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COURT OF APPEALS

STATE OF NEW YORK

ONONDAGA COUNTY,

Appellants,

-against-

NO. 66

STATE OF NEW YORK,

Respondents.

20 Eagle Street
Albany, New York
September 8, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Chrishanda Sassman-Reynolds
Official Court Transcriber

1 CHIEF JUDGE WILSON: Good afternoon, and welcome.

2 The first case on today's calendar is Onondaga
3 County v. State of New York.

4 Counsel?

5 MS. CALLAHAN: Thank you, Your Honor. May it
6 please the court. I am Janet Callahan from Hancock
7 Estabrook. I'm here on behalf of the Onondaga County
8 appellants. I'd like to reserve two minutes - - -

9 CHIEF JUDGE WILSON: Yes.

10 MS. CALLAHAN: - - - for rebuttal.

11 I'm going to focus my argument on point 1 of our
12 brief. Our primary argument, both here today and in the
13 Fourth Department, is simply that the even-year election
14 law violates the constitutional rights granted to charter
15 counties by Article IX, Section 1.h.1.

16 It attacks their fundamental, constitutionally
17 conferred right to determine and adopt their own form of
18 government approved by their voters and free from state
19 intrusion.

20 JUDGE GARCIA: So Counsel - - -

21 JUDGE SINGAS: But doesn't the only authority - -
22 - I'm sorry - - - for 1.h.1. come from the legislature?

23 MS. CALLAHAN: No. What we're saying is the
24 authority comes from - - - 1.h.1. is a constitutional right
25 which is conferred on the counties - - - charter counties

1 only. The Constitution then mandates the legislature to
2 put that right - - - it's a broad right that's been
3 conferred by 1.h.1. - - - to put it into a framework or a
4 structure. And the legislature did that. And they did
5 that by enacting Section 33 of the Municipal Home Rule Law.

6 JUDGE GARCIA: So is everything in that statute
7 constitutes - - - of constitutional dimension now? By
8 enacting that statute, they transform what's in that
9 statute, and then what's in your charter into a
10 constitutional right?

11 MS. CALLAHAN: No. What we're - - - all we're
12 talking about here is the core right? What are the core
13 rights?

14 JUDGE GARCIA: But how do we know what's a core
15 right?

16 MS. CALLAHAN: I think we know because Section 33
17 tells us. And in Section 33 - - -

18 JUDGE GARCIA: So anything in 33 is a core right,
19 which then becomes constitutional?

20 MS. CALLAHAN: In terms of the alternative forms
21 of government there are certain core rights that go into a
22 charter. And Section 33 tells the counties you must put
23 this in your county charter. And one of the things that
24 they mandate must be put into a county charter is terms of
25 office. So we're saying that's a core right.

1 JUDGE GARCIA: Right. But I'm trying to
2 understand the sequencing from it's a provision in the
3 Constitution that says the legislature will do this, the
4 legislature does this, the counties adopt charters. And
5 now that somehow is - - - seems bootstrapped into becoming
6 a constitutional right when it is something that was just
7 authorized by the legislature. Fairly broad authorization,
8 right?

9 MS. CALLAHAN: It's our position that it doesn't
10 come from the legislature. It comes from the Constitution.

11 JUDGE GARCIA: The direction comes from the
12 legislature.

13 MS. CALLAHAN: The Constitution mandates the
14 legislature to effectuate - - -

15 CHIEF JUDGE WILSON: And so your - - -

16 MS. CALLAHAN: - - - the constitutional right.

17 JUDGE SINGAS: But the - - -

18 CHIEF JUDGE WILSON: So your view now is that the
19 legislature could not amend Section 33 to strike terms of
20 office?

21 MS. CALLAHAN: Yeah. What we're saying is if
22 they - - - it was a constitutional amendment that created
23 this right, 1.h.1.

24 CHIEF JUDGE WILSON: Right.

25 MS. CALLAHAN: We're not saying the legislature

1 can't ever change it or take it away, but it was given by a
2 constitutional amendment. It must be taken away - - -

3 CHIEF JUDGE WILSON: But - - -

4 MS. CALLAHAN: - - - by a constitutional
5 amendment.

6 CHIEF JUDGE WILSON: - - - so it cannot be
7 legislatively amended by changing the statute?

8 MS. CALLAHAN: Correct. Correct. It must be
9 done by constitutional amendment.

10 JUDGE GARCIA: Do you know of any other statute
11 that's true of?

12 MS. CALLAHAN: Off the top of my head, I'm - - -
13 I'm not sure, frankly, Your Honor.

14 JUDGE HALLIGAN: It's an unusual relationship,
15 though, right? That you're positing between the
16 Constitution and the legislature's power, which is why it
17 seems striking that there aren't any other examples to me.

18 MS. CALLAHAN: Well, I think this is part of the
19 enlarging Municipal Home Rule. So as part of it. When it
20 started out - - -

21 JUDGE HALLIGAN: But do you mean in the
22 constitutional provision or the statutory provision?

23 MS. CALLAHAN: In the constitutional provision.

24 MS. CALLAHAN: And where - - -

25 MS. CALLAHAN: 2.c.

1 JUDGE HALLIGAN: - - - where in - - - so 2.c.
2 you're saying instructs us to treat the relationship
3 between the constitutional provision and the legislative
4 powers that way?

5 MS. CALLAHAN: So 2.c. was in effect for many
6 years before 1.h.1. was enacted. 2.c applies to all local
7 units of government. It applies to noncharter counties and
8 towns, villages, and cities. 2.c. gives the local
9 governments the right to pass local laws, but it has a
10 consistency provision in there. 1.h.1. is broadly
11 construed. 1.h.1. says we're going to give counties only -
12 - -

13 JUDGE TROUTMAN: And how is your view impacted by
14 a substantial state interest?

15 MS. CALLAHAN: What we're saying is - - - what
16 we're talking about - - - the issue here, which is the
17 terms of office of a purely local election, is not a matter
18 of substantial state concern. If you look at what the
19 matters of substantial state concern are - - -

20 JUDGE RIVERA: But - - - but isn't voter
21 participation a matter of state concern?

22 MS. CALLAHAN: It's voter - - - it - - - what the
23 state is talking about is general voter participation.
24 What we're talking about is voter participation in only
25 local elections. And the counties have held - - -

1 JUDGE RIVERA: How is that less - - - any less
2 consequential - - -

3 MS. CALLAHAN: Because the - - -

4 JUDGE RIVERA: - - - to the right to vote and to
5 choose someone that you think will represent you well?

6 MS. CALLAHAN: They have the right to vote. But
7 counties have for a hundred years always held their local
8 elections in odd years, and there have been reasons for
9 that. And one of the reasons for that is because they
10 don't want the local issues to be buried in national and
11 state issues.

12 JUDGE TROUTMAN: But how is ensuring maximum
13 participation, not a substantial state interest?

14 MS. CALLAHAN: I think the issue - - - not - - -
15 it's very laudatory that the state always wants to increase
16 voter participation, but the only races that we're talking
17 about are purely local races that have purely local issues.
18 If they want to build a park in one of the counties or - -
19 -

20 CHIEF JUDGE WILSON: So it seems - - -

21 MS. CALLAHAN: - - - just a local race and not of
22 statewide or national importance.

23 CHIEF JUDGE WILSON: It - - - it seems - - -

24 MS. CALLAHAN: And what happens - - -

25 CHIEF JUDGE WILSON: - - - to me that your

1 question about substantial - - - your view on substantial
2 state importance would invalidate large portions of the
3 election law. For example, the Election Law says that poll
4 workers have to wear designated buttons or badges and no
5 others. It says that notices of changes of polling
6 location have to be on yellow paper. Seems to me all these
7 things you would say are not of substantial state interest
8 and therefore are unconstitutional.

9 MS. CALLAHAN: The matters of state concern would
10 be matters that have to do with the integrity of the voting
11 process.

12 CHIEF JUDGE WILSON: Yellow paper as opposed to
13 blue?

14 MS. CALLAHAN: All we're saying is the term of
15 office of local officials is something that has been left
16 to the local governments to determine, as part of their
17 right, to form a charter government, as conferred by 1.h.1.

18 JUDGE RIVERA: Well, it's not the term. It's the
19 timing of the election, right? The term is whatever number
20 of years it is. Right?

21 MS. CALLAHAN: It's the term that's being
22 affected by this even-year election law. So the timing of
23 elections - - -

24 JUDGE RIVERA: To the extent that the term means
25 it starts this year and it ends this year or this date and

1 it ends this date? Is that what you mean by term in that
2 way?

3 MS. CALLAHAN: Is it a one-year term or three-
4 year term or five-year term? And it can never be a five-
5 year term anymore because of this statute.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. GENOVA: Good afternoon, Your Honors. My
8 name is Angelo Genova. I'm with the law firm of Genova
9 Burns. I represent appellants, County of Nassau, the
10 County Executive, Bruce Blakeman, and the Nassau County
11 legislature. I reserve no time and rather will rely on our
12 reply brief. May it please the court.

13 I join in the arguments of counsel for Onondaga
14 with regard to the statutory and constitutional provisions'
15 interpretations. I'd like to make three points.

16 The 1963 amendments to the Constitution were
17 intended to expand affirmative powers of local government,
18 and to restrict the powers of state government over local
19 Government affairs. The second point is the constitutional
20 provisions in Article IX, in section 1 and 2 were intended
21 to accomplish that very objective, as manifest by the
22 Municipal Home Rule Law adopted at the same time, and both
23 ought to be liberally construed.

24 The third point is within the constitutional
25 provision itself. Section 2.b of Article IX, the powers of

1 the legislature are constrained by language which is
2 expressed, which states that any actions by the legislature
3 with regard to changes to that - - - those rights are
4 subject to the bill of rights of local government
5 established by Section 1, and must be so construed.

6 The court's approach to the whole issue should be
7 driven by the fact that the home rule amendment was passed
8 in 1963 to expand home rule and construe it liberally.
9 Both the state and the Fourth Department disregard Article
10 IX's mandate for liberal construction of Section 1 and the
11 underpinnings of the Municipal Home Rule Law.

12 First, Article IX at Section 3.c dictates and
13 mandates that rights and privileges and immunities granted
14 to local governments by this article shall be liberally
15 construed. That requirement is manifest in the Home Rule
16 Law itself at 35.3 and provides that county charters should
17 be construed liberally.

18 The state takes the position the county rights at
19 issue are derived from statute, from the Home Rule Law, and
20 that the - - - that the ones at play in this case are not
21 expressly granted under Article IX, Section 1, and
22 therefore not constitutionally protected.

23 However, the state and the Appellate Division
24 entirely fails to engage with the fact that liberal
25 construction is constitutionally mandated. While Section 1

1 itself does not mention terms of office, admittedly, or
2 timing, explicitly, it provides for a broad system of self-
3 governance. 33.b. of the Municipal Home Rule Law requires
4 a county charter to provide for the agencies or officers
5 responsible for the performance of the functions and duties
6 of the county and the manner of election or appointment,
7 terms of office, if any, and removal of such officers.

8 It further provides that the county charter law
9 should be liberally construed. The Appellate Division has
10 taken the opposite approach, construing the county Section
11 1 rights in the narrowest of ways and contrary to the
12 constitutional objectives.

13 The 1963 amendment to Article IX, which expanded
14 the rights of local governments to manage their own
15 elections without state interference, is rendered
16 meaningless under this interpretation, as is the idea of
17 home rule in general. Under this interpretation, the
18 legislature can at any time and at its own discretion,
19 without resort to constitutional amendment, pass a general
20 law taking away whichever county right it so chooses.

21 Now, the Fourth Department found that the
22 legislative enactments enjoy a strong presumption of
23 constitutionality, and they do. And that question before
24 the court is therefore not whether the Constitution permits
25 the action, but whether it prohibits it.

1 It's our contention that the even-year election
2 law is plainly prohibited by the Constitution. The Fourth
3 Department held that Section 2.c. of Article IX authorizes
4 the state legislature to adopt general laws or special laws
5 under certain circumstances relating to the terms of office
6 of local government officials.

7 JUDGE GARCIA: Why is that wrong?

8 MR. GENOVA: Well, it's wrong because it begins
9 with the fact that fundamentally, and I think this is the
10 threshold question for the court - - - you have to agree
11 with us if we're - - - if our argument is to prevail, that
12 embedded in Section 1 of Article IX are these fundamental
13 constitutional rights.

14 JUDGE GARCIA: Unspecified?

15 MR. GENOVA: Right.

16 JUDGE GARCIA: Right?

17 MR. GENOVA: Well, unspecified - - -

18 JUDGE GARCIA: Terms of office isn't in Article
19 I.

20 MR. GENOVA: No. But - - -

21 JUDGE GARCIA: So - - - excuse me. Terms of
22 office is in the section we were just talking about.
23 Right? C., in addition to the powers granted by the
24 statute, it's in 2.c. Right?

25 MR. GENOVA: Well, I would first of all,



1 respectfully, say that terms of office is in Article IX,
2 Section 1. It's not expressly in that. But what is local
3 governance.

4 JUDGE GARCIA: Okay. So it's not expressly in 1.
5 But if we look at 2.c., 2.c. seems to me to say you can do
6 this unless it conflicts with a general law, right?

7 MR. GENOVA: Well, I - - - that's one
8 interpretation, but I would venture a different
9 interpretation.

10 JUDGE RIVERA: But why would that interpretation
11 not be correct?

12 MR. GENOVA: Well, first of all, the question is
13 whether or not 2.c. even applies - - - and if you'll bear
14 with me a minute - - - even applies in this context. First
15 of all, 2.c. - - - 2.c. applies to noncharter legislation.
16 And we learned from the Heimbach decision that it's
17 concerned with units of local government, and its focus is
18 on general legislative power, not charters or alternative
19 forms of government.

20 2.c. is - - - adds to the powers of counties and
21 local government. It begins with language, "In addition to
22 the powers granted in the statute of local governments or
23 in any other law." Any other law is itself Article IX,
24 Section 1. The constitutional provision upon which we rely
25 that embedded in that provision in the Constitution is the

1 notion of self-governance.

2 JUDGE SINGAS: Well, that's a very roundabout way
3 where 2.c. explicitly talks about terms of office. And
4 you're asking us to instead ignore that and go to 1 which
5 implies it according to you. And wouldn't - - - if we
6 adopted your reasoning, wouldn't 2.c. then become
7 superfluous?

8 MR. GENOVA: No, I don't think so. And let me
9 try to answer that. First of all, to say that it
10 implicitly includes, we know that Article IX, Section 1,
11 intend - - - was intended to include terms of office
12 because the legislature, when it manifest Article IX,
13 Section 1, through the Municipal Home Rule Law in 33,
14 defined and - - - and manifest what was intended by that
15 constitutional provision.

16 CHIEF JUDGE WILSON: What about - - -

17 MR. GENOVA: And in the Municipal Home Rule Law -
18 - -

19 CHIEF JUDGE WILSON: Just a second. What - - -
20 what - - -

21 MR. GENOVA: - - - in that - - -

22 CHIEF JUDGE WILSON: Excuse me. Excuse me. Just
23 a sec.

24 What about Section X of the Municipal Home Rule
25 Law - - - Section X.1? That says, "in addition to the

1 powers granted in the Constitution, one of the things
2 municipalities can do is to adjust terms of office."
3 That's in the statute and by saying it's in addition to
4 what's in the Constitution it makes it sound as if it's
5 statutory, not constitutional.

6 MR. GENOVA: Well, I respect that view, but I
7 think it - - - it's an additional power, a power that was
8 born of that Constitution.

