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On the Voters’ Terms: Amending New York City’s Charter to Protect Voter-Imposed Term Limits

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ON THE VOTERS’ TERMS

I. INTRODUCTION

Over the past two decades, New York City voters have on three separate occasions voted overwhelmingly to limit citywide elected officials to two terms in office. Clearly, the citizens of New York City favor mandatory turnover in local government, to ensure that they are represented by Jeffersonian citizen-legislators, rather than self-serving career politicians. On the most recent occasion, in 2010, the voters re-imposed the two-term limit that had existed since 1993, after the New York City Council amended the City Charter by local law in 2008 to give itself and Mayor Michael R. Bloomberg a third term in office. Unfortunately, this latest two-term limit is as ephemeral as each of the previous voter-imposed term limits because the City Council could, under the City Charter as it has been interpreted by the courts, once again nullify the will of the voters by passing a local law that alters the two-term limit. As a former Deputy Mayor and two-time Chair of a New York City Charter Revision Commission, I care deeply about these issues, and I understand their importance to the integrity of our local democracy. Structural limitations imposed by the citizens on their elected officials must be respected. It is the politicians who work for the people, not the other way around. When the Mayor and City Council voted themselves a third term, they did great damage to the voters’ faith in their elected officials. That trust would be further eroded if the City Council were to once again invalidate the will of the voters for their own personal benefit.

The issue of term limits first came before New York City voters in a 1993 referendum in which they voted overwhelmingly to impose a two-term limit on the Mayor, City Council Members, Public Advocate, and Comptroller.1 City Council Members and their allies proposed extending the limit for their offices to three terms in 1996, but the voters soundly defeated that referendum.2 Then, after the September 11, 2001 terrorist attacks, there was talk of changing the law to allow Mayor Rudolph Giuliani to run for a third term or continue in office for some extended period while the city recovered, but Mayor Giuliani put that idea to rest, citing the need to keep the city united in a difficult time.3 Ultimately, the election and transition to Mayor Michael Bloomberg took place as scheduled.

Then, in October 2008, Mayor Bloomberg, seizing on the notion that the financial crisis was an emergency requiring him to remain in office, crafted a one-time-only deal with the City Council, which narrowly passed a local law permitting those holding city offices at the time to run for a third term, including Mayor


Bloomberg and the very City Council Members who had approved the law. As part of the deal, the two-term limit was placed back on the ballot for a referendum in 2010. The voters would restore the two-term limit with a third decisive vote.

In a case I litigated on behalf of elected officials, voters, and good governance groups challenging the Mayor and City Council’s decision to vote themselves a third term, the federal courts held that the First Amendment did not prevent the City Council from annulling the will of the voters by local law, the City Charter did not require a voter referendum to undo the term limits imposed by the people, and the Charter’s conflicts-of-interest provisions do not forbid City Council Members from voting themselves a third term.

As a result, while the voters have returned to the two-term limit once again, that limit can be changed at any time by self-interested politicians. They can ignore the will of the people for whom they purportedly work. They can overlook the clear conflicts of interest inherent in such an act. They can take advantage of their incumbency, which, in this particular electoral market, effectively grants them a lifetime appointment, barring indictment or other notable scandal. They can sit comfortably in their seats without any meaningful competition that might lead to bold, fresh ideas that respond to the evolving needs of the city. And finally, they can vote themselves four more years of a public salary and benefits.

Therefore, the only way to ensure that the will of the voters is not once again trampled by a future Mayor and City Council is to amend the City Charter to make crystal clear that the City Council cannot alter the two-term limit without voter approval, and to make explicit that to do so for a politician’s benefit would violate the city’s conflicts-of-interest laws. I submit that if the voters were given the opportunity to amend the City Charter so that, in the future, this structural issue so fundamental to the proper functioning of local government can be decided only by the people of New York City, they would overwhelmingly approve of doing so. Such a step would


6. Good governance groups endeavor to protect the public against governmental abuses of power. The good governance groups who served as plaintiffs in the lawsuit, Molinari v. Bloomberg, included the groups New York Public Interest Research Group, Inc. (NYPIRG), U.S. Term Limits, and Responsible New York. See Molinari v. Bloomberg, 596 F. Supp. 2d 546 (E.D.N.Y. 2009), aff’d, 564 F.3d 587 (2d Cir. 2009).

7. Id.

8. See, e.g., N.Y.C. Charter § 2604(c)(2) (2013) (prohibiting a public servant from having “any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties”); Id. § 2604(c)(3) (2013) (providing that “[a] 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 or any person or firm associated with the public servant”).
begin to restore the voters’ faith in our politicians, and our local democracy would be better off for the effort.

To be clear, this article is not about the virtue of term limits. Proponents and critics have principled views on the subject. This is about making sure that self-serving politicians cannot ignore the will of the people. When the voters speak clearly and impose a fundamental, structural change to clip public officials’ wings, the people’s representatives must not be permitted to brush it aside.

Part II of this article provides the historical background regarding voter-approved two-term limits in New York City. Part III provides a discussion and analysis of the legal challenge to Mayor Bloomberg’s extension of term limits in 2008. Finally, Part IV provides a roadmap for a voter-initiated revision of the City Charter that would ensure that the two-term limit that the voters have three times approved can be altered only with the approval of the voters. In an Appendix, we provide a sample petition for such a referendum, including proposed revisions to the City Charter.

