FREDERIC M. UMANE
PRESIDENT

JULIE DENT
SECRETARY

JOSE MIGUEL ARAUJO
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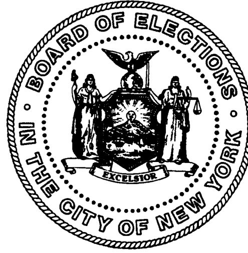
GREGORY C. SOUMAS
JUDITH D. STUPP
COMMISSIONERS



BOARD OF ELECTIONS

IN
THE CITY OF NEW YORK
EXECUTIVE OFFICE, 32 BROADWAY
NEW YORK, NY 10004-1609
(212) 487-5300
FAX (212) 487-5349
www.vote.nyc.ny.us

MARCUS CEDERQVIST
EXECUTIVE DIRECTOR

GEORGE GONZALEZ
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS
ADMINISTRATIVE MANAGER

AGENDA
COMMISSIONERS' MEETING
TUESDAY, MAY 5, 2009
AT 1:30 P.M.

1. Minutes
   a) 3/24/09
   b) 3/31/09
   c) 4/07/09
   d) 4/14/09
   e) 4/21/09
   f) 4/28/09
   g) 4/30/09

2. Marcus Cederqvist
   a) HAVA Update
   b) NYC Council Hearing on Executive Budget for Fiscal Year 2010 – May 18, 2009 at 10:00 A.M.

3. Steven Richman
   a) Special Election June 2, 2009 – Date and Time of Hearings on Objections

4. John Ward
   a) Comparative Expenditures

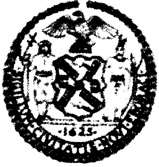
For Your Information

- Subtitle V of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York – Amending Part 6217.5(C) Voter Registration Processing
- NYS Unified Court System Letter re: Judicial Candidates
- The City of New York Executive Budget Fiscal Year 2010
- Molinari v. Bloomberg, U.S. Court of Appeals for the Second Circuit (09-0331-cv)
- Designation of Vacancies for Judge of the Civil Court of the City of New York for the September 15, 2009 Primary Election
- Calendar for Independent Nominating Petitions – June 2, 2009 Special Election
- Calendar for Certificate of Nomination – June 2, 2009 Special Election

- In Memoriam: John Gideon, 1947-2009, Publisher of the "Daily Voting News"

News Items of Interest

- *The New York Times:* Skepticism at the Court on Validity of Vote Law
- *The New York Times:* Bronx Voters Elect Diaz As New Borough President
- *Daily News:* Diaz on way to big Bronx win
- *The Associated Press:* Court questions key voting rights provision
- *New York Law Journal:* Charter Amendment Extending Term Limits Upheld by Circuit



THE COUNCIL OF
THE CITY OF NEW YORK
OFFICE OF THE SPEAKER
CITY HALL
NEW YORK, N.Y. 10007

GARY ALTMAN
LEGISLATIVE COUNSEL

TELEPHONE
212-788-7210

April 29, 2009

Hon. Marcus Cederqvist, Executive Director
NYC Board of Elections
32 Broadway, 7th Floor
New York, NY 10004

Dear Mr. Cederqvist:

RE: Hearing on Proposed Executive Expense, Revenue, Capital and Contract Budgets and CD-XXXV & CD-XXXVI Programs for Fiscal Year 2010.

Please be advised that a hearing on the Proposed Executive Expense, Revenue, Capital and Contract Budgets regarding the Board of Elections will take place on **Monday, May 18, 2009 in the Council Chambers, City Hall, 2nd Floor, New York, NY.**

You are scheduled to appear at this hearing at **10:00 a.m.** Please feel free to bring with you such members of your staff you deem appropriate.

Thank you for your cooperation.

Sincerely,

Gary Altman
Legislative Counsel

GA:ss

2009 MAY -1 PM 5:30

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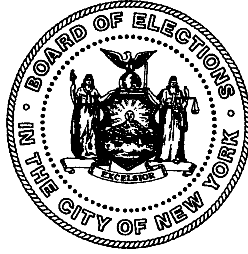

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ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN
GENERAL COUNSEL
Tel: (212) 498-5338
Fax: (212) 497-5342
E-Mail:
srichman@boe.nyc.ny.us

May 4, 2009

TO: The Commissioners of Elections

FROM: Steven H. Richman, General Counsel

COPIES: Marcus Cederqvist, George Gonzalez, Pamela Perkins, Joseph LaRocca, John Owens, Steven Denkberg, & Charles Webb

RE: Special Election – 77th and 85th State Assembly Districts Bronx County – Tuesday, June 2, 2009

As you know, the Governor has issued proclamations calling Special Elections to fill the vacancy in the office of Member of the New York State Assembly in the 77th and 85th State Assembly Districts in Bronx County for TUESDAY, JUNE 2, 2009.

Upon receipt of said proclamations, the Board issued the Calendars relating to the filing of Certificate of Nominations and Independent Nominating Petitions for these Special Elections.

<u>ACTION ITEM – DATE AND TIME OF HEARINGS ON OBJECTIONS</u>

These Calendars do not reflect a date for hearings on any objections or related matters for these Special Elections.

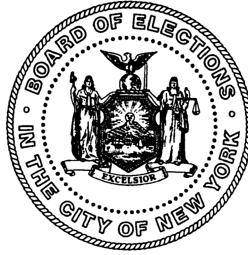
The last day to file Specifications of Objection to Certificates of Nominations is Wednesday, May 20, 2009 and to Independent Nominating Petitions is Tuesday, May 26, 2009 (Note: That is just one(1) week before the Election.

Under your rules, a hearing cannot be held less than 24 hours after the Clerks' report is made available to the participants.

Therefore, you may wish to schedule the Board's hearings on these matters for:

> **Tuesday, May 19, 2009 and Tuesday, May 26, 2009, if necessary (in conjunction with the Stated Meeting of the Board) for those Specifications that can be heard as well as designate a committee (pursuant to Rule J5) to meet, between and after those dates to hear and determine any other specifications that may be filed after the date of the hearings, upon notice to the parties.**

Thank you for your attention to this matter.



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JOHN J. WARD
FINANCE OFFICER

DATE: May 05, 2009

TO: Commissioners

FROM: John J. Ward
Finance Officer

RE: Comparative Expenditures

FY09	P.S. Projection through 5/01/09 Payroll:	$16,881,500
FY09	P.S. Actual through 5/01/09 Payroll:	$22,295,479
	Difference	($ 5,413,979)

Overtime pays two weeks ending 4/17/09

OVERTIME USAGE

General Office	24,644
Brooklyn	25,410
Queens	22,115
Bronx	23,151
New York	31,993
Staten Island	102
Total	$127,415

Respectfully submitted,

Finance Officer

Subtitle V of Title 9 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby amended by amending Part 6217.5(C) Voter Registration Processing, to read as follows:

C. All voter registration activity must be done by a bipartisan team of workers, to assure fairness and uniformity in the process.

1. Bipartisan processing:

   i. Staff member(s) of one major political party review(s) and enters the information from either an individual application or a batch of applications[, electronically signing their work].

   ii. The work on [that] such application or batch of applications is proofread and reviewed by a staff member(s) of the opposite major political party[, who also electronically signs their work].

   iii. Any edits or changes to the information initially entered must be made and [signed] approved, in a bipartisan process, by the two staff [persons] members of opposite parties.

   iv. Once [signed] completed by two staff [persons] members of opposite parties, the information is sent from the county registration system to NYSVoter for inclusion on the statewide list of registered voters, and verification of each voter's identity.

EXPLANATION: Mater underscored is new; matter bracketed [ ] is old regulation to be omitted.

NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

PAUL LEWIS, ESQ.
CHIEF OF STAFF

LAURA SMITH, ESQ.
EXECUTIVE DIRECTOR
JUDICIAL CAMPAIGN ETHICS CENTER

MM
FYI

April 2009

George Gonzalez
& Marcus Cederqvist
New York City Board of Elections
32 Broadway, 7th Floor
New York, NY 10004

Dear Commissioners:

As you know, judicial candidates are subject to a number of court rules in the conduct of their campaigns. There are several court resources available to judicial candidates to help them comply with these rules, including my office, the Judicial Campaign Ethics Center.

In case it may be helpful to judicial candidates in your area, I have enclosed some flyers that could perhaps be offered as counter materials at your offices.

Please do not hesitate to contact me directly by telephone at 212-428-2504 or by email at lalsmith@courts.state.ny.us if you have any questions or if you would like additional materials or information.

Sincerely,

Laura Smith

Encls.

25 BEAVER STREET, NEW YORK, NEW YORK 10004 • PHONE: 212-428-2504 • FAX: 212-401-9029 • LALSMITH@COURTS.STATE.NY.US

NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

ANN PFAU
CHIEF ADMINISTRATIVE JUDGE

PAUL LEWIS, ESQ.
CHIEF OF STAFF

LAURA SMITH, ESQ.
EXECUTIVE DIRECTOR
JUDICIAL CAMPAIGN ETHICS CENTER

To: All Judicial Candidates

From: The Judicial Campaign Ethics Center

Subject: **2009 Judicial Campaign Ethics Training and Guidance**

Mandatory Training*

If you are seeking *state-paid* elective judicial office, you must complete a two-hour judicial campaign ethics training program. 22 NYCRR 100.5(A)(4)(f); 100.6(A); pt. 1200, Rule 8.2(b).

Training sessions in 2009 will be held on the following dates:

Tuesday, April 28 at 10 a.m.
Tuesday, June 16 at 2 p.m.
Monday, August 3 at 2 p.m.

Recordings of the training will be made available for those unable to attend in person.

The training should be completed no later than 30 days after the date you receive the nomination, or 30 days after you file a designating petition if you are running in a primary.

Please register for the training by contacting Nancy Lucadamo at 212-428-2526 or the Judicial Campaign Ethics Center at 1-888-600-JCEC.

Advisory Opinions

You may direct inquiries about your own campaign conduct to the Judicial Campaign Ethics Center by email (contactJCEC@courts.state.ny.us) or fax (212-401-9029).

Additional Resources

For more information about court rules applicable to judicial candidates, or a copy of the Judicial Campaign Ethics Handbook, please visit our website at www.nycourts.gov/ip/jcec or call the Judicial Campaign Ethics Center at 1-888-600-JCEC.

* *Candidates for town or village justice are invited, but not required, to take the training.*

25 BEAVER STREET, NEW YORK, NEW YORK 10004 • PHONE: 212-428-2504 • FAX: 212-401-9029 • LALSMITH@COURTS.STATE.NY.US

The City of New York

Executive Budget
Fiscal Year 2010

Michael R. Bloomberg, Mayor

Supporting Schedules

EXECUTIVE BUDGET - FY10
OPERATING BUDGET
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

OBJECT CLASS	IC REF OBJ DESCRIPTION	MODIFIED FY09-04/24/09 # POS	MODIFIED FY09-04/24/09 AMOUNT	EXECUTIVE BUDGET FY10 # POS	EXECUTIVE BUDGET FY10 AMOUNT	INC/DEC # POS	INC/DEC AMOUNT
RESPONSIBILITY CENTER:							
BUDGET CODE: 0204 HAVA Funding							
01 F/T SALARIED	001 FULL YEAR POSITIONS		1,130,000		1,130,000		
SUBTOTAL FOR F/T SALARIED			1,130,000		1,130,000		
05 AMT TO SCHED	053 AMOUNT TO BE SCHEDULED-PS	24		24			
SUBTOTAL FOR AMT TO SCHED		24		24			
SUBTOTAL FOR BUDGET CODE 0204		24	1,130,000	24	1,130,000		
TOTAL FOR		24	1,130,000	24	1,130,000		
RESPONSIBILITY CENTER: 0001 EXECUTIVE MANAGEMENT							
BUDGET CODE: 0101 EXECUTIVE MANAGEMENT							
01 F/T SALARIED	001 FULL YEAR POSITIONS	2	91,904	2	91,904		
SUBTOTAL FOR F/T SALARIED		2	91,904	2	91,904		
03 UNSALARIED	031 UNSALARIED		134,316		134,316		
SUBTOTAL FOR UNSALARIED			134,316		134,316		
SUBTOTAL FOR BUDGET CODE 0101		2	226,220	2	226,220		
TOTAL FOR EXECUTIVE MANAGEMENT		2	226,220	2	226,220		
RESPONSIBILITY CENTER: 0002 DEPARTMENTAL OPERATIONS							
BUDGET CODE: 0201 DEPARTMENTAL OPERATIONS							
01 F/T SALARIED	001 FULL YEAR POSITIONS	21	1,500,874	21	1,500,874		
SUBTOTAL FOR F/T SALARIED		21	1,500,874	21	1,500,874		
03 UNSALARIED	031 UNSALARIED		144,262		144,262		
SUBTOTAL FOR UNSALARIED			144,262		144,262		

EXECUTIVE BUDGET - FY10
OPERATING BUDGET
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

OBJECT CLASS	IC REF	OBJ DESCRIPTION	MODIFIED FY09-04/24/09 # POS	MODIFIED FY09-04/24/09 AMOUNT	EXECUTIVE BUDGET FY10 # POS	EXECUTIVE BUDGET FY10 AMOUNT	INC/DEC # POS	INC/DEC AMOUNT
04 ADD GRS PAY		042 LONGEVITY DIFFERENTIAL		87,008		87,008		
		047 OVERTIME		4,292,462		2,292,462		2,000,000-
		050 PMTS TO BENEFIC DECSD EMPLOYES		1,605		1,605		
SUBTOTAL FOR ADD GRS PAY				4,381,075		2,381,075		2,000,000-
06 FRINGE BENES		067 SUPPLEMENTAL EMPLOYEE WELF BEN		24,000		24,000		
SUBTOTAL FOR FRINGE BENES				24,000		24,000		
SUBTOTAL FOR BUDGET CODE 0201			21	6,050,211	21	4,050,211		2,000,000-
TOTAL FOR DEPARTMENTAL OPERATIONS			21	6,050,211	21	4,050,211		2,000,000-
RESPONSIBILITY CENTER: 0003 FINANCE OFFICE								
BUDGET CODE: 0301 FINANCE OFFICE								
01 F/T SALARIED		001 FULL YEAR POSITIONS	6	316,119	6	316,119		
SUBTOTAL FOR F/T SALARIED			6	316,119	6	316,119		
03 UNSALARIED		031 UNSALARIED		12,496		12,496		
SUBTOTAL FOR UNSALARIED				12,496		12,496		
SUBTOTAL FOR BUDGET CODE 0301			6	328,615	6	328,615		
TOTAL FOR FINANCE OFFICE			6	328,615	6	328,615		
RESPONSIBILITY CENTER: 0004 DATA PROCESSING								
BUDGET CODE: 0401 DATA PROCESSING OFFICE								
01 F/T SALARIED		001 FULL YEAR POSITIONS	28	1,934,984	28	1,934,984		
SUBTOTAL FOR F/T SALARIED			28	1,934,984	28	1,934,984		
03 UNSALARIED		031 UNSALARIED		275,000		275,000		
SUBTOTAL FOR UNSALARIED				275,000		275,000		
SUBTOTAL FOR BUDGET CODE 0401			28	2,209,984	28	2,209,984		

EXECUTIVE BUDGET - FY10
OPERATING BUDGET
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

OBJECT CLASS IC REF OBJ DESCRIPTION	MODIFIED FY09-04/24/09		EXECUTIVE BUDGET FY10			
					INC/DEC	
	# POS	AMOUNT	# POS	AMOUNT	# POS	AMOUNT
TOTAL FOR DATA PROCESSING	28	2,209,984	28	2,209,984		
RESPONSIBILITY CENTER: 0005 CHIEF CLERK - BROOKLYN						
BUDGET CODE: 0501 BROOKLYN OFFICE						
01 F/T SALARIED 001 FULL YEAR POSITIONS	69	2,265,744	69	2,265,744		
SUBTOTAL FOR F/T SALARIED	69	2,265,744	69	2,265,744		
03 UNSALARIED 031 UNSALARIED		153,839		153,839		
SUBTOTAL FOR UNSALARIED		153,839		153,839		
SUBTOTAL FOR BUDGET CODE 0501	69	2,419,583	69	2,419,583		
TOTAL FOR CHIEF CLERK - BROOKLYN	69	2,419,583	69	2,419,583		
RESPONSIBILITY CENTER: 0006 CHIEF CLERK - QUEENS						
BUDGET CODE: 0601 QUEENS OFFICE						
01 F/T SALARIED 001 FULL YEAR POSITIONS	54	1,751,427	54	1,751,427		
SUBTOTAL FOR F/T SALARIED	54	1,751,427	54	1,751,427		
03 UNSALARIED 031 UNSALARIED		146,308		146,308		
SUBTOTAL FOR UNSALARIED		146,308		146,308		
SUBTOTAL FOR BUDGET CODE 0601	54	1,897,735	54	1,897,735		
TOTAL FOR CHIEF CLERK - QUEENS	54	1,897,735	54	1,897,735		
RESPONSIBILITY CENTER: 0007 CHIEF CLERK - BRONX						
BUDGET CODE: 0701 BRONX OFFICE						

EXECUTIVE BUDGET - FY10
OPERATING BUDGET
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

OBJECT CLASS	IC REF	OBJ	DESCRIPTION	MODIFIED FY09-04/24/09 # POS	MODIFIED FY09-04/24/09 AMOUNT	EXECUTIVE BUDGET FY10 # POS	EXECUTIVE BUDGET FY10 AMOUNT	INC/DEC # POS	INC/DEC AMOUNT
01 F/T SALARIED		001	FULL YEAR POSITIONS	43	1,530,432	43	1,530,432		
SUBTOTAL FOR F/T SALARIED				43	1,530,432	43	1,530,432		
03 UNSALARIED		031	UNSALARIED		162,314		162,314		
SUBTOTAL FOR UNSALARIED					162,314		162,314		
SUBTOTAL FOR BUDGET CODE 0701				43	1,692,746	43	1,692,746		
TOTAL FOR CHIEF CLERK - BRONX				43	1,692,746	43	1,692,746		
RESPONSIBILITY CENTER: 0008 CHIEF CLERK - MANHATTAN									
BUDGET CODE: 0801 NEW YORK OFFICE									
01 F/T SALARIED		001	FULL YEAR POSITIONS	57	1,932,911	57	1,932,911		
SUBTOTAL FOR F/T SALARIED				57	1,932,911	57	1,932,911		
03 UNSALARIED		031	UNSALARIED		309,420		309,420		
SUBTOTAL FOR UNSALARIED					309,420		309,420		
SUBTOTAL FOR BUDGET CODE 0801				57	2,242,331	57	2,242,331		
TOTAL FOR CHIEF CLERK - MANHATTAN				57	2,242,331	57	2,242,331		
RESPONSIBILITY CENTER: 0009 CHIEF CLERK - RICHMOND									
BUDGET CODE: 0901 STATEN ISLAND OFFICE									
01 F/T SALARIED		001	FULL YEAR POSITIONS	21	841,210	21	841,210		
SUBTOTAL FOR F/T SALARIED				21	841,210	21	841,210		
03 UNSALARIED		031	UNSALARIED		76,528		76,528		
SUBTOTAL FOR UNSALARIED					76,528		76,528		
SUBTOTAL FOR BUDGET CODE 0901				21	917,738	21	917,738		

EXECUTIVE BUDGET - FY10
OPERATING BUDGET
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

OBJECT CLASS IC REF OBJ DESCRIPTION	MODIFIED FY09-04/24/09		EXECUTIVE BUDGET FY10			
					INC/DEC	
	# POS	AMOUNT	# POS	AMOUNT	# POS	AMOUNT
TOTAL FOR CHIEF CLERK - RICHMOND	21	917,738	21	917,738		
TOTAL FOR PERSONAL SERVICES	325	19,115,163	325	17,115,163		2,000,000-

EXECUTIVE BUDGET - FY10
UNIT OF APPROPRIATION SUMMARY
AGENCY: 003 BOARD OF ELECTIONS

UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

PERSONAL SERVICES	CURRENT MODIFIED		EXECUTIVE BUDGET		INC/DEC (-)
	NUM POS	BUDGET AMOUNT	NUM POS	BUDGET AMOUNT	
TOTALS FOR OPERATING BUDGET	325	19,115,163	325	17,115,163	2,000,000-
FINANCIAL PLAN SAVINGS	6-	684,873	6-	427,851	257,022-
APPROPRIATION	319	19,800,036	319	17,543,014	2,257,022-

FUNDING SUMMARY	CURRENT MODIFIED	EXECUTIVE BUDGET	INC/DEC (-)
CITY	19,800,036	17,543,014	2,257,022-
OTHER CATEGORICAL			
CAPITAL FUNDS - I.F.A.			
STATE			
FEDERAL - C.D.			
FEDERAL - OTHER			
INTRA-CITY SALES			
TOTAL	19,800,036	17,543,014	2,257,022-

CURRENT CONDITION - FY10
POSITION SCHEDULE
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

LINE	DESCRIPTION	PAY BANK/#	TITLE CODE	MIN-MAX RATE	CURRENT CONDITION FY10 # POS	CURRENT CONDITION FY10 ANNUAL RATE
	OBJECT: 001 FULL YEAR POSITIONS					
1100	EXECUTIVE DIRECTOR (BOARD	D 003	94223	47,270-153,151	1	159,720
1101	COORDINER ELECTION DAY OP	D 003	94409	57,125- 85,235	1	85,235
1102	DIRECTOR, PUBLIC AFFAIRS	D 003	94408	45,758-196,574	1	90,508
1103	ASSOCIATE STAFF ANALYST (	D 003	94414	60,179- 77,916	10	661,001
1105	DEPUTY EXECUTIVE DIRECTOR	D 003	94224	45,758-196,574	1	143,748
1106	ADMINISTRATIVE MANAGER (B	D 003	94372	45,758-196,574	1	125,646
1108	VOTER REGISTRATION ACTIVI	D 003	94407	57,125- 73,819	1	73,819
1110	COMPUTER SYSTEMS MANAGER	D 003	94225	45,758-196,574	2	221,575
1111	COMPUTER SPECIALIST (SOFT	D 003	94526	80,241-107,819	4	415,068
1112	COMPUTER OPERATOR (BOARD	D 003	94389	34,962- 48,867	3	127,746
1114	PROJECT COORDINATOR OF EL	D 003	94412	70,266- 92,423	6	493,551
1115	SENIOR ADMINISTRATOR (BOA	D 003	94201	62,722- 92,885	1	92,885
1116	SENIOR SYSTEMS ANALYSTS (	D 003	94388	84,813- 84,813	1	91,210
1117	SENIOR COMPUTER PROGRAMME	D 003	94229	50,977- 77,152	8	528,729
1121	CHIEF CLERK (BOARD OF EL	D 003	94203	45,758-196,574	1	102,102
1122	CHIEF CLERK (BOARD OF EL	D 003	94203	45,758-196,574	1	87,452
1123	CHIEF CLERK (BOARD OF EL	D 003	94203	45,758-196,574	1	98,792
1124	CHIEF CLERK (BOARD OF EL	D 003	94203	45,758-196,574	1	97,130
1130	FINANCE OFFICER	D 003	94214	48,231- 87,490	1	87,490
1135	ADMINISTRATIVE ASSOCIATE	D 003	94206	43,771- 83,514	22	1,098,687
1136	ADMINISTRATIVE ASSOCIATE	D 003	94206	43,771- 83,514	18	871,034
1140	DEPUTY CHIEF CLERK (BOARD	D 003	94204	45,758-196,574	1	92,728
1141	DEPUTY CHIEF CLERK (BOARD	D 003	94204	45,758-196,574	1	90,362
1142	DEPUTY CHIEF CLERK (BOARD	D 003	94204	45,758-196,574	2	168,667
1143	DEPUTY CHIEF CLERK (BOARD	D 003	94204	45,758-196,574	1	90,362
1144	DEPUTY CHIEF CLERK (BOARD	D 003	94204	45,758-196,574	1	87,452
1150	ASSISTANT FINANCE OFFICER	D 003	94215	43,771- 56,595	2	103,473
1160	ADMINISTRATIVE ASSISTANT	D 003	94207	36,825- 47,469	47	1,941,638
1161	ADMINISTRATIVE ASSISTANT	D 003	94207	36,825- 47,469	20	773,674
1164	ADMINISTRATIVE ASSISTANT	D 003	94207	36,825- 47,469	7	279,120
1170	DIRECTOR OF EQUIPMENT	D 003	94208	48,231- 80,052	3	186,678
1174	COORDINATOR COUNSEL(BOARD	D 003	94406	45,758-196,574	2	195,880
1175	COUNSEL TO THE BOARD (BOA	D 003	94200	40,680- 45,952	2	91,904
1180	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	6	203,802
1182	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	3	83,267
1183	CLERK TO THE BOARD (BOARD	D 003	94216	25,314- 40,797	2	78,007
1184	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	6	161,737
1186	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	1	30,270
1187	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	1	27,111
1188	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	2	56,278
1189	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	7	196,705