9 CHIEF JUDGE WILSON: It's in addition to the
10 powers in the Constitution. By implication, it's not a
11 power in the Constitution.

12 MR. GENOVA: I understand that, Your Honor. But
13 I would also refer the court to 33.b that says expressly
14 that the manner of the conduct of the elections and the
15 timing of those elections. When the legislature adopted
16 the Municipal Home Rule Law, it did so contemporaneously
17 with the adoption of the 1963 amendment.

18 CHIEF JUDGE WILSON: Right. And so it could have
19 put terms of office into the Constitution. They were doing
20 it at the same time, and they didn't.

21 It's sort of a strange argument to say they knew
22 about this, and they decided to put it in statute instead
23 of the Constitution, and therefore it's in the
24 Constitution.

25 MR. GENOVA: But they were mandated to put - - -

1 the Constitution wasn't going to address all matters of
2 self-governance. They were mandated in the first section
3 of Article IX, Section 1, to adopt legislation for this
4 purpose.

5 CHIEF JUDGE WILSON: But at that time - - - at
6 that time, would've - - - would they have had the option to
7 not put terms of office into the Municipal Home Rule Law?

8 MR. GENOVA: I would agree they would have had
9 the option. But maybe they concluded that it wasn't
10 necessary because they had included it in 33.b and they
11 included terms of office, and they included manner of
12 election.

13 And getting back to the predicate for Article IX,
14 Section 1, what is self-governance without the ability to
15 make those choices in terms of the governance to be
16 applied, terms of office and the like? This goes back to
17 the fundamental point as to whether or not this court is
18 going to embrace the notion of a liberal construction of
19 these provisions.

20 The mandate of the constitutional provision that
21 they are liberally construed to effect the purposes of
22 Article IX, Section 1.

23 JUDGE RIVERA: But they can't be liberally
24 construed in contravention of every interpretation of the
25 Constitution, otherwise every other rule of construction

1 that the court has recognized and adopted.

2 MR. GENOVA: Your Honor, it's correct that we
3 have a rule of construction, but that rule of construction
4 starts with the fact that it's a constitutional mandate
5 that there be a liberal construction. This is not just a -
6 - - a rule of construction that applies to statutory
7 construction. This is embedded at the core of what the
8 legislature intended in 1963: to expand the rights and
9 expand the powers of local government. And to deprive
10 local government of the opportunity - - -

11 JUDGE RIVERA: But liberality doesn't mean
12 inconsistent, right?

13 MR. GENOVA: Your Honor?

14 JUDGE RIVERA: Liberality doesn't mean
15 inconsistent?

16 MR. GENOVA: No, it doesn't mean inconsistent - -
17 -

18 JUDGE RIVERA: Or rendering, as Judge Singas has
19 mentioned - - -

20 MR. GENOVA: But it means - - -

21 JUDGE RIVERA: - - - language superfluous, which
22 would be in contravention of other rules of construction.

23 MR. GENOVA: Respectfully, I agree with that.
24 But I would also say that liberal construction, as a matter
25 of law, requires you to construe the Constitution in a

1 manner to achieve its objectives.

2 JUDGE HALLIGAN: But where's the limit - - -
3 where's the limit on that proposition?

4 MR. GENOVA: The limit on the proposition on the
5 liberal construction?

6 JUDGE HALLIGAN: Yeah. Yes.

7 MR. GENOVA: Well, you find the limits within the
8 language of the Constitution itself. And here when we look
9 at the Constitution itself, we're mandated under Article
10 IX, Section 1, to adopt - - - to allow for local government
11 to self-govern. We start with that proposition.

12 And what does it mean to self-govern? Well, I
13 would think it means to self-govern to be able to determine
14 the timing of an election. It speaks to the timing of
15 election. It talks about elective office and electing
16 legislators. And that provision also talks about - - -
17 about having legislative bodies and having elective
18 offices.

19 Now, you start with that proposition. So how is
20 the court supposed to construe that section of the law? Is
21 it supposed to construe it narrowly? Or is it to say how
22 is the Constitution to be read in a manner that effectuates
23 the role of governance - - - local governance?

24 JUDGE CANNATARO: But wouldn't superfluidity be
25 another limit? I mean, don't we have to read all these

1 sections in a way that harmonizes their operation?

2 MR. GENOVA: Yes, we do, Your Honor. And I think
3 you can do that here because we're narrowly talking about
4 the timing of an election and terms of office. You asked a
5 question earlier of my colleague as to whether or not you
6 read this in a manner wouldn't l.h. open the floodgates to
7 everything being unconstitutional per 33? I think that was
8 the question of Your Honor.

9 And the answer to that is, sure, that might
10 happen at some point. But in the case before you, you can
11 decide this appeal, because the central issues in this
12 appeal are the time of the election and the term of office,
13 and those are the issues that you are required to evaluate.
14 And you will not be running afoul or opening up a Pandora's
15 box by addressing those issues - - -

16 JUDGE GARCIA: Counsel - - -

17 MR. GENOVA: - - - you need to hear.

18 JUDGE GARCIA: - - - I know your time is on. If
19 I could just one more thing. What, in your view then,
20 would section 2.c. prohibit? If there's a general law - -
21 - a state general law that says, you know, you have these
22 terms. What - - - it has to prohibit something. Right?
23 What would 2.c. prohibit? If I had a general state law
24 that said terms of office are X and the local government
25 wants to do Y, what would 2.c. prohibit?



1 MR. GENOVA: Well, our theory is that 2.c. is
2 inapplicable - - -

3 JUDGE GARCIA: I understand that.

4 MR. GENOVA: - - - to the rights - - -

5 JUDGE GARCIA: Where would it apply?

6 MR. GENOVA: Where would it apply? It - - - it -
7 - -

8 JUDGE GARCIA: Yeah. Term of office, general
9 statute, just assume that. I know - - - but for purposes
10 of my hypothetical, I have a general state statute, and it
11 says terms of office are X. A local government now wants
12 to do Y. When would it be barred by a general law under
13 2.c.?

14 MR. GENOVA: Well, I think it would - - - first
15 of all, it would - - - it - - - we argue that it doesn't
16 apply to county charters.

17 JUDGE GARCIA: I understand that.

18 MR. GENOVA: I understand that.

19 JUDGE GARCIA: When would it apply?

20 MR. GENOVA: So where it would apply is it would
21 apply when a local government seeks to adopt in the
22 categories identified in 2.c. - - -

23 JUDGE GARCIA: Term of office says that.

24 MR. GENOVA: It says - - -

25 JUDGE GARCIA: Right? Term of office is in 2.c.?



1 MR. GENOVA: - - - it says - - - it says - - -

2 JUDGE GARCIA: Right.

3 MR. GENOVA: - - - local government.

4 JUDGE GARCIA: But it - - - now I'm a local
5 government and I want to change the term of office in
6 contravention to a general statute. That would prevent
7 that, 2.c., then?

8 MR. GENOVA: It - - - the protection that
9 counties have under 2.c. revert back to Article IX, section
10 1.

11 JUDGE GARCIA: But it's not a protection. What
12 2.c. seems to say to me is you can do this except to the
13 extent that it contradicts a general law. So when would a
14 contradiction with a general law prevent a local government
15 from doing something under 2.c.?

16 MR. GENOVA: That's where, respectfully, I have a
17 difference of opinion with Your Honor. It - - - 2.c. says
18 more than that. It isn't just a contradiction with the
19 general law. It talks - - -

20 JUDGE GARCIA: It says local - - - adopt and
21 amend local laws not inconsistent with the provisions of
22 the Constitution or any general law.

23 MR. GENOVA: Right. But it begins with, in
24 addition to powers granted in the statute of local
25 governments or any other laws.

1 JUDGE GARCIA: So I get back to my question when
2 could you do that? It lists terms of office as one of the
3 subheadings there.

4 MR. GENOVA: If it - - - you can do that when it
5 doesn't act in contravention of the powers granted in the
6 statute of local governments or any other law, that's when
7 the legislature can act.

8 JUDGE GARCIA: But it says terms of office. So
9 now I'm a local government and I want to alter my terms of
10 office, and there's a general law that says I can't. Does
11 it prohibit me, or does it not?

12 MR. GENOVA: Well, if the - - - if that local
13 government doesn't have the protection of Article IX,
14 Section 1 with respect to terms of office, which we say it
15 does, then the legislature can act. The two - - - I'm not
16 doing this too well. But the two are integrated. That you
17 have to read 2.c. in pari materia.

18 JUDGE GARCIA: But we agree that 2.c. has to mean
19 something, right? So to say that it - - - Section 1 kind
20 of trumps that, I just want to know, in your view, is there
21 a time under 2.c.1. where a local government in
22 contravention to - - - would be prohibited in contravention
23 to a general statute from changing the terms of office?

24 MR. GENOVA: Yes, there is. Because when you
25 look at the - - - when you look at the categories, we're

1 focused on two elements in paragraph 1 of 2.c. Mode of
2 selection and removal of terms of office. That's - - - and
3 removal of terms of office. That's in paragraph 1. If you
4 go to what I believe is in Municipal Home Rule Law, I think
5 it's at 35, the - - - these powers are also delineated
6 under the Municipal - - - these categories are delineated
7 or like categories are delineated under the Municipal Home
8 Rule Law.

9 So we're focused on mode of selection, terms of
10 office. In those circumstances, it's our contention that
11 the legislature cannot proceed to restrict what is allowed
12 for under other law - - -

13 JUDGE CANNATARO: So Counsel - - -

14 JUDGE GARCIA: So contrary to Article 2, Section
15 c, a state can't do a general law that governs terms of
16 office?

17 MR. GENOVA: That covers terms of - - - local
18 terms of office, local terms of office, or county terms of
19 office. With - - - we're not challenging the - - - we're
20 not arguing that the balance of the items that are
21 identified as categories that the State could act. We do
22 contest that whether or not there has to be a consistency.
23 I think Heimbach tells us there doesn't have to be a
24 consistency, and you can have county laws which are
25 inconsistent with general laws.

1 But to answer your question directly, as best I
 2 can, the argument is with regard to 2.c. any other law
 3 includes are - - - the provisions of the Constitution at
 4 Article IX, Section 1, those - - - the governance is
 5 embraced by that. When you move down to paragraph 1 and
 6 you talk about mode of selection and removal of terms at -
 7 - - of office, those are trumped by any other law which are
 8 covered by Section 9 - - - excuse me, Article IX, section
 9 1.

10 JUDGE CANNATARO: So there is no circumstance in
 11 which a general law could prohibit a local government from
 12 - - -

13 JUDGE GARCIA: Because of Section 1 - - -

14 JUDGE CANNATARO: - - - changing its terms of
 15 office?

16 JUDGE GARCIA: Because of Section 1 through the
 17 statute.

18 MR. GENOVA: If you believe and if you concur
 19 with us that this is a constitutional - - - or absent a
 20 constitutional amendment. If there's a constitutional
 21 amendment that says state government should make that
 22 judgment or it's not a power that resides with the county
 23 government.

24 JUDGE HALLIGAN: Well, that's always the case,
 25 right? That you can amend?



1 MR. GENOVA: Pardon?

2 JUDGE HALLIGAN: It's always the case that you
3 can amend a provision of the Constitution with a
4 constitutional amendment?

5 MR. GENOVA: That would be right. But to the
6 extent that you're asking me the question that the power to
7 set the term - - - our position is the power to set the
8 term of office for local government resides with local
9 government, because that's an essential element of home
10 rule, and you need to liberally construe the Constitution
11 towards that end.

12 JUDGE CANNATARO: No law of general application
13 could alter that? Notwithstanding the language of Section
14 2 - - - of 2.c.?

15 MR. GENOVA: Absent a constitutional amendment
16 and - - -

17 JUDGE CANNATARO: Absent a constitutional
18 amendment.

19 MR. GENOVA: - - - and - - - and for local - - -

20 JUDGE RIVERA: But if that's what it meant, it
21 would say absent a constitutional amendment. You're
22 injecting language into that provision. It is a
23 constitutional provision, after all.

24 MR. GENOVA: Well, I - - - I'm - - - it's not - -
25 - respectfully, Your Honor, I'm not injecting it. It's - -

1 - I think, it's axiomatic that you want to amend the
2 Constitution, you have to do it by way of constitutional
3 amendment. That's why I say it.

4 JUDGE RIVERA: Well, but the point is, is there's
5 the - - - there's already the language covering removal and
6 selection and removal in terms of office. It's already
7 here. There's a reading that's already been proposed to
8 you that suggests that this means that the legislature can
9 indeed pass a general law affecting, defining, identifying
10 what the selection and removal in terms of office are.

11 MR. GENOVA: I think we're saying something more
12 fundamental. That the restrictions contained in 2.c. are
13 inapplicable because 2.c. is inapplicable to rights that
14 are embedded in Article IX, Section 1. So to the extent
15 that Article IX, Section 1, as I think Your Honor's used
16 the term "trumps" in this case for terms of office and for
17 dates of elections, because it's a matter of governance.
18 Article IX, Section 1 does do so. So that the restrictions
19 contained in 2.c., to the extent that they - - - they are
20 arguably the basis for this legislature to proceed.

21 JUDGE GARCIA: And I don't mean to beat this
22 anymore. But it seems to me, then that argument becomes
23 that through a general provision of one authorizing a
24 statute, that that statute then has the effect of trumping
25 a constitutional provision. A separate specific

1 constitutional provision. And that seems a very difficult
2 argument.

3 MR. GENOVA: Well, the - - - but there's also a
4 flip side to it, and I guess is what would constitutional
5 home rule mean if it could be modified by the legislature
6 at any time if you - - - if you accord that kind of
7 construction or interpretation here. And that's your
8 dilemma and it's a dilemma we think - - -

9 JUDGE RIVERA: Well, what's the dilemma? You've
10 got another constitutional provision that allows exactly
11 for that. So it's all elevated at a constitutional
12 authority.

13 MR. GENOVA: All elevated to constitutional
14 authority? To the extent - - -

15 JUDGE RIVERA: The legislature - - -

16 MR. GENOVA: Well, if it - - -

17 JUDGE RIVERA: - - - to pass a general law.

18 MR. GENOVA: - - - if this - - - if this - - -

19 JUDGE RIVERA: You're ignoring the very provision
20 that authorizes the action taken.

21 MR. GENOVA: Well, I'm contesting whether or not
22 it authorizes it. What - - - what I'm simply saying is I
23 don't believe it authorizes it for the reasons that I've
24 mentioned.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. GENOVA: Thank you. And thank you for the
2 additional time. I enjoyed it.

3 MR. JULIAN: Good afternoon. My name is Robert
4 Julian. I represent the Oneida County appellants,
5 including County Executive Anthony Picente, who is here in
6 the room.

7 Having heard the questions let me go to my
8 argument, which is the issue of whether or not this is a
9 general law. It is not.

10 It adversely affects, as indicated in the amicus
11 cases: Madison, Warren, Saratoga, Fulton, Ontario, and
12 Chenango counties. Specifically, the New York State
13 Constitution requires that supervisors from cities be
14 elected in odd years. Section 13.8 of the Constitution was
15 adopted in 1894, in circumstances very similar to what is
16 going on today.

17 JUDGE SINGAS: But if there's an election, this
18 applies. So how is that not a general law?

19 MR. JULIAN: I'm sorry, I don't understand the
20 question.

21 JUDGE SINGAS: If there's an election, if there -
22 - - if it's for an elected office, then this applies. So
23 I'm wondering how it's not - - -

24 MR. JULIAN: Sure.

25 JUDGE SINGAS: - - - a general law in those

1 circumstances?

