SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ANNE MARIE McARDLE, CAROLYN SOLIERI, MICHAEL REPRESA, CHRISTINE ANITA PETERS, ERIC ANDRE JOHNSON, FRANK E. COLEMAN, JR., GEORGE McANANAMA, JOAN GRONOWSKI, JOSEPH PINION III, KISHA SKIPPER, MARK PAROLISI and RONALD MATTEN,

Plaintiffs/Petitioners,

Index No. 69278/2022

Justice Assigned:

Hon. George E. Fufidio

vs.

CITY OF YONKERS, MAYOR MICHAEL SPANO, MIKE BREEN, JOHN RUBBO, TASHA DIAZ, ANTHONY MERANTE, CORAZON PINEDA ISAAC, SHANAE WILLIAMS, MEMBERS, YONKERS CITY COUNCIL, LAKISHA COLLINS-BELLAMY, CITY COUNCIL PRESIDENT

Defendants/Respondents.

FOR AN ORDER AND JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR.

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MEMORANDUM OF LAW
IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Respondents City of Yonkers, Mayor Michael Spano; Mike Breen, John Rubbo, Tasha Diaz, Anthony Merante, Corazon Pineda Isaac, Shanae Williams, Members, Yonkers City Council; and Lakisha Collins-Bellamy, City Council President (collectively "City Respondents") in support of their motion to dismiss petitioners' Anne Marie McArdle, Carolyn Solieri, Michael Represa, Christine Anita Peters, Eric Andre Johnson, Frank E. Coleman, Jr., George McAnanama, Joan Gronkowski, Joseph Pinion III, Kisha Skipper, Mark Parolisi and Ronald Matten (collectively referred to herein as the "Petitioners") Verified Petition, dated December 12, 2022 (the "Petition").

Petitioners bring this proceeding seeking an order to declare as void, Local Law 10-2022 ("Local Law 10"), which extended term limits for the public offices of Mayor of the City of Yonkers and the Yonkers City Council ("City Council") from three terms to four terms. Over the course of three lengthy and well-attended public meetings, members of the public had ample opportunity to voice their views regarding extending term limits.[1] In the end, after considering the testimony of individuals who opposed term limits, as well as a substantial number of individuals who strongly favored extending term limits, the City Council voted 4-3 to pass the local law, which was signed into law by Mayor Spano.

In enacting Local Law 10, the City Council and Mayor Spano (the "Mayor") made a decision that they believed was in the public interest and favored by a significant majority of their constituents and would result in voters having more candidates to choose from on election day. Given the steady progress in the City, which was cited by many speakers at the public meetings

[1] This included a City Council led community forum, a City Council meeting, and a public hearing held before Mayor Mike Spano. Many letters and emails were also submitted to the City Council and Mayor regarding the extension of term limits. Correspondence received by the City reflected a clear majority of support for the extension of term limits.

who favored extending term limits, the elected representatives made the choice that they believed best represented the interests of the citizens who had put them in office.

Petitioners obviously disagree with the enactment of Local Law 10, however, the well-established precedent of the Second Circuit and New York State Courts makes crystal clear that Petitioners cannot state a cause of action to overturn this duly enacted local law, passed by the City officials who were elected to represent the people and who are accountable to their voters. This is precisely what the Second Circuit Court of Appeals held in the seminal 2009 case *Molinari v. Bloomberg*, where the court upheld a local law enacted by the New York City Council and Mayor Mike Bloomberg that extended their term limits. Indeed, Petitioners' arguments here are virtually ***identical*** to the arguments that were squarely rejected in *Molinari*, first by the Eastern District of New York, and then, by the Second Circuit.

The law recognizes that Petitioners, and others who may disagree with the enactment of Local Law 10, are not without recourse. First, they had an opportunity to speak at three separate public meetings to advocate their position prior to the enactment of the legislation. Second, now that the law is enacted, they may vote against the Mayor and those council members who supported this legislation (to the extent those elected officials seek an additional term). And third, they may petition to put a referendum on the ballot at the next general election to reduce the maximum number of terms that may be served. There has been, and there remains, avenues for opponents of Local Law 10 to seek redress. But what Petitioners cannot do – based on well-established precedent – is use this Court to supplant the will of the City Council and its exclusive authority to amend the Yonkers City Charter to extend term limits.

This honorable Court should adhere to well-settled Second Circuit and New York State Court precedent and dismiss the instant petition as a matter of law.

ARGUMENT

Petitioners assert three separate causes of action, but in effect, the first two causes of action seek the same relief under alternative legal mechanisms. Specifically, the first two causes of action seek a declaratory judgment, or in the alternative, a ruling pursuant to CPLR Article 78, that Local Law 10 should be deemed null and void because the City of Yonkers City Charter's ("City Charter") ethics provisions prohibit the City Council and Mayor from enacting legislation to extend their term limits. The third cause of action seeks a declaratory judgment that even if Local Law 10 was lawfully enacted, Respondents must schedule a mandatory referendum before the extension of term limits may become effective.

As discussed herein, these causes of action should be dismissed by the Court as a matter of law for failure to state a cause of action pursuant to CPLR 3211(a)(7) and/or 7804(f). Moreover, it is respectfully submitted that the first two causes of action should be dismissed pursuant to CPLR 3211(a)(3), as Petitioners lack standing to assert a cause of action for a violation of the City Charter ethics provision at issue herein, as no private right of action is included in the article of the City Charter governing ethical conduct.

