

FREDERIC M. UMANE  
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SECRETARY

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GREGORY C. SOUMAS  
JUDITH D. STUPP  
COMMISSIONERS

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EXECUTIVE DIRECTOR

GEORGE GONZALEZ  
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS  
ADMINISTRATIVE MANAGER

## 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](http://www.vote.nyc.ny.us)

### AGENDA COMMISSIONERS MEETING TUESDAY, SEPTEMBER 1, 2009 AT 1:30 P.M.

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1. Minutes
  - a) 07/14/09
  - b) 07/21/09
  - c) 07/28/09
  - d) 08/03/09
  - e) 08/11/09
2. Marcus Cederqvist
  - a) HAVA Update
  - b) Report on 8/27/2009 Meeting with Staff from Mayor's Office
3. George Gonzalez
  - a) Schedule for Opening the Back of Lever Voting Machines
4. Troy Johnson
  - a) Draft Notice to All Candidates - 2009 Special Election 38<sup>th</sup> AD Queens
5. John Ward
  - a) Vacancy Report

## **For Your Information**

- NYS Board of Elections Weekly Status Report for the Week of August 21, 2009 through August 27, 2009
- Notice to All Candidates – September 15, 009 Primary Election
- United States District Court, for the Southern District of New York – Summons in A Civil Action/09CV7560 – Brother T. Williams-Bey, Niyyirrah El, Juan Antonio Martinez Sr. and Juan Antonio Martinez Jr. , Plaintiff v. Commissioners of Elections, Board of Elections in the City of New York, Defendant
- Letter from Martin E. Connor, Counselor at Law re: Anna Lewis, Civil Court, NY County 3<sup>rd</sup> Municipal Court District
- Letter from Martin E. Connor, Counselor at Law re: Voting history of Vance Family
- Affirmation of Martin Bowe in Opposition to the Order to Show Cause – Supreme Court of the State of New York, County of Queens – Marquez Claxton, Petitioner against, Yvonne Mitchell, Juliet Barton and Richard Murphy, Objectors- Respondents, Commissioners of Elections of the Board of Elections in the City of New York, Respondents – Index No. 21060/2009
- Order to Show Cause – The Supreme Court of the State of New York – Marquez Claxton, Petitioner against, Yvonne Mitchell, Juliet Barton and Richard Murphy, Objectors-Respondents, Commissioners of Elections of the Board of Elections in the City of New York, Respondents – Index No. 21060/2009
- Erlene J. King, Petitioner against, The Board of Elections in the City of New York, Respondent – Index No. 700035/2009
- Memorandum of Agreement with the NYS Division of Military and Naval Affairs for use of the Staten Island Armory for the 2009-2010 Election Cycle
- Letter to Hon. Fern A. Fisher, Deputy Chief Administrative Judge for New York City Courts Office of Court Administration, State New York
- Revised – Supreme Court State of New York re: Election Law, Bart Haggerty, Candidate-Agrieved and John F. Haggerty Jr., Petitioner-Objector against Jay S. Golub, Candidate and The New York City Board of Elections, Respondents – Index No. 20187/09
- Supreme Court State of New York re: Election Law, Bart Haggerty, Candidate-Agrieved and John F. Haggerty Jr., Petitioner-Objector against Jay S. Golub, Candidate and The New York City Board of Elections, Respondents – Index No. 20187/09
- Marquez Claxton, Candidate for Member of the City Council, 31<sup>st</sup> Council District, Democratic Party
- State of New York, Court of Appeals – In the Matter of Israel Martinez, &c., Appellant, v. Frederic M. Umane, et al., Respondents, Grisela Laraja, &c., Respondent/In the Matter of Grisela Laraja, &c., Petitioner, v. Israel Martinez, &c., et al., Respondents – Mo. No. 2009-983
- New York Supreme Court, Queens County – Deborah Heinichen, Petitioner-Objector against, Steven J. Colorundo and Joan M. Vogt, Respondent-Candidates and The New York City Board of Elections – Index No. 20160/09
- New York Supreme Court, Queens County – Ruby K. Muhammad, Petitioner-Objector against, Myrna P. Littlewort and Kevin Li, Respondent-Candidate and The New York City Board of Elections, Respondent – Index No. 20158/09

- New York Supreme Court, Queens County – Kevin Li and Myrna Littlewort, Petitioner-Candidates against, the New York City Board of Elections and Ruby K. Muhammad, Objector-Respondent – Index No. 21179/09
- New York Supreme Court, Queens County – Anthony P. Nunziato and Joanne R. Mugno, Candidates-Agrieved and Manuel J. Caruana, Petitioner-Objector against, Frank P. Messano and Rosemarie Iacovone, Candidates and The New York City Board of Elections, Respondents – Index No. 20193/09
- New York Supreme Court, Queens County – Bart Haggerty, Candidate-Agrieved and John F. Haggerty Jr., Petitioner-Objector against, Jay S. Golub, Candidate and The New York City Board of Elections, Respondent – Index No. 20187/09
- New York Supreme Court, Queens County – Jay S. Golub, Candidate-Agrieved against, Bart J. Haggerty Jr., Respondent-Candidate and The New York City Board of Elections, Respondent – Index No. 20162/09



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TROY JOHNSON  
COORDINATOR  
CANDIDATE RECORDS UNIT

# **NOTICE TO ALL CANDIDATES**

August 28, 2009

TO: All Persons who are candidates in the September 15, 2009  
Special Election for Queens Assembly District 38:

Pursuant to the applicable provisions of the Election Law of the State of New York, the Rules and Regulations of the New York State Board of Elections and the Rules, Regulations, Policies and Procedures adopted by the Commissioners of Elections in the City of New York, please take notice of the following information:

All activities relating to any type of paper ballot will be conducted at the Queens Borough Office of the Board of Elections (located at 126-06 Queens Boulevard, Kew Gardens, NY 11415).

All activities relating to the mechanical voting machines and Ballot Marking Device(s) (BMD's) will be conducted at the Queens Borough Voting Machine Facility of the Board of Elections (located at 66-26 Metropolitan Avenue, Middle Village, NY 11379).



## **1. Optical Scanning System Test**

Pursuant to the provisions of New York State Board of Elections Rule 6210.11, you or your representative designated in writing may attend a test of the optical scanning system used to canvass and/or recanvass paper ballots used in the Special Election. You or your representative designated in writing, may appear and observe the test(s), which will be conducted on

**Friday, September 11 at 10:00 AM**

## **2. Inspection of Voting Machines, BMD's & Paper Ballots**

- (a) Pursuant to the provisions of Section 7-128(2) of the NYS Election Law, you or your representative designated in writing may inspect the voting machines & BMD to be used in the September 15, 2009 Special Election on

**Tuesday, September 8, 2009 between the hours of  
10:00 A.M. and 3:00 P.M.**

- (b) Pursuant to the provisions of Section 7-128(1) of the NYS Election Law, you or your representative designated in writing may inspect the paper ballots, including the Ballot Marking Devices (BMDs) ballots, to be used in the September 15, 2009 Primary on

**Tuesday, September 8, 2009 between the hours of  
10:00 A.M and 3:00 P.M.**

**Note:** This inspection will take place at the Queens Borough Voting Machine Facility, **NOT** the Borough Office.

### **3. CANVASS AND/OR RECANVASS OF VOTES CAST**

#### **MACHINES AND PAPER BALLOTS**

- (a) Pursuant to the provisions of Sections 9-102 and 9-208 of the NYS Election Law, (as amended by Chapter 116 of the Laws of New York State 2009) you or your representative designated in writing may be present and observe the recanvass of votes cast on the voting machines and the canvass of any and all write-in votes cast on the voting machines. This canvass/recanvass will commence on **Friday, September 18, 2009 at 10:00 A.M.** and will continue until such canvass/recanvass of all machines is completed.

The Board of Elections will have a team or teams of Board staff conduct the canvass/recanvass. You may appoint a sufficient number of watchers to have at least one watcher with each team.

- (b) Pursuant to the provisions of Sections 9-200 and 9-209 of the NYS Election Law, you or your representative designated in writing may be present and observe the canvass or recanvass of any emergency and BMD ballots votes cast on Election Day. This canvas and recanvass will commence on **Thursday, September 17, 2009 at 10:00 A.M.** and will continue until completed.
- (c) Pursuant to the provisions of Sections 9-200 and 9-209 of the NYS Election Law, you or your representative designated in writing may be present and observe the canvass of votes cast on any and all valid absentee and/or affidavit ballots. This canvass will commence on **Thursday, September 17, 2009**, immediately following the recanvass of emergency ballots (if any), and will continue until completed, including Saturday and Sunday. Candidates may appoint a sufficient number of watchers to ensure adequate representation throughout the canvass of the paper ballots

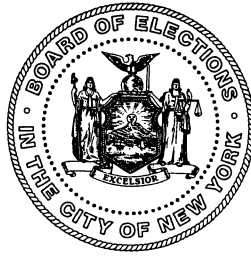
If you have any questions or require additional information, please contact the Chief Clerk – Barbara Conacchio - or Deputy Chief Clerk – Katherine A.

James - either in the Queens Borough Office [Telephone: (718) 730-6730] or the Voting Machine Facility [Telephone: (718) 417-2026].

Thank you for your cooperation and understanding in these matters.

Very truly yours,

Troy Johnson  
Coordinator,  
Candidate Records Unit



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PRESIDENT

JULIE DENT  
SECRETARY

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JUAN CARLOS "J.C." POLANCO  
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PAMELA GREEN PERKINS  
ADMINISTRATIVE MANAGER

JOHN J. WARD  
FINANCE OFFICER

DATE: September 1, 2009  
TO: Commissioners  
  
FROM: John Ward  
Finance Officer.  
  
RE: Vacancies

					Inc.	New.
1	Assistant General Counsel					\$75,000
2	Valerie Marshall	Adm. Asst.	N.Y.	Dem.	\$39,440	\$37,562
3	Robert Helenius	VMT	Bklyn	Rep.	\$27,818	\$26,493
4	Lisa Sattie	Adm. Asst.	S.I.	Dem.	\$39,440	\$37,562
5	Steve Morena	Clerk.	Qns	Rep.	\$27,111	\$25,820
6	Roselie DeDomenico	Clerk.	Qns	Dem.	\$27,111	\$25,820
7	Matthew FX Smith	Adm Assoc	Bklyn	Rep.	\$46,878	\$44,646
8	Theresa Robertson	Clerk.	Bklyn.	Dem.	\$27,111	\$25,820

**Selina Williams**

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**From:** Marcus Cederqvist  
**Sent:** Friday, August 28, 2009 1:32 PM  
**To:** \*Commissioners  
**Cc:** \*ExecutiveManagement; \*Chief & Deputy Chief Clerks (all); \*Managers; \*ExecSupportGroup; \*Gartner Group  
**Subject:** FW: 8-28-09 Status Report  
**Attachments:** 8-28-09 Status Report.pdf

Attached is this week's SBOE report to DOJ and the court.

One item of note – the category entitled “Testing, Certification, and Selection of Voting Systems and Devices” now carries the description “Status of tasks in this category: in jeopardy and behind schedule.” Last week the same category read “Status of tasks in this category: on schedule with revised timeline.”

-----Original Message-----

**From:** ROBBYANN MITOLA [mailto:RMITOLA@elections.state.ny.us]  
**Sent:** Friday, August 28, 2009 12:15 PM  
**To:** ANNA SVIZZERO; JOSEPH BURNS; JOHN CONKLIN; KIMBERLY GALVIN; PAUL COLLINS; ROBERT WARREN; STAN ZALEN; TODD VALENTINE  
**Subject:** 8-28-09 Status Report

Attached is the weekly HAVA Compliance Update for the week ending August 28, 2009.

Have a wonderful weekend!

RobbyAnn



State of New York  
**STATE BOARD OF ELECTIONS**

**James A. Walsh**  
Chair  
**Douglas A. Kellner**  
Chair  
**Gregory P. Peterson**  
Commissioner  
**Evelyn J. Aquila**  
Commissioner

40 STEUBEN STREET  
ALBANY, N.Y. 12207  
Phone: 518/474-6367 Fax: 518/486-4546  
website: www.elections.state.ny.us

**Todd D. Valentine**  
Executive Director  
**Stanley L. Zalen**  
Executive Director  
**Kimberly A. Galvin**  
Special Counsel  
**Paul M. Collins**  
Deputy Counsel

August 28, 2009

Honorable Gary L. Sharpe  
United States District Court  
for the Northern District of New York  
James T. Foley U.S. Courthouse  
445 Broadway, Room 441  
Albany, New York 12207

Re: *United States v. New York State Board of Elections, et al.*  
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe,

We enclose herewith Status Report of the Defendant New York State Board of Elections for the week ending August 27, 2009.

Respectfully submitted,

s/ \_\_\_\_\_  
Kimberly A. Galvin (505011)  
Special Counsel

s/ \_\_\_\_\_  
Paul M. Collins (101384)  
Deputy Special Counsel

**HAVA COMPLIANCE UPDATE**  
**Activities & Progress for the Week of 8/21/09-8/27/09**

Following is a detailed report concerning the previous week's progress in implementing the terms of the Court's Orders.

**PLAN A**

**Overall Compliance Status Summary**

Overall, activities and progress toward HAVA compliance are on schedule.

**Contracting with Voting System Vendors**

Status of tasks in this category: on schedule

- OSC rejected the ES&S adds due to insufficient justification of the price increase. SBOE continues to work with both ES&S and OGS to find a resolution.
- The assignment of the Sequoia contract to Dominion is still in process.

**Testing, Certification, and Selection of Voting Systems & Devices**

Status of tasks in this category: in jeopardy and behind schedule

- Overall progress of testing :
  - NYSTEC & SysTest have assigned a resource to each test case/procedures. They are continuing to discuss methods to work closely together on each case to make the approval process work efficiently.
  - Multiple test deck training sessions for counties were conducted this week.
  - Daily conference calls continue with NYSTEC, SysTest and SBOE.

NEW YORK STATE BOARD OF ELECTIONS

**Delivery and Implementation of Voting Systems & Devices**

Status of tasks in this category: on schedule

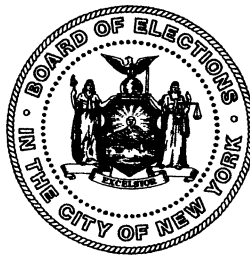
- Acceptance testing continues.

**HAVA COMPLAINT PROCESS**

**NYC HAVA Complaint**

The public comment period on the proposed regulation closed on July 27, 2009. SBOE continues to review comments, and anticipate a vote to adopt the regulation at the board meeting on September 10, 2009.





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ADMINISTRATIVE MANAGER

TROY JOHNSON  
COORDINATOR  
CANDIDATE RECORDS UNIT

# **NOTICE TO ALL CANDIDATES**

August 24, 2009

TO: All Persons who are candidates in the  
September 15, 2009 Primary Election:

Pursuant to the applicable provisions of the Election Law of the State of New York, the Rules and Regulations of the New York State Board of Elections and the Rules, Regulations, Policies and Procedures adopted by the Commissioners of Elections in the City of New York, please take notice of the following information:

All activities relating to any type of paper ballot will be conducted at each Borough Office of the Board of Elections (locations of which are set forth in Schedule A).

All activities relating to the mechanical voting machines and Ballot Marking Device(s) (BMD's) will be conducted at each Borough Voting Machine Facility of the Board of Elections (locations of which are set forth in Schedule B).

**1. Optical Scanning System Test**

Pursuant to the provisions of New York State Board of Elections Rule 6210.11, you or your representative designated in writing may attend a test of the optical scanning system used to canvass and/or recanvass paper ballots used in the September Primary. You or your representative designated in writing, may appear and observe the test(s) in the applicable Borough(s) where you are a candidate, which will be conducted in accordance with the following schedule:

<b><u>BOROUGH</u></b>	<b><u>DATE &amp; TIME OF TEST</u></b>
<b><u>New York</u></b>	<b><u>Tuesday, September 8 at 10:00 AM</u></b>
<b><u>Bronx</u></b>	<b><u>Wednesday, September 9 at 10:00 AM</u></b>
<b><u>Brooklyn</u></b>	<b><u>Thursday, September 10 at 10:00 AM</u></b>
<b><u>Queens</u></b>	<b><u>Friday, September 11 at 10:00 AM</u></b>
<b><u>Richmond</u></b>	<b><u>Tuesday, September 8 at 2:30 PM</u></b>

**2. Inspection of Voting Machines, BMD's & Paper Ballots**

- (a) Pursuant to the provisions of Section 7-128(2) of the NYS Election Law, you or your representative designated in writing may inspect the voting machines & BMD' to be used in the September 15, 2009 Primary on **Tuesday, September 8, 2009 between the hours of 10:00 A.M. and 3:00 P.M.**
- (b) Pursuant to the provisions of Section 7-128(1) of the NYS Election Law, you or your representative designated in writing may inspect the paper ballots (including the Ballot Marking Devices-BMDs ballots) to be used in the September 15, 2009 Primary on **Tuesday, September 8, 2009 between the hours of 10:00 A.M and 3:00 P.M.**

**Note:** This inspection will take place at the Borough Voting Machine Facility, not the Borough Office.

**3. CANVASS AND/OR RECANVASS OF VOTES CAST**

## **MACHINES AND PAPER BALLOTS**

- (a) Pursuant to the provisions of Sections 9-102 and 9-208 of the NYS Election Law, (as amended by Chapter 116 of the Laws of New York State 2009) you or your representative designated in writing may be present and observe the recanvass of votes cast on the voting machines and the canvass of any and all write-in votes cast on the voting machines. This canvass/recanvass will commence on **Friday, September 18, 2009 at 10:00 A.M.** and will continue until such canvass/recanvass of all machines is completed. *Please note that the number of Board of Elections teams per borough that will conduct this canvass/recanvass is noted below:*

**Manhattan:** 24 teams  
**Bronx:** 11 teams  
**Brooklyn:** 12 teams  
**Queens:** 8 teams  
**Staten Island:** 8 teams.

You may appoint a sufficient number of watchers to have at least one watcher with each team.

- (b) Pursuant to the provisions of Sections 9-200 and 9-209 of the NYS Election Law, you or your representative designated in writing may be present and observe the canvass or recanvass of any emergency and BMD ballots votes cast on Primary Day. This canvas and recanvass will commence on **Thursday, September 17, 2009 at 10:00 A.M.** and will continue until completed.
- (c) Pursuant to the provisions of Sections 9-200 and 9-209 of the NYS Election Law, you or your representative designated in writing may be present and observe the canvass of votes cast on any and all valid absentee and/or affidavit ballots. This canvass will commence on **Thursday, September 17, 2009**, immediately following the recanvass of emergency ballots (if any), and will continue until completed, including Saturday and Sunday. *Candidates may appoint a sufficient number of watchers to ensure adequate representation throughout the canvass of the paper ballots. Please note that the*

*number of Board of Elections teams per borough that will conduct this canvass/recanvass is noted below:*

**Manhattan:** 14teams  
**Bronx:** 3 teams  
**Brooklyn:** 6 teams  
**Queens:** 6 teams  
**Staten Island:** 4 teams

You may appoint a sufficient number of watchers to have at least one watcher with each team.

If you have any questions or require additional information, please contact the appropriate Chief Clerk/Deputy Chief Clerk in the respective borough. Thank you for your cooperation and understanding in these matters.

Very truly yours,

Troy Johnson  
Coordinator,  
Candidate Records Unit

Attachments (Schedules A & B)

## **SCHEDULE A**

### **Manhattan Borough Office**

200 Varick Street – 10<sup>th</sup> Floor  
New York, NY 10014  
212 - 886-2100

Gregory Lehman, Chief Clerk  
Timothy Gay, Deputy Chief Clerk

**Bronx Borough Office**

1780 Grand Concourse – 5<sup>th</sup> Floor  
Bronx, NY 10457  
718 – 960-0730

Dawn Sandow, Deputy Chief Clerk  
Anna Torres, Deputy Chief Clerk

**Brooklyn Borough Office**

345 Adams Street – 4<sup>th</sup> Floor  
Brooklyn, NY 11201  
718 – 797-8800

Diane Haslett-Rudiano, Chief Clerk  
Mary Rose Sattie, Deputy Chief Clerk

**Queens Borough Office**

126-06 Queens Blvd.  
Kew Gardens, NY 11415  
718 – 730-6730

Barbara Conacchio, Chief Clerk  
Katherine A. James, Deputy Chief Clerk

**Staten Island Borough Office**

1 Edgewater Plaza – 4<sup>th</sup> Floor  
Staten Island, NY 10305  
718 - 876-0079

Sheila DelGiorno, Chief Clerk  
Anthony Andriulli, Deputy Chief Clerk

**SCHEDULE B**

**VOTING MACHINE FACILITIES**

**MANHATTAN**

450 West 33<sup>rd</sup> Street  
New York, NY 10001  
212 – 465-0503

**BRONX**

**BRONX (BMD only)**

---

1780 Grand Concourse  
Bronx, NY 10457  
718 – 960-0730

1932 Arthur Ave.  
Bronx, NY 10457  
No Telephone #

**BROOKLYN**

**BROOKLYN (BMD only)**

---

645 Clinton Street  
Brooklyn, NY 11231  
718- 522- 4796

5112 Second Ave  
Brooklyn, NY 11220  
No Telephone #

**QUEENS**

66-26 Metropolitan Ave  
Middle Village, NY 11379  
718 - 417-2026

**STATEN ISLAND**

1 Edgewater Plaza  
Staten Island NY 10305  
718 - 876-0719

Counts

Page

UNITED STATES DISTRICT COURT

for the Southern District of New York

Brother T. Williams-Bey,  
Niyirrah EL, Juan Antonio Martinez  
Juan Antonio Martinez, Jr.

09 CV 7560

Plaintiff

Civil Action No.:

v.

Commissioners of Elections  
Constituting the Board of Elections  
in the City of New York

Defendant

JUDGE COTE

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address)

RECEIVED  
G.O. BOARD OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 28 PM 6:37

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff(s) attorney, whose name and address are:

PRO SE Brother T. Williams-Bey  
c/o. 305 E. 170th Street  
Bronx, New York, U.S.A. 10456

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

J. MICHAEL McMAHON  
CLERK OF COURT

AUG 28 2009

Date: \_\_\_\_\_

Catherine Lapsley

Signature of Clerk or Deputy Clerk

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the summons unexecuted because \_\_\_\_\_ ; or

Other *(specify)*:

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ 0.00.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:

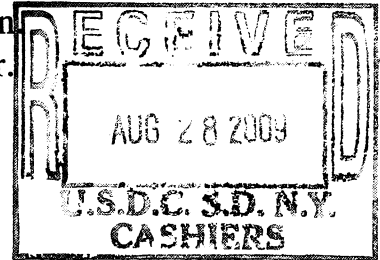


**JUDGE COTE**

**09 CV 7560**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
Brother T. Williams Bey, Niyyirrah El, Lincoln Salmon  
Juan Antonio Martinez Sr., S Juan Antonio Martinez Jr.  
Sonya Simmons, Joyce Nix, et al



Plaintiff

Against

COMPLAINT

THE COMMISSIONERS OF  
ELECTIONS CONSTITUTING THE  
BOARD OF ELECTIONS IN THE  
CITY OF NEW YORK

Defendants

RECEIVED  
G.O. BOARD OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 28 PM 5:34

----- X  
1. NATURE OF THE CASE

1. The plaintiffs herein are filing a summons and complaint and are moving by order to show cause bringing on a motion for an injunction directing The New York City Board of Election to place Mark Escoffery-Bey and Israel Martinez on as candidate for The New York City Council 16<sup>th</sup> and 17<sup>th</sup> respectively in the County of Bronx, City and State of New York in the Democratic Primary to be held on September 15, 2009.

2. The Board of Elections removed Plaintiffs names from the voters list, Thus denying their right to vote. Plaintiffs request that their voting rights be restored.

3. The jurisdiction of this court and plaintiff right to bring action are found under 42 U.S.C. #1983, 28 U.S.C. #1331, 1988 first amendment right to political association and the Fourteenth Amendment right to due process and equal protection of law.

