, 399 (*Johnson*) [quoting *CalFed*, *supra*, 54 Cal.3d at p. 17].) As explained below, school board elections—no different from city council elections—are beyond the reach of legislative enactment.

Simply put, there is no legislative justification for depriving San Franciscans of their right to include noncitizens in the polity. The Superior Court's decision that invalidated a portion of San Francisco's charter and disenfranchised noncitizens was in error. Reversal is required.

A. There is no conflict as the Education Code recognizes a charter city's ability to regulate its school board elections.

San Francisco's ordinance enfranchising noncitizens in school board elections does not present an "actual conflict" with state law—it is supported by the Education Code's statutory scheme. Section 5301 recognizes a charter city's right to regulate school board elections: "The provisions of this chapter shall apply to all district elections, *except as otherwise provided by law, or as otherwise provided in the charter of any city* or city and county in the matters concerning which the provisions of such charters are afforded controlling force and effect by the Constitution or laws of the state." (Ed. Code, § 5301 [italics added].)

Two other Education Code sections that address school board elections defer to this delegation. Section 5300 states:

"School district elections … shall be governed by the Elections Code, *except as otherwise provided in this code*." (Ed. Code, § 5300 [italics added].) Likewise, section 5220 provides that "[b]oards of education are elected in cities under the provisions of the laws governing the respective cities, except as otherwise provided in this chapter." (Ed. Code, § 5220.)

Read together, the sections provide a straightforward rule: Charter cities have the final say on laws pertaining to school board elections. The Education Code's provisions regulating school board elections that defer to the Election Code simply provide a default legal framework if the charter city declines to exercise its authority. Put simply, the statutory scheme ensures that some laws are in place.

Here, the Elections Code is inapplicable because San Francisco passed a law—that is also in its charter—enfranchising noncitizens in school board elections. Indeed, after San Franciscans passed Proposition N, which permitted noncitizens to vote in school board elections, Proposition N was codified in the charter as section 13.111. (S.F. Charter, § 13.111.) Nevertheless, section 13.111 would sunset on December 31, 2022, unless the Board of Supervisors passed an ordinance making noncitizen voting permanent. (*Id.* § 13.111(a)(2).) Thus, when the Board permanently enfranchised noncitizens under ordinance 206-21, it did so pursuant to section 13.111(a)(2). The Education Code, of course, defers to city charters—and here, San Francisco's

charter authorizes the Board to permanently enfranchise noncitizens. The Education Code, therefore, defers to ordinance 206-21 just as it defers to the San Francisco charter. Thus, under section 5301, the San Francisco charter, which permits noncitizen voting in school board elections, controls.

The Superior Court's holding to the contrary—that the Elections Code limits school board elections solely to United States citizens—is, therefore, wrong. (Order at p. 3.) The Superior Court reasoned that because section 5390 of the Education Code establishes that the "qualifications of voters … shall be governed by those provisions of the Elections Code applicable to statewide elections," ordinance 206-21 conflicts with sections 2101(a), 2300(a), and 321(a) of the Elections Code. (Order at pp. 3-4.) But the Superior Court reached this conclusion without considering the repeated provisions in the Education Code that defer to city charters and render the Elections Code inapplicable where a city's charter provides otherwise.

In fact, section 5301 does not make a single appearance in the Superior Court's Order. The Superior Court's failure to consider, let alone apply, section 5301 further reinforces its erroneous conclusion that the Legislature "unambiguously" sought to exclude noncitizens from voting in school board elections. The Superior Court was able to read the Elections Code in that manner only because it failed to consider section

5301.

While Respondents, unlike the Superior Court, cite section 5301, it comes in a footnote that fails to account for San Francisco's power under article XI, section 5: "Section 5301 does not aid the City's argument if the City's program exceeds its authority under article IX, section 16." (Resp. Br. at p. 44 fn. 11.) But nothing in section 5301's text suggests that it applies only when charter cities regulate school board elections under Article IX, section 16. Rather, section 5301 defers to laws passed by charter cities with powers that are "afforded controlling force and *effect by the Constitution*." (Ed. Code, § 5301 [italics added].) Hence, section 5301 exempts not only school board election laws passed pursuant to Article IX, section 16, (see App. Opening Br. at p. 27), but also those passed under Article XI, section 5, which permits charter cities to "make and enforce *all* ordinances and regulations in respect to municipal affairs." (Cal. Const. art. XI, § 5 [italics added].) Respondents' decision to sidestep section 5301's text is telling.