CURRENT CONDITION - FY10
POSITION SCHEDULE
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

LINE	DESCRIPTION	PAY BANK/#	TITLE CODE	MIN-MAX RATE	CURRENT CONDITION FY10 # POS	CURRENT CONDITION FY10 ANNUAL RATE
	OBJECT: 001 FULL YEAR POSITIONS					
1190	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	1	25,820
1191	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	3	80,318
1192	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	2	58,374
1193	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	9	253,928
1194	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	2	57,347
1195	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	4	113,748
1198	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	4	111,845
1201	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	9	251,023
1202	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	4	113,551
1203	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	3	93,727
1205	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	11	309,607
1206	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	1	27,664
1211	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	4	113,105
1212	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	6	164,824
1214	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	1	30,147
1215	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	1	25,820
1217	CLERK TO THE BOARD	D 003	94216	25,314- 40,797	10	284,276
1236	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	5	152,293
1237	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	4	121,075
1238	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	12	344,988
1239	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	3	87,690
1240	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	2	63,377
1242	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	1	30,793
1243	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	2	64,036
1244	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	1	32,420
1245	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	2	63,642
1246	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	2	62,924
1247	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	2	59,813
1248	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	3	85,697
1249	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	2	63,057
1250	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	4	125,049
1251	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	5	155,737
1253	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	1	27,818
1254	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	5	156,090
1255	VOTING MACHINE TECHNICIAN	D 003	94210	25,974- 36,564	6	191,323
1301	SENIOR VOTING MACHINE TEC	D 003	94211	28,836- 40,505	1	27,818
1302	STENOGRAPHER/SECRETARIAL	D 003	94374	31,955- 42,363	1	42,363
	SUBTOTAL FOR OBJECT 001				342	14,765,370

CURRENT CONDITION - FY10
POSITION SCHEDULE
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 001 PERSONAL SERVICES

LINE	DESCRIPTION	PAY BANK/#	TITLE CODE	MIN-MAX RATE	CURRENT CONDITION FY10 # POS	CURRENT CONDITION FY10 ANNUAL RATE
	OBJECT: 001 FULL YEAR POSITIONS					
	POSITION SCHEDULE FOR U/A 001				342	14,765,370
	INCREASE/(DECREASE) TO AUTHORIZED FULL-TIME HEADCOUNT				-23	-992,993
	TOTAL FOR U/A 001				319	13,772,377

NOTE: ABOVE DATA REFLECTS FULL-TIME ACTIVE POSITIONS AND SALARIES AS OF 03/28/09

EXECUTIVE BUDGET - FY10
OPERATING BUDGET
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 002 OTHER THAN PERSONAL SERVICES

OBJECT CLASS	IC REF	OBJ	DESCRIPTION	MODIFIED FY09-04/24/09 # CNTRCT	MODIFIED FY09-04/24/09 AMOUNT	EXECUTIVE BUDGET FY10 # CNTRCT	EXECUTIVE BUDGET FY10 AMOUNT	INC/DEC # CNTRCT	INC/DEC AMOUNT
RESPONSIBILITY CENTER:									
BUDGET CODE: 0204 HAVA Funding									
40 OTHR SER&CHR		414	RENTALS - LAND BLDGS & STRUCTS		2,675,001		303,642		2,371,359-
		499	OTHER EXPENSES - GENERAL		14,870,000		15,170,000		300,000
SUBTOTAL FOR OTHR SER&CHR					17,545,001		15,473,642		2,071,359-
SUBTOTAL FOR BUDGET CODE 0204					17,545,001		15,473,642		2,071,359-
BUDGET CODE: 0205 HAVA Outreach									
60 CNTRCTL SVCS		686	PROF SERV OTHER		600,000				600,000-
SUBTOTAL FOR CNTRCTL SVCS					600,000				600,000-
SUBTOTAL FOR BUDGET CODE 0205					600,000				600,000-
BUDGET CODE: 0206 Polling Place Access Improvement Program									
30 PROPTY&EQUIP		300	EQUIPMENT GENERAL		208,000				208,000-
SUBTOTAL FOR PROPTY&EQUIP					208,000				208,000-
SUBTOTAL FOR BUDGET CODE 0206					208,000				208,000-
TOTAL FOR					18,353,001		15,473,642		2,879,359-
RESPONSIBILITY CENTER: 0002 DEPARTMENTAL OPERATIONS									
BUDGET CODE: 0201 DEPARTMENTAL OPERATIONS									
10 SUPPLYS&MATL	856001	10E	AUTOMOTIVE SUPPLIES & MATERIAL		1,155		1,155		
	856001	10F	MOTOR VEHICLE FUEL		3,000		3,000		
	856001	10X	SUPPLIES + MATERIALS - GENERAL		82,779		82,779		
		100	SUPPLIES + MATERIALS - GENERAL		500,000		500,000		
		101	PRINTING SUPPLIES		160,000		260,000		100,000
		105	AUTOMOTIVE SUPPLIES & MATERIAL		5,000				5,000-
		106	MOTOR VEHICLE FUEL		24,000		24,000		
		117	POSTAGE		2,800,000		2,000,000		800,000-
		199	DATA PROCESSING SUPPLIES		110,000		210,000		100,000
SUBTOTAL FOR SUPPLYS&MATL					3,685,934		3,080,934		605,000-

EXECUTIVE BUDGET - FY10
OPERATING BUDGET
AGENCY: 003 BOARD OF ELECTIONS
UNIT OF APPROPRIATION: 002 OTHER THAN PERSONAL SERVICES

OBJECT CLASS	IC REF	OBJ	DESCRIPTION	MODIFIED FY09-04/24/09 # CNTRCT	MODIFIED FY09-04/24/09 AMOUNT	EXECUTIVE BUDGET FY10 # CNTRCT	EXECUTIVE BUDGET FY10 AMOUNT	INC/DEC # CNTRCT	INC/DEC AMOUNT
30 PROPTY&EQUIP		300	EQUIPMENT GENERAL		150,000		150,000		
		302	TELECOMMUNICATIONS EQUIPMENT		30,000		30,000		
		305	MOTOR VEHICLES		54,000				54,000-
		314	OFFICE FURITURE		123,000		250,000		127,000
		315	OFFICE EQUIPMENT		10,000		50,000		40,000
		319	SECURITY EQUIPMENT		145,000		95,000		50,000-
		332	PURCH DATA PROCESSING EQUIPT		410,000		210,000		200,000-
		337	BOOKS-OTHER		20,000		15,000		5,000-
SUBTOTAL FOR PROPTY&EQUIP					942,000		800,000		142,000-
40 OTHR SER&CHR	858001	40B	TELEPHONE & OTHER COMMUNICATNS		449,678		412,838		36,840-
	856001	40G	MAINT & REP OF MOTOR VEH EQUIP		10,020		10,020		
		400	CONTRACTUAL SERVICES-GENERAL		960,000		1,000,000		40,000
		402	TELEPHONE & OTHER COMMUNICATNS		170,000		300,000		130,000
		403	OFFICE SERVICES		70,000		100,000		30,000
		407	MAINT & REP OF MOTOR VEH EQUIP		500		500		
		412	RENTALS OF MISC.EQUIP		400,000		400,000		
		417	ADVERTISING		465,000		400,000		65,000-
	856001	42C	HEAT LIGHT & POWER		452,009		574,039		122,030
	856001	42G	DATA PROCESSING SERVICES		111,748		111,748		
		427	DATA PROCESSING SERVICES		15,000		15,000		
		451	NON OVERNIGHT TRVL EXP-GENERAL		16,200		13,200		3,000-
		452	NON OVERNIGHT TRVL EXP-SPECIAL		10,600		10,600		
		453	OVERNIGHT TRVL EXP-GENERAL		7,100		7,100		
		454	OVERNIGHT TRVL EXP-SPECIAL		16,100		8,100		8,000-
		499	OTHER EXPENSES - GENERAL		39,357		1,016,197		976,840
SUBTOTAL FOR OTHR SER&CHR					3,193,312		4,379,342		1,186,030
60 CNTRCTL SVCS		600	CONTRACTUAL SERVICES GENERAL	2	695,000	2	1,500,000		805,000
		602	TELECOMMUNICATIONS MAINT	8	1,000	8	1,000		
		608	MAINT & REP GENERAL	1	1,132	1	1,132		
		612	OFFICE EQUIPMENT MAINTENANCE	2	220,000	2	220,000		
		613	DATA PROCESSING EQUIPMENT	1	150,000	1	200,000		50,000
		615	PRINTING CONTRACTS	9	12,782,500	9	13,007,500		225,000
		619	SECURITY SERVICES	1	225,000	1	200,000		25,000-
		624	CLEANING SERVICES	1	100,000	1	100,000		
		633	TRANSPORTATION EXPENDITURES	9	4,150,000	9	2,750,000		1,400,000-
		671	TRAINING PRGM CITY EMPLOYEES	1	40,000	1	190,000		150,000
		682	PROF SERV LEGAL SERVICES	1	150,000	1	150,000		
		686	PROF SERV OTHER		100,000		100,000		

OBJECT CLASS	IC REF	OBJ DESCRIPTION	MODIFIED FY09-04/24/09 # CNTRCT	MODIFIED FY09-04/24/09 AMOUNT	EXECUTIVE BUDGET FY10 # CNTRCT	EXECUTIVE BUDGET FY10 AMOUNT	INC/DEC # CNTRCT	INC/DEC AMOUNT
SUBTOTAL FOR CNTRCTL SVCS			36	18,614,632	36	18,419,632		195,000-
SUBTOTAL FOR BUDGET CODE 0201			36	26,435,878	36	26,679,908		244,030
BUDGET CODE: 0202 ELECTION PAYMENTS								
40 OTHR SER&CHR		414 RENTALS - LAND BLDGS & STRUCTS		316,000		300,000		16,000-
		499 OTHER EXPENSES - GENERAL				1,500,000		1,500,000
SUBTOTAL FOR OTHR SER&CHR				316,000		1,800,000		1,484,000
60 CNTRCTL SVCS		686 PROF SERV OTHER	1	16,916,430	1	14,716,430		2,200,000-
SUBTOTAL FOR CNTRCTL SVCS			1	16,916,430	1	14,716,430		2,200,000-
SUBTOTAL FOR BUDGET CODE 0202			1	17,232,430	1	16,516,430		716,000-
TOTAL FOR DEPARTMENTAL OPERATIONS			37	43,668,308	37	43,196,338		471,970-
RESPONSIBILITY CENTER: 0003 FINANCE OFFICE								
BUDGET CODE: 0203 DCAS Intracity								
40 OTHR SER&CHR	856001	41D RENTALS - LAND BLDGS & STRUCTS		13,446,458		18,929,751		5,483,293
SUBTOTAL FOR OTHR SER&CHR				13,446,458		18,929,751		5,483,293
SUBTOTAL FOR BUDGET CODE 0203				13,446,458		18,929,751		5,483,293
TOTAL FOR FINANCE OFFICE				13,446,458		18,929,751		5,483,293
TOTAL FOR OTHER THAN PERSONAL SERVICES			37	75,467,767	37	77,599,731		2,131,964

EXECUTIVE BUDGET - FY10
UNIT OF APPROPRIATION SUMMARY
AGENCY: 003 BOARD OF ELECTIONS

UNIT OF APPROPRIATION: 002 OTHER THAN PERSONAL SERVICES

OTHER THAN PERSONAL SERVICES	CURRENT MODIFIED		EXECUTIVE BUDGET		INC/DEC (-)
	INTRACITY $	BUDGET AMOUNT	INTRACITY $	BUDGET AMOUNT	
TOTALS FOR OPERATING BUDGET	14,556,847	75,467,767	20,125,330	77,599,731	2,131,964
FINANCIAL PLAN SAVINGS		5,894,000-		8,924,352-	3,030,352-
APPROPRIATION		69,573,767		68,675,379	898,388-

FUNDING SUMMARY	CURRENT MODIFIED	EXECUTIVE BUDGET	INC/DEC (-)
CITY	69,365,767	68,675,379	690,388-
OTHER CATEGORICAL			
CAPITAL FUNDS - I.F.A.			
STATE			
FEDERAL - C.D.			
FEDERAL - OTHER	208,000		208,000-
INTRA-CITY SALES			
TOTAL	69,573,767	68,675,379	898,388-

EXECUTIVE BUDGET- FY10
AGENCY SUMMARY

AGENCY: 003 BOARD OF ELECTIONS

PERSONAL SERVICES

PERSONAL SERVICES	CURRENT MODIFIED		EXECUTIVE BUDGET		INC/DEC (-)
	NUM POS	BUDGET AMOUNT	NUM POS	BUDGET AMOUNT	
TOTALS FOR OPERATING BUDGET	325	19,115,163	325	17,115,163	2,000,000-
FINANCIAL PLAN SAVINGS	6-	684,873	6-	427,851	257,022-
APPROPRIATION	319	19,800,036	319	17,543,014	2,257,022-

FUNDING SUMMARY	CURRENT MODIFIED	EXECUTIVE BUDGET	INC/DEC (-)
CITY	19,800,036	17,543,014	2,257,022-
OTHER CATEGORICAL			
CAPITAL FUNDS - I.F.A.			
STATE			
FEDERAL - C.D.			
FEDERAL - OTHER			
INTRA-CITY SALES			
TOTAL	19,800,036	17,543,014	2,257,022-

OTPS MEMO AMOUNTS

EXECUTIVE BUDGET- FY10
AGENCY SUMMARY

AGENCY: 003 BOARD OF ELECTIONS

OTHER THAN PERSONAL SERVICES

OTHER THAN PERSONAL SERVICES	CURRENT MODIFIED		EXECUTIVE BUDGET		INC/DEC (-)
	INTRACITY $	BUDGET AMOUNT	INTRACITY $	BUDGET AMOUNT	
TOTALS FOR OPERATING BUDGET	14,556,847	75,467,767	20,125,330	77,599,731	2,131,964
FINANCIAL PLAN SAVINGS		5,894,000-		8,924,352-	3,030,352-
APPROPRIATION		69,573,767		68,675,379	898,388-

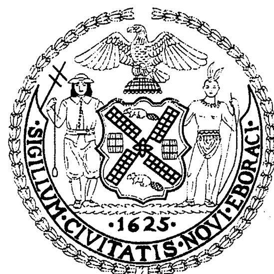
FUNDING SUMMARY	CURRENT MODIFIED	EXECUTIVE BUDGET	INC/DEC (-)
CITY	69,365,767	68,675,379	690,388-
OTHER CATEGORICAL			
CAPITAL FUNDS - I.F.A.			
STATE			
FEDERAL - C.D.			
FEDERAL - OTHER	208,000		208,000-
INTRA-CITY SALES			
TOTAL	69,573,767	68,675,379	898,388-

PS MEMO AMOUNTS

EXECUTIVE BUDGET - FY10
AGENCY SUMMARY
AGENCY: 003 BOARD OF ELECTIONS

	MODIFIED FY09 - 04/24/09		EXECUTIVE BUDGET FY10		
	POSITIONS	BUDGET AMOUNT	POSITIONS	BUDGET AMOUNT	INC/DEC AMT
PS					
TOTALS FOR OPERATING BUDGET	325	19,115,163	325	17,115,163	2,000,000-
FINANCIAL PLAN SAVINGS	6-	684,873	6-	427,851	257,022-
APPROPRIATION	319	19,800,036	319	17,543,014	2,257,022-
OTPS					
TOTALS FOR OPERATING BUDGET		75,467,767		77,599,731	2,131,964
FINANCIAL PLAN SAVINGS		5,894,000-		8,924,352-	3,030,352-
APPROPRIATION		69,573,767		68,675,379	898,388-
AGENCY TOTALS					
TOTALS FOR OPERATING BUDGET	325	94,582,930	325	94,714,894	131,964
FINANCIAL PLAN SAVINGS	6-	5,209,127-	6-	8,496,501-	3,287,374-
APPROPRIATION	319	89,373,803	319	86,218,393	3,155,410-
FUNDING					
CITY		89,165,803		86,218,393	2,947,410-
OTHER CATEGORICAL					
CAPITAL FUNDS - I.F.A.					
STATE					
FEDERAL - C.D.					
FEDERAL - OTHER		208,000			208,000-
INTRA-CITY SALES					
TOTAL FUNDING		89,373,803		86,218,393	3,155,410-

The City of New York



Capital Commitment Plan
Executive Budget
Fiscal Year 2010

Volume 3
May 2009

Michael R. Bloomberg, Mayor

Office of Management and Budget
Mark Page, Director

FY 2010 EXECUTIVE APPROPRIATIONS AND COMMITMENTS
WITH FY 2009 PLAN AND FORECAST AND ACTUALS
($ IN THOUSANDS / COMMITMENT TOTALS EXCLUSIVE OF IFA)

MGN AGY	PROJECT ID NO	DESCRIPTION	CITY COST	NC COST	PLAN COMM DATE	CURRENT MILESTONE	MILESTONE START	MILESTONE END
	IFDS	003 IFA DESIGN	85	0	07/10			
850	PW335SSLS	Site Safety Lump Sum						
	SVCS	001 SERVICES	600	0	06/10			
	SVCS	002 SERVICES	600	0	06/11			
850	PW335SS04	SITE SAFETY #4						
	CTGY	002 CONTINGENCY	750	0	06/09			
850	PW335SS05	SITE SAFETY #5						
	IFOT	003 IFA OTHER TECHNICAL SERVI	75	0	06/10			
850	PW335SS06	SITE SAFETY #6						
	CTGY	002 CONTINGENCY	75	0	06/12			
	IFOT	003 IFA OTHER TECHNICAL SERVI	75	0	06/12			
856	PW335ASB4	VARIOUS PUBLIC BUILDINGS- ENVIRONMENTAL REMEDIATION						
CO#: D	CONS	002 CONSTRUCTION	78-	0	08/08			
CO#: B	CONS	004 CONSTRUCTION	12-	0	08/08			
	CONS	008 CONSTRUCTION	1,461	0	01/09			
CO#: D	CONS	008 CONSTRUCTION	39	0	11/08			
CO#: E	CONS	008 CONSTRUCTION	90	0	10/08			

BUDGET LINE: PW-340 FMS #: 856 813 BOARD OF ELECTIONS

AVAILABLE BALANCE AS OF: 02/28/09	$95,197,926.73 (CITY)		$70,000,000.00 (NON-CITY)
CONTRACT LIABILITY:	$4,414,168.48 (CITY)		$.00 (NON-CITY)
ITD EXPENDITURES:	$39,886,647.79 (CITY)		$.00 (NON-CITY)

	FY 10	FY 11	FY 12	FY 13		FY 10	FY 11	FY 12	FY 13
EXECUTIVE APPROPRIATIONS (C)					COMMITMENT PLAN (C)	62,591			
(N)					(N)				

FY 2009	JULY	AUG	SEPT	OCT	NOV	DEC	JAN	FEB	MARCH	APRIL	MAY	JUNE	FY 09
PLAN (C)										3,775		20,561	24,336
FORCST (C)										3,775		23,050	26,825
ACTUAL (C)													
PLAN (N)													
FORCST (N)													
ACTUAL (N)													

MGN AGY	PROJECT ID NO	DESCRIPTION		CITY COST	NC COST	PLAN COMM DATE	CURRENT MILESTONE	MILESTONE START	MILESTONE END
856	PW340BMD	BOE STATEN ISLAND VOTING MACHINES							
	CONS	001 CONSTRUCTION		3,000	0	06/09			
	EQFN CQ	002 EQUIPMENT AND FURNITURE	COMMUNICATIONS EQUIPMENT	400	0	06/09			
	EQFN FF	003 EQUIPMENT AND FURNITURE	OFFICE FURNITURE	25	0	06/09			
856	PW340CALL	BOE CALL CENTER UPGRADE							
	EQFN	001 EQUIPMENT AND FURNITURE		616	0	06/10			

FY 2010 EXECUTIVE APPROPRIATIONS AND COMMITMENTS
WITH FY 2009 PLAN AND FORECAST AND ACTUALS
($ IN THOUSANDS / COMMITMENT TOTALS EXCLUSIVE OF IFA)