POINT I

THIS PROCEEDING MUST BE DISMISSED BECAUSE THE SECOND CIRCUIT COURT OF APPEALS DECISION IN *MOLINARI V. BLOOMBERG* CONFIRMED THAT CITY COUNCIL MEMBERS AND A MAYOR DO NOT FACE ANY CONFLICT OF INTEREST WHEN EXTENDING TERM LIMITS BY LOCAL LAW AND BECAUSE THE CITY'S ETHICS PROVISION SIMPLY DOES NOT APPLY TO ACTIONS TO EXTEND TERM LIMITS

Petitioners argue that certain ethics standards included in the City Charter prohibit City Council members and the Mayor from enacting legislation to extend term limits. As discussed herein, this argument should fail for three reasons. As a preliminary matter, Petitioners lack standing, as the ethics provisions of the City Charter clearly do not provide for a private right of

action.[2] Even if Petitioners had standing (which they do not), the plain language of the City Charter ethics provision prohibits City officials from taking action on matters that *directly affect* their "*financial interests*;" it does not prohibit actions taken regarding matters of public interest that *could affect* their *political interests*. Finally, the Second Circuit Court of Appeals and other relevant authorities have already resolved this question, holding that nearly identical ethical provisions included in the New York City Charter did not prohibit the New York City Council and Mayor Bloomberg from enacting a local law to extend their term limits.

A. City Charter § C1A-6 does not apply here because it only restricts actions related to City Respondents' "financial interests"

The "purpose" section of City Charter Article 1-A titled "Ethics," seeks the goals, *inter alia*, of establishing standards of ethical conduct for City officers and employees, providing City officers with clear guidance on ethical standards, and most concretely, requiring public disclosure of financial interests that may influence the actions of City officers and employees so that public accountability is maximized. *See* City Charter § C1A-2. With those ends in mind, section C1A-6 of the City Charter states as follows:

> § C1A-6 **General Ethics Standards.**
> A. A City officer or employee shall not use his or her official position or office, or take or fail to take any action, in a manner which he or she knows or has reason to know may result in a **financial benefit** for:
> 1. himself or herself;

[2] Petitioners lack standing to challenge an alleged ethical violation insofar as alleged ethical violations fall within the purview of the City's ethics board pursuant to City Charter § C1A-1, et seq. This portion of the City Charter is a comprehensive scheme that affords any individual the opportunity to file a complaint with the City Board of Ethics for investigation and determination, and does not include a private right of action. Where the legislative body has adopted administrative enforcement of a statute, "[t]he question then becomes whether, in addition to administrative enforcement, an implied right of action would be consistent with the legislative scheme." *Uhr v. East Greenbush Cent. Sch. Dist.*, 94 N.Y.2d 32, 40 (1999); *see also e.g. Hammer v. American Kennel Club*, 1 N.Y.3d 294, 300 (2003) ("The statute does not, either expressly or impliedly, incorporate a method for private citizens to obtain civil relief. In light of the comprehensive statutory enforcement scheme, recognition of a private civil right of action is incompatible with the mechanisms chosen by the Legislature."). In any event, the Court should not intervene in that comprehensive administrative process. Only after the City Board of Ethics renders a decision, should the Court then have jurisdiction to determine whether the decision was arbitrary and capricious or contrary to law.

2. a member of his or her household;
3. his or her relative;
4. his or her outside employer or business, or any owner, director, or office thereof;
5. Reserved.
6. his or her customers or clients; or
7. his or her creditors (emphasis added).

Petitioners argue that this section of the City Charter prevents City Council members and the Mayor from enacting a local law that would extend the number of consecutive terms that may be served by such public officers. While the Petition does not include much specificity regarding this claim, Petitioners' central contention is that the extension of term limits will lead to these officials' receiving "financial remuneration for another 4 or 8 years"[3] and that "[s]aid ethics standard prohibits sitting councilmembers or the mayor from voting on, or signing into law, charter amendments which would, or might, directly benefit themselves." Pet. ¶¶ 10-11. It is notable that Petitioners cite no case law, ethics opinions, or other relevant authorities for this proposition. But even more glaring, are a number of crucial omissions in the Petition that undermine this cause of action.

As will be discussed in the following section of this memorandum—but not mentioned in the Petition—is that the New York State Supreme Court, the New York City Conflicts of Interest Board, the Eastern District of New York, and Second Circuit all held that nearly identical ethics requirements included in the New York City Charter did not restrict the New York City Council and Mayor Mike Bloomberg from extending their term limits by local law.[4]

But before even addressing the various adjudications relating to the nearly identical *Molinari* case, it is crucial to highlight a number of facts not included in the Petition that belie

[3] Local Law 10 extends term limits by one 4-year term.
[4] As detailed more fully below, the New York City ethics requirements at issue in *Molinari v. Bloomberg* were in fact, even more stringent than the City of Yonkers ethics obligations raised by Petitioners herein.

Petitioners' argument with specific regards to the ethics requirements included in the Yonkers City Charter.

The Petition conspicuously fails to note that the term "financial benefit" is further defined in the City Charter (this omission is surely owing to the fact that such definition clearly hinders Petitioners' argument).

Specifically, City Charter § C1A-4(I) defines financial benefit as follows:

> "financial benefit" shall mean any **pecuniary or material** benefit including but not limited to any money, stock, security, service, license, permit, contract, authorization, loan, travel, entertainment, discount **not available to the general public**, real or personal property, or anything of value. (emphasis added).