The Court's inquiry should end here. As *CalFed* instructs, "[t]o the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be." (*CalFed*, *supra*, 54 Cal.3d at pp. 16-17.) And it cannot be ignored that this case does not present a conflict between municipal and state government—neither in their

democratically enacted laws, nor in this litigation. The principal challenger here is a public policy foundation that failed to prevail through the democratic process—twice. They first failed to convince San Franciscans to reject Proposition N. Then they failed a second time when the Board of Supervisors codified Proposition N despite their misgivings. The democratic process has lawfully resolved this dispute.[3] The Superior Court's decision should be reversed at the first step of the *CalFed* test alone.

B. School board governance, including school board elections, is a municipal affair.

Noncitizen voting in school board elections also fits *CalFed*'s definition of a municipal affair. As *CalFed* explains, "municipal affairs" are not "static and compartmentalized." (*CalFed*, *supra*, 54 Cal.3d at p. 13.) Rather, defining a municipal affair requires a case-by-case analysis with scrupulous attention to the surrounding "facts and circumstances." (*Id.* at pp. 16-17.)

The inquiry here is focused solely on a charter city's authority to regulate school board elections, not education more broadly. Because this case is specifically about whether

[3] Respondents ignore this history when they assert that "there can be considerable debate" about the merits of noncitizen voting, (Resp. Br. at p. 19). That is beside the point here, where one side of the debate prevailed in the democratic process.

a charter city can enfranchise its noncitizen residents in local school board elections, *CalFed* raises one question: Are school board elections particularized to a charter city's interests and, therefore, a municipal affair? The Court should answer in the affirmative for two reasons.

First, the Education Code reinforces the municipal nature of school district governance when it permits city charters to govern school boards. Section 5200 provides that "[a]ny unified school district that is coterminous with or includes within its boundaries a chartered city … shall be governed by the board of education provided for in the charter of the city." (Ed. Code, § 5200.) Section 5201 further reinforces the city charter as the central authority. It permits charter cities, pursuant to their article XI, section 5 powers, to "control[] and govern[]" its school district. (Ed. Code, § 5201.). Section 5220 is also instructive: "Boards of education are elected in cities under the provisions of the laws governing the respective cities." (Ed. Code, § 5220.). Put together, the sections confirm that city charters provide the governing framework for school districts. School district governance, therefore, constitutes a municipal affair.

Second, as the California Supreme Court held in *Johnson v. Bradley*, charter cities may enact substantive election laws consistent with their power to control municipal affairs. At issue in *Johnson* was whether a charter city could match public funds for qualifying campaign contributions

even though a state law forbade expending public dollars in political campaigns. (*Johnson*, *supra*, 4 Cal.4th at p. 394). In affirming the city's campaign finance law, the Court concluded that article XI, section 5 permits charter cities to enact "substantive" and "procedural" election laws. (*Id.* at pp. 403-404.) That is because regulating a local election—procedurally and substantively—"clearly implicate[]" a municipal affair. *(Ibid.*); *Cf. Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 796 (*Jauregui*) ["Commonsense tells us how city council members are elected is the essence of a municipal affair."].).

Johnson's broad principle—charter cities may enact substantive election laws in local elections—applies to school board elections, too. The impact of school board elections, like city council elections, are limited by geographic scope. What's more, both campaign finance laws and voter enfranchising laws are substantive—not procedural. Thus, consistent with *Johnson*, charter cities are permitted to pass a law enfranchising noncitizens in school board elections.

If the Court needs further confirmation that school board elections are municipal affairs, it can look to *Ferry*, a recent decision by the Vermont Supreme Court. (*Ferry, supra,* 2023 WL 1461835.) In that case, the challengers, like Petitioners here, contended that because the Vermont Constitution, like California's, permits citizens to vote only in

statewide elections, municipalities could not extend the franchise to noncitizens in local elections. (*Ferry, supra*, 2023 WL 1461835 at pp. *8-9.) Applying precedent that extended as far back as 1777 (including *Woodcock v. Bolster* (1863) 35 Vt. 632, 1863 WL 1496] [holding that noncitizens were entitled to vote in town and school district meetings]) the Court rejected the challengers' argument and continued to "reinforce[] the delineation between the regulation of statewide versus local elections." (*Id.* at p. *10.)