MGN AGY	PROJECT ID NO	DESCRIPTION		CITY COST	NC COST	PLAN COMM DATE	CURRENT MILESTONE	MILESTONE START	MILESTONE END
856	PW340CLIN	BOE MOVE FROM 645 CLINTON STREET BROOKLYN							
	CONS	001 CONSTRUCTION		4,149	0	06/09			
	EQFN FF	002 EQUIPMENT AND FURNITURE	OFFICE FURNITURE	750	0	06/09			
	EQFN CQ	003 EQUIPMENT AND FURNITURE	COMMUNICATIONS EQUIPMENT	1,700	0	06/09			
856	PW340ELEC	BOARD OF ELECTIONS							
	EQFN	001 EQUIPMENT AND FURNITURE		50,000	0	04/10			
856	PW340EQP	SERVER AND STORAGE EQUIPMENT UPGRADE							
	EQFN	001 EQUIPMENT AND FURNITURE		463	0	04/10			
856	PW340MANH	MANHATTAN ELECTIONS WAREHOUSE					DEVSCOPE	06/04	09/04
	CONS LS	001 CONSTRUCTION	CONST/RECONST OF LEASED S	3,270	0	04/09			
	EQFN FF	002 EQUIPMENT AND FURNITURE	OFFICE FURNITURE	750	0	06/09			
	EQFN CQ	003 EQUIPMENT AND FURNITURE	COMMUNICATIONS EQUIPMENT	505	0	04/09			
856	PW340MAO	BOE - 42 BROADWAY - MAN ADMIN OFFICE #3022							
	CONS	001 CONSTRUCTION		2,381	0	06/10			
	EQFN FF	002 EQUIPMENT AND FURNITURE	OFFICE FURNITURE	626	0	06/10			
CO#: BB	IFSP	003 IFA CONSTRUCTION SUPERVIS		30	0	06/09			
	EQFN CQ	005 EQUIPMENT AND FURNITURE	COMMUNICATIONS EQUIPMENT	505	0	06/10			
856	PW340PMQA	BOARD OF ELECTIONS PM/QA SERVICES							
	SVCS	004 SERVICES		1	0	06/09			
	SVCS	005 SERVICES		8,000	0	06/10			
856	PW340VOM	BOE MOVE FROM 1780 GRAND CONCOURSE - VOTING MACHINES							
	CONS	004 CONSTRUCTION		4,750	0	06/09			
	EQFN FF	005 EQUIPMENT AND FURNITURE	OFFICE FURNITURE	275	0	06/09			
	EQFN CQ	006 EQUIPMENT AND FURNITURE	COMMUNICATIONS EQUIPMENT	850	0	06/09			
856	PW340WARE	BOE - ADDITIONAL WAREHOUSE SPACE QUEENS							
	EQFN FF	002 EQUIPMENT AND FURNITURE	OFFICE FURNITURE	2,561	0	06/09			
	EQFN FF	004 EQUIPMENT AND FURNITURE	OFFICE FURNITURE	125	0	06/09			
	EQFN CQ	005 EQUIPMENT AND FURNITURE	COMMUNICATIONS EQUIPMENT	1,225	0	06/09			

MGN AGY	PROJECT ID NO	DESCRIPTION	CITY COST	NC COST	PLAN COMM DATE	CURRENT MILESTONE	MILESTONE START	MILESTONE END
	IFSP	101 IFA CONSTRUCTION SUPERVIS	60	0	06/09			
856	PW325CA	210 Joralemon Street, 3rd Floor-DA's ComAlert Space						
	IFDS	100 IFA DESIGN	40	0	06/09			
CO#: B	IFSP	101 IFA CONSTRUCTION SUPERVIS	30	0	06/09			
856	PW325COOL	210 JORALEMON ST.- COOLING TOWERS						
	IFSP	100 IFA CONSTRUCTION SUPERVIS	48	0	06/09			
CO#: A	IFSP	100 IFA CONSTRUCTION SUPERVIS	40	0	06/09			
	IFDS	101 IFA DESIGN	25	0	06/09			
856	PW325ELEC	210 JORALEMON ST. ELECTRICAL UPGRADE & EMERGENCY GENERATOR						
	IFDS	100 IFA DESIGN	200	0	06/09			
	IFSP	101 IFA CONSTRUCTION SUPERVIS	1,000	0	06/09			
856	PW325EXTR	210 JORALEMON ST.- EXTERIOR						
CO#: BB	IFSP	100 IFA CONSTRUCTION SUPERVIS	15	0	06/09			
CO#: BB	IFDS	101 IFA DESIGN	10	0	06/09			
856	PW325FC	210 JORALEMON STREET - BROOKLYN MUNI. FAN COIL REPLACEMENT				DEVSCOPE	09/08	11/08
	IFDS	100 IFA DESIGN	118	0	06/09			
	IFSP	101 IFA CONSTRUCTION SUPERVIS	79	0	06/09			
856	PW325STA	210 JORALEMON STREET STABILIZATION				DEVSCOPE	01/07	01/07
	IFDS	103 IFA DESIGN	30	0	06/09			
856	PW326DOM	125-01 QUEENS BLVD.- QUEENS FAMILY JUSTICE CENTER - NEW FACI				DEVSCOPE	06/06	07/06
	CONS	007 CONSTRUCTION	57	0	06/09			
CO#: G	EQFN	007 EQUIPMENT AND FURNITURE	5	0	07/08			
856	PW335ASB4	VARIOUS PUBLIC BUILDINGS- ENVIRONMENTAL REMEDIATION						
	IFSP	100 IFA CONSTRUCTION SUPERVIS	50	0	06/09			
856	PW340ELEC	BOARD OF ELECTIONS						
	IFSP	100 IFA CONSTRUCTION SUPERVIS	10,982	0	06/09			
CO#: BB	IFDS	101 IFA DESIGN	9,980	0	06/09			
856	PW340QNS1	126-06 Queens Blvd QUEENS- BOARD OF ELECTIONS OFFICES						
	IFSP	100 IFA CONSTRUCTION SUPERVIS	58	0	06/09			
CO#: A	IFDS	101 IFA DESIGN	30	0	06/09			
856	PW357COOL	253 BROADWAY COOLING TOWERS REPLACEMENT				DEVSCOPE	11/06	01/07
	IFSP	100 IFA CONSTRUCTION SUPERVIS	360	0	06/09			
	IFDS	101 IFA DESIGN	50	0	06/09			
856	PW357EXTR	253 BROADWAY- EXTERIOR AND ROOF				DEVSCOPE	06/03	09/03
	IFSP	100 IFA CONSTRUCTION SUPERVIS	1,200	0	06/09			
856	PW357INFR	253 BROADWAY INFRASTRUCTURE UPGRADE						
	CONS	001 CONSTRUCTION	2,600	0	06/09			
856	PW357LBBY	253 BROADWAY - LOBBY RENOVATION						
	IFSP	002 IFA CONSTRUCTION SUPERVIS	15	0	06/09			
	IFDS	003 IFA DESIGN	10	0	06/09			

FY 2010 EXECUTIVE APPROPRIATIONS AND COMMITMENTS
WITH FY 2009 PLAN AND FORECAST AND ACTUALS
($ IN THOUSANDS / COMMITMENT TOTALS EXCLUSIVE OF IFA)

MGN AGY	PROJECT ID NO	DESCRIPTION	CITY COST	NC COST	PLAN COMM DATE	CURRENT MILESTONE	MILESTONE START	MILESTONE END
856	PW340BMD	BOE STATEN ISLAND VOTING MACHINES						
	IFDS	100 IFA DESIGN	60	0	06/09			
	IFSP	101 IFA CONSTRUCTION SUPERVIS	58	0	06/09			
856	PW340CLIN	BOE MOVE FROM 645 CLINTON STREET BROOKLYN						
	IFDS	100 IFA DESIGN	1,980	0	06/09			
	IFSP	101 IFA CONSTRUCTION SUPERVIS	1,000	0	06/09			
856	PW340MANH	MANHATTAN ELECTIONS WAREHOUSE				DEVSCOPE	06/04	09/04
	CO#: BB IFSP	100 IFA CONSTRUCTION SUPERVIS	100	0	06/09			
	CO#: BB IFDS	101 IFA DESIGN	50	0	06/09			
856	PW340MAO	BOE - 42 BROADWAY - MAN ADMIN OFFICE #3022						
	CO#: BB IFDS	004 IFA DESIGN	30	0	06/09			
856	PW340VOM	BOE MOVE FROM 1780 GRAND CONCOURSE - VOTING MACHINES						
	IFDS	100 IFA DESIGN	1,985	0	06/09			
	IFSP	101 IFA CONSTRUCTION SUPERVIS	1,000	0	06/09			
856	PW340WARE	BOE - ADDITIONAL WAREHOUSE SPACE QUEENS						
	IFDS	100 IFA DESIGN	770	0	06/09			
	IFSP	101 IFA CONSTRUCTION SUPERVIS	900	0	06/09			
856	S247-406	MANHATTAN 9 - 125 EAST 149TH STREET						
	CO#: AA IFSP	100 IFA CONSTRUCTION SUPERVIS	40	0	06/09			
	CO#: AB IFDS	101 IFA DESIGN	20	0	06/09			
856	350STMARK	ACS- 350 ST. MARKS PLACE LEASED SPACE						
	IFDS	100 IFA DESIGN	30	0	06/09			
	CO#: A IFDS	100 IFA DESIGN	100	0	06/09			
	IFSP	101 IFA CONSTRUCTION SUPERVIS	200	0	06/09			
	CO#: B IFSP	101 IFA CONSTRUCTION SUPERVIS	200	0	06/10			

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**
3
4
5 ______________
6 August Term, 2008
7
8 (Argued: March 27, 2009 Last Suppl. Briefs Filed: April 10, 2009 Decided: April 28, 2009)
9
10
11 Docket No. 09-0331-cv
12
13
14 ______________
15 GUY MOLINARI,
16
17 *Plaintiff,*
18
19 WILLAM C. THOMPSON JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE NEW YORK
20 CITY COMPTROLLER, BETSY GOTBAUM, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS
21 PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, BILL DE BLASIO, INDIVIDUALLY AND IN HIS
22 OFFICIAL CAPACITY AS A MEMBER OF THE NEW YORK CITY COUNCIL, LETITIA JAMES,
23 INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A MEMBER OF THE NEW YORK CITY COUNCIL,
24 CHARLES BARRON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NEW
25 YORK CITY CITY COUNCIL, ROSALIE CALIENDO, PHILLIP DEPAOLO, PHILIP FOGLIA, KENT
26 LEBSOCK, ANDREA RICH, MIKE LONG, TOM LONG, SARAH LYONS, IDA SANOFF, GLORIA SMITH,
27 ERIC SNYDER, KENNETH J. BAER, KENNETH A. DIAMONDSTONE, PETER GLEASON, MARK
28 WINSTON GRIFFITH, ARI HOFFNUNG, ALFONSO QUIROZ, YDANIS RODRIGUEZ, JO ANNE SIMON,
29 NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC., U.S. TERM LIMITS, LUVENIA SUBER,
30 STANLEY KALATHARA, AND RESPONSIBLE NEW YORK,
31
32
33 *Plaintiffs-Appellants,*
34
35 v.
36
37 MICHAEL R. BLOOMBERG, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK,
38 CHRISTINE QUINN, IN HER OFFICIAL CAPACITY AS SPEAKER OF THE NEW YORK CITY COUNCIL,
39 NEW YORK CITY COUNCIL, CITY OF NEW YORK,
40

Defendants-Appellees,

JAMES J. SAMPEL, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF COMMISSIONERS OF ELECTIONS FOR THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK, AND BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Defendants.

Before:
STRAUB, POOLER, RAGGI, *Circuit Judges.*

On appeal from a judgment of the United States District Court for the Eastern District of New York (Charles P. Sifton, *Judge*), granting defendants' motion for summary judgment and dismissing plaintiffs' Amended Complaint. In October 2008, the New York City Council enacted Local Law 51, which Mayor Bloomberg signed into law on November 3, 2008. Local Law 51 amended previously existing term limits legislation by extending the number of eligible terms from two consecutive terms to three for the Mayor, Council Members, Public Advocate, Comptroller and Borough Presidents. Local Law 51 amends term limits legislation that was enacted in 1993 by referendum, and will allow certain officials to run for third terms in November 2009. Because we hold that Local Law 51 does not violate plaintiffs' First Amendment rights, substantive due process rights, New York State referendum law and the City of New York's conflict of interest law, we affirm.

RANDY M. MASTRO, Gibson, Dunn & Crutcher LLP, New York, NY (Norman Siegel, New York, NY, on the brief), *for Plaintiffs-Appellants Willam C. Thompson Jr., Betsy Gotbaum, Bill de Blasio, Letitia James, Charles Barron, Rosalie Caliendo, Phillip DePaolo, Philip Foglia, Kent Lebsock, Andrea Rich, Mike Long, Tom Long, Sarah Lyons, Ida Sanoff, Gloria Smith, Eric Snyder, Kenneth J. Baer, Kenneth A. Diamondstone, Peter Gleason, Mark Winston Griffith, Ari Hoffnung, Alfonso Quiroz, Ydanis Rodriguez, Jo Anne Simon, U.S. Term Limits, Luvenia Suber, Stanley Kalathara, and Responsible New York.*

(Pieter Van Tol, Andrew Behrman, Lovells LLP, New York, NY, for *Plaintiff-Appellant New York Public Interest Research Group, Inc.*)

ALAN G. KRAMS, Assistant Corporation Counsel (Michael A. Cardozo, Corporation Counsel of the City of New York, *on the brief*), New York, NY, *for Defendants-Appellees.*

Harry Kresky, New York, NY, *for Lenora B. Fulani and the New York City Organizations of the*

1 *New York Independence Party as* amici curiae *in support of Plaintiffs-Appellants.*
2
3 Robert D. Joffe, Cravath, Swaine & Moore LLP, New York, NY, *for the Partnership for New*
4 *York City, Inc. as* amicus curiae *in support of Defendants-Appellees.*
5
6 ---
7 STRAUB, *Circuit Judge*:

8 Plaintiffs-Appellants appeal from the judgment of the United States District Court for the
9 Eastern District of New York (Charles P. Sifton, *Judge*), granting defendants' motion for
10 summary judgment and dismissing plaintiffs' Amended Complaint. At issue in this litigation is
11 an amendment to the Charter of the City of New York, entitled Local Law 51, which was passed
12 by the City Council and signed into law by Mayor Michael R. Bloomberg on November 3, 2008.
13 It provides that Members of the City Council, the Mayor, Public Advocate, Comptroller and
14 Borough Presidents are eligible to serve a maximum of three consecutive terms in office. It
15 amends sections 1337 and 1338 of the City Charter, which previously provided for a maximum
16 of two consecutive terms for these officials and which were enacted by a city-wide referendum in
17 1993.

18 The individual plaintiffs include the current Comptroller and Public Advocate of New
19 York City, several current members of the New York City Council who voted against the
20 legislation at issue in this case, several individuals who are alleged to "have developed concrete
21 plans" to run for City Council seats in the November 2009 election, several individuals who are
22 alleged to have expended time and money in favor of the two public referenda on term limits
23 which are also at issue in this case, and "voters from all walks of life – and all five boroughs of
24 this great City – who . . . voted to impose term limits" in these two referenda. The plaintiffs also
25 include three organizations – New York Public Interest Research Group, Inc., U.S. Term Limits

and Responsible New York – which were referred to by the District Court as "good-government groups."

The individual defendants are the current Mayor of New York City, the Speaker of the City Council and the current head of the New York City Board of Elections. The institutional defendants are the New York City Council, the Board of Elections and the City of New York itself.

The gravamen of plaintiffs' Amended Complaint is that defendants violated federal, State and City law by amending existing term limit legislation enacted by referendum, thereby extending themselves the opportunity to run for an additional term in office. Plaintiffs assert several causes of action, including violations of the United States and New York State Constitutions, the New York Municipal Home Rule Law and the City Charter's conflict of interest provisions. The District Court dismissed plaintiffs' Amended Complaint in its entirety on summary judgment.

On appeal, appellants advance four principal arguments. First, they argue that defendants violated their First Amendment rights because City voters will now be less likely to participate in the referendum process, and thus engage in less First Amendment speech, if laws enacted by referenda can be amended by City Council legislation. Second, they argue that defendants violated their substantive due process rights guaranteed by the Fourteenth Amendment of the United States Constitution because the sole purpose of Local Law 51 is to extend defendants' own political careers by entrenching incumbents. Third, they argue that defendants violated New York Municipal Home Rule Law § 23(2)(b), which they contend requires a mandatory referendum to enact the provisions of Local Law 51. Finally, they argue that defendants violated

1 the City Charter's conflict of interest provisions by enacting legislation conferring upon
2 themselves a political benefit. Because we hold that the enactment of Local Law 51 did not run
3 afoul of any of these provisions, we affirm the District Court's judgment.

4 **BACKGROUND**

5 **I. New York State's Referendum Scheme**

6 As a general matter, this case touches upon the City Council's and Mayor's authority to
7 enact local laws amending the City Charter. Cities in the State of New York are given broad
8 power to enact local laws, including those amending a city charter, as long as they "relat[e] to its
9 property, affairs or government" and are "not inconsistent with the provisions of th[e] [state]
10 constitution or any general law." N.Y. CONST., ART. IX, § 2; *see also* N.Y. MUN. HOME RULE
11 LAW § 10(1)(i)-(ii). This includes local laws relating to "[t]he powers, duties, qualifications,
12 number, mode of selection and removal, terms of office, compensation, hours of work,
13 protection, welfare and safety of its officers and employees." N.Y. MUN. HOME RULE LAW §
14 10(1)(ii).

15 A city may enact such laws by a majority vote of its legislative body and the approval of
16 its mayor, and, in the case of a mayor's veto, the legislative body may override the mayor's veto
17 with a two-thirds vote. *See id.* §§ 20-21.[1] Moreover, sections 36 and 37 of the New York
18 Municipal Home Rule Law allow voters to enact such laws directly by means of a referendum.
19 *See id.* at §§ 36, 37. Such a referendum may be initiated directly by voters through a process

[1] There is one exception at issue here, which will be discussed in Part III of this Opinion, namely, New York Municipal Home Rule Law § 23, which sets forth certain types of local laws that are "subject to mandatory referendum," N.Y. MUN. HOME RULE LAW § 23, including those that "change[] the membership . . . of the legislative body," *see id.* § 23(2)(b).

commonly referred to as a voter initiative. *See id.* § 37. Generally, if qualified voters 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 referendum, the proposed local law will appear on the ballot at the next general election. *See id.* A referendum proposing a local law amending the City Charter may also be initiated by a charter commission. *See id.* § 36. A charter commission may be created by a voters' petition, the City Council or the Mayor. *See id.* § 36(2)-(4).

Notwithstanding these provisions, the New York Court of Appeals has made clear that "[d]irect legislation in cities must always rest on some constitutional or statutory grant of power. Government by representation is still the rule. Direct action by the people is the exception." *McCabe v. Voorhis*, 243 N.Y. 401, 413 (1926).

II. 1993 Voter Initiative and 1996 Referendum

In November 1993, City voters put a referendum on the ballot by voter initiative proposing term limits for certain elected City officials, which was ultimately adopted by a vote of more than 59%. It provided:

> CHAPTER 50
> TERM LIMITS
>
> § 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 mayor, public advocate, comptroller, borough president or council member if that person

1 had previously held such office for two or more full consecutive
2 terms (including in the case of council member at least one
3 four-year term), unless one full term or more has elapsed since that
4 person last held such office; provided, however, that in calculating
5 the number of consecutive terms a person has served, only terms
6 commencing on or after January 1, 1994 shall be counted.
7
8 N.Y. City Charter §§ 1137-38 (N.Y. Legal Publ'g Corp. 2001) (repealed Nov. 3, 2008)
9 (hereinafter, the "1993 Voter Initiative").

10 In 1996, the City Council put a referendum on the ballot seeking to increase the term
11 limits applicable to Council Members from two to three consecutive terms ("1996 Referendum").
12 City voters rejected the 1996 Referendum by a margin of approximately 54% to 46%.

13 **III. <u>2008 Term Limits Amendment</u>**

14 More than a decade later, on October 2, 2008, Mayor Bloomberg announced that he
15 intended to work with the Speaker of the City Council, Christine C. Quinn, to introduce
16 legislation to extend the City's term limits set forth in sections 1137 and 1138 of the City Charter
17 from two consecutive terms to three and then seek re-election. The Mayor emphasized that the
18 change in law would allow voters to elect experienced leadership in a time of unprecedented
19 fiscal crisis. Thus, on October 7, 2008, City Council Members, at the Mayor's request,
20 introduced bill No. 845-A, which, if signed into law, would amend sections 1137 and 1138 of the
21 City Charter to change the term limits from no more than two consecutive terms to no more than
22 three such terms.

23 Plaintiffs claim that the Mayor was aware of his intentions to ask the City Council to pass
24 legislation extending term limits as early as 2007,[2] but delayed his announcement until October

[2] Plaintiffs point to a *New York Times* article, which reports that the Mayor's "unofficial emissaries" "began approaching" term-limits proponent and "[b]illionaire" Ronald Lauder two

1 2008 so that voters could not put the issue of term limits on the ballot through a voter initiative
2 prior to the November 2009 election. Under section 37 of New York Municipal Home Rule
3 Law, if qualified voters were to have filed a petition following the introduction of the bill in
4 October 2008 putting the term limits issue to a referendum, it would appear on the November
5 2009 election ballot at the earliest. *See* N.Y. MUN. HOME RULE LAW § 37(6)-(7). Even if
6 successful, such a voter initiative would not affect those made eligible for reelection in
7 November 2009 as a result of the Mayor's proposed amendment.

8 In addition, plaintiffs emphasize the reported discussions between the Mayor and Ronald
9 Lauder. Specifically, *The New York Times* reported that Mr. Lauder initially vowed to
10 "vigorously oppose" the plan outlined by Mayor Bloomberg, but he "backed down" after the
11 Mayor promised him a seat on a charter commission that the Mayor agreed to convene in 2010 to
12 put the term limits issue back on the ballot for referendum. Michael Barbaro & Kareem Fahim,
13 *Lauder Opposes Mayor on Permanent Change to Term Limits*, N.Y. TIMES, Oct. 6, 2008, at A21
14 (available at J.A. 353-54). Plaintiffs claim that this agreement is reflected in the following
15 provision of the bill:

> 16 This local law shall take effect immediately and shall apply
> 17 to elections held on or after the date of its enactment, provided that
> 18 this local law shall be deemed repealed upon the effective date of a
> 19 lawful and valid proposal to amend the charter to set term limits at
> 20 two, rather than three, full consecutive terms, as such terms were in

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years ago "to persuade him not to fight a one-time extension of term limits." Sam Roberts & Eric Konigsberg, *Enigmatic Billionaire Is Drawn Back to the Term Limits Fray*, N.Y. TIMES, Oct. 9, 2008, at A1 (available at J.A. 281-83). They also cite a *New York Post* report indicating that the Mayor's staff conducted polling no later than the beginning of June 2008 to explore whether voters would support a change to the City's term limits, which showed "little sentiment" among voters for such a change. David Seifman, *Mike's Poll Sizing Up "3rd Term"*, N.Y. POST, June 4, 2008, at 11 (available at J.A. 790).