When it is considered that City officials are restricted from taking actions relating only to "financial benefits" *as defined by the City Charter*, the intent of the plain language is clear. The defined term "financial benefit" specifically enumerates "pecuniary and material" instruments, such as money, stock, and contracts. There is no language that restricts officials from acting on matters of public concern that could implicate their political interests nor is there any language that restricts legislators or the Mayor from taking action on matters that could, or would impact their own financial remuneration in the form of their salaries.

In fact, Petitioners notably fail to address that the City Charter expressly permits the Mayor's salary to be "increased only by local law." *See* City Charter § C3-3. And similarly, City Council members may increase the salaries of City Council members for future terms, and may even increase their own current salaries by local law subject to permissive referendum. *See* City Charter § C4-2. These provisions exist side-by-side, and in harmony with City Charter § C1A-6 which states that the Mayor and City Council members may not take any actions which may result in their own "financial benefit." This is because the City Charter obviously does not intend that

the Mayor and City Council be prohibited from taking actions relating to their own financial remuneration in the form of their salaries. But if Petitioners' purported reading of the City Charter were adopted, such sections permitting an increase in salaries by local law would be rendered meaningless and void, as these officials would be ethically prohibited from taking any action leading to their own financial remuneration. Neither the plain language of the City Charter ethics provisions nor the obvious intent of these provisions call for this result. And moreover, it is well-established that "under recognized principles of statutory construction, [statutes] are to be read together and given a harmonious interpretation wherever possible, and are to be read also in such a way as will effectuate the legislative intent." *E.g. Potter v. Berlin*, 21 A.D.3d 1310, 1312 (4th Dep't 2005).

Given that the City Council and the Mayor are not restricted by the City Charter ethics provisions from directly increasing their own salaries by local law, it defies logic that the City Charter would prevent legislators and the Mayor from extending term limits by local law, an action that leads to no direct financial remuneration or salary increase, but merely permits those officials to run again for the same political office, in which case their victory and continued employment are not assured.

As a final note regarding the ethics provision raised by Petitioners, it is notable that the provision relied upon includes language that states that City officials may not take action on matters that could lead to financial benefits and that are "not available to the general public." *See* City Charter § C1A-4(I). The inclusion of this modifying language makes sense given the clear intent of the ethics provision—City officials should not avail themselves of benefits by virtue of their office that the general public would not otherwise be able to access. Even assuming *arguendo*, that extending term limits would lead to a "financial benefit," which it does not, the

extension of term limits would still not be an exclusive benefit that is "not available to the general public." Any City resident that seeks to run for Mayor or City Council in the future would have the same opportunity to avail themselves of the opportunity to run for an additional term, based on Local Law 10. The benefit of being able to seek an additional term does not only redound to the current members of the City Council or the current Mayor. As can be distinguished from, for example, a City Council member receiving a lavish gift based on his or her role in government, which the ethics rules clearly seek to prevent, the approval of this legislation will benefit any future resident that runs for office and seeks to serve additional terms.

Petitioners ask this court to ignore the plain language of the ethics provisions and to read in additional restrictions, which are simply not there. But "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *See Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998). In ignoring the plain language, Petitioners' interpretation would also render the provisions of the City Charter that expressly permit the City Council and Mayor to increase their own salaries to be void. The Court should not adopt Petitioners' interpretation, which has no basis in the plain meaning of the City Charter, and is clearly not intended by the City Charter.

What's more, in addition to the foregoing, this precise question has already been addressed by the Second Circuit Court of Appeals in *Molinari v. Bloomberg*, which resoundingly held that even more restrictive language than that found here did not prohibit legislators from enacting a local law to extend term limits.

B. The Second Circuit Court of Appeals has determined that the purported conflict of interest alleged here does not prevent legislation extending term limits

Not only does Petitioners' argument ignore the plain language and intent of the City Charter ethics provisions, but it simply disregards that the very arguments it is making have already been squarely rejected by the Second Circuit and other authorities.

In *Molinari v. Bloomberg*, Plaintiffs argued unsuccessfully, first before the Eastern District of New York ("*Molinari I*"), and then before the Second Circuit Court of Appeals ("*Molinari II*") that the New York City Council and Mayor Mike Bloomberg violated New York City's ethical provisions contained in its City Charter, when it voted to grant an extension of term limits for Mayor Bloomberg and the City Council members ("Local Law 51"). District Court Judge Sifton summarized Plaintiffs' arguments, in relevant part, as follows:

> Plaintiffs make three claims based on the conflict of interest provisions in the City Charter. Chapter 68 § 2604(b)(3) of the City Charter provides, in relevant part, that "[n]o public servant shall use or attempt to use his or her position as a public servant **to obtain any financial gain… or… private or personal advantage, direct or indirect, for the public servant." Chapter 68 § 2604(b)(2) provides, in relevant part, that a City public servant may not have "any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties."** Plaintiffs maintain that the enactment of the term-limits amendment contravenes these conflicts provisions, because to determine one's own ability to remain in public office is to use one's position to gain 'personal advantage.' Plaintiffs further allege that those who voted in favor of the term limits amendment will gain financially, because they will receive higher salaries, significant benefits packages, and financial allowances.

Molinari v. Bloomberg (Molinari I), 596 F. Supp. 2d 546, 577 (E.D.N.Y. 2009). (emphasis added).[5]

[5] The extension of term limits permitted Mayor Bloomberg to seek a third term, and allowed 35 council members to seek reelection that otherwise would have been term-limited. *See Molinari I*, 596 F. Supp. 2d at 555-56.