4. The plaintiff are all duly qualified voters in New York City in the State of New York.

5. The plaintiffs seek to have the candidates name appear on the ballot for the September 15, 2009 primary election. Plaintiffs claim that the Election Law of the State of New York has been applied unconstitutionally to invalidate the candidacy of their choice. Herein in that the candidates filed a petition and with sufficient community support to permit their names to appear on the ballot. The plaintiff (s) further contend that to invalidate the plaintiffs choice of candidates operates to perpetuate the status quo. The plaintiff further contends that the voters are deprived of supporting a candidate of their own choice in their own party through no fault of their own. The voters have no control of the petition once they have affixed their signatures to the said petition. The plaintiffs further contend that a violation of the State Constitution is a serious matter.

6. The rights of the voters herein pertains to an election for New York City Council Districts 16<sup>th</sup> and 17<sup>th</sup> Bronx, New York, which area is within the jurisdiction of this United States District Southern District.

7. The plaintiffs herein seeking this injunctive relief against the government actions of removing the names Mark Escoffery-Bey and Israel Martinez as candidates in the democratic primary for the City Council Districts 16 and 17 in Bronx.

8. The plaintiffs, with first amendments rights as voters would suffer irreparable harm if these candidates names are removed from the ballot.

9. There is a likelihood of success on the merits to their actions to seek to put Mark Escoffery-Bey and Israel Martinez on the ballot so there voters can exercise their constitutional rights to vote for a candidate of their choice.

10. The election is to be held on September 15, 2009, the plaintiffs are moving for injunction relief because of the short time in question for them to seek their protected right under the United State Constitution.

11. If the election was to go forward without the relief requested, this would be an irreparable damage to plaintiffs constitutional first amendment right to vote and upon information and belief, the democratic voters of the 16<sup>th</sup> and 17<sup>th</sup> Councilmatic District would have no choice in their primary. It is a well known fact that the winner of the Democratic Primary in these District will win the November election.

12. The right for a candidate to appear on the ballot is integral to the right to vote and is protected by the United States Constitution.

13. Mark Escoffery-Bey is an African-American seeking to be on the ballot of the Democratic Primary for the 16<sup>th</sup> Councilmatic District and as an African-American he is a member of an ethnic group constituting a suspect class for the purpose of the equal protection analysis. Isreal Martinez is an Hispanic-American seeking to be on the ballot of the Democratic Primary for the 17<sup>th</sup> Councilmatic District and as an Hispanic-American he is a member of an ethnic group constituting a suspect class for the purpose of the equal protection analysis.

14. Plaintiffs have no plain or adequate remedy in any other court and timely relief can be obtain by plaintiff only through the granting of am writ of madus by this court.

15. On or about July 16, 2009 a Designating Petition was properly and duly filed by and on behalf of Mark Escoffery-Bey as aforementioned 16<sup>th</sup> City Councilmatic candidate in the Democratic Primary to be held on September 15 ,2009, said petition had approximately 2318 signatures for a position for which 900 valid signatures were required. Upon information and belief, the New York City Board of Elections miscalculated the exact numbers.

16. Among the petitions filed on behalf of Mark Escoffery-Bey there were 12 pages of signatures (sheet 30,31, 40, 116, 158, 159, 173, 179, 190 191, 196 206) were improperly invalidated by the board of Elections of the City of New York in their entirety on the grounds that the subscribing witness wrote incorrect number of signature on the page the total number of signatures 106. This mere minor technicality should not have invalidated

the signatures. This petition was improperly not counted by the New York City Board Elections depriving those voters listed therein of their United States Constitutional Rights.

17. Furthermore, plaintiffs voters rights to vote were removed by the New York City Board of Elections In violation of the Federal Motor Voter Law and a Federal Decree by the United State Supreme Court. Plaintiffs request their right to vote be restored and their signatures counted. The New York City Board of Elections refuse to count 30 of these signatures.

18. Upon information and belief, the Board of Elections of the City of New York by invalidating the signatures of Mark Escoffery-Bey deprive the voters of the Democratic Party in the 16<sup>th</sup> Councilmatic District in Bronx of their choice.

19. Upon information and belief the act of not counting said signatures is a constitutional violation of the rights of the voters on said petition all of whom were minorities.

20. Among the petitions filed on behalf of Mark Escoffery-Bey there were approximately 385 signature invalidated by the City of New York Board of Elections due to dissimilar signature. Dissimilar signatures without more does not lead to a conclusive presumption that the nominating petitions were not sign by the voters. We believe that it is not. There are also no indication in the referee's report as to weather or not these 385 signatures

were from the valid signatures, signatures already invalidated by the Board of Elections or the total signatures which rendered the count meaningless.

21. The proper counting of these signature would give the candidate more than 900 signatures thus placing him on the ballot.

22. On or about July 16, 2009 a Designating Petition was properly and duly filed by and on behalf of Israel Martinez as aforementioned 17<sup>th</sup> City Councilmatic candidate in the Democratic Primary to be held on September 15, 2009, said petition had approximately 2400 signatures for a position for which 900 valid signatures were required. Upon information and belief, the New York City Board of Elections miscalculated the exact numbers.

23. Amongst the petitions filed on behalf of Israel Martinez was a petition of valid signatures comprising of approximately 101 signatures which was not counted because the New York City Board of Elections ruled that plaintiffs Sandra Simmons and Joyce Nix Furthermore, plaintiffs voters rights to vote were removed by the New York City Board of Elections In violation of the Federal Motor Voter Law and a Federal Decree by the United State Supreme Court. Plaintiffs request their right to vote be restored and their signatures counted.

24. All three plaintiffs that the New York City Board of Elections removed as voter were witnesses to Israel Martinez petitions. Sandra Simmons and Joyce Nix are homeless and live in a female shelter. They placed their current address on the petitions. The petition states that "I now

reside at”. Furthermore it states “I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and if it contains a material false statement shall subject to the same penalties as if I had been duly sworn. Their signature on the petition matches the buff-card on record at the New York City Board of Elections.

25. Amongst the petitions filed on behalf of Israel Martinez was a petition of valid signatures comprising of approximately 93 signatures which were improperly not counted by the New York City Board of Elections depriving those voters listed herein of their constitutional rights to have their signatures count for the candidate of their choice. These 93 signatures contained minor alterations. The 1992 New York State Election Reform Act liberalize the election laws so that mere technicalities like alterations does not invalidate signatures.

26. Upon information and belief, the act of not counting said signature is a constitutional violation of the right of the voters on said petitions all of whom are minorities.

27. If these signatures are counted, Israel Martinez will have well over the 900 required signatures.

28. Upon information and belief, the judicial process that took place in Bronx County Supreme Court and the Appellant Court First Department Removing Mark Escoffery-Bey and Israel Martinez as candidates, violated the constitutional rights of the candidate and right of the plaintiff of their federal of their federal and states constitutional rights.

29. Upon Information and belief, Appellant Division First Department Chief Justice Gonzales before becoming a justice in the Bronx Supreme Court and the Appellant Division, was active politically on behalf of the Bronx Democratic Party in the same Councilmatic District where Israel Martinez was seeking to be an insurgent candidate against the candidate of the Bronx Democratic Party. Furthermore, Counsel to the Bronx Democratic party, Howard Vargas was the treasurer and consultant for the election of Justice Gonzales to the State Supreme Court. Justice Gonzales was the deciding vote to keep Mark Escoffery-Bey and Israel Martinez off the ballot (see new York daily news article.) Chief Justice Gonzales and Justice Seewald should as a matter of fairness and right have excluded Themselves from determining the case of Mark Escoffery-Bey and Israel Martinez.

30 Upon information and belief, the behaviors and decision of Bronx Supreme Court Justice Robert G. Seewald, and Presiding Justice Gonzalez were highly prejudicial, unfair, not based on valid legal precedence, and unconstitutional, because his decisions deem these petitioners, voters of the district, and the candidates seeking office, a fair, unprejudiced court proceeding and forum, which is the hallmark of our legal system and the aim of our New York and Constitutional rights.

31. Upon information and belief, Bronx Supreme Court Justice Robert G. Seewald, and Presiding Justice Gonzalez was selected through a flawed, unconstitutional process of selecting judges, which makes him beholden to the existing political leadership of his county and, in this case, the Bronx Democratic Party.

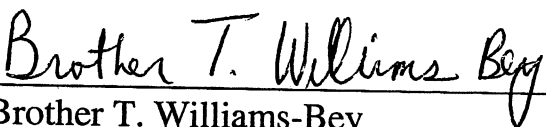


**W H E R E F O R E**, the plaintiffs herein seek the following remedies:

- (1) That the Board of Elections in the City of New York restore plaintiffs right to vote;
- (2) that the Board of Elections in the City of New York place on the ballot for the Democratic Primary for September 15, 2009, the name of Mark Escoffrey-Bey and Israel Martinez as Democratic Party candidates for the 16<sup>th</sup> and 17<sup>th</sup> New York City Councilmatic Districts;
- (3) that the attorney for the plaintiffs be granted legal fees;
- (4) that the plaintiffs recover the necessary fees and costs of this action and that punitive damages be assessed as to the violation of the voting rights of plaintiffs; and
- (5) that this court take such further and other action as it deems just and proper herein.

I, Brother T. Williams-Bey, hereby verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

August 28, 2009  
New York, U.S.A.

  
Brother T. Williams-Bey  
C/o. 305 E. 170<sup>th</sup> Street  
Bronx, New York, 10456  
(866) 701-0777

32 Upon information and belief, it is the same Democratic Party of Bronx county leadership whose lawyers acted herein to remove Mark Escoffrey-Bey and Israel Martinez, candidates, that aided and helped select Bronx Supreme Court Justice Robert G. Seewald, and Presiding Justice Gonzalez to become a judge, so that the process and procedure followed in New York should be invalidated because it leads to a system of political inequality and unfairness and results in what took place in the Bronx Supreme Court before Justice Robert G. Seewald, and in the Appellate Division of Supreme Court, First Judicial Department, with regards to Mark Escoffrey-Bey and Israel Martinez.

33. Upon information and belief, the findings of Justice Robert G. Seewald, and Presiding Judge Gonzalez against Mark Escoffrey-Bey and Israel Martinez were politically motivated and tainted and done to further the political motive of the Bronx Democratic Party, all in violation of the valid and constitutional rights of the petitioners, and the rights of these voters.

34. Based on the aforementioned politically influenced judiciary which is a direct and significant cause Mark Escoffery-Bey and Israel Martinez were improperly removed as candidates by the Supreme Court, State of New York, Bronx County by Justice Robert G Seewald and by the New York Appellant Division, First Department, these candidate the United States due process rights for a fair court which is non-bias, non-prejudicial and not influenced by politics were seriously violated.

VERIFICATION

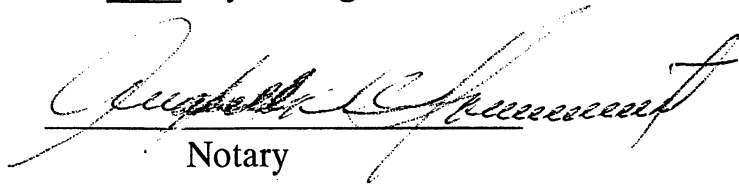
STATE OF NEW YORK

COUNTY OF BRONX

T. Williams-Bey Being duly sworn, deposes and says: That (s)he is the plaintiff herein, that (s)he has read the foregoing petition and knows the content thereof that the same is true to his/her own knowledge except to those matters alleged on information and belief and that as to those matters (s)he believes to be true

Brother T. Williams Bey  
Brother T. Williams-Bey

Sworn to before me  
this 29 day of August 2009

  
Notary

ARABELLA M. POMEROY  
County Clerk of Deeds  
City of New York No. 2-10463  
Certificate Issued in New York  
County Commission Expires 7/4/2011

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IN THE CITY OF NEW YORK  
2009 AUG 28 PM 5: 38

VERIFICATION

I, Brother T. Williams-Bey, Plaintiff, hereby declare or certify, verify, or state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

New York, U.S.A.  
August 28, 2009

Yours, etc.,

Brother T. Williams Bey  
Brother T. Williams-Bey, Plaintiff  
C/o. 305 E. 170<sup>th</sup> Street  
Bronx, New York, 10456  
(866) 701-0777.

Subscribed and affirmed

Before me this 28 day

Of August, 2009.

X. Arabella M. Pousriety

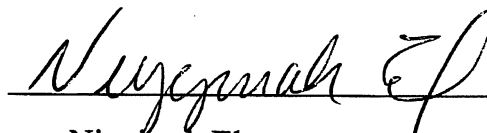
ARABELLA M. POUSERIETY  
Commissioner of Elections  
City of New York, New York  
Certificate filed in New York  
County Commission Expires 7/1/2011

VERIFICATION

STATE OF NEW YORK

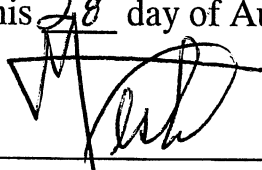
COUNTY OF BRONX

Niyyirrah El, Being duly sworn, deposes and says: That (s)he is the plaintiff herein, that (s)he has read the foregoing petition and knows the content thereof that the same is true to his/her own knowledge except to those matters alleged on information and belief and that as to those matters (s)he believes to be true



Niyyirrah El  
1685 University Ave #3D  
Bronx, New York, 10453  
(917) 849-9982.

Sworn to before me  
this 28 day of August 2009

  
\_\_\_\_\_  
Notary

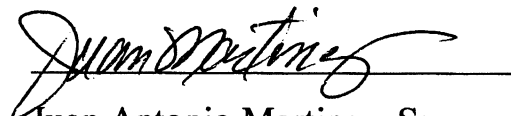
VICTOR N. ALONSO  
Notary Public, State of New York  
No. 01AL6206050  
Qualified in Bronx County  
Term Expires May 18, 2013

VERIFICATION

STATE OF NEW YORK

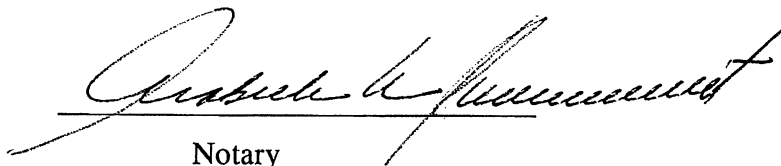
COUNTY OF BRONX

Juan Antonio Martinez, Sr., Being duly sworn, deposes and says: That (s)he is the plaintiff herein, that (s)he has read the foregoing petition and knows the content thereof that the same is true to his/her own knowledge except to those matters alleged on information and belief and that as to those matters (s)he believes to be true



Juan Antonio Martinez, Sr.  
1000 Freeman Ave  
Bronx, New York 10459

Sworn to before me  
this 28 day of August 2009



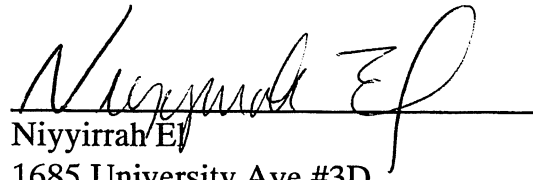
Notary  
ARABELLA M. POUERIET  
Commissioner of Deeds  
City of New York No. 2-10463  
Certificate filed in New York  
County Commission Expires 7/1/2011

VERIFICATION

I, Niyyirrah El, Plaintiff, hereby declare or certify, verify, or state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

New York, U.S.A.  
August 28, 2009

Yours, etc.,

A handwritten signature in black ink, appearing to read "Niyyirrah El", is written over a horizontal line. The signature is cursive and stylized.

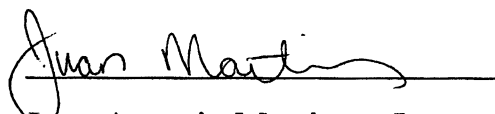
Niyyirrah El  
1685 University Ave #3D  
Bronx, New York, 10453  
(917) 849-9982.

VERIFICATION

STATE OF NEW YORK

COUNTY OF BRONX

Juan Antonio Martinez, Jr., Being duly sworn, deposes and says: That (s)he is the plaintiff herein, that (s)he has read the foregoing petition and knows the content thereof that the same is true to his/her own knowledge except to those matters alleged on information and belief and that as to those matters (s)he believes to be true



Juan Antonio Martinez, Jr.  
1000 Freeman Ave  
Bronx, New York 10459

Sworn to before me  
this 28 day of August 2009



Notary

ARABELLA M. POUERIET  
Commissioner of Deeds  
City of New York No. 8-10463  
Certificate filed in New York  
County Commission Expires 11/2/2011

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IN THE CITY OF NEW YORK  
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United States District Court  
Southern District of New York

----- X  
Brother T. Williams Bey, Niyirrah El, Lincoln Salmon.  
Juan Antonio Martinez Sr., S Juan Antonio Martinez Jr.  
Sonya Simmons, Joyce Nix, et al,

Plaintiff

Against

Affidavitt  
Case No.

New York City Board of Elections  
Commissioners of the New York City Board of Elections

Defendants

- X
1. These plaintiff voters seek to have the New York City Board of Elections place onto the ballot Mark Escoffery-Bey and Israel Martinez for the 16<sup>th</sup> and 17<sup>th</sup> Councilmatic District, county of Bronx, New York City for the September 15, 2009 primary election as per the complaint and papers attached hereto. To restore the rights of voters that were removed by the New York City Board of Elections.
  2. We are moving herein by Order to Show Cause because of the fact that the election is to be held on September 15, 2009.
  3. The voters have no access to relief except in Federal Court and will suffer irreparable harm if these candidate are not placed on the ballot
  4. The party herein is seeking injunction relief and or a writ of mandamus.
  5. This party is likely to succeed if this case is resolved on the merits because it is well settled that the voting is a constitutional right. See Reynolds v. Sims, 377 U.S. 533 (1964)

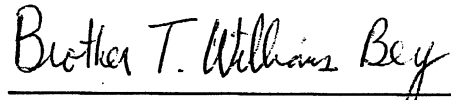
6. These African Americans and Hispanic-Americans are in protected category under federal law whose rights have been violated.
7. The right to appear on the ballot is integral to the right to vote and must be scrutinized
8. under the same test constitutionally. Mondonado v. Rodriguez 523 Supp. 177, 179-80
9. (S.D.N.Y. 1981), Williams v. Scalfani, 444 F. Supp. 906, 911 (S.D.N.Y. 1978) aff mem. 580 F. 2d 1046 (2d.Cir.) also Williams v Rhodes 393 U.S. 23, 30 (1968), Smith v. Cherry 489 F. 1098, 1102 (7<sup>th</sup> Cir. 1973),
10. All the candidates are in an ethnic group that constitute a suspect class for the purpose of equal protection analysis. Keyes v. School District 1, 413 U.S. 189, 197 (1973), Hernandez V. Texas 347 U.S. 475, 477-79 (1954) Soberal-Perez v. Heckler 717 F. 2d 36,41 (2n, Cir. 1983)
11. Plaintiffs have satisfied the requirement of irreparable harm because if the election would go forward without the relief requested, any infringement on plaintiff's constitutional first amendment right to vote would be irreparable, unless a court took the extraordinary step to invalidate the results of the election. See Williams v. Salerno, 792 F2d. 323,326 (2d Cir); Koppel v. New York State Board of Elections, 8.F. Supp 2d382,384 (S.D.N.Y. 1998) aff'd 153 F 3d. 95 (2d Cir. 1998)
12. "The First Amendment right to vote is vital underpinning of our system of government" and if the plaintiffs meet the burden of proving irreparable harm and not being able to vote is an irreparable harm, and a substantial likelihood of success on the merits, then the plaintiffs should be awarded the injunctive relief of having their candidate placed on the ballot. See Miguel Jiminez et al v. Westchester County Board of

Elections et al, 03 C1V 1673 (S.D.N.Y. 2003 Judge Sidney Stein).  
Matheson vs New York City Board of Elections. (See Attached exhibit)

13. All the remedies sought herein other than injunctive relief of placing the above named candidates on the ballot should be decided separate from this relief and on the merits of said case.
14. The plaintiffs herein are seeking their remedy under their constitutional rights and there has been no prior similar relief requested of this court by these voters.

I, Brother T. Williams-Bey, hereby declare or certify, verify and state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated August 28, 2009  
New York, U.S.A.

  
\_\_\_\_\_  
Brother T. Williams Bey  
C/o. 305 E. 170<sup>th</sup> Street  
Bronx, New York, 10456

We are proceeding by order to show cause rather than by notice of motion because of the time restraints in that the primary election will be held on September 15, 2009 and that to proceed by notice of motion would result in the matter being heard beyond the date of the Primary Election.

Subscribed and affirmed

before me this 28 day  
of August, 2009

X. 

ARABELLA M. POUSRIET  
Commissioner of Courts  
City of New York No. 2-00463  
Certificate filed in New York  
County Commission Expires 7/4/2011

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX: ELECTION MATTERS PART**

-----  
In the Matter of the Application of Cordelia Gilford,  
as Objector,

Petitioner,

-against-

Mark Escoffery-Bey as Candidate for Council Member  
from the 16<sup>th</sup> Council District and Mark Escoffrey-Bey as  
the candidate's Contact Person, and

Frederic M. Umane, et als, being the Commissioners of the  
Board of Elections in the City of New York,

Respondents,

For an order INVALIDATING and declaring null and void  
certain designating petitions filed with the Board of  
Elections purporting to designate the within named  
Candidates for Public Office and/or Party Positions from  
Bronx County to be voted upon in the Democratic  
Primary Election to be held on September 15, 2009 and  
enjoining the New York City Board of Elections from  
placing the Respondent candidates' name on the official  
ballot and voting machines for said Democratic Primary  
Election.

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In the Matter of the Application of Mark Escoffery-Bey,  
as candidate for the Democratic nomination for the  
Public Office of City Council Member of the  
City of New York, Bronx County, 16<sup>th</sup> District,

Petitioner,

-against-

Cordelia Gilford, Objector,

Respondent,

For an Order Pursuant to Article 16 of the Election Law  
to Declare the Validity of a Designating Petition to  
designate Petitioner as a candidate in the Democratic  
Party Primary Election to be held September 15, 2009.

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**TO THE SUPREME COURT, BRONX COUNTY, ELECTION MATTERS PART:**

Pursuant to the directive of the Hon. Robert G. Seewald, at the call of the  
Election Matters Calendar on August 3, 2009, the within proceedings were referred to

Index No:260450-09

Report of the Referee

Index No:260465-09

the undersigned to hear and report with recommendations. In the proceeding brought under Index No. 260450/09, petitioner, Cordelia Gilford, as objector, seeks to invalidate the designating petition filed on behalf of Mark Escoffery-Bey, a candidate for Council Member from the 16<sup>th</sup> Council District, in the Democratic Party primary to be held on September 15, 2009. In the proceeding bearing Index No. 260465/09, petitioner, Mark Escoffery-Bey, moves to validate his designating petition. These two proceedings are consolidated for the purposes of this report.

The consolidated hearing with respect to these two election matters was held at the Bronx County Board of Elections on August 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup>, 2009. Cordelia Gilford (hereinafter referred to as "petitioner-objector"), as the petitioner in the invalidating proceeding and respondent in the validating proceeding, was represented by Stanley K. Schlein, Esq. Candidate, Mark Escoffery-Bey (hereinafter referred to as "the candidate"), was represented by Verena Powell, Esq. This referee was assisted during the course of the hearing by Referee Brenda Mechmann. The transcription and filing of the minutes were waived by the parties. The Clerk's Report of the Board of Elections indicated that Mr. Escoffery-Bey's designating petition contained 2318 signatures, of which 1148 were found to be invalid and 1170 were found to be valid. The designating petition was thus found to have contained more than the required number of 900 signatures for placement of the candidate's name on the ballot in the primary election. The burden of going forward, therefore, rested with the petitioner to invalidate.

#### PETITION TO INVALIDATE

In support of the petition to invalidate, counsel for petitioner-objector

argued that an overwhelming number of the 1170 signatures found valid by the Board of Elections should be found invalid as the signatures on the designating petition were forged and/or of dissimilar handwriting to that of the actual registered voter.

Specifically, in her specifications of objections to the candidate's designating petition, the petitioner-objector claimed that 944 of the 1170 signatures were forged/dissimilar.

The Clerk's Report contained no ruling as to the objections alleging forged/dissimilar signatures and referred those signatures to the court.