1 force and effect prior to the enactment of this local law, where such
2 proposal has been submitted for the approval of the qualified
3 electors of the city and approved by a majority of such electors
4 voting thereon.
5
6 *See* S.A. 67-68. Plaintiffs argue that "[t]his alteration of the Term-Limits Bill made clear that the
7 Bill's true purpose was to afford a third term in office to currently term-limited City officials
8 only; afterward, the voters would decide the term limits applicable to subsequent generations of
9 City officials." *See* Brief for Plaintiffs-Appellants William C. Thompson, Jr., *et al.* ("Brief for
10 Appellants") at 11. Plaintiffs invoke a *New York Times* blog post reporting that Mr. Lauder
11 stated, "'I believe very strongly that the mayor should get the extra term and the City Council
12 should get a third term. That is part of the deal. But I never spoke about the first-term council
13 members.'"[3] Michael Barbaro, *Lauder Puts New Hurdle in Mayor's Path*, N.Y. TIMES CITY
14 ROOM, Oct. 21, 2008,
15 http://cityroom.blogs.nytimes.com/2008/10/21/lauder-puts-a-new-hurdle-in-mayors-path/
16 (available at J.A. 360-61).
17 When the bill was introduced into the City Council, Public Advocate Betsy Gotbaum and
18 City Council Members Bill de Blasio and Letitia James, who are plaintiffs and appellants in this
19 action, requested the City's Conflicts of Interest Board to issue an advisory opinion as to whether

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[3] Plaintiffs make many allegations about the proposed apostasy of Ronald Lauder's support for Local Law 51 in light of his former support for term limits in New York City, which took the form of large cash contributions to the pro-term limits position in the 1993 and 1996 referenda. Mr. Lauder is said to have "struck a deal" with Mayor Bloomberg pursuant to which he changed his position in return for the Mayor's promise to name him to the city commission which would seek to place the term limits issue on the ballot in 2010. But we think it important to note that Mr. Lauder is a private citizen who is free to change his political positions as he wishes. There is no allegation that he performed any illegal act and he is not a party to this action.

1 Council Members would violate the City Charter's conflict of interest provisions by voting on
2 the bill. The Board ruled that no violation would occur. It reasoned that the conflict of interest
3 provisions prohibit Members from voting on proposed legislation that would confer a personal
4 benefit, but that an extension of term limits was a public benefit relating to their roles as public
5 officials.

6 Council Members de Blasio and James subsequently filed a petition in New York State
7 Supreme Court, New York County (Jacqueline W. Silbermann, Justice), seeking a temporary
8 restraining order enjoining Council Members from voting on the bill on the ground that it would
9 violate the City Charter's conflict of interest provisions. The court denied the petition, holding
10 that no irreparable harm would occur to petitioners because they could, *inter alia*, abstain from
11 voting on the bill and that "granting the TRO would be an undue interference by one branch of
12 government with another at this stage of the legislative process, and, thus, the matter is not now
13 justiciable." *DeBlasio v. Conflicts of Interest Board of the City of New York*, No. 1141289/08
14 (N.Y. Sup. Ct. Oct. 22, 2008) (TRO Hearing).

15 On October 23, 2008, the City Council voted 29 to 22 to enact Local Law 51, amending
16 the City's term limits law to three consecutive terms. Of the fifty-one sitting Members who
17 voted on the Bill, thirty-five would have been prohibited from running for reelection under the
18 term limits enacted in 1993. Of those thirty-five Members, twenty-three voted to enact Local
19 Law 51.

20 Mayor Bloomberg signed the bill into law on November 3, 2008. Local Law 51 provides,
21 in relevant part:

22 § 1137. Public policy. 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 "citizen representatives" who are responsive to the needs of the people and are 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.*

§ 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 mayor, public advocate, comptroller, borough president or council member if that person had previously held such office for three or more full consecutive terms, unless one full term or more has elapsed since that person last held such office; provided, however, that in calculating the number of consecutive terms a person has served, only terms commencing on or after January 1, 1994 shall be counted.

Local Law No. 51 (Nov. 3, 2008). Immediately prior to signing the bill, Mayor Bloomberg expressed his commitment to convene a charter commission in 2010 to put the term limits issue back on the ballot for referendum.

IV. This Litigation

Plaintiffs commenced this action on November 10, 2008 and filed an Amended Complaint on November 17, 2008. Their Amended Complaint alleges that defendants violated: (1) plaintiffs' First Amendment rights by amending the 1993 Voter Initiative through City Council legislation, thereby discouraging voters from participating in the referendum process in the future; (2) plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment by passing legislation with the sole purpose of extending their own political careers and entrenching incumbents; (3) State and City law mandating a referendum to enact legislation regarding term limits; and (4) the City Charter's conflict of interest provisions by enacting legislation that enabled certain Members of the City Council and the Mayor to run for reelection

1 and retain positions of seniority, thus conferring personal benefits at public expense.[4]

2 On December 12, 2008, defendants moved to dismiss the Amended Complaint and the

3 parties cross-moved for summary judgment. On January 5, 2009, the District Court heard oral

4 argument. On January 13, 2009, the District Court denied plaintiffs' motion for summary

5 judgment and granted summary judgment to defendants, entering judgment shortly thereafter.

6 On January 22, 2009, appellants timely filed a notice of appeal from the District Court's

7 Memorandum and Order.[5]

8 **DISCUSSION**

9 "We review an award of summary judgment *de novo*, and we will uphold the judgment

10 only if the evidence, viewed in the light most favorable to the party against whom it is entered,

11 demonstrates that there are no genuine issues of material fact and that the judgment was

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[4] Plaintiffs also asserted claims under the provision of the New York State Constitution that is analogous to the First Amendment. The District Court held that these claims failed for the same reasons that plaintiffs' First Amendment claims were subject to summary judgment. Although appellants do not appear to have made a direct statement that they have abandoned their state constitutional claims on this appeal, we agree with the appellees that they have in fact done so. The argument will therefore be treated by this Court as having been waived.

[5] On January 16, 2009, the City filed its request for administrative pre-clearance pursuant to section 5 of the Voting Rights Act with the Department of Justice ("DOJ"). *See* 42 U.S.C. § 1973c; 28 C.F.R. § 51.1 *et seq.* On March 17, 2009, the DOJ issued its pre-clearance letter, stating that it "does not interpose any objection to the specified changes [in Local Law 51,]" but its failure to object "does not bar subsequent litigation to enjoin the enforcement of the changes." Because the District Court's judgment was entered prior to the DOJ's pre-clearance letter, it was without jurisdiction to do so. *See, e.g.*, *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981); *see also Branch v. Smith*, 538 U.S. 254, 283-84 (2003) (Kennedy, J., plurality concurring opinion) ("To be consistent with the statutory scheme, the district courts should not entertain constitutional challenges to nonprecleared voting changes and in this way anticipate a ruling not yet made by the Executive."). Accordingly, we remanded to the District Court on March 30, 2009 for it to affirm in full its prior judgment, which it did on April 7, 2009. The parties subsequently filed supplemental briefs on April 8, 2009, indicating that they reassert their identical pleadings and arguments previously filed in this appeal. This action is, therefore, ripe for our review.

1 warranted as a matter of law." *Barfield v. N.Y. City Health & Hosp. Corp.*, 537 F.3d 132, 140
2 (2d Cir. 2008) (citing Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
3 (1986); *Rubens v. Mason*, 527 F.3d 252, 254 (2d Cir. 2008)).

4 **I. <u>The First Amendment</u>**

5 In their Amended Complaint, plaintiffs allege that defendants violated their First
6 Amendment rights by enacting Local Law 51. They claim that they as well as other voters in the
7 City will be less likely to participate in the referendum process in the future, and thus engage in
8 less First Amendment speech, if laws enacted by referenda can be amended or repealed by City
9 Council legislation. Applying the First Amendment balancing test first set forth in *Anderson v.*
10 *Celebrezze*, 460 U.S. 780 (1983), the District Court dismissed plaintiffs' claim. *See Molinari v.*
11 *Bloomberg*, 596 F. Supp. 2d 546, 565-67 (E.D.N.Y. 2009). It held, "On balance, no rational fact
12 finder could conclude that the claimed interference with plaintiffs' [First Amendment] rights
13 outweighs the right of the City Council to let people choose the best candidates to deal with the
14 current economic situation." *Id.* at 567.

15 Here, appellants claim that the District Court used the correct analytical framework but
16 misapplied it. They emphasize that the record contains evidence showing that those who
17 participated in the 1993 and 1996 referenda process have no intention of doing so in the future if
18 the law ultimately enacted and maintained thereby can simply be amended by City Council
19 legislation. In essence, they argue that Local Law 51 "decreases [their speech's] effectiveness"
20 and, as a result, their speech is chilled. *See* Brief for Appellants at 22. They contend, moreover,
21 that the "timing [of Local Law 51] exacerbated these already-significant burdens by directly
22 frustrating the timely exercise of New York City voters' acknowledged right to put the term

1 limits issue to a third citywide vote prior to this November's election." *See id.* at 25. They allege
2 that the sole purpose of Local Law 51 was to "entrench" incumbents and, as such, their First
3 Amendment interests outweigh the interests of the City. *See id.* at 26-31. Appellees, for their
4 part, claim that the objective of Local Law 51 was to provide the City's citizens the opportunity
5 to vote for experienced public officials in a time of financial crisis. Appellants contend,
6 however, that Local Law 51 was not necessary to achieve this objective because the Mayor or the
7 City Council could have timely put the issue of term limits to a referendum prior to the
8 November 2009 election.[6] *See generally* N.Y. MUN. HOME RULE LAW § 36.

9 We agree, however, with appellees' further argument that Local Law 51 does not
10 implicate plaintiffs' First Amendment rights and, therefore, we need not decide whether the
11 District Court erred in determining that the City's interests outweighed plaintiffs' First
12 Amendment interests. No balancing is necessary because plaintiffs do not have a viable First
13 Amendment claim in the first place.

14 **A. <u>Plaintiffs Have Not Identified a Burden on Their First Amendment Rights</u>**

15 The logical starting point is to identify precisely what plaintiffs are claiming it is that
16 violates their First Amendment right to free speech. There is no doubt that New York law
17 permits the City Council to amend a law previously enacted by referendum, as the New York
18 Court of Appeals has so held. *See Caruso v. City of N.Y.*, 517 N.Y.S.2d 897 (Sup. Ct. 1987)
19 (Blyn, *J.*), *aff'd on op. of Blyn, J.*, 533 N.Y.S.2d 379 (App. Div. 1st Dep't 1988), *aff'd on op. of*

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[6] The Mayor and the City Council each has authority to create a charter commission, which could theoretically put an issue on the ballot for referendum at a special election as early as sixty days after the proposed legislation is filed with the city clerk. *See* N.Y. MUN. HOME RULE LAW § 36(2), (4), (5)(b).

1 *Blyn, J.*, 547 N.E.2d 92 (N.Y. 1989), *cert. denied*, 493 U.S. 1077 (1990). By adopting the lower

2 court's opinion, the New York Court of Appeals stated:

> 3 [T]he laws proposed and enacted by the people under an initiative
> 4 provision are subject to the same constitutional, statutory and
> 5 charter limitations as those passed by the Legislature and are
> 6 entitled to no greater sanctity or dignity. Inasmuch as a legislative
> 7 body may modify or abolish its predecessor's acts subject only to
> 8 its own discretion, it likewise should be able, in the absence of an
> 9 express regulation or restriction, to amend or repeal an enactment
> 10 by the electorate, its co-ordinate unit, and *vice versa*.
> 11

12 *Id.* at 900 (internal citations omitted).[7]

13 Although we are clearly bound to follow *Caruso* as a matter of New York State law, *see*

14 *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87, 89 (2d Cir. 2003), plaintiffs, at bottom, contend that

15 this scheme violates the First Amendment because it discourages citizens from participating in

16 the referendum process.

17 The First Amendment provides that "Congress shall make no law . . . abridging the

18 freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition

19 the Government for a redress of grievances." U.S. CONST., amend I. The Fourteenth

20 Amendment makes that prohibition applicable to the State and City of New York. *See Thornhill*

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[7] Appellants appear to argue in a footnote that *Caruso* is distinguishable because it did not address "whether that power allows a wholly self-interested legislature to completely eviscerate a referendum that was explicitly intended to constrain that body's own power." *See* Brief for Appellants at 48-49 n.15. This is simply a recast of plaintiffs' conflict of interest argument, which we address *infra*, Part IV. Appellants also appear to argue that *Caruso* is inapposite because the term limits law enacted by the 1993 Voter Initiative expressly stated that it was the "public policy" of New York City not to permit an elected official to serve more than eight consecutive years. We fail to see how *Caruso* is limited to those laws that do not affect the City's "public policy." It is clear that that the New York Court of Appeals did not intend to limit the import of *Caruso* in this respect: the issue presented was "whether the Council may amend or repeal a local law enacted by voter initiative." *See Caruso*, 517 N.Y.S.2d at 899. This question was answered in the affirmative. *See id.* at 899-901.

1 *v. Alabama*, 310 U.S. 88, 95 (1940). It is axiomatic that "[t]he First Amendment 'was fashioned
2 to assure unfettered interchange of ideas for the bringing about of political and social changes
3 desired by the people.'" *Meyer v. Grant*, 486 U.S. 414, 421 (1988) (quoting *Roth v. United*
4 *States*, 354 U.S. 476, 484 (1957)).

5 Although it is self-evident that the referendum can serve "[a]s a basic instrument of
6 democratic government," *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976),
7 the right to pass legislation through a referendum is a state-created right not guaranteed by the
8 U.S. Constitution, *see Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210-11 (10th Cir.)
9 ("[N]othing in the language of the Constitution commands direct democracy, and [the court is]
10 aware of no [contrary] authority."), *cert. denied*, 537 U.S. 814 (2002). *See also Marijuana*
11 *Policy Project v. United States*, 304 F.3d 82, 85 (D.C. Cir. 2002); *Stone v. City of Prescott*, 173
12 F.3d 1172, 1174-76 (9th Cir.), *cert. denied*, 528 U.S. 870 (1999); *Taxpayers United for*
13 *Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("[T]he Constitution does not
14 require a state to create an initiative procedure."); *Pony Lake Sch. Dist. 30 v. State Comm. for*
15 *Reorganization of Sch. Dists.*, 710 N.W.2d 609, 623 (Neb.) ("Because the rights of initiative or
16 referendum are a means of direct democracy, federal courts have concluded that the partial
17 reservation or total absence of the right of initiative or referendum in a state constitution does not
18 violate a fundamental right to vote."), *cert. denied*, 547 U.S. 1130 (2006); *cf. Hunter v. Erickson*,
19 393 U.S. 385, 392 (1969) (implying the same); *Meyer*, 486 U.S. at 421-25 (same).

20 Nonetheless, as the Supreme Court has recognized, if a state chooses to confer the right of
21 referendum to its citizens, it is "obligated to do so in a manner consistent with the Constitution."
22 *Meyer*, 486 U.S. at 420; *Taxpayers United for Assessment Cuts*, 994 F.2d at 295 ("[W]e conclude

1 that although the Constitution does not require a state to create an initiative procedure, if it
2 creates such a procedure, the state cannot place restrictions on its use that violate the federal
3 Constitution."). Thus, courts have decided whether particular regulations of voter initiative or
4 referendum schemes have run afoul of the U.S. Constitution. *See, e.g.*, *Cipriano v. City of*
5 *Houma*, 395 U.S. 701 (1969) (holding unconstitutional under the Equal Protection Clause the
6 restriction of the right to vote in a revenue bond referendum to only those who pay property
7 taxes); *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) (rejecting a Free Exercise challenge to
8 provisions of the Massachusetts Constitution prohibiting voter initiatives to amend the state
9 constitution to allow public financial support of private, religiously affiliated schools), *cert.*
10 *denied*, 546 U.S. 1150 (2006).

11 The Supreme Court, in *Meyer v. Grant* and *Buckley v. American Constitutional Law*
12 *Foundation, Inc.*, 525 U.S. 182 (1999), addressed the First Amendment restrictions on such
13 governmental regulation of voter initiatives. In *Meyer*, the Supreme Court held that Colorado's
14 prohibition against paying circulators of voter initiative petitions violated the First Amendment.
15 *See* 486 U.S. at 415-16, 422-23. The Court made clear "that the power to ban initiatives entirely"
16 does not allow a state "to limit discussion of political issues raised in initiative petitions." *Id.* at
17 425. The Court explained:

18 The circulation of an initiative petition of necessity
19 involves both the expression of a desire for political change and a
20 discussion of the merits of the proposed change. Although a
21 petition circulator may not have to persuade potential signatories
22 that a particular proposal should prevail to capture their signatures,
23 he or she will at least have to persuade them that the matter is one
24 deserving of the public scrutiny and debate that would attend its
25 consideration by the whole electorate. This will in almost every
26 case involve an explanation of the nature of the proposal and why

1 its advocates support it. Thus, the circulation of a petition involves
2 the type of interactive communication concerning political change
3 that is appropriately described as "core political speech."
4
5 *Id.* 421-22 (internal footnote omitted).

6 The Court went on to say that the refusal to permit the plaintiffs to pay petition circulators
7 restricted protected speech in two ways:

8 First, it limits the number of voices who will convey appellees'
9 message and the hours they can speak and, therefore, limits the size
10 of the audience they can reach. Second, it makes it less likely that
11 appellees will garner the number of signatures necessary to place
12 the matter on the ballot, thus limiting their ability to make the
13 matter the focus of statewide discussion.
14
15 *Id.* at 422-23 (internal footnote omitted). The Court rejected "the State's arguments that the
16 prohibition is justified by its interest in making sure that an initiative has sufficient grass roots
17 support to be placed on the ballot, or by its interest in protecting the integrity of the initiative
18 process."[8] *Id.* at 425. The Court concluded, therefore, that the State failed to justify the burden
19 on political expression and held the law unconstitutional. *See id.* at 428.

20 In *Buckley*, the Supreme Court held unconstitutional under the First Amendment each of
21 the following three conditions that Colorado placed on the ballot-initiative process: "(1) the
22 requirement that initiative-petition circulators be registered voters; (2) the requirement that they
23 wear an identification badge bearing the[ir] . . . name; and (3) the requirement that proponents of
24 an initiative report the names and addresses of all paid circulators and the amount paid to each

[8] As to the former, the Court concluded that it was "adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Meyer*, 486 U.S. at 425-26. As to the latter, the Court explored the various other "provisions of the Colorado statute" that "deal expressly with the potential danger that circulators might be tempted to pad their petitions with false signatures" and found them to be sufficient to achieve the State's objective. *Id.* at 427.

circulator." 525 U.S. at 186 (citations omitted). The Supreme Court concluded that all three of Colorado's requirements drastically reduced the number of persons, both volunteer and paid, available to circulate petitions. *Id.* at 193-205. It went on to conclude that the State's dominant justification – to police lawbreakers among petition circulators – was "served by the requirement . . . that each circulator submit an affidavit setting out, among several particulars, the 'address at which he or she resides, including the street name and number, the city or town, and the county.'" *Id.* at 196 (brackets omitted). It held, therefore, that the requirements were unconstitutional, as they "cut[] down the number of message carriers in the ballot-access arena without impelling cause." *Id.* at 197.

Both *Meyer* and *Buckley* "involved an unconstitutional regulation of speech that happened to occur in the context of an . . . initiative scheme." *Save Palisade FruitLands*, 279 F.3d at 1212. The challenged laws "specifically regulated the process of advocacy itself: the laws dictated *who* could speak (only volunteer circulators and registered voters) or *how* to go about speaking (with name badges and subsequent reports)." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099 (10th Cir. 2006) (*en banc*), *cert. denied*, 549 U.S. 1245 (2007). Together, *Meyer* and *Buckley* make clear that the First Amendment protects political speech from undue government interference in the context of referendum petitioning.

However, *Meyer* and *Buckley* do not guarantee a right to legislate by referendum, much less a right protecting a law enacted by referendum from amendment or repeal by a legislative body. As explained by the Tenth Circuit *en banc*:

> Although the First Amendment protects political speech incident to an initiative campaign, it does not protect the right to make law, by initiative or otherwise. . . . The distinction is

1 between laws that regulate or restrict the communicative conduct
2 of persons advocating a position in a referendum, which warrant
3 strict scrutiny, and laws that determine the process by which
4 legislation is enacted, which do not.
5
6 *Id.* at 1099-1100 (citation omitted); *see also Biddulph v. Mortham*, 89 F.3d 1491, 1498 n.7 (11th
7 Cir. 1996) (explaining that in *Meyer*, "the Court established an explicit distinction between a
8 state's power to regulate the initiative process in general and the power to regulate the exchange
9 of ideas about political changes sought through the process. The Court only addressed the
10 constitutionality of the latter.").

11 Here, plaintiffs are not in any way restricted from engaging in First Amendment activity
12 as the referenda proponents were in *Meyer* and *Buckley*. In fact, plaintiffs emphasize that they
13 were free to exercise their First Amendment rights in connection with the 1993 and 1996
14 referenda in an attempt to highlight the time and cost they expended on those efforts. Plaintiffs
15 remain free to do so in connection with referenda or otherwise now and in the future. Plaintiffs'
16 claim is simply that their First Amendment rights are violated by Local Law 51 because City
17 voters will be less likely in the future to engage in the referendum process if a law enacted by that
18 process can be amended or repealed through City Council legislation.[9] This claim implicates no
19 First Amendment right. *Cf. Smith v. Ark. State Highway Employees*, 441 U.S. 463, 464-65
20 (1979) (per curiam) ("The First Amendment right to associate and to advocate 'provides no
21 guarantee that a speech will persuade or that advocacy will be effective.'") (quoting *Hanover
22 Township Fed'n of Teachers v. Hanover Cmty. Sch. Corp.*, 457 F.2d 456, 461 (7th Cir. 1972));

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[9] It would be remiss not to mention the fact that the 1993 Voter Initiative imposed the previous term limits on elected officials in New York City for over fifteen years – even withstanding the 1996 Referendum – thereby underscoring the significant effect that City voters have had on the electoral process.