As noted in the preceding section of this memorandum, the conflict-of-interest provisions at issue in *Molinari*, were in fact, significantly more restrictive than the provisions in the Yonkers City Charter. The New York City Charter provisions are not limited to restricting public servants from taking actions that may result in a "financial benefit," as is the case with respect to the Yonkers City Charter section. It also precluded the New York City Council members and Mayor from seeking any "private or personal advantage" and stated that such officials may not have any financial **or** "private interest," both "direct or indirect" in conflict with the discharge of the officials' duties. Even despite these more stringent ethical obligations, the District Court and Second Circuit concluded that this provision did not conflict with the relevant officials' enactment of a term limits extension. To the extent any "benefit" accrued to the elected officials, it was a "political" one, not a "financial" or "private" benefit. To that end, the District Court's holding seized on the obvious negative ramifications of interpreting the New York City Charter's conflict-of-interest provision to prohibit legislators from voting on matters before them that affected, either directly or indirectly, their prospects for remaining in office or winning re-election. The court held, in relevant part:

> **The decision of the conflicts Board was correct**.[6] As the Board found, holding that elected officials may not act on legislation properly before them if their actions would have implications for their own political prospects "would bring democratic government to a halt." COIB Op. at 9. The "benefits" incurred by Council Members voting on this amendment were not private ones, rendering inapposite the caselaw and prior opinions cited by plaintiffs. The one case cited by plaintiffs concerning an election-related conflicts issue addressed legislative activity outside of the legislators' "core legislative function" of voting on legislation.

[6] Plaintiffs in the *Molinari* litigation had, prior to litigating, sought an opinion from the New York City Conflicts of Interest Board ("COIB"), that the New York City Council and Mayor Bloomberg could not enact a local law extending term limits due to the ethical standards found in Chapter 68 § 2604(b) of the New York City Charter. COIB rejected Plaintiffs' arguments in a lengthy advisory opinion, and their rationale was adopted by the federal courts. The COIB Advisory Opinion (Advisory Opinion No. 2008-3) can be accessed at the COIB web page: https://www.nyc.gov/assets/coib/downloads/pdf5/aos/2004-2013/AO2008_03.pdf

Molinari I, 596 F. Supp. 2d 546 at 580.

The Second Circuit upheld the decision of the District Court, noting that the District Court's holding had been based on the rationale spelled out in the COIB's Advisory Opinion. *See Molinari v. Bloomberg (Molinari II)*, 564 F.3d. 587, 616-17 (2d Cir. 2009) (citing *Molinari I*, 596 F. Supp. 2d at 577-78). The Second Circuit held that it was proper for the District Court to defer to the COIB's Advisory Opinion because "plaintiffs have failed to make a 'clear showing' that the [COIB] was incorrect." *Molinari II*, 564 F.3d. at 617.

But the Second Circuit did not conclude its analysis there. The court reviewed the cases and COIB opinions that Appellants had raised as part of their efforts to show that the COIB Advisory Opinion was incorrect, and explained why these authorities were distinguishable. Specifically, the Second Circuit indicated that in each of the authorities that the Appellant challengers to the local law relied upon, "the interest served by the public servant's official actions resulting in a conflict was a *personal*, *private* interest, **not an interest in the terms and conditions of his or her public office**." *Id*. (emphasis added).[7]

In several of these decisions and opinions raised by the *Molinari* Appellants—which the Second Circuit found were inapposite—the types of conflicts that had been found to be violations, are the types of conflicts that are clearly also intended to be prohibited by the City of Yonkers conflict-of-interest provision, which seeks to prevent public officials from taking actions that may lead to a "pecuniary" benefit that is "not available to the general public."[8] Notably, in drawing a

[7] The list of cases and opinions that the *Molinari* appellants misguidedly relied upon are itemized in the *Molinari II* decision. *See Molinari II*, 564 F.3d. at 617, FN 19.

[8] In an excerpt from the Second Circuit's decision, the following cases were among those involving personal or private interests where a conflict of interest would properly be found:

> See *Baker v. Marley*, 8 N.Y.2d 365, 170 N.E.2d 900, 208 N.Y.S.2d 449 (N.Y. 1960) (finding violation where mayor participated in meetings of village board, which adopted resolutions leading to the condemnation of various parcels of real property, including one owned by the mayor from which he stood to gain

distinction from cases cited by Appellants where a "personal or private interest" was in fact at stake, the Second Circuit cited favorably to the case, *George v. City of Cocoa, Fla.* in which only a "political interest" was at stake, and not an impermissible "personal or private" interest. The Second Circuit summarized the *City of Cocoa* decision as follows:

> holding that city council member in Florida did not have conflict barring him from voting on a redistricting plan because of his political interests as an incumbent planning to run for reelection in one of the new single member districts, reasoning *inter alia*, that every one of the incumbent city council members had such an interest and it would be 'absurd' to interpret Florida's voting conflicts statute in such a way that would disqualify all members of legislative bodies from participating in legislative redistricting decisions.

Molinari II, 564 F.3d. at 617, FN 19.