Counsel for petitioner-objector relied on the specifications of objections as her bill of particulars and timely filed a written bill of particulars indicating an intent to prove that some of the signatures claimed as forged/dissimilar were also invalid on the ground that the person who signed the petition was not validly registered or enrolled.

#### Line-by-Line Review

Prior to the commencement of the line-by-line review, counsel for the candidate conceded that 26 of the signatures on the designating petition which she reviewed with a representative of the petitioner-objector were dissimilar to the signature for that individual contained in the voter registration record.<sup>1</sup>

On August 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup>, this Referee conducted a line-by-line review of 532 signatures from Volume 272 (the candidate's only petition volume) which petitioner-objector maintained were forged/dissimilar. Thomas McNeil, an aide to Stanley K. Schlein, Esq., was present for petitioner-objector, and Verena Powell, Esq. was present for the candidate. Representatives of each side were permitted to make

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<sup>1</sup>A list of the 26 signatures is attached to this report.

their arguments as to the validity or invalidity of the individual signatures subject to review. I was assisted in my review of the signatures by a representative of the Board of Elections who operated the computer terminal to access the records of the Board.

Of these 532 signatures, I invalidated 330 on the ground that the signatures on the designating petition sheets were dissimilar to the signatures for the named individuals on the voter registration records. Of the remaining 202 signatures, I found 192 to be sufficiently similar to the signatures on the voter registration records to be found satisfactory and valid. I reserved decision on 10 signatures which were printed.

Referee Brenda Mechmann reviewed 33 signatures which petitioner-objector alleged were forged/dissimilar. Of these, Referee Mechmann found 26 to be invalid as dissimilar to the signatures for the named individuals on the voter registration records and 7 to be sufficiently similar to the signatures on the voter registration records to be valid. In addition, Referee Mechmann reviewed 11 signatures which petitioner-objector claimed were invalid on the ground that the person who signed the petition was not validly registered or enrolled and found 4 to be invalid on this basis.

In sum, of the 569 signatures reviewed for claimed dissimilar handwriting, 382 were found to be invalid, a number which exceeds 65% of the signatures reviewed. The total number of signatures found invalid pursuant to the line-by-line review is 386<sup>2</sup>.

#### Witness Testimony

In further support of the petition to invalidate, counsel for petitioner-

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<sup>2</sup>A summary of the specific line-by-line determinations of this referee and Referee Mechmann is attached to this report.

objector called 7 witnesses.

A signature purporting to be that of **Gloria Benfield** appears on sheet 3, line 10 of the candidate's designating petition. Ms. Benfield testified that the signature that appears on page 3, line 10 is not her signature, that she did not sign the candidate's designating petition and that she was never asked to sign the candidate's designating petition. Ms. Benfield further testified that she is co-chair of the Youth Council with the incumbent City Council Member Helen Foster and would not sign any petition for a candidate opposing Council Member Foster. Ms. Benfield testified that she spoke to her building superintendent, Edwin Ortiz, that morning who told her that three additional individuals listed in the petition as living in her apartment building, Lourdes Arias, Jesus Nieves, and Ivette Cardona, have not lived in the building for years.

A signature purporting to be that of **Dominga Ortiz** appears on sheet 3, line 6 of the candidate's designating petition. Ms. Ortiz testified that the signature that appears on page 3, line 6 is not her signature, that she did not sign the candidate's designating petition and that she was not asked to sign any designating petitions this year.

A signature purporting to be that of **Lucille White** appears on sheet 106, line 4 of the candidate's designating petition. Ms. White testified that the signature that appears on sheet 106, line 4 is not her signature, that she did not sign the candidate's designating petition and that she was never asked to sign this candidate's or any other candidate's designating petition this year.



A signature purporting to be that of **Calinda Lewis** appears on sheet 98, line 2 of the candidate's designating petition. Ms. Lewis testified that the signature that appears on sheet 98, line 2 is not her signature and that she was never asked to sign the candidate's designating petition. Ms. Lewis further testified that the address contained in the petition and also contained on her voter registration card is her former address from which she moved 10 years ago.

A signature purporting to be that of **Helga Johnson** appears on sheet 124, line 1 of the candidate's designating petition. Ms. Johnson testified that the signature that appears on sheet 124, line 1 is not her signature and that she was never asked to sign this candidate's designating petition. Ms. Johnson testified on cross-examination that she signed a designating petition at the end of June for candidate Helen Foster.

A signature purporting to be that of **Maxine Ziegler** appears on sheet 102, line 7 of the candidate's designating petition. Ms. Ziegler testified that the signature that appears on sheet 102, line 7 is not her signature and that she was not asked to sign a designating petition for this candidate in July.

A signature purporting to be that of **George Robinson Sr.** appears twice on the candidate's designating petition, on sheet 20, line 1 and sheet 52, line 5. Mr. Robinson was shown both sheets of the petition and testified that neither of the signatures was his and that he was never asked to sign this candidate's designating petition.

I found the testimony of each of the seven witnesses to be forthright,

credible and sufficient to establish that the eight signatures purportedly attributable to these witnesses to be forgeries.

Prior to the testimony of these witnesses, 5 of these 8 signatures (Benfield, Ortiz, Ziegler and Robinson [2]) were found invalid during the line-by-line review as a result of dissimilar handwriting. The three others (White, Lewis and Johnson) had not been reviewed and based upon their testimony are found invalid, bringing the total number of invalid signatures to 389. I find the testimony of Ms. Benfield regarding her conversation about 3 other signers with her building superintendent, while credible, constitutes inadmissible hearsay, and, therefore, is not sufficient to establish that the signatures of those three individuals are invalid.

#### Summary - Petition to Invalidate

Pursuant to the line-by-line determinations and witness testimony, I find 389 signatures to be invalid. After subtracting these 389 signatures found invalid from the starting number of 1170, the candidate is left with 781 valid signatures, which is less than the required number of 900 signatures for placement of the candidate's name on the ballot in the primary election. The burden then shifted to the candidate on his petition to validate.

#### PETITION TO VALIDATE

Pursuant to the rules of the Election Matters Part as announced at the call of the calendar on August 3, 2009, petitioners were required to file and serve their bill of particulars by 2:15 p.m., Wed., August 5, 2009. On August 7<sup>th</sup>, counsel for the candidate filed and served a bill of particulars which stated that "the designating petition contains the requisite number of signatures of duly enrolled voters" and that the

Objector's accusations of forgery "are based on discounting duly enrolled Bronx voters based on inadequate search parameters in the Board of Elections database." Counsel for the candidate was directed by this Referee to provide to the court and counsel for the petitioner-objector with a list of the specific signatures found invalid by the Board of Elections that the candidate claimed to be valid.

On Friday, August 7<sup>th</sup>, this referee advised counsel for both petitioner-objector and the candidate that because there was such a large number of signatures for which line-by-line review was requested, additional referees would be available at the Board of Elections on Saturday to conduct these line-by-line reviews and that the respective parties should have personnel available to assist in this process. On Saturday, August 8<sup>th</sup>, two other referees and myself were present at the Board. Several representatives were present for the petitioner-objector, ready to proceed with the line-by-line review. Counsel for the candidate was present and proceeded with the line-by-line review of the signatures petitioner-objector claimed to be forged/dissimilar, but the candidate was not present and no other representative from the candidate was able to proceed with the line-by-line review with either of the two additional available referees. On Sunday, August 9<sup>th</sup>, myself and one other referee was present at the Board. Again, while counsel for the candidate was present and proceeded with the line-by-line review of the signatures petitioner-objector claimed to be forged/dissimilar, the candidate was not present and no other representative of the candidate was available to proceed with the line-by-line review with the additional available referee. By the end of the day Sunday, counsel for the candidate had still not provided either the referee or counsel for the petitioner-objector with a list of the specific signatures found invalid by the Board of

Elections that the candidate claimed were valid.

On Monday, August 10<sup>th</sup>, the line-by-line review of the signatures petitioner-objector claimed to be forged/dissimilar continued until approximately 3:30 p.m. At this point, counsel for the candidate had still not provided either the referee or counsel for the petitioner-objector with a list of the specific signatures found invalid by the Board of Elections that the candidate claimed should be restored. However, she did have a list of some signatures she wished to be reviewed and the line-by-line determination with respect to the petition to validate began. This referee reviewed 41 signatures and found 4 of these signatures to be valid as the individual was duly enrolled and registered at the address contained in the petition. Five of the signatures were found to be invalid as fraudulent as both the printed name and signature on the designating petition was found to be spelled differently than the name on the voter registration records. Two signatures were found invalid on the ground that the signer was not properly enrolled. I reserved decision on 30 signatures in which the individual was duly registered and enrolled but the address on the petition sheet was different than the address on the voter registration card.<sup>3</sup>

At approximately 4:45 p.m., I advised the parties that the line-by-line determinations would conclude at 5:30 p.m. At the call of the calendar on August 3<sup>rd</sup>, the parties were advised that election matters would conclude at 1:00 p.m. on August 10<sup>th</sup>, but this referee provided the parties with additional time in light of the significant number of signatures which needed to be reviewed and the time lost by the fact that

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<sup>3</sup>A summary of the line-by-line determinations with respect to the petition to validate is attached to this report.

counsel for the candidate had two unrelated court appearances which could not be changed. At approximately 5:00 p.m., counsel for the candidate stated that she wished to discontinue the line-by-line review as she would not have a sufficient number of signatures available for review by 5:30 to recoup enough signatures to reach the required 900 number.

### CLOSING ARGUMENTS

Counsel for petitioner-objector contended that a finding by the referee that 1/3 of the 1170 signatures found valid in the clerk's report were dissimilar to the signatures contained in the voter registration records, coupled with the testimony of seven witnesses establishing that their signatures were forged, demonstrates that the petition gathering process of the candidate was permeated with fraud. Counsel for petitioner-objector noted that the invalidation of 389 signatures by the referee (386 during the line-by-line review and 3 as a result of hearing testimony) mandates the granting of the petition as the candidate lacks the necessary 900 valid signatures to remain on the ballot.

Counsel for the petitioner-objector further argued that the candidate should be precluded from arguing the merits of the petition to validate due to the untimely filing of the bill of particulars.

Counsel for the candidate argued that a finding of dissimilar handwriting does not constitute fraud and that the petitioner-objector presented no evidence demonstrating that the candidate participated in any fraudulent activity or had knowledge of any fraudulent activity committed in the petition gathering process. Counsel for the candidate noted that petitioner-objector only proved that 8 of the 2319

signatures collected were forged and that this constituted an extremely small percentage of the total number of signatures gathered.

With respect to the petition to validate, counsel for the candidate argued that the 30 signatures which the referee reviewed which were previously found invalid on the ground that the signer was not registered should be restored as each of these 30 signers was duly registered and enrolled. It is the candidate's position that even though in each case the address of the signer on the petition is incorrect, in the specifications of objections petitioner-objector failed to challenge the signature on the basis of wrong address and should, therefore, be precluded from challenging the signatures on that basis now.

Counsel for the candidate also maintained that 12 pages of signatures (sheets 30, 31, 40, 116, 158, 159, 173, 179, 190, 191, 196, 206) were improperly invalidated in their entirety on the ground that the subscribing witness wrote the incorrect number of signatures on the page. The candidate submits that in each case, the claimed number of signatures by the subscribing witness is actually less than the number of signatures on that page and pursuant to Election Law 6-134(11), a petition sheet may not be invalidated solely on the basis of such an understatement. It is the candidate's position that he is entitled to recoup each of the 106 claimed signatures on those 12 pages.

In rebuttal, counsel for petitioner-objector argued that the candidate's assertions regarding the 12 petition sheets which were invalidated in their entirety should be disregarded as this claim was raised for the first time on closing argument. With respect to the candidate's argument that petitioner-objector should be precluded

from raising a challenge to the 30 signatures which listed the wrong address on the petition sheet because such claim was not raised in the specifications of objections, counsel for petitioner-objector maintained that pursuant to the "Designating Petition and Opportunity to Ballot Petition Rules for the September 2009 Primary Election" adopted by the Board of Elections pursuant to Election Law 6-154(2), the objection raised, "NR," stands for "not registered as stated in the BOE records" and that this objection also covers the situation where the signer's address on the petition differs from the address of that individual in the Board of Elections records.

Counsel for petitioner-objector again argued that a determination by the referee that 385 signatures were forged/dissimilar mandates the candidate's forfeiture of ballot placement.

#### Petition to Invalidate - Summary

With respect to the 106 claimed signatures on the 12 petition sheets invalidated in their entirety by the Board, petitioner-objector raised challenges in the specification of objections to all but 3 of these signatures. As the candidate waited until closing argument to claim that the Board erred in invalidating the entire sheets, petitioner-objector was deprived of the opportunity to address the challenges raised to these signatures contained in the specifications of objections. Thus, the candidate is estopped from arguing that the 103 signatures challenged in the specifications of objections should be restored. This includes the 15 signatures in which the petitioner-objector's challenges were ruled "not as specified" as the petitioner-objector could have argued before the Referee that the Board erred in denying these challenges. The three signatures which the petitioner-objector did not challenge are found to be valid.

With respect to the 30 signatures which contained an incorrect address, I found the challenge "NR" sufficient to cover this situation and conclude that such signatures were properly found invalid by the Board.

In sum, I find that the Board incorrectly ruled seven signatures to be invalid and those signatures should be restored bringing the total number of valid signatures to 788, which is less than the required number of 900 signatures for placement of the candidate's name on the ballot in the primary election.

SUMMARY

As the candidate lacks the sufficient number of valid signatures for placement on the ballot, I recommend that the petition to invalidate be granted and the petition to validate be denied.

Dated: August 12, 2009

Respectfully submitted,



Nina Rusnak  
Special Referee





**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX: ELECTION MATTERS PART**

In the Matter of the Application of Cordelia Gilford,  
as Objector,

Petitioner,

-against-

Mark Escoffery-Bey as Candidate for Council Member  
from the 16<sup>th</sup> Council District and Mark Escoffery-Bey as  
the candidate's Contact Person, and

Frederic M. Umane, et als, being the Commissioners of the  
Board of Elections in the City of New York,

Respondents,

For an order INVALIDATING and declaring null and void  
certain designating petitions filed with the Board of  
Elections purporting to designate the within named  
Candidates for Public Office and/or Party Positions from  
Bronx County to be voted upon in the Democratic  
Primary Election to be held on September 15, 2009 and  
enjoining the New York City Board of Elections from  
placing the Respondent candidates' name on the official  
ballot and voting machines for said Democratic Primary  
Election.

In the Matter of the Application of Mark Escoffery-Bey,  
as candidate for the Democratic nomination for the  
Public Office of City Council Member of the  
City of New York, Bronx County, 16<sup>th</sup> District,

Petitioner,

-against-

Cordelia Gilford, Objector,

Respondent,

For an Order Pursuant to Article 16 of the Election Law  
to Declare the Validity of a Designating Petition to  
designate Petitioner as a candidate in the Democratic  
Party Primary Election to be held September 15, 2009.

Index No:260450-09

Report of the Referee

Index No:260465-09

Signatures stipulated to by parties as dissimilar

<u>Sheet</u>	<u>Line</u>	<u>Sheet</u>	<u>Line</u>
2	2	15	7
2	10	19	3
3	1	19	9
3	5	20	2
6	5	21	8
6	8	25	2
6	10	25	3
7	9	50	1
8	2	50	3
8	3	50	5
8	8	50	7
13	1	50	10
13	8	52	3

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART OSCMPARY

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX:

MARK ESCOFFERY-BEY

Index No. 260465/2009

-against-

Hon. ROBERT G. SEBIAWU

NYC BOARD OF ELECTIONS

Justice.

The following papers numbered 1 to \_\_\_\_\_ Read on this motion.  
Noticed on \_\_\_\_\_ and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Answered		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Application is decided in accordance with the attached memorandum decision.

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 8.14.09

Hon.   
J.S.C.

ROBERT G. SEBAWU

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX: ELECTION MATTERS PART**

-----  
In the Matter of the Application of Cordelia Gilford,  
as Objector,

Index No:260450-09

Petitioner,

-against-

**DECISION AND JUDGMENT**

Mark Escoffery-Bey as Candidate for Council Member  
from the 16<sup>th</sup> Council District and Mark Escoffrey-Bey as  
the candidate's Contact Person, and

Frederic M. Umane, et als, being the Commissioners of the  
Board of Elections in the City of New York,

Respondents,

For an order INVALIDATING and declaring null and void  
certain designating petitions filed with the Board of  
Elections purporting to designate the within named  
Candidates for Public Office and/or Party Positions from  
Bronx County to be voted upon in the Democratic  
Primary Election to be held on September 15, 2009 and  
enjoining the New York City Board of Elections from  
placing the Respondent candidates' name on the official  
ballot and voting machines for said Democratic Primary  
Election.

-----  
-----  
In the Matter of the Application of Mark Escoffery-Bey,  
as candidate for the Democratic nomination for the  
Public Office of City Council Member of the  
City of New York, Bronx County, 16<sup>th</sup> District,

Index No:260465-09

Petitioner,

-against-

Cordelia Gilford, Objector,

Respondent,

For an Order Pursuant to Article 16 of the Election Law  
to Declare the Validity of a Designating Petition to  
designate Petitioner as a candidate in the Democratic  
Party Primary Election to be held September 15, 2009.

-----  
HON. ROBERT G. SEEWALD:

In the primary election proceeding brought under Index No.260450/09,  
petitioner, Cordelia Gilford, seeks to invalidate the designating petition filed on behalf of

Mark Escoffery-Bey, a candidate for Council Member from the 16<sup>th</sup> Council District, in the Democratic Party primary to be held on September 15, 2009. In the proceeding bearing Index No. 260465/09, petitioner, Mark-Escoffery-Bey, moves to validate his designating petition. These two proceedings are consolidated for the purposes of this decision. The Special Referee has filed her report and the Court has heard oral argument.

After conducting a consolidated hearing of these two matters which included numerous line-by-line determinations and the calling of seven witnesses by the petitioner to invalidate, the Special Referee recommended the invalidation of 389 signatures from the candidate's designating petition, 8 on the ground of forgery, 377 on the ground that the signatures contained on the designating petition were dissimilar to the signature for that individual contained in the voter registration records and 4 on the ground that the signer was not duly registered/enrolled. With respect to the petition to validate, the Special Referee recommended the validation of seven signatures which the Board of Elections had previously ruled invalid. After subtracting the net number of signatures invalidated (382) from the number of valid signatures contained in the Clerk's Report (1170), the candidate was left with 788 valid signatures. The Special Referee recommended that the petition to invalidate be granted on the ground that the candidate lacked a sufficient number of valid signatures for placement on the ballot (900 for Member of City Council) and recommended that the petition to validate be denied.

At oral argument, counsel for the petitioner to invalidate recommended adoption of the Special Referee's report and urged the court to make a further finding of permeation of fraud based on the Special Referee's finding that 1/3 of the 1170

signatures found valid in the clerk's report were dissimilar to the signatures contained in the voter registration records and that witness testimony established 8 signatures to be forged.

Counsel for the candidate argued that the Special Referee erred in failing to reinstate the 106 signatures contained in 12 petition sheets on the ground that the Board of Elections erroneously invalidated these 12 petition sheets in their entirety. It is the candidate's position that each of these 12 petition sheets contained an understatement of the signature count by the subscribing witness, and, pursuant to Election Law 6-134(11), a petition sheet may not be invalidated solely on the basis of such an understatement.

This argument is without merit. Counsel's argument for the candidate pertaining to the 12 petition sheets was made for the first time on closing arguments. The petitioner to invalidate had filed challenges to 103 of these 106 signatures in her specifications of objections. Despite ample time to raise this argument and the availability of several Special Referees to evaluate any challenge by either party with respect to these 12 petition sheets, the candidate failed to address this issue until the close of the hearing. As a result, the petitioner to invalidate was denied the opportunity to litigate any issues relating to the 103 challenged signatures on these 12 pages. The candidate was properly estopped from seeking restoration of these signatures on the ground of untimeliness. In addition, the Special Referee properly declined to restore 30 signatures in which the address of the signer on the petition differed from the address of that individual contained in the voter registration records.

Counsel for the candidate also raised an issue at oral argument which had


not been previously raised before the Special Referee. Counsel for the candidate argued that the specifications of objections filed in this matter were invalid on the ground that one or two objection abbreviations utilized in the specifications of objections were different from the objection abbreviations promulgated by the Board of Elections. This argument is rejected as lacking specificity, untimely and without merit.

Accordingly, the Report of the Special Referee is confirmed. The petition to invalidate the designating petition of Mark Escoffery-Bey for the public office of Member of City Council for the 16<sup>th</sup> Council District is granted on the ground that the candidate lacks a sufficient number of valid signatures for placement on the ballot. While the evidence presented before the Special Referee suggests irregularities in the petition gathering process, as the petition to invalidate has been granted on other grounds, the Court need not address the claims of permeation of fraud. The Board of Elections is directed to remove from the ballot the name of Mark Escoffery-Bey as a candidate for the public office of Member of City Council for the 16<sup>th</sup> Council District in the Democratic Party Primary to be held on September 15, 2009.

The petition to validate is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the Court.

Dated: August 14, 2009

  
\_\_\_\_\_  
ROBERT G. SEEWALD  
J.S.C.







**IMPORTANT. COMPLETE AND SIGN REVERSE SIDE OF THIS FORM.**

**B. DISTRICT COURT DISPOSITION (Check as many as apply)**

1. Stage of Proceedings	2. Type of Judgment/Order Appealed		3. Relief	
<input checked="" type="checkbox"/> Pre-trial <input type="checkbox"/> During trial <input type="checkbox"/> After trial	<input type="checkbox"/> Default judgment <input type="checkbox"/> Dismissal/jurisdiction <input type="checkbox"/> Dismissal/merit <input type="checkbox"/> Summary judgment <input type="checkbox"/> Declaratory judgment	<input type="checkbox"/> Judgment / court decisions <input type="checkbox"/> Jury verdict <input type="checkbox"/> Judgment NOV <input type="checkbox"/> Directed verdict <input checked="" type="checkbox"/> Other (specify) <u>P.I.</u>	<input type="checkbox"/> Damages: _____ Sought: \$ _____ _____ Granted: _____ Denied: \$ _____	<input checked="" type="checkbox"/> Injunctions <input checked="" type="checkbox"/> Preliminary <input type="checkbox"/> Permanent <input checked="" type="checkbox"/> Granted <input type="checkbox"/> Denied

**C. NATURE OF SUIT (Check as many as apply)**

<b>1. Federal Statutes</b> <input type="checkbox"/> Antitrust <input type="checkbox"/> Bankruptcy <input type="checkbox"/> Banks/Banking <input checked="" type="checkbox"/> Civil Rights <input type="checkbox"/> Commerce, routes <input type="checkbox"/> Commodities <input type="checkbox"/> Other (specify): _____	<input type="checkbox"/> Communications <input type="checkbox"/> Consumer Protection <input type="checkbox"/> Copyright <input type="checkbox"/> Patent <input type="checkbox"/> Trademark <input type="checkbox"/> Election <input type="checkbox"/> Energy <input type="checkbox"/> Environmental	<input type="checkbox"/> Freedom of Information <input type="checkbox"/> Immigration <input type="checkbox"/> Labor <input type="checkbox"/> OSHA <input type="checkbox"/> Securities <input type="checkbox"/> Soc. Security <input type="checkbox"/> Tax	<b>2. Torts</b> <input type="checkbox"/> Admiralty/Maritime <input type="checkbox"/> Assault/Defamation <input type="checkbox"/> FELA <input type="checkbox"/> Product Liability/Warranty <input type="checkbox"/> Other (Specify): _____	<b>3. Contracts</b> <input type="checkbox"/> Admiralty / Maritime <input type="checkbox"/> Arbitration <input type="checkbox"/> Commercial <input type="checkbox"/> Employment <input type="checkbox"/> Insurance <input type="checkbox"/> Negotiable Instruments <input type="checkbox"/> Other (Specify): _____	<b>4. Prisoner Petitions</b> <input type="checkbox"/> Civil Rights <input type="checkbox"/> Habeas Corpus _____ 2254 _____ 2255 <input type="checkbox"/> Mandamus <input type="checkbox"/> Parole <input type="checkbox"/> Vacate Sentence <input type="checkbox"/> Other
<b>5. Other</b> <input type="checkbox"/> Forfeiture/Penalty <input type="checkbox"/> Real Property <input type="checkbox"/> Treaty (specify): _____ <input type="checkbox"/> Other (specify): _____	<b>6. General</b> <input type="checkbox"/> Arbitration <input type="checkbox"/> Attorney Disqualification <input type="checkbox"/> Class Action <input type="checkbox"/> Counsel Fees <input type="checkbox"/> Shareholder Derivative <input type="checkbox"/> Transfer	<b>7. Will appeal raise constitutional issue?</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <b>Will appeal raise a matter of first impression?</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			

Is any matter relative to this case pending below?  Yes  No (specify) Appeal from P.I. case still pending

To your knowledge, is there any case now pending or about to be brought before this Court or any other court or administrative agency which

(A) arises from substantially the same case or controversy as this appeal?  Yes  No

(B) involves an issue that is substantially the same, similar, or related to an issue in this appeal?  Yes  No

If "YES", state whether  "A" or  "B" or  "Both" and provide:

Case Name:	Docket No.:	Citation:	Court or Agency:
Name of Appellant:			
Date: <u>Set 5, 2003</u>	Signature of Counsel of Record: <u>Alan G. Kraus Asst. 4 (app. advise)</u>		

**NOTICE TO COUNSEL**

Once you have filed your Notice of Appeal with the District Court or the Tax Court and have paid the \$5 filing fee, you have only ten (10) days in which to docket your appeal. You must take the following steps within those ten (10) days:

1. Complete this Civil Appeal Pre-Argument Statement (Form C); serve it upon all parties, and file it with the Clerk of the Court of Appeals.
2. File the Court of Appeals Transcript Information/Civil Appeal Form (Form D) with the Clerk of the Court of Appeals.
3. Pay the \$100 docketing fee to the Clerk of the United States District Court, unless you are authorized to prosecute the appeal without payment.