II. THE VOTERS SPEAK: IN THE 1990S, NEW YORK CITY CITIZENS IMPOSE TWO-TERM LIMITS FOR LOCAL OFFICIALS

Starting in the early 1990s, many states began to adopt statutory or constitutional provisions limiting the number of years that an individual could serve in the state or city legislature.9 Those who supported term-limit legislation argued that limits would oust entrenched representatives who no longer served the will of their constituents, remove the stranglehold that special interests had on representatives, and allow a more representative and diverse group of citizens to serve in state and local government, thus more effectively responding to concerns of ordinary voters.10 Such changes would, theoretically, eliminate “career politicians” and restore voter interest and trust in politics. Opponents of term-limit legislation responded that these measures would instead simply deprive legislatures of their most experienced members.11

The debate surrounding term limits came in full force to New York City in 1993, when the civic organization New Yorkers for Term Limits launched a campaign to combat “ossification of municipal government” resulting from entrenchment of incumbents in office—entrenchment that was evidenced by the fact that “nearly 95 percent of . . . incumbents were re-elected” in the 1991 City Council elections.12 New Yorkers for Term Limits (an entity funded by term-limits proponent Ronald Lauder), U.S. Term Limits, and other like-minded organizations and individuals

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10. Id. at 431–35.

11. Id. at 428.

waged an expensive and arduous effort to put the issue of a two-term limit for elected city officials on the November 1993 ballot as a citywide referendum.\textsuperscript{13}

Proponents of the two-term limit faced substantial obstacles in attempting to have their referendum proposition placed on the ballot, let alone in persuading fellow voters of the desirability of their position. This is because, in the first instance, proponents of a referendum must create a petition bearing the signatures of “qualified electors”—meaning city voters “who were registered and qualified to vote in such a city at the last general election preceding the filing of the petition”—in number “equal to at least ten per centum of the total number of valid votes cast for governor in such a city at the last gubernatorial election, or to thirty thousand, whichever is less.”\textsuperscript{14} Unless the City Council decides within two months after the petition filing to adopt the referendum proposal, proponents of the referendum must then file an additional petition within the next two months signed “by qualified electors who did not sign the original petition, equal in number to at least five per centum of the total number of votes cast for governor in such city at the last gubernatorial election, or to fifteen thousand, whichever is less.”\textsuperscript{15} Moreover, the entire procedure is fraught with expensive legal challenges, such as challenges to the validity and sufficiency of the signatures.\textsuperscript{16}

These organizations in favor of term limits expended substantial time, effort, and other resources in navigating these procedures and promoting their message to the citizens of New York City. New Yorkers for Term Limits itself spent approximately $1 million in the course of its efforts to promote the 1993 term-limits initiative, which included hiring six staff members and gathering over 130,000 signatures to get the proposal on the ballot.\textsuperscript{17} And collecting signatures was only part of the challenge: the City Clerk rejected the initial petition that sought to place the question of term limits in front of the City Council for a vote because, the City Clerk believed, as a change in election law, the issue was not eligible for a city referendum under the State Constitution. Only after a state court judge ordered that the question of term limits be placed on the ballot—a decision upheld by the New York Court of Appeals less than one month before the scheduled voting day—did the referendum get on the ballot.\textsuperscript{18} The 1998 term-limits referendum became the first such ballot initiative successfully organized by citizens since 1966.\textsuperscript{19}

These proponent organizations led the “national tide of anti-incumbency” to reflect voters’ frustrations with legislative bodies that would eventually bring “one of


\textsuperscript{14. N.Y. Mun. Home Rule Law § 37(2) (McKinney 2013).}

\textsuperscript{15. Id. § 37(7).}

\textsuperscript{16. See Myers, supra note 1.}

\textsuperscript{17. See id.}

\textsuperscript{18. See id.}

\textsuperscript{19. See id.}
the most radical changes in government in the city’s history.”20 Indeed, before 1993, three of the last seven New York City Mayors served for three terms, which proponents of term limits sought to make impossible.21 Proponents hoped that the City Council would see an even greater impact, as twenty-three of the then-fifty-three Council Members had served for more than eight years.22 Supporters believed that term limits would “break the cycle of incumbency, replacing career politicians with fresh faces and new ideas for the city’s problems.”23 Indeed, by forcing representatives from office at regular intervals, term limits were thought to make campaigns more competitive by consistently pitting new and fresh ideas from a more attractive selection of candidates against one another.24 This cycle would lead to the election of a more diverse group of representatives, resulting in a broader dispersion of power that would in turn lead to more responsive and creative legislative solutions.25 Once career politicians are replaced with non-professional legislatures, these representatives will be less concerned with popular approval and re-election and, instead, will be more likely to risk constituent disapproval in the process of voting for what is truly in the city’s best interest.26

Opponents, however, argued that campaign finance reform would be a more effective means to make elections more competitive.27 They further argued that, even with term limits, legislatures would continue to attract only a narrow and elite group of citizens and that this group would be further winnowed because those considering public office would be dissuaded from leaving their current occupation for a brief stint in politics.28 Moreover, opponents argued, legislators in their final years of office might be less responsive to their constituents and, as a whole, legislatures would lose significant institutional expertise.29

With this perspective, opponents of term limits also mobilized to persuade voters to reject the referendum proposition, likewise expending substantial time, money, and other resources in the process.30 In both state court and the public arena, these opponents argued that term limits were an infringement on voters’ rights under both the U.S. and New York State Constitutions and, given such strong opposition, the City Council also considered putting a countermeasure on the ballot, limiting the
term limits to certain citywide offices, although such a limitation never came to fruition.\textsuperscript{31} As noted above, less than one month before the vote, the New York Court of Appeals upheld the state trial court’s decision ordering that the question of term limits be placed on the ballot.\textsuperscript{32}

New York City voters overwhelmingly adopted the 1993 referendum by a vote of more than fifty-nine percent in favor versus less than forty-one percent against—a greater than eighteen percent margin of victory, with over one million votes cast.\textsuperscript{33} As enacted by the 1993 referendum, the City Charter’s prior term-limits law (1993 Term-Limits Law) provided as follows:

\begin{verbatim}
§ 1137. Public Policy. It is hereby declared to be the public policy of the city of New York to limit to not more than eight consecutive years the time elected officials can serve as mayor, public advocate, comptroller, borough president and council member, so that elected representatives are “citizen representatives” who are responsive to the needs of the people and are not career politicians.

