Motion No. 2023-505

Court of Appeals of the State of New York

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 PAROLIS, AND RONALD MATTEN,

Appellants,

v.

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

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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July 11, 2023

Appellate Division, Second Department Case No. 2023-04226

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PRELIMINARY STATEMENT

In 2022, the Yonkers City Council passed, and the Mayor signed, Local Law 10, a measure that increases from three to four the limit on how many consecutive four-year terms a person may serve in certain Yonkers elective offices. The Appellate Division, Second Department unanimously held that this term-limit increase became effective upon passage and signing. In particular, approval via citywide referendum was not required under Municipal Home Rule Law § 23 (2) (e), the court explained, because Local Law 10 is not a law that "changes the term of an elective office." The term of each office impacted by the Yonkers law remains four years. The law changes only the maximum number of consecutive terms a person may serve—a change for which no referendum is statutorily required.

The Second Department's ruling does not warrant this Court's review. Indeed, the decision is about as straightforward as they come. It follows entirely from venerable precedent of this Court—*Matter of Benzow v Cooley* (9 NY2d 888 [1961])—squarely holding that, under Municipal Home Rule Law § 23 (2) (e)'s identically worded predecessor, local laws increasing term limits need not be approved via referendum.

Matter of Benzow has not been overruled. It is not in need of reconsideration. And it is fully supported by standard principles of statutory interpretation.

The motion for leave to appeal should be denied.

STATEMENT OF THE CASE

A. The Yonkers City Council And Mayor Enact Local Law 10, Increasing The Number Of Consecutive Terms That Elected City Officials May Serve

The City of Yonkers is the third largest city in the State of New York and the largest city in Westchester County (City of Yonkers, *Demographics*, https://www.yonkersny.gov/work/demographics). Its form of government is prescribed by the Yonkers City Charter.[1] Pursuant to the Charter, the City is run by a Mayor, who functions as chief executive as well as chief administrative officer, overseeing the work of the City's many agencies, departments, commissions, and boards (Yonkers Charter § C3-2). The lawmaking function is delegated to a City Council: a seven-person body comprised of a City Council President and six City Councilmembers (*id.* §§ C4-1 [A], C4-2, C4-7). The positions of Mayor,

[1] The Yonkers City Charter is available online via eCode360, a database of municipal codes (*see* https://ecode360.com/15120059).

City Council President, and City Councilmember are elective offices (*id.* §§ C3-1, C3-4 [A], C4-2, C4-3, C4-7 [A]). For all three positions, the term of office is four years (*id.* § C2-2 [B]).

Prior to 1994, there was no limit on the number of consecutive terms that persons could serve as Mayor, City Council President, or City Councilmember (R 19).[2] A person elected to any of those positions could continue in the role for as many terms as he or she could win reelection (R 19). In 1994, legislation imposing a limit of two consecutive terms was passed by the City Council, signed by the Mayor, and approved by Yonkers voters at a citywide referendum (R 19).

In 2011, Mike Spano, a democrat, was elected Mayor (R 16). In 2015, he was reelected to a second term (R 16). Spano won the 2015 race in a landslide, receiving more than 80 percent of all votes cast (*see* County of Westchester, *2015 General Election Canvass Book*, at 466–477, https://citizenparticipation.westchestergov.com/images/stories/pdfs/2015CanvassGeneral151103.pdf). Media outlets reported that his win represented the largest margin of victory ever in a Yonkers mayoral

[2] Citations of the form "R ___" refer to pages of the record on appeal in this matter filed in the Second Department.

election (*see e.g.* Dan Murphy, *Mayor Spano, Act 2!*, Yonkers Rising, Nov. 6, 2015).

In 2018, late into Spano's second mayoral term, the City Council passed with bipartisan support, and Spano signed, a Yonkers local law permitting persons to hold the office of Mayor, City Council President, or City Councilmember for up to three consecutive terms (R 16). In 2019, Spano ran for, and won, reelection to a third term as Mayor (R 16). He received more than 75 percent of the total number of mayoral votes cast (*see* County of Westchester, *2019 General Election Canvass Book*, at 440–453, available at https://citizenparticipation.westchestergov.com/images/stories/pdfs/2019canvassgnl1105.pdf).