The Second Circuit's discussion of the *City of Cocoa* decision echoed similar reasoning that had been explained by the COIB Advisory Board and adopted by the District Court. The Second Circuit summarized this portion of the COIB Advisory Opinion:

> The [COIB] Board also cited *Golden v. New York City Council*, 305 A.D.2d 598,762 N.Y.S.2d 410 (App. Div. 2d Dep't), *appeal denied*, 762 N.Y.S.2d 410, 305 A.D.2d 598 (N.Y. 2003), in which the Appellate Division held that the City Council had authority to enact laws regarding term limits. *See id.* at 580. The Board concluded: "Given this judicial authority, to hold that all Members of the Council who would arguably benefit by being enabled to run for another term are disqualified by Chapter 68 from voting on such a law would deny to the people's elected representatives one of the powers afforded them by State and local law." *Id.* The Board commented that, if plaintiffs' position were correct, "it [would]

> financially); *Zagoreos v. Conklin*, 109 A.D.2d 281, 491 N.Y.S.2d 358, 363-64 (App. Div. 2d Dep't 1985) (finding violation where determinative votes on construction-related applications to town and zoning boards were cast by board members who were employees of the construction company); *Tuxedo Conservation & Taxpayers Ass'n v. Town Bd. of Town of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (App. Div. 2d Dep't 1979) (finding violation where town-board member voted on a multi-million dollar construction project from which his advertising company stood to gain financially)…[.]

Molinari II, 564 F.3d. at 617, FN 19.

> follow that they could not vote on *any measure* affecting the terms and conditions of their public service as Council Members." *Id.* at 580. But this is not the case, the Board explained, as Council Members can vote on pay raises, campaign contribution limits, ethics rules regarding lobbyists, etc. *See id.* at 580. Otherwise, it opined, "democratic government" would come "to a halt." Id.

Molinari II, 564 F.3d. at 616.

As discussed earlier, if the Yonkers City Charter's ethics provisions intended to prevent the City Council and Mayor from making decisions that implicated their own financial remuneration, the City Charter would not expressly authorize those officials to approve their own pay raises—but it does. Similarly, the federal courts observed that since New York State jurisprudence expressly holds that a city council has authority to enact laws regarding term limits (*see Golden v. N.Y. City Council*, 305 A.D.2d 598, 599-600 (2d Dep't 2003), lv. denied 762 N.Y.S.2d 874 (2003)) then to interpret ethics provisions as prohibiting a city council to take legislative action regarding term limits would unduly deprive the people's representatives of powers clearly afforded to them by state law.

It is abundantly clear that the District Court and Second Circuit (as well as the COIB and New York County Supreme Court)[9] all have reached the conclusion that interpreting conflict-of-interest statutes as restricting public officials from enacting local laws that implicate term limits would undercut the very essence of representative democracy and their own powers which are conferred upon them by state and local law.

[9] In addition to the federal court decisions in *Molinari*, Supreme Court, New York County held in a related decision, that there was no conflict implicated by the City Council and Mayor extending term limits. In its decision, the court held—similar to the *Molinari* courts—that "the subject section [2604(b)(3) of the New York City Charter] is intended to deal with conflicts between a public servant's official duties and his or her private personal financial interests. Since there is no 'personal advantage,' as contemplated by the section, in permitting incumbents who otherwise would have been barred from seeking reelection to now run for another term, there is no merit to plaintiffs' position." *Cohen v. Bloomberg*, 24 Misc.3d 740, 744 (Sup. Ct. N.Y. Cnty. Apr. 30, 2009) (Lehner, J.).

The Appellants in *Molinari* attempted, in vain, to find case law or advisory opinions that would stand for the proposition that a vote regarding the terms or conditions of public office was akin to a vote in that public officials' personal or private interest. They could not find one such case, and Petitioners here have not even attempted to set forth any authority as part of their Petition—a reflection that the law of the Second Circuit is well-settled on this issue.

The Second Circuit concluded its holding, in relevant part, stating: "Accordingly, the District Court properly dismissed plaintiffs' claims under City law alleging that defendants had a conflict of interest in violation of section 2604(b)(2) and (3) of the City Charter and Rule 1-13(d)" and then noting that "it is not the role of this Court to interject itself into city politics. We shall only adjudicate the constitutional and legal claims properly before us, which we have analyzed exhaustively." *Molinari II*, 564 F.3d. at 618. It is respectfully submitted that this Court should arrive at the same conclusion and dismiss the causes of action relating to the Yonkers City Charter ethics provisions, as a matter of law.

POINT II

THIS PROCEEDING MUST BE DISMISSED BECAUSE A MANDATORY REFERENDUM IS PLAINLY NOT REQUIRED SUBSEQUENT TO PASSAGE OF A LOCAL LAW EXTENDING TERM LIMITS

Petitioners' argument that a vote to extend term limits is subject to mandatory referendum has been rejected time and again by New York Courts as well as by the District Court and Second Circuit in *Molinari*. As discussed below, it is well-settled that extending term limits is not subject to mandatory referendum, as such an extension does not change the actual term of an elected official's service. Moreover, numerous courts have confirmed that the existence of a prior referendum has no bearing on the authority of a legislative body to later amend such a law. Finally,

because there is simply no basis in law for the City Council to mandate a referendum, the City Council would not even be permitted to schedule a referendum.

A. Federal and New York State Court precedent have settled conclusively that local laws that extend term limits are not subject to mandatory referendum

Petitioners' argument that a mandatory referendum is required to extend term limits is the same recycled argument that has been clearly rejected by New York State and federal courts on numerous occasions.

Petitioners argue that a mandatory referendum is required because the local law "alters the qualifications of candidates for such municipal offices, alters the terms of office of those serving in the city's elected leadership positions and/or changes the terms of succession of the mayor by allowing him/her to serve a fourth term." Pet. ¶ 28.