**IF YOU DO NOT COMPLY WITH THESE REQUIREMENTS WITHIN TEN (10) DAYS, YOUR APPEAL WILL BE DISMISSED.**

(NOTE: THIS FORM IS NOT REQUIRED OF NON-ATTORNEY *PRO SE* LITIGANTS.)

**SEE THE CIVIL APPEALS MANAGEMENT PLAN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.**

**NOTICE CONCERNING DISCLOSURE OF INTERESTED PARTIES**

Rule 0.15 of the local rules of this Court supplementing the Federal Rules of Appellate Procedure provides as follows:

**0.15 Disclosure of Interested Parties.**

To enable the judges of the court to evaluate possible disqualification, counsel for all private (nongovernment) parties, in an appeal, or in a motion or other proceeding related to an appeal, shall in all cases submit when such party's initial brief is due, or upon request of the Clerk, an identification of any corporate parent of the party.

**ADDITIONAL COUNSEL**

<b>Attorney for</b>	<b>Name</b>	<b>Address</b>	<b>Telephone No.</b>
Intervenor	Frank A. Bolz III	95-25 Queens Blvd Ste 626 Rego Park, NY 11374	(718) 459-9000

**NOT FOR PUBLICATION**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

Marilyn E. Matheson, Oneita Brown Hooper, Andy Francis,  
Audry Murphy, Barbara Walker, Elroy Chase Adrienne  
Richardson, Edna Anderson, Doris Hayes, Monique Gordon,  
Shakeena Grant,

Plaintiffs,

-against-

**ORDER**  
CV-03-4170(ERK)

New York City Board of Elections, and The Commissioner  
of the New York City Board of Elections, et al.

Defendant.

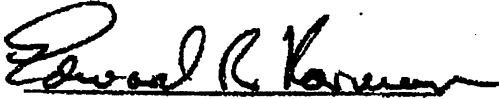
----- X

Korman, Ch. J.,

The motion for a preliminary injunction is granted for the reason stated on the record. The motion for a stay pending appeal by the Corporation Counsel on behalf of the Board of Elections is denied. I note that the Board of Elections is a necessary party only for the purpose of effectuating injunctive relief. Since it found Mr. Brown's petitions sufficient to put him on the ballot, and since the preliminary injunction grants that relief, I question the standing of the Board of Elections to object to the preliminary injunction.

**SO ORDERED:**

September 2, 2003  
Brooklyn, New York

  
Edward R. Korman  
United States District Judge

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X     **Docket #**  
MATHESON, et al.,     :     **03-CV-4170**  
Plaintiff,     :

- versus -     :     U.S. Courthouse  
                  :     Brooklyn, New York  
NYC BOARD OF ELECTIONS,     :  
Defendant     :     September 2, 2003  
-----X

TRANSCRIPT OF CIVIL CAUSE FOR PRELIMINARY INJUNCTION  
BEFORE THE HONORABLE EDWARD R. KORMAN  
UNITED STATES DISTRICT JUDGE

**A P P E A R A N C E S:**

For the Plaintiff:     **Neil Grimaldi Esq.**

For the Defendant:     **Jane Goldberg, Esq.**  
                          **Steve Richman, Esq.**

For the Intervenors:     **Frank Bolz, Esq.**

Official Transcriber:     **Rosalie Lombardi**  
  **CN**

Transcription Service:     **Transcription Plus II**  
                                  **823 Whittier Avenue**  
                                  **New Hyde Park, N.Y. 11040**  
                                  **(516) 358-7352**

Transcription Plus II     Rosalie Lombardi

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

Proceedings recorded by electronic sound-recording, transcript produced by  
transcription service

Transcription Plus II Rosalie Lombardi

**Proceedings**

THE CLERK: Matheson v. Board of Elections.

Your appearances, counsel.

MR. GRIMALDI: Neil Grimaldi for the plaintiff.

MR. BOLZ: Frank Bolz for the intervenors.

MS. GOLDBERG: Jane Goldberg for Board of Elections and  
Teresa Crotty for Board of Elections.

MR. RICHMAN: Steve Richman, general counsel for the board of  
elections.

THE COURT: Good morning.

I have not had a chance to write a written opinion in this case so  
I'm going to be working from notes and read my opinion into the record except for  
a partial transcript of the last hour or so of the hearing that we held on Thursday.  
I didn't have a transcript to work from so I'm working from my own notes and  
recollection and although I do not wish to hear any reargument of legal issues, if I  
say anything that's manifestly factually inaccurate, you can correct me.

Let me begin, first, by saying that although I have not held what  
could be strictly described as an evidentiary hearing on this motion for a  
preliminary injunction, we have had what I would say is the de facto equivalent. I  
say de facto equivalent because there were three participants, who while not  
sworn, had first-hand knowledge of the facts and in a very candid, forthright way,  
help me reconstruct what happened here. The three individuals I'm referring to  
are, of course, Mr. Richman, Mr. Bolz and Mr. Marchant. I'm not referring to you,  
Mr. Grimaldi, only because you didn't have first-hand knowledge.

Let me begin by saying that with an overview of one of the  
prudential factors that influences my decision and that is also relevant to one of

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the elements that has to be taken into account in determining whether to grant a preliminary injunction or not in this case if I should deny the motion for a preliminary injunction it will mean that there will be no primary contest in this particular council-manic (phonetic) district in Queens. While it could conceivably happen that there would be a special election if I should ultimately decide finally in favor of Mr. Brown, that is not only an extraordinary expense but it's simply not possible, really, to recreate the primary day in which all voters know that they're supposed to go to the polls if they wish to to vote for candidates so that denying in the preliminary injunction is the effect of denying a permanent injunction and throwing Mr. Brown off the ballot and leaving the voters in this particular council-manic district without a choice.

On the other hand, if I grant the preliminary injunction putting Mr. Brown on the ballot and it turns out that ultimately that decision is wrong, there is no real prejudice to Mr. Brown other than a few extra days, possibly, of campaigning.

Under New York law if there is only one valid candidate, that candidate is deemed to be the winner of the primary automatically so that if it should turn out ultimately that I was wrong in putting Mr. Brown on the ballot, Mr. Sanders will be the candidate regardless of how many votes Mr. Brown would get in the general election. I eluded to these concerns in my decision in the Noach Deer case when I initially granted partial preliminary injunctive relief by ordering Mr. Deer's name to be placed on the absentee ballot which was going to press imminently. I noted that if it should turn out that I was wrong and that Mr. Deer did not deserve a place on the ballot, there would be no harm to his adversary, Simfa Felder (phonetic), because Felder would simply be declared the winner.



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On the other hand, if it turned out that I erroneously refused to put Deer's name on the absentee ballot, Deer would be irreparably prejudiced since he would not have the benefit of the absentee ballots. I note parenthetically that I ultimately decided against putting Mr. Deer on the ballot.

So with that as a back drop, we turn to what I think are largely undisputed facts although, of course, they involve disputed issues of law.

I think as a result of what I described as a de facto hearing, Mr. Brown has 901 signatures, needing 900 to get a place on the ballot. Now, those 901 signatures are contested and provide the basis for both the legal and factual discussion. We get to the 901 signatures in the following way. There were sixteen signatures that ultimately turn on the validity of the New York law requirement that a subscribing witness be a member of the same party as the candidate for whom he's circulating a petition.

In a carefully considered opinion last year, my colleague, Sterling Johnson, concluded that that New York state law requirement was unconstitutional. The case is Caloshi v. The New York City Board of Elections, 2002 WL 31051530. Although Judge Johnson's decision was reversed by the Court of Appeals, it was not reversed on this ground. It was reversed on the ground that there was another number of signatures which were objectionable that he hadn't ruled on and if you deducted those signatures you would not have to have reached the issue that Judge Johnson resolved with respect to the residence of the subscribing witness. I tend to agree at this point with Judge Johnson's opinion and at the very least it demonstrates a reasonable likelihood of success with respect to those sixteen voters.

The next group that make up the 901 signatures were 56 that

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were in Volume 416 of the petitions that were filed by Mr. Brown at the Board of Elections. They were filed, I believe it was July 14, almost close to midnight with a whole batch of other volumes, some of which were not numbered and none of which were accompanied by what is called a cover sheet. Now, the cover sheet as I understand it is not a sheet that's on every volume, it's simply a summary sheet that lists the numbers of each volume of petitions that are filed with the Board of Elections. Within three days of that error being called to his attention, Mr. Brown provided a cover sheet which listed in number form each of the volumes that were filed on his behalf containing petition signatures. As it turned out, a scrivener's error was made; that is one of the volumes that was listed was Volume 410. It should have been 416. The Board, pursuant to a practice described by Mr. Richman in the portion of the transcript that I had transcribed from August 11, did not notice this defect; that is that Volume 410 contained signatures for someone else and that there had been essentially a scrivener's error. As Mr. Richman described it, the Board did not look at the petition signatures, it simply counted them without reviewing them. On July 24, the objectors to the petition, Mr. Sanders, I guess, who is an intervenor here, having previously filed a general objection to the petitions, filed a specific objection to the petition with the Board and sent by registered mail to Mr. Brown's campaign an objection which in part indicated that Volume 410 did not contain any signatures for Mr. Brown and, therefore, that none of the signatures of the Board should have been counted. The Board convened on July 28. It obviously sustained the objection to the Volume 410, since it quite accurately and correctly concluded that Volume 410 did not contain any signatures for Mr. Brown. At that point, Mr. Brown called the attention of the Board or realized, perhaps, for the first time or

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simply called to the attention of the Board the fact that there had been this scrivener's error -- what I call a scrivener's error -- that No. 410 had been written when it should have been 416. The Board, however, refused to count any of the ballots in Volume 416 even though, as we determined later in this proceeding when I ordered that those votes be counted just to determine whether in fact we had a live legal issue, Volume 416 could have been reviewed in a little over a day to a day and a half. I note parenthetically that it took the Board, I believe, three days to get a correct clerk's tally which eliminated Volume 410 but which did not include Volume 416. In Volume 416, as I indicated, out of some -- I forget the number of signatures - several hundred -- 56 are valid signatures and would otherwise be counted.

MR. GRIMALDI: Did you say 56?

THE COURT: That's my count. If I'm wrong you'll correct me but I think we went over this on --

MR. GRIMALDI: Well, that's -- I think it was 56 that were valid.

THE COURT: Right. That's what I said.

MR. GRIMALDI: Okay.

THE COURT: Now, I believe that the Board acted unreasonably under the circumstances of this case in failing to count those votes. I'm not suggesting that on every occasion they have to acquiesce in the correction of an error, even an error of this kind, but there was absolutely no practical reason that these votes could not have been counted and the consequence, as I say, of not counting the votes in Volume 416 because of a scrivener's error would have the effect of, again, yielding a primary contest in which there would be no choice for the voters even though there were a sufficient number of valid signatures.

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I note in this regard, although I have not admittedly had an opportunity to do the kind of research that I would like to do, that the Election Law 6-134, Paragraph 2, provides that in pertinent part – and I don't rely on this exclusively, as I said, because I have not had a chance to reflect on it in the way that I would have since I sort of noticed it as I was going over my notes for today - - when a determination is made that a designating petition does not comply with such regulations, that is regulations promulgated by the Board for the processing of petitions, the candidate shall have three business days from the date of such determination to cure the violation. He in effect cured the violation by telling the Board at its hearing at which they made the determination that Volume 410 was not valid – again, a correct determination -- that there had been a scrivener's error. I don't really see anything in the state law that would have precluded him from doing that. In addition, Paragraph 10 of 6-134 provides that, "The provisions of this section shall be liberally construed not inconsistent with substantial compliance thereto and the prevention of fraud." Well, with these particular 56, they're not inconsistent. Counting these votes is not inconsistent with substantial compliance and the prevention of fraud and so I believe that there's a reasonable probability of success with respect to those 56.

X We come now to the largest group that make up the 901 signatures that I began by saying are presumptively valid and that is 829 which were otherwise valid but which were struck by the trial judge before whom the objections were heard, that is the objections by Mr. Sanders. The trial judge refused to hear the application by Mr. Brown to compel the Board to count Volume 416 because of a totally irrational construction of the New York Election Law. Briefly, it's conceded that if the Board's striking or refusal to count Volume

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416 had brought Mr. Brown below 900 signatures, his petition to have that volume counted -- his cross-petition to validate was timely filed within three days. But because of the way the limitations are on the jurisdiction of the Board with respect to what signatures could be validated or invalidated, when he left the Board of Elections Mr. Brown had over 1,000 signatures and under those circumstances he could not file the motion to validate. He would have been required under this absurd reading of New York law to have brought the validating petition within ten days after the petition was filed.

It's hard for me to see any kind of a rational basis for the rule that if the Board of Elections ruling leaves you less than 900 signatures in this case, you can move to validate signatures within three days but if it leaves you slightly over you can't do that. I don't understand the basis for that ruling. So that even if technically speaking Mr. Brown were actually a party to the present case and even according administrative determinations by the Board of Elections res judicata affect, I think that it's quite clear that the absence of any reasonable appellate remedy would not even preclude Mr. Brown from re-litigating this issue. This is just an aside because this action is brought by voters who have a separate interest from the candidate.

With that aside, let me now turn to the 869 signatures that were stricken.

MS. GOLDBERG: 829, your Honor?

THE COURT: 829 that the Judge, himself, described as otherwise valid.

Here is some background as required before I deal with the Judge's ruling.

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I believe that in total, 3,221 signatures were submitted -- half of Mr. Brown, each on a separate -- could we just pause for one moment?

(Pause in proceedings)

THE COURT: I'm sorry. I had to pause for one second.

There was a total of 3,221 signatures, each on separate petitions, each witnessed separately. Of those, 50 submitted by two witnesses were found to contain forgeries. I note that with the exception of four buff cards, the determination that forgery was what occurred here, was not based on a comparison of the buff card with the petition. It simply was based on eyeballing the individual petitions and deciding that they looked like the signatures were similar. I'm not sure to what degree of certainty you could have about whether something is a forgery by doing it in that way as opposed to comparing it with the buff cards. But in any event, 50 were found to be forged and for the moment I'm assuming that those 50 were validly struck.

In addition, because the witnesses who witnessed the petitions have contained forged signatures, I would deem them not to be reliable because they witness and sign that they had witnessed forged signatures. Other signatures that were otherwise valid that were witnessed by these two witnesses were struck and I believe there were 36 otherwise valid signatures that were not forged but were witnessed by these two witnesses that were struck because of what we have categorized at the hearings as the "fruit of the poison tree," namely, they just couldn't be regarded as being reliable because the witness was shown to be less than honest in the manner in which they signed the witness forms. Another group of 67 involved so-called "green outs" -- a green out is the equivalent of a white out except that since the petition sheets are green, if you're

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going to cover over a part of the petition you have to do it with some sort of a green colored cover. What was whited out were signatures of the witnesses who actually witnessed the voter's signature on the petition. The reason for the white out, apparently, since it was visible to the naked eye what signature was covered over when you put it up to the light, the reason for the green out was that the witnesses in those cases had not been registered Democrats when they witnessed the signatures and so what happened was that they covered over that signature and three other people who did not suffer from that disqualification signed as witnesses.

Here, again, in addition to invalidating the signatures that were greened out, the judge also invalidated the other ballot signatures that were properly witnessed by the three witnesses who had in a sense falsely signed that they had witnessed the 67 signatures that I've been discussing. So, I believe that we concluded on Friday that a total of 73 valid signatures were knocked off from the handful of witnesses who either witnessed forged signatures or wrote their names over the green out as the fruit of the poison tree, that is the valid signatures were struck because one could not trust the accuracy of the witnesses' oath even with respect to signatures that were apparently otherwise valid.

With all of those being struck we were down to the 829 that the judge invalidated and he invalidated these on the ground that they were permeated by fraud.

Now, by my count the 117 – that is 67 green outs and 50 forgeries added up to 117 signatures, each on separate petitions, that suffered either from the green out defect or from the forgery defect. That's 117 out of 3,221 separate

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petitions – signatures which, I don't know, it seems to me to come to somewhere between 3% and 4% of the total number of signatures that were filed which is a significantly small number. It means that somewhere over 96% of the signatures were unaffected by any apparent fraud.

Now, obviously – and this seems to me to be the word of the New York State Judiciary because no statute has been cited to me but it wouldn't matter whether it was a statute or a judge-made rule – it would be perfectly reasonable to strike petitions that were permeated by fraud. Permeated by fraud, however, is a particularly subjective judgment and in this particular case I find that just from the sheer numbers, this tiny percentage of fraud – petition signatures – to say that 3,221 were permeated by fraud or even that the remaining 829 were permeated by fraud, my understanding of the word "permeated" means that there was fraud throughout and fraud throughout to such an extent that one cannot rely on what would appear to be otherwise valid signatures – because there was fraud throughout the process in my view is, at least for the purpose of a preliminary injunction motion, it's unreasonable to say that this was permeated by fraud and to strike 829 signatures -- and, again, to leave the voters without any choice in a primary contest because a tiny percentage were fraudulent is unreasonable. Moreover, although I accept the striking of the 50 signatures that were struck because they were forged, I note again that they were not, except for about three or four, there were no comparisons made between the buff cards and the signatures and that's the whole purpose of signing a buff card is so that you can compare the buff card with the signatures.

Now, it may be that for the purpose of striking the 50 forged ones



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that actually striking them and the other valid ones that were taken by those witnesses simply eyeballing them in the way that the judge did would be enough but when we come to that factor being a crucial factor in the judge's determination, we could argue and we have argued whether that was the only factor in his determination that their signatures were permeated by fraud but it was certainly a significant factor in his decision and it seems to me that if you're going to use that factor to toss out 829 valid signatures and in effect kick a candidate off the ballot and deprive the voters of a choice, at the very least some higher standard ought to apply and that there ought to be some comparison between the buff cards and the signatures.

So for the foregoing reasons, I find that the plaintiffs have a reasonable likelihood of success in demonstrating that there were 901 valid signatures and that Mr. Brown belongs on the ballot.

When I say that this is a preliminary injunction, I mean just that. I'm willing -- if you go through the buff cards, for example, and find that there were more forgeries than 50 or if you can show me that there was a sufficient number so that I could say that fraud permeated, which means that throughout all of the petitions fraud was all over the place which is what I understand "throughout" as the relevant definition here of "permeated with fraud," I'm willing to listen.

So that is my ruling.

You'll let me know whether you want to proceed any further with this in terms of this being only a preliminary injunction. If you do, I'm going to invite the Brennan Center for Democracy to appear as amicus curiae in this case. I do not intend to file any written opinion. The transcript of these proceedings is

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essentially my ruling.

Mr. Bolz.

MR. BOLZ: Yes.

THE COURT: Did you want to say something? I thought --

MR. BOLZ: Yes.

You said something about that you invited who to appear?

THE COURT: The Brennan Center for Democracy.

MR. BOLZ: Okay.

THE COURT: I invite them in in cases because -- don't take offense to this, Mr. Grimaldi, but I often find that the attorneys appearing in these cases really don't have a sufficient handle on the law at least for 1983 proceedings. I don't know what position they'll take. They declined the invitation in the Noach Deer case because, apparently Noach Deer's lawyers had consulted with them and they felt that that would compromise their position as an unbiased friend of the Court.

Now, Mr. Bolz, I want to say -- and I'm going to say this on the record -- I thought that the manner in which you presented this case was extraordinarily professional. It was extraordinarily able and it played no small part in my ability to understand both the law and what went on here and I also appreciated, particularly, the candor that you demonstrated on occasion when it appeared we were going down some road that was simply inappropriate. So I think that you performed not only in an extraordinary way in terms of your client but, also, as an officer of the Court and I say the same to Mr. Richman. You appear before me on a regular basis. As I indicated, I'm very fond of you and you were also extremely helpful to me in helping understand the process and

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**Bye. Bye.**

**(Matter concluded)**

**-oOo-**

**Transcription Plus II**

**Rosalie Lombardi**

**C E R T I F I C A T E**

I, ROSALIE LOMBARDI, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 2nd day of September, 2003.

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Rosalie Lombardi  
Transcription Plus II

Transcription Plus II . Rosalie Lombardi

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**LEAGUE OF WOMEN VOTERS OF OHIO, et al., Plaintiffs-Appellees, JEANNE WHITE, Intervenor-Appellee, v. JENNIFER BRUNNER, in her official capacity as Secretary of State of Ohio, et al., Defendants-Appellants.**

**Nos. 06-3335/3483/3621**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**08a0429p.06; 548 F.3d 463; 2008 U.S. App. LEXIS 24200; 2008 FED App. 0429P (6th Cir.)**

**October 21, 2008, Argued  
November 26, 2008, Decided  
November 26, 2008, Filed**

**PRIOR HISTORY:** Appeal from the United States District Court for the Northern District of Ohio at Toledo. Nos. 05-07309--James G. Carr, Chief District Judge.

*League of Women Voters of Ohio v. Blackwell*, 2006 U.S. Dist. LEXIS 23437 (N.D. Ohio, Mar. 23, 2006)

*League of Women Voters v. Blackwell*, 432 F. Supp. 2d 723, 2005 U.S. Dist. LEXIS 35951 (N.D. Ohio, 2005)

*League of Women Voters v. Blackwell*, 432 F. Supp. 2d 734, 2006 U.S. Dist. LEXIS 8427 (N.D. Ohio, 2006)

*League of Women Voters of Ohio v. Blackwell*, 2006 U.S. Dist. LEXIS 8432 (N.D. Ohio, Feb. 10, 2006)

*League of Women Voters of Ohio v. Blackwell*, 432 F. Supp. 2d 742, 2006 U.S. Dist. LEXIS 58863 (N.D. Ohio, 2006)

**COUNSEL:** [\*\*1] **ARGUED:** Richard N. Coglianese, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants.

Jennifer Rebecca Scullion, PROSKAUER ROSE, New York, New York, for Appellees.

**ON BRIEF:** Richard N. Coglianese, Damian W. Sikora, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellants.

Jennifer Rebecca Scullion, PROSKAUER ROSE, New York, New York, Jon M. Greenbaum, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, Washington, D.C., Steven P. Collier, Jason A. Hill, CONNELLY, JACKSON & COLLIER, Toledo, Ohio, John A. Freedman, Michael R. Geske, ARNOLD & PORTER, Washington, D.C., Kathleen McCree Lewis, DYKEMA GOSSETT, Detroit, Michigan, Brenda Wright, DEMOS: A NETWORK FOR IDEAS AND ACTION, Brighton, Massachusetts, Richard Marvin Kerger, Kimberly A. Conklin, KERGER & HARTMAN, Toledo, Ohio, for Appellees.