Most importantly, *Ferry*'s reasoning is entirely consistent with home rule under the California Constitution. Similarly to *Jauregeui*, which concluded that "[c]ommonsense" confirms that a "city-wide election[] is a municipal matter," (*Jauregui, supra*, 226 Cal.App.4th at p. 796), *Ferry* further explains that municipalities may define voting qualifications in their elections because municipal officers are "accountable to their local electorate and not the votes of the freemen of the state at large." (*Ferry, supra*, 2023 WL 1461835 at p. *12.) Accountability to the local electorate, *Ferry* continues, makes it "fundamentally different to act as a statewide officer compared to a municipal officer in terms of power[]." (*Ibid.*)

Ferry's distinction between statewide and local elections based on accountability is even more applicable here. Recall that the San Francisco Board of Supervisors, who are

accountable solely to San Franciscans, decided to permanently enfranchise noncitizen voting in school board elections. The Board's decision merely extended Measure N, where San Francisco voters—all of whom were United States citizens—made the policy judgment to enfranchise noncitizens in school board elections. The Board of Supervisors and San Franciscans joint decision to enfranchise noncitizens, therefore, represents local accountability, local ideals, and has no impact on the state at large. It is quintessentially a local decision over a local matter. That is home rule's essence.

Respondents argue that the issue here is education, a statewide affair, not local elections. (Resp. Br. at p. 55.) That conclusion mischaracterizes the "affair" in question. True enough, the provision of education is a state affair. (See, e.g., Cal. Const. art. IX, § 1 ["A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement"].) But, as noted above, ordinance 206-21 addresses a wholly different topic—noncitizens' ability to vote in a charter city's local school board elections. Under *Johnson*, local elections are municipal affairs.

C. Local school board elections are not a statewide concern.

CalFed sets a high bar for concluding that an issue is one of statewide concern—there must be a "convincing basis" for the legislative action "originating in extramunicipal concerns" and that justifies "legislative supersession based on sensible [and] pragmatic considerations." (*CalFed*, *supra*, 54 Cal.3d at p. 18.) The legislative interest must also be particularized and directly affect the state or region. (*City of Vista*, *supra*, 54 Cal.4th at p. 562.) Only then will the statewide interest justify a "state law interference in the autonomy of independent governmental entities." (*Id.* at p. 563.)

Below, the Superior Court incorrectly held that the state statutes that limited voting to United States citizens addressed matters of statewide control because they involved "education and voter qualifications." (Order at p. 6.) School boards—like city councils—make local, not statewide, decisions; hence, in this realm, the charter city operates as independent sovereign. For example, when the San Francisco Unified school board makes a decision, it does not impact children attending a school in San Diego Unified. And vice versa. Thus, there is no reason for the state to require San Diego and San Francisco to have identical voter qualification laws in their school board elections.

A justification based on "election integrity" is just as

inapt. That is because election integrity is principally concerned with ensuring that all votes are from eligible voters and that eligible voters are free to cast their ballots without undue pressure or intimidation, not defining the voting population. As *Johnson* explains, voter integrity is a statewide matter because elections must be "free from domination by self-seeking individuals or pressure groups." (*Johnson*, *supra*, 4 Cal.4th at p. 409 [quoting 35 Ops. Cal. Att'y Gen. 230, 231-32 (1960)].) Put differently, election integrity does not consider who can vote; rather, it accepts the voting population and protects its ability to make an informed decision.

Curiously, Respondents do not identify a statewide interest. Rather, they analogize California's interest in prosecuting noncitizen voters to the federal government's interest in prosecuting Californians who use marijuana in violation of federal law. (Resp. Br. at pp. 61-62.). The fact that the state could bring charges against someone who votes in violation of state law, Respondents contend, proves that voting in school board elections is a statewide interest.[4] (*Id.*

[4] Respondents' argument here begs the question. Noncitizen voting in school board elections is only illegal if Ordinance 206-21 is invalid under home rule. And even then, any retroactive prosecution would violate the due process clause. (See, e.g., *U.S. v. Pennsylvania Indus. Chemical Corp.* (1973) 411 U.S. 655, 673-674) [explaining that prosecuting an

at p. 62.) This analogy, once again, fails to answer the relevant *CalFed* question: What interest does California have in preventing noncitizens from voting in local school board elections? Respondents' failure to provide a relevant answer is telling and undermines their case.