1 *Ukrainian-Am. Bar Ass'n, Inc. v. Baker*, 893 F.2d 1374, 1379 (D.C. Cir. 1990) ("The right to
2 speak protected by the first amendment is not, however, a right to be heeded."). At bottom,
3 "there is a crucial difference between a law that has the 'inevitable effect' of reducing speech
4 because it restricts or regulates speech, [as in *Meyer* and *Buckley,*] and a law that has the
5 'inevitable effect' of reducing speech because it makes particular speech less likely to succeed."
6 *Initiative & Referendum Inst.*, 450 F.3d at 1100. The former implicates the First Amendment and
7 the latter does not. *See generally id.*

8 We find instructive the Tenth Circuit's *en banc* decision in *Initiative & Referendum Inst.*
9 It addressed whether an amendment to the Utah Constitution authorizing referenda violated the
10 First Amendment by singling out initiatives regarding wildlife management by requiring a super-
11 majority for their adoption. *See id.* at 1086. The plaintiffs, including six wildlife and animal
12 advocacy groups, argued that by raising the bar for wildlife initiatives, this provision imposed a
13 "chilling effect" on the exercise of their First Amendment rights because it made it more difficult
14 to pass such initiatives. *See id.* The Tenth Circuit rejected their argument, writing:

> 15 Under the Plaintiffs' theory, every structural feature of
> 16 government that makes some political outcomes less likely than
> 17 others – and thereby discourages some speakers from engaging in
> 18 protected speech – violates the First Amendment. Constitutions
> 19 and rules of procedure routinely make legislation, and thus
> 20 advocacy, on certain subjects more difficult by requiring a
> 21 supermajority vote to enact bills on certain subjects. . . . [citing
> 22 examples] These provisions presumably have the "inevitable
> 23 effect" of reducing the total "quantum of speech" by discouraging
> 24 advocates of nuclear power plants, general banking laws, or
> 25 unauthorized state flags from bothering to seek legislation or
> 26 initiatives embodying their views. Yet if it violates the First
> 27 Amendment to remove certain issues from the vicissitudes of
> 28 ordinary democratic politics, constitutions themselves are
> 29 unconstitutional. Indeed, the Plaintiffs' theory would have the

1 ironic effect of rendering the relief they seek in this litigation
2 unconstitutional under the First Amendment: if it is
3 unconstitutional to amend the Utah constitution to require a
4 supermajority to approve a wildlife initiative, those who favor such
5 an amendment would be less likely to engage in advocacy in its
6 favor.
7
8 No doubt the Plaintiffs are sincere in their many sworn
9 statements that they find the heightened threshold for wildlife
10 initiatives dispiriting, and feel "marginalized" or "silenced" in the
11 wake of Proposition 5. Their constitutional claim begins, however,
12 from a basic misunderstanding. The First Amendment ensures that
13 all points of view may be heard; it does not ensure that all points of
14 view are equally likely to prevail.
15
16 *Id.* at 1100-01 (internal citations omitted).

17 We believe that the Tenth Circuit's analysis is sound and equally applicable here. That is,
18 while the plaintiffs in *Initiative & Referendum Inst.* claimed that their First Amendment rights
19 were chilled because Utah's super-majority requirement made it more difficult to pass wildlife
20 referenda, plaintiffs here claim that their First Amendment rights are chilled because New York
21 State law puts referenda and City Council legislation on equal footing, permitting the latter to
22 supersede the former (and *vice versa*). As such, like in *Initiative & Referendum Inst.*, there is no
23 restriction on plaintiffs' speech.

24 Other courts have addressed analogous circumstances and come to similar conclusions
25 that reinforce our holding that no First Amendment right is implicated in this case. For example,
26 *Pony Lake School District 30 v. State Committee for Reorganization of School Districts*, 710
27 N.W.2d 609, 624-25 (Neb.), *cert. denied*, 547 U.S. 1130 (2006), held that Nebraska's
28 referendum process did not violate the First Amendment by requiring a heightened amount of
29 petition signatures to temporarily suspend the operation of a law that was enacted by a legislative

body pending a referendum approving it. The court reasoned:

> Although plaintiffs primarily rely on *Meyer* and *Buckley* to support their position, neither case is applicable to initiative or referendum processes that do not restrict political communication or association. Neither do they apply to legislation which is not intended to regulate these procedures.
>
> [The act] does not impose any restrictions or conditions on plaintiffs' right to communicate with voters about the political change they seek. Nor does [the act] attempt to regulate the circulation of initiative or referendum petitions. Rather, plaintiffs' assertion that their right to free speech has been diminished is based entirely upon their claim that unless [the act] is suspended until the referendum vote, the ability of those opposed to [it] to persuade voters to reject it will be more difficult. Plaintiffs' claim is not based upon any actual restrictions on their right to communicate with voters.
>
> Given the conditions the people of Nebraska have imposed on their power to suspend an act's operation pending a referendum election, the "difficulty," as described by plaintiffs, can be avoided only by this court's expanding the scope of the referendum power itself. As discussed, the U.S. Constitution does not guarantee a right of referendum, and to expand this right would be to ignore the clear and unambiguous procedure set out by the people in article III, § 3, of the state Constitution. This we shall not do.

Id. (internal citations omitted); *see also Marijuana Policy Project v. United States*, 304 F.3d 82, 84, 85 (D.C. Cir. 2002) (rejecting a First Amendment challenge to a law denying the District of Columbia authority to "enact . . . any law" reducing penalties associated with possession, use, or distribution of marijuana, because the legislation "restricts no speech; to the contrary, medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties."); *Stone v. City of Prescott*, 173 F.3d 1172, 1775 (9th Cir.) (holding that an Arizona ordinance denying its citizens the opportunity to petition for a city-wide referendum with respect to laws passed under an

1 emergency declaration did not fall within the orbit of *Meyer* and *Buckley*, as the law at issue was
2 "not a restriction, condition, or requirement that impermissibly burdens the exercise of the
3 referendum power, thereby invoking the protection of the First Amendment. Instead, it is a
4 delegation to the legislature by the people of a part of their reserved power of referendum."), *cert.*
5 *denied*, 528 U.S. 870 (1999); *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 297
6 (6th Cir. 1993) ("Unlike the challenged provisions in *Meyer*, Michigan's initiative system does
7 not restrict the means that the plaintiffs can use to advocate their proposal. . . . Our result would
8 be different if, as in *Meyer*, the plaintiffs were challenging a restriction on their ability to
9 communicate with other voters about proposed legislation, or if they alleged they were being
10 treated differently than other groups seeking to initiate legislation."); *Wellwood v. Johnson*, 172
11 F.3d 1007, 1009 (8th Cir. 1999) (upholding an Arkansas law that required the signatures of 15
12 percent of the registered voters in a political subdivision to put on the ballot a local initiative
13 regarding whether a county is "wet" or "dry" because the requirement "in no way burden[s] the
14 ability of supporters of local-option elections to make their views heard").

15 As our Sister Circuits (and the Nebraska Supreme Court) have recognized, plaintiffs'
16 First Amendment rights are not implicated by referendum schemes *per se* (and certainly not by
17 the City Council's amendment of a law previously enacted by a referendum), but by the
18 regulation of advocacy within the referenda process, *i.e.*, petition circulating, discourse and all
19 other protected forms of advocacy. Even if plaintiffs are correct that the enactment of Local Law
20 51 will make it more difficult for plaintiffs to organize voter initiatives and referenda in the
21 future, "the difficulty of the process alone is insufficient to implicate the First Amendment, as
22 long as the communication of ideas associated with the [referendum process] is not affected."

1 *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997), *cert. denied*, 523 U.S. 1005 (1998).

2 Here, no such effect exists. Nothing is preventing plaintiffs from engaging in First
3 Amendment speech regarding term limits, whether within the referendum context or not. While
4 we appreciate the practical reality that City voters will not be able to stop certain elected officials
5 from seeking a third term in office through a voter initiative because the process would take until
6 at least the November 2009 election, *see supra* **[pp. 7-8]**, this temporal fact does not amount to a
7 First Amendment violation. *See, e.g.*, *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210-
8 11 (10th Cir.) (holding that the United States Constitution does not guarantee the right to pass
9 legislation by means of a referendum), *cert. denied*, 537 U.S. 814 (2002).

10 **B. <u>Balancing Under *Anderson v. Celebrezze* is Unnecessary</u>**

11 Appellants argue, however, that Local Law 51 is entitled to First Amendment scrutiny
12 under *Anderson v. Celebrezze*, 460 U.S. 780 (1983). They state, because "[a]ll election laws
13 invariably impose some burden upon individual voters," *Green Party of N.Y. State v. N.Y. State*
14 *Bd. of Elections*, 389 F.3d 411, 419 (2d Cir. 2004) (internal quotation marks omitted), Local Law
15 51 is subject to First Amendment balancing. Their argument begins from a faulty premise.
16 *Anderson* and its progeny deal with election and voting rights laws that restrict speech or ballot
17 access. Local Law 51 does neither.

18 To clarify this point, it is necessary to briefly discuss *Anderson*, its progeny and the cases
19 cited by appellants in their briefs. In *Anderson*, the Supreme Court addressed the First
20 Amendment validity of Ohio's early filing deadline, which required an independent candidate for
21 the President of the United States to file his or her paperwork by March 20 in order to be on the
22 general election ballot for November 1980. *See* 460 U.S. at 782-83. As the Supreme Court

1 pointed out, by March of an election year, "developments in campaigns for the major-party
2 nominations have only begun, and the major parties will not adopt their nominees and platforms
3 for another five months." *Id.* at 790-91. The Supreme Court wrote:

> 4 Constitutional challenges to specific provisions of a State's
> 5 election laws . . . cannot be resolved by any "litmus-paper test" that
> 6 will separate valid from invalid restrictions. Instead, a court must
> 7 resolve such a challenge by an analytical process that parallels its
> 8 work in ordinary litigation. It must first consider the character and
> 9 magnitude of the asserted injury to the rights protected by the First
> 10 and Fourteenth Amendments that the plaintiff seeks to vindicate. It
> 11 then must identify and evaluate the precise interests put forward by
> 12 the State as justifications for the burden imposed by its rule. In
> 13 passing judgment, the Court must not only determine the
> 14 legitimacy and strength of each of those interests, it also must
> 15 consider the extent to which those interests make it necessary to
> 16 burden the plaintiff's rights. Only after weighing all these factors
> 17 is the reviewing court in a position to decide whether the
> 18 challenged provision is unconstitutional.

19

20 *Id.* at 789. The Supreme Court concluded that the early filing deadline had the effect of "totally
21 exclud[ing] any candidate who makes the decision to run for President as an independent after
22 the March deadline." *Id.* at 792. It reaffirmed that "it is especially difficult for the State to
23 justify a restriction that limits political participation by an identifiable political group whose
24 members share a particular viewpoint, associational preference, or economic status." *Id.* at 793.
25 The Court wrote:

> 26 A burden that falls unequally on new or small political
> 27 parties or on independent candidates impinges, by its very nature,
> 28 on associational choices protected by the First Amendment. It
> 29 discriminates against those candidates and – of particular
> 30 importance – against those voters whose political preferences lie
> 31 outside the existing political parties. By limiting the opportunities
> 32 of independent-minded voters to associate in the electoral arena to
> 33 enhance their political effectiveness as a group, such restrictions
> 34 threaten to reduce diversity and competition in the marketplace of

> ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment – "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"– are served when election campaigns are not monopolized by the existing political parties. . . . The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process.

Id. at 794-95 (internal citations and footnote omitted). The Court proceeded to hold the statute unconstitutional, concluding that these burdens outweighed the State's minimal interests in imposing a March deadline. *See id.* at 796-806.

We recently had occasion to apply the *Anderson* balancing test in *Price v. New York State Board of Elections*, 540 F.3d 101 (2d Cir. 2008), upon which appellants rely heavily in their brief. In *Price*, we addressed the First Amendment constitutionality of New York's prohibition on voting by absentee ballot in elections for political party county committees. *See id.* at 103-04. We reiterated the Supreme Court's statement that "[a]ll '[e]lection laws will invariably impose some burden upon individual voters.'" *Id.* at 107 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)) (second alteration in original). We emphasized that, in determining whether to apply the First Amendment balancing test, "it is important only that there is at least some burden on the voter-plaintiffs' rights." *Id.* at 109. We held that the plaintiffs "have an associational right to vote in political party elections, and that right is burdened when the state makes it more difficult for these voters to cast ballots." *Id.* at 108 (internal citations omitted). In addition, we held that "candidates' associational rights are affected, in at least some manner, when barriers are placed

1 before the voters that would elect these candidates to party positions." *Id.* (citing *Anderson*, 460
2 U.S. at 786). We concluded: "Because there is some burden on the plaintiffs' associational
3 rights, we must apply the framework articulated in *Burdick.*" *Id.* (citing *Burdick*, 504 U.S. at
4 433-34). On balance, we concluded that the State's interests were of "infinitesimal weight" and
5 thus could not outweigh the plaintiff's First Amendment interests. *See id.* at 110-12.

6 In an attempt to convince us to apply the *Anderson* balancing test to Local Law 51,
7 appellants seize on our recent reaffirmation that "[a]ll election laws will invariably impose some
8 burden upon individual voters." *Price*, 540 F.3d at 107 (quoting *Burdick*, 504 U.S. at 433)
9 (internal quotation marks and alteration omitted). But *Anderson*, *Burdick* and their progeny (as
10 well as all the other cases cited by appellants) are completely inapposite.[10] These cases all

[10] *See, e.g.*, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008) (applying *Anderson*'s balancing test and upholding a Voter ID law); *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion) (striking down, in the face of a First Amendment challenge, Vermont's campaign finance statute limiting both the amounts that candidates for state office could spend on their campaigns and the amounts that individuals, organizations, and political parties could contribute to those campaigns); *Clingman v. Beaver*, 544 U.S. 581 (2005) (applying *Anderson*'s balancing test and rejecting the Libertarian Party's challenge to Oklahoma's semi-closed primary allowing a party to invite its own members and those registered as Independents to vote in the party's primary, but not members of other parties); *Burdick*, 504 U.S. 428 (applying *Anderson*'s balancing test and upholding Hawaii's ban on write-in voting); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (holding that the First Amendment prohibits government officials from discharging or threatening to discharge public employees solely for not supporting the political party in power); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (holding that California violated the First Amendment by, *inter alia*, banning primary endorsements by political parties); *Bullock v. Carter*, 405 U.S. 134 (1972) (upholding an Equal Protection challenge to a Texas law requiring a candidate to pay a filing fee as a condition to having his name placed on the ballot in a primary election); *Williams v. Rhodes*, 393 U.S. 23, 24 (1968) (invalidating Ohio's election laws that made "it virtually impossible for a new political party, even though it has hundreds of thousands of members, or an old party, which has a very small number of members, to be placed on the state ballot to choose electors pledged to particular candidates for the Presidency and Vice Presidency of the United States"); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006) (invalidating an Ohio election law requiring all minor parties to file a petition no later than 120 days prior to the date of the primary

1 involve direct restrictions on speech or access to the ballot. Plaintiffs face no such restrictions by
2 virtue of Local Law 51. Rather, plaintiffs argue that they and other voters will be less likely to
3 engage in speech and that their speech will potentially become less effective if law passed by
4 referenda can be amended or repealed by City Council legislation. For the reasons explained,
5 this does not amount to a First Amendment violation.

6 Finally, in footnote five of their Brief and throughout their Reply Brief, appellants argue
7 that their First Amendment rights are violated because the extension of term limits "burdens both
8 voters in their ability to effectively support would-be challengers to entrenched incumbents and
9 challengers in their ability to mount effective campaigns." Brief for Appellants at 24 n.5. Thus,
10 in order to trigger First Amendment scrutiny, appellants argue that Local Law 51 affects the
11 "eligibility of candidates." Reply Brief for Plaintiffs-Appellants William C. Thompson, Jr., *et al.*
12 ("Reply Brief for Appellants") at 5 (citing *Anderson*, 460 U.S. at 788 ("Each provision of these
13 schemes, whether it governs the registration and qualifications of voters, the selection and
14 *eligibility of candidates*, or the voting process itself, inevitably affects – at least to some degree –
15 the individual's right to vote and his right to associate with others for political ends.") (emphasis
16 added)).

17 Notwithstanding appellants' protestations to the contrary, this argument necessarily
18 focuses on the substantive impact that the extension of term limits has on the political landscape.

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election); *Green Party of N.Y. State v. N.Y. State Bd. of Elections*, 389 F.3d 411 (2d Cir. 2004) (applying the *Anderson* balancing test and invalidating New York's voter enrollment scheme, which did not keep data on enrollment in political parties that failed to receive 50,000 votes for their gubernatorial candidates in the previous election); *Unity Party v. Wallace*, 707 F.2d 59 (2d Cir. 1983) (rejecting a First Amendment and Equal Protection challenge to New York's requirement that minor party candidates accept the nomination of the party by a certain date prior to the election).

1 *See* Reply Brief for Appellants at 5 ("As a matter of law, the Term-Limits Amendment, by
2 regulating eligibility requirements for office, necessarily burdens First Amendment activity to at
3 least some degree."). But they ultimately concede, and the law is clear, that they have no First
4 Amendment right to term limits. *See id.* at 5. *Cf. U.S. Term Limits, Inc. v. Thorton*, 514 U.S.
5 779, 837 (1995) (explaining that the issue of term limits at the state and local level does not
6 implicate the U.S. Constitution). Moreover, their Amended Complaint, in its eighty-six pages,
7 makes no allegation that plaintiffs' First Amendment rights are somehow burdened, even if only
8 in the slightest way, by Local Law 51's substantive change to term limits.

9 Faced with these insurmountable problems, appellants quickly switch gears and argue that
10 the First Amendment "burdens [do not] flow[] from the substance of the Term-Limits
11 Amendment itself. Rather, they are all the direct result of the *process* by which that law was
12 enacted and, more specifically, of [defendants'] calculated disregard for the voice of City voters."
13 *See* Reply Brief for Appellants at 7. In particular, they argue, defendants' "eleventh-hour
14 undoing of the 1993 and 1996 Referenda has discouraged referenda-related speech, impaired its
15 future effectiveness, and directly frustrated the present exercise of New York City voters'
16 acknowledged right to put the term-limits issue to a third citywide vote." *Id.* Thus, appellants
17 transform the very essence of their claim as they arrive at different junctures of the First
18 Amendment analysis.

19 We are not persuaded by these efforts. At bottom, plaintiffs challenge New York's equal
20 treatment of law enacted by referendum and law enacted by a legislative body. Such a scheme,

1 however, does not run afoul of the First Amendment.[11] Any chilling of plaintiffs' First
2 Amendment activity is self-imposed and thus "incidental[] and constitutionally insignificant."
3 *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

4 **II. <u>Substantive Due Process</u>**

5 Appellants argue next that Local Law 51 violates their substantive due process rights
6 guaranteed by the Fourteenth Amendment of the U.S. Constitution. Specifically, they argue that
7 because the purpose of Local Law 51 was an "incumbency re-employment program" to allow
8 "those in power to have the opportunity to remain in power," rational-basis review is not
9 applicable. *See* Brief for Appellants at 36, 38, 40.

10 The law in this Circuit is clear that "[w]here, as here, a statute neither interferes with a
11 fundamental right nor singles out a suspect classification, 'we will invalidate [that statute] on
12 substantive due process grounds only when a plaintiff can demonstrate that there is no rational
13 relationship between the legislation and a legitimate legislative purpose.'" *Maloney v. Cuomo*,
14 554 F.3d 56, 59-60 (2d Cir. 2009) (per curiam) (quoting *Beatie v. City of N.Y.*, 123 F.3d 707, 711
15 (2d Cir. 1997)). Appellants identify neither a fundamental right nor a suspect classification that
16 is at issue here. As for a fundamental right, appellants appear to argue that Local Law 51
17 implicates a right to term limits or a right to be free from law enacted by legislators acting in
18 their own political self-interest.[12] The Due Process Clause guarantees neither.[13] As for a suspect

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[11] Although plaintiffs in fact criticize the City's procedures for holding referenda because "[c]itizens seeking a vote by referendum . . . face an arduous task to merely appear on the ballot, let alone to persuade fellow voters of the desirability of their position," J.A. 54 (Pls. Am. Complt. ¶ 65), they make no legal challenge to that process in the instant suit.

[12] Appellants do not appear to argue that laws enacted by referenda cannot be subsequently amended or repealed by a legislative body without contravening the Due Process

1 class, clearly plaintiffs are not so situated, nor do they suggest otherwise.

2 To avoid rationality review, appellants argue that it "is deeply inappropriate for
3 legislation that threatens to distort or manipulate regular democratic processes, such as 'when
4 [incumbent] state legislators are passing laws dealing with their own re-election prospects.'" *See*
5 Brief for Appellants at 36 (alteration in original). For this proposition, they rely on a dissenting
6 opinion from the Fourth Circuit's denial of a petition for rehearing *en banc*, *see Miller v.*
7 *Cunningham*, 512 F.3d 98, 99 (4th Cir. 2007) (Wilkinson, J., dissenting), and the First Circuit's
8 decision in *Bonas v. Town of North Smithfield*, 265 F.3d 69 (1st Cir. 2001). Neither stands for
9 this proposition, and both are entirely inapposite.

10 Although we need not heed a dissent from the Fourth Circuit's denial of a petition for
11 rehearing *en banc*, we have satisfied ourselves that it is irrelevant to this appeal. In his dissent,
12 Judge Wilkinson addresses a Virginia election law entitling an incumbent state legislator to
13 select the method of nomination for his own seat, to which he was himself eligible to seek
14 reelection. *See Miller*, 512 F.3d at 99-100 (Wilkinson, J., dissenting). Judge Wilkinson appears
15 to opine that it violates the Equal Protection Clause by discriminating in favor of incumbents, as
16 well as the First Amendment rights of political parties to free association. *See id.* at 104-05.

Clause of the Fourteenth Amendment. Assuming, *arguendo*, that they do raise such an argument, it must be rejected because there is no fundamental right to pass law by referendum at all. *See supra* **[p. 16]**.

[13] *Cf. U.S. Term Limits, Inc. v. Thorton*, 514 U.S. 779, 837 (1995) (regarding term limits); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (with respect to politically self-interested legislation, holding that political gerrymandering raises a non-justiciable question because, *inter alia*, incumbents pass redistricting legislation with an intent, at least in part, to gain "political advantage," and determining when the motive of "political advantage" reaches an intolerable level is impracticable).

1 Although appellants cherry pick statements from his dissent that appear to support their position,
2 the dissent, taken as a whole, directly contradicts their argument. Indeed, it explicitly recognizes
3 that the issue of term limits, even if the lack thereof tends to favor incumbents, is not one of
4 constitutional dimension. *See id.* at 104. Moreover, Judge Wilkinson notes:

> 5 [T]here is certainly nothing unconstitutional *per se* about
> 6 incumbents shaping the electoral process to their advantage. This
> 7 is merely a feature of American politics. The Framers were surely
> 8 aware of the desire of those who hold elective office to retain
> 9 elective office, yet they were clearly comfortable giving
> 10 incumbents the authority to write election law. Judicial
> 11 intervention into the electoral process, merely for the purpose of
> 12 rooting out self-interested political behavior, would therefore be a[]
> 13 "substantial" incursion into textually and traditionally legislative
> 14 prerogatives.

15
16 *Id.* at 102.

17 The First Circuit opinion in *Bonas* is equally unhelpful to plaintiffs, as it involves nothing
18 more than the interpretation of state election law. In *Bonas*, the voters of North Smithfield,
19 Rhode Island passed a 1998 referendum switching municipal elections from odd-numbered to
20 even-numbered years starting in the year 2002. *See* 265 F.3d at 71-73. Three school committee
21 members were elected in 1997, each to serve a four-year term in accordance with the election law
22 at that time. *See id.* The committee members asserted that the 1998 referendum "erases any
23 need for an election in 2001." *See id.* at 71. The referendum, however, did not explicitly
24 mention any changes in the election schedule leading up to 2002, nor was any official action ever
25 taken aimed at lengthening the terms for these offices. *See id.* at 72. The defendants,
26 nevertheless, decided not to hold a municipal election in 2001. *See id.* at 73. The plaintiffs sued,
27 seeking to compel the election in November 2001 for those whose terms expired that year. The

1 court wrote:

> 2 Here, our evaluation of whether such widespread
> 3 disenfranchisement has occurred starts – and ends – with a
> 4 question of state law: Do state and local rules mandate an election
> 5 in North Smithfield for the offices of town council and school
> 6 committee in the fall of 2001? [If] such an election is required . . .
> 7 the Town's refusal to hold it would work a total and complete
> 8 disenfranchisement of the electorate, and therefore would
> 9 constitute a violation of due process (in addition to being a
> 10 violation of state law).