Pursuant to Municipal Home Rule Law ("MHRL") section 10, cities are free to adopt local laws except where in conflict with the New York State Constitution and any general laws of the State. *See e.g. Jancyn Mfg. Corp. v. County of Suffolk*, 71 N.Y.2d 91, 96 (1987). One such restriction on this authority is that certain local laws may not be enacted without being subject to mandatory referendum, pursuant to MHRL § 23. MHRL § 23 mandates that a local law must be submitted to voters under the following circumstances:

> 2. Except as otherwise provided by or under authority of a state statute, a local law shall be subject to mandatory referendum if it:
>
> a. In the case of a city, provides a new charter for such city.
> b. In the case of a city, town or village, changes the membership or composition of the legislative body or increases or decreases the number of votes which any member is entitled to cast.
> c. Changes the veto power of the elective chief executive officer.
> **d. Changes the law of succession to the office of the chief executive officer of a county elected on a county-wide basis or if there be none the chairman of the board of supervisors, the mayor of a city or village or the supervisor of a town.**

> **e.** Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or **changes the term of an elective office**, or reduces the salary of an elective officer during his term of office.
> f. Abolishes, transfers or curtails any power of an elective officer.
> g. Creates a new elective office.
> h. In the case of a city, changes the boundaries of wards, or other districts, from which members of the county board of supervisors, chosen as such in such city to represent the city, are elected.
> i. Changes a provision of law relating to public utility franchises.
> j. In the case of a city, reduces the salary or compensation of a city officer or employee, increases his hours of employment or changes his working conditions if such salary, compensation, hours or conditions have been fixed by a state statute and approved by the vote of the qualified electors of the city. No provision effecting such reductions, increases or changes contained in any local law or proposed new charter shall become effective unless the definite question with respect to such reductions, increases or changes shall be submitted separately from any provisions not relating to such reductions, increases or changes and approved by the affirmative vote of a majority of the qualified electors voting thereon.
> k. In the case of a city, changes a provision of law relating to the membership or terms of office of the civil service commission of the city. (emphasis added)

Although the Petition fails to identify which sections under MHRL § 23(2) it seeks relief under, sections (d) and (e) pertaining to succession and changes to the term of an elective office are clearly implicated by the Petition. With respect to Petitioners' claim that the local law "changes the qualifications" for office and thus must be subject to mandatory referendum, MHRL § 23 does not include any relevant specific language. City Respondents will consider each of Petitioners' arguments in turn, to the extent they can be properly apprehended. Crucially, Petitioners' main argument has been expressly rejected by New York State and federal courts, as discussed herein.

1. It is well-established that the extension of term limits does not constitute a "change to the term" of an elective office

Petitioners' argument that the extension of term limits constitutes a "change to the term" of elective office necessitating submission of a local law for approval by mandatory referendum

subject to MHRL § 23(2)(e) has been squarely rejected in both New York State and federal courts. In *Golden v. City Council*, a New York City Charter provision allowed city officials to serve two terms in office. The New York City Council then enacted a local law, which essentially permitted city officials to serve more than two terms in office, but without changing the length of the terms themselves.[10] In upholding the local law, and determining that a mandatory referendum was not required, the Appellate Division, Second Department stated conclusively that a change to term limits, that **does not change the length of a term of office**, is not subject to mandatory referendum. Specifically, the court held: "A local law is subject to mandatory referendum if it 'changes the term of an elective officer' (Municipal Home Rule Law § 23[2][e])…In this case, however, Local Law No. 27 merely amended the term-limit provisions of the City Charter **without changing the length of the term of office**....[.]" *Golden v. N.Y. City Council*, 305 A.D.2d 598, 599-600 (2d Dep't 2003), lv. denied 762 N.Y.S.2d 874 (2003) (internal citations omitted) (emphasis added).

The *Golden* decision was not an issue of first impression; the decision was predicated upon New York State court case law, including at the Court of Appeals, and cited two earlier decisions for the assertion that mandatory referendum is not required where the length of the term of office is not changed. *See Golden*, 305 A.D.2d at 600. This included *Benzow v. Cooley*, in which the Buffalo City Council enacted a local law to permit Buffalo's mayor to serve an additional term. In *Benzow*, the court held that a mandatory referendum was not required, because "a reading of the Local Law clearly indicates that it is not one which 'changes the term of an elective office'.

[10] At issue in *Golden* was a New York City Charter provision limiting city officials to "two terms." However, every twenty years, the usual four-year terms were split into two two-year terms, in order to accommodate redistricting after a census. Accordingly, some officials were limited to two four-year terms (8 years) while others were limited to a four-year term and a two-year term (6 years). The local law remedied this by specifying that only "four year" terms were "full terms" under the Charter and a two-year term not accompanied by a second two-year term was a nullity. The effect of the change was that certain legislators who had been capped to one four-year term and one two-year term (6 years in total), were now permitted to serve 8 years (2 two-year terms and 1 four year term) or even longer, i.e. 10 years (1 two-year term, and two four-year terms). *See generally Golden v. N.Y. City Council*, 305 A.D.2d 598 (2d Dep't 2003), lv. denied 762 N.Y.S.2d 874 (2003).

The term of the Mayor under the new law is still four years." *Benzow v. Cooley*, 12 A.D.2d 162, 164 (4th Dep't 1961), *aff'd* 9 N.Y.2d 888 (1961) ("Local Law No 1 of 1960 of the City of Buffalo is not subject to mandatory referendum under subdivision 3 or 4 of section 15 of the City Home Rule Law"[11]). The *Golden* decision also cited *Holbrook v. Rockland County*, in which the Appellate Division, Second Department, held that a local law did not "change the term of an elective office" and was thus not subject to mandatory referendum under MHRL 23(2)(e), because while it imposed a new eligibility requirement, it did so "without changing a legislator's four-year term of office." *Holbrook v. Rockland County*, 260 A.D.2d 437, 438 (2d Dep't 1999).