**JUDGES:** Before: KEITH, MERRITT, and GIBBONS, Circuit Judges.

Stenson, Charlene Dyson, Anthony White, Deborah Thomas, Leonard Jackson, Deborah Barberio, Mildred Casas, Sadie Rubin, Lena Boswell, Chardell Russell, Dorothy Cooley, and Lula [\*\*4] Johnson-Ham. The original complaint also included the allegations of Dorothy Stewart, Justine Watanabe, and Jimmie Booker, all of whom were later allowed to withdraw as parties.

The plaintiffs in this case include two organizational plaintiffs and numerous individual Ohio voters. The League of Women Voters of Ohio ("LWVO") is a nonpartisan organization with more than 3,000 members statewide. LWVO alleges that the Secretary's and Governor's actions and inactions caused it injury by impeding its voter registration and education efforts and by injuring the rights of its individual members, who are alleged to [\*467] have standing in their individual capacities. The League of Women Voters of Toledo-Lucas County is a nonpartisan organization affiliated with the LWVO that alleges standing on essentially the same grounds as the LWVO. The individual plaintiffs are registered voters in Ohio who allege they were denied the right to vote or severely burdened in exercising the right to vote during the November 2004 election.

[\*\*\*P3] The individual

plaintiffs allege that they were disenfranchised or severely burdened in exercising the right to vote in that the following occurred on November 2, 2004:

Mildred Casas [\*\*5] went to her polling location at Ohio State University, but poll workers told her she was at the wrong location for her address and sent her to the King Avenue Methodist Church. At the church, poll workers again told Casas she was at the wrong location and sent her to the Newman Center. At the third location, poll workers informed Casas she was not on the list. Finally, they provided a provisional ballot to Casas. These events took more than six hours.

Sadie Rubin went to her polling place on the Kenyon College campus. That location had two voting machines for approximately 1,300 voters; one of the machines broke during the day. Rubin waited in line for more than nine hours in order to vote. Voting was completed there at approximately 4:00 a.m. the following day.

Deborah Thomas went to the polling place where she has voted for almost twenty years and was told she was not on the voter list. Poll workers gave Thomas a provisional ballot. The ballot was not counted and the county board of elections has no record of Thomas's attempts to vote.

Anthony White went to his polling place, where poll work-

bring a ballot to Dyson's car and stated that they were not aware of any obligation to do so. Dyson left without voting.

Deborah Barberio was eligible to vote in the election, and her name appeared on the relevant voter roll. Barberio's husband received a voter information card at the home they shared, but Barberio did not. Barberio then confirmed with the county board of elections that she was registered. On election day, poll workers informed Barberio that she was not on the registration list and suggested she complete a provisional ballot. The board of elections later maintained that Barberio was not registered and did not count her ballot.

The individual plaintiffs voted or attempted to vote in Lucas, Franklin, Cuyahoga, Knox, and Medina Counties. The League alleges that these incidents of disenfranchisement or severe burdening of the right to vote were more likely to occur in those counties than elsewhere in Ohio. The League further alleges that each of the individual plaintiffs has a reasonable basis to believe that she will be disenfranchised, or severely burdened in exercising her right to vote, in future elections.

The [\*\*9] League maintains that the above were not isolated incidents. Rather, the League alleges that systemic failures occurred in November

2004 with respect to:

(1) registration: Registered voters did not appear on voting rolls in their precincts and were denied the right to vote by provisional ballot, or their provisional ballots were not counted. The Secretary issued a directive instructing local officials "not to accept voter registration forms unless printed on paper of a specified color, weight, and type," impeding new voter registration;

(2) absentee ballots: Voters who requested absentee ballots did not receive them or received them too late yet were precluded from voting in person. Election workers improperly denied requests for absentee ballots;

(3) polling places: Election officials provided voters with wrong information about polling places, causing voters to travel to multiple polling places. Voters who were unable to spend hours traveling to multiple polling places were unable to vote. Many polling places did not open on time, causing voters to leave without voting in order to attend school or work. Some polling places closed early; at others, poll workers sent voters away without [\*\*10] voting, contrary to Ohio law that permits anyone in line as of closing time to vote.

Too few voting machines were allocated to meet the predicted voter turnout, resulting in wait times from two to twelve hours. The ratio of voters to

act despite their authority to do so.

Based on the above, the League alleges that the Secretary and Governor violated 42 U.S.C. § 1983 in that Ohio's voting system denies them equal protection of the law and substantive and procedural due process guaranteed them by the *Fourteenth Amendment to the United States Constitution*. The League also alleges a violation of the Help America Vote Act of 2002 ("HAVA"), 42 U.S.C. § 15301 et seq. Accordingly, the League seeks preliminary and permanent injunctive relief requiring the Secretary and Governor "[t]o promulgate, adopt, and enforce uniform standards" [\*470] related to various aspects of Ohio's election system including voter registration, absentee ballots, voting machines, ballots, voting procedures, [\*\*13] recruiting and training of poll workers, and assistance for disabled voters.

3 Violation of equal protection is alleged on behalf of all plaintiffs.

4 Violation of substantive due process is alleged on behalf of all plaintiffs.

5 Violation of procedural due process is alleged on behalf of LWVO, League of Women Voters Toledo-Lucas County, Stenson, White, Thomas, Jackson, and Barbério.

6 Violation of HAVA is alleged on behalf of LWVO

and League of Women Voters Toledo-Lucas County.

The Secretary and Governor filed their first motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(1), (6), and (7)* on August 29, 2005. The main thrust of the motion was that the League had sued the wrong parties--the Secretary of State and the Governor--for wrongs allegedly committed by the local county Boards of Election ("BOEs"). As a result of this error, the Secretary and Governor argued that the League had failed to state a claim against them. By a case management order dated September 26, 2005, the district court ordered the parties to begin discovery while the motion to dismiss was pending.

[\*\*\*P6] On October 4, 2005, intervenor-appellee Jeanne White moved to intervene as a party plaintiff. White alleges that on November [\*\*14] 2, 2004, she attempted to vote for president at her polling place in Mahoning County. That polling place utilized direct-recording electronic voting machines, more commonly known as touchscreen voting machines. White attempted to select the candidate she preferred, but the machine "jumped" from her candidate to another candidate. The machine "jumped" several times when White attempted to correct this problem. White believes that her vote may have been counted for the wrong candidate. She also alleges that "jumping" occurred on other ma-



a state-wide basis and under the supervision of state officials, Ohio's voting system breeds non-uniformity that defendants could and should correct." *Id.* at 728.

Second, the district court held that the League had stated a claim for violation of substantive due process. *Id.* at 728-30. The district court found that "[t]here is no question that [the League] has alleged actionable constitutional violations. What remains is whether [the Secretary and the Governor] are legally responsible for those violations." *Id.* at 728. Relying on *City of Canton v. Harris*, 489 U.S. 378, 387, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) [\*\*17] and its progeny, the district court found that the Secretary and Governor "may be answerable for constitutional violations where state employees have not been trained adequately and that lack of training has caused constitutional wrongs" if they acted with deliberate indifference or willful blindness. *Id.* at 729. Further, the district court found that the League had pled sufficient facts to proceed on a failure to train theory.

[\*\*\*P7] Third, the district court held that the League had stated a claim for violation of procedural due process on a failure to train theory. *Id.* at 730. Fourth, the district court held that the League had not stated a claim under HAVA because Ohio was not required to

comply with HAVA until January 2006. *Id.* at 731. Accordingly, the district court granted the motion to dismiss the HAVA count and denied the motion to dismiss the § 1983 counts. *Id.* at 734. Addressing the remaining issues presented by the first motion to dismiss, the district court held that the Secretary and Governor are proper parties to this action; that the organizational plaintiffs have standing; that the League was not required to join the local BOEs as parties; that the claims are not barred by [\*\*18] claim preclusion; and that venue is proper in the Northern District of Ohio. *Id.* at 731-34.

On December 7, 2005, the Secretary and Governor filed a third motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (1) and (6). The majority of the motion renewed various arguments made in the first motion to dismiss.

The following day, the Secretary and Governor sought leave to file an interlocutory appeal of the December 2 order pursuant to 28 U.S.C. § 1292(b). The district court granted in part and denied in part the motion for leave to take an interlocutory appeal. No. 3:05CV7309, 2006 U.S. Dist. LEXIS 8432, 2006 WL 1580032 (N.D. Ohio Feb. 10, 2006). The district court agreed with the Secretary and Governor that (1) its denial of the motion to dismiss the § 1983 claims involves a controlling question

2006 U.S. Dist. LEXIS 8432,  
[WL] at \*2 n. 1.

By separate order of the same date, the district court denied the third motion to dismiss. 432 F. Supp. 2d 734 (N.D. Ohio 2006). The district court held that its December 2 order was the law of the case. *Id.* at 738-39. Wherefore, the district court rejected those arguments it had previously considered and overruled. In the same order, the district court held that sovereign immunity does [\*\*\*P8] not bar jurisdiction over the claims asserted here because the League alleges ongoing violations of federal law and seeks prospective relief only. *Id.* at 739-40. Anticipating that the Secretary and Governor would seek immediate appeal from its denial of the motion to dismiss on the basis of sovereign immunity, the district court certified the appeal as frivolous and retained jurisdiction over the case during the pendency of any such appeal. *Id.* at 740. The Secretary and Governor timely appealed from the February 10 orders.

9 The district court also addressed, and rejected, the two new arguments raised by the third motion to dismiss: that the two-year [\*\*21] statute of limitations under 42 U.S.C. § 1983 bars the League's claims to the extent that the allegations arose before July 28, 2003 and that

some of the individual plaintiffs' claims were moot because they lacked a reasonable basis to believe the violations alleged would recur. 432 F. Supp. 2d at 740-41.

Subsequently, the district court denied the motion to dismiss White's complaint for the reasons stated in its December 2 order. No. 3:05CV7309, 2006 U.S. Dist. LEXIS 23437, 2006 WL 753118 (N.D. Ohio Mar. 23, 2006). Again, the Secretary and Governor timely appealed.

On May 1, 2006, the Secretary and Governor filed a fourth motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). They argued that Ohio's passage of House Bill 3 ("H.B. 3") bars the conduct complained of and therefore moots the alleged violations of federal law. The district court ordered [\*473] discovery regarding H.B. 3 and held its decision regarding mootness in abeyance pending completion of discovery on that issue. As a result, the district court has not yet decided whether H.B. 3 moots the constitutional claims presented here.

10 As characterized by the Secretary and Governor, H.B. 3

institutes a statewide registration system under which (a) voter identification [\*\*22] is required

11 The district court had previously denied the Secretary's and Governor's motion for a stay pending the sovereign immunity appeal. 432 F. Supp. 2d 742 (N.D. Ohio 2006).

## II.

At the threshold, the Secretary and Governor argue that this court lacks jurisdiction because the claims presented are moot. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *L.A. County v. Davis*, 440 U.S. 625, 631, [\*\*\*P9] 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969)). Mootness implicates [\*\*24] Article III's "case or controversy" requirement. *Gentry v. Deuth*, 456 F.3d 687, 693 (6th Cir. 2006). Accordingly, mootness can be raised at any stage of litigation because it is a jurisdiction requirement. See *Midwest Media Prop., LLC v. Symmes Twp.*, 503 F.3d 456, 460 (6th Cir. 2007). "

12 The League argues that the mootness issue is not properly before this court because the motion to dismiss for mootness is currently pending before the district court. Because mootness poses a jurisdictional bar, however, we are

required to consider it. See *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992); *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530 (6th Cir. 2001).

A defendant's "voluntary cessation of a challenged practice" does not moot a case. *Ammex, Inc. v. Cox*, 351 F.3d 697, 704 (6th Cir. 2003) (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)); *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 342-43 (6th Cir. 2007). Rather, voluntary conduct moots a case only in the rare instance where "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." [\*\*25] *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (citation omitted). What is more, the party asserting mootness bears the "'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (quoting *Jones v. City of Lakeland*, 224 F.3d 518, 529 (6th Cir. 2000)); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000). However, government officials receive "more solicitude" on [\*474] this point than do private parties. *Ammex*, 351 F.3d at 705.

Ed. 714 (1908); *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 n.8 (6th Cir. 2007).

The test for determining whether the *Ex parte Young* exception applies is a "straight-forward" one. *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002). The court considers "whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* (alteration in original) (citation omitted); *Dubuc v. Mich. Bd. of Law Exam'rs*, 342 F.3d 610, 616 (6th Cir. 2003). The focus of the inquiry remains on the allegations only; it "does not include an analysis of the merits of the claim." *Verizon*, 535 U.S. at 646; *Dubuc*, 342 F.3d at 616.

The Secretary [\*\*28] and Governor argue that the *Ex parte Young* exception is not applicable here because the League "fail[s] to allege ongoing constitutional violations." Specifically, they point to excerpts from [\*475] deposition testimony "to attempt to show that none of the plaintiffs has a reasonable basis to believe the violations will occur in the future. This approach is contrary to *Verizon*, which limits the inquiry to the complaint.

15 A motion to dismiss pursuant to *Rule 12(b)(1)* for lack of subject matter

jurisdiction may refer to the evidence without converting the motion into one for summary judgment. *Ernst*, 427 F.3d at 372.

The amended complaint falls comfortably within the *Ex parte Young* doctrine. The League alleges that Ohio's election machinery unconstitutionally denies or burdens Ohioans' right to vote based on where they live in violation of the *Equal Protection Clause*. Additionally, the League alleges that top state officials have displayed willful indifference to Ohioans' fundamental right to vote by failing to train poll workers in violation of the *Due Process Clause*. The League alleges that these problems are chronic and will continue absent injunctive relief. Finally, the League properly [\*\*29] characterizes its prayer for relief as prospective. Therefore, the *Eleventh Amendment* offers no immunity to the defendants. "

16 The Secretary and Governor also maintain that they are not proper parties to this action in that any alleged errors were the fault of local BOEs rather than high-level state officials. The district court properly rejected this argument. The Secretary of State of Ohio is the state's chief election officer *ex officio*. *Ohio Rev. Code* § 3501.04; see, e.g., *Sandusky County Democratic*

First, the League argues that Ohio's voting system arbitrarily denies its citizens the right to vote or burdens the exercise of that right based on where they live—"county to county, city to city, and precinct to precinct." These disparities are alleged to violate the Equal Protection Clause.

Although allegations of mere negligence will not sustain an action under § 1983, the statute "contains no independent state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Howard v. Grinage*, 82 F.3d 1343, 1350 (6th Cir. 1996). Rather, when litigating under § 1983, the plaintiff must prove the culpable mental state applicable to the underlying constitutional right. *Daniels*, 474 U.S. at 330; *Howard*, 82 F.3d at 1350. The Secretary and Governor argued in the district court, and before us, that the equal [\*\*32] protection claim requires a showing of "intentional and purposeful discrimination." The League contends that the proper scienter requirement is, alternatively, knowledge, willful blindness, or deliberate indifference. We need not decide this issue, however, because the only question before us is whether the amended complaint pleads facts, if proven, sufficient to establish that the defendants arbitrarily deny Ohioans the right to vote depending on where they live. See

*Bush v. Gore*, 531 U.S. 98, 104-05, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000) (per curiam) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (emphasis added)); *Reynolds v. Sims*, 377 U.S. 533, 557, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) (noting that "arbitrary and capricious action" can violate the Fourteenth Amendment (quoting *Baker v. Carr*, 369 U.S. 186, 226, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962))); see also *League of Women Voters v. Fields*, 352 F. Supp. 1053 (E.D. Ill. 1972); *Ury v. Santee*, 303 F. Supp. 119, 126 (N.D. Ill. 1969). We find that it does.

The right to vote is a fundamental right, "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966). [\*\*33] The right to vote includes the right to have one's vote counted on equal terms with others. *Bush*, 531 U.S. at 104 ("[T]he right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."); *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972) ("[A] citizen has a constitutionally

ing that defendants were not entitled to judgment on the pleadings where plaintiffs alleged that some counties adopted more reliable voting procedures than others in violation of equal protection). Likewise, we find it relevant here.

*Ury v. Santee*, 303 F. Supp. 119, decided thirty years before *Bush*, involved an equal protection challenge to a local election in Wilmette, Illinois. The district court made the following findings of fact:

On election day, April 15, 1969, qualified voters who desired to vote were forced to wait unreasonable lengths of time to obtain and cast their ballots in certain of the precincts . . . as a result of the consolidation of 32 precincts into six precincts, because of the assignment of excessive numbers of registered voters to the precincts, the establishment of inadequate voting facilities and the failure to provide sufficient numbers of judges to service such polling [\*\*36] places. In many instances voters . . . were required to wait for periods of two to four hours to cast their ballots and were forced to attempt to vote three, four, and,

in one instance, five times, and were otherwise hindered in their right to cast ballots by reason of the excessively crowded conditions at the polling places and their environs.

*Id.* at 124. On these facts, the district court held that the overcrowded conditions effectively deprived the plaintiffs of the right to vote.

The League alleges facts similar to, and more egregious than, those presented in *Ury*. Voters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting machines. Voting machines were not allocated proportionately to the voting population, [\*478] causing more severe wait times in some counties than in others. At at least one polling place, voting was not completed until 4:00 a.m. on the day following election day. Long wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line. Poll workers [\*\*\*P13] received inadequate training, causing [\*\*37] them to provide incorrect instructions and leading to the discounting of votes. In some counties, poll workers misdirected voters to

due process.

White alleges that touch-screen voting machines at her polling place malfunctioned, causing her vote to "jump" from her chosen candidate to another candidate. She further alleges that this problem affected "significant numbers" of voters "due to the promulgation and maintenance of nonuniform rules, standards, procedures, and training of election personnel throughout Ohio." White, too, can state a claim for violation of substantive due process.

[\*479] D

That Ohio's voting system impinges on the fundamental right to vote does not, however, implicate procedural due process, as alleged in count three of the amended complaint. The League contends that Ohio's

voting system deprives Ohioans of "their liberty interest in voting and does so without adequate pre- or post-deprivation process." However, the League has not alleged a constitutionally protected **[\*\*40]** interest. The brevity of argument in the League's brief--which subsumes procedural due process into the substantive due process analysis--reflects the lack of authority for this position. Accordingly, count three of the complaint is dismissed.

V.

**[\*\*\*P14]** For the foregoing reasons, we affirm in part and reverse in part, leaving the League's and White's equal protection and substantive due process claims to proceed in the district court.

Connors  
FyI

**MARTIN E. CONNOR**

Counselor at Law  
61 Pierrepont Street  
Brooklyn, New York 11201  
Telephone: 718-875-1010  
Facsimile: 718-875-6044  
e-mail: sendem1@aol.com

August 27, 2009

Steven H. Richman, Esq.  
General Counsel  
Board of Elections in the City of New York  
32 Broadway, 7<sup>th</sup> Floor  
New York, New York 10004-1609

Re: Anna Lewis, Civil Court, NY County  
3<sup>rd</sup> Municipal Court District

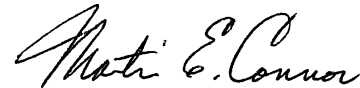
Dear Mr. Richman:

Enclosed is a copy of the decision and judgment of Justice Lehner in the validating proceeding brought by Anna Lewis. This copy was e-mailed to me by the court.

Justice Lehner has ordered the Board of Elections to restore Ms. Lewis' name to the ballot in the Democratic Primary Election. THIS IS A CHANGE FROM THE BOARD'S RULING.

Should you have any questions please call me at 347-645-9146 or 518-924-7813.

Very truly yours,



MARTIN E. CONNOR

P.S. Counsel for the Objector has told me he intends to appeal to the Appellate Division.

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RECEIVED  
GENERAL COUNSEL  
BD. OF ELECTIONS  
IN THE CITY OF NEW YORK



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 19

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In the Matter of the Application of  
ANNA R. LEWIS,

Petitioner,

-against-

Index No.  
111509/09

LYDIA HUMMEL,

Objector,

-and-

THE BOARD OF ELECTIONS IN THE CITY OF  
NEW YORK,

Respondent,

for an order pursuant to Article 16 of the Election Law  
to declare the validity of a designating petition.

RECEIVED  
GENERAL COUNSEL  
BO. OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 31 PM 3:05

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EDWARD H. LEHNER, J.:

This is a proceeding to validate the petition designating petitioner as a candidate for judge of the Civil Court of the City of New York from the Third Municipal Court District in the forthcoming Democratic Party Primary Election.

After specifications were filed by the Objector, the respondent Board of Elections ("BOE") found that the petition contained 1166 valid signature. Since 1500 valid signatures are necessary in order to be entitled to appear on the ballot for such election, the BOE removed petitioner's name from the ballot. This proceeding then ensued and the court appointed Leslie S. Lowenstein as Special Referee to hear and report with respect to issues raised.

After hearings on August 17, 18 and 19, the Referee filed his report on August 20 recommending against validating the petition, finding that petitioner had filed only 1256 valid signatures. Applications with respect to the report were orally argued before me on August 25.

To reach the required 1500 signatures, petitioner argued three legal issues which related to: i) misstatements with respect to witness identification information (“WID”); ii) the invalidation of signatures by the BOE for reasons other than specified by the Objector; and iii) the alleged improper signature by a subscribing witness on five sheets

On the first issue, several subscribing witnesses who obtained a total of 207 signatures and all of whom resided in Kings County correctly stated their respective addresses in the Statement of Witness, but did not alter the printed information appearing on the petition below the signature line (the WID) which read “County of New York.” The BOE disqualified the signatures obtained by said witnesses, and the Referee agreed with such conclusion.

Just last week the Fourth Department, presented with a similar issue, concluded, quoting from *Powers v. Kozlowski*, 54 AD3d 540 (4<sup>th</sup> Dept. 2008); *lv. to ap. den.* 11 NY3d 701 (2008), that since “the complete address of each subscribing witness was listed in the first paragraph of the STATEMENT OF WITNESS,” the signatures obtained by such witnesses, who incorrectly stated their

addresses in the WID, should be validated, since where the error “does not involve the ‘substantive requirements of witness eligibility’ and there is no implication of fraud, resort to strict construction should be avoided.” [Dalton v. Wayne County Board of Elections,

\_\_ AD3d \_\_, 2009 WL 2525414]. Similar conclusions were reached in Arcuri v. Hojnacki, 32 AD3d 658 (3<sup>rd</sup> Dept. 2006), lv. to ap. den. 7 NY3d 707, and Berkowitz v. Harrington, 307 AD2d 1002 (2<sup>nd</sup> Dept. 2003).

Since the parties acknowledge finding no First Department decision on this issue, I am bound by the aforesaid decisions of the other three departments and, in any event, find such holdings in harmony with the legislative intent of lowering the barriers to ballot access. Thus, I disaffirm this aspect of the report of the Referee and validate the 207 signatures obtained by these witnesses.

The second issue presented relates to the signatures of 40 persons which the BOE disqualified, but for reasons different from that set forth by the Objector in her specifications. It appears that in each of the 40 instances the BOE wrote “AS” (meaning “as specified”) next to the objected signature, but added a reason different from that specified by the Objector. Petitioner’s counsel acknowledged at oral argument that these 40 persons were not registered voters with a Democratic enrollment who resided within the district. Thus, it would not appear that petitioner has in any way been prejudiced with regard to this issue. The Referee’s

confirmation of the BOE report was therefore proper.

Moreover, it should be noted that it has been held that the “Supreme Court ... has jurisdiction to entertain objections to signatures on designating petitions, even where an objector asserts ‘grounds other than those asserted before the Board of Elections’ ”[*Venuti v. Westchester County Board of Elections*, 43 AD3d 482 (2<sup>nd</sup> Dept. 2007), lv. to ap. den. 9 NY3d 804 (2007)]. Accord: *Edelstein v. Suffolk County Board of Elections*, 33 AD3d 945 (2<sup>nd</sup> Dept. 2006) (“The Supreme Court properly entertained specific objections to signatures on the appellant’s nominating petition that had not been asserted before the Board of Elections ... because the appellant was sufficiently apprised of the grounds for the objections.”); *Brotherton v. Suffolk County Board of Elections*, 33 AD3d 944 (2<sup>nd</sup> Dept. 2006); *Master v. Davis*, \_\_ AD3d \_\_, 2009 WL 2529008 (2<sup>nd</sup> Dept.); *Belak v. Rossi*, 96 AD2d 1011 (3<sup>rd</sup> Dept. 1983), lv. to ap. den. 60 NY2d 552 (1983) (“Special Term has jurisdiction to hear objections to signatures other than those objected to before the board of elections”). Thus, the Referee could properly have disqualified the signatures of the persons who admittedly were not qualified to sign the designating petition even if the BOE had not so ruled.