§ 1138. Term Limits. Notwithstanding any provision to the contrary contained in this charter, no person shall be eligible to be elected to or serve in the office of the mayor, public advocate, comptroller, borough president or council member if that person had previously held such office for two or more full consecutive terms [including in the case of council member at least one four-year term], unless one full term or more has elapsed since that person last held such office . . . .\textsuperscript{34}
\end{verbatim}

In 1996, City Council Members and others presented a ballot proposal to city voters seeking to alter the 1993 Term-Limits Law as it applied to them by increasing the term limits applicable to Council Members from two consecutive terms to three consecutive terms. In an attempt to convince voters that a two-term limit had been ill-advised, proponents of the ballot proposal created the Coalition for Voters Choice, held fundraisers, gave speeches, and ran television advertisements to disseminate their message.\textsuperscript{35} But many opposed the Council’s proposal. Ronald Lauder, for example, defended the 1993 referendum, spending approximately $2 million to finance a campaign of television advertising and other forms of support to defeat that Council-sponsored ballot proposal.\textsuperscript{36} The 1996 New York City Campaign Finance Board Voter Guide, entitled \textit{The Term Limits Question and More}, summarized the primary rationale underlying the position of those who opposed the Council’s 1996 proposal as follows:

\begin{verbatim}
31. Id.
32. Myers, supra note 1.
33. Id.
36. Toy, supra note 2.
\end{verbatim}
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Incumbency has so many advantages that most incumbents are elected to office year after year regardless of their records. The current two-term limit will open up the process to many qualified people who would not otherwise attempt to run against an entrenched incumbent. It will ensure that leadership positions are based on merit, rather than incumbency and seniority. A larger pool of competent candidates will provide new blood and fresh ideas for meeting the challenges of running City government. This in turn will result in better decision-making.37

Ultimately, the citizens of New York City voted to maintain the city’s two-term limit as applied to City Council Members, rejecting the Council’s 1996 referendum proposition by a margin of approximately fifty-four percent against approximately forty-six percent in favor, with over one million votes cast.38 The will of the voters once again clearly favored restricted two-term limits. Even then-City Council Speaker Peter Vallone, who spearheaded the effort to extend term limits, recognized that another effort to challenge the term-limits law would be futile because “this was the majority vote of the people, and it will stand.”39 Indeed, “the proposal’s defeat showed that voters wanted to end the practice of making careers in politics.”40

III. MAYOR BLOOMBERG’S 2008 TERM-LIMITS AMENDMENT, AND THE ENSUING CLASH IN COURT

A. The Introduction of the Term-Limits Bill and Passage of the 2008 Term-Limits Amendment

The term-limits issue resurfaced in the fall of 2008, when Mayor Bloomberg was approaching the end of his second term in office as Mayor of New York City. On October 2, 2008 Mayor Bloomberg, citing the economic crisis, announced that he would work with City Council Speaker Christine Quinn to introduce Council legislation to change the city’s term-limits law from two terms to three and then seek re-election.41 Numerous good-governance groups, commentators, and government officials criticized the Mayor and Speaker’s plan, often pointing to the high rate of incumbent re-elections in New York City.42 Five days later, the City Council

38. Toy, supra note 2.
39. Id.
40. Id. (emphasis added).
introduced a bill (Term-Limits Bill) “by request of the Mayor.”\footnote{N.Y.C. Bar Ass’n, Comm. on N.Y.C. Affairs, Statement on Proposals to Change New York City’s Term Limits Law (Oct. 14, 2008), available at http://www.nycbar.org/pdf/report/20071632.pdf.} Ronald Lauder, previously a vocal supporter of term limits, initially objected to that proposal because he wanted a “one-time-only” measure to permit Mayor Bloomberg to seek a third term, rather than a permanent change to the law.\footnote{N.Y.C. Council, Term Limits for Elected Officials, Int. 0845-2008 (Oct. 7, 2008).} However, Mayor Bloomberg’s attorneys had expressed reservations regarding the legality of a “one-time-only” revision: “[a] one-time extension of term limits,” they found, “could be seen as self-serving to the legislators who pass it and more vulnerable to a legal challenge.”\footnote{Michael Barbaro & Kareem Fahim, Lauder Opposes Mayor on Permanent Change to Term Limits, N.Y. Times, Oct. 6, 2008, at A21, available at http://www.nytimes.com/2008/10/06/nyregion/06limits.html.}

To obtain the support of Mr. Lauder and others, Mayor Bloomberg promised to convene a Charter Revision Commission in 2010 “to revisit the term limits issue . . . and submit it again to the voters in a referendum.”\footnote{Sam Roberts & Eric Konigsberg, Enigmatic Billionaire Is Drawn Back to the Term Limits Fray, N.Y. Times, October 9, 2008, at A1, available at http://www.nytimes.com/2008/10/09/nyregion/09lauder.html?_r=1&ref=nyregion&oref=slogin.} Mayor Bloomberg also promised Mr. Lauder a seat on that Commission.\footnote{Id.} After a meeting with the Mayor, Mr. Lauder stated that he would “reluctantly support the mayor’s legislation to extend term limits to three terms, with the understanding that I will serve on a Charter Revision commission which will place the question of the number of terms before the voters in 2010.”\footnote{Barbaro & Chan, supra note 44.} Mr. Lauder added that he believed the voters would “return to a two-term limit.”\footnote{Id.}