2 MR. JULIAN: Because the - - - this - - - the
3 even-year election law does not allow for comparable terms
4 of office for members of the county boards of supervisors
5 of seven counties of this county. And what that means is
6 each of those counties will have to reconstitute not every
7 two years, but every year. They'll have to reappoint the
8 county attorney. They'll have to elect the chair of the
9 board, because the city supervisors will be elected in odd
10 years pursuant to 13.8 of the New York State Constitution.

11 JUDGE CANNATARO: Are you saying that it would
12 have to apply to every elective office in order to be a
13 general statute?

14 MR. JULIAN: No. So what I'm - - - what I'm
15 saying is a general statute under general - - - under the
16 Municipal Home Rule Law, Section 2 is defined as a law
17 applicable to all counties.

18 JUDGE GARCIA: No, it's not. No. It's defined
19 as a term that in - - - which in terms and in effect
20 applies alike to all counties.

21 MR. JULIAN: Okay.

22 JUDGE GARCIA: And I think that's a both thing,
23 right? It's an "and". So in terms and in effect, right?

24 MR. JULIAN: I - - -

25 JUDGE GARCIA: So in terms it does, right? It



1 says this applies to everyone. No?

2 MR. JULIAN: No, you lost me. I can't agree with
3 that.

4 JUDGE GARCIA: So let's do it the other way.
5 Let's look at special - - -

6 MR. JULIAN: Okay.

7 JUDGE GARCIA: - - - all right? You claim this
8 is a special law. So that special law says a law which in
9 terms and in effect applies to one or more, but not all,
10 counties.

11 MR. JULIAN: Right.

12 JUDGE GARCIA: Right? So to me that means that a
13 law that - - - to be a special law has to both in terms and
14 in effect apply to some, but not all. And it seems because
15 of the terms of this law, it applies to all by its terms.
16 You're saying its effect is different, but by its terms,
17 doesn't it apply to all counties?

18 MR. JULIAN: I don't believe it does.

19 JUDGE GARCIA: How so?

20 MR. JULIAN: Because you are talking about
21 whether a county will be able to run a government based
22 upon a one-year increment. I - - -

23 JUDGE CANNATARO: What is it? I'm not sure what
24 the relationship - - - what you just said, since the
25 question was geared towards the terms of the statute and

1 not the effects of the statute.

2 MR. JULIAN: Okay.

3 JUDGE CANNATARO: I'm not sure how that affects
4 the terms at all.

5 MR. JULIAN: I - - - I think it affects the terms
6 simply because if you're trying to run a government as a
7 practical term and effect, you need to have more than one
8 year to run the government.

9 JUDGE HALLIGAN: What do you do about united - -
10 - sorry - - - Uniformed Firefighters? I think that that we
11 said there that a statute is a general law if the
12 classification made is defined by conditions common to the
13 class and related to the subject of the statute. Right?
14 So why is that not what we have here?

15 MR. JULIAN: Well, I go to Adler and the
16 instruction of Judge Cardozo, in which he said - - -

17 JUDGE HALLIGAN: I think Uniformed Firefighters
18 probably is - - - is after that? Yes.

19 MR. JULIAN: Certainly, yes.

20 JUDGE HALLIGAN: Okay. So it - - - why is this
21 not a general law under Uniform Firefighters?

22 MR. JULIAN: It is not a general law under
23 Uniform Firefighters because seven counties have - - -

24 JUDGE HALLIGAN: But why are they not? You know,
25 the point is conditions common to the class. Why isn't

1 that a distinct condition? A different condition?

2 MR. JULIAN: It's - - - it is a different
3 condition. And - - - and it's - - - it - - - the problem,
4 respectfully, is 13.8 of the Constitution requires
5 supervisors from cities to be elected in odd years. And
6 the policy reasoning for that is laudable, and that is the
7 bright light of day in 1895, after the Tweed scandals, the
8 belief was that local elections should be in odd years.

9 Equally laudable is increasing voter
10 participation. But the way to do that is not through a - -
11 - a general - - - an attempt to bootstrap this into a
12 general law, as the way to do it is a constitutional
13 amendment. You have seven counties who are going to be
14 adversely affected, and they are - - - they are counties
15 that are under this law going to be holding elections every
16 year for their board of supervisors.

17 CHIEF JUDGE WILSON: Sounds antidemocratic.

18 MR. JULIAN: Huh?

19 CHIEF JUDGE WILSON: It sounds antidemocratic to
20 have elections every year.

21 MR. JULIAN: Judge, if you've run for office, and
22 I've run for office fourteen times in my life, it's not
23 only not democratic, it really discourages people from
24 running for office.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. JULIAN: Thank you.

2 MR. TSEYTLIN: Thank you, Your Honor. Misha
3 Tseytlin for the Ashlaw plaintiffs. I would like to
4 reserve two minutes for rebuttal.

5 My clients involve - - - include the county. I -
6 - - we also have five town clients and eight individual
7 plaintiff clients. And I'd like to spend the majority of
8 my time discussing our individual claims. But I would like
9 to make a point that with regard to the town clients, it's
10 very clear this is not a general law.

11 The law specifically excludes from its coverage
12 towns that are coterminous with villages. That is an
13 explicit exclusion that by the text of the Constitution,
14 clearly makes this not a general law, a special law. If
15 you have a law that specifically says we're going to carve
16 out this category, that is, I think, the clearest example
17 of a special law imaginable. I mean, it's almost on all
18 fours with with the Second Patrolmen's Benevolent case,
19 where there were four, I think, cities that were treated
20 differently.

21 Here, there are in practical effect, six towns
22 that are treated differently. So that makes this a special
23 law.

24 JUDGE HALLIGAN: So why would - - - even if we
25 agreed with you, why wouldn't it be correct that it would

1 still be valid as a special law that serves a substantial
2 state interest?

3 MR. TSEYTLIN: Well, I have two answers to that.
4 One, I was very pleased to see that this court was very
5 closely engaged with the constitutional text as we were
6 talking about Article IX, Section 1. If you read the
7 Constitution, there is absolutely not a word mentioning an
8 exception to allow the legislature to enact a special law
9 without getting that message.

10 That is a nontextualist exception with respect,
11 completely invented by this court out of whole cloth.

12 JUDGE HALLIGAN: So you're suggesting, if I'm
13 understanding you - - - but maybe I'm not, that our
14 decision in Greater New York Taxi was incorrect?

15 MR. TSEYTLIN: It is very clearly not supported
16 by the constitutional text.

17 JUDGE HALLIGAN: So - - - so - - -

18 MR. TSEYTLIN: Yes. Yes.

19 JUDGE HALLIGAN: - - - you're suggesting that - -
20 - would we need to overrule Greater New York Taxi in order
21 to rule for you on the question of whether it's permissible
22 as a special law?

23 MR. TSEYTLIN: No, Your Honor, I - - - I - - - as
24 I said before, I have two answers.

25 JUDGE HALLIGAN: Okay.

1 MR. TSEYTLIN: My first answer was - - -

2 JUDGE HALLIGAN: First is overrule Greater New
3 York Taxi?

4 MR. TSEYTLIN: No. First - - - yeah. Follow the
5 constitutional text. I mean - - - you know, my colleagues
6 got - - -

7 JUDGE HALLIGAN: What is the second one?

8 MR. TSEYTLIN: - - - beat up by for not - - - for
9 - - - on the constitutional text. But you know, what's
10 good for the goose.

11 But the second one is if that nontextualist
12 exception is to be remain, it should be read narrowly. And
13 when you have a provision of - - -

14 JUDGE HALLIGAN: By the way, did you ask us
15 specifically to overrule Greater New York Taxi? I don't
16 have the brief in front of me.

17 MR. TSEYTLIN: I believe that's fairly included
18 in Oneida County's brief and - - - you know. But our
19 primary submission is that if - - - that next nontextualist
20 exception should be read narrowly, and when you have the
21 only state interest here - - - claimed state interest, is
22 turnout in local elections, that is not a substantial state
23 interest.

24 JUDGE HALLIGAN: Why is that the case? I'm
25 curious about that because it seems to me there might be an

1 argument that encouraging voter turnout at any and all
2 elections would be something that is a benefit.

3 MR. TSEYTLIN: We're talking - - - if we're
4 talking about the precedent of this court. This court's
5 decision in Baldwin says that the contours of - - - of ward
6 lines is not a state interest. So who lives in a wards - -
7 -

8 JUDGE HALLIGAN: Well, but - - - maybe that's
9 distinct from increasing voter turnout. I'm just wondering
10 why that's - - - specifically that interest wouldn't be a
11 substantial state interest?

12 MR. TSEYTLIN: For the exact same reason that
13 Baldwin was correctly decided. That is to say that the
14 wards - - - who votes in the wards, whether it's turnout or
15 who wards are they, ultimately, they're only going to
16 determine what comes out of local legislation.

17 JUDGE HALLIGAN: If the interest was in
18 increasing voter turnout in state elections. Would that be
19 a substantial state interest?

20 MR. TSEYTLIN: Absolutely.

21 JUDGE HALLIGAN: Okay. So your argument is that
22 if - - - even if it's every local election across the state
23 that that's not - - - that's somehow not - - - you can't
24 make that a state interest. It's inherently a local
25 interest only?

1 MR. TSEYTLIN: Well, if it - - - well, if it's -
2 - - if it was every local election, we wouldn't be getting
3 into this argument - - -

4 JUDGE HALLIGAN: Fair point.

5 MR. TSEYTLIN: - - - because it would be a
6 general.

7 JUDGE HALLIGAN: Understood. But - - -

8 MR. TSEYTLIN: And - - - but that's - - - but
9 yeah, that's really important. What happens when a special
10 law is you're not acting equally on everyone. And for
11 example, the Chief Justice's question before.

12 JUDGE HALLIGAN: Okay. Let me reframe it.

13 MR. TSEYTLIN: Yes.

14 JUDGE HALLIGAN: Maybe that's helpful. If the
15 point is that it's going to increase voter turnout in a
16 very significant number of local elections. I'm just
17 trying to tease out is your distinction state versus local,
18 or is it that it needs to be uniform?

19 MR. TSEYTLIN: It - - - well, if it's uniform,
20 then we don't get to this question. Once it's nonuniform,
21 which it very, very clearly is for - - - at least, for
22 towns. Then it - - - then the distinction matters. You
23 know, to get to the Chief Justice's question and to answer
24 your question, the Chief Justice asked - - -

25 JUDGE HALLIGAN: Just make - - - the distinction

1 being - - -

2 JUDGE CANNATARO: Yeah. Which distinction?

3 JUDGE HALLIGAN: - - - state local, or the
4 distinction being uniform versus not uniform?

5 MR. TSEYTLIN: Uniform versus nonuniform goes to
6 whether it's a general or a special law.

7 JUDGE HALLIGAN: Yeah.

8 MR. TSEYTLIN: Once we're in a special law, then
9 it's not uniform. The distinction is state versus local.

10 JUDGE HALLIGAN: Thank you.

11 MR. TSEYTLIN: So for example, if the - - - if
12 the legislature were to pass a law tomorrow that said in
13 the city - - - in the Town of Champion, we will have
14 elections on a particular day and those elections have to
15 be - - - you know, done on red paper only. My submission
16 is that's a special law and there is no state - - -
17 substantial state interest sufficient to - - - under this
18 non nontextual exception to allow the state legislature to
19 signal - - -

20 JUDGE HALLIGAN: That might be because - - - you
21 know, whatever interest is served by red paper is not
22 substantial, as distinct from increasing voter turnout,
23 which might be substantial.

24 MR. TSEYTLIN: Fair enough, Your Honor. If you -
25 - - if Your Honor believes that if the legislature enacted

1 the following law tomorrow, in the Town of Champion, you
2 will have elections on a particular day, because that's
3 going to increase the turnout in the Town of Champion. My
4 respectful submission is the state, there is no substantial
5 state interest of the state in the number of people that
6 turn out in the Town of Champion for Town of Champion
7 elections.

8 JUDGE HALLIGAN: Because it is - - -

9 JUDGE CANNATARO: So let me - - -

10 JUDGE HALLIGAN: - - - small Town of Champion or
11 - - - or for some other reason?

12 JUDGE CANNATARO: Or is it because that it's not
13 universal in application?

14 MR. TSEYTLIN: Because it is the town's - - -
15 because it's town elections, the - - - for the town board
16 that only governs the town.

17 CHIEF JUDGE WILSON: So you - - - so you - - -

18 JUDGE TROUTMAN: So the State - - -

19 CHIEF JUDGE WILSON: - - - your argument has
20 nothing to do with whether it's special or general then.
21 It's just you don't view the state as having an interest in
22 local election turnout; is that right?

23 MR. TSEYTLIN: That's not correct, Your Honor.

24 CHIEF JUDGE WILSON: Okay.

25 MR. TSEYTLIN: Because if it was a general law

1 under the text of the Constitution, it doesn't matter if
2 it's a matter of statewide concern because the
3 Constitution's text says the legislature can act by general
4 law. Once the legislature does something unusual, it shall
5 have a special law.

6 CHIEF JUDGE WILSON: So let me - - - all right.

7 MR. TSEYTLIN: Yes.

8 CHIEF JUDGE WILSON: But let me - - - let me try
9 and just move you back.

10 MR. TSEYTLIN: Yes.

11 CHIEF JUDGE WILSON: Do you think that the state
12 has an interest in turnout in local elections? An increase
13 - - - in increasing turnout?

14 MR. TSEYTLIN: For purposes of the nontextualist
15 exception - - -

16 CHIEF JUDGE WILSON: No, no. Just generally.
17 Just generally.

18 MR. TSEYTLIN: Not a substantial state interest
19 sufficient under this court's case law, no.

20 CHIEF JUDGE WILSON: There's no substantial
21 interest of the state in increasing turnout in local
22 elections?

23 MR. TSEYTLIN: That's correct, Your Honor.

24 CHIEF JUDGE WILSON: And that's despite the fact
25 that the Constitution requires that there be elections?

1 Local elections?

2 MR. TSEYTLIN: Yeah. The - - - well, it's very
3 important. So the - - - the Constitution, the only time
4 the Constitution discusses local elections is Article IX,
5 Section 1. And that is a power given to the localities,
6 not to the state legislature. I don't think my friends
7 would even dispute that.

8 But in any event, I think it's important - - -
9 oh, I - - - I would like an opportunity to talk about our
10 Anderson-Burdick claims, unless there's more questions
11 about this.

12 You know, we brought claims on individual rights
13 claims on behalf of our individual rights plaintiffs under
14 the well-established Anderson-Burdick framework. Anderson-
15 Burdick is a famously fact-intensive framework that looks
16 to the amount of burden on voters, the actual state
17 interest involved, and whether the law advances the actual
18 state interest.

19 We were never given the opportunity to even
20 litigate these claims. When this case came before supreme
21 court, we said, hey, we got to develop our individual
22 rights claims. Please don't consolidate us with all these
23 Article IX claims. And we were told, don't worry, we'll
24 put your claims on a different track.

25 Then the Article IX claims won in front of the



1 Supreme Court. We were very happy about that. We go up to
2 the Appellate Division. We say, Appellate Division, if you
3 don't agree with us on this Article IX stuff, and we think
4 you should, please send our - - - our Anderson-Burdick
5 claims back to the trial court, as is done as a - - - as a
6 standard matter in Anderson-Burdick cases.