II. Article II Does Not Prohibit Noncitizen Voting In Local Elections.

The California Constitution recognizes a bedrock democratic principle: the People have a right to self-governance. (Cal. Const. art. II, § 1.) At its core, the right to self-governance is the right to make laws. (*Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 254.) Consistent with this principle, where there is a challenge to a duly enacted law courts "do not look to the Constitution" for an authorization, but "only to see if [the act] is prohibited." (*Ibid.* [quotation marks omitted].) The presumption of constitutionality is even stronger when a law enfranchises, and so "every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process." (*Hedlund v. Davis* (1956) 47 Cal.2d 75, 81.)

The issue here is whether the constitution prohibits a

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individual when they have relied on an official interpretation of law undoubtedly violates the "traditional notions of fairness inherent in our system of criminal justice"]).

law that enfranchises noncitizens even though no article, nor section, prohibits or limits a law that enfranchises noncitizens. Below, the Superior Court interpreted article II, section 2, which only enfranchises 18-year-old United States citizens and California residents, to also limit a charter city's ability to pass a law enfranchising noncitizens. Not only did that holding ignore the presumption in favor of broader democratic participation, it also inserted a prohibition where none exists. The Superior Court's interpretation of article II, section 2 was incorrect and should be reversed.

A. Article II, section 2 does not prohibit a law that enfranchises noncitizens.

Article II, section 2 provides: "A United States citizen 18 years of age and resident in this State may vote." (Cal. Const. art. II, § 2.) This one sentence is permissive and protective. (See, e.g., Meriam-Webster Dict. (3d ed. Year) p. 1396 ["may" indicates a "possibility" or grants "permission."]) In doing so, article II, section 2 permits 18-year-old United States citizens who are also California residents to vote and protects their right against overbroad laws that would disenfranchise.

Further, because "may" is permissive, it does not exclude. (See generally *Housing Auth. of City of Oakland v. Superior Ct. of Alameda County* (1941) 18 Cal.2d 336, 339 [explaining that the import of "may" is a grant of discretion]; *Perrine v. Municipal Ct.* (1971) 5 Cal.3d 656, 662-663

[concluding that "may" is clearly permissive]; *Tarrant Bell Property, LLC v. Superior Ct.* (2011) 51 Cal.4th 538, 542 ["Under well-settled principles of statutory construction we ordinarily construe the word may as permissive." (cleaned up)].) Applied here, guaranteeing that one group of people can vote does not exclude the possibility of others receiving the same opportunity through legislation. Put otherwise, article II, section 2 simply acts as a floor, defining one, but not all, voting group.

If article II, section 2's drafters wanted the section to act as a ceiling rather than a floor, they could have written: "*Only* a United States citizen 18 years of age and resident in this State may vote." Or they could have written: "A United States citizen 18 years of age and resident in this State, *and no other individuals*, may vote. Of course, the drafters chose neither option. Therefore, article II, section 2 is harmonious with San Francisco's ordinance expanding the voting population to noncitizens.

The Superior Court's holding to the contrary is wrong. It should be reversed.

B. Even if article II, section two were ambiguous, the canons of construction make clear that noncitizen voting is constitutional.

Even if the Court determines that article II, section 2 is somehow ambiguous, it must apply "established principles of construction, applicable to statutes and constitutional

provisions alike." (*Mutual Life Ins. Co. v. City of Los Angeles*, (1990) 50 Cal.3d 402, 407.) As a case of constitutional interpretation, the "whole-text canon" is of vital importance. (See, e.g., Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) pp. 167-169.) That is because this canon acknowledges that no constitutional provision exists in a silo, therefore, the entire text is to be "'construed as a whole' and given a 'reasonable interpretation.'" (*People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 930; *see also M'Culloch v. Maryland* (1819) 17 U.S. 316.).