The last issue argued relates to 39 signatures allegedly witnessed by Richard D’Ornellas on five sheets. On each sheet there appeared two signatures on the line for the signature of the subscribing witness, one by D’Ornellas and one by Leonard

Kane. D'Ornellas testified before the Referee that since he believed that someone other than Kane had signed Kane's name because Kane had previously suffered a stroke, he struck out Kane's signature, initialed the petition, and signed his own name thereto. However, he consistently maintained that he had seen all the signatories sign the petition as he had been working with Kane in obtaining the signatures on the street at 54<sup>th</sup> Street and Ninth Avenue. The signatures obtained by D'Ornellas were invalidated by the BOE and, after hearing the testimony, the Referee ruled "that there is insufficient credible testimony here so as to permit the validation of any of these petition sheets on the testimony of the subscribing witness."

Initially, it is noted that it has been held that the inclusion of two subscribing witnesses does not invalidate a petition [Sole v. Draffin, 78 AD2d 573 (4<sup>th</sup> Dept. 1980)]. Further, the Court of Appeals has ruled that where the name of a subscribing witness was stricken and replaced by another, there is no requirement to invalidate the petition where there "is no evidence that the alteration was made by anyone other than the subscribing witness or that it resulted in any fraud or confusion" [Grancio v. Coveney, 60 NY2d 608, 611 (1983)], but that any "alteration of the statement which is unexplained and uninitialed will result in the invalidation of the petition" [Jonas v. Velez, 65 NY2d 954 (1985). See also, Sherwood v. Bestry, 154 AD2d 889 (4<sup>th</sup> Dept. 1989).

Here, D'Ornellas explained the reason that he crossed out Kane's signature and initialed the pages. While I understand why, due to certain inconsistencies in parts of his testimony, the Referee did not give credence thereto, I find that in light of D'Ornellas's consistent and uncontroverted testimony that he did witness all the signatures to which he signed as subscribing witness, of which 39 have been found to be valid, his testimony with respect thereto should be accepted and the signatures validated.

Summarizing the foregoing, I find that in addition to the 1256 signatures which Objectant acknowledges to be valid, there should be added the 207 signatures that were excluded due to the WID issue and the 39 signatures obtained by D'Ornellas, with the result that the petitioner has 1502 valid signatures. Therefore, the Board of Elections is directed to place her name on the ballot for the forthcoming Democratic Primary Election as a candidate for judge of the Civil Court of the City of New York in the 3rd Municipal Court District.

This decision constitutes the judgment of the court.

Dated: August 27, 2009

  
\_\_\_\_\_  
J.S.C.

**MARTIN E. CONNOR**

Counselor at Law  
61 Pierrepont Street  
Brooklyn, New York 11201  
Telephone: 718-875-1010  
Facsimile: 718-875-6044  
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RECEIVED  
GENERAL COUNSEL  
BO. OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 31 PM 3: 05

August 27, 2009

Convt, Fuz

Steven H. Richman, Esq.  
General Counsel  
Board of Elections in the City of New York  
32 Broadway, 7<sup>th</sup> Floor  
New York, New York 10004-1609

Re: Voting history of Vance Family

Dear Mr. Richman:

I represent Cyrus R. Vance, Jr., who, as you know, is a candidate in the Democratic Party Primary Election for the office of New York County District Attorney. I am writing this letter on his behalf to place on the record his concern that the voting history recorded in the Board of Elections for him and his parents contains serious inaccuracies.

As you know, since the computerized voter files were instituted, the "voting history" file for a voter is not an original record. Rather, Board data entry clerks make their entries based on their review of the polling place sign-in (*i.e.* "scribe") books. These books are kept by the Board for two years after the election. Understandably such a process conducted by the Manhattan Borough Office of the Board is error-prone. For most voters for which an erroneous entry is made there are no consequences and the mistake goes forever unnoticed.

A recent press inquiry at the Board's General Office questioned Candidate Vance's voting history in several aspects. The Board staff was most helpful in researching the true facts which so rebutted the charges the reporter was investigating that no story was published. However, I am writing to set forth the true facts so that you are prepared should there be any further inquiry.

My client moved from New York to Seattle in 1988 and voted there until his return to New York in 2004. The first issue raised was that the computerized voting history (copy enclosed herewith) shows him as having voted in person in New York on November 7, 1989. Enclosed herewith is a copy of the buff card voting record for Mr. Vance (VSN # M0289703). The voter sign-in shows the inspector began to enter data on that date and then placed a line through the signature line. There is no voter's signature for that date. Also enclosed herewith is a copy of Mr. Vance's father's buff card (VSN # C0138098) indicating that he in fact voted on that date. Curiously, the computerized voting history for Secretary Vance also shows him voting on that date.

August 27, 2009

The second question raised was that the computerized voting history indicates that Mr. Vance did not vote in the November 2008 Presidential Election. The Board staff ascertained that this is not true, based on examination of the Scribe book for that election. However, the computerized history has not been corrected as of today's date. Would you kindly have the Manhattan Borough Office staff see to this correction?

Curiously, the computerized voting history for Mr. Vance's mother, Grace S. Vance (VSN # C0140093), a copy of which is enclosed, indicates that she voted in the November 2008 election. However, Mrs. Vance passed away in the Spring of 2008. The Board's computerized records still indicate her status as "active". How far behind is Manhattan in processing Health Department death notices?

The final two allegations relate to the fact that Mr. Vance's computerized voting history has him voting in person in Manhattan on November 8, 1994 and November 4, 1997. These are erroneous entries. Mr. Vance voted in person in Seattle on those dates. Furthermore, the time records for his law firm for November 4, 1997 show him working all day in Seattle. The firm's records do not go back to 1994. However, to what end would someone vote on both coasts in person on the same day? The computerized voting history for Secretary Vance indicate that he voted on those two dates.

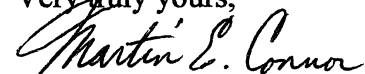
Finally, I must point out that a comparison of Mr. Vance's buff card voting history shows that he voted in New York in the April 1988 Presidential Primary (prior to his move). Yet, there is no entry for that election in his computerized history. Secretary Vance's buff card proves he voted in April 1988, November 1988 and September 1990. Yet there are no computerized history entries for those elections.

The really strange entries in the computerized history are the ones that show Mr. Vance voting in a Special Election on December 31, 1986 and his father voting in a Special Election on December 31, 1985. We both know there hasn't been a Special Election on New Year's Eve in New York within human memory.

The chaos in the Manhattan Borough Office in the late 1980's and 1990's was well documented in Senate Elections Committee hearings in which I participated, in reports by the State Board of Elections, and in numerous press accounts of the day. Today, the office is better-run but they obviously still make careless mistakes.

Kindly keep this letter and the accompanying documents on file so that any future inquiries about my client's voting history can be accurately answered.

Very truly yours,



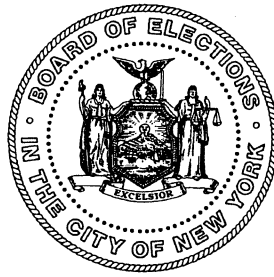
MARTIN E. CONNOR

Encl.









## New York City Board of Elections

Serial No : M0289703  
Full Name : VANCE , CYRUS ,  
Street : 885 WEST END AVENUE 5B  
City/Zip : MANHATTAN 10025  
DOB : 06/14/54  
History

Status : Active As of 1/1/1980  
ED/AD : 049/069  
Enrollment : Democratic  
Registration Date : 1/1/1980

Election Date	Election Type	Ballot Type	Voter Type	ED/AD
09/09/08	PR	R	R	049/069
02/05/08	PP	R	R	049/069
11/06/07	GE	R	R	049/069
11/07/06	GE	A	R	049/69
09/12/06	PR	R	R	094/67
11/08/05	GE	R	R	094/67
09/13/05	PR	R	R	094/67
11/02/04	GE	R	R	094/67
11/04/97	GE	R	R	082/73
11/08/94	GE	R	R	082/73
11/07/89	GE	R	R	087/66
12/31/86	SP	R	R	087/66

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PURSUANT TO SECTION 1-107 OF THE  
ELECTIONS LAW (A.D. for 1964)

**VANCE** | **CYRUS** | **R. JR.**  
SICAMAP SHIPPING CORP.  
GARDENVILLE, CALIF. 94727

Residence Address  
Mailing address if different  
City or town, zip code  
New York City 10028  
Village

Apartment Dweller  
If Apartment Dweller, Apt. No., Floor No., Apt. No., Apt. No., Apt. No., Apt. No.  
Length of time at residence  
Years, Months, Days

Did you previously vote in New York State? Yes  No   
If not, under what name did you register?  
Yes  No

Did you register under your present name? Yes  No   
If not, under what name did you register?  
Yes  No

Did you previously vote in New York State? Yes  No   
If not, under what name did you register?  
Yes  No

Did you register under your present name? Yes  No   
If not, under what name did you register?  
Yes  No

Did you register under your present name? Yes  No   
If not, under what name did you register?  
Yes  No

Did you register under your present name? Yes  No   
If not, under what name did you register?  
Yes  No

Registration papers  
Own  Mother  Father   
Spouse

Boys in U.S.A.? Yes  No   
Date of person  
City and State  
County

Boys in U.S.A.? Yes  No   
Date of person  
City and State  
County

Boys in U.S.A.? Yes  No   
Date of person  
City and State  
County

Boys in U.S.A.? Yes  No   
Date of person  
City and State  
County

Boys in U.S.A.? Yes  No   
Date of person  
City and State  
County

Boys in U.S.A.? Yes  No   
Date of person  
City and State  
County

Boys in U.S.A.? Yes  No   
Date of person  
City and State  
County

ENROLLMENT  
(check only ONE)  
If you wish to enroll in a political party, check the party of your choice:  
 Democratic  
 Conservative  
 Right to Life  
 Republican  
 Liberal  
I do not wish to enroll in any political party.  
I transfer my present party enrollment to my new address (See instruction No. 8)  
I am herewith changing my enrollment (See instruction No. 10)

ENROLLMENT  
(check only ONE)  
If you wish to enroll in a political party, check the party of your choice:  
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 Right to Life  
 Republican  
 Liberal  
I do not wish to enroll in any political party.  
I transfer my present party enrollment to my new address (See instruction No. 8)  
I am herewith changing my enrollment (See instruction No. 10)

ENROLLMENT  
(check only ONE)  
If you wish to enroll in a political party, check the party of your choice:  
 Democratic  
 Conservative  
 Right to Life  
 Republican  
 Liberal  
I do not wish to enroll in any political party.  
I transfer my present party enrollment to my new address (See instruction No. 8)  
I am herewith changing my enrollment (See instruction No. 10)

ENROLLMENT  
(check only ONE)  
If you wish to enroll in a political party, check the party of your choice:  
 Democratic  
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 Right to Life  
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ENROLLMENT  
(check only ONE)  
If you wish to enroll in a political party, check the party of your choice:  
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 Republican  
 Liberal  
I do not wish to enroll in any political party.  
I transfer my present party enrollment to my new address (See instruction No. 8)  
I am herewith changing my enrollment (See instruction No. 10)

AFFIDAVIT  
"I affirm that the information provided herein is true and I understand that this application will be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject me to the same penalties for perjury as if I had been duly sworn."  
Signature of Member of Applicant  
Date

AFFIDAVIT  
"I affirm that the information provided herein is true and I understand that this application will be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject me to the same penalties for perjury as if I had been duly sworn."  
Signature of Member of Applicant  
Date

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"I affirm that the information provided herein is true and I understand that this application will be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject me to the same penalties for perjury as if I had been duly sworn."  
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Signature of Member of Applicant  
Date

AFFIDAVIT  
"I affirm that the information provided herein is true and I understand that this application will be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject me to the same penalties for perjury as if I had been duly sworn."  
Signature of Member of Applicant  
Date

AFFIDAVIT  
"I affirm that the information provided herein is true and I understand that this application will be accepted for all purposes as the equivalent of an affidavit, and if it contains a material false statement, shall subject me to the same penalties for perjury as if I had been duly sworn."  
Signature of Member of Applicant  
Date

Other Remarks  
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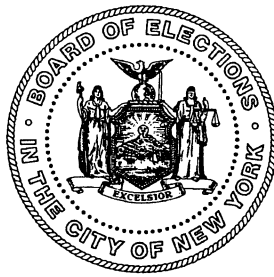
FORM NO 48798B

YEAR	MONTH	IF PAPER BALLOTS ARE USED		PUBLIC COUNTED NUMBER		SIGNATURE OF VOTER FOR ELECTIONS	INSPECTOR'S INITIALS
		NO ON BALLOT		MACHINE MACHINE			
		BILL YEARS	VOTES	# 1	# 2		
1	2	3	4	5	6		7
90	11					<i>James R. Vance</i>	<i>EW</i>
90	9					<i>James R. Vance</i>	<i>EW</i>
89	11					<i>James R. Vance</i>	<i>EW</i>
89	11					<i>James R. Vance</i>	<i>EW</i>
88	7					<i>James R. Vance</i>	<i>EW</i>
85	9/16					<i>James R. Vance</i>	<i>EW</i>
84	11/16					<i>James R. Vance</i>	<i>EW</i>
84	4/13					<i>James R. Vance</i>	<i>EW</i>
82	11/2					<i>James R. Vance</i>	<i>EW</i>
81	11/3					<i>James R. Vance</i>	<i>EW</i>
80	11					<i>James R. Vance</i>	<i>EW</i>

REGISTRATION SIGNATURE  COMPARE NEW SIGNATURE WITH VOTER'S ORIGINAL SIGNATURE ON OTHER SIDE

CHALLENGED DATE	REGISTERED DATE

ENROLLMENT AND CHANGE OF ENROLLMENT				
ENROLLMENT NUMBER	DATE	PARTY	REMARKS	INITIALS OF REGISTRAR
14	10/14/64			<i>EW</i>



## New York City Board of Elections

Serial No : C0138098  
Full Name : VANCE , CYRUS ,  
Street : 2 EAST 93 STREET 3C  
City/Zip : MANHATTAN 10128  
DOB : 03/27/17

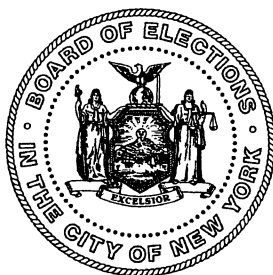
Status : Purged As of 2/20/2002  
ED/AD : 001/068  
Enrollment : Democratic  
Registration Date : 1/1/1979

### History

Election Date	Election Type	Ballot Type	Voter Type	ED/AD
11/04/97	GE	R	R	082/73
11/05/96	GE	R	R	082/73
11/08/94	GE	B	R	082/73
09/13/94	PR	R	R	082/73
11/02/93	GE	R	R	082/73
11/03/92	GE	B	R	082/73
11/06/90	GE	R	R	087/66
11/07/89	GE	R	R	087/66
12/31/85	SP	R	R	087/66

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## New York City Board of Elections

Serial No : C0138098  
Full Name : VANCE , CYRUS ,  
Street : 2 EAST 93 STREET 3C  
City/Zip : MANHATTAN 10128  
DOB : 03/27/17  
Sex : M  
US Citizen : Y  
C/O Name :

Status : Purged AS of 2/20/2002  
ED/AD : 001/068  
Enrollment : Democratic  
Registration Date : 1/1/1979  
Future Enrollment : None  
Enrollment Act Date :  
Voter Type : Regular

### Mailing Address

Line 1 :  
Line 2 :  
Line 3 :  
Line 4 :

### Poll site Information

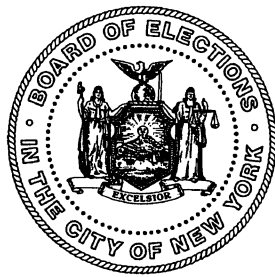
Site Num/Name : M0100-Church Heavenly Rest  
Address : 2 East 90 Street New York 10128

Handicapped : Y                      Status : Active

### District Information

CD : 14      SD : 26      CO : 4      CC : 9      LD : 14



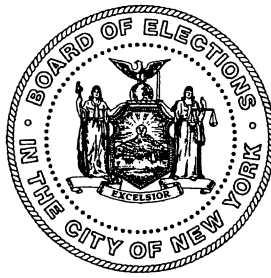


## New York City Board of Elections

PRINT	1. DID YOU PREVIOUSLY VOTE IN N.Y. STATE? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	2. SURNAME <b>VANCE</b>	GIVEN NAME <b>GRACE</b>	INITIAL <b>S. J. A.</b>	DATE OF REGISTRATION <b>10/14/64</b>	NEW YORK - CENTRAL REGISTRATION <b>C0140093</b>
		3. STREET ADDRESS <b>NO. 2 ST. EAST 93 ST</b>		6. LENGTH OF RESIDENCE AT TIME OF NEXT ELECTION YRS. <b>16</b> MO. <b>3</b> DAYS YRS. <b>16</b> MO. <b>3</b> DAYS YRS. <b>13</b> MO. <b>3</b> DAYS		7. DATE OF BIRTH <b>6/2/18</b>
		10. HEIGHT <b>5'8 1/2"</b>		11. COLOR OF HAIR <b>GR</b>		9. SEX <b>F</b>
		12. COLOR OF EYES <b>BRN</b>		13. MARRIED <input checked="" type="checkbox"/> SINGLE <input type="checkbox"/> WIDOWED		CANCELLATION DATE REASON <input checked="" type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> 4 <input type="checkbox"/> 5 <input type="checkbox"/> 6 <input type="checkbox"/> 7
		14. WAS APPLICANT CHALLENGED? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		15. CHECK CARD EXECUTED <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		16. CANCELLATION REASON <b>NEW 61-10-72 AD</b>
		17. IN WHAT YEAR DID YOU LAST VOTE AT A GENERAL ELECTION IN THIS STATE? <b>1960</b>		18. DID YOU REGISTER UNDER YOUR PRESENT NAME? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		19. OTHER REMARKS <b>Section 101</b>
		20. IF NOT, FROM WHAT ADDRESS DID YOU VOTE? <b>87/66</b>		21. TO BOARD OF ELECTIONS: INSERT PRIOR REGISTRATION SERIAL NO HERE		<b>3060 Foxhall Rd N.W.</b>
		22. ST. ADDRESS <b>Wash D.C.</b>		23. CITY OR TOWN <b>City of Washington</b>		State <b>D.C.</b>
		24. NAME AND ADDRESS OF EMPLOYER <b>Housewife</b>		25. NATURALIZATION PAPERS EXHIBITED <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		ABSENTEE REGISTRATION DUE TO <b>SPONSOR FED EMP</b>
		26. TO BE FILLED IN WHERE APPLICANT PRODUCES NATURALIZATION PAPERS		27. THE FOREGOING STATEMENTS ARE TRUE		
		OWN <input type="checkbox"/> FATHERS <input type="checkbox"/> MOTHERS <input type="checkbox"/> HUSBANDS <input type="checkbox"/>		<b>X</b> <b>Grace Vance</b>		
		28. CITY AND STATE		SIGNATURE OF APPLICANT		
		29. NAME OF PERSON TO WHOM ISSUED		<b>C. Hendricks</b>		
		30. IF NATURALIZED THROUGH HUSBAND, HAS APPLICANT BEEN MARRIED FOR NINETY DAYS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		SIGNATURE OF DEPUTY BOARD MEMBER		
		31. TO THE REGISTRATION BOARD: IF A FOREIGN BORN APPLICANT FAILS TO EXHIBIT NATURALIZATION PAPERS HE MUST EXECUTE AN AFFIDAVIT AS REQUIRED BY ELECTION LAW SECTION 17D				

Grace Vance  
SIGNATURE OF APPLICANT





## New York City Board of Elections

Serial No : C0140093  
Full Name : VANCE , GRACE ,  
Street : 2 EAST 93 STREET 3C  
City/Zip : MANHATTAN 10128  
DOB : 06/02/18

Status : Active As of 1/1/1964  
ED/AD : 001/068  
Enrollment : Democratic  
Registration Date : 1/1/1964

### History

Election Date	Election Type	Ballot Type	Voter Type	ED/AD
11/04/08	GE	R	R	001/068
02/05/08	PP	R	R	001/068
11/07/06	GE	R	R	001/68
09/12/06	PR	R	R	001/68
11/08/05	GE	R	R	001/68
11/02/04	GE	B	R	001/68
03/02/04	PP	R	R	001/68
11/05/02	GE	R	R	001/68
11/06/01	GE	R	R	082/73
10/11/01	SP	R	R	082/73
09/25/01	SP	R	R	082/73
11/07/00	GE	R	R	082/73
03/07/00	PP	R	R	082/73
11/03/98	GE	R	R	082/73
11/05/96	GE	R	R	082/73
11/08/94	GE	R	R	082/73
09/13/94	PR	R	R	082/73
11/02/93	GE	R	R	082/73
11/03/92	GE	B	R	082/73
04/07/92	PP	R	R	087/66
11/06/90	GE	R	R	087/66
11/07/89	GE	R	R	087/66
12/31/85	SP	R	R	087/66

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Comments  
Pg 2

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
In the Matter of the Application of MARQUEZ  
CLAXTON,

Petitioner,

- against -

YVONNE MITCHELL, JULIET BARTON, and  
RICHARD MURPHY,

**AFFIRMATION OF  
MARTIN BOWE IN  
OPPOSITION TO THE  
ORDER TO SHOW CAUSE**

Index No. 21060/2009

Objectors-Respondents,

Commissioners of Elections of the Board of Elections in  
the City of New York constituting the Board of Elections  
in the City of New York,

Respondents.  
-----X

**MARTIN BOWE**, an attorney admitted to practice in the State of New York,  
affirms the truth of the following pursuant to CPLR Rule 2106 and subject to the penalties of  
perjury:

1. I am the Assistant Corporation Counsel assigned to represent the  
Commissioners of Elections in the City of New York, respondents in the instant action. I am  
familiar with the facts and circumstances concerning the petition.

**I. THE BOARD COMPLIED WITH THE COURT'S ORDER**

2. In the instant proceeding, the petitioner complains that the Board of  
Elections in the City of New York failed to place him on the absentee, military and special  
ballots, which he alleges was ordered by this Court on August 17, 2009.

3. As the petitioner has been placed on the ballot (both on the printed strip  
for use in the lever voting machine and on the Primary Day standby paper ballots used as both

emergency and affidavit ballots), the Board has complied with the Order and the petition should be dismissed with prejudice in its entirety for failing to state a claim.

**II. THE BOARD COMPLIED WITH THE COURT'S ORDER. TO THE EXTENT THERE IS ANY AMBIGUITY WITH WHICH BALLOTS THE COURT'S ORDER WAS DIRECTED, CONTEMPT CANNOT BE FOUND BECAUSE THE ORDER IS AMBIGUOUS, AND THE BOARD'S INTERPRETATION OF THE ORDER WAS REASONABLE AND REQUIRED BY LAW**

4. The Order directed that the petitioner be placed on the "appropriate ballot." As set forth below at Point "IV," the Board complied with state law which governs precisely when absentee, military and special ballots are to be prepared and mailed to the voters. To the extent there is any ambiguity with respect to the scope of the Court's Order directing petitioner's name be included on the "appropriate ballot," the Board cannot be found in contempt.