In 2022, during Spano's third term as Mayor, the City Council passed with bipartisan support, and Spano signed, Local Law 10—the law at issue in this case (R 41). Local Law 10 further extended term limits. It permits persons to hold the office of Mayor, City Council President, or City Councilmember for up to four consecutive terms (R 26–27).

B. The Second Department Unanimously Determines That Local Law 10 Became Effective Upon Passage And Signing—And Need Not Be Approved Via Citywide Referendum

Later in 2022, Anne Marie McArdle and other Yonkers residents filed a hybrid declaratory judgment complaint and CPLR article 78 petition against the City of Yonkers, Spano, and the members of the City Council in Supreme Court, Westchester County, seeking to invalidate Local Law 10 (*see* R 15–20). Plaintiffs—appellants here—claimed that the law cannot become effective until approved via citywide referendum, on the ground that it "changes the term of an elective office" under Municipal Home Rule Law § 23 (2) (e) (R 18–20).

In April 2023, Supreme Court denied plaintiffs' hybrid complaint/petition, finding that no referendum was required (R 3–6). On appeal, the Second Department unanimously sustained that ruling (2023 NY App Div LEXIS 3438 [2d Dept June 23, 2023, Case No. 2023-04226]).[3]

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[3] The Second Department did remit to Supreme Court, however, for the limited ministerial purpose of having that court amend its decision and order to expressly set forth a declaratory judgment that no referendum is required and, consequently, that Local Law 10 is valid (2023 NY App Div LEXIS 3438, at *8).

In a decision and order issued June 23, 2023, the Second Department determined that the case is controlled by this Court's decision in *Matter of Benzow* (2023 NY App Div LEXIS 3438, at *5). There, interpreting former City Home Rule Law § 15 (4)—Municipal Home Rule Law § 23 (2) (e)'s materially identical "city-specific predecessor"—this Court held that no referendum was required in order for a Buffalo local law lifting mayoral term limits to take effect (*id.* at *4–5). The Buffalo law "was not one that 'changes the term of an elective office,' since the term of the mayor under the new law was still four years" (*id.* at *5). The same is true of Yonkers Local Law 10, the Second Department observed (*id.*). "Accordingly, under the Court of Appeals' decision in *Matter of Benzow*, we must conclude that Local Law No. 10 was not subject to a mandatory referendum" (*id.*).

The Second Department also reasoned that this Court's recent decision in *Hoehmann v Town of Clarkstown* (2023 NY LEXIS 765 [May 19, 2023, Case Nos. 56, 57 & 58]) is inapposite (2023 NY App Div LEXIS 3438, at *5–6). That case involved a local law that "was subject to mandatory referendum pursuant to Municipal Home Rule Law § 23 (2) (f) because it 'abolishes, transfers or curtails a power of an elective officer'"

(*id.* at *6 [quoting Municipal Home Rule Law § 23 (2) (f) (alteration marks omitted)]). "Here, there is no claim that a referendum was required pursuant to Municipal Home Rule Law § 23 (2) (f)," the court noted (*id.*)

On June 27, 2023, Spano, who is currently seeking his fourth consecutive term as Yonkers mayor, prevailed in the democratic party primary election, winning nearly 70 percent of the vote (County of Westchester, *Unofficial Tally of Election Results*, https://www.westchestergov.com/boe99/link25.aspx). On July 3, 2023, plaintiffs filed in this Court, and Judge Halligan signed, a proposed order to show cause bringing on a motion for leave to appeal the Second Department's determination. The upcoming general election, including the election for Mayor of Yonkers, is scheduled for November 7, 2023.

REASONS FOR DENYING THE MOTION

The Second Department's unanimous decision sustaining Yonkers Local Law 10's term-limit increase does not meet this Court's criteria for leave to appeal (*see* 22 NYCRR 500.22 [b] [4]). The decision follows directly from, and is compelled by, this Court's long-settled *Matter of Benzow* precedent. And *Matter of Benzow* was not overruled by

Hoehmann—a decision in which the Court did not even mention *Matter of Benzow* or Municipal Home Rule Law § 23 (2) (e), and instead opined only on a different Municipal Home Rule Law provision, and only in *dicta* at that. Nor are there any defects in the logical underpinning of *Matter of Benzow* that warrant reexamination. Plaintiffs' motion for leave to appeal should be denied.