7 And what the Appellate Division tells us in its
8 opinion is on this record your individual rights claims.
9 With all respect to the Appellate Division, that's a
10 complete non sequitur. We haven't had a chance to develop
11 our record our - - - on our Anderson-Burdick claims. We
12 have - - - we had draft expert reports prepared that we
13 were ready to go at the supreme court.

14 JUDGE RIVERA: So you didn't stipulate to a
15 summary judgment there?

16 MR. TSEYTLIN: Oh, this is very important, Your
17 Honor. There was - - - we had our claims, the Article IX
18 claims, and then we had our individual rights claims. And
19 we told the Onondaga Supreme Court, don't consolidate us
20 because our Article IX claims they can go forward,
21 stipulated. But we need to develop facts on our Anderson-
22 Burdick claims. It's impossible to try Anderson-Burdick
23 claims without a factual record. They're always done with
24 experts, and it's very complicated.

25 So we said, please don't consolidate us. And - -

1 - and the - - - and supreme court says, well, if I do
2 consolidate, I promise you I'm going to set your - - -
3 your individual right claims on a different track. Your
4 motion to dismiss will be briefed faster than the cross-
5 motion for summary judgment. And then you'll get to go
6 forward on your individual rights claims. There was no
7 stipulation.

8 And then we get to the Appellate Division, and
9 they tell us we don't have a record. And then - - - and to
10 just justify that decision, they cite a couple of election
11 law cases under Election Law 16, which are done under
12 verified petitions, which of course is on evidence.

13 So we have this really bizarre situation where we
14 have standard fact-intensive claims, 66 paragraphs of
15 detailed allegations that we didn't get to develop facts
16 on. And then we're told by the develop - - - the Appellate
17 Division on this record, you lose.

18 JUDGE RIVERA: What's the facts you would be
19 developing?

20 MR. TSEYTLIN: Well, so the - - - they're the
21 facts about burdens and the facts about this claimed state
22 interest. With regard to burdens, we have expert
23 declarations that are drafted and ready to go, talking
24 about the - - - the ballot drop off and the confusion on
25 voters and the difficulty of getting voter participation on

1 individual - - - on local races, when you have these
2 overarching state and national races. Those are all
3 blocked - - -

4 CHIEF JUDGE WILSON: But are all of those really
5 sort of - - - sound sort of - - - you know, simplifying
6 them a little bit. But they sound as if you're saying we
7 have free speech issues, the political speech that we'd
8 like to engage in. And the problem is that other speech
9 that's happening at the same time under this is going to be
10 more attractive to people, and they're not going to listen
11 to us.

12 I'm not sure that makes that a First Amendment
13 claim of any sort. I'm not even sure the framework applies
14 to that nature of claim.

15 MR. TSEYTLIN: Well, so the cases that are most
16 analogous to this are like the dropbox - - - elimination of
17 dropbox cases - - -

18 CHIEF JUDGE WILSON: Dropbox.

19 MR. TSEYTLIN: - - - dropbox cases that have come
20 up in the Anderson-Burdick framework. Or the voter ID
21 cases, where - - - where you have voters saying things - -
22 -

23 CHIEF JUDGE WILSON: Those are a little bit
24 different though. That's not speech competing with speech.
25 Right? That's a mechanism that's being applied to the

1 ballot box or voter registration - - - I - - - you know, ID
2 or those sorts of things. It's not - - - your basic
3 complaint here is our local elections, the speech about
4 them is going to get drowned out by more important national
5 speech or statewide speech.

6 MR. TSEYTLIN: Well, just for one example on
7 dropbox. So the primary complaint on - - - in the dropbox
8 cases is that you eliminate the dropboxes, you're going to
9 have longer lines, and it's going to be harder to vote.
10 One of our well-pleaded allegations is you're going to have
11 longer lines for folks, because you're going to have - - -
12 the folks that want to vote in local elections are not
13 going to be voting in these crowded elections. Maybe that
14 will prove out, or maybe it's not, but it's way too early,
15 I would respectfully submit, to engage in that kind of
16 speculation.

17 We have well-pleaded allegations. We - - -
18 there's, contrary to what the Appellate Division said,
19 there is no record on these. And the other half of the
20 equation is we pleaded that the state's claimed interest in
21 greater turnout is illusory. We said that there will be so
22 much - - - we alleged that there will be such substantial
23 drop off that while more voters will be at the polls, they
24 wouldn't be - - - most of them wouldn't even be voting in
25 the local elections. They just - - - they would ignore it.

1 And you can look at the - - - the town's amicus
2 brief here, of a small case study of what happens.

3 JUDGE TROUTMAN: So you're arguing that because
4 there are national and statewide races, that there's too
5 much information for them to consider, so they'll ignore
6 their local interest?

7 MR. TSEYTLIN: The - - - the expert reports that
8 we will submit is that there is significant voter drop off.
9 I mean - - -

10 JUDGE TROUTMAN: So that's what you're saying.

11 MR. TSEYTLIN: Well - - -

12 JUDGE TROUTMAN: That the - - - it's too much.
13 So it's better that they keep it the way that it is. They
14 need to have their own individual elections, and changing
15 things is adversely impacting their ability to participate
16 in their local governance.

17 MR. TSEYTLIN: But - - - certainly, that's one
18 way to put it. The other way to put it in the - - - in
19 terms of the Anderson-Burdick inquiry, is the state's
20 claimed interest in greater turnout. Well, yeah, there
21 will be more people voting in the election, but a lot of
22 them are going to be just ignoring the down ballot races.
23 And there are this substantial scholarly literature that -
24 - -

25 JUDGE RIVERA: Doesn't that turn on the message

1 of those local candidates?

2 MR. TSEYTLIN: Well, the - - - again, this - - -
3 it's very difficult to discuss this before the court
4 because all we do is have pleaded allegations that the - -
5 - that the benefits are illusory. Once we have the kind of
6 thing that's always done in Anderson-Burdick throughout the
7 nation, which is we'll submit our experts, the state will
8 submit their experts, then this court or the - - - you
9 know, the supreme court and the Appellate Division, and
10 then maybe this court will have - - -

11 JUDGE TROUTMAN: So you were denied the
12 opportunity to present that?

13 MR. TSEYTLIN: We were completely denied the
14 opportunity. We were completely bait and switched. We
15 were moved from Jefferson County to Onondaga County on the
16 promise that we could develop our claims. We were not
17 given the opportunity in the supreme court.

18 We go up to the Appellate Division. We say,
19 okay, I can read the room we were going to lose on the - -
20 -

21 JUDGE TROUTMAN: I think you've already said
22 that.

23 MR. TSEYTLIN: We were - - - yeah. We were - - -
24 we said on this record you lose. You know, we're pleading
25 before this court let us develop our claims. Maybe their

1 experts will prove out their case, maybe the - - - our
2 experts will prove out ours.

3 JUDGE RIVERA: Are individuals similarly situated
4 prohibited in the future from bringing such a claim?

5 MR. TSEYTLIN: Certainly. If they're - - -
6 they're not my clients. They could - - - they would be - -
7 - I would think they would be foreclosed by the Appellate
8 Division's statewide precedent. But certainly, you know,
9 with regard to my clients, we - - -

10 JUDGE RIVERA: The precedent - - - I thought the
11 precedent was it's too speculative, you didn't put in
12 enough?

13 MR. TSEYTLIN: I mean, it would be quite odd if
14 the precedent is you didn't have enough evidence. Well,
15 we've had no trial, so we haven't even had a chance to
16 present evidence. But I mean, the bottom line is for my
17 clients, which are the ones I represent, we brought a
18 complaint, we made well-pleaded allegations, and we
19 basically had the courthouse doors closed on us for reasons
20 that I just do not understand.

21 CHIEF JUDGE WILSON: Thank you.

22 MR. TSEYTLIN: Thank you.

23 MS. ROSENBLUTH: May it please the court. Sarah
24 Rosenbluth for respondents, Governor Hochul and the State
25 of New York.

1 There are a few different issues here. So if I
2 can, I'd like to start by addressing the structural
3 constitutional issues followed by the general versus
4 special law question, the substantial state interest, and
5 then finish with the Anderson-Burdick claims.

6 So I think I want to start just by trying to
7 clear up some confusion regarding 2.c. Obviously, there
8 was some discussion of that earlier.

9 So 2.c. romanette (ii) sub 1 prohibits local
10 governments from enacting inconsistent laws regarding a
11 number of subjects, including terms of office. Now, we
12 agree - - - so this - - - so one thing just to clear up is
13 that this applies differently to counties and towns. And
14 we have both counties and towns as plaintiffs in this
15 action.

16 So as - - - we agree that there's no general
17 consistency requirement to county charters. So as to
18 counties, the significance of 2.c.ii.1 is that it just
19 shows and I think it really undermines the argument that
20 there's anything implicit in the Constitution that gives
21 counties an absolute right to set terms of office. Because
22 - - -

23 JUDGE CANNATARO: But it doesn't apply to them
24 directly; is that what you're - - -

25 MS. ROSENBLUTH: Correct. Correct. It - - - no,

1 I'm sorry. To count - - - to charter counties.

2 JUDGE CANNATARO: Charter county?

3 MS. ROSENBLUTH: Yes. Because there are some
4 noncharter counties that have filed the amicus briefs in
5 this case. I want to say all the plaintiffs here are
6 charter counties. But there are some noncharter counties
7 that have filed amicus briefs. I think they have suggested
8 that they can rely on 1.h.1. But that's not - - - it's - -
9 - they're allowed to opt in to 1.h.1., but they haven't yet
10 and therefore are bound by 2.c.ii.1.

11 JUDGE TROUTMAN: Aren't terms of office an
12 implicit part of establishing a form of government as set
13 forth in Section 1.h.1.?

14 MS. ROSENBLUTH: No. it's not, Your Honor,
15 because plaintiffs have never explained how the even-year
16 election law interferes with their right to form an
17 alternative form of government and why they are inherently
18 linked.

19 And if I could just give a little bit of
20 background by way of answering this question. So the New
21 York State Constitution historically set boards of
22 supervisors as the default form of county government. And
23 that form of government concentrated executive and
24 legislative power in one entity, i.e., the board of
25 supervisors.

1 But under today's Constitution, the innovation is
2 that now the legislature must permit counties to adopt
3 their own charters, setting forth alternative forms of
4 government which may allocate executive and legislative
5 functions as per local needs.

6 So as I mentioned, all the plaintiffs are county
7 - - - I'm sorry, are charter counties, and they've all
8 adopted charters that establish an elected county executive
9 as a totally separate from an elected county legislature.
10 So that's what's referred to when we talk about the form -
11 - - alternative form of government.

12 And I think it's actually helpful to refer back
13 to constitutional text from earlier on. Now, admittedly,
14 this more that the sort of elaboration on this point that
15 is no longer in the Constitution, but I think it provides
16 helpful context here. So for example, in the 1935 Fearon
17 amendment to Article IX this was the first one that
18 basically directed the legislature to provide for the
19 organization of government. And it said, "any such form of
20 government." I'm sorry. The organization - - - sorry.
21 This is the first time that the Constitution directed the
22 legislature to, by law, provide for the organization and
23 government of counties and provide for alternative forms of
24 government. And then it says, "any such form of government
25 shall set forth the structure of the county government and

1 the manner in which it is to function."

2 So there's really nothing in conflict between - -
3 - so when a state law says you have to have elections in
4 even numbered years, the plaintiffs have not at all
5 attempted to make out a showing of how that prevents them
6 from adopting a particular form of government that that
7 allocates executive and legislative functions in different
8 places. That's all that form of government is referring
9 to.

10 JUDGE SINGAS: So you're basically saying that it
11 does not include terms of office? Like, when they're
12 talking about alternate forms, they're talking about
13 whether a county executive will be elected or appointed,
14 but has nothing to do with terms of office. And then you
15 have to go to 2.2 - - - c.ii. - - -

16 MS. ROSENBLUTH: Yeah. Right. So if I can get
17 back to the 2.c.ii issue?

18 JUDGE SINGAS: Yeah.

19 MS. ROSENBLUTH: So as I was discussing the chart
20 - - - that that admittedly is not applicable to charter
21 counties who are not required to have - - -

22 JUDGE GARCIA: So then, on that point - - -

23 MS. ROSENBLUTH: Yeah.

24 JUDGE GARCIA: - - - for charter counties?

25 MS. ROSENBLUTH: Yes.

1 JUDGE GARCIA: You - - - the authority to do
2 what was done here is purely from 2.b.1. Right? That the
3 legislature can do this?

4 MS. ROSENBLUTH: I think it's 2.b.ii. Yes.

5 JUDGE GARCIA: Oh, I'm sorry. 2.b.ii?

6 MS. ROSENBLUTH: I think.

7 JUDGE GARCIA: Okay. But the legislature by - -
8 - yeah - - - general law or special law - - -

9 MS. ROSENBLUTH: correct.

10 JUDGE GARCIA: - - - can do this?

11 MS. ROSENBLUTH: Yes.

12 JUDGE GARCIA: Special law under certain
13 conditions. But so 2.c. doesn't apply to charter counties?

14 MS. ROSENBLUTH: It doesn't apply to charter
15 counties. It does apply to towns. And notably my friend
16 who represents the Ashlaw plaintiffs does also represent
17 towns. And I think the 2.c. argument is totally fatal as
18 to his town plaintiffs, because it definitely does apply to
19 local legislation passed by towns.

20 JUDGE GARCIA: So what, in your view, to your
21 adversary's point, if we were to agree with you on this,
22 what is it the state can't do by general law?

23 MS. ROSENBLUTH: Well, the State cannot repeal
24 the county charter law and not - - - not allow counties to
25 adopt charters. The county's authority - - -

1 JUDGE GARCIA: Full scale repeal?

2 MS. ROSENBLUTH: Correct. Correct. It has to
3 allow counties to adopt charters.

4 JUDGE GARCIA: What if it repealed it and
5 replaced it with something else? Does that allow them to
6 do that?

7 MS. ROSENBLUTH: I mean, as long as they're able
8 to adopt an alternative form of government besides the
9 default in the Constitution, which is the Board of
10 Supervisors. As long as there's some latitude toward - - -
11 for them to adopt an alternative form of government, then
12 1.h.1. would be satisfied.

13 JUDGE GARCIA: So is the bottom line, it gives
14 you the right to self-government, but we can always change
15 the terms of what that means?

16 MS. ROSENBLUTH: No. Because there would still
17 be authority for the localities. So for - - - so first of
18 all, you have the adopt - - - ability to adopt a charter
19 that - - - and you have the ability by a charter - - -

20 JUDGE GARCIA: And you can call it a charter, but
21 - - - we'll tell you then later what could be in there.

22 MS. ROSENBLUTH: Okay. So let's say you have the
23 ability to adopt an alternative form of government that is
24 not a board of supervisors that necessarily concentrates
25 executive and legislative power. You also as a town have

1 the ability to pass all sorts of local laws that are
2 enumerated in 2.c.ii. Now, for some of them there is a
3 consistency requirement.

4 JUDGE GARCIA: But what - - - right. I mean,
5 it's called a Bill of Rights, right?

6 MS. ROSENBLUTH: Yes.

7 JUDGE GARCIA: So what rights other than you can
8 govern yourselves and you can have a thing called a
9 charter, what rights do the - - - let's stick with charter
10 counties.

11 MS. ROSENBLUTH: Yeah.

12 JUDGE GARCIA: What rights do they have that
13 cannot be changed by general law?

14 MS. ROSENBLUTH: They have the right to have an
15 option to them of a - - - they have the right to choose a
16 legislatively prescribed option of a form of government
17 that is not a board of supervisors.