Soon, the Term-Limits Bill was modified with the following language to reflect Mayor Bloomberg’s agreement with Mr. Lauder. It provided in part:

\begin{quote}
[T]his local law shall be deemed repealed upon the effective date of a lawful and valid proposal to amend the charter to set term limits at two, rather than three, full consecutive terms, as such limits were in force and effect prior to the enactment of this local law, where such proposal has been submitted for the approval of the qualified electors of the city and approved by a majority of such electors voting thereon.
\end{quote}

This alteration of the Term-Limits Bill would afford a third term in office to currently term-limited city officials only—including Mayor Bloomberg and Speaker Quinn. Afterward, the voters would decide the term limits applicable to subsequent generations of city officials. As Mr. Lauder put it, “the mayor should get the extra term and the City Council should get a third term. That is part of the deal. But I...
never spoke about the first-term council members.” In barely two weeks, the Term-Limits Bill, as modified, went through the legislative process of two public committee hearings and to a full vote of the City Council.

On October 23, 2008, the Council met and voted twenty-nine to twenty-two to enact the Mayor’s Term-Limits Bill and its three-term limit. At that meeting, opponents of the Term-Limits Bill proposed an amendment to the bill to put the issue directly in front of the voters—one that would have called for an immediate appointment of a Charter Revision Commission to submit the proposed term-limits change to the voters, to be decided at a special election in time for the 2009 election cycle—but supporters of the bill defeated the proposed amendment by a vote of twenty-eight to twenty-two, with one abstention. At the time, polls showed that eighty-nine percent of New Yorkers favored submitting this term-limits change to the voters. Of the fifty-one sitting Council Members who voted on the term-limits bill, thirty-five would have been term-limited in 2009 under the two-term limit. And twenty-three of those term-limited members—more than seventy-five percent of the twenty-nine-member majority—voted, in effect, to give themselves an additional term in office.

Mayor Bloomberg signed the Term-Limits Bill into law on November 3, 2008 and in doing so amended the term limits contained in the New York City Charter (as enacted, the “2008 Term-Limits Amendment”). At the signing hearing, he reiterated his commitment to convene a Charter Revision Commission in 2010 to put this term-limits issue on the ballot. Mayor Bloomberg declared that he would “appoint a Charter Revision Commission to look at the issue of whether two or three terms is appropriate, and to put on the ballot the ability for the public to either reaffirm what we have today or to change it.”

As enacted, the 2008 Term-Limits Amendment, also known as Local Law 51, amended sections 1137 and 1138 of the New York City Charter to provide as follows:

It is hereby declared to be the public policy of the city of New York to

limit the time elected officials can serve as mayor, public advocate, comptroller,
borough president and council member so that elected representatives are

54. Id.
55. Id.
56. Id.
58. Id.
59. Id.
“citizen representatives” who are responsive to the needs of the people and not career politicians. It is further declared that this policy is most appropriately served by limiting the time such officials can serve to not more than three full consecutive terms.

. . . [N]o person shall be eligible to be elected or to serve in the office of mayor, public advocate, comptroller, borough president or council member if that person had previously held office for three or more full consecutive terms, unless one full term or more has elapsed since that person last held office.60

B. The Legal Challenge to the 2008 Term-Limits Amendment

On November 10, 2008, a group of plaintiffs—whom I represented—brought a declaratory-judgment action against Mayor Bloomberg, challenging the 2008 Term-Limits Amendment in the U.S. District Court for the Eastern District of New York.61 The plaintiffs included the Comptroller and Public Advocate of New York City, members of the New York City Council who voted against the 2008 Term-Limits Amendment, individuals who had developed concrete plans to run for City Council seats in November 2009, individuals who had expended money and time in support of the two public referenda on term limits, and voters who voted in favor of term limits in the two referenda. The plaintiffs also included the good-governance groups New York Public Interest Research Group, Inc. (NYPIRG), U.S. Term Limits, and Responsible New York.62

The plaintiffs asserted multiple causes of action against the Mayor, including constitutional voting-rights, free-speech,63 ballot-access, and substantive due-process claims, as well as claims that the failure to enact the 2008 Term-Limits Amendment by voter referendum violated state and local mandatory-referendum laws and New York public policy.64 Additionally, the plaintiffs asserted that the 2008 Term-Limits Amendment violated the City Charter’s conflicts-of-interest laws65 requiring the

62. Id.
63. The plaintiffs asserted that the revisions to the New York City Charter as a result of the 2008 Term-Limits Amendment ran afoul of the U.S. and New York State Constitutions because they denied supporters of the legislative referenda on term-limits access to the ballot, because they chilled speech by making it less likely that candidates would speak out in favor of term limits, because the 1994 and 1996 legislative referenda were reversed, and because the 2008 Term-Limits Amendment denied past and future voters on referenda a right to vote “effectively and meaningfully.” Molinari, 596 F. Supp. 2d at 560–65.
64. Amended Complaint, supra note 61, at 2–4.
65. The court explained:

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
2008 Term-Limits Amendment to be “invalidated because it was enacted by local officials laboring under prohibited conflicts of interest.”66 Put simply, the plaintiffs argued that it was illegal for the Mayor and City Council to undo the will of the voters, as expressed in the 1993 and 1996 referenda. Among other reasons, they believed that “citizen voters . . . are more likely to vote their consciences on a topic and strive for ethical government” than self-interested legislators.67 As one commentator portended in 2006, having Council Members “defy the will of the voters to keep themselves in office” would send a “poor message to New Yorkers that their vote doesn’t count.”68