A. The Second Department's Ruling Upholding Yonkers Local Law 10 Follows Directly From This Court's Decision In *Matter Of Benzow*

The Second Department's ruling that Yonkers Local Law 10 became effective upon passage by the City Council and signing by the Mayor, without the need for approval via referendum, breaks no new jurisprudential ground. As that court recognized, its determination follows directly from *Matter of Benzow*. Indeed, plaintiffs do not dispute—nor plausibly could they dispute—that a straightforward application of *Matter of Benzow* requires the result the Second Department reached below.

Matter of Benzow concerned the Buffalo Common Council's passage of Local Law 1 in 1960, which amended the Buffalo City Charter (22 Misc 2d 208, 209 [Sup Ct, Erie County 1961]). Before the amendment, the

charter provided that "[a]ny mayor elected as such * * * for a full term of four years shall be ineligible for the next term after the termination of his office" (*id.*) Local Law 1 removed that one-term limit. It amended the charter to provide instead that "[a]ny mayor heretofore or hereafter elected as such * * * shall be eligible for reelection" (*id.*) The amendment did not expressly set forth any cap on the number of times a mayor would be "eligible for reelection," thereby evidently allowing persons to serve however many consecutive mayoral terms they could win at the polls.

A member of the Buffalo Common Council sued the city in Supreme Court, Erie County, asserting that Local Law 1 was inoperative and could not take effect until approved via citywide referendum pursuant to the former City Home Rule Law (22 Misc 2d at 209). In support, the legislator pointed to § 15 (4), the provision of the former City Home Rule Law requiring referenda for any local law that "changes the term of an elective office" (*id.*, quoting former City Home Rule Law § 15 [4]).[4] Supreme Court

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[4] The precise language of City Home Rule Law § 15 (4) at issue in *Matter of Benzow* was added in 1947 (L 1947, ch 217, § 1), although the provision had been phrased similarly ever since the City Home Rule Law was enacted (*see* L 1924, ch 363).

rejected the applicability of § 15 (4) and dismissed the lawsuit (*id.* at 211, 216).

The Fourth Department affirmed, holding that Buffalo Local Law 1 was effective notwithstanding the lack of approval via citywide referendum (12 AD2d 162 [4th Dept 1961]). "[A] reading of the Local Law clearly indicates that it is not one which 'changes the term of an elective office,'" the court stated (*id.* at 164). Namely, "[t]he term of Mayor under the new law is still four years" (*id.*). Thus, the court concluded, the Buffalo law did not require approval via referendum under former City Home Rule Law § 15 (4) (*id.*).

This Court unanimously affirmed. It held that Local Law 1 was "not subject to mandatory referendum under subdivision * * * 4 of section 15 of the [former] City Home Rule Law," and therefore was effective notwithstanding that a referendum had not been held (9 NY2d at 889).

In the proceedings below, the Second Department correctly determined that *Matter of Benzow* controls the present case involving Yonkers Local Law 10's term-limit increase. The reason: This Court's interpretation of former City Home Rule Law § 15 (4) controls the interpretation of Municipal Home Rule Law § 23 (2) (e). Municipal Home

Rule Law § 23 (2) (e) is, in relevant part, identical to former City Home Rule Law § 15 (4), its "city-specific predecessor" (2023 NY App Div LEXIS 3438, at *5). That is no accident. The New York State Office of Local Government, which was responsible for drafting the Municipal Home Rule Law, intended for that law to "substantially" continue the former City Home Rule Law as far as "the specification of types of local laws subject to referenda" is concerned (NY St Off of Local Govt., *Memorandum: Constitutional Amendment re Home Rule and Related Litigation* at 2 [May 1963]).