18 JUDGE CANNATARO: What else besides form of
19 government? Anything else under Section 1?

20 MS. ROSENBLUTH: Well under 1.h.1. that's what
21 it's about.

22 JUDGE CANNATARO: So it's just the form? It's
23 whether you want to go with the traditional Board of
24 Supervisors - - -

25 MS. ROSENBLUTH: Yeah.

1 JUDGE CANNATARO: - - - or something alternative,
2 like a county executive type form of government?

3 MS. ROSENBLUTH: Yes. Under 1.h.1., yes. Now
4 certainly, under - - -

5 JUDGE RIVERA: So the form of gov - - - sorry.
6 And form of government as you interpret it is the
7 allocation of authority?

8 MS. ROSENBLUTH: Um-hum. Yes.

9 JUDGE RIVERA: And that's it?

10 MS. ROSENBLUTH: Yes.

11 JUDGE RIVERA: So you do not think that whatever
12 the term of office, might affect the thinking about the
13 allocation of authority?

14 MS. ROSENBLUTH: I mean, there's ways in - - - I
15 guess I don't quite understand the question.

16 JUDGE RIVERA: Well, if you designate a very
17 short period of time for a term - - -

18 MS. ROSENBLUTH: Yeah.

19 JUDGE RIVERA: - - - that might very well affect
20 whether or not you think that individual in that role
21 should have certain types of authority.

22 MS. ROSENBLUTH: Sure. But the county has still
23 made the choice as an initial matter as to who should
24 exercise that power. And that's - - -

25 JUDGE RIVERA: Yes. But that may - - - that's my

1 point. Your argument is so it wouldn't matter how long
2 they're in that office, that is not a factor in considering
3 how to allocate authority. And I'm pushing you a little
4 bit on that.

5 MS. ROSENBLUTH: I - - - I see. I guess - - -

6 JUDGE RIVERA: As you can imagine.

7 MS. ROSENBLUTH: - - - my answer would be no,
8 that's not part of what a form of government means. And
9 then just to sort of finish out the point. Sorry.

10 JUDGE GARCIA: So it says Bill of Rights, though,
11 and it seems like there's really only one right in there.

12 MS. ROSENBLUTH: Well, there's a number of rights
13 that are enumerated that are not at all at issue in this
14 case regarding eminent domain and so forth. So - - - you
15 know, there's certainly content to those rights as well.
16 And there is fundamentally a right to an elective form of
17 government. That's really the basic proposition here.

18 JUDGE SINGAS: So you're saying that basically
19 they couldn't pass a law that said every county has to
20 appoint - - - or you know, the board of elections or board
21 of directors has to appoint the county executive versus
22 elect one? They couldn't pass a law that did that?

23 MS. ROSENBLUTH: Right. I mean, I think - - - I
24 think that what they're entitled to per 1A is an elective
25 legislature. So certainly, and they're absolutely right

1 that the state legislature's powers under Section 2 are
2 constrained by Section 1. So the legislature could not
3 pass a law requiring appointed legislative officers at the
4 local level. That's absolutely correct.

5 JUDGE SINGAS: So that would be a right, then?

6 MS. ROSENBLUTH: And that is a right. And it's
7 said expressly in 1A and 1B.

8 And then, so I just want to finally just put a
9 finer point on - - - on just to kind of where I started
10 from, which is the idea that the fact that terms of office.

11 So we - - - you know, we agree that 2.c.ii. does
12 not apply to county - - - to chartered counties, but the
13 fact that terms of office is expressly outlined in 2.c.ii.,
14 I think, is evidence that the constitutional drafters knew
15 how to be clear about that and be explicit about that when
16 they wanted to do so.

17 And finally - - -

18 JUDGE CANNATARO: And so they would have put it
19 in 1.h.1. if they meant terms of office, is that - - -

20 MS. ROSENBLUTH: Correct. Correct. And so as -
21 - - I think there's - - -

22 JUDGE RIVERA: Well, assuming, as you do, that
23 form of government does not include term?

24 MS. ROSENBLUTH: Yes. Right.

25 JUDGE RIVERA: If we disagree with you on that,

1 do you lose?

2 MS. ROSENBLUTH: No. Because I think that - - -
3 well, I think that - - -

4 JUDGE RIVERA: Or do they win?

5 MS. ROSENBLUTH: No. Because, I mean, we still
6 certainly there's - - - 1.h.1. grants counties no
7 freestanding rights whatsoever. There - - - it's simply a
8 direction to the legislature to implement certain rights.
9 And this is what I wanted to get back to, which is that
10 there was some discussion, I believe, during the first
11 attorney's argument, which is to the effect - - - I think
12 sort of the logical conclusion of what she was arguing is
13 that, essentially, the legislature may never amend MHRL 33.

14 I mean, that's a pretty unusual position. And
15 there's a lot of provisions in the Constitution that direct
16 the legislature to take some action. So their theory
17 essentially means that any time the Constitution says the
18 legislature shall do X, Y, Z, then no legislature can ever
19 choose to change that.

20 JUDGE HALLIGAN: Are you aware of any other - - -
21 over here.

22 MS. ROSENBLUTH: I'm sorry.

23 JUDGE HALLIGAN: Are you aware of any other
24 circumstances in which effectively, you constitutionalize a
25 statute that way?

1 MS. ROSENBLUTH: I am not, off the top of my
2 head, and I think that would be a very unusual thing to
3 happen.

4 So I do want to move on and discuss the general
5 law issue, unless there are further questions on this.
6 Okay. So - - -

7 JUDGE HALLIGAN: Will you specifically, with
8 respect to the general law, address the exemptions and how
9 your theory squares with them?

10 MS. ROSENBLUTH: Yes.

11 JUDGE HALLIGAN: Particularly the town villages
12 and the three years?

13 MS. ROSENBLUTH: Sure. So I think just to sort
14 of frame this conversation, what I'd like to - - - well, I
15 think - - - you know, the overriding point is that under
16 this court's precedent a statute that applies to a defined
17 class is general, so long as the statute's conditions are
18 reasonable and related to the subject of the statute.
19 Excuse me.

20 There's been a lot of discussion about how this
21 affects different counties. I mean, first of all, I just
22 want to say that counsel for Oneida made representations
23 about how this affects a number of other counties who are
24 not plaintiffs to this action. So that's just a point I
25 want to make note of.

1 But in any event, I think the key question is
2 whether any differential impact on localities is a function
3 of intentional legislative design, in which case the
4 statute is a special one, or whether it is merely a
5 function of pre-existing local circumstances. So really,
6 to use a sort of intentionally extreme example to
7 illustrate the point. A statute that textually applied
8 only to counties that start with the letter B or to only to
9 counties that border Seneca Lake - - - you know, those
10 would clearly be special laws.

11 JUDGE CANNATARO: What's your authority for this
12 kind of distinction?

13 MS. ROSENBLUTH: I mean, I think you get it from
14 - - - really I mean, it's just sort of reading all the
15 cases together and putting them all together. But I mean,
16 I think, it - - - that is sort of what you tend to see. So
17 for example - - - okay, so one example I think is the Hotel
18 Dorset case, where, I mean, you had a law that was pretty
19 clearly intended to apply to the MoMA in New York City.
20 But it was - - - but the way that the statute was
21 structured, it sort of left open the possibility that any
22 other cultural institution could meet those.

23 JUDGE GARCIA: But this does - - -

24 JUDGE CANNATARO: And that would be a - - - I'm
25 sorry, Judge. That would be a general statute, even if it

1 was clearly drafted to only have an impact on one person or
2 entity?

3 MS. ROSENBLUTH: So I - - - I think that that
4 Hotel Dorset kind of leaves that open. I - - - our
5 position would be, yes. If there are other - - - if
6 there's - - - literally, if the statute is literally
7 designed to apply to a class of one, I think that would be
8 hard to say it's a general law. The Hotel Dorset is an
9 unusual case because you read the case and it really seems
10 to be driving towards that conclusion. It seems very clear
11 that it was only targeted towards the MoMA and yet the
12 court held. I don't think there's a holding on the general
13 versus special issue, but it sort of suggested that that
14 was not a problem because there were other institutions
15 that could meet its criteria. But we would still have the
16 fallback of the special - - -

17 JUDGE CANNATARO: What is - - -

18 JUDGE RIVERA: So the mere possibility that
19 others might fit that class in the future is a basis for
20 the distinction?

21 MS. ROSENBLUTH: I think that anyone else - - -

22 JUDGE RIVERA: These externalities?

23 MS. ROSENBLUTH: - - - that anyone else can. I
24 mean, I think it would have to be that it's - - - it's
25 written in such a way that any number of institutions or

1 entities would be covered. I mean, that's - - - you know,
2 that's an extreme case. That's certainly not our case.
3 And we obviously do have the backup argument of the
4 substantial state interest here.

5 JUDGE GARCIA: What about the coterminous point
6 your adversary made?

7 MS. ROSENBLUTH: Right. So towns are exempted if
8 they are entirely coterminous with villages.

9 JUDGE GARCIA: Right.

10 MS. ROSENBLUTH: And that - - - the reason is
11 because no villages are covered by this law at all.

12 JUDGE GARCIA: Right. No. I understand it's
13 reasonable. Goes to the reasonable carve-out.

14 MS. ROSENBLUTH: Right.

15 JUDGE GARCIA: But isn't it applied by its terms
16 differently to differently situated towns?

17 MS. ROSENBLUTH: Well, I would say that - - -
18 that actually, if you look at the definition of a general
19 law, it says that it has to apply alike. A law which
20 applies in terms and in effect applies alike to all
21 counties, all cities, all towns, or all villages. So I
22 think that - - - you know, you could argue that this
23 applies alike to all counties and to all towns. And so
24 it's - - - I'm sorry, all counties. And so, therefore, you
25 don't really have to go any further. But - - -

1 JUDGE CANNATARO: But it doesn't apply to all - -
2 -

3 MS. ROSENBLUTH: It does apply to all counties.

4 JUDGE CANNATARO: Well, it applies to all
5 counties, but it doesn't apply to all towns.

6 MS. ROSENBLUTH: It only - - - towns are only
7 exempted if they are entirely coterminous with a village,
8 and no village at all is covered by this law. And my
9 understanding is that counties - - - I'm sorry, towns that
10 fit that category in those towns, the dominant local form
11 of government is the village, so it just wouldn't really
12 make sense in that case.

13 JUDGE CANNATARO: So is your argument that the
14 statute errs on the side of those coterminous entities,
15 errs on the side of exempting them because it wouldn't have
16 application to any villages?

17 MS. ROSENBLUTH: Yes. Yes.

18 JUDGE CANNATARO: And that doesn't make it a
19 special law?

20 MS. ROSENBLUTH: No. No. I mean, the
21 legislature is entitled to set conditions. And here the
22 condition is county and town offices, except insofar as
23 they're enumerated in the Constitution, for the most part.
24 And so it doesn't have to apply it to villages.

25 JUDGE GARCIA: I'm trying to understand your

1 interpretation of the general law definition. So in your
2 view, if a law said it applies equally to all counties and
3 also to all villages beginning with the letter A, it would
4 be okay?

5 MS. ROSENBLUTH: No. I - - - I don't want to
6 rely too heavily on that rationale. I haven't fully
7 thought that one through. But so - - - but to Judge
8 Halligan's point about the exemptions, I do think that
9 almost all the exemptions here are constitutionally
10 required. And I think a case like Rozler v. Franger, which
11 is a Fourth Department case that was affirmed by this
12 court, is an example of a case that has upheld a statute
13 that does make exemptions for a savings clause or sort of
14 other - - - other cases that have been, like, grandfathered
15 in in some way.

16 And so I think the fact that there are exemptions
17 because it would be unconstitutional not to have those
18 exemptions, it's just a very odd situation where we're sort
19 of caught between a rock and a hard place. Where if we
20 extended the statute to those offices, it would be
21 unconstitutional to - - -

22 CHIEF JUDGE WILSON: What is it you would say
23 that the Constitution is trying to guard against - - -

24 MS. ROSENBLUTH: Yes.

25 CHIEF JUDGE WILSON: - - - by making a

1 distinction between special and general?

2 MS. ROSENBLUTH: I mean, I think it is intending
3 to guard against - - - well, I think really what it's
4 trying to guard against is if you have - - - and that's
5 sort of - - - let me just take a moment here.

6 So if it's a - - - I think a paradigmatic special
7 law would be one that, let's say, calls for the renovation
8 of a block of sidewalk in Buffalo or in any town. That's
9 something that the city itself could and probably should be
10 dealing with. And it's not really clear why the state
11 should get involved. So that's the type of thing where we
12 want to prevent the state from reaching in and intervening
13 in a very targeted way to something that another entity of
14 government should be dealing with.

15 But I think when we start to get to these
16 differential effects and this very abstract kind of points
17 here, we're kind of getting away from that concern. And it
18 doesn't really do anyone a lot of good to really focus on
19 every little possible differentiation, especially because
20 like I said, I do think the point also is to, of course, to
21 allow for the fact that there's many - - - to allow for
22 preexisting local circumstances.

23 Of course, counties have different forms of
24 government. That's the whole point. So of course it
25 applies a little bit differently in counties with boards of

1 supervisors.

2 And so I think that to Judge Wilson's point - - -
3 you know, if - - - as long as - - - I mean, the - - -
4 there's exceptions around the edges, but the main rule is
5 as long as we're not really targeting one place where it
6 should be dealt with by a different level of government.

7 And I do just want to also emphasize that the
8 even-year election law, despite various exemptions and so
9 forth, that are - - - it does apply to all county and town
10 legislative offices. Full stop. So that - - - yes.

11 JUDGE HALLIGAN: Can I just ask you to shift
12 gears for a minute?

13 MS. ROSENBLUTH: Yeah.

14 JUDGE HALLIGAN: The Anderson-Burdick claims.

15 MS. ROSENBLUTH: Sure.

16 JUDGE HALLIGAN: Right? So I - - - it seems to
17 me that the primary consequence that they're alleging are
18 the long lines. Yes? Okay. Is it your position that long
19 lines are never a severe restriction? Could they be a
20 severe restriction?

21 MS. ROSENBLUTH: So my position - - -

22 JUDGE HALLIGAN: Well, I mean, for example - - -

23 MS. ROSENBLUTH: Yeah.

24 JUDGE HALLIGAN: - - - if there was a statute
25 passed that sharply curtailed the hours that the polls are

1 open.

2 MS. ROSENBLUTH: No.

3 JUDGE HALLIGAN: And that resulted in long lines?

4 MS. ROSENBLUTH: So our position is that that's
5 actually not a plausible allegation because, first of all,
6 New York State now has - - -

7 JUDGE HALLIGAN: Well - - - but so just to be
8 clear. Long lines can be a severe - - -

9 MS. ROSENBLUTH: They can be.

10 JUDGE HALLIGAN: Okay.

11 MS. ROSENBLUTH: They can be. It's not plausible
12 here because New York now has universal mail voting. So
13 that's - - - it's - - -

14 JUDGE HALLIGAN: But it sounds to me like that is
15 verging towards testing the - - - the - - -

16 MS. ROSENBLUTH: Sure. But it - - -

17 JUDGE HALLIGAN: - - - factual allegation itself.

18 MS. ROSENBLUTH: So - - - okay. But if we have a
19 presumption of constitutionality, it's - - - that has to do
20 some work as well. And it's just a little bit strange to
21 say, oh, there's going to be long lines when actually let -
22 - - and I also just want to make one other point, which is
23 that State Board of Election Regulations, I believe it's 9
24 NYCRR 6210.19(d) does require that local - - - that local
25 boards of elections and local polling stations have

1 sufficient resources on hand to make sure there's never
2 more than a thirty-minute wait.