Accordingly, article II, section 2 must be read with article II, section 4. That is because both sections 2 and 4 define, in part, voter qualifications under the constitution. Section 2 identifies one group who must always be enfranchised (18-year-old United States citizens who are also California residents), while section 4 identifies two groups whom the Legislature must disenfranchise (the "mentally incompetent" and people "serving a state or federal prison term for the conviction of a felony"). (Cal. Const. art. II, § 4.) When reading the two sections together, section 4—not section 2—disenfranchises, and it makes no mention of noncitizens.

The *expressio unis est exclusio alterius* canon is also instructive here. This canon explains that the specification of the one implies the exclusion of the other; and it carries the greatest force where there is a specific enumeration. (See

Scalia & Garner, *supra*, at pp. 107-108.) Context is critical when applying this canon because it requires the specifying "the scope of inclusiveness (thereby limiting the implied exclusion)." (*Id.* at p. 108.)

The relevant scope of inclusiveness is framed by article II, section 4, which disenfranchises two specific groups: the mentally incompetent and those serving a felony sentence. This carries the implication that the only voters that the constitution disenfranchises are those found in section 4—not noncitizens.

The omitted-case canon further cements that conclusion. It explains that "nothing is to be added to what the text states or reasonably implies." (*See* Scalia & Garner, *supra*, at pp. 93, 96.) Because article II, section 2 contains no prohibition on who cannot vote, it would be inappropriate and unreasonable to insert words into that section that would have a disenfranchising effect. (*Cf.* App. Opening Br. at p. 20.) The same logic applies when applied to article II, section 4; because it specifically identifies who cannot vote, it would be inappropriate and unreasonable to add noncitizens to a list where they are omitted.

Respondents concede that article II, section 2 and section 4 are read together (Resp. Br. at p. 15), and that *expressio unis* is relevant to resolving any potential ambiguity (Resp. Br. at pp. 18-25)—yet they reach an illogical conclusion. In essence, Respondents assert that section 4—

which specifically *disenfranchises*—implies that section 2—which specifically *enfranchises*—also disenfranchises. (Resp. Br. at p. 21.) That argument fundamentally misunderstands, and consequently misapplies, the *expressio unis* canon, which forbids stretching a text in ways that conflict with "common sense." (*See* Garner & Scalia, *supra* at p. 107.)

The correct application of the *expressio unis* canon leads to one straightforward and logical conclusion. Section 4, which specifically disenfranchises, implies that only the enumerated groups in this section are constitutionally disenfranchised. As for section 2, the canon implies only that the enumerated groups are constitutionally enfranchised—it does not imply anything about disenfranchisement. San Francisco's law enfranchising noncitizen voters poses no constitutional issues. It should be upheld.

CONCLUSION

For the foregoing reasons, the Superior Court's decision should be reversed.

Respectfully submitted,

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March 7, 2023

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Amicus Curiae, pursuant to Rule 8.204 of the California Rules of Court, certifies that the foregoing is proportionally spaced and contains 5019 words, as counted by the word count of the computer program used to prepare the brief.

Dated:
March 7, 2023

Orrick, Herrington & Sutcliffe LLP

/s/ *John Palmer*
John Palmer
Attorney for Amicus Curiae

PROOF OF SERVICE

I am a citizen of the United States, over eighteen years old, and not a party to this action. My place of employment and business address is Orrick, Herrington & Sutcliffe LLP, 51 West 52nd Street, New York, NY 10019.

On March 7, 2023, I served true copies of the within Amicus Curiae Brief on the trial court and on the parties interested in this proceeding as follows:

On the Superior Court clerk for delivery to the trial judge, by directing preparation of a printed copy for mailing to:

Hon. Richard B. Ulmer, Jr.
c/o Clerk of the Superior Court
Department 302
400 McAllister Street
San Francisco, CA 94102-4514

By U.S. Mail, First-Class Postage Prepaid: I am readily familiar with the firm's practice in this office of processing correspondence for mailing. Under that practice, such correspondence is placed in a sealed envelope and deposited with the U.S. Postal Service on that same day with first-class postage thereon fully prepaid in the ordinary course of business.

on counsel for each party:

Electronic service through TrueFiling: I am e-filing this document through the Court of Appeal's TrueFiling service. I am designating that electronic copies be served through a link provided by email from TrueFiling to the attorneys who are registered with TrueFiling for this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed by me on March 7, 2023, at New York, New York.

/s/ *Amy S. Gerrish*
Amy S. Gerrish