Applying *Matter of Benzow*, the Second Department held that Yonkers Local Law 10 did not require approval via referendum pursuant to Municipal Home Rule Law § 23 (2) (e). That provision of the Municipal Home Rule Law "requires a referendum when a proposed law would * * * change the term of an elective office," the court observed (2023 NY App Div LEXIS 3438, at *5). But Local Law 10 effects no such change; it merely "increase[s] the number of consecutive four-year terms that a person could hold the office of mayor, city council president, or councilmember from three terms to four terms" (*id.* at *2). The court accurately stated that § 23 (2) (e) "does not address," and therefore does

not require approval by referendum for, "the circumstance * * * where a legislative body amends a local charter to extend the number of consecutive terms that a person may serve in an elective office" (*id.* at *5).

Accordingly, "Local Law No. 10 is valid," the Second Department correctly concluded (2023 NY App Div LEXIS 3438, at *8).

The present case is even easier than *Matter of Benzow* insofar as Yonkers Local Law 10 is significantly more moderate than Buffalo Local Law 1, the law that *Matter of Benzow* upheld. By providing that "[a]ny mayor heretofore or hereafter elected as such * * * shall be eligible for reelection" (22 Misc 2d at 209), and not prescribing any concomitant constraint upon that eligibility, the Buffalo law seemingly eliminated term limits entirely. By contrast, under Local Law 10, Yonkers elected officials remain subject to term limits. The law simply adjusts the applicable limit from three terms to four (R 26).

B. The Second Department's Faithful And Straightforward Application Of *Matter Of Benzow* Should Not Be Disturbed

Plaintiffs contend that the Second Department's decision below, applying *Matter of Benzow* to uphold the validity and effectiveness of Yonkers Local Law 10, conflicts with this Court's recent ruling in

Hoehmann. They argue that *Hoehmann* "overruled the holding in *Benzow*" (Sussman Aff in Supp of Order to Show Cause ¶ 10). This Court lacks subject-matter jurisdiction to consider that argument. And on the merits, the argument is preposterous: As described more fully below, the Court in *Hoehmann* (a) addressed a local law that in so many words impacted the length of "the term" of elected officials, not just the maximum number of consecutive terms they could serve, (b) opined that approval via referendum was required by Municipal Home Rule Law § 23 (2) (f), saying nothing about § 23 (2) (e), the provision at issue here, and (c) observed that the applicability of § 23 (2) (f) was not contested among the parties, rendering any ruling on that (already inapposite) issue *dicta*. *Hoehmann* provides no basis for reversal.

1. This Court Lacks Subject-Matter Jurisdiction To Review Plaintiffs' Contention That The Decision Below Conflicts With *Hoehmann*

Start with the threshold issue of subject-matter jurisdiction. With exceptions not relevant here, the New York State Constitution limits this Court's jurisdiction to "the review of questions of law" (NY Const, art VI, § 3 [a]). "[A]n unpreserved issue does not raise a 'question of law'" within the meaning of that jurisdictional constraint (*Henry v New Jersey Transit*

Corp., 2023 NY LEXIS 495, at *4 n 2 [Mar. 21, 2023, Case No. 11]; *see generally Hecker v State of New York*, 20 NY3d 1087, 1087 [2013], *rearg denied*, 21 NY3d 987 [2013]). "In general, arguments * * * are preserved only if presented at the trial court level" (*Henry*, 2023 NY LEXIS 495, at *4). At the very least, preservation requires that an argument be "asserted at the first opportunity" (*Matter of Schulz v State of New York*, 81 NY2d 336, 344 [1993]; *see e.g. Grzesiak v General Elec. Co.*, 68 NY2d 937, 938–939 [1986] [finding that the Court lacked subject-matter jurisdiction to consider an argument "not raised until [the proponent's] posttrial motion for judgment notwithstanding the verdict"]).

Plaintiffs did not even mention *Hoehmann* until oral argument in the Second Department. The decision came out on May 19, 2023 (2023 NY LEXIS 765, at *3), shortly after plaintiffs filed their opening appellate brief below on May 12, 2023. Respondents filed their answering brief on June 12, 2023, giving plaintiffs until June 22, 2023 in which to file a reply brief and address *Hoehmann* therein (22 NYCRR 1250.9 [d]). Yet, plaintiffs opted not to do so. Indeed, they filed no further written submissions whatsoever. Not a brief. Not a letter apprising the court (and respondents) of their reliance on new legal authority. *Nothing*.