On January 13, 2009, the district court denied the plaintiffs’ motion for summary judgment and granted summary judgment to the defendants. The district court held that the enactment of the 2008 Term-Limits Amendment did not violate either the New York or U.S. Constitutions, that the 2008 Term-Limits Amendment was not subject to a mandatory voter referendum under the City Charter, and that the officials’ actions did not constitute a violation of the Charter’s conflicts-of-interest provisions.69

Specifically, although the district court recognized that the proponents of the 1993 and 1996 referenda “successfully advocated before the public the position that . . . elected officials should hold office for no more than two consecutive terms” and that “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,” the court found that their free-speech rights were not infringed when the 2008 Term-Limits Amendment was enacted.70 In denying the plaintiffs’ claims, the district court stated that:

[T]he right of free speech does not protect the content of one side’s speech from having to address the content of the speech of an opponent . . . “The First Amendment ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail.”71

In addition, the district court denied the plaintiffs’ arguments that, under the Municipal Home Rule Law and New York City Charter, a referendum is the only proper way to change the term limits set out in the City Charter. First, the plaintiffs pointed to Municipal Home Rule Law section 23(2)(b), which provides that a
referendum is required when a local law, “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.” The plaintiffs argued that the “membership” of the City Council “changes” when new legislators are seated within the body, activating a mandatory referendum. The court sided with the defendants, who argued that “membership” meant “structural changes” rather than a change in “eligibility” criteria. Similarly, the district court found that the 2008 Term-Limits Amendment did not alter the “form or composition” of City Council as plaintiffs urged the district court to do, where a change in “form or composition” would also trigger a mandatory referendum. Finally, the plaintiffs argued that a referendum was necessary under Municipal Home Rule Law section 23(2), which requires a referendum when a local law “changes the term of an elective office.” (City Charter section 38(4) similarly requires a referendum when a local law “changes the term of an elective officer.”) The district court disagreed with the plaintiffs’ contention that the “term of an elective office” refers to the total amount of time an elected officer may serve.

The plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit. The Second Circuit, in an opinion by Judge Chester J. Straub, affirmed the ruling of the district court. Like the district court, the Second Circuit found no violation of the free-speech rights of voters who participated in the 1993 and 1996 referenda. The court also declined to afford relief to the plaintiffs for their claims regarding conflicts of interest and mandatory referenda under the City Charter and Municipal Home Rule Law. The court concluded by noting that, while it may be a “justifiable reaction” to feel that the 2008 Term-Limits Amendment “disregards the will of the people as expressed by the 1993 Voter Initiative and 1996 Referendum,” it was not the role of the court to “interject itself into city politics.” In effect, both the district court and Second Circuit found that the only way for New York City citizens to ensure that a referendum on term limits was not undone by the City Council would be through an amendment to the City Charter.

73. Molinari, 596 F. Supp. 2d at 572.
74. Id.
76. Id.
79. Molinari, 596 F. Supp. 2d at 574.
81. Id. at 616–18.
82. Id. at 609–15.
83. Id. at 618.
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C. The 2010 Charter Revision Commission

In March 2010, Mayor Bloomberg appointed a Charter Revision Commission, as promised, though Ronald Lauder was not a member of the Commission. On May 25, 2010, the New York Times reported that the Commission was revisiting the issue of term limits. Finally, on Election Day, November 2, 2010, New Yorkers voted “overwhelmingly” to limit politicians to two consecutive terms in office. The City Charter was amended to once again provide for a two-term limit, as it stands today. The current City Charter provides:

(a) Notwithstanding any provision to the contrary contained in this charter, no person shall be eligible to be elected to or serve in the office of mayor, public advocate, comptroller, borough president or council member if that person had previously held such office for two or more consecutive full terms, unless one full term or more has elapsed since that person last held such office.

(b) Notwithstanding any other provision to the contrary, no local law may be enacted by the city council, including but not limited to amendment of the provisions of this chapter, if such local law would alter or permit alteration of the term limit set forth in this section as such limit applies to any person then serving in the office of mayor, public advocate, comptroller, borough president or council member.

Thus, while New York City politicians may serve only two consecutive terms, the City Charter still allows for the City Council to change the term limit—back to three terms, or any other length—as long as the law would not apply to any currently seated elected officials. It is still a real concern today that the City Council could change that provision requiring the term extension to be prospective. In other words, they could repeal section (b) before amending section (a). The will of the voters could be undone yet again.

IV. PROTECTING SELF-INTERESTED POLITICIANS FROM THEMSELVES: A PROPOSED AMENDMENT TO THE CITY CHARTER THAT WOULD INSULATE CITIZEN-IMPOSED TERM LIMITS FROM ALTERATION BY THE CITY COUNCIL WITHOUT A MANDATORY REFERENDUM

As noted above, there is a way to ensure that the will of the voters—who have now voted overwhelmingly in favor of a two-term limit for citywide elected officials on three separate occasions—is not once again trampled by a future Mayor and City

85. Id.
87. Hernandez, supra note 5.
89. Id. (emphasis added).
Council, and that is to both amend the City Charter to make clear that the City Council cannot alter the two-term limit without voter approval and make explicit that to do so for a politician’s own benefit would violate the city’s conflicts-of-interest laws. This section provides a roadmap for amending the City Charter so that the City Council and the Mayor cannot undo or change voter-imposed term limits absent a voter referendum. This section discusses both the substantive provisions of the City Charter that would need to be amended and some of the procedural requirements for doing so under New York State and New York City law.