5. The Court of Appeals has made clear that "[t]o sustain a finding of either civil or criminal contempt based on an alleged violation of a court order it is necessary to establish that a lawful order of the court clearly expressing an unequivocal mandate was in effect." Department of Env't'l Protection v. Department of Env't'l Conservation, 70 N.Y.2d 233, 240 (1987); accord, Garcia v. Great Atl. and Pac. Tea Co., 231 A.D.2d 401, 402 (1st Dept. 1996). "Contempt is a drastic remedy which should not issue absent a clear right to such relief." Coronet Capital Co. v. Spodek, 202 A.D.2d 20, 29 (1st Dept. 1994). "Any ambiguity in the court's mandate should be resolved in favor of the would-be contemnor." Richards v. Estate of Kaskel, 169 A.D.2d 111, 122 (1st Dept. 1991). This insistence on clarity stems from the fact that a party charged with contempt could be incarcerated, Benson Realty Corp. v. Walsh, 54 A.D.2d 881, 882, (1st Dept. 1976), appeal dismissed, 43 N.Y.2d 732, appeal denied, 43 N.Y.2d 642 (1977), a fact required to be noted in large type on the front of a movant's moving papers. Jud. Law § 756.

6. The order or judgment allegedly violated is the relevant paper for ascertaining whether the court issued an unequivocal directive, not statements in judicial opinions or other documents. See Richards, 169 A.D.2d at 122 (“judgment, on its face, lacked the necessary clarity and precision to sustain a contempt”); Department of Env’tl Protection, 70 N.Y.2d at 240 (examine conduct “in light of the express terms of the order”). In Betancourt v. Boughton, 204 A.D.2d 804, 810 (3d Dept. 1994), the Court set aside a contempt determination where the order allegedly violated “does not clearly reflect the court’s stated intent.” See also Bellman v. McGuire, 176 A.D.2d 583, 584 (1st Dept. 1991)(noting that “the prior order did not specifically direct” what the movant was seeking). 176 A.D.2d at 584.

7. Additionally, “[i]n order to find a party in civil contempt of court pursuant to Judiciary Law § 753, the applicant must demonstrate by clear and convincing evidence that the alleged contemnor has intentionally engaged in conduct which violated a lawful order of the court clearly expressing an unequivocal and explicit mandate.” See Miller v. Miller, 61 A.D.3d 651, 877 N.Y.S.2d 148 (2d. Dep’t 2009).

8. Here, the Court ordered that petitioner’s name be place on the “appropriate ballot.” See Ex. A to the Petition. By August 18, 2009—the date the Court’s order was served upon the Board—the absentee, military and special ballots had already been printed and they mailing process had begun, both pursuant to state law. See Point IV below. Thus, the Board cannot be found to have “intentionally engaged in conduct which violated” the Court’s Order dated August 17, 2009. Miller, 61 A.D.3d at 652, 877 N.Y.S.2d at 149.

9. Additionally, had petitioner requested that his name be placed on the absentee, military and special ballots in addition to the election day ballot (not all governed by the same provisions of state law), the Board would have submitted appropriate moving papers



articulating the various applicable statutory mandates, as set forth below at Point IV. However, petitioner did not raise the issue of absentee, special and military ballots in this proceeding, until now. Therefore, the Court's order cannot be viewed as sufficiently specific for purposes of petitioner's request for a finding of contempt, thus barring a finding of contempt.

10. In view of the clear legal mandates set forth in State Law with respect to the printing and sending of absentee, military and special ballots—law that petitioner was presumably aware of at the time he filed the initial petition in this matter—the Board cannot be found to have “intentionally engaged in conduct which violated a lawful order of the court” (Miller, 61 A.D.3d at 652, 877 N.Y.S.2d at 149) when the Board followed state law by approving and sending the absentee, military and special ballots according to the schedule set by the legislature (see Point “IV” below).

### **III. THE PETITION IS FACIALLY FLAWED**

11. The Petition should be denied because it does not contain the appropriate warning on the first page of petitioner's motion papers.

12. New York Judiciary Law § 756 clearly states that

The application shall contain on its face a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both, according to law together with the following legend printed or type written in a size equal to at least eight point bold type.

13. Here, petitioner has set forth the requisite warning noted in large type on the second page of movant's papers. See Petition. Therefore, petitioner's request for a finding of contempt must be denied. See Jud. Law § 756.

#### IV. STATE LAW BARS ANY CHANGES TO ABSENTEE, MILITARY AND SPECIAL BALLOTS

14. Even if the Order is construed to extend to the absentee, and special ballots, the petition should nonetheless be dismissed for the additional reasons set forth below.

15. New York Election Law only requires that the absentee ballot be “as nearly as practical” in the same form as the ballot provided to voters in the district on primary election day. See N.Y. Elec. Law § 7-122(1)(a).

16. Here, it was impractical for the Board to add petitioner’s name, as demonstrated by the timeline set forth in the accompanying Affirmation of Steven Richman.

17. Specifically, Mr. Richman’s Affirmation demonstrates that the absentee ballots were ordered to be printed on August 7, 2009; the printing of the ballots began on August 8, 2009, and was completed eight days later on August 16, 2009. On August 13 the Board began mailing the absentee and military ballots to voters in Queens County, four days prior to this Court’s Order. Notably, the printing and delivery of the Queens County absentee, military and special ballots was completed in all languages and delivered by August 17, 2009, the day prior to the service of the Court’s order on the Board. See Richman Affirmation at ¶¶ 10-13.

18. Critical to the instant action and pursuant to New York Election Law, the Commissioners of Elections in the City of New York voted to print absentee ballots on August 5, 2009, well before the Court’s Order of August 17, 2009. See N.Y. Elec. Law § 4-114; Richman Affirmation at ¶ 3.

19. By that vote, the Board determined which candidates were duly designated or nominated to be placed on the absentee ballot for the September 15, 2009 primaries. Richman

Affirmation at ¶ 4. This determination of the Board is “final and conclusive.” See N.Y. Elec. Law § 7-122(4).

20. While a board of elections or a court of competent jurisdiction may determine—after the Section 7-122(4) “final and conclusive” determination—that a candidate was improperly placed on an absentee ballot, resulting in votes for that candidate to not be counted at the election, nothing in New York Election Law provides mechanisms under which a candidate may be added to the absentee ballot after the Board’s determination. See id.

21. Indeed as demonstrated in the facts relevant here, adding an additional candidate to the absentee ballot after the Board has made its final and conclusive determination of which candidates are duly designated or nominated to be placed on the absentee ballot is simply an impractical, if not impossible, feat. See Richman Aff. at ¶¶ 15.

22. Moreover, to do so would force the Board to violate other provisions of New York Election Law which regulate military ballots. Under the relevant provisions, military ballots should be in the same form as absentee ballots and must have been mailed out no later than August 14, 2009. See N.Y. Election Law § 7-123(2); §10-108. Further, the failure to include the name of a candidate on a military ballot cannot be a basis to invalidate the election. Id. § 10-116.

23. Here, the Board complied with these statutory requirements, but cannot continue its compliance if the form of the absentee, military and special ballots were now changed. See Richman Aff. at ¶¶ 5-7.

24. Finally, New York Election Law mandates that if the Board receives more than one military, absentee or special ballot envelope from the same voter, “the one bearing the earlier date of execution shall be accepted and the other rejected.” See N.Y. Elec. Law § 9-

104(1)(c); Richman Aff. ¶ 16. Applying this law, even if it was practical for the Board to distribute new absentee ballots, the effect of those ballots would be mooted where absentee voters already mailed in their votes with the original absentee ballots.

#### V. PETITIONER HAS FAILED TO JOIN NECESSARY PARTIES

25. Plaintiff has failed to serve the petition upon necessary parties, i.e., the other primary election candidates whose names are on all ballots: Michael R. Duncan, Lou Grays, Jacques M. Leandre, Frederick A. Lewis II and James Sanders Jr. (“Candidates”). See Richman Aff. ¶ 11.

26. In King v. Board of Elections—where petitioner sought the same relief petitioner seeks herein—the Court found held that the petition would be dismissed if petitioner failed to properly join the other primary candidates:

“Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made...defendants.” (CPLR 1001[a]). ...The issue of non-joinder may be raised at anytime by any party or by the court on its own motion (see Figari v New York Tel. Co., 32 A.D.2d 434, 438 119691). ...[T]he court, sua sponte, finds that there are those, heretofore not named as parties, who may have an genuine interest in and/or may be inequitably affected by the outcome of this proceeding. More specifically, the court finds that any judgment in this proceeding will have an impact on the current candidates running for the same district seat.

See a copy of the King Order annexed hereto.

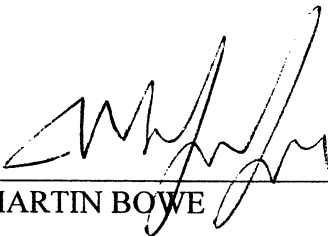
27. Here, as in King, petitioner seeks to have his name added to those ballots which, by law, had appropriately been printed and sent to the voters prior to the Board receiving the Court’s Order. As the other primary Candidates have a right to be heard with respect to any

change to the ballots at issue, petitioner should have served them with the Order To Show Cause in this matter.

28. Petitioner has submitted no evidence to show that the other Candidates have been properly joined. The Petition should be dismissed.

29. As petitioner cannot obtain the requested relief from the Board, the Board respectfully requests that his motion be denied in its entirety, and that the petition be dismissed with prejudice.

Dated: New York, New York  
August 30, 2009

  
MARTIN BOWE

KING

At an IAS Term, Special Election Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28<sup>th</sup> day of August, 2009.

P R E S E N T:

HON. DAVID I. SCHMIDT

Justice.

-----X

IN THE MATTER OF THE APPLICATION OF

ERLENE J. KING,

Petitioner,

- against -

Index No. 700035/2009

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondent.

-----X

The following papers numbered 1 to 4 read on this motion:

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

Papers Numbered

1-2

Opposing Affidavits (Affirmations) \_\_\_\_\_

3-4

Reply Affidavits (Affirmations) \_\_\_\_\_

\_\_\_\_\_ Affidavit (Affirmation) \_\_\_\_\_

Other Papers \_\_\_\_\_

Upon the foregoing papers, petitioner Erlene J. King brings this proceeding, by order to show cause dated August 24, 2009, seeking a judgment directing respondent the Board of Elections in the City of New York to "include the name of petitioner Erlene J. King and to reprint the absentee ballots for the 45<sup>th</sup> Council

District to be used In the Democratic Party Primary Elections to be held September 15, 2009." Oral argument of petitioner's application was held before the court on August 27, 2009.

"Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made . . . defendants" (CPLR 1001[a]). Further, "[w]hen a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned . . ." (CPLR 1001[b]). Moreover, the issue of non-joinder may be raised at anytime by any party or by the court on its own motion (see *Figari v New York Tel. Co.* 32 AD2d 434, 438 [1969]). Although the parties do not address the issue of non-joinder, the court, sua sponte, finds that there are those, heretofore not named as parties, who may have an genuine interest in and/or may be inequitably affected by the outcome of this proceeding. More specifically, the court finds that any judgment in this proceeding will have an impact on the current candidates running for the same district seat.

Accordingly, it is

ORDERED that the proceeding is held in abeyance and the matter is adjourned so as to allow joinder of all necessary parties. Petitioner is directed to join all the other candidates on the ballot for the 45<sup>th</sup> council district, namely Ernest Emmanuel, Dexter A. McKenzie, Kendall Stewart, Samuel Taitt and Jumaane D.



Williams as party respondents in this proceeding. In light of the practicalities involved, petitioner is directed to make service of the Order to Show Cause dated August 24, 2009, all other papers in this proceeding and a copy of this order upon the proposed respondents personally under CPLR 308 (1) by Monday, August 31, 2009. The matter is returnable before this court at Special Election Part I to be held at the Supreme Court Courthouse, 360 Adams Street, Brooklyn, New York, Room 541, on the 1<sup>st</sup> day of September, 2009 at 10:30 a.m.. Any failure by petitioner to join all the above-named necessary parties will result in the dismissal of this proceeding under CPLR 3211(a)(10).

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

RICHMAN AFF

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X

In the Matter of the Application of MARQUEZ  
CLAXTON,

Petitioner,

- against -

YVONNE MITCHELL, JULIET BARTON, and  
RICHARD MURPHY,

Objectors-Respondents,

**AFFIRMATION OF  
STEVEN H. RICHMAN IN  
OPPOSITION TO THE  
ORDER TO SHOW CAUSE**

Index No. 21060/2009

Commissioners of Elections of the Board of Elections in  
the City of New York constituting the Board of Elections  
in the City of New York,

Respondents.

-----X

**STEVEN H. RICHMAN**, an attorney admitted to practice in the State of New York, affirms the truth of the following pursuant to CPLR Rule 2106 and subject to the penalties of perjury:

1. I am the General Counsel for the Board of Elections in the City of New York and am familiar with the facts and circumstances of the instant proceeding through personal knowledge and conversations with employees of the Board who have reviewed relevant records maintained by the Board.

2. The Board is an agency created pursuant to Section 3-200 of the New York State Election Law. It is charged with administering the New York State Election Law within the City of New York.

3. On August 5, 2009, the Commissioners of Elections in the City of New York voted to print military, absentee and special ballots at the conclusion of the Board's

hearings, except in those districts where the hearings were continued until the following Tuesday, August 11, 2009. As of August 5, 2009, only the 3rd Municipal Court District in the Borough of Manhattan had hearings continued until August 11, 2009.

4. By that vote the Board determined which candidates were duly designated or nominated to be placed on the military, absentee and special ballot for the September 15, 2009 primaries.

5. The Board of Elections is required by Section 10-108 of the New York State Election Law to mail military ballots to eligible voters no later than thirty-two days before the Primary Election. The Board complied with that statutory requirement.

6. Section 10-116 of the Election Law requires the Board of Elections in the City of New York to determine the names of all candidates appearing on the military ballot at least three days before the first day for the distribution of military ballots. Again, the Board complied with that statutory requirement. That Section further provides that “The failure of the county board of elections to include the name of any candidate... on the military ballot shall in no way affect the validity of election with respect to the office for which the nomination was made or the validity of the military ballot as to any other matter”.

7. Section 7-123(2) of the Election Law provides that the ballots for military voters shall be the same form as those to be voted by absentee voters in the election district of the military voter.

8. Title III of the Election Law provides for special ballots and Section 11-304 requires them to be cast and canvassed in the same manner as an absentee ballot.

9. On August 7, 2009, the order to print the military, absentee and special ballots was placed.

10. On Monday August 8, 2009, the printing of the English/Spanish military, absentee and special ballots started. On Thursday August 13, the printing of the Chinese/Korean military, absentee and special ballots started.

11. On August 13, 2009, the English/Spanish military, absentee and special ballots were delivered to the Board. On Monday August 17, 2009 the Chinese/Korean military, absentee and special ballots were delivered to the Board. Those ballots set forth as candidates in this contest: Michael R. Duncan, Lou Grays, Jacques M. Leandre, Frederick A. Lewis II and James Sanders Jr. Thus, by August 17, 2009, the printing and delivery of the military, absentee and special ballots at issue in this case was completed. Appendixed hereto as "Exhibit A" is a true and correct copy of an email confirming the delivery schedule of absentee ballots to Queens County.

12. By Thursday August 13, 2009, military and absentee ballots for Election Districts contained within the four Assembly Districts (*i.e.*, Assembly Districts 23, 29, 31 and 32) that comprise the 31<sup>st</sup> Council District began being mailed out by the Queens Office of the Board of Elections.

13. The Board continued to mail out absentee and military ballots to voters within the Assembly Districts that compromise the 31st Council District. Appendixed hereto as "Exhibit B" is a true and correct copy of the summary of the number of the military, absentee, and special ballots that have been distributed to voters as of August 28, 2009. This summary was generated and maintained in the regular course of business by the Board. As of August 28, 2009, a total of 1009 military, absentee and special ballots were mailed.

14. Given the fact that many voters have already received military and absentee ballots, and some voters have already returned their ballots, the Board contends that it

would be impossible for it to issue new military, absentee and special ballots in the 31st Council District without both violating state law and creating the very voter confusion the relevant state law sections cited above are aimed at preventing.

15. Additionally, it is uncertain that it would be physically possible for the Board to reprint new military, absentee and special ballots in time for military, absentee and special ballot voters, especially those voters in remote locations, to allow the recipients to timely return them.

16. Further, Section 9-104(1)(c) of the Election Law mandates that if the Board of Elections receives more than one military, absentee or special ballot envelope from the same voter, "the one bearing the earlier date of execution shall be accepted and the other rejected". Therefore, to grant the relief sought by the petitioner in this instant proceeding may not even provide the benefit sought by this application.

Dated: New York, New York  
August 30, 2009

  
STEVEN H. RICHMAN



-----Original Message-----

**From:** Tom Sattie

**Sent:** Friday, August 28, 2009 1:30 PM

**To:** \*ExecutiveManagement; \*Legal Department

**Cc:** \*CRU Group

**Subject:** 31 Council Absentee Delivery

Hello All,

According to my records, here is how the signoffs and deliveries went for 31 Council Absentee ballots:

**ENGLISH**

Proofs sent to BOE - Saturday, August 8

Proofs approved by BOE - Monday, August 10

Printed Absentees sent to BOE - Thursday, August 13

**CHINESE-KOREAN**

Proofs sent to BOE - Tuesday, August 11

Proofs approved by BOE - Thursday, August 13

Printed Absentees sent to BOE - Monday, August 17

As always, boroughs were instructed to begin sending Absentee ballots immediately upon receipt.

Thanks,

Tom



**Exhibit B**



AD	WEEK #3							TOTALS
	August 23, 2009	August 24, 2009	August 25, 2009	August 26, 2009	August 27, 2009	August 28, 2009	August 29, 2009	
22	0	0	0	0	0	0	0	0
23	0	0	0	0	0	0	0	0
24	0	0	0	0	0	0	0	7
25	0	0	0	0	0	0	0	2
26	0	0	0	0	0	0	0	4
27	0	0	0	0	0	0	0	2
28	0	0	0	0	0	0	0	8
29	0	0	0	0	0	0	0	3
30	0	0	0	0	0	0	0	1
31	0	0	0	0	0	0	0	0
32	0	0	0	0	0	0	0	1
33	0	0	0	0	0	0	0	1
34	0	0	0	0	0	0	0	2
35	0	0	0	0	0	0	0	2
36	0	0	0	0	0	0	0	3
37	0	0	0	0	0	0	0	1
38	0	0	0	0	0	0	0	2
39	0	0	0	0	0	0	0	1
TOTALS	0	5	26	3	6	0	0	40

AD	WEEK #3							TOTALS
	August 23, 2009	August 24, 2009	August 25, 2009	August 26, 2009	August 27, 2009	August 28, 2009	August 29, 2009	
22								0
23								0
24								7
25								2
26								4
27								2
28								8
29								3
30								1
31								0
32								1
33								1
34								2
35								2
36								3
37								1
38								2
39								1
TOTALS	0	5	26	3	6	0	0	40

AD	WEEK #5							TOTALS
	September 6, 2009	September 7, 2009	September 8, 2009	September 9, 2009	September 10, 2009	September 11, 2009	September 12, 2009	
22	0	0	0	0	0	0	0	0
23	0	0	0	0	0	0	0	0
24	0	0	0	0	0	0	0	0
25	0	0	0	0	0	0	0	0
26	0	0	0	0	0	0	0	0
27	0	0	0	0	0	0	0	0
28	0	0	0	0	0	0	0	0
29	0	0	0	0	0	0	0	0
30	0	0	0	0	0	0	0	0
31	0	0	0	0	0	0	0	0
32	0	0	0	0	0	0	0	0
33	0	0	0	0	0	0	0	0
34	0	0	0	0	0	0	0	0
35	0	0	0	0	0	0	0	0
36	0	0	0	0	0	0	0	0
37	0	0	0	0	0	0	0	0
38	0	0	0	0	0	0	0	0
39	0	0	0	0	0	0	0	0
TOTALS	0	0	0	0	0	0	0	0

		WEEK #6	
AD	IND	IND	IND
22	September 13, 2009	September 14, 2009	September 15, 2009
23			
24			
25			
26			
27			
28			
29			
30			
31			
32			
33			
34			
35			
36			
37			
38			
39			
TOTALS	0	0	0
	0	0	0

*This concludes the "Daily" Distribution portion of your report.*



<b>SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF QUEENS</b>	
<p>In the Matter of the Application of MARQUEZ CLAXTON,</p> <p>Petitioner,</p> <p>- against -</p> <p>YVONNE MITCHELL, JULIET BARTON, and RICHARD MURPHY,</p> <p>Objectors-Respondents,</p> <p>Commissioners of Elections of the Board of Elections in the City of New York constituting the Board of Elections in the City of New York,</p>	<p>Respondents.</p>
<p><b>AFFIRMATION OF MARTIN BOWE IN OPPOSITION TO THE ORDER TO SHOW CAUSE</b></p> <p><b>MICHAEL A. CARDOZO</b> Corporation Counsel of the City of New York Attorney for City Defendants 100 Church street, Room 2-194 New York, N.Y. 10007-2601</p> <p>Of Counsel: Martin Bowe (MB8042) Tel: (212) 788-0878</p>	
<p>Due and timely service is hereby admitted. New York, N.Y. . . . . '09 Attorney for .....</p>	



*Commt  
Ry*

CE NO.

AN JAS TELM PART 24  
At a ~~Special Election Part X~~, of the  
Supreme Court of the State of New  
York, held in and for the County of  
Queens, at the Supreme Court  
Courthouse thereof, located at 88-11  
Sutphin Boulevard, Jamaica, New  
York on the 27<sup>th</sup> day of August,  
2009.

DATE

PRESENT: Hon. ~~HON AUGUSTUS C. AGATE~~

EMERGENCY  
Justice

FOR

-----X  
In the Matter of the Application of

HON. VALERIE

BRATHWAITE-NELSON

MARQUEZ CLAXTON

Petitioner,

Index No.

21060/2009

as designated for the public office of Member of  
the New York City Council from the 31<sup>st</sup> Council  
New York City Council District, County of  
Queens, City and State of New York

Petitioner,

- against -

ORDER TO SHOW  
CAUSE

YVONNE MITCHELL, JULIET BARTON, and  
RICHARD MURPHY,

Objectors-Respondents,

Commissioners of Elections of the Board of  
Elections in the City of New York constituting the  
Board of Elections in the City of New York,

Respondents.  
-----X

RECEIVED  
G.O. BOARD OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 28 AM 11:20

The purpose of this hearing is to punish the respondents, COMMISSIONERS OF ELECTIONS OF THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK CONSTITUTING THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK, for a civil and criminal contempt of court and such punishment may consist of fine or imprisonment or both, according to law.

WARNING:  
YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT

Upon the annexed the affirmation of emergency of Bernard Mitchell Alter, dated August 27, 2009, and all prior proceedings had herein,

LET the respondents, Commissioners of Elections of the Board of Elections in the City of New York constituting the Board of Elections in the City of New York, show cause at ~~the Court of the City of New York~~ of this court to be held at the courthouse thereof, Room ~~25A~~ <sup>25A</sup>, located at 88-11 Sutphin Boulevard, Jamaica, New York, on the 31<sup>ST</sup> day of AUGUST, 2009, at 9:30

9/19  
JSC  
DATE

o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard,

WHY an order should not be granted:  
(1) pursuant to CPLR 5104 and Judiciary Law Sections 750 and 751 punishing the respondents Commissioners of Elections of the Board of Elections in the City of New York constituting the Board of Elections in the City of New York, as and for a contempt of this court on the grounds  
✓ TO PRINT ABSENTEE, SPECIAL + MILITARY BALLOTS WITH THE PETITIONERS NAME AS A CANDIDATE FOR SUCH POSITION. 142

(i) CANCELING ALL Absentee, Special & Military Ballots FOR THE 31ST NYC CITY COUNCIL DISTRICT WHICH FAILS TO SET FORTH THE PETITIONERS NAME AS A CANDIDATE FOR CITY COUNCIL, PURSUANT TO § 7-122 OF THE ELECTION LAW AND OR IN THE ALTERNATE DIRECTOR OF THE BOARD OF ELECTIONS.

that they have willfully and contumaciously violated the Order of this Court, dated August 17, 2009 and entered on August 18, 2009, and that such conduct has impeded, impaired, and prejudiced the rights of the Petitioner, and

(3) why the petitioner, should not have such other and further relief as may be just, proper, and equitable;

Sufficient reason appearing therefor, let ~~service~~ service of a copy of this order together with the papers upon which it was granted upon the respondents,

Commissioners of Elections of the Board of Elections in the City of New York

constituting the Board of Elections in the City of New York, by ~~personally~~ <sup>PERSONAL</sup>

DELIVERY OF

~~delivering~~ a true copy of same to them at their office located at 32 Broadway,

New York, City, County and State of New York, and upon the attorney for

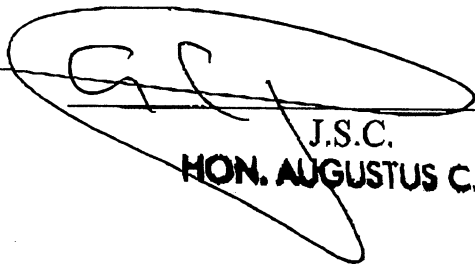
respondents, Alain Massena, for the respondents, Yvonne Mitchell, Juliet Barton,

and Richard Murphy, by personally delivering a true copy of same, ~~to be deemed~~

sufficient service.

on or before the 28<sup>th</sup> day of AUGUST 2009  
be deemed good and sufficient service

Enter,

  
J.S.C.  
HON. AUGUSTUS C. AGATE

ack  
JSC

---

**CERTIFICATION**

---

The undersigned hereby certifies that annexed papers adhere to the requirements of 22 NYCRR §130-1.1.