Accordingly, when the Second Department considered (and rejected) plaintiffs' belated argument that *Hoehmann* had overruled *Matter of Benzow* (*see* 2023 NY App Div LEXIS 3438, at *5–6), that court "necessarily decided the unpreserved issue within its interest-of-justice jurisdiction" (*People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 407 [2006], *rearg denied*, 7 NY3d 742 [2006]). But unlike the Appellate Division, this Court has no interest-of-justice jurisdiction (*id.*; *Hecker*, 20 NY3d at 1087). So, because the *Hoehmann* argument is not a "question of law" in the constitutional sense, it therefore falls outside of this Court's purview (NY Const, art VI, § 3 [a]). In other words, the principal issue that plaintiffs think leaveworthy is beyond this Court's power to review.

2. There Is No Conflict: *Hoehmann* Did Not Overrule *Matter Of Benzow* And Does Not Require Reversal

On the merits, the Second Department's decision applying *Matter of Benzow* to uphold Yonkers Local Law 10 does not conflict with this Court's decision in *Hoehmann*. The Second Department's observation that *Hoehmann* "is not dispositive" here (2023 NY App Div LEXIS 3438, at *6) is a profound understatement. *Hoehmann* cannot plausibly be read as even implicating *Matter of Benzow*, let alone overruling it. The Court's

Hoehmann ruling has nothing whatsoever to do with the statutory question presented in *Matter of Benzow* and in the present case.

Hoehmann concerned a local law passed by the Town of Clarkstown in 2014 (2023 NY Misc LEXIS 2569, at *3 [Sup Ct, Rockland County Mar. 15, 2023, Index No. 035405/2022]). The law, styled Local Law 9, amended the Town Code to provide that "the term of any elected Clarkstown official elected in a regular election after January 1, 2015, shall not exceed eight consecutive years" (*id.* [alteration marks omitted]). The law further provided that this limitation could only be repealed by "a majority vote of the [Town] Board, plus one," *i.e.*, "a supermajority" (*id.* at *4).

The Clarkstown Town Supervisor sued the Town in Supreme Court, Rockland County, seeking a declaratory judgment that Local Law 9 was not operative because it had not been approved via referendum (2023 NY Misc LEXIS 2569, at *3–4). In his complaint, the Supervisor relied exclusively on Municipal Home Rule Law § 23 (2) (f), under which a referendum is required for a local law that "[a]bolishes, transfers or curtails any power of an elective officer" (*Hoehmann* R 23–25).[5] The

[5] Citations of the form "*Hoehmann* R ___" refer to pages of the record on appeal filed in *Hoehmann* in the Second Department. That

Supervisor's theory was that Local Law 9 curtailed the power of the members of the Town Board by preventing them from repealing the eight-year term cap by simple majority, as they ordinarily are empowered to do (*Hoehmann* R 23–25).[6]

In response, the Town and various intervenors did not dispute the Supervisor's claim that Local Law 9 was subject to mandatory referendum under Municipal Home Rule Law § 23 (2) (f) on the basis of the supermajority provision. Rather, they contended that the Supervisor's claim was untimely (2023 NY Misc LEXIS 2569, at *4). Supreme Court agreed and dismissed the Supervisor's challenge as time-barred (*id.* at *8).

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record is available via the New York State Courts Electronic Filing System, using case number 2023-03811.

[6] The Supervisor appears to have assumed that Local Law 9 not only capped the length of Town of Clarkstown elected officials' terms of office at eight years but also prohibited those officials from serving more than eight consecutive years in office *across multiple terms*, and thereby imposed *de facto* term limits. In his complaint, filed near the end of his second consecutive four-year term, the Supervisor stated that Local Law 9 "would prohibit him from seeking another term as elected Supervisor" (*Hoehmann* R 24).