3 JUDGE HALLIGAN: Okay. So I take it one of their
4 arguments is that allowing for dismissal at this juncture
5 could make it difficult to proceed with other types of
6 claims in the future. Right? And you identify, it looks
7 to me, just a handful of cases where there is dismissal at
8 this phase. Two out of the Appellate Division, one from
9 2011 out of the Southern District of Indiana, and a Ninth
10 Circuit case, which looks to me like it was about a very
11 specific senate vacancy.

12 MS. ROSENBLUTH: Yeah.

13 JUDGE HALLIGAN: Is there anything more out there
14 that we should look to to find some comfort at dismissal at
15 this stage?

16 MS. ROSENBLUTH: Yes. I think that matter of
17 Walsh v. Katz from this court in 2011, is directly on
18 point. I believe it was a pleading stage dismissal. But
19 it basically does take - - - it doesn't rely on any factual
20 - - - any factual - - -

21 JUDGE HALLIGAN: But it is atypical, is it not,
22 to dismiss Anderson - - -

23 MS. ROSENBLUTH: I don't believe so. First of
24 all, I - - -

25 JUDGE HALLIGAN: Well, maybe - - - what should

1 give us comfort at doing it at this stage - - -

2 MS. ROSENBLUTH: Well, that's what I want to say
3 - - -

4 JUDGE HALLIGAN: - - - in this case?

5 MS. ROSENBLUTH: - - - about Walsh v. Katz, where
6 there's no - - - that case relies on legal propositions to
7 say - - - that was about a residency requirement. And I do
8 want to make the point that plaintiffs' claims under the
9 Anderson-Burdick framework are entirely state
10 constitutional claims. So the federal cases do have a
11 little bit less relevance. They're not irrelevant, but
12 just take them for what they're worth.

13 And Walsh did hold as a legal matter that the
14 residency requirement at issue impacted the right to vote
15 only in an incidental and remote way. There was no direct
16 and appreciable impact on the right to vote.

17 JUDGE GARCIA: But I don't understand why your
18 defense of this - - - in terms of lines wouldn't be the
19 same for anything, shorter hours, no ballot boxes? Because
20 you can always mail your vote in. Or there's a statute
21 that says you can't have a thirty-minute wait. So I'm
22 cutting the hours in half. But hey, you can mail your vote
23 in, and you're only going to have to wait thirty minutes.

24 MS. ROSENBLUTH: I also just want to say that - -
25 - I mean, that point taken. I mean, I do think that - - -

1 you know, it should be understood that there's many ways of
2 voting here. I understand your point. To that I would
3 just say that there's - - - counsel makes reference to 66
4 well-pleaded paragraphs in the complaint. There's really
5 very little detail in those. There's - - - and I - - - and
6 I think they even plead in their own complaint about the
7 number of offices that are up for - - - that will be added
8 to the ballot. I think we're talking - - -

9 JUDGE SINGAS: Isn't that his point? He'd like
10 to get more detail through a factual development?

11 MS. ROSENBLUTH: Yes. But they're very, very
12 sketchy. I would say they're - - - he calls them well-
13 pleaded allegations, and I would dispute that. So I think
14 - - - so we're talking about, I believe, approximately four
15 to twelve additional - - - and this is a matter of public
16 record that there's - - - it's a matter - - - matter of
17 four to twelve additional slots on the ballot.

18 So it's just not plausible to believe that that's
19 so going to swamp the - - - it's going to become so
20 burdensome, especially when we - - - the data that we do
21 have in the record and I mean the legislative record, not
22 the litigation record, does show that the ballot drop off
23 effects are real. But in the academic research papers that
24 we cite that were before the legislature, it shows that
25 drop off effects are vastly outweighed by voter - - -

1 increased voter turnout.

2 So there's nothing in the complaint that suggests
3 that the magnitude of the issue, when it - - - I don't
4 think they dispute the degree of the impact on voter
5 turnout.

6 So I think we would need something to say that
7 there's such an overwhelming ballot drop-off effect that
8 actually out - - - or sort of rivals the effects on voter
9 turnout. And that's nothing at all like we have in the - -
10 - like, there's just really no figures. There's - - - it's
11 very sketchy saying, oh, we're worried there's going to be
12 longer lines. We worry there's going to be - - - we're
13 going to have a harder time recruiting volunteers. It's
14 all very speculative.

15 And then just to very briefly - - -

16 JUDGE RIVERA: What more would they say?

17 MS. ROSENBLUTH: Well, I mean, if - - -

18 JUDGE RIVERA: Are you saying they should have
19 had their experts do up a whole research paper and attach
20 that?

21 MS. ROSENBLUTH: No. I mean, I think that they
22 could allege data from other jurisdictions that is widely
23 available. And I don't think it supports their claim that
24 - - - the data that we - - - that does exist here that - -
25 - that is in the legislative record, it only supports our

1 side.

2 JUDGE RIVERA: Unsurprising, right? I mean,
3 that's unsurprising.

4 MS. ROSENBLUTH: Okay. Sure. Fair enough. But
5 I mean, I think that in the face of the presumption of
6 constitutionality of the statute and - - - you know,
7 significant legislative findings, there - - - in light of
8 that presumption, their burden is to come forward - - -

9 JUDGE HALLIGAN: But that presumption doesn't
10 kick in at the time when you're deciding whether the
11 statute is constitutional or unconstitutional. Does that
12 weigh with the same force when you're deciding whether to
13 allow a litigation to proceed, to decide that very
14 question?

15 MS. ROSENBLUTH: I'd have to think about that a
16 little bit more. Point taken. However, I mean, I do think
17 that it - - -

18 JUDGE RIVERA: Well, they might want to argue
19 what's in the legislative record was, of course, selective
20 to support what the legislature wanted to do - - -

21 MS. ROSENBLUTH: I mean - - -

22 JUDGE RIVERA: - - - and they want to show
23 otherwise.

24 MS. ROSENBLUTH: I understand. But I think it's
25 pretty widely accepted, and I do not believe they are

1 contesting the fact that this - - - and they've been saying
2 again and again increase voter turnout, it's a laudable
3 goal. You know, it's really nice that it's going to do
4 that. And I think everyone agrees. And we're talking
5 about orders of magnitude in the increased turnout.

6 JUDGE RIVERA: So is your point that the
7 legislature and that we - - - no court can look beyond
8 that, that the legislature could have decided, okay, there
9 - - - maybe there's some real concern, right? There's some
10 merit to their concerns. But it's outweighed by the fact
11 that many, many, many more people are going to go to the
12 ballot box?

13 MS. ROSENBLUTH: Yeah. Yes. I mean, I think - -
14 -

15 JUDGE RIVERA: - - - and that the courts just
16 have no role - - -

17 MS. ROSENBLUTH: No. I just think that in order
18 to be - - -

19 JUDGE RIVERA: - - - in looking behind that?

20 MS. ROSENBLUTH: - - - a well-pleaded allegation,
21 as they insist that they put forward, it would have to give
22 some plausible basis to believe that this effect - - -

23 JUDGE RIVERA: Well, you agree there is an
24 effect.

25 MS. ROSENBLUTH: There is an effect.

1 JUDGE RIVERA: You're just saying it's outweighed
2 by something else?

3 MS. ROSENBLUTH: Yes. But it's orders of
4 magnitude larger.

5 JUDGE RIVERA: Yes. And so that's my point. Is
6 your argument that the court cannot look behind a
7 legislative - - -

8 MS. ROSENBLUTH: No.

9 JUDGE RIVERA: - - - determination to that
10 effect?

11 MS. ROSENBLUTH: I think that if they - - - if
12 they put in their complaint some data from other
13 jurisdictions - - - other jurisdictions providing a reason
14 to support the allegation that this is actually a real
15 concern, and it's not just - - - it's absolutely not
16 outweighed by turnout, but they haven't done that here.

17 JUDGE RIVERA: But what if they just made a
18 factual allegation of that effect?

19 MS. ROSENBLUTH: They - - - they've not made any
20 - - -

21 JUDGE RIVERA: Don't we have to accept that it's
22 true and move on?

23 MS. ROSENBLUTH: They've made no factual
24 allegation about the size of that effect. I will say.

25 JUDGE RIVERA: And that's what's missing?

1 MS. ROSENBLUTH: Yes. And I just also wanted to
2 briefly touch on this - - - this is going back to my point
3 about the general law. I just wanted to briefly touch on
4 the Baldwin case that they've cited. I do think that case
5 is easily distinguishable because that case only considered
6 the validity of a local law and said this was properly
7 within the purview of the locality.

8 I think anything that says about the state power
9 is at best dicta. There is really no opportunity for the
10 court in that case to consider what was and was not a
11 proper exercise of state legislative authority.

12 And I'm happy to discuss the state's substantial
13 interest in these areas. But I see my red light is on.
14 Would that be helpful?

15 CHIEF JUDGE WILSON: I think we're okay.

16 MS. ROSENBLUTH: Okay. Great. Thank you very
17 much.

18 MR. HUNT: May it please the court. Brad Hunt
19 from Mackenzie Hughes for respondent Dustin Czarny.

20 I would start by making one point that has not
21 actually been addressed so far in the arguments today. And
22 that is that if you look at Section 1 of Article IX, there
23 are actually three specific references in the text of that
24 amendment of that - - - of that provision to any amendment
25 thereof, meaning an amendment of the - - - of a charter by

1 act of the legislature.

2 It's twice in 1.h.1. and once in 1.h.2. And the
3 - - - so the Constitution specifically contemplates that
4 there can be amendments of a - - - you know, the change to
5 the terms of charters by act of the legislature. And the
6 context in which that comes up is that what the
7 Constitution says is that certain kinds of amendments are
8 subject to referendum requirements, none of which apply
9 here, and none of which have even been argued that they
10 apply here. But I do think it's instructive that right
11 there in a - - - in Section 1, there is express
12 contemplation that, you know, a county charter can be
13 amended there by act of the legislature.

14 I - - - and - - - you know, I would reiterate the
15 points that - - - that the state has made that - - - you
16 know, what Article IX - - - what Article IX, Section 1,
17 does is say, you know, state and county shall be empowered
18 by general law to adopt charters. And the general law in
19 question is the Municipal Home Rule Law. So I think - - -
20 you know, that's where you go to understand the details of
21 what charters can and can't do, and specifically the ways
22 in which they can and cannot supersede state law.

23 And that's Section 34 of the MHRL in particular,
24 is what addresses the question of what - - - in what
25 respects can a charter right supersede state law? And

1 there's, you know, a list of specific ways in which
 2 charters cannot supersede state law, including in Section
 3 G, a list of twenty different - - - different statutes,
 4 including the election law that, you know, state statutes
 5 that cannot be superseded by a - - - by charters.

6 And then, now in section H, the - - - you know,
 7 that of - - - of 34 of the Municipal Home Rule Law, that's
 8 where the even-year election law is - - - is codified
 9 there. It's specifically a provision that - - - that
 10 cannot - - - that cannot be amended by charters. So I
 11 think that the text of - - - the text of Section 1, as well
 12 as the - - - the clear text of Section 34 of the MHRL show
 13 that a charter right - - - you know, can be - - - can be
 14 amended by its general state law. And that's exactly what
 15 happened here with the even-year election law.

16 I would say that it is a - - - a general law
 17 under the test that this court put forth in the Uniformed
 18 Firefighters case. You know, the two basic requirements
 19 are that, you know, any difference in the way it plays out
 20 in a - - - in different local governments, say, has to be
 21 based on a - - - you know, defined conditions that are
 22 related to the subject of the law.

23 And you know, this - - - the even-year election
 24 law does exactly that. It defines - - - you know, it
 25 defines the terms of what - - - how - - - you know, how the

1 law will be enforced. And it's all related to the subject,
2 which is the timing of elections.

3 You know, it's the - - - the exemptions from the
4 law are actually, you know, all required by the
5 Constitution or by math. You know, they're related to the
6 timing of elections - - -

7 JUDGE GARCIA: So just, in your view - - -

8 MR. HUNT: - - - and what you have to do.

9 JUDGE GARCIA: - - - does reasonable apply to how
10 you define a subclass, or does reasonable apply to the
11 effects?

12 MR. HUNT: I'm sorry. Say that again?

13 JUDGE GARCIA: So it has to be reasonable.

14 MR. HUNT: Yes.

15 JUDGE GARCIA: There's - - - is that reasonable
16 as to the effects or reasonable as to the definition?
17 Like, this by definition doesn't apply to all towns, right?

18 MR. HUNT: Right. Yeah. I mean, I think the
19 answer is - - - you know, it - - - you would look at the -
20 - - you know, in this case, I would say it applies. You
21 know, it does not - - -

22 JUDGE GARCIA: It's reasonable that this has a
23 different effect because counties have different types of
24 governments.

25 MR. HUNT: And - - - right.

1 JUDGE GARCIA: Do you think by that same
2 reasonable standard to your excluding from its scope by
3 definition, certain towns?

4 MR. HUNT: I guess I wouldn't - - - I wouldn't
5 put it that way. I wouldn't say that even your - - -

6 JUDGE GARCIA: How do you get by the carve-out
7 definition?

8 MR. HUNT: I guess I - - - and I'm trying to
9 answer the question, so - - - you know, I'll do it - - -

10 JUDGE GARCIA: My question, but - - -

11 MR. HUNT: - - - doing my best here. I would not
12 say that the even-year election law carves out certain
13 towns by definition. You know, the - - - you know, it says
14 it won't - - - doesn't - - - it doesn't apply to towns that
15 are coterminous with a village.

16 JUDGE GARCIA: Right.

17 MR. HUNT: But that's - - - you know, that's not
18 targeting a particular - - -

19 JUDGE GARCIA: But in its terms, it doesn't apply
20 to all towns. Right? By its own terms, it does not apply
21 to all towns?

22 MR. HUNT: I - - - it does - - - okay. It does
23 not apply to - - - it does not apply to towns that are
24 coterminous with a village. But it's not - - - it's not
25 targeting - - - it's not targeting specific towns. And

1 it's - - - you know, it has that exemption, just because it
2 doesn't apply to villages at all. So - - - you know, I
3 guess - - -

4 JUDGE GARCIA: That's reasonable?

5 MR. HUNT: And that is - - - that is reasonable.

6 JUDGE GARCIA: And is that what we apply, or is
7 your point that it applies to all towns?

8 MR. HUNT: I think - - - I think you can
9 certainly apply that it's reasonable. I would - - - I - -
10 - you know, I think that's what this court did in Uniformed
11 Firefighters, which actually upheld provisions of the
12 Public Officers Law. I - - - you know, and said that they
13 trump a inconsistent New York City charter provision which
14 was about residency requirements and the provisions of the
15 Public Officers Law in that case, actually, specifically
16 distinguished cities with a population of one million or
17 more, which I think - - - you know - - -

18 JUDGE GARCIA: So then reasonable would apply to
19 that?

20 MR. HUNT: And this court said it's reasonable to
21 treat them differently, and that's okay. So I think you
22 can do the same thing here. If anything, I think there's
23 probably even a stronger - - - stronger case here than
24 there was in Uniform Firefighters.

25 And if there are no other questions, I will rest

1 on our papers.