11

12 *Id.* at 75. The court ultimately concluded that "the language of the referendum requires that the

13 odd-year election cycle continue undisturbed until the year 2002." *Id.* at 77. Thus, *Bonas* holds

14 only that incumbents cannot *sua sponte* do away with an election when state law mandates it.

15 This has nothing to do with the issues presented on this appeal.

16 Let us be clear. It is indisputable that, as a result of Local Law 51, several Members of

17 the City Council who voted for it and were ineligible to run for reelection under the previous

18 term limits law will now be able to seek reelection in the City's November 2009 election. Some,

19 perhaps even many, of these incumbents may be elected to a third term. Nevertheless, Local Law

20 51 neither interferes with a fundamental right nor singles out a suspect classification.

21 Accordingly, it is subject to rationality review.

22 Here, the City's purported reason for enacting Local Law 51 is to provide the voters with

23 an opportunity to elect experienced public officials in a time of financial crisis. It is beyond

24 dispute that extending New York City's term limits to three consecutive terms is rationally

25 related to that legitimate objective. The fact that defendants also may have been motivated by

26 political reasons – the desire to remain in office and in positions of seniority – is inconsequential

27 under our substantive due process analysis. *See Beatie*, 123 F.3d at 712 ("To uphold the

legislative choice, a court need only find some 'reasonably conceivable state of facts that could provide a rational basis' for the legislative action.") (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). We note only that this consideration may well play a part in the voters' decision to vote them back into office (or not).

Finally, plaintiffs make much of the fact that the Mayor and various Council Members have stated that they intend to put the issue of term limits to referendum after the next election cycle in an effort to return the law to a maximum of two consecutive terms. Plaintiffs state that this "one time only deal" violates due process. However, Local Law 51 does not contain a sunset provision; rather, it states that it:

> 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 the majority of such electors voting thereon.

See S.A. 67-68. Of course, the fact that this law may be repealed by a referendum makes it no different than any other law amending the City Charter. We fully agree with the District Court's statement that terming Local Law 51 a "one-time only" measure "does not change [the Due Process] analysis." *Molinari v. Bloomberg*, 596 F. Supp. 2d 546, 571 (E.D.N.Y. 2009).

In conclusion, Local Law 51 does not violate plaintiffs' substantive due process rights guaranteed by the Fourteenth Amendment.

III. New York State Referendum Law

Plaintiffs argued before the District Court that under Municipal Home Rule Law § 23(2)(b), (e) and (f), the substance of Local Law 51 could be enacted only by referendum. These

1 subsections provide, in relevant part:

> 2 Except as otherwise provided by or under authority of a state
> 3 statute, a local law shall be subject to mandatory referendum if it:
> 4 . . .
> 5 b. In the case of a city, town or village, *changes the membership* or
> 6 composition *of the legislative body* or increases or decreases the
> 7 number of votes which any member is entitled to cast.
> 8 . . .
> 9 e. Abolishes an elective office, or changes the method of
> 10 nominating, electing or removing an elective officer, or *changes*
> 11 *the term of an elective office*, or reduces the salary of an elective
> 12 officer during his term of office.
> 13
> 14 f. Abolishes, transfers or *curtails any power of an elective officer*. .
> 15 . .
> 16

17 N.Y. MUN. HOME RULE LAW § 23(2) (emphasis added). Plaintiffs advanced this challenge under

18 the parallel provisions of the New York City Charter as well.[14]

19 On appeal, however, appellants have abandoned their arguments with respect to

20 subdivisions (e) and (f), as well as New York City Charter § 38,[15] and argue here only that Local

21 Law 51 "changes the membership . . . of the legislative body," as provided under Municipal

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[14] New York City Charter § 38 provides, in relevant part, that a referendum is required for the passage of a local law that: "Abolishes or changes the form or composition of the council[,] . . . changes the term of an elective officer, or [a]bolishes, transfers or curtails any power of an elective officer." N.Y. City Charter § 38 (N.Y. Legal Publ'g Corp. 2001).

[15] They make no argument in their opening brief with respect to subdivisions (e) or (f) of section 23(2) of the New York Municipal Home Rule Law or New York City Charter § 38, except for noting in a footnote that if we were to certify the question regarding section 23(2)(b) to the New York Court of Appeals, we should certify the questions regarding the former provisions as well. *See* Brief for Appellants at 48 n.15. Moreover, appellants offer no response in their Reply Brief to appellees' argument that their claims under subdivisions (e) and (f) and New York City Charter § 38 are abandoned. Appellants merely reassert their request for certification. *See* Reply Brief for Appellants at 20-21. In short, they make no argument whatsoever regarding their claims under subdivisions (e) or (f) or New York City Charter § 38. Accordingly, such claims are deemed abandoned. *See, e.g.*, *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir.), *cert. denied*, 510 U.S. 843 (1993).

1 Home Rule Law § 23(2)(b).[16] As noted at the outset, the New York Court of Appeals has made
2 clear that local governments have broad power to enact local laws, and direct democracy in New
3 York is the exception, not the rule. *See McCabe v. Voorhis*, 243 N.Y. 401, 413 (1926). Section
4 10 of the Municipal Home Rule Law provides that city governments shall have the power to
5 adopt and amend local laws relating to "[t]he powers, duties, qualifications, number, mode of
6 selection and removal, terms of office, compensation, hours of work, protection, welfare and
7 safety of its officers and employees." N.Y. MUN. HOME RULE LAW § 10(1)(a)(1). Indeed, the
8 Second Department in *Golden v. New York City Council*, 762 N.Y.S.2d 410 (App. Div. 2d
9 Dep't), *appeal denied*, 793 N.E.2d 411 (N.Y. 2003) held that a referendum was not required to
10 enact Local Law 27 (2002), which amended term limits and had the effect of allowing certain
11 City Council Members to seek reelection who were ineligible under the previous term limit law
12 and, in some instances, to serve two more consecutive years than previously allowed. The parties
13 in that case did not, however, invoke subsection 23(2)(b) of the New York Municipal Home Rule
14 Law. Thus, we are now faced with the question of whether plaintiffs' invocation of this
15 subsection commands a different result than as in *Golden*.
16 Appellants argue that Local Law 51 "changes the membership of" the City Council
17 because it will inevitably result in the reelection of many incumbents in November 2009 who

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[16] By pursuing only a claim under Municipal Home Rule Law § 23(2)(b), appellants have necessarily abandoned their argument that extending term limits for the Mayor, Comptroller and Borough Presidents requires a referendum under state law because section 23(2)(b) does not apply to executive officials. *See* N.Y. MUN. HOME RULE LAW § 23(2)(b) (applying only to those laws that "change[] the membership or composition *of the legislative body* . . . .") (emphasis added). Accordingly, appellants' argument relates only to City Council Members and the Public Advocate. *See* N.Y. City Charter §§ 21-22 ("There shall be a council which shall be the legislative body of the city. . . . The council shall consist of the public advocate and of fifty-one other members termed council members.").

1 were ineligible to seek reelection under the previous term limit law. The parties do not dispute
2 that the incumbent reelection rate in New York City is approximately 98%. Appellees offer two
3 responses to this argument. First, they contend that the phrase "membership" refers to structural
4 changes in the legislative body, not changes in the identity of the individuals who constitute it.
5 For example, they claim that an increase or decrease in the number of seats in the City Council
6 would constitute a "change[]" in "membership." Second, they argue that the law in question
7 must directly cause the "change[] in membership" to trigger section 23(2)(b). They contend that
8 Local Law 51 merely permits certain incumbents to run for reelection who were term limited
9 under the previous law, but it is the voters who will cause the "change[]" in "membership" by
10 voting for particular candidates in the November 2009 election. New York State's jurisprudence
11 in this area makes clear that appellees are correct in both respects.

12 There is no case law interpreting Municipal Home Rule Law § 23(2)(b), which went into
13 effect on January 1, 1964. There is case law, however, interpreting its predecessor, City Home
14 Rule Law § 15(1), which provided, in relevant part, "Except as otherwise provided by or under
15 authority of an act of the legislature, a local law shall be subject to mandatory referendum if it . . .
16 [c]hanges the *form* or composition of the local legislative body . . . ." N.Y. CITY HOME RULE
17 LAW § 15(1) (repealed Jan. 1, 1964) (McKinney's 1952) (emphasis added). The only notable
18 difference between City Home Rule Law § 15 and Municipal Home Rule Law § 23(2)(b) is that
19 the former uses the word "form" where the latter uses "membership."

20 It is clear, however, that the New York State Legislature did not intend to make a
21 substantive change in the meaning of the provision by virtue of this revision. The passage of
22 New York Municipal Home Rule Law in 1964 consolidated several separate statutes that defined

1 the powers of different types of municipalities. Specifically, it replaced "the City Home Rule

2 Law, the Village Home Rule Law, articles 6 and 6A of the County Law (containing general

3 grants of local law powers to counties) and §§ 51-a though 51-f of the Town Law (containing

4 general grants of local law powers to suburban towns)." N.Y. MUN. HOME RULE LAW § 58

5 (note). The New York Office for Local Government was assigned the task of drafting the

6 Municipal Home Rule Law. Its stated purpose in drafting the law was to "assure uniformity" in

7 governance among the various types of municipalities and to make it "easier to effectuate"

8 "future amendments and revisions of law . . . since only one law would have to be amended

9 rather than four." *See* Purpose and Scope of Mun. Home Rule Law, Memorandum of N.Y.

10 Office for Local Gov't, *reprinted in* 35C McKinney's Consol. Laws of N.Y., at XI, XIII-XIV

11 (1994); *see also* Analysis of the Mun. Home Rule Law, Memorandum of N.Y. Office for Local

12 Gov't (enacted by L. 1963, c. 843), *reprinted in* 35C McKinney's Consol. Laws of NY, at XV-

13 XXIII (1994).

14 Furthermore, the Municipal Home Rule Law states that it was not intended:

15 to abolish or curtail any rights, privileges, powers or jurisdiction
16 heretofore conferred upon or delegated to any local government or
17 to any board, body or officer thereof, unless a contrary intention is
18 clearly manifest from the express provisions of this chapter or by
19 necessary intendment therefrom, or to restrict the powers of the
20 legislature to pass laws regulating matters other than the property,
21 affairs or government of local governments as distinguished from
22 matters relating to their property, affairs or government.
23
24 N.Y. MUN. HOME RULE LAW § 50(3).

25 With particular respect to section 23 of the Municipal Home Rule Law, New York's

26 Office for Local Government stated:

1 Section 23 is based on City Home Rule Law, section 15, with some
2 clarification in the first subdivision. . . . With respect to matters
3 subject to mandatory referendum, the subjects are as they appear in
4 the City Home Rule Law provision, except that changes are made
5 to adjust the section to the fact that it also applies to counties,
6 towns and villages.
7
8 Analysis of the Mun. Home Rule Law, 35C McKinney's Consol. Laws of N.Y., at XXI; *see also*
9 Home Rule Handbook, N.Y. Office for Local Gov't, Memorandum, *Constitutional Amendment*
10 *Re Home Rule and Related Legislation*, May 1963, at J.A. 813-15 ("The procedure for adoption
11 of local laws, the specification of types of local laws subject to referenda (mandatory or
12 permissive), the restriction and prohibitions against the adoption of local laws would be
13 substantially as they now are in the City Home Rule Law.").

14 We conclude, therefore, that the New York State Legislature did not intend a substantive
15 change by replacing the word "form" as used in section 15 of the City Home Rule Law with
16 "membership" as used in section 23(2)(b) of the Municipal Home Rule Law. *See, e.g., In re*
17 *Estate of Horchler*, 322 N.Y.S.2d 88, 90 (App. Div. 2d Dep't 1971) ("[N]o general or material
18 change in the existing law is intended by a revision, unless the legislative design to accomplish a
19 change is evident.") (internal citations omitted), *aff'd on op. of App. Div.*, 283 N.E.2d 768 (N.Y.
20 1972).

21 It necessarily follows that case law interpreting the former is persuasive as to the proper
22 interpretation of the latter. These cases demonstrate that a law that has the effect of changing
23 *who* constitutes a legislative body, as plaintiffs allege Local Law 51 will do, does not "change[]
24 the form or composition of the legislative body." In *Neils v. City of Yonkers*, 237 N.Y.S.2d 245
25 (Sup. Ct. 1962), the court addressed whether the changing of ward boundary lines constituted "a

change in the form or composition" of the local legislative body under section 15(1) of the City Home Rule Law. *See id.* at 250-51. Even though the changing of boundary lines would appear to affect who would be elected to office, the court held that it did not come within section 15(1) of the City Home Rule Law and so did not require a referendum. *See id.* at 251.

In *Mehiel v. County Board of Legislators*, 571 N.Y.S.2d 808 (App. Div. 2d Dep't), *appeal denied*, 578 N.E.2d 443 (N.Y. 1991), New York's Appellate Division addressed whether a local law passed by the Westchester County Legislature providing for the reapportionment of its legislative districts required a referendum under New York Municipal Home Rule Law § 34(4), which deals with permissive referenda in counties. Like section 15 of the City Home Rule Law, section 34(4) requires a referendum to enact any local law that "changes the form or composition of the board of supervisors of such county." *See id.* at 809. The court held that "[t]he redistricting plan under consideration merely changes the boundary lines of the legislative districts in Westchester County and does not constitute a change in the 'form or composition' of the Westchester County Legislature." *Id.* (internal citations omitted).

We find *Neils* and *Mehiel* especially instructive because redistricting has as much potential to change the individual members of a legislative body as does a change in term limits. Nevertheless, both courts decided that redistricting does not "change[] the form or composition" of the relevant body. This case law leads us to conclude that Municipal Home Rule Law § 23(2)(b) refers to structural changes, and not changes in the identity of the individual members who comprise the legislative body.

We also find persuasive the District Court's discussion of the term "membership" as used in the Optional County Government Law, a New York State statute enacted around the same time

1 as the Municipal Home Rule Law. This statute, enacted in 1961 but since repealed, provided in
2 relevant part:

> 3 If such city elects to withdraw from the jurisdiction of its civil
> 4 service commission and adopt the county civil service
> 5 administration, *the membership of the county civil service*
> 6 *commission shall*, on the date on which such change of form of
> 7 administration by the city becomes effective, *be increased to five*
> 8 *members*, all of whom shall be appointed by the county manager,
> 9 and not more than three of whom shall at the same time be
> 10 adherents of the same political party.

11
12 Chapter 565 (the Optional County Government Law § 1008) (1961), *reprinted in* LAWS OF N.Y.,
13 184th Session, 1961, Vol. 2, at 1787 (emphasis added). As aptly noted by the District Court:

> 14 It is unlikely that the legislature radically revised its understanding
> 15 of the term "membership" between 1961 and 1963. Hence, the
> 16 1963 legislature, which passed the Municipal Home Rule Law,
> 17 conceived of the term "membership" as referring to structural
> 18 characteristics, including the number of persons in the legislative
> 19 body.

20
21 *Molinari v. Bloomberg*, 596 F. Supp. 2d 546, 572 (E.D.N.Y. 2009).
22 We also find persuasive the relatively recent New York Court of Appeals decision in
23 *Mayor of City of New York v. Council of City of New York*, 874 N.E.2d 706 (N.Y. 2007). In
24 2001, the City Council, over then-Mayor Rudolph Giuliani's veto, enacted Local Laws 18 and
25 19. Prior to the enactment of these local laws, the Mayor was required to engage in collective
26 bargaining with City employees through one certified employee organization regarding certain
27 matters. There was one exception: the Mayor had to bargain directly with unions representing
28 "uniformed" employees, *e.g.*, uniformed police, fire, sanitation and correction services. The
29 2001 local laws, however, expanded the definition of "uniformed" employees to include fire
30 alarm dispatchers and emergency medical technicians. *See id.* at 707-09. The Mayor challenged

1 the local laws on the ground that it was subject to a mandatory referendum under Municipal

2 Home Rule Law § 23(2)(f), which provides: "Except as otherwise provided by or under

3 authority of a state statute, a local law shall be subject to mandatory referendum if it . . .

4 [a]bolishes, transfers or curtails any power of an elective officer." *See id.* at 710.

5 The Court rejected the Mayor's challenge, reasoning:

6 The requirement of a referendum for legislation that
7 "curtails any power of an elective officer" must be read as applying
8 only to legislation that impairs a power conferred on the officer as
9 part of the framework of local government. For example, a local
10 law limiting the power of New York City's Mayor to appoint
11 commissioners, or to prepare a budget, or to create or abolish
12 positions within his executive office would require a referendum
13 (see N.Y. City Charter §§ 6, 8 [f]; § 225 [a]). But, as a general
14 rule, a law that merely regulates the operations of city government,
15 in collective bargaining or in some other area, is not a curtailment
16 of an officer's power. . . .
17
18 *So here, the Mayor's power in the New York City*
19 *governmental structure is unimpaired. A local law prescribing a*
20 *procedural rule for collective bargaining is not an encroachment*
21 *on the Mayor's role in City government. The limitation on his*
22 *freedom to act is merely a consequence of legislative*
23 *policymaking. By contrast, the cases the Mayor relies on all*
24 *involved limitations on an elected officer's structural authority.*
25
26 *Id.* at 711 (internal citations omitted) (emphasis added). Thus, the New York Court of Appeal's

27 analysis clearly emphasizes Municipal Home Rule Law § 23(2)'s concern with structural changes

28 made by law, as opposed to an incidental consequence of a law.

29 Based on these authorities, we agree with appellees that the term "membership" as used

30 in Municipal Home Rule Law § 23(2)(b) refers to the structural characteristics of the legislative

31 body. A structural change to the "membership" might occur, for example, where a law directly

1 increases or decreases the number of seats in the legislative body.[17] Local Law 51, however,

2 affects only an incumbent's eligibility to seek reelection.

3 Even assuming, *arguendo*, that the term "membership" as used in the statute refers to the

4 specific individuals constituting a legislative body, as appellants suggest, Local Law 51 does not

5 trigger Municipal Home Rule Law § 22(2)(b) because it does not directly change the

6 membership; rather, the election results in November 2009 will cause this change. *See Lane v.*

7 *Johnson*, 28 N.E.2d 705 (N.Y. 1940).

8 In *Lane*, the Village of Peekskill, which was part of the Town of Cortlandt, decided to

9 form its own city, the City of Peekskill. It drafted a charter with that effect, which provided,

10 *inter alia*, for the election of two supervisors who were defined thereunder as "City officers."

11 *See id.* at 710-11. Under New York law at the time, "[t]he supervisors of the cities . . . in each

12 county, when lawfully convened, [were also] the board of supervisors of the county." *See id.* at

13 711 (internal quotation marks omitted). Thus, when the two supervisors were elected as

---

[17] We note that City Charter § 22 provides that "the size of the council . . . may be increased by local law without approval" by the electors in a referendum. *See* N.Y. City Charter §§ 22, 38 (N.Y. Legal Publ'g Corp. 2001). On its face, this seems to conflict with section 23(2)(b), though appellants do not raise this argument. We need not resolve this conflict. We note, however, by its express terms section 22 is subject to state law. *See* N.Y. City Charter § 22 ("*Consistent with state law*, the size of the council and the number of districts from which council members are elected may be increased by local law without approval pursuant to section thirty-eight.") (emphasis added); *see also id.* § 28 ("The council in addition to all enumerated powers shall have power to adopt local laws which it deems appropriate, *which are not inconsistent with the* provisions of this charter or with the constitution or *laws of* the United States or *this state*, for the good rule and government of the city;") (emphasis added); *see also* N.Y. MUN. HOME RULE LAW § 10 (enumerating powers and limits of local government). Moreover, the New York Court of Appeals has long held that a city charter cannot be "inconsistent with [the] laws of the State." *People v. Lewis*, 64 N.E.2d 702, 703 (N.Y. 1945); *see also Fossella v. Dinkins*, 485 N.E.2d 1017, 1018-19 (N.Y. 1985) (per curiam). Thus, any analysis of section 22 of the City Charter would in turn implicate state law, including New York Municipal Home Rule Law § 23.

Peekskill "City officers," they also became members of the Board of Supervisors of the county, thereby increasing the number of supervisors on the county Board. *See id.* The plaintiffs argued that the Peekskill charter violated New York law prohibiting any law "which . . . changes the form or composition of the elective body of such county . . . without adoption by the electors of such county . . . ." *See id.* The Court of Appeals rejected the argument, writing:

> [The City of Peeskill] has not by the special or local law . . . changed in any manner any provision of law which fixes the form of county government of Westchester or the form or composition of any elective body. It has merely exercised its power to incorporate a city[;] and by force of the provisions of the general law which determines the form or composition of the Board of Supervisors, city officers become members of the Board of Supervisors and thus the number of members of the Board of Supervisors is increased.

Id. at 712.

As in *Lane*, Local Law 51 is not what works the change in the membership of the City Council. Rather, any effect caused by Local Law 51, although real, is indirect. The change will be caused by the November 2009 election results. Local Law 51 affects only certain candidates' eligibility to seek reelection. It is of no moment that a number of formerly term-limited Council members will likely – indeed, almost certainly – win reelection because of the opportunity afforded them by Local Law 51. The City's argument in this regard appears to us to be unassailable: "If merely changing the likelihood that particular individuals will serve in the future constitutes 'changing' the Council's membership or composition, then a host of other legislation with similar spillover effects – campaign finance changes, for one example – would also need voter approval." Brief for Defendants-Appellees Michael R. Bloomberg, *et al.* at 4. This conclusion is consistent not only with *Lane* but also with the redistricting decisions in *Niels*

1 and *Mehiel*. Clearly redistricting is likely to have the ultimate effect of changing who will run
2 and sit in a legislative body, but New York courts have held it does not require a referendum.
3 For all the reasons discussed, we hold that section 23(2)(b) of New York Municipal
4 Home Rule Law does not require a referendum to enact Local Law 51. We decline appellants'
5 invitation to certify the interpretation of this provision to the New York Court of Appeals.
6 "Despite our discretionary authority to certify, certification is an exceptional procedure, to which
7 we resort only in appropriate circumstances." *McGrath v. Toys "R" Us, Inc.*. 356 F.3d 246, 250
8 (2d Cir. 2004) (citing *Krohn v. N.Y. City Police Dep't*, 341 F.3d 177, 180 (2d Cir. 2003)). "In
9 the past, we have certified questions to the New York Court of Appeals only where there is a
10 split of authority on the issue, where the statute's plain language does not indicate the answer, or
11 when presented with a complex question of New York common law for which no New York
12 authority can be found." *Riordan v. Nationwide Mut. Fire Ins. Co.*, 977 F.2d 47, 51 (2d Cir.
13 1992).
14 These circumstance are not present here. We are confident as to how the New York
15 Court of Appeals would rule on this issue in light of the presumption of representative
16 democracy in New York, the plain meaning of the statute, its legislative history, the holdings in
17 *Niels* and *Mehiel*, the meaning of the term "membership" as used in the Optional County
18 Government Law § 1008 and the New York Court of Appeals decisions in *Mayor of City of New*
19 *York v. Council of City of New York* and *Lane v. Johnson*. Conversely, there is a complete
20 absence of authority suggesting that the New York Court of Appeals would hold that section

1 23(2)(b) is triggered by Local Law 51.[18] Accordingly, we perceive no benefit from certifying this
2 question to the New York Court of Appeals because we are in a position to conclude with
3 sufficient certainty what it would hold. That is, New York Municipal Home Rule Law § 23(2)(b)
4 does not require a referendum to enact Local Law 51.