On appeal, the Second Department reversed, found the Supervisor's claim timely, and held Local Law 9 invalid because it had not been approved via referendum (2023 NY App Div LEXIS 2619 [2d Dept May 15, 2023, Case No. 2023-03811]). The parties "do not dispute" that a referendum was required under Municipal Home Rule Law § 23 (2) (f) because the law restricted the general power of the members of the Town Board to act via simple majority, the Second Department observed (*id.* at *4–5). The court also stated that a referendum was required for the separate reason that Local Law 9 "changes the term of an elective office" per Municipal Home Rule Law § 23 (2) (e) (*id.* at *4)—even though, on appeal, as in Supreme Court, the Supervisor had not advanced that argument (*see Hoehmann* Br for Plaintiff-Appellant 10–24).[7]

This Court affirmed the Second Department's bottom-line judgment that Clarkstown Local Law 9 was invalid (2023 NY LEXIS 765, at *2–3). Consistent with the aforementioned constraints on its ability to review unpreserved issues (*supra* pp 13–14), the Court relied only on the

[7] Like the *Hoehmann* Second Department record on appeal, the Supervisor's brief to that court is also available via the New York State Courts Electronic Filing System using case number 2023-03811.

decisional ground the Supervisor actually had advanced in the litigation: that a referendum was required pursuant to Municipal Home Rule Law § 23 (2) (f) in light of the supermajority-repeal provision—a contention that, the Court noted, "was not disputed" (*id.* at *2). "No such referendum was held" (*id.*). Accordingly, Local Law 9 "lacks operative effect" and "has no legal force" (*id.* at *2–3).

This Court's decision in *Hoehmann* does not mention *Matter of Benzow*. It does not even mention Municipal Home Rule Law § 23 (2) (e). And its only reference to Municipal Home Rule Law § 23 (2)—a reference to § 23 (2) (f)—is *dicta*, inasmuch as the parties did not dispute that a referendum was required by that subsection in light of Local Law 9's supermajority-repeal provision (2023 NY LEXIS 765, at *2). Plaintiffs are simply flat wrong to assert (Sussman Aff in Supp of Order to Show Cause ¶ 10) that "[i]n *Hoehmann* * * * the Court agreed that the words 'changes the term of an elective office' equally apply to the imposition of term limits, requiring a mandatory referendum." The Court in *Hoehmann* had no jurisdictionally proper occasion to consider that language, and did not opine on it.

In sum, the Court's *Hoehmann* decision casts no doubt whatsoever of the correctness of *Matter of Benzow* and the Second Department's application of *Matter of Benzow* to sustain Yonkers Local Law 10 here. There is no conflict.

3. The Second Department's Decision Below Likewise Does Not Conflict With *Its Own* Prior Ruling In *Hoehmann*

Contrary to plaintiffs' suggestion (*see* Sussman Aff in Supp of Order to Show Cause ¶ 7), the Second Department's application of *Matter of Benzow* does not conflict with *that court's* decision in the *Hoehmann* case, either, notwithstanding the court's characterization of Local Law 9 as a law that "changes the term of an elective office" within the meaning of Municipal Home Rule Law § 23 (2) (e) (*see* 2023 NY App Div LEXIS 2619, at *4). There is no tension whatsoever between the respective Second Department rulings, for two key reasons.

First, Local Law 9 did not, or at least did not solely, institute a limit on the number of consecutive terms a person could serve in Town of Clarkstown elective office (*contra* Sussman Aff in Supp of Order to Show Cause ¶ 9). By its plain text, the law changed the terms themselves insofar as it provided that "*the term* of any elected Clarkstown official

elected in a regular election after January 1, 2015, shall not exceed eight consecutive years" (*Hoehmann*, 2023 NY Misc LEXIS 2569, at *3 [emphasis added]). No such change is effectuated by the Yonkers local law, however. The terms of office of Yonkers elected officials are the same as they were the moment before the law was enacted: four years in length.

Second, the Second Department's characterization of Local Law 9 as changing the term of Town of Clarkstown elective office within the meaning of Municipal Home Rule Law § 23 (2) (e) was *dicta*. As noted above (*supra* p 19), the parties in *Hoehmann* all agreed that Local Law 9 was subject to mandatory referendum under § 23 (2) (f) in light of the effect of the repeal-only-by-supermajority provision (*see* 2023 NY App Div LEXIS 2619, at *4–5). The court's statement regarding § 23 (2) (e) was, at most, an advisory opinion.