2 CHIEF JUDGE WILSON: Thank you.

3 MR. HUNT: Thank you.

4 MS. CALLAHAN: Let me see if I can quickly make a
5 few points.

6 First, in terms of the argument that was just
7 made, that 1.h.1. does allow legislative amendment of a
8 charter only if it's approved on a referendum. And that's
9 in 1.h.1.

10 The state's attorney was asked, well, is there
11 anything that state legislation can't do? And the answer
12 was the state cannot prevent the counties from adopting a
13 charter. So a charter is like a constitution. The people
14 have to adopt the charter. And when they go to adopt the
15 charter, that's going to change their form of government,
16 which they're allowed to do under the Constitution, under
17 1.h.1.

18 What do they need to know before they can adopt
19 that charter? The basic - - - the basic format - - - the
20 basic structure of the charter is they need to set the
21 powers, the duties, the mode of selection, and the terms of
22 office of their officials. Those are the core elements of
23 any form of government.

24 Before 1.h.1. was enacted, the State gave a try
25 to bypassing this. The Alternative County Government Law,

1 and they had four different forms of government in there.
2 And every single one of those forms - - - and that's a
3 statute that's still in effect - - - mentioned terms of
4 office. It's a core right of any government.

5 They've got to be able to say who the officials
6 are, what the duties and powers are that are allocated to
7 those officials, and what their terms of office are. When
8 the people go to vote, they need to know how long that term
9 is going to be. And that's been truncated by the even-year
10 election law.

11 In terms of 2.c. and 1.h.1. the - - -

12 JUDGE RIVERA: Let's say we disagree and we say
13 you haven't established that it's unconstitutional, that
14 the statute is unconstitutional. What happens the next
15 day?

16 MS. CALLAHAN: So I think that what happens is
17 you just have the elections as they would be. The
18 elections just take place.

19 JUDGE RIVERA: I'm saying what happens to the
20 right to form of government? To choose your form of
21 government?

22 MS. CALLAHAN: Then they have the rights that
23 they've always had, which is the - - - they can choose a
24 charter. Under 1.h.1. counties have a right to choose a
25 charter. And the rights of chartered government are set

1 forth in Section 33.

2 I just - - - there's a critical distinction here.
3 Charter counties have a different set of rules than
4 noncharter counties, and they're set forth in two different
5 sections of the Constitution. Charter counties are
6 governed by 1.h.1. 2.c. applies to noncharter counties and
7 all other units of government. So to the extent that a
8 county exercises its constitutional right to become a
9 charter county under 1.h.1., its rights relative to the
10 structure of that government are not dependent on the
11 authority to pass local laws under 2.c.

12 If a charter county had to rely on 2.c. to adopt
13 charter laws to define its powers, duties, officers, in
14 terms of office, there wouldn't be any need for 1.h.1.
15 1.h.1. wouldn't add any additional authority and it would
16 be superfluous.

17 JUDGE GARCIA: Can we go back just to your point
18 on 1.h.1. on amending a need for a referendum? It seems to
19 me that what's listed there as requiring this type of
20 referendum are pretty - - - what you would describe as core
21 rights. So if you abolish or create an elective county
22 office, if you change the voting or veto power, or the
23 method of removing an elective county officer, you have to
24 do that. Doesn't that imply you don't have to do as much
25 for other amendments?

1 MS. CALLAHAN: I think that there is no right for
2 other amendments unless they're enacted by constitutional
3 amendment. If the legislature wants to make one of these
4 amendments, it's got to be approved by the people. There's
5 got to be a referendum.

6 JUDGE GARCIA: So we would have to say that they
7 carved out these really core functions. That we can have
8 an elected official and allow those to be amended, but
9 everything else you can't amend?

10 MS. CALLAHAN: I'm saying there's no question
11 that 1.h.1. confers a constitutional right on counties to
12 adopt a charter. What does that mean? What right does
13 1.h.1. confer on counties, unless they have the right to
14 set the very basic fundamental core rights of what a
15 government is? And it's our position that that includes
16 terms of office.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. TSEYTLIN: Thank you, Your Honors. Briefly
19 on general law and then on our Anderson-Burdick claims.
20 First, I think it's pretty clear that they - - - neither my
21 friends have a coherent answer of how the exclusion of
22 multiple towns - - - explicit exclusion of multiple towns
23 doesn't render this a special law. So then the question
24 really becomes - - -

25 JUDGE GARCIA: I think their point was it's

1 reasonable?

2 MR. TSEYTLIN: Yeah. That's not in the text.
3 That's not in any - - - I mean, that's - - - that - - -

4 JUDGE GARCIA: But that we said that?

5 MR. TSEYTLIN: I mean, this court has not said
6 that any reasonable line making something a special law
7 turns it into a general law, there's no case that says
8 that. So I think the - - - this case then presents the
9 question to the court of how, you know, how broadly is this
10 court going to be willing to allow the legislature to
11 stretch the nontextualist exemption for special laws that
12 achieve a substantial concern?

13 If the court is going to say that anything that
14 the legislature says is important or approximate to that is
15 a special concern, the entire careful distinction in the
16 Constitution between general law and special law goes by
17 the wayside, as does home rule. Because if the legislature
18 can take something as local as the terms of local office
19 and say that's statewide concern, it can enact special
20 legislation for that point, there's no reason for
21 legislature to ever worry about enacting a general law. It
22 can always pick a subset of towns, counties, have you and
23 just say, well, look, legislature, we identified something
24 that we consider important and that's it.

25 But the Constitution, obviously, really cares

1 about that general law and special law distinction. So to
2 the extent that this court is going to maintain the
3 nontextualist exemption for substantial concerns, I would
4 ask this court to have that be narrow so as to not to
5 swallow the core limitations of the Constitution.

6 Now, on Anderson-Burdick. You know, I heard
7 basically the kind of argument that I would expect to see
8 in - - - you know, in an expert report from the other side,
9 citing some sort of literature that they - - - that they
10 think is more persuasive than the expert report that we put
11 on. Our complaint alleges that their turnout - - - that
12 their hope for turnout gains are illusory. That is an
13 explicit allegation or complaint.

14 Our complaint alleges longer lines. Our
15 complaint alleges - - -

16 JUDGE GARCIA: What's illusory?

17 MR. TSEYTLIN: The - - - the turnout gains for
18 the local races. We do not dispute that more people will
19 vote at the polls. But it doesn't matter how many people
20 come to the polls if they don't vote in the local races.
21 That doesn't matter.

22 Now, what's the volume of - - - what's the delta?
23 You know, I got to draft expert report sitting in my inbox
24 since May - - -

25 CHIEF JUDGE WILSON: So I understand - - - I

1 understand your point about the pleading.

2 MR. TSEYTLIN: Yes.

3 CHIEF JUDGE WILSON: And let me just divert you
4 for a second. Do you think there's anything a little odd
5 about a situation where the legislature is making a
6 determination about which way it best thinks it can
7 increase voting? And then to have that - - - before there
8 are really any results, determined by a court? And is
9 there a sort of a - - - some kind of separation of powers
10 question there?

11 MR. TSEYTLIN: I mean, what we brought, Your
12 Honor, is a standard Anderson-Burdick claim. You know, the
13 legislature - - - a legislature of another state, or maybe
14 the New York State can say, we don't want drop boxes. We
15 want to cut voting behavior in half. I'm - - - voting
16 times in half. We want to have - - - you know, voting on
17 only one hour per day. I'm aware of no case anywhere in
18 the nation applying the well-established Anderson-
19 Burdick - - -

20 JUDGE HALLIGAN: Well, it would be a little hard
21 to argue, I think, that cutting polling place times in half
22 is intended to increase voting.

23 JUDGE GARCIA: Right.

24 MR. TSEYTLIN: Well, they could say - - - you
25 know, it's - - - it's - - - I - - -



1 JUDGE HALLIGAN: It does seem like it's a
2 different kind of policy.

3 MR. TSEYTLIN: Fair enough. Fair enough. Let's
4 say - - - say the legislature says we don't want to have
5 absentee voting anymore because we think that more educated
6 voting happens on Election Day, because absentee voting - -
7 - you know, new developments can happen a week before
8 Election Day. We want to have only in in-person voting.
9 That - - - a legislature could do that. You know, we got
10 some states trending maybe in that direction. You know, we
11 don't know where the - - - where the future may hold.

12 The notion of bringing a pre-enforcement - - - a
13 pre - - - you know, upon enactment, Anderson-Burdick claim
14 is standard. The way that - - - you know, obviously, I
15 have a greater challenge in that I don't have - - -

16 JUDGE GARCIA: Your argument there is it's
17 actually suppressing voter turnout. Your argument seems to
18 me it's not increasing voter turnout. Right? It's not
19 substantively increasing voter turnout. So if you have a
20 law aimed at increasing voter turnout, it seems hard that
21 you could then come in and say, well, you're increasing
22 voter turnout. So now we're going to have these long
23 lines, and why can't they say, no, we're not? And - - -

24 MR. TSEYTLIN: Well - - -

25 JUDGE GARCIA: - - - we have these rules that

1 say, you vote thirty minutes.

2 MR. TSEYTLIN: Bring your experts. You know,
3 file a - - -

4 JUDGE GARCIA: Why do they need, at this point,
5 an expert to say that? Because they're increasing voter
6 turnout, right? They're not trying to decrease voter
7 turnout. Your problem seems to be, well, they're
8 increasing it too much. So I'm not going to be able to get
9 in to vote.

10 MR. TSEYTLIN: Yeah. I mean, look, they're
11 lumping - - - they're attempting to - - - to lump two times
12 the voter turnout into one. Before voters - - - you know,
13 voters who are interested in both US elections come on even
14 years, come on odd years. Voters who are only interested
15 in local, or - - - or national come on one or the other.
16 They're trying to lump it all in together.

17 We alleged that's going to cause longer lines.
18 This is going to cost voter turnout - - - cause voter
19 burdens. And we allege that their benefits of more
20 participation in local elections is illusory.

21 We have - - - we have the right under the
22 C.P.L.R., under every Anderson-Burdick case that I'm aware
23 of, to prove up our case.

24 JUDGE RIVERA: But they - - - but that was my
25 point to her. They - - - the legislature made a different

1 conclusion.

2 MR. TSEYTLIN: Yeah.

3 JUDGE RIVERA: What role does the court have in
4 interjecting itself into this different view of the impact
5 of this statute?

6 MR. TSEYTLIN: That it happens every single
7 Anderson-Burdick claim. Every single one. You always have
8 the vote - - - the claimed burden on voters on one hand and
9 the claim state benefit on the other hand, and the parties
10 fight it out with evidence and the courts - - -

11 JUDGE RIVERA: And so if I thought you were
12 conceding that there will be greater - - - exactly their
13 goal. That you're conceding they're going to achieve their
14 goal?

15 MR. TSEYTLIN: No.

16 JUDGE RIVERA: And you don't like it?

17 MR. TSEYTLIN: Absolutely not, Your Honor. We -
18 - - we allege - - -

19 CHIEF JUDGE WILSON: Well, wait. The only way -
20 - - the only way you're going to have longer lines is if
21 more people are coming to the polls?

22 MR. TSEYTLIN: No. The longer line - - - so
23 imagine you're a voter that cares about the local
24 elections. If you're voting in local elections, you're
25 going to have a lower turnout election. So you're not

1 going to have to deal with those longer lines. You now
2 have to vote on even year elections - - -

3 JUDGE RIVERA: Well, I thought you cared about
4 your local elections - - -

5 MR. TSEYTLIN: - - - where you're dealing with
6 the longer lines.

7 JUDGE RIVERA: Excuse me?

8 MR. TSEYTLIN: Sorry.

9 JUDGE RIVERA: If you care about your local
10 elections, don't you care that you've got the greatest
11 number of people showing up to the local election?

12 MR. TSEYTLIN: But you don't know - - - but
13 without facts, you don't know if they're actually going to
14 be participating in the local elections, or if they're only
15 there to vote in the national and the presidential
16 election.

17 JUDGE RIVERA: And what - - - is that the pure
18 speculation we're talking?

19 MR. TSEYTLIN: No, Your Honor. We have - - - we
20 have an allegation that the - - - that the benefits of - -
21 - of more voting in local elections are illusory.

22 JUDGE SINGAS: But is your argument that the
23 person who cares about the local election will not wait on
24 the longer line to vote in that local election, because the
25 line is too long?

1 MR. TSEYTLIN: Our - - - we have an allegation
2 that says that that will be a greater burden on them. And
3 for some folks, that will be too great of a burden. How
4 much of a burden that is and how much drop off there is, is
5 a factual question. If you take a look at the town - - -

6 JUDGE RIVERA: Then they can mail it in.

7 MR. TSEYTLIN: Well - - -

8 JUDGE RIVERA: They don't have to wait.

9 JUDGE HALLIGAN: Do you mean drop off in terms of
10 waiting in line to complete voting or drop off in terms of
11 not flipping over the ballot to actually vote the local
12 election?

13 MR. TSEYTLIN: When I say ballot drop off, I mean
14 the latter. That is - - -

15 JUDGE HALLIGAN: So you're not alleging that they
16 won't wait in the lines?

17 MR. TSEYTLIN: Well, our allegation is that it
18 was - - - we do have an allegation that for folks that are
19 down on the economic scale that they may not vote in lines.

20 JUDGE CANNATARO: So your allegation is that in
21 an even year election, voters who would have otherwise
22 voted in an odd year local election will just not bother to
23 vote because it's an even year general election?

24 MR. TSEYTLIN: No. Our allegation is their claim
25 that all of - - -

1 JUDGE CANNATARO: They'll stand in the line.
2 They'll go into the ballot booth. They'll receive their
3 ballot. But they'll only mark the big races? They won't
4 mark the little races, even though they would have done it
5 if it was in an odd year?

6 MR. TSEYTLIN: No. We don't make that
7 allegation. The allegation we make is that the voters who
8 don't care about the local elections to begin with,
9 wouldn't bother coming out to the local elections. A lot
10 of them are going to drop off, and therefore, that instance
11 - - - those are the only voters that they think is going to
12 increase voter turnout. That that benefit is illusory.

13 There's a lot - - - look, I hear some skepticism
14 on the bench. There's a lot of literature about this. We
15 have multiple experts that are going to talk about the
16 volume of - - -

17 JUDGE HALLIGAN: I'm just not clear I understand
18 - - -

19 JUDGE RIVERA: This was my - - - again. This - -
20 - I'm sorry to sound like the broken record, but this
21 again, I have yet to hear a good answer from either one of
22 you. What is the role of the court when you have state
23 legislatures who take one view of the existing research and
24 the locale of claimant who takes a different view?

25 MR. TSEYTLIN: The role of the courts in every

1 Anderson-Burdick case is to look at the competing experts.
2 Obviously, where the - - - where - - -

3 JUDGE RIVERA: And so to make a different
4 decision from the state legislators?

5 MR. TSEYTLIN: We - - - with respect to the
6 legislature. You do - - - you know, it is our burden. But
7 in every single First Amendment, Fourteenth Amendment case,
8 this - - - you're always second guessing the - - - the body
9 who - - - imagine the dropboxes - - -

10 CHIEF JUDGE WILSON: But this sort of ties
11 together Judge Garcia's question and my earlier question,
12 which is is this really an Anderson-Burdick case? Because
13 you're not alleging an attempt to suppress voters, and
14 you're not alleging there's going to be a drop off in
15 turnout. You're - - - actually you're saying there's going
16 to be an increase in turnout, but some people who might
17 have otherwise voted are not going to vote. And other
18 people who care less about the local elections are going to
19 go to the polls and maybe not turn the ballot over. I'm
20 not sure that's an Anderson-Burdick framing at all.