A. Proposed Substantive Amendments to New York City’s Charter

As an initial matter, cities in New York State have the power to enact local laws, including those amending a city charter, as long as they “relat[e] to its property, affairs or government” and are “not inconsistent with the provisions of th[e] [state] constitution or any general law.”90 There are two ways in which a city may enact such laws: (1) “by a majority vote of its legislative body and the approval of its mayor, and, in the case of a mayor’s veto, the legislative body may override the mayor’s veto with a two-thirds vote;”91 or (2) pursuant to sections 36 and 37 of the New York Municipal Home Rule Law, voters may directly enact such laws through a referendum.92 With regard to the latter, there are two ways to initiate a referendum proposing a local law amending the City Charter. First, qualified voters may “file with the City Clerk a petition containing a certain number of signatures requesting that a proposed local law amending the City Charter be put to the referendum.”93 That proposed local law will then “appear on the ballot at the next general election.”94 Second, “[a] referendum proposing a local law amending the City Charter may also be initiated by a charter commission.”95 “A charter commission may be created by a voters’ petition, the City Council or the Mayor.”96

90. N.Y. Const. art. IX, § 2; see also N.Y. Mun. Home Rule Law § 10(l)(i)–(ii) (McKinney 2013). “This includes local laws relating to ‘[t]he powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees.’” Molinari v. Bloomberg, 564 F.3d 587, 591 (2d Cir. 2009) (quoting N.Y. Mun. Home Rule Law § 10(l)(i)).


93. Molinari, 564 F.3d at 591 (citing N.Y. Mun. Home Rule Law § 37). In particular, “[q]ualified electors of a city, in number equal to at least ten per[cent] of the total number of valid votes cast for governor in such city at the last gubernatorial election, or to thirty thousand, whichever is less, may file in the office of the city clerk a petition for the submission to the electors of the city of such a proposed local law to be set forth in full in the petition. Qualified electors shall be deemed for this purpose to be voters of the city who were registered and qualified to vote in such city at the last general election preceding the filing of the petition.” N.Y. Mun. Home Rule Law § 37(2).


95. Id. (citing N.Y. Mun. Home Rule Law § 36).

96. Id. (citing N.Y. Mun. Home Rule Law § 36(2)–(4)).
Certain New York State and New York City laws, however, are subject to mandatory referendum requirements embodied in Municipal Home Rule Law section 23 and New York City Charter section 38—namely, those laws that fundamentally change the state’s or New York City’s electoral and governmental structure. In *Molinari v. Bloomberg*, however, the Second Circuit held that New York City’s local laws seeking to alter or permit the alteration of term limits of city officials do not fall within the subset of local laws enumerated in section 38 of the Charter that must be enacted pursuant to a voter referendum.97 Accordingly, in order to indisputably bring local laws altering or permitting the alteration of term limits within the ambit of laws that require a referendum, it is necessary to amend section 38 of the City Charter.98 Doing so would clarify the scope of section 38 of the Charter, which, as a matter of the spirit and letter of the Charter, should be understood to prevent self-interested officials from voting themselves the opportunity to remain in office beyond what the voter-initiated term-limits laws would otherwise permit.

B. Step One: Insulating Voter-Initiated Laws from Interference by the Mayor and City Council

Section 38 of the City Charter requires that local laws concerning certain designated subject matters can be enacted only by “the affirmative vote of a majority of the qualified electors of the city voting upon the proposition” in a general election.99 As such, the first step in insulating voter-initiated local laws regarding term limits from interference by the Mayor and City Council is to explicitly include in section 38’s list any local laws that alter, or permit alteration of, the term limits set forth in chapter 50 of the Charter (discussed below). In so doing, any such local law could “become operative . . . only when approved at [a general] election by the affirmative vote of a majority of the qualified electors of the city voting upon the proposition.”100 Thus, as amended, section 38 would include a new subsection 19 and provide as follows (with proposed additions indicated in italics and proposed deletions by brackets):

§ 38. Local laws; referendum. A local law shall be submitted for the approval of the electors at the next general election held not less than sixty days after the adoption thereof, and shall become operative as prescribed therein only when approved at such election by the affirmative vote of a majority of the qualified electors of the city voting upon the proposition, if it . . .

19. Alters or permits alteration of the term limits set forth in Chapter 50 of this charter.

In addition to the above or in the alternative, section 38(4) could provide:

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97. *Molinari*, 564 F.3d at 614.
100. See id.
§ 38. Local laws; referendum. A local law shall be submitted for the approval of the electors at the next general election held not less than sixty days after the adoption thereof, and shall become operative as prescribed therein only when approved at such election by the affirmative vote of a majority of the qualified electors of the city voting upon the proposition, if it . . .

4. Abolishes an elective office, or changes the method of nominating, electing or removing an elective officer, or changes the term of an elective officer, including by altering or permitting the alteration of an elective officer’s term limits, or reduces the salary of an elective officer during his or her term of office.

Amending section 38 such that it expressly codifies local laws altering or permitting the alteration of term limits as one of the categories of laws that local legislatures must submit to the voters in order to be valid furthers and renders unambiguous the statutory purpose of section 38 to prevent self-interested local officials from determining the scope of their own powers and tenures. Indeed, voters in New York City should strongly consider implementing this proposed amendment, thereby effectively overturning the Second Circuit’s misguided and counterintuitive decision in Molinari, which empowered local potentates to aggrandize their power without the consent of the people.

C. Step Two: Additional Proposed Amendments to Further Ensure that Government Officials Cannot Circumvent Voter-Imposed Term Limits

To further buttress the aforementioned change to section 38 and clarify the spirit and letter of the Charter, the following sections of the Charter should also be amended: sections 1138(b), 1152(k)(1), and 2604(b)(3). Each of these sections and its proposed amendments are addressed in turn. 101

First, section 1138 of the Charter, which currently imposes certain restrictions on altering term limits by local law, should be amended to make clear that local laws altering or permitting the alteration of the term limits set forth in this section would require the approval of the electors. Currently, and as relevant, section 1138(b) provides:

b. Notwithstanding any other provision to the contrary, no local law may be enacted by the city council, including but not limited to amendment of the provisions of this chapter, if such local law would alter or permit alteration of the term limit set forth in this section as such limit applies to any person then serving in the office of mayor, public advocate, comptroller, borough president or council member.102

101. A sample petition containing these proposed amendments is attached as an Appendix to this article. In both the sample petition and the body of the article, italics indicate words or phrases that are being added to the text of the City Charter, and brackets indicate words or phrases that are being deleted.