The Second Department panel votes in the respective cases underscore the absence of any conflict between them. Two members of the panel that heard and decided the present case also sat on the panel that earlier had heard and decided *Hoehmann*: Justice Wooten and Justice Wan (*compare* 2023 NY App Div LEXIS 3438, at *1, *with* 2023

NY App Div LEXIS 2619, at *1). In *Hoehmann*, both of those Justices voted to invalidate Clarkstown's Local Law 9 (2023 NY App Div LEXIS 2619, at *11). And in this case, they both voted to uphold Yonkers Local Law 10 (2023 NY App Div LEXIS 3438, at *8). The only plausible explanation is that the Justices correctly recognized that the question presented in *Hoehmann* had nothing to do with the question presented here.

Additionally, any conflict between panels of the Second Department would counsel *against* leave to appeal to this Court. That sort of intra-departmental inconsistency would suggest that further percolation is necessary to allow the Second Department to settle on a definitive position on the Municipal Home Rule Law § 23 (2) (e) issue that this Court can then evaluate (*cf.* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.6 [10th ed. 2013] [explaining that the existence of conflicts between panels of a single federal circuit court of appeals generally counsels against certiorari review by the U.S. Supreme Court]).

4. *Matter Of Benzow* Is Sound And Not In Need Of Reconsideration

Finally, there is no merit to plaintiffs' attack on *Matter of Benzow* as illogical (*see* Sussman Aff in Supp of Order to Show Cause ¶¶ 10, 12–

13). The Court was eminently justified in interpreting Municipal Home Rule Law § 23 (2) (e)'s materially identical, city-specific predecessor to require referenda for local laws that extend the length of the term of an elective office but not for local laws that merely raise the limit on how many consecutive terms of office a person may serve. At least once before, this Court has declined an invitation to disturb that commonsense distinction (*see Matter of Golden v New York City Council*, 305 AD2d 598 [2d Dept 2003], *lv denied*, 100 NY2d 504 [2003]). The Court should do so again here.

The most obvious justification for the distinction of which plaintiffs complain is Municipal Home Rule Law § 23 (2) (e)'s plain text, which must be given effect unless it would give rise to an absurdity or contradiction—neither of which arise here (*Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 507 [2010]). The statute's clear language requires a referendum for any local law that "changes the term of an elective office" (Municipal Home Rule Law § 23 [2] [e]; former City Home Rule Law § 15 [4] [same]), which would include a law that makes the term longer. But the operative language imposes no such requirement for laws that increase the limit on the number of consecutive terms a person is eligible

to serve. The statute that plaintiffs desire simply is not the statute that the Legislature enacted.

Further, adhering to the relevant plain language—and distinguishing laws that extend the length of an elective term from laws that extend existing term *limits*—respects the tenets of participatory democracy that underlie Municipal Home Rule Law § 23 (and former City Home Rule Law § 15, the analog directly at issue in *Matter of Benzow*). Local laws that extend the length of a term alter the fundamental bargain between officials and their constituents, because they increase the number of years an official can serve in office on the strength of a single electoral victory. Thus, for local laws extending the length of a term, approval via referendum is needed in order to ensure that they do not "diminish[] the power of the voters * * * without direct authorization from the electorate" (*Hoehmann*, 2023 NY LEXIS 765, at *2).

In contrast, local laws that increase term *limits*, like the Buffalo law at issue in *Matter of Benzow* and the Yonkers law at issue here, do not present the same concern. This is because an official can enjoy the benefits of a term-limit extension only if he garners sufficient voter support to win each successive consecutive term. In that way, term-limit

extensions are *continuously* subject to the most fundamental of all mandatory referenda: term-by-term general elections.

This Court's decision in *Matter of Benzow* sensibly tracks the aforementioned distinction. It reflects a sound apprehension of legislative intent that the present case presents no legitimate reason to disturb.

CONCLUSION

Plaintiffs' motion for leave to appeal should be denied.

July 11, 2023

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AFFIRMATION OF SERVICE

I hereby affirm under penalty of perjury that, on July 11, 2023, I caused the foregoing Memorandum of Law in Opposition to Motion for Leave to Appeal to be served upon plaintiffs by e-mailing a copy to counsel for plaintiffs at

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