21 MR. TSEYTLIN: Well, the ballot drop off is that
22 I was engaging in largely goes to the second half. So the
23 way that Anderson-Burdick works is you talk about voter
24 burdens on one hand and the - - - the benefit to the state
25 on the other.

1 CHIEF JUDGE WILSON: No. I understand that.

2 MR. TSEYTLIN: So if there's a very substantial
3 ballot drop off, then the state's interest - - -

4 CHIEF JUDGE WILSON: Drop off in what?

5 MR. TSEYTLIN: - - - becomes - - - for the - - -
6 the folks who are - - - who otherwise would not have voted
7 in the local elections, not caring about the local
8 elections. So the fact that the races are jammed together,
9 they're not voting. Suddenly the state's interest - - -

10 JUDGE HALLIGAN: But isn't that just about - - -

11 JUDGE CANNATARO: Is that drop off?

12 JUDGE HALLIGAN: Isn't that just about the the
13 size of the increase? In other words, are you alleging
14 that - - - I know we're way over time, but are you alleging
15 that individuals who would vote in a local election will
16 not either show up or flip their ballots? Or are you
17 alleging that the purported increase in participation in
18 voting in the local elections will be smaller than what the
19 state is suggesting?

20 MR. TSEYTLIN: Our allegation is that latter
21 category is illusory. That - - - that it would be a very,
22 very small - - -

23 JUDGE HALLIGAN: But then you're not alleging
24 that individuals who would otherwise vote in a local
25 election will not - - - will either not show up or will not

1 flip the ballot and complete the local elections; is that
2 right?

3 MR. TSEYTLIN: Yes. The allegations in regard to
4 those people is they will face longer lines and then they
5 will - - - they will face confusion and that those
6 candidates that they wish to support in local races, they
7 will have a harder time getting volunteers, getting
8 airtime, and getting voter interest in those races because
9 everybody is so focused on - - - and as a practical matter,
10 we all know this is true.

11 If you have a presidential race, a governor's
12 race, a senate race - - -

13 JUDGE HALLIGAN: So are you - - -

14 MR. TSEYTLIN: - - - that's what everyone's
15 focused on.

16 JUDGE HALLIGAN: - - - are you alleging a
17 decrease in what we now have as participation in the local
18 elections?

19 MR. TSEYTLIN: No. We're - - - I'm alleging - -
20 - we have alleged - - -

21 JUDGE HALLIGAN: Yeah.

22 MR. TSEYTLIN: - - - that for those local
23 elections, they will be harder to participate in because
24 there's longer lines - - -

25 JUDGE HALLIGAN: But you're not alleging a

1 decrease in participation?

2 MR. TSEYTLIN: Fair enough, Your Honor. But we
3 are alleging that those voters who will face longer lines,
4 they will face more confusion, and they will face harder
5 time getting their fellow citizens interested.

6 JUDGE GARCIA: So if I am - - -

7 JUDGE RIVERA: So if I'm getting this, you are
8 saying that although there will be sort of in the macro,
9 more people going to the polls, you could see that this - -
10 - that this goal of the state legislature, that's not
11 illusory. There will be more people going to the polls
12 because that's the whole point about the longer lines.
13 Yes?

14 MR. TSEYTLIN: We - - - that's - - -

15 JUDGE RIVERA: No, no, no.

16 MR. TSEYTLIN: - - - that's not - - -

17 JUDGE RIVERA: Yeah, it's - - -

18 MR. TSEYTLIN: No. No.

19 JUDGE RIVERA: No, no, please. It's yes or no?

20 MR. TSEYTLIN: No.

21 JUDGE RIVERA: Okay. So we'll come back to that.
22 But if I understand your argument, that - - - that what the
23 local people are concerned about is that the voters who
24 care about their issues will not vote, and that that's the
25 decrease, that's the fall off, right? That the state leg

1 is not taking into consideration or doesn't care about
2 whichever way you want to see that.

3 Am I understanding your argument to that extent?

4 MR. TSEYTLIN: No. I think - - - with respect, I
5 think you're - - - that's my argument on neither of the
6 equations.

7 JUDGE RIVERA: Okay.

8 MR. TSEYTLIN: With regard to the - - - the first
9 one - - -

10 JUDGE RIVERA: Okay.

11 MR. TSEYTLIN: - - - is what I'm saying is
12 there's the voter - - - there's more voters in even year
13 elections.

14 JUDGE RIVERA: Yes.

15 MR. TSEYTLIN: But they're not there for the - -
16 - for the local races. So they're going to - - - a lot of
17 them are going - - - just not going to vote at all. So
18 while - - - while there are more people at the polls - - -

19 CHIEF JUDGE WILSON: Can I just - - -

20 MR. TSEYTLIN: Yes.

21 CHIEF JUDGE WILSON: Okay. So let's just slow
22 you down there for a second.

23 MR. TSEYTLIN: Yes.

24 CHIEF JUDGE WILSON: So for an even year election
25 under the new regime, were it implemented, more people will

1 come to the polls than they did previously in even year
2 elections. True or false?

3 MR. TSEYTLIN: No. I don't think - - - I don't
4 think they've posited that.

5 CHIEF JUDGE WILSON: No. I'm sorry. I'm asking
6 what you're pleading?

7 MR. TSEYTLIN: No. We didn't - - - we did not
8 plead. And there's been no claim that even year turnout is
9 going to be higher because of this law. They're - - -

10 CHIEF JUDGE WILSON: Okay. So why are the lines
11 longer in even year elections?

12 MR. TSEYTLIN: No. They're longer than they
13 would be in the odd year elections. So the person who is
14 interested - - -

15 JUDGE RIVERA: Why isn't that a greater turnout?

16 MR. TSEYTLIN: No.

17 JUDGE RIVERA: I don't understand.

18 MR. TSEYTLIN: No. So the - - - the even year
19 turnout, as far as I understand their thesis, is going to
20 remain flat.

21 CHIEF JUDGE WILSON: Wait. Let me - - - you can
22 slow down a second?

23 MR. TSEYTLIN: Yes. So - - -

24 CHIEF JUDGE WILSON: So if the lines are not
25 going to be longer in the even year elections under the new

1 regime, people are not going to have a harder time getting
2 to the polls than they do now in the even year elections;
3 is that right?

4 MR. TSEYTLIN: But - - - that's correct. That's
5 correct, Your Honor.

6 CHIEF JUDGE WILSON: Okay. So then what I guess
7 your allegation is, is that however hard or easy it is to
8 get to the polls in the odd year elections, it's going to
9 be harder than it was in the odd year elections, although
10 it may be just the same - - - it will be just the same as
11 it was in the even year elections. And there's some class
12 of people who vote only in the local elections, who do so
13 because the lines there are shorter than the even year
14 elections to which they don't go. Is that it?

15 MR. TSEYTLIN: That was - - - that was a
16 substantial part of our argument, yes, Your Honor.

17 CHIEF JUDGE WILSON: Okay.

18 MR. TSEYTLIN: And the - - - and look - - -

19 JUDGE RIVERA: Sorry. And you never argued there
20 were going to be longer lines?

21 MR. TSEYTLIN: No, no. The longer - - - I think
22 - - - I think the Chief Justice properly articulated our
23 point. Is that for local elections - - -

24 JUDGE RIVERA: Yeah.

25 MR. TSEYTLIN: - - - there's going to be much

1 longer lines for local elections because they are forced to
2 vote at the same time as the presidential elections, which
3 they did not before.

4 JUDGE GARCIA: But let's say, as a matter of
5 proof, it came about that two years, four years from now,
6 just make up a number - - - 1.5 million people voted in
7 local elections, when before, 1.2 million. How do you
8 prove your case?

9 MR. TSEYTLIN: I mean, I understand - - - I
10 understand the concern there. That's the nature.

11 JUDGE GARCIA: How do you ever prove that?

12 MR. TSEYTLIN: No. That - - - that's the nature
13 of Anderson-Burdick. You think about the - - - think about
14 any single Anderson-Burdick claim. Like, the - - -

15 JUDGE GARCIA: You have to say those 300,000
16 people, there are these other - - - that increase voter
17 participation in local elections, there were other people.
18 How many? That didn't vote in those years because the
19 lines were longer?

20 MR. TSEYTLIN: I mean, it is certainly true that
21 Anderson-Burdick involves a balancing of values. For
22 example, the Crawford case in the U.S. Supreme Court.

23 JUDGE CANNATARO: It's certainly true that
24 Anderson-Burdick what?

25 MR. TSEYTLIN: Involves a balancing of values.



1 For example, in the - - -

2 JUDGE GARCIA: But just as a matter of proof, how
3 would you show that those voters, those 500,000 in my
4 hypothetical, aren't the voters that were voting in the odd
5 year election?

6 MR. TSEYTLIN: I mean, it - - - it's very hard to
7 talk about this in terms of hypotheticals. I think it
8 would be - - - and the way this is done in all Anderson-
9 Burdick cases is that you have an evidentiary record on the
10 burdens. How much longer the lines are, how hard - - - how
11 much voter engagement there is.

12 JUDGE CANNATARO: But should we care about who
13 the voters - - - if there is this increase in the
14 hypothetical you just received, and there are more people
15 voting now in the even year elections than there were in
16 the odd year elections, does it matter who went to the
17 polls and who didn't go to the polls?

18 MR. TSEYTLIN: I mean, it might matter if the
19 increase - - - if the increase is very small, if most
20 people are dropping off, and then there are people - - - I
21 mean, just - - - it's very hypothetical. And let's say
22 that the increase is all people just kind of voting party
23 line with their party's candidate of president, and they're
24 not really engaging with the lower issues. That is
25 certainly a different record than one that says voting and

1 engagement on local elections has doubled. You never know
2 - - -

3 JUDGE GARCIA: So even if they've doubled the
4 participation in local elections in terms of sheer numbers,
5 a claim could be made if you came in and showed those
6 people are voting by party line?

7 MR. TSEYTLIN: No. Well, the - - - the double
8 one was - - - was the other end of the extreme. I said if
9 they could show that, it doubled - - -

10 JUDGE GARCIA: So if it was a quarter, then you
11 could show they're voting by party line for the most part?

12 MR. TSEYTLIN: I mean, I hear the skepticism,
13 Your Honor, but this is the way Anderson-Burdick always
14 works. This - - - it is a - - - it is a context - - - you
15 read every single Anderson-Burdick case, they say it's
16 intensely fact - - -

17 JUDGE GARCIA: And you have one that - - - like
18 this? Where there has been an increase in voter turnout -
19 - -

20 MR. TSEYTLIN: We don't.

21 JUDGE GARCIA: - - - and it - - - and you say,
22 well, it depends on the voter - - -

23 MR. TSEYTLIN: I mean - - -

24 JUDGE GARCIA: - - - where - - - how are they
25 voting?

1 MR. TSEYTLIN: Like this. We - - - we don't have
2 facts in this case.

3 JUDGE GARCIA: No, we don't. So we're trying to
4 figure out, I think, my colleagues and I, how this would
5 work in front of a court.

6 MR. TSEYTLIN: I mean, it would be no different
7 than the voter ID cases, the - - - the - - - the - - -

8 JUDGE GARCIA: Voter ID case. I didn't have a
9 voter ID law. I had two million people coming out to vote.
10 I put a voter ID in, I get a million people.

11 MR. TSEYTLIN: Yeah. But a lot of - - - a lot -
12 - - you know, having litigated voter ID cases, a lot of
13 times it's not - - - there's no proof of a low or decreased
14 voter turnout. The proof is - - -

15 JUDGE HALLIGAN: Okay. But do you have any
16 Anderson-Burdick cases where what happens is an increase in
17 voter turnout and there's a cognizable Anderson-Burdick
18 claim there?

19 MR. TSEYTLIN: No.

20 JUDGE HALLIGAN: I think that's the question.

21 MR. TSEYTLIN: I don't have any cases like that,
22 but we don't have any - - - any pleaded - - - any record
23 evidence that there will be any meaningful increase in
24 voter turnout. In the voter ID cases that I have litigated
25 there's often no impact on voter turnout at all. And the

1 only claims of burden are it was harder for people to vote.
2 They had to go to the DMV, they had to do this and that.
3 And those cases - - -

4 JUDGE CANNATARO: Is your primary allegation in
5 this case is that what makes it harder for the voter to
6 vote is the long lines, which just sort of commonsensically
7 translates into higher voter turnout?

8 MR. TSEYTLIN: But - - - but - - - Yeah. But I
9 feel, at - - - Your Honor, that's an optical illusion.
10 Because the longer lines is not in the odd year election.
11 If - - - if my allegation was the longer lines happen in
12 the old elections, my point is that people who are
13 interested in the odd year elections that had short lines
14 are now facing longer lines.

15 JUDGE CANNATARO: Are going to be discouraged
16 from voting because there are longer lines? But that goes
17 back to my - - - the question I was asking. Does it - - -
18 if you're increasing turnout now, you're asking us to
19 judge, well, we don't like the - - - who makes up the
20 increased turnout. That sounds like a value judgment to go
21 back to an earlier question that you received. That's way
22 outside the - - - the voter suppression analysis and more
23 like a value judgment about whether we want more voters or
24 we want less voters, but of a specific type.

25 MR. TSEYTLIN: We have no allegations on our



1 complaint about the specific type of voters. Our
2 allegations are on the burden side: longer lines, voter
3 confusion, harder to get your fellow citizens engaged on
4 those issues. Those are allegations on the burden side.
5 Our allegations on the state benefits side is the state
6 benefits are illusory because of voter drop off.

7 So the - - - so those are the two halves of the
8 Anderson-Burdick equation. Whether we can prove those up
9 by expert reports - - -

10 JUDGE RIVERA: So what's the drop off in that
11 little equation you just articulated?

12 MR. TSEYTLIN: So our - - - in our complaint, our
13 allegation was that the drop off, that is, the voters who
14 come out on even years - - -

15 JUDGE RIVERA: Yes.

16 MR. TSEYTLIN: - - - would not have come out in
17 odd years.

18 JUDGE RIVERA: Yeah.

19 MR. TSEYTLIN: They're just not filling out the
20 ballots on local elections. They're just like, I'm here to
21 vote for - - -

22 JUDGE RIVERA: So you mean drop off as in number
23 of people who show up?

24 MR. TSEYTLIN: No, no. The - - - the - - -

25 JUDGE RIVERA: You mean people who vote on the



1 local campaigns or local questions?

2 MR. TSEYTLIN: The opposite. So the term voter
3 drop off is a term of art in the social science literature
4 that says that is voter - - - ballots that are not fully
5 completed to the end. That voters - - - let's say I only
6 care about who's president and who's governor. I come in -
7 - -

8 JUDGE RIVERA: How is that different from what I
9 just said?

10 MR. TSEYTLIN: I thought - - - I thought you were
11 saying the opposite, but maybe I'm wrong.

12 JUDGE RIVERA: No. My point was - - - we're
13 arguing that they're going to show up, but they're not
14 going to vote on the local campaigns or the - - -

15 MR. TSEYTLIN: That's right.

16 JUDGE RIVERA: - - - local issues?

17 MR. TSEYTLIN: Yes, that's right, Your Honor.

18 JUDGE RIVERA: Okay.

19 MR. TSEYTLIN: I apologize. I misheard your
20 question. I apologize.

21 JUDGE RIVERA: No, no. It's okay.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. TSEYTLIN: Thank you.

24 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Onondaga County v. State of New York, No. 66 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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