With this precedent already established in New York State courts, plaintiffs in *Molinari I* nevertheless made the argument that the extension of term limits by the City Council was subject to mandatory referendum, because the officials could now serve for 12 years, rather than 8 years, thus "changing the term of an elective office." Deferring to the New York State precedent in *Golden*, the District Court in *Molinari* rejected this claim, holding: "[i]n this case, the law changes the maximum amount of time an official can serve from eight to twelve years, but the length of each term remains four years. Local Law 51 did not change the term of office of an elected official within the meaning of New York law." *Molinari I*, 596 F. Supp. 2d at 575. As has been held in New York State courts and in *Molinari*, the principle that extending term limits does not "change the term of an elective office," is settled law.[12]

[11] City Home Rule Law was a predecessor of MHRL.
[12] In fact, plaintiffs in *Molinari II* simply "abandoned their argument" with respect to MHRL § 23(2)(e). *See Molinari II*, 564 F.3d. at 609.

2. The extension of term limits does not constitute a change to the rules for succession nor does it change the qualifications for office and in any event, a change to the qualifications for office is not subject to mandatory referendum

The succession provision included in MHRL § 23(2)(d), on its face, clearly deals with local laws that would implicate the rules for succession if the mayor of a city is incapacitated or leaves office prematurely. It does not apply, as Petitioners wish, to require mandatory referendum where a local law authorizes an elected official to run for an additional term.

Specifically, the Yonkers City Charter section titled "Qualifications and vacancy in office" addresses the exact circumstances contemplated by MHRL § 23(2)(d),[13] *inter alia*: it provides a line of succession for an acting mayor if the Mayor dies or leaves office, and provides procedures for a special election. *See* City Charter § C3-4. Any amendments to this section of the City Charter bearing on the law of succession of the mayor of the city would be subject to mandatory referendum, and in fact, an amendment to this section was approved at mandatory referendum in 1995. Plainly, succession deals with the procedures when a mayor leaves office during a term, it does not in any way relate to measures to extend term limits. By permitting a mayor to seek another term, the mayor will not "succeed" himself. He would have to gain his party's nomination, and then prevail in a general election in November to become the next mayor. There is no plausible construction of the term "succession" that could lead to any other implication. *See Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998) ("the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof"). Nor do Petitioners cite any authority for such argument.

[13] MHRL § 23(2)(d) states that a local law shall be subject to mandatory referendum if it: "Changes the law of succession to the office of the chief executive officer of a county elected on a county-wide basis or if there be none the chairman of the board of supervisors, the mayor of a city or village or the supervisor of a town."

In any event, this exact argument has been made before, unsuccessfully, and was rejected in a decision that was affirmed by the Court of Appeals in *Benzow*, a case referenced previously herein, where the mayor of Buffalo was permitted by local law to be a candidate for re-election following the term of his incumbency. The local law amended the City Charter "to provide that a Mayor, heretofore or hereafter elected to such office, shall be eligible for re-election." Petitioner in *Benzow* made the same argument as petitioners herein, arguing that the ability to seek another term "changes the law of succession to the mayoralty" and thus, must be subject to mandatory referendum. *Benzow v. Cooley*, 12 A.D.2d 162, 164 (4th Dep't 1961), *aff'd* 9 N.Y.2d 888 (1961). The court rejected this argument, holding: "In our view, these words refer only to the filling of a vacancy in office during the incumbency of a Mayor, such as when the Mayor dies or is for some reason unable to continue before the expiration of his current term. We can find no broader construction for 'law of succession' in the [City] Home Rule Law or in the Buffalo City Charter." *Id*. There is simply no basis in the plain language of MHRL § 23(2)(d) to support Petitioners' construction.

A similar fate meets Petitioners' purported argument that a mandatory referendum is required where the qualifications of candidates are altered. Petitioners cite to no authority for this proposition. To the contrary, in *Holbrook v. Rockland County*, it was expressly held that changes of qualifications are not subject to mandatory referendum. There, the court held:

> Contrary to the plaintiff's contention, the "two hat" laws which bar Rockland County legislators from holding a second elective office do not change the terms of an elective office or curtail any powers of an elective officer. Rather, the provisions operate to impose a new eligibility requirement or qualification for holding office, without changing a legislator's four-year term of office, or curtailing any power of the office. Accordingly, no voter referendum was required to validly enact the two local laws (see, Matter of Benzow v Cooley, 22 Misc 2d 208, affd 12 AD2d 162, affd 9 NY2d 888; cf., Morin v Foster, 45 NY2d 287).

Holbrook v. Rockland County, 260 A.D.2d 437, 438 (2d Dep't 1999).

In any event, no change of qualification is proposed here. The same qualifications for office as previously existed remain; the only difference is that individuals that otherwise were term limited no longer face such an impediment. Accordingly, the part of Petitioners' cause of action predicated on qualifications for office should simply be dismissed as it fails to even assert a cognizable cause of action. Petitioners' arguments predicated on MHRL § 23 have been tried before, and the courts have made it abundantly clear that they do not have any merit.