5 **IV. Conflict of Interest**

6 Finally, plaintiffs allege that defendants violated the conflicts of interest provisions set
7 forth in Chapter 68 of the City Charter, § 2604(b)(2), (3), as well as Conflicts Board Rule 1-13(d)
8 ("Rule 1-13(d)").

9 The provisions provide, in relevant part:

10 2. No public servant shall engage in any business, transaction or
11 private employment, or have any financial or other private interest,
12 direct or indirect, which is in conflict with the proper discharge of
13 his or her official duties.
14

---

[18] Appellants rely exclusively on *Forti v. New York State Ethics Commission*, 554 N.E.2d 876 (N.Y. 1990), in which the New York Court of Appeals addressed the constitutionality of the Ethics in Government Act, to argue that Local Law 51 implicates "membership" as used in section 23(2)(b). In *Forti*, the plaintiffs claimed, *inter alia*, that the Act violated the Equal Protection Clause because its "revolving door" rules treated former executive employees more stringently than former legislative employees. *See id.* at 878-79. The New York Court of Appeals rejected this argument, explaining, *inter alia*, that the disparate treatment could be justified by "the fact[] that each legislator is personally accountable to his or her constituency and *that the Legislature itself is reconstituted every two years with an attendant change in membership, political orientation and priorities*." *Id.* at 883 (emphasis added). Honing in on this language, appellants argue that "change[] in [] membership" must mean a change in the individual members. However, the mere happenstance that the New York Court of Appeals used the word "membership" in the latter context to mean change in the legislature's individual members carries little, if any, weight with respect to the proper interpretation of New York Municipal Home Rule Law § 23(2)(b), which was not even remotely at issue in *Forti*. Moreover, even assuming that a change in "membership" encompasses a mere change in the individual members, *Forti* reinforces our conclusion that the November 2009 election, not Local Law 51, is what will affect that change. *See Forti*, 554 N.E.2d at 883 (referring to a change in membership every two years as a result of elections).

1 3. No public servant shall use or attempt to use his or her position
2 as a public servant to obtain any financial gain, contract, license,
3 privilege or other private or personal advantage, direct or indirect,
4 for the public servant or any person or firm associated with the
5 public servant.
6
7 City Charter § 2604(b)(2)-(3) (N.Y. Legal Publ'g Corp. 2001). Rule 1-13(d) provides that "[i]t
8 shall be a violation of City Charter § 2604(b)(2) for a public servant to intentionally or
9 knowingly[] . . . aid, induce or cause another public servant to engage in conduct that violates any
10 provision of City Charter § 2604." N.Y. Board of Conflicts Rule 1-13(d), *available at*
11 http://www.nyc.gov/html/conflicts/downloads/pdf3/Rules%20Amendments%20by%20Rule%20
12 Number/1_13.pdf.
13 Prior to voting on Local Law 51, Council Members de Blasio and James and Public
14 Advocate Gotbaum filed an inquiry with the City of New York Conflicts of Interest Board (the
15 "Board"), requesting an advisory opinion as to whether Council Members and the Public
16 Advocate would violate these provisions by voting on the bill. On October 15, 2008, the Board
17 issued Advisory Opinion No. 2008-3 ("Advisory Opinion"), holding that Members of the City
18 Council would not violate the conflict rules by voting on Local Law 51. Specifically, it held:
19 [I]t is the Board's view that their official actions in participating in
20 a legislative process that might yield them this arguable benefit [of
21 an extra term] would *not* confer upon them any "private or
22 personal advantage" within the meaning of Charter Section
23 2604(b)(3), nor would it constitute a "private interest" in conflict
24 with the proper discharge of their official duties in violation of
25 Charter Section 2604(b)(2).
26
27 *Id.* at 773. The Board concluded that "it is squarely *within* the proper discharge of Council
28 Members' official duties as legislators (and, in Ms. Gotbaum's case, as an elected official whose
29 duties include presiding over the Council) for them to vote upon, and otherwise participate in the

legislative process regarding, a bill lawfully pending before the Council." *Id.* It wrote, "while term-limited elected officials may have a personal political interest in the Bill's outcome, that interest does not fall within the 'definable and crucial subset' of Chapter 68 that would disqualify them from participating in consideration and possible enactment of the proposed legislation." *Id.* The Board also cited *Golden v. New York City Council*, 762 N.Y.S.2d 410 (App. Div. 2d Dep't), *appeal denied*, 793 N.E.2d 411 (N.Y. 2003), in which the Appellate Division held that the City Council had authority to enact laws regarding term limits. *See id.* at 775. The Board concluded: "Given this judicial authority, to hold that all Members of the Council who would arguably benefit by being enabled to run for another term are disqualified by Chapter 68 from voting on such a law would deny to the people's elected representatives one of the powers afforded them by State and local law." *Id.* The Board commented that, if plaintiffs' position were correct, "it [would] follow that they could not vote on *any measure* affecting the terms and conditions of their public service as Council Members." *Id.* at 776-77. But this is not the case, the Board explained, as Council Members can vote on pay raises, campaign contribution limits, ethics rules regarding lobbyists, etc. *See id.* at 777. Otherwise, it opined, "democratic government" would come "to a halt." *Id.*

Displeased with the Board's conclusions, plaintiffs assert three causes of action in their Amended Complaint seeking a declaratory judgment that defendants violated City Charter § 2604(b)(2) and(3) and Rule 1-13(d) by proposing and/or voting upon Local Law 51, and that the Law is therefore invalid. They allege that defendants violated the conflict provisions by voting on legislation that resulted in pecuniary benefits, including six-figure salaries, substantial benefits package and additional annual financial allowances. They also allege that defendants will gain

1 an "increase in the political cache wrought by additional years spent in the public eye, which
2 unquestionably serves to increase future political and employment prospects for these public
3 servants." *See id.* at 111, 112 (Pls. Am. Complt. ¶¶ 317, 322). With respect to Mayor
4 Bloomberg, plaintiffs allege that "[t]he Mayor's political dealings to guarantee the passage and
5 enactment of the Term-Limits Amendment, including, but not limited to, his deal with Ronald
6 Lauder and City Council Speaker Christine Quinn, also involved the use of his position to confer
7 upon himself other direct and indirect forms of 'financial gain' and 'private or personal
8 advantage.'" *Id.* at 112 (Pls. Am. Complt. ¶ 323).

9 The District Court held that a private right of action existed under Chapter 68 of the
10 Charter, but dismissed plaintiffs' claims essentially for the reasons stated by the Board in its
11 Advisory Opinion. *See Molinari v. Bloomberg*, 596 F. Supp. 2d 546, 577-82 (E.D.N.Y. 2009).
12 In doing so, the court gave considerable weight to the conclusions of the Board. *See id.* at 579-
13 80. Appellees argue that the District Court was correct on the merits but contend that we need
14 not reach these questions because no private right of action exists under Chapter 68 of the City
15 Charter.

16 Assuming, without deciding, that a private right of action exists under Chapter 68 of the
17 City Charter, we hold that the District Court properly dismissed plaintiffs' claims under City
18 Charter § 2604(b)(2) and(3) and Rule 1-13(d). First, we note that the District Court properly
19 deferred to the Board's conclusions. *See DiLucia v. Mandelker*, 493 N.Y.S.2d 769, 771 (App.
20 Div. 1st Dep't 1985) (noting that the Board's "opinions should be given considerable weight by
21 the courts. . . . [T]he conclusion is plain that absent a clear showing to the contrary, advisory
22 opinions of such agencies should be given great deference and validity."), *aff'd for reasons stated*

1 *below*, 501 N.E.2d 32 (N.Y. 1986). Here, plaintiffs have failed to make a "clear showing" that

2 the Board was incorrect.

3 The cases and Board opinions cited by appellants make this clear. In each one, the

4 interest served by the public servant's official actions resulting in a conflict was a *personal,*

5 *private* interest, not an interest in the terms and conditions of his or her public office.[19]

---

[19] *See Baker v. Marley*, 170 N.E.2d 900 (N.Y. 1960) (finding violation where mayor participated in meetings of village board, which adopted resolutions leading to the condemnation of various parcels of real property, including one owned by the mayor from which he stood to gain financially); *Zagoreos v. Conklin*, 491 N.Y.S.2d 358, 363-64 (App. Div. 2d Dep't 1985) (finding violation where determinative votes on construction-related applications to town and zoning boards were cast by board members who were employees of the construction company); *Tuxedo Conservation & Taxpayers Ass'n v. Town Bd. of Town of Tuxedo*, 418 N.Y.S.2d 638 (App. Div. 2d Dep't 1979) (finding violation where town-board member voted on a multi-million dollar construction project from which his advertising company stood to gain financially); *In re Sanders, Jr.*, COIB Case No. 2005-442 (May 31, 2007) (finding violation where New York City Council Member, having married his Chief of Staff, continued to employ her in that capacity, as his subordinate, in direct violation of the City's conflict of interest provision); *In re Sass*, COIB Case No. 98-190 (June 29, 1999) (finding violation where Director of Administration of the Manhattan Borough President's Office used her position to authorize the hiring of her own private company to clean the Borough President's offices); *In re Ross*, COIB Case No. 97-76 (Dec. 22, 1997) (finding violation where Assistant District Attorney issued a false grand jury summons to a police officer to interfere with his scheduled testimony against the Assistant's husband in traffic court on the same day); Advisory Opinion 94-17 (July 11, 1994) (advising that member of City commission should not vote on an application submitted by a private company for a project that a not-for-profit corporation with which he had a financial relationship publicly supported); Advisory Opinion 93-21 (July 12, 1993) (advising that a Council Member was not permitted to nominate a family member for appointment to a community board because it could create an appearance that the Council Member was securing a private advantage for someone with whom he or she was associated); Advisory Opinion 90-04 (April 16, 1990) (advising then-Mayor of the City of New York to recuse himself from matters before the Board of Estimate concerning the renewal of two Manhattan cable franchises in which Time Warner, Inc. had an interest because the Mayor had an indirect financial interest in Time Warner); *cf. George v. City of Cocoa, Fla.*, 78 F.3d 494, 498 (11th Cir. 1996) (holding that city council member in Florida did not have conflict barring him from voting on a redistricting plan because of his political interests as an incumbent planning to run for reelection in one of the new single member districts, reasoning, *inter alia*, that every one of the incumbent city council members had such an interest and it would be "absurd" to interpret Florida's voting conflicts statute in such a way that would disqualify all members of legislative bodies from participating in legislative redistricting

1 Appellants rely heavily upon Advisory Opinion, 95-24 (Oct. 30, 1995), but that opinion is
2 inapposite. It advises only that Council Members may use City employees and resources in
3 conducting non-partisan voter registration drives, as long as no partisan political activity is
4 conducted during the drives which would promote the interests of a particular Council Member,
5 elected official or candidate for elective office. The Board opined that "if the voter registration
6 drives were to be used to promote the political campaign of Council Members or others, it would
7 constitute a conflict of interest for the Council Members to ask their aides to participate in such
8 drives . . . . " J.A. 619.
9 Appellants cite this opinion for the proposition that City Council Members can violate the
10 City Charter's conflict of interest provisions when engaging in purely political activity. As is
11 clear, this opinion relates to the use of public monies for private campaigns and has nothing at all
12 to do with the present case.
13 Plaintiffs stress that Local Law 51 is particularly egregious because it provides a one-time
14 benefit to those who voted for it. However, as noted *supra*, Local Law 51 does not contain a
15 sunset provision; it merely states that it can be repealed by a subsequent referendum.
16 Finally, plaintiffs rehash their allegations regarding Mayor Bloomberg's communications
17 with Mr. Lauder. However, as the District Court stated, even if these allegations were true, they
18 would not establish a violation of Chapter 68. "The Mayor's alleged 'benefit' was a former
19 opponent's support for a piece of legislation, not a personal or financial reward in his private
20 capacity." *Molinari*, 596 F. Supp. 2d at 580. We agree.
21 Accordingly, the District Court properly dismissed plaintiffs' claims under City law

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decisions).

1 alleging that defendants had a conflict of interest in violation of sections 2604(b)(2) and (3) of

2 the City Charter and Rule 1-13(d).

3 **CONCLUSION**

4 Local Law 51 has no doubt stirred controversy. Some feel that it disregards the will of

5 the people as expressed by the 1993 Voter Initiative and 1996 Referendum. That may be a

6 justifiable reaction. But it is not the role of this Court to interject itself into city politics. We

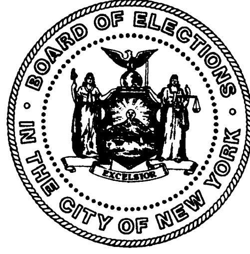
7 shall only adjudicate the constitutional and legal claims properly before us, which we have

8 analyzed exhaustively.

9 For the foregoing reasons, we AFFIRM the District Court's judgment granting

10 defendants' motion for summary judgment and dismissing plaintiffs' Amended Complaint.

Comm Mtg
FYI



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Designation of Vacancies for Judge of the Civil Court of the City of New York

(Pursuant to Section 6-168 of the Election Law)

September 15, 2009 Primary Election

Borough of Brooklyn

Vacancy #	District	Previous Judge	Reason for Vacancy
1	Countywide	Lila Gold	Constitutional Age Limit
2	3rd	Richard Velasquez	Elected to Supreme Court
3	5th	Rachel Adams	Term Expiration

Borough of Manhattan

Vacancy #	District	Previous Judge	Reason for Vacancy
4	3rd	Cynthia Kern	Term Expiration
5	3rd	Marilyn Shafer	Constitutional Age Limit
6	6th	Analisa Torres	Term Expiration
7	9th	Judith Gische	Elected to Supreme Court
8	9th	Walter Tolub	Term Expiration

Borough of Queens

Vacancy #	District	Previous Judge	Reason for Vacancy
9	Countywide	Lee Mayersohn	Elected to Supreme Court
10	Countywide	Bernice Siegal	Elected to Supreme Court

Borough of the Bronx

Vacancy #	District	Previous Judge	Reason for Vacancy
11	Countywide	Francis Alessandro	Constitutional Age Limit
12	Countywide	Stanley Green	Term Expiration

Borough of Staten Island

Vacancy #	District	Previous Judge	Reason for Vacancy
13	1st	Judith McMahon	Elected to Supreme Court

Issued By: The Board of Elections in the City of New York on May 1, 2009

Comm mtg
Fyi

CALENDAR FOR INDEPENDENT NOMINATING PETITIONS

JUNE 2, 2009 SPECIAL ELECTIONS
MEMBER OF ASSEMBLY
77th & 85th ASSEMBLY DISTRICTS, BRONX COUNTY

Date of Proclamation & First Day to circulate Petitions.................................. May 1, 2009
Last day to file petitions .... 9 a.m. – Midnight, May 13, 2009

FOR PETITIONS FILED ON:	**General Objections Must Be Received By:***
Friday, May 1	Monday, May 4
Monday, May 4	Thursday, May 7
Tuesday, May 5	Friday, May 8
Wednesday, May 6	Monday, May 11
Thursday, May 7	Monday, May 11
Friday, May 8	Monday, May 11
Monday, May 11	Thursday, May 14
Tuesday, May 12	Friday, May 15
Wednesday, May 13	Monday, May 18

General Objections Filed On:	**Specifications Must be Received By:***
Monday, May 4	Monday, May 11
Thursday, May 7	Wednesday, May 13
Friday, May 8	Thursday, May 14
Monday, May 11	Monday, May 18
Thursday, May 14	Wednesday, May 20
Friday, May 15	Thursday, May 21
Monday, May 18	Tuesday, May 26

Last day to file Certificate of Acceptance or Declination of Nomination .... May 15

Last day to fill vacancy caused by Declination of Nomination.............................. May 18

Last day to institute court proceedings with regard to independent nominating petitions......... May 20, 2009 or (3) three business days after hearing where petition is invalidated.

Last day to submit proof of service of Specifications........The day after specifications are filed.

Board of Elections hearings on Independent Nominating Petitions at Executive Office, 42 Broadway, 6th Floor Hearing Room–TO BE ANNOUNCED AT THE COMMISSIONERS' MEETING ON MAY 5

*Board of Elections is open for filing from 9 AM to 5 PM. The Board of Elections will remain open until Midnight only if a specified filing date for objection(s)/ specification(s)/certificate(s) is the last day to file said objection(s)/ specification(s)/certificate(s).

For information, call the Board of Elections at 212-487-5300.

NOTE: *The Independent Nominating Petition Rules for 2008 (Adopted 11/27/07 & Precleared by the U.S. Attorney General on 1/17/08, per Section 5, Voting Rights Act) governs Independent Nominating Petitions filed for this Election.*

Issued By: The Board of Elections in the City of New York on May 1, 2009

Comments FYI

CALENDAR FOR CERTIFICATE OF NOMINATION JUNE 2, 2009 SPECIAL ELECTIONS MEMBER OF ASSEMBLY 77th & 85th ASSEMBLY DISTRICTS, BRONX COUNTY

****

Date of Proclamation..........May 1, 2009
Last day to file Certificate of Nomination..........9:00 AM–Midnight, May 11, 2009

FOR CERTIFICATES FILED ON:	**General Objections Must Be Received By:***
Friday, May 1	Monday, May 4
Monday, May 4	Thursday, May 7
Tuesday, May 5	Friday, May 8
Wednesday, May 6	Monday, May 11
Thursday, May 7	Monday, May 11
Friday, May 8	Monday, May 11
Monday, May 11	Thursday, May 14

General Objections Filed On:	**Specifications Must be Received By:***
Monday, May 4	Monday, May 11
Thursday, May 7	Wednesday, May. 13
Friday, May 8	Thursday, May. 14
Monday, May 11	Monday, May. 18
Thursday, May 14	Wednesday, May 20

Last day to file Certificate of Acceptance or Declination of Nomination..........May 13

Last day to authorize nomination..........May 15

Last day to fill vacancy caused by declination of nomination..........May 15

Last day to authorize substitution..........May 19

Last day to institute court proceedings regarding Certificate of Nomination.....10 days after filing of Certificate

Last day to submit proof of service of Specifications.........The day after Specifications are filed

Board of Elections hearings on Certificate of Nominations at Executive Office, 42 Broadway, 6th Floor Hearing Room–TO BE ANNOUNCED AT THE COMMISSIONERS' MEETING ON MAY 5

*Board of Elections is open for filing from 9 AM to 5 PM. The Board of Elections will remain open until Midnight only if a specified filing date for objection(s)/ specification(s)/certificate(s) is the last day to file said objection(s)/ specification(s)/certificate(s).

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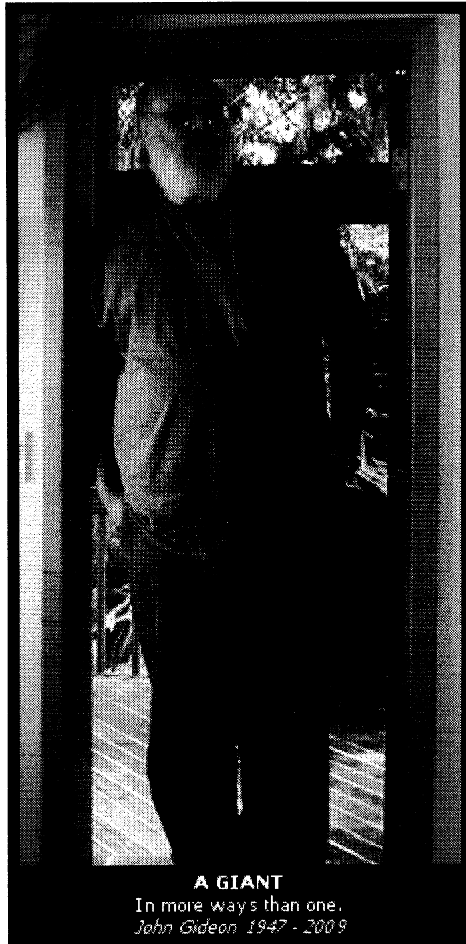
Issued By: The Board of Elections in the City of New York on May 1, 2009

F.Y.I.

John Gideon, publisher of the "Daily Voting News"


A GIANT
In more ways than one.
John Gideon 1947 - 2009

www.bradblog.com/?p=7102
Blogged by **Brad Friedman** on 4/27/2009 12:29PM

In Memoriam: John Gideon, 1947 - 2009

Father, grandfather, husband, veteran, patriot, co-director of VotersUnite.org, democracy advocate, blogger, friend...

"I will choose to celebrate his life."
- Ellen Theisen, John Gideon's co-director at VotersUnite.org on his passing.

It was a very lonely time for advocates of democracy in the U.S. when John Gideon posted his first guest blog here in the dark days of October 2005, and when we began to carry his vital "Daily Voting News" on Election Day, one month later, in November of that same year.

While the fight for democracy in this country has become somewhat less lonely as the Election Integrity movement has grown since then, thanks in no small part to the tireless, daily contributions of John, it feels very lonely again today. My good friend passed away this evening in a Seattle hospital, having succumbed to a surprise and sudden bout with bacterial meningitis.

John held on as long as he could, but tonight he'll rest with his beloved wife who passed some years ago.

He was 62, and a Vietnam veteran who never stopped fighting for his fellow veterans and in service of our country. He is survived by his son Rick and young grandson Collin, and a life-long legacy of fighting in defense of his nation, and for all that it stands for. He has left that legacy behind as a gift --- and challenge --- for us all.

John's always-understated "Daily Voting News" --- which he filed, often seven days a week, for well over five years --- provided simple links to news of election reform, failure and success from around the nation, as culled from papers, blogs, press releases and official and academic reports around the country, and even the world. In so doing, he connected the seemingly disparate dots of local stories, and apparently anecdotal woes, into a cohesive tale of a nation struggling to regain footing on the pedestal on which it had once, and still hoped to stand.

The compelling narrative the DVN slyly wove together daily --- almost, as if in slow-motion, with each passing day --- was clear: We were, and are, a country whose promise of public, transparent democracy threatens to slip away forever beneath a cynical and foolish crush of ill-considered corporatism and greed, self-imposed expediency and often well-meaning, yet

destructive naivete. In short: Unless we take care --- *every single day* --- what's left of our democracy will further wither to the whims of cold, disinterested privatization no longer resembling the self-governance our founders envisioned, and that we have convinced ourselves still remains.