Thus, in its present form, section 1138 may be amended either (1) by a local law passed by City Council;\textsuperscript{103} or (2) by a referendum pursuant to sections 36 and 37 of the New York Municipal Home Rule Law.\textsuperscript{104} In order to ensure that future Mayors and members of the City Council cannot circumvent the voters’ choice and once again single-handedly enact local laws altering or permitting the alteration of New York City’s term limits, section 1138(b) should be amended as follows:

§ 1138. Term Limits.

b. Notwithstanding any other provision to the contrary, no local law may be enacted by the city council, including but not limited to amendment of the provisions of this chapter, if such local law would alter or permit alteration of the term limit set forth in this section without the approval of the electors [as such limit applies to any person then serving in the office of mayor, public advocate, comptroller, borough president or council member]. The term limits set forth in this section may only be altered by mandatory referendum pursuant to section thirty-eight of this charter and section twenty-three of the Municipal Home Rule Law, by Charter Commission-initiated ballot proposal pursuant to section forty of this charter and section thirty-six of the Municipal Home Rule Law, or by voter-initiated charter revision petition pursuant to section forty of this charter and section thirty-seven of the Municipal Home Rule Law.

Second, amending section 1152(k)(1) of the Charter, which concerns when an amendment to the Charter takes effect, would also help prevent a future Mayor and the City Council from unilaterally undoing voter-initiated local laws pertaining to term limits. In particular, it is necessary to remove from this section the provision inserted in 2010 that carves out an exception to the two-term limit for those officials in office at the time this provision was enacted—including City Council officials who were willing to re-impose the two-term limit for future public officials, but not for themselves:

§ 1152. Time of Taking Effect.

(k)(1) The amendments to the charter, amending sections thirty-eight, [eleven hundred thirty-seven and] eleven hundred thirty-eight and twenty-six hundred and four, approved by the electors on November ___ [second], two thousand ___ [ten], shall take effect immediately, and hereafter shall control as provided with respect to all the powers, functions and duties of officers, agencies and employees [provided, however, that, notwithstanding any inconsistent provision of the charter, persons holding the offices of mayor, public advocate, comptroller, borough president or council member on the date such amendments take effect shall be subject, with respect to eligibility to be elected to or serve in the offices so held, to the provisions of section

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eleven hundred thirty-eight that were in effect immediately prior to the
approval of such amendments, and to the provisions of subdivision b of
such section as added by such amendments until one full term or more
has elapsed since having last held such offices, after which such persons
shall be fully subject to the provisions of section eleven hundred thirty-
eight, as amended by such amendments, in its entirety].

Finally, and as the “silver bullet” to ensure that the Mayor and City Council
cannot vote themselves a change in term limits, it is necessary to amend the City
Charter’s conflicts-of-interest provisions, which can only be changed by referendum.
The city’s conflicts laws preclude local elected officials from acting in their self-
interest instead of in the public interest. Yet, in Molinari, the district court and the
Second Circuit refused to invalidate Mayor Bloomberg’s 2008 Term-Limits
Amendment on conflicts-of-interest grounds because, the court said, the Amendment
did not implicate a personal, private interest.105 As a matter of public policy, however,
the city’s conflicts laws should be amended to render invalid any self-serving attempts
by city officials to vote themselves the opportunity to continue to serve when they
otherwise would have been forced out of office by operation of law. The following
changes to section 2604 of the Charter, which currently embodies the conflicts-of-
interest provisions, would establish that laws altering or permitting the alteration of
the city’s term limits enacted by legislators are invalid under this section:

§ 2604. Prohibited interests and conduct.

b. Prohibited conduct

3. No public servant shall use or attempt to use his or her position
as a public servant to obtain any financial gain, contract, license,
privilege or other private or personal advantage, direct or indirect,
or use or attempt to use his or her position to alter or permit the
alteration of the term limits set forth in Chapter 50 of this Charter,
except with the approval of the electors, for the public servant or any
person or firm associated with the public servant. A vote in favor
of a local law that alters or permits the alteration of such term limits
for the public servant or any person or firm associated with the public
servant, except with the approval of the electors, shall constitute
prohibited conduct under this subdivision.

If implemented, the amendments to the City Charter proposed above would,
finally and for the first time, insulate the two-term limit for citywide officials,
approved three times by the voters, from alteration by self-interested local officials
without voter approval.

V. CONCLUSION

New York City’s voters imposed a two-term limit on citywide elected officials in

105. See Molinari, 564 F.3d at 617–18.
and the City Council effectively nullified the will of the people by passing a local law extending term limits to three terms, enabling the Mayor and many City Council Members to run for, and win, a third consecutive term. In the ensuing court challenge, the courts held that laws altering term limits were not among the categories of local laws that require voter approval under section 38 of the City Charter, and that it was not a violation of the city’s conflicts-of-interest laws, as drafted, for politicians to vote themselves a third term. As a result, even though the voters promptly reinstated the two-term limit in 2010, a future Mayor and City Council can at any moment once again override the will of the voters by local law, extending the two-term limit for their personal benefit.