B. It is irrelevant that term limits had been established by prior referendums

It is also irrelevant that prior referendums approved by City of Yonkers voters in 1994 and 2001 established term limits. The same was true with respect to Local Law 51 extending term limits for Mayor Bloomberg and the City Council members in *Molinari*. In a 1993 City-wide referendum, New York City voters adopted an amendment to the City Charter instituting a two-term limit for city officials by a vote of 59%-41%. The Charter amendment even included a public policy statement stating that the purpose of the amendment was so that elected representatives are "citizen representatives." *See Molinari I*, 596 F. Supp. 2d at 555, FN 3. In 1996, voters rejected a proposal to to extend term limits from 2 to 3 terms, this time by a 54%-46% total. *Id*. Despite these results, Local Law 51 was upheld. The *Molinari* decisions, in fact, were buttressed in New York Court of Appeals jurisprudence.

> [N]either the Municipal Home Rule Law nor the City Charter place any limitations on the legislature's ability to overturn or modify laws passed by referendum, or vice versa. As a result, each subsequent enactment takes priority over previous ones, regardless of the source. The New York Court of Appeals has endorsed the statement that "laws proposed and enacted by the people under an initiative provision are subject to the same constitutional, statutory, and charter limitations and those passed by the legislature and are entitled to no greater sanctity or dignity." *Matter of Caruso v. City*

> *of New York*, 136 Misc. 2d 892, 895-96, 517 N.Y.S.2d 897 (1987), aff'd, 143 A.D.2d 601, 533 N.Y.S.2d 379 (1st Dept.), *aff'd for reasons stated by trial court*, 74 N.Y.2d 854, 547 N.E.2d 92, 547 N.Y.S.2d 837 (1989). New York courts have on a number of occasions upheld legislative amendments to laws that were originally enacted by referendum.

Molinari I, 596 F. Supp. 2d at 559.

In *Golden v. N.Y. City Council*, also discussed above, the Appellate Division, Second Department held:

> Moreover, the fact that the term-limit provisions of the City Charter were enacted through voter referendum did not preclude the City Council from amending those provisions, as 'laws proposed and enacted by the people under an initiative provision are subject to the same constitutional, statutory and charter limitations as those passed by the Legislature and are entitled to no greater sanctity or dignity.

Golden v. N.Y. City Council, 305 A.D.2d 598, 600 (2d Dep't 2003), lv. denied 762 N.Y.S.2d 874 (2003).

Similarly, in *Caruso v. New York*, the court made the following observation in a similar context, holding:

> Inasmuch as a legislative body may modify or abolish its predecessor's acts subject only to its own discretion, it likewise should be able, in the absence of an express regulation or restriction, to amend or repeal an enactment by the electorate, its coordinate unit, and vice versa.
>
> In the instant case, 20 years have elapsed between the time of the enactment by the voters and the subsequent amendment by the Council, during which period the voters' wishes presumably were being enforced as reflected in section 440 of the Charter. To the extent that the Council passed a local law amending the Charter, and the Council represents the people, it may be considered that the *vox populi*, which secured the initiated legislation, changed its own voice.
>
> Even assuming the Council immediately amended the Charter following the voter initiative, petitioners and other eligible voters would not be without remedies. They could reenact the Charter provision, elect other Council members who more closely follow

> their views, or amend the Constitution, the Municipal Home Rule Law, or perhaps the Charter, to control or curb Council powers with respect to initiated legislation.

Caruso v. New York, 136 Misc.2d 892, 896 (Sup. Ct. N.Y. Cnty. 1987) (Blyn, J.), aff'd 143 A.D.2d 601 (1st Dep't 1988), aff'd for reasons stated by trial court 74 N.Y.2d 854 (1989) (internal citations omitted).

The same is true here, where referendums were adopted in 1994 and 2001. The councilmembers who voted in 2022 to extend term limits are reflecting the views of their constituents, who are seeking more, not less choices in the upcoming elections. If the will of the voters is that the Mayor or any of the councilmembers should not receive another term, the voters will have an opportunity to vote accordingly. Moreover, voters are free to put a referendum on the ballot to repeal the amendment that was passed by the council. As the District Court noted in *Molinari I*:

> In 1993 and again in 1996, the proponents of referenda successfully advocated before the public the position that in the circumstances as they then existed, elected officials should hold office for no more than two consecutive terms. Some plaintiffs now plausibly state that they either continue to maintain their earlier positions or agree with that position even in the current economic situation. Their position may well have merit and it may again prevail either in the context of a new referendum or in an election in which all or many incumbents are rejected at the polls.

Molinari I, 596 F. Supp. 2d at 563-64.

The court added, "passing a subsequent law that overturns a prior law is not a nullification of the results of prior laws. If it were, as noted above, no law could be repealed or amended." *Molinari I*, 596 F. Supp. 2d at 564.

Accordingly, that the local law was previously enacted by referendum had no bearing on the authority of the City Council to pass a subsequent enactment.

C. **The City Council Lacks Authority to Call for a Referendum**

As discussed in the preceding sections, there is simply no requirement in the Municipal Home Rule Law, or elsewhere, that this local law be subject to a mandatory referendum. Legislators are limited by the state and federal constitution as well as their own charter and state law with respect to their authority to pass local laws. Where there is no requirement that a referendum be held, a city may not expend public funds for the conduct of a referendum without specific state statutory authorization. 1991 N.Y. Op. (Inf.) Att'y Gen. 19, 1991 N.Y. AG LEXIS 21. In other words, there is simply no basis for the City Council itself to hold a mandatory referendum for the local law and it is respectfully submitted that the Court may not order the City to do so, given the lack of any specific state authority for such a referendum to be held.

CONCLUSION

For the foregoing reasons, City Respondents request that the Court dismiss the Verified Petition.

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Respectfully submitted,

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