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MEMORANDUM

TO: John Arntz, Director of Elections
 FROM: Ana Flores *AF*
 Andrew Shen *AS*
 Deputy City Attorneys
 DATE: January 20, 2022
 RE: Non-United States Citizen Voting in School Board Elections Under 18 U.S.C. § 611

In light of the approaching voter registration deadline of January 31, 2022 to vote in the February 15, 2022, Consolidated Special Municipal Election and in response to your request, in this memorandum we write to explain why it is lawful for non-United States citizens to participate in local school board elections under 18 U.S.C. § 611.

BACKGROUND

In November 2016, San Francisco voters approved Proposition N, authorizing non-United States citizen (“noncitizen”) parents, guardians and caretakers to vote in San Francisco Unified School District Board of Education (“School Board”) elections. Before Proposition N, the Charter defined a “voter” as a person who was “registered in accordance with the provisions of state law”—in other words, a United States citizen who is at least 18 years old and who is not in prison or on parole for a felony conviction. (S.F. Charter, Art. XVII; Cal. Const. Art. II, § 2.) Proposition N amended the Charter to allow a noncitizen to vote in School Board elections if the voter is (1) a resident of San Francisco, (2) legal voting age, and (3) the parent, guardian, or caregiver of a child under 19 years old residing in San Francisco.

Proposition N also provided that the City’s noncitizen voting program would expire by December 31, 2022, or on the December 31 immediately following the third election for School Board members held after the adoption of the measure, whichever is later. (S.F. Charter § 13.111(a)(2).) But Proposition N also provided that after that presumptive sunset date, the Board could, by ordinance, reauthorize this noncitizen voting program. (*Ibid.*) Through Ordinance No. 206-21, effective on December 13, 2021, the Board of Supervisors reauthorized the City’s noncitizen voting program without a sunset date. Ordinance No. 206-21 also clarified that voters registered through the noncitizen voting program may participate in the School Board recall elections, which will appear on the February 15, 2022 ballot.

DISCUSSION

A. 18 U.S.C. § 611 Permits Noncitizen Voting in Local Elections.

In 1996, the United States Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”). (Pub. L. No. 104-208, 110 Stat. 3009-546.) IIRIRA included a provision barring noncitizens from voting in federal elections. (18 U.S.C. § 611 (West).) Any noncitizen who votes in violation of any Federal, State, or local constitutional provision, statute, ordinance or regulation is deportable. (8 U.S.C. § 1227 (West).)

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But this federal law does not preclude noncitizens from voting in state and local elections. Under 18 U.S.C. § 611 (“Section 611”), it is unlawful for any noncitizen to vote in any election held solely or in part for the purpose of electing a candidate for federal office, unless:

- (1) the election is held partly for some other purpose;
- (2) noncitizens are authorized to vote for such other purpose under a state constitution or statute or a local ordinance; and
- (3) voting for such other purpose is conducted independently of voting for a candidate for such federal offices, in such a manner that a noncitizen has the opportunity to vote for such other purpose but not an opportunity to vote for a candidate for any one or more of such federal office.

B. The City’s Noncitizen Voting Program Satisfies All Three of Section 611’s Requirements.

Noncitizen parents, guardians, and caretakers who are of legal voting age and who have a child under 19 years old residing in San Francisco may vote in School Board elections. School Board elections are for a local purpose, distinct from an election for federal office. As required by Section 611, this noncitizen voter participation is authorized by a local ordinance – Proposition N and the implementing provisions set forth in Article X of the Municipal Elections Code. And, though School Board elections are conducted at the same time as regularly scheduled City elections, noncitizen voters cannot and do not vote in any other election contest, under the procedures further described below.

The Department of Elections (the “Department”) has processes in place to ensure noncitizens vote independently of voting in other election contests. The Department stores noncitizen voter registration information in a supplementary voter database, with restricted access, separate from the rest of the Department’s voter registration information. Noncitizen voters must register using noncitizen registration applications and do not use the State of California Voter Registration application. The Department assembles noncitizen vote-by-mail packets in-house rather than have them assembled by their print vendor. Noncitizens receive the noncitizen version of the official ballot, which lists only the School Board elections. These vote-by-mail packets contain information specific to noncitizens and have a return envelope with a distinct color that is different than the vote-by-mail packets that contain all the election contests. The Department also prepares a separate voter information booklet for noncitizen voters that only includes content regarding School Board contests.

At polling places, the names and addresses of noncitizen voters are listed in their own specific sections in the voter rosters. Like the vote-by-mail ballots, at polling places, noncitizens receive a ballot which lists only the School Board elections. The Department also uses envelopes for provisional ballots specific to noncitizen voters.

The measures outlined above ensure that noncitizens may vote in School Board elections (including recalls of School Board members) but do not have the opportunity to cast a vote for any other office – including any federal office – and satisfy the requirements of Section 611.

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CONCLUSION

As discussed above, Section 611 does not bar voting in local elections if the applicant is eligible to vote under State or local law. Proposition N and the associated provisions of the Municipal Elections Code authorized San Francisco noncitizen parents, guardians and caretakers of a child under the age of 19 to vote in School Board elections, including the recall elections to be held on February 15, 2022.