When the Mayor and City Council voted themselves a third term, they did great damage to the voters’ faith in their elected officials; that trust would be further eroded if the City Council were to once again trample on the will of the voters for their own personal benefit. The only way to ensure that does not happen is for the voters to amend the City Charter by voter-initiated referendum to add term limits to the list of subjects of local law that require voter approval under section 38 of the Charter. And, as a failsafe, two other sections of the Charter should be amended. First, the Charter’s term-limits provisions should be amended to make explicit that term limits can only be altered with the approval of the voters. Second, the Charter’s conflicts-of-interest provisions should be amended to make it an express violation of the conflicts-of-interest laws for a politician to alter or permit the alteration of term limits for his or her own benefit without voter approval. These measures would begin to restore the voters’ faith in our politicians, and our local democracy would be better off for the effort.
APPENDIX

SAMPLE PETITION FOR NEW YORK CITY CHARTER AMENDMENT TO INSULATE TERM LIMITS FROM ALTERATION BY CITY COUNCIL WITHOUT VOTER APPROVAL

To: City Clerk, City of New York

(1) We the undersigned, being duly qualified electors of the City of New York, State of New York, representing not less than thirty thousand electors, present this petition to the City Clerk of New York and respectfully request that the following proposed local law to amend the Charter of the City of New York be submitted to the voters of the City of New York at the next general election:

A LOCAL LAW

To amend the New York City Charter, in relation to the term limits for various elected officials.

Be it enacted by the people of the City of New York pursuant to the authority provided in section 37 of the Municipal Home Rule Law as follows:

Section 1. The New York City Charter, sections 38, 1138(b), 1152(k)(1) and 2604(b)(3) are hereby amended (by inserting therein the italicized text, and by deleting therefrom the bracketed text) to read as follows:

Chapter 2
Council

§ 38. Local laws; referendum. A local law shall be submitted for the approval of the electors at the next general election held not less than sixty days after the adoption thereof, and shall become operative as prescribed therein only when approved at such election by the affirmative vote of a majority of the qualified electors of the city voting upon the proposition, if it . . . .

19. Alters or permits alteration of the term limits set forth in Chapter 50 of this charter.

Chapter 50
Term Limits

§ 1138. Term Limits.

b. Notwithstanding any other provision to the contrary, no local law may be enacted by the city council, including but not limited to amendment of the provisions of this chapter, if such local law would alter or permit alteration of the term limit set forth in this section without the approval of the electors [as such limit applies to any person then serving in the office of mayor, public advocate, comptroller, borough president or council member]. The term limits set forth in this section may only be altered by mandatory referendum pursuant to
section thirty-eight of this charter and section twenty-three of the Municipal Home Rule Law, by Charter Commission-initiated ballot proposal pursuant to section forty of this charter and section thirty-six of the Municipal Home Rule Law, or by voter-initiated charter revision petition pursuant to section forty of this charter and section thirty-seven of the Municipal Home Rule Law.

§ 1152. Time of Taking Effect

(k)(1) The amendments to the charter, amending sections thirty-eight, [eleven hundred thirty-seven and] eleven hundred thirty-eight and twenty-six hundred and four, approved by the electors on November _____ [second], two thousand ______ [ten], shall take effect immediately, and hereafter shall control as provided with respect to all the powers, functions and duties of officers, agencies and employees[; provided, however, that, notwithstanding any inconsistent provision of the charter, persons holding the offices of mayor, public advocate, comptroller, borough president or council member on the date such amendments take effect shall be subject, with respect to eligibility to be elected to or serve in the offices so held, to the provisions of section eleven hundred thirty-eight that were in effect immediately prior to the approval of such amendments, and to the provisions of subdivision b of such section as added by such amendments until one full term or more has elapsed since having last held such offices, after which such persons shall be fully subject to the provisions of section eleven hundred thirty-eight, as amended by such amendments, in its entirety].

Chapter 68
Conflicts of Interest

§ 2604. Prohibited interests and conduct.

b. Prohibited conduct

3. No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, or use or attempt to use his or her position to alter or permit the alteration of the term limits set forth in Chapter 50 of this charter, except with the approval of the electors, for the public servant or any person or firm associated with the public servant. A vote in favor of a local law that alters or permits the alteration of such term limits for the public servant or any person or firm associated with the public servant, except with the approval of the electors, shall constitute prohibited conduct under this subdivision.
Section 2. Severability.

If any provision of this local law shall be held invalid or ineffective, in whole or in part, or inapplicable to any person or situation, such holding shall not affect, impair or invalidate the remainder of this local law, which shall constitute a local law “set forth in full,” and all other provisions thereof shall nevertheless be separately and fully effective, and shall be applicable to all other persons or situations.

Section 3. This local law shall take effect on November __, 20__.

(2) Severability of Petition. If any provisions of this petition shall be held invalid or ineffective, in whole or in part, or inapplicable to any person or situation, such holding shall not affect, impair or invalidate the remainder of this petition, and all other provisions thereof shall nevertheless be separately and fully effective, and shall be applicable to all other persons or situations.

(3) Each of the undersigned states that he or she is a registered voter and qualified elector of the City of New York, that his or her present place of residence is truly stated opposite his or her signature, and that he or she does hereby petition for the submission of the proposed local law set forth in full in this petition to the electors of the City of New York.

In witness whereof, I set my hand, the day and year placed opposite my signature.

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On the Voters’ Terms

STATEMENT OF WITNESS

I, ________________________________ (name of witness) state:

I am a duly qualified voter of the State of New York and a duly qualified elector of the City of New York.

I now reside at ________________________________ (residence address).

Each of the individuals whose names are subscribed to this petition sheet containing ______ (fill in number) signatures, subscribed the same in my presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet.

I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Date: __________

_________________ (city), __________ (county)  _____________________ 

Signature of Witness