If there is anything we can give back to the man, in thanks for his selfless service, over so many decades, on so many fronts, it is to continue to carry the torch of the man who fought for democracy until he had nothing more he could give.

On a personal note, John was one of the best friends I've ever had. As true in friendship as he was to his country.

There were very few days, over these last many years, when he and I didn't speak by phone at least once --- even when there was very little to talk about in the day's daily news (though those days were few and far between, as witnessed by the years-long historic chronicle of the DVN and the pages of this blog). Sometimes the conversations were brief, more often much longer, occasionally gruff --- yes, the frustrating battles left him quite grouchy from time to time --- but they always served as an unerring grounding to me, and to the overall mission of The BRAD BLOG.

I cannot overstate his importance to the work you've seen on these pages for so many years. While he often stayed far in the background and out of the limelight, his incessant questioning and encouragement of election officials and commissioners and advocates alike moved the ball slowly, but persistently, forward in every aspect of the struggle for Election Integrity and transparency in America. And as if that wasn't enough, he generously babysat this blog when I was otherwise indisposed or off the grid (sometimes for weeks at a time), encouraged and helped guest bloggers have their voices heard here, and, yes, tirelessly pushed back against those over-stuffed cynics --- be they academics, attorneys, officials, media outlets and even other EI advocates --- who too frequently took lazy shots across the bow of The BRAD BLOG, and at myself, in lieu of taking accountability for their own prejudices, fears and failings.

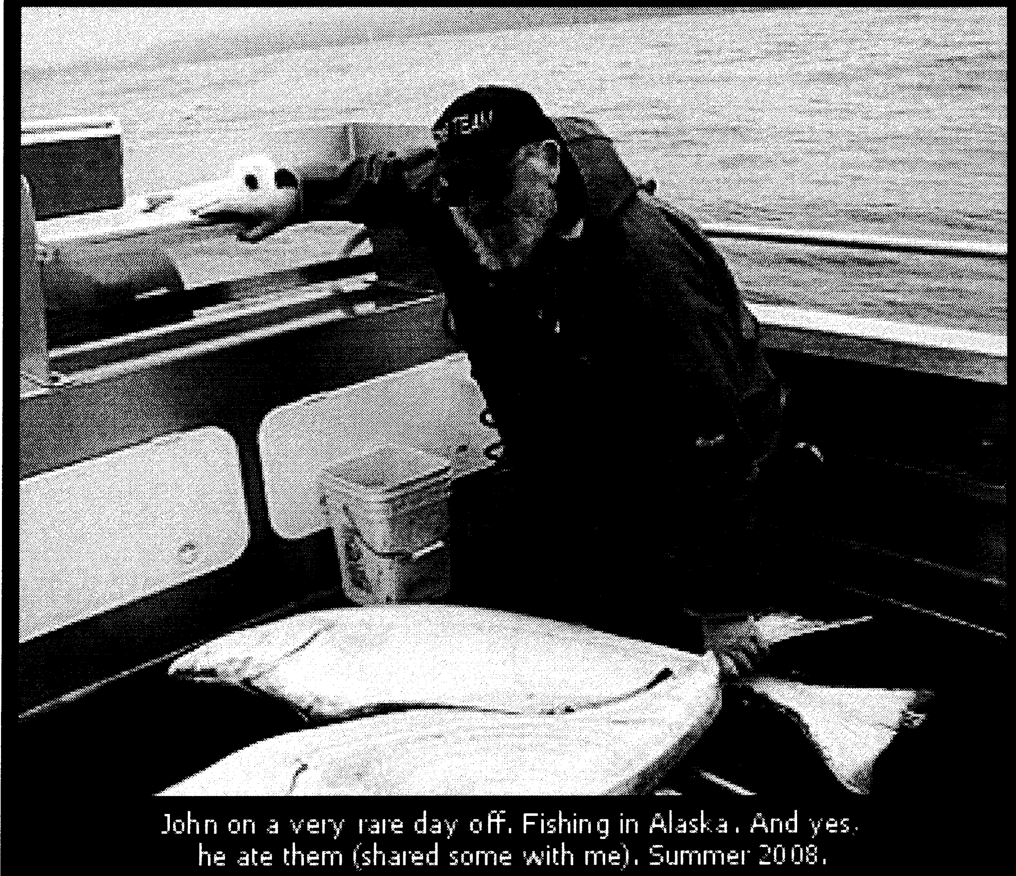
At the bottom of every email, John closed with an auto-signature that quoted a declaration crafted, in March of 2008, in part by me and his ever-faithful friend and partner at VotersUnite.org, Ellen Theisen. The short, simple phrase became known as the Creekside Declaration, and may sum up so much of what John stood for over these last many years, every day of his life...

"Mission: To encourage citizen ownership of transparent, participatory democracy."

As I type through my tears, I am awed by the challenge, and mission, that John --- a very gentle giant indeed, but a giant nonetheless --- has left behind for me, and for all of us. If I can sometime soon dry up those tears, I vow to join Ellen, whose quote opened this far-too-soon obituary --- and *celebrate* John's life. Until then, I hope you'll join me in *remembering* by carrying his torch, his challenge and his mission wherever, and however, you can...as if the future of this nation depended on it. Because I truly believe that it does.

Thank you for everything, John. You will be missed, my friend, more than you will ever know...

Ellen Theisen, John Gideon, Pokey Anderson, myself, and a couple of friends. Washington state, June 2008. *Photo by Desi Doyen.*



John on a very rare day off. Fishing in Alaska. And yes, he ate them (shared some with me). Summer 2008.

The New York Times

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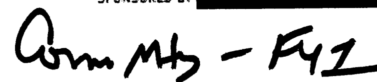

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April 30, 2009

Skepticism at the Court on Validity of Vote Law

By ADAM LIPTAK

WASHINGTON — A central provision of the Voting Rights Act of 1965, designed to protect minorities in states with a history of discrimination, is at substantial risk of being struck down as unconstitutional, judging from the questioning on Wednesday at the Supreme Court.

Justice Anthony M. Kennedy, whose vote is likely to be crucial, was a vigorous participant in the argument, asking 17 questions that were almost consistently hostile to the approach Congress had taken to renewing the act in 2006.

"Congress has made a finding that the sovereignty of Georgia is less than the sovereign dignity of Ohio," Justice Kennedy said. "The sovereignty of Alabama is less than the sovereign dignity of Michigan. And the governments in one are to be trusted less than the governments in the other."

Georgia and Alabama, along with seven other states and many local governments, mostly in the South, are subject to Section 5 of the act, which requires them to seek federal permission before making changes in voting procedures. Ohio is not covered, and only two townships in Michigan are.

In reauthorizing Section 5 for 25 years in 2006, Congress did nothing to change the criteria for inclusion under the provision, relying instead on a formula based on historic practices and voting data from elections held decades ago. That seemed to rankle Justice Kennedy. About two-thirds of his questions concerned the coverage formula.

"No one questions the validity, the urgency, the essentiality of the Voting Rights Act," he said. "The question is whether or not it should be continued with this differentiation between the states. And that is for Congress to show."

The court has often divided 5 to 4 in highly charged cases involving voting and race, with Justice Kennedy casting the swing vote.

Should the court strike down the coverage formula in Section 5, Congress would be free to take a fresh look at what jurisdictions should be covered. But making distinctions among the states based on new criteria may not be politically feasible.

"It is one thing to retain coverage of jurisdictions that have lived with the constraints of Section 5 for some time," Nathaniel Persily, a law professor at Columbia, wrote in The Yale Law Journal in 2007. "It is quite another to heap a new and costly administrative scheme onto jurisdictions unaccustomed to needing federal permission for their voting laws."

At the argument Wednesday, Justice Kennedy said there was evidence that "it costs the states and the municipalities a billion dollars over 10 years to comply."

Congress collected thousands of pages of information concerning continued problems in the covered jurisdictions, some of which Justice Stephen G. Breyer summarized. Virginia and Texas, for instance, still have significant disparities in voting registration rates, Justice Breyer said. The number of minority officeholders in Mississippi, Louisiana and South Carolina, he added, "is still not great."

But Congress did much less work in comparing practices in jurisdictions covered by Section 5 to those in jurisdictions that are not. Had Congress taken account of more recent data, Justice Samuel A. Alito Jr. suggested, it might have drawn the coverage lines differently.

"The difference between Latino registration and white registration in Texas was 18.6 percent, which is not good," Justice Alito said, "but it's substantially lower than the rate in California, which is not covered — 37 percent."

The case, Northwest Austin Municipal Utility District No. 1 v. Holder, No. 08-322, was brought by a small Texas water district.

Gregory S. Coleman, a lawyer for the district, began his argument with a relatively modest request — that the district be allowed to "bail out" of Section 5 coverage.

But the possibility of a ruling on that or another narrow ground did not seem to attract much interest from the justices.

Justice Ruth Bader Ginsburg asked Mr. Coleman to describe an acceptable coverage formula. Mr. Coleman sidestepped the question but said that only Hawaii would be covered were recent data plugged into the old formula.

Chief Justice John G. Roberts Jr. asked Debo P. Adegbile, a lawyer with the NAACP Legal Defense and Educational Fund, whether "today Southerners are more likely to discriminate than Northerners?"

Mr. Adegbile responded that "the pattern has been more repetitious violations in the covered jurisdictions and more one-off discrimination in other places."

While questioning at the Supreme Court is an imperfect indicator of how the justices will vote, Justice Kennedy gave every indication on Wednesday that he believed that the justifications offered by Congress for retaining Section 5 had fallen short.

"This is a great disparity in treatment, and the government of the United States is saying that our states must be treated differently," Justice Kennedy said to Neal K. Katyal, a deputy United States solicitor general. "And you have a very substantial burden if you're going to make that case."

Mr. Katyal responded with an appeal to the history of the Voting Rights Act.

The law, Mr. Katyal said, was "one of the most transformative acts in American history." It is, he said, still justified, "because with this act what Congress did was essentially redeem itself in the eyes of the world."

Bronx Voters Elect Díaz As New Borough President

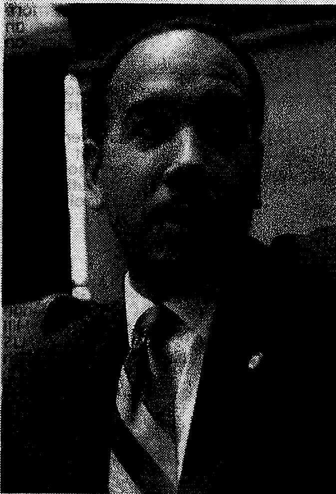
By TRYMAINE LEE

Assemblyman Rubén Díaz Jr. easily captured a special election for Bronx borough president on Tuesday, and will succeed Adolfo Carrión Jr., who is now director of the White House Office of Urban Affairs.

Mr. Díaz, 35, a Democrat, defeated his lone opponent in the race, Anthony J. Ribustello, a Republican district leader best known as the actor who played Tony Soprano's driver on "The Sopranos."

"You don't run to lose, so of course I'm disappointed," Mr. Ribustello said in a phone interview. "But I'll be back to fight another day."

With all the precincts in, Mr. Díaz had 28,301 votes, or 87 percent, to Mr. Ribustello's 4,081 votes, according to the City Board of Elections.



NATHANIEL BROOKS FOR THE NEW YORK TIMES

Rubén Díaz Jr., a Democrat, succeeds Adolfo Carrión Jr.

Mr. Díaz's election was seen as a foregone conclusion by many. He managed to do what would have seemed virtually impossible a year ago, cobbling together the support of the borough's tattered Democratic factions that had been torn apart by a power struggle last fall. The groups united behind Mr. Díaz's candidacy. Mr. Díaz also outspent Mr. Ribustello's $4,000 campaign a few times over.

"I'm excited. I'm humbled," Mr. Diaz said in a telephone interview after his victory, the blare of music and cheers in the background. He characterized the winning margin as "a mandate to push one strong Bronx agenda."

"This is the culmination of over two years of working with elected officials and community leaders," he said. "I hear Bronxites loud and clear. and I'm ready to work for them."

Mr. Díaz began laying the blueprint for his borough presidency well before Tuesday's election, making known his intention to appoint Assemblywoman Aurelia Greene, the dean of the Bronx Democratic delegation, as his deputy.

Mr. Díaz was elected to the Assembly at 23, and is the son of State Senator Rubén Díaz Sr., a conservative Democrat and Pentecostal preacher who has often been at odds with his more liberal counterparts in the party.

THE NEW YORK TIMES NEW YORK WEDNESDAY, APRIL 22, 2009

Comm mtg.
FYI

Diaz on way to big Bronx win

ASSEMBLYMAN Ruben Diaz Jr. was headed for an easy victory yesterday in a special election to become Bronx borough president — and the state's highest elected Latino.

He will fill the remaining eight months left by Adolfo Carrión, who stepped down to become White House director of urban policy.

Should Diaz win, he will likely seek a full, two-year term in November's regular election.

Diaz was up against Anthony Ribustello, an east Bronx GOP district leader who played Tony Soprano's driver on the HBO series "The Sopranos."

Diaz, 35, has represented Soundview and Hunts Point in Albany for 13 years.

His father is state Sen. Ruben Diaz Sr., a member of the Albany Gang of Three. That trio is widely credited with helping Sen. Malcolm Smith (D-Queens) become the Senate majority leader.

While the elder Diaz, a Pentecostal minister, opposes gay marriage and abortion, the younger Diaz is pro-choice and supports civil unions.

He has pledged to fight for affordable housing, better schools and jobs in the struggling borough of 1.4 million people.

Bob Kappstatter

DAILY NEWS Wednesday, April 22, 2009

Comments Fy1

Court questions key voting rights provision

THE ASSOCIATED PRESS

WASHINGTON — The Supreme Court's conservative justices led a sustained attack yesterday on a key element of the Voting Rights Act, questioning whether one-time bastions of segregation still should be held to account for past discrimination.

The justices who were skeptical of that part of the voting rights law included Justice Anthony Kennedy, whose views are likely to prevail on the closely divided court. He tends to side with his more conservative colleagues on matters of race.

On the other side, the liberal justices defended Congress' decision to keep the law in place.

The tenor of the quick-paced argument suggested that there could be a court majority to strike down the provision of the voting rights law that has been the Justice Department's main enforcement tool against discriminatory changes in voting since the law was enacted in 1965. It opened elections to millions of blacks and other minorities.

The law requires all or parts of 16 states, mainly in the South, with a history of discrimination in voting to get approval in advance of changes in the way elections are conducted. The idea is to prevent discriminatory measures from being put in place. (The provision also applies to a few counties in California, New York and elsewhere that have a high percentage of residents who do not speak English.)

The court is being asked by a small Texas utility district to strike down the extension as an unconstitutional intrusion into the domain of state and local governments that have made substantial progress since the era of Jim Crow and government-sponsored discrimination.

Kennedy acknowledged that the provision has been successful in rooting out discrimination in voting over the past 44 years. But times have changed, he said, questioning Congress' judgment in 2006 that it was needed for another 25 years.

"Democracy was a shambles," Kennedy said of the era when the law first was enacted. "That's not true anymore."

When Justice Department lawyer Neal Katyal pointed out that the high court has upheld previous extensions of the law, Justice Antonin Scalia dismissively replied, "A long time ago."

At another point, Chief Justice John Roberts asked, "At what point does that history . . . stop justifying action with respect to some jurisdictions?"

Chief Justice Roberts and Justice Ginsburg

Katyal did not specifically answer that question, but said, "After 16,000 pages of testimony, 21 different hearings over months, Congress looked at the evidence and determined that their work was not done."

Roberts and Justice Samuel Alito also noted that by some measures of racial disparity, states not required to submit election changes fare worse than those with a history of discrimination.

The court's liberal justices said Congress pointed out that instances of voting discrimination occur more often in the states covered by the portion of the voting rights law that is under challenge.

"I don't understand with a record like that how you can maintain . . . that things have radically changed," Justice David Souter said.

Justice Ruth Bader Ginsburg referred to the "second-generation discrimination" that Congress was aiming to stop. "You start with the blatant overt discrimination, and then in time people recognize . . . that won't go any more, so the discrimination becomes more subtle, less easy to smoke out," she said. "But it doesn't go from blatant overt discrimination to everything is equal."

Outside court, more than 100 NAACP members sang and chanted. Betty Johnson, 62, of Elkton, Md., said, "Just because we have an African-American president doesn't mean that people's voting rights can't be taken away."

New York Law Journal

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Charter Amendment Extending Term Limits Upheld by Circuit

BY MARK HAMBLETT

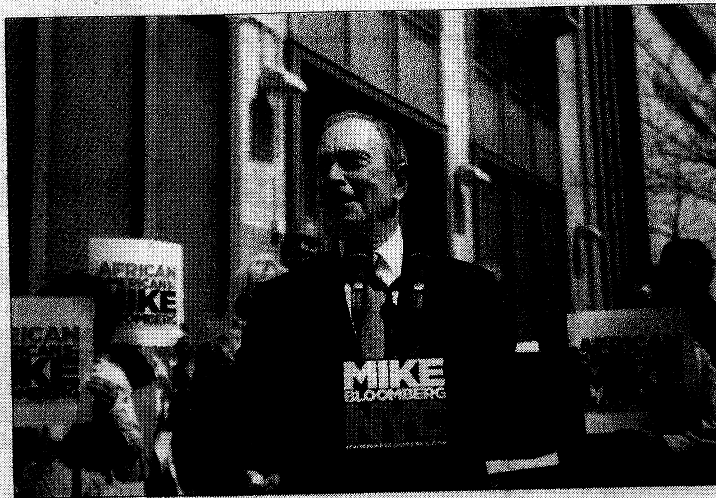
MAYOR Michael R. Bloomberg has cleared another hurdle in his bid to run for a third term.

The U.S. Court of Appeals for the Second Circuit yesterday upheld the constitutionality of the 2008 terms limits amendment to the New York City Charter that lifted the two-term ceiling for the mayor, City Council members, the public advocate, the comptroller and the borough presidents.

Mr. Bloomberg has said he wants another term to insure that the city has experienced leadership to guide it through the financial crisis. The circuit said that was a "legitimate objective," and the amendment did not interfere with any fundamental constitutional rights.

The appeal in *Molinari v. Bloomberg*, 09-0331-cv, was decided by Judges Chester J. Straub, Rosemary S. Pooler and Reena Raggi.

The lawsuit was brought by Comptroller William C. Thompson; Public Advocate Betsy Gotbaum; Council members who voted against Local Law 51 extending the limits to three terms from two; people who were planning to run for Council seats in November; and those who claim to have spent time and money in favor of two public referenda in which the voters approved and then preserved term limits.



NEWSCOM/RICHARD B. LEVINE

MAYOR **Michael R. Bloomberg**, who pushed to amend the City Charter to extend the two-term limit, campaigns for a third in Harlem earlier this month.

The plaintiffs claimed violations of the state and federal constitutions, including infringement of their First Amendment rights, and violations of the New York Municipal Home Rule Law and the City Charter's conflict of interest provisions.

City voters approved term limits by 59 percent in a 1993 initiative and then in 1996 rejected by a margin of 54 percent to 46 percent a Council-sponsored referendum to extend the limits to three terms.

Mr. Bloomberg announced on Oct. 2, 2008, that he would seek a change in the term » Page 10

The Second Circuit decision will be published **Monday.**

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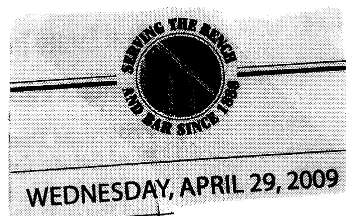

WEDNESDAY, APRIL 29, 2009

Term Limits

« Continued from page 1

limits provisions in City Charter §§1337 and 1338 in order to help the city deal with the global economic crisis.

His announcement drew immediate criticism from several quarters as high-handed and self-serving. The New York City Bar Association, for example, opposed the move, saying in a statement, "A change in term limits by legislative action would be bad policy, contrary to the principles of good government and potentially damaging to our City institutions."

In spite of public opposition, the City Council passed the changes in Local Law 51 by a 29-22 margin and the bill was signed into law on Nov. 3, 2008.

The plaintiffs then brought suit in Brooklyn federal court.

Eastern District Judge Charles P. Sifton granted summary judgment to Mr. Bloomberg and other defendants in January (NYLJ, Jan. 14) and the plaintiffs appealed.

Writing for the circuit yesterday, Judge Straub first said Local Law 51 "does not implicate plaintiffs' First Amendment rights."

The court, he said, was bound to follow the New York Court of Appeals in *Caruso v. City of New York*, 517 NYS2d 897 (Sup. Ct. 1987). The *Caruso* Court said that "Inasmuch as a legislative body may modify or abolish its predecessor's acts subject only to its own discretion, it likewise should be able...to amend or repeal an enactment by the electorate, its co-ordinate unit, and vice versa."

First Amendment Rights

Caruso notwithstanding, the plaintiffs argued that their First Amendment rights were violated because the change by the City Council discouraged citizens from participating in the referendum process.

But Judge Straub said, "Nothing is preventing the plaintiffs from engaging in First Amendment speech regarding term limits, whether within the referendum context or not."

He continued, "While we appreciate the practical reality that city voters will not be able to stop certain elected officials from seeking a third term in office through a voter initiative because the process would take until at least the November 2009 election...this temporal fact does not amount to a First Amendment violation."

The panel rejected the plaintiffs' claim of a substantive due process violation, saying they failed to identify "a fundamental right" or a "suspect classification" at issue.

The defendants need only show that the law survives "rational-basis review," and Judge Straub found they succeeded.

"Here, the city's purported reason for enacting Local Law 51 is to provide the voters with an opportunity to elect experienced public officials in a time of financial crisis," he said. "It is beyond dispute that extending New York City's term limits to three consecutive terms is rationally related to that legitimate objective."

And it is "inconsequential," he said, "that defendants also may have been motivated by political reasons—the desire to remain in office and in positions of seniority."

The court went on to rule that New York Municipal Home Rule Law §23(2)(b) does not require a referendum to enact Local Law 51 and there was no violation of the conflict of interest provisions in Chapter 68 of the City Charter, §2604(b)(2),(3) and Conflicts Board Rule 1-13(d).

Randy M. Mastro of Gibson, Dunn & Crutcher represented the plaintiffs. Mr. Mastro was deputy mayor under Rudolph Giuliani.

"While the courts may have found this term limits extension to be within the legal authority of the mayor and the City Council, that doesn't make it right," Mr. Mastro said yesterday. "What the mayor and City Council did here extending their terms by legislation and thwarting the will of the voters was simply wrong and undemocratic."

Mr. Bloomberg and the City Council were represented by Assistant Corporation Counsel Alan G. Krams.

Corporation Counsel Michael A. Cardozo said yesterday in a statement, "This ruling will give New York City residents the opportunity to vote for officials of their choice."

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