Dated: August 27, 2009



---

**BERNARD MITCHELL ALTER**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
In the Matter of the Application of

MARQUEZ CLAXTON

Petitioner,

Index No.

21060/2009

as designated for the public office of Member of  
the New York City Council from the 31<sup>st</sup> Council  
New York City Council District, County of  
Queens, City and State of New York

**AFFIRMATION OF  
EMERGENCY**

Petitioner,

- against -

YVONNE MITCHELL, JULIET BARTON, and  
RICHARD MURPHY,

Objectors-Respondents,

Commissioners of Elections of the Board of  
Elections in the City of New York constituting the  
Board of Elections in the City of New York,

Respondents.

-----X

STATE OF NEW YORK)

)ss.:

COUNTY OF KINGS )

BERNARD MITCHELL ALTER, being an attorney duly admitted to  
practice in the Courts of the State of New York, hereby affirms the

following under penalty of perjury pursuant to CPLR 2106:

1. That I am the attorney for the petitioner, am fully familiar with the facts herein and make this affirmation in support of the relief set forth as set forth in the proposed order to show cause herein.
2. That the petitioner is a candidate for the democratic primary for the position of member of the NYC Council in a primary election to be held on Spetmeber 15, 2009 for the democratic primary for the 31<sup>st</sup> NYC Council District in the City of New York .
3. On July 16, 2009, petitioner filed with the respondents, Commissioners of Elections of the Board of Elections in the City of New York constituting the Board of Elections in the City of New York, (hereinafter “Commissioners”), a designating petition for the office of NYC Council for the 31<sup>st</sup> Council District in the City of New York, County of Queens for the democratic primary to be held on September 15, 2009.
  1. Respondents “Commissioners” are charged with conducting that election.
  2. On August 4,2009, the “Commissioners” pursuant to a specification of objections filed by YVONNE MITCHELL, JULIET BARTON, and RICHARD MURPHY, co-respondents

herein removed petitioner from the ballot on the grounds that petitioner had 867 signatures valid out of the 900 required.

3. A petitioner to validate was filed with this court on August 6, 2009. The case was noticed to be heard on August 11, 2009.
4. Upon a further review dated August 13, 2009, the “Commissioners” found petitioner to have 895 signatures out of the the 900 required.
5. Trial was held before Hon. Valerie Bathwaite Nelson, J.S.C., on August 14, 2009 and August 17, 2009 at which time the court reserved decision.
6. On August 17, 2009, the court issued an order, which was entered on August 18, 2009, a copy of which is annexed as Exhibit A, granting petitioners relief in full and ordered the “Commissioners” to restore petitioner to the appropriate ballot finding that petitioner had 908 valid sigantures.
7. On August 18, 2009, the “Commissioners” were personally served with a certified copy of the order and a demand by letter for compliance with that order. Proof of service is annexed as Exhibit B, which is the time stamp by the “Commissioners.”
8. On August 24, 2009, petitioner inquired about the status of the

restoration to the ballot. To his shock, he found out that although the “Commissioners” restored him to the machine vote, they did not do so with respect to absentee ballots, military ballots, and special ballots. Thus petitioners’ name will not be on those ballots.

9. On August 25, 2009, by letter personally delivered to the “Commissioners”, a copy of which is annexed as Exhibit C, a demand to do so was made upon the “Commissioners.”
10. On August 26, 2009, a letter was faxed to your affirmant by counsel for “Commissioners,” a copy of which is annexed as Exhibit D, refusing to comply with the court’s order.
11. Analyzing this, one can readily see the slipping and sliding of the “Commissioners.”
12. In the first place, the court did not specify the ballot to which petitioner was to be restored but to the appropriate ballot.
13. That should not give “Commissioners” a thing to think about. Petitioner was improperly removed by the “Commissioners” from the ballot and the court is telling the “Commissioner” to undo the illegal conduct that was done to the petitioner.
14. Petitioner had to be put into the position he was supposed to be in



when on August 4, 2009 he was illegally and unlawfully removed from the ballot by the “Commissioners.”

15. What “Commissioners” did after that date is no moment.

“Commissioners” removed petitioner illegally from the ballot.

They must undo their unlawful acts and put the petitioner back into the position he was in on August 4, 2009.

16. The “Commissioner” argue that they complied with legal requirements on August 5, 2009 by stating the absentee and military ballots and that at that time, their certification was proper.

17 Now the court, exercising its responsibility, has determined the “Commissioner’s” conduct in removed petitioner on August 4, 2009 from the ballot was illegal and had no basis in law.

18 The “Commissioners” had to take steps to comply fully with the court’s order and set petitioner back into the position he was in on August 4, 2009.

19 The “Commissioners” have not done so and are using chicanery to prevent petitioner from getting full ballot access.

20. It is respectfully submitted that the disobedience and resistance of the mandate of this Court by the respondents “Commissioners” was and is willfully contumacious as is clear from the foregoing facts and

constitutes criminal contempt as defined by Judiciary Law §§750 and 751 and CPLR 5104.

21. It is further respectfully submitted that the “Commissioners” failure and/or refusal to sign the restore the petitioner to the ballot was specifically calculated to, and actually did defeat, impair, impede and prejudice the rights of the Petitioner to prevent him from gaining full ballot access.

22. No prior application has been made for the relief sought herein.

WHEREFORE, it is respectfully requested that the court grant the following relief:

- a) pursuant to CPLR 5104 and Judiciary Law Sections 750 and 751 punishing the respondents Commissioners of Elections of the Board of Elections in the City of New York constituting the Board of Elections in the City of New York , as and for a contempt of this court on the grounds that they have willfully and contumaciously violated the Order of this Court, dated August 17, 2009 and entered on August 18, 2009, and that such conduct has impeded, impaired, and prejudiced the rights of the Petitioner, and
- b) for such other and further relief as may be just, proper, and equitable under the premises including motion costs, damages for

the wrongful conduct and attorney's fees.

Dated: Brooklyn, New York  
August 27, 2009

  
\_\_\_\_\_  
BERNARD MITCHELL ALTER

**Exhibit A**

**ORIGINAL**

Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE VALERIE BRATHWAITE NELSON ELECTION PART J  
Justice

-----X  
In the Matter of the Application of

Index No.: 21060/09

MARQUEZ CLAXTON

Motion  
Dated: 8/17/09

Petitioner,

Cal. No.: 1

as designated for the public office  
of Member of the New York City Counsel  
from the 31<sup>st</sup> Council New York City  
Council District, County of Queens,  
City and State of New York

Petitioner,

-against-

YVONNE MITCHELL, JULIET BARTON, and  
RICHARD MURPHY,

Objectors-Respondents,

Commissioners of Elections of the Board  
of Elections in the City of New York  
constituting the Board of Elections in  
the City of New York,

Respondents,

for an order declaring valid the  
designating petition which designated  
the petitioner for the public office of  
Member of the New York City Counsel from  
the 31<sup>st</sup> New York City Council District,  
County of Queens, City of New York, in  
the Democratic Primary Election to be  
held on September 15, 2009

-----X  
The following papers numbered 1 to 4 read on this  
application by petitioner to validate the designating petition of  
Marquez Claxton.

QUEENS COUNTY CLERK  
FILED  
RECORDED  
2009 AUG 18 AM 10:06

No. 156223

STATE OF NEW YORK,  
COUNTY OF QUEENS,  
SHELLY BROWN STEWART,  
COUNTY CLERK AND  
CLERK OF THE SUPREME  
COURT, QUEENS COUNTY,  
IN SENATE CHIEF  
CLERK HAVE COMPARED  
THIS COPY WITH THE  
ORIGINAL FILED IN  
RECORDS IN MY OFFICE  
ON  
8/18/09  
CORRECT TRANSCRIPT  
THREE-FOLD COPY OF  
THE WHOLE OF THE  
ORIGINAL  
153  
WITNESSED BY HAND  
AND SEAL OF SAID  
COUNTY AND STATE

Papers  
Numbered

Order to Show Cause, Petition, Exhibits, Affidavits... 1 - 4

Upon the foregoing papers and after a hearing, oral argument and due deliberation, the application is decided as follows:

In this special election proceeding an order is sought declaring valid the petition designating the petitioner as a candidate for the public office of member of the New York City Council District, from the 31<sup>st</sup> New York City Council District, County of Queens, City of New York, to be voted upon in the Democratic Primary Election to be held on September 15, 2009. On August 11, 2009, counsel for the parties appeared before the Court and consented to an adjournment of the hearing for the purpose of providing the parties with an opportunity to appear at the New York City Board of Elections (hereinafter also referred to as "the Board") to review various documents relating to the designating petition.

After appearing at the Board and extensively reviewing the petition all counsel returned to the Court for the continuation of the hearing herein. During the hearing counsel stipulated as follows: Petitioner submitted 2,340 signatures on the petition filed; the Board found 1,445 of those signatures invalid; the Board found 895 of those signatures valid; and a potential candidate must obtain 900 signatures to be placed on the ballot.

Based upon the aforementioned stipulation, petitioner must establish that five additional signatures are valid if the petitioner is to be placed on the ballot for the election. As noted above, the Board determined that 1,445 of the signatures submitted by petitioner were invalid. Of these 1,445 signatures, the Board determined that 291 of such signatures were invalid due to illegible signatures. Petitioner objects to the Board's finding of illegible signatures with respect to the signatures of the following fourteen individuals:

Clainda Stuart	Marie Michel
Jacqueline Jaome	Allan Monroe
Kwame Obeng	Cleveland Vanier
Pamela Brown	Wanda Lowe
Gwendolyn Jackson	Sara Martinez
Edwin D. Solomon	Melissa Martinez
Chukwuemeka Ude	John Wells

During the hearing, petitioner adduced evidence in the form of

affidavits from each of the aforementioned fourteen individuals. Thirteen of these affidavits were admitted into evidence without objection, as petitioner's exhibit 1. One affidavit, bearing the name of Wanda Lowe, was admitted into evidence as part of petitioner's exhibit 1, over the objection of counsel for respondents. Each of the affidavits attests that "... I signed the designating petition of ... [petitioner]..." The Court finds that with the exception of the affidavit bearing the name of Wanda Lowe, petitioner exhibit 1 is sufficient credible evidence to satisfy petitioner's burden of proof. (See, Matter of Jaffee v. Kelly, 32 AD 3d 485 (2006)).

Although counsel for respondents indicated that he intended to challenge the aforementioned affidavits he failed to adduce any testimony or other admissible evidence in support of said position. Additionally, the record does not reflect any challenge to the veracity of the affidavits or any claim of fraud or forgery. Further, during the hearing, counsel for respondents withdrew the challenge to the affidavit of Kwame Obeng and stipulated that the petition signature of said individual is legible.

Counsel for respondents moved to strike the affidavits of Marie Michel, Jacqueline Jaome, Allan Monroe and Wanda Lowe based solely upon his assertion that the notary stamp number appearing thereon is incorrect. However, counsel for respondents failed to offer any admissible evidence to support said assertion. Initially, the Court notes that counsel for respondents previously stipulated into evidence three of the subject affidavits. Additionally, the Court notes that even assuming the notary incorrectly affixed the official number upon said affidavits counsel for respondents has not demonstrated that such would affect the validity of the affidavit. Under these circumstances, the motion to strike said affidavits is denied.

During the hearing, the Court reserved decision with respect to petitioner's additional application for a determination by the Court concerning the alleged signatures of Norberta Cruz and Agnes Carter and the application of respondents for a determination by the Court concerning the alleged signature that appears on petition sheet 79, line 10. The Board determined that the signatures of Cruz and Carter are not legible and that the signature appearing on petition sheet 79, line 10, is legible. It is noted that the parties entered into certain evidentiary stipulations concerning these signatures and concerning certain documents from the Board of Elections. Upon review of the record, the Court finds the said evidentiary stipulations defective. Therefore, the Court declines to substantively review the Board's documents and places no reliance on petitioner's exhibits 2 and 3, respondent's exhibit A



and any other exhibits relating thereto. Accordingly, the applications with respect to Norberta Cruz, Agnes Carter and the signature appearing on petition sheet 79, line 10 are denied. The determinations made by the Board with respect to said signatures are not disturbed by the Court's decision herein.

Accordingly, based upon all the facts and circumstances herein, the application is granted to the extent that the following thirteen signatures<sup>1</sup> are determined by the Court to be valid:

Clainda Stuart	Marie Michel
Jacqueline Jaome	Allan Monroe
Kwame Obeng <sup>2</sup>	Cleveland Vanier
Pamela Brown	Sara Martinez
Gwendolyn Jackson	Melissa Martinez
Edwin D. Solomon	John Wells
Chukwuemeka Ude	



QUEENS COUNTY CLERK  
FILED  
RECORDED  
2009 AUG 18 AM 10:06

The application is denied in all other respects.

**ORDERED AND ADJUDGED** that the designating petition filed with the Board of Elections of the City of New York to designate the above named petitioner as a candidate for the public office of member of the New York City Council District, from the 31<sup>st</sup> New York City Council District, County of Queens, City of New York, to be voted upon in the Democratic Primary Election to be held on September 15, 2009 and bearing the identification number QN0900442 is valid solely to the extent set forth above.

**ORDERED and ADJUDGED** that the Board of Elections of the City of New York is directed to place the name of the above named petitioner on the appropriate ballot for the Democratic Primary Election to be held on September 15, 2009.

Dated: August 17, 2009

  
.....  
VALERIE BRATHWAITE NELSON, J.S.C.  
  
CLERK

<sup>1</sup>As previously noted, the Court finds that petitioner has not sustained his burden with respect to Wanda Lowe. The determination of illegibility by the Board concerning this alleged signature is therefore not disturbed by the Court's decision herein.

<sup>2</sup>As noted, counsel for respondents stipulated that the filed petition signature of Kwame Obeng is legible.



**Exhibit B**

# ALTER & BARBARO

*Attorneys and Counselors at Law*

26 Court Street, Suite 1812, Brooklyn, New York 11242 Tel: (718) 237-0880 Fax: (718) 722-7887

August 18, 2009

2009 AUG 18 P 4: 10

RECEIVED  
G.O. Bd of Elections  
NY THE CITY OF NEW YORK

Board of Elections in  
The City of New York  
32 Broadway, 7<sup>th</sup> floor  
New York, N.Y.

Re: Claxton v. Mitchell, et al, Supreme Court, Queens County, Index No. 21060/09

To Whom It May Concern:

On August 17, 2009, the Supreme Court, Queens County (Hon. Valerie Brathwaite Nelson, J.S.C.) placed the above-referenced petitioner on the appropriate ballot for the Democratic Primary for the 31<sup>st</sup> NYC Council District to be held on September 15, 2009.

I have obtained a copy of the order certified by the Clerk of the County of Queens on August 18, 2009 and am herewith delivering same to your office for prompt action.

Pursuant to the court's order, you are hereby directed to place the name of petitioner, Marquez Claxton, on the appropriate ballot for the Democratic Primary Election for the 31<sup>st</sup> NYC Council District to be held on September 15, 2009.

Please be guided accordingly. If you have any further questions, do not hesitate to call.

Very truly yours,

ALTER AND BARBARO, ESQS.

158

**EXHIBIT C**

# ALTER & BARBARO

*Attorneys and Counselors at Law*

26 Court Street, Suite 1812, Brooklyn, New York 11242 Tel: (718) 237-0880 Fax: (718) 729-7880

RECEIVED  
G.O. BOARD OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 25 PM 12:16

August 25, 2009

Board of Elections in  
The City of New York  
32 Broadway, 7<sup>th</sup> floor  
New York, N.Y. 10007

Re: Claxton v. Mitchell, et al, Supreme Court, Queens County, Index No. 21060/09

To Whom It May Concern:

On August 17, 2009, the Supreme Court, Queens County (Hon. Valerie Brathwaite Nelson, J.S.C.) placed the above-referenced petitioner, Marquez Claxton, on the appropriate ballot for the Democratic Primary for the 31<sup>st</sup> NYC Council District to be held on September 15, 2009.

On August 18, 2009, a certified copy of the order was personally delivered to your office along with a covering letter. Both were time stamped by your office. I am again delivering you copies of those documents as part of this transmission.

I am now advised that although you have restored my client to the voting machines for election-day that you have not printed and mailed absentee ballots with my client's name thereon and refuse to do so.

This is in direct violation of the court order. You are hereby advised that if you do not print and mail absentee ballots with my client's name thereon and remedy the failure to do so no later than the close of business by Wednesday, August 26, 2009 and so notify me in writing, that I will immediately file a motion to hold your agency in contempt of court and seek damages and legal fees accordingly.

Because of the advent of the election on September 15, 2009, my client cannot tolerate any delay in this matter.

**Please be guided accordingly.**

**ALTER & BARBARO, ESQS.**

*Letter to Board of Elections*

*August 25, 2009*

*Page 2 of 2*

If you have any further questions, do not hesitate to call.

Very truly yours,

ALTER AND BARBARO, ESQS.

A handwritten signature in black ink, appearing to read 'B. Mitchell Alter', written over a horizontal line.

By: B. Mitchell Alter, Esq.





FREDERIC M. UMANE  
PRESIDENT

JULIE DENT  
SECRETARY

JOSE MIGUEL ARAUJO  
JUAN CARLOS "J.C." POLANCO  
JAMES J. SAMPAL  
NANCY MOTTOLA-SCHACHER  
NAOMI C. SILIE  
J.P. SIPP  
GREGORY C. SOUMAS  
JUDITH D. STUPP  
COMMISSIONERS

## BOARD OF ELECTIONS

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[www.vote.nyc.ny.us](http://www.vote.nyc.ny.us)

MARCUS CEDERQVIST  
EXECUTIVE DIRECTOR  
  
GEORGE GONZALEZ  
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS  
ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN  
GENERAL COUNSEL  
Tel: (212) 487-5338  
Fax: (212) 487-5342  
E-Mail:  
[srichman@boe.nyc.ny.us](mailto:srichman@boe.nyc.ny.us)

**VIA TELEFAX (718) 722-7887**

August 26, 2009

Alter & Barbaro  
26 Court Street  
Suite 1812  
Brooklyn, NY 11241  
Attn: B. Mitchell Alter, Esq.

RE: Marquez Claxton, Candidate for  
Member of the City Council, 31<sup>st</sup>  
Council District, Democratic Party

Gentlemen:

The Board of Elections received your letter dated August 25, 2009 yesterday afternoon. The Commissioners of Elections at their open public meeting held yesterday afternoon, upon careful consideration and deliberation denied your request in accordance with the provisions of the New York State Election Law and consistent with the Board's duly established policies and procedures.

As an initial matter, it is the Board's understanding that the Order directed that Ms. Claxton be placed on the ballot, not the military, absentee or special ballots. In fact, Ms. Claxton has been placed on the Primary Ballot (both on the printed strip for use in the lever voting machine and on the Primary Day standby paper ballots used as both emergency and affidavit

ballots). Therefore, the Board has complied with the Order entered in New York State Supreme Court. There is no basis in law or fact to threaten to seek to hold this Board in contempt of court.

New York State Election Law requires that the absentee ballot be "as nearly as practicable" in the same form as the ballot voted in the district on primary election day. N.Y. Elec. Law § 7-122(1)(a). Please note that pursuant to New York State Election Law, the Commissioners of Elections in the City of New York voted to print absentee ballots on August 5, 2009. N.Y. Elec. Law § 4-114. By that vote the Board determined which candidates were duly designated or nominated to be placed on the absentee ballot for the September 15, 2009 primaries. This determination of the Board is "final and conclusive." N.Y. Elec. Law § 7-122(4).

While a board of elections or a court of competent jurisdiction may decide after this "final and conclusive" determination that a candidate was improperly placed on an absentee ballot, resulting in votes for that candidate not being counted in the election, nothing in the New York State Election Law provides a mechanism under which a candidate may be added to the absentee ballot after the Board's determination.

In addition, the Board of Elections is required by Section 10-108 of the New York State Election Law to mail military ballots to eligible voters no later than thirty-two days before the Primary Election. In this instance, the Board complied with that statutory requirement. Section 10-116 of the Election Law requires the Board of Elections in the City of New York to determine the names of all candidates appearing on the military ballot at least three days before the first day for the distribution of military ballots. Once again, the Board complied with that statutory requirement. That Section further provides that "The failure of the county board of elections to include the name of any candidate... on the military ballot shall in no way affect the validity of the election with respect to the office for which the nomination was made or the validity of the military ballot as to any other matter".

Further, Section 7-123(2) of the Election Law provides that the ballots for military voters shall be in the same form as those used by absentee voters in the election district of the military voter, while Title III of the Election Law provides for special ballots in the same form as an absentee ballot and Section 11-304 of the Election Law requires them to be cast and canvassed in the same manner as an absentee ballot.




Based on the foregoing statutory provisions, the Board of Elections in the City of New York does not reprint or remail any military, absentee or special ballot after they have been printed. This Board will strongly oppose any attempt to compel the Board to engage in an act not permitted by the Election Law.

Thank you for your attention and understanding in this matter.

Very truly yours,

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK

By:

  
\_\_\_\_\_  
Steven H. Richman, General Counsel

Copy: The Commissioners of Elections in the City of New York  
Marcus Cederqvist, Executive Director  
George Gonzalez, Deputy Executive Director  
Pamela Perkins, Administrative Manager  
John Owens, Director, Campaign Financial Reporting  
Enforcement  
Steven Denkberg, Counsel to the Commissioners  
Charles Webb, III, Counsel to the Commissioners  
Troy Johnson, Coordinator, Candidate Records Unit  
Temporary Legal Staff  
  
Marilyn Richter, Esq., Deputy Chief, General Litigation  
New York City Law Department

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

-----X  
In the Matter of the Application of

MARQUEZ CLAXTON

Petitioner,

Index No.

21060/2009

as designated for the public office of Member of  
the New York City Council from the 31<sup>st</sup> Council  
New York City Council District, County of  
Queens, City and State of New York

Petitioner,

ORDER TO SHOW  
CAUSE, ETC.

- against -

YVONNE MITCHELL, JULIET BARTON, and  
RICHARD MURPHY,

Objectors-Respondents,

Commissioners of Elections of the Board of  
Elections in the City of New York constituting the  
Board of Elections in the City of New York,

Respondents.

-----X

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G.O. BOARD OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 28 AM 11:20

ALTER & BARBARO, ESQS.  
*Attorneys for Petitioner*  
26 Court Street, Room 1812  
**Brooklyn, New York 11242**  
Tel: (718) 237-0880

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS  
CIVIC CENTER AT MONTAGUE STREET  
BROOKLYN, NEW YORK 11201

*Comments  
FY2*

JUSTICES' LIBRARY

FAX NUMBER (718) 643-4993

FAX TRANSMITTAL COVER SHEET

PLEASE DELIVER TO: STEVEN RICHMAN, ESQ

ATTENTION: \_\_\_\_\_

FACSIMILE TELEPHONE NUMBER: (212) 487-5342

SENDER: \_\_\_\_\_

NUMBER OF PAGES ( INCLUDING THIS PAGE ): 4

SPECIAL INSTRUCTION OR COMMENTS: \_\_\_\_\_

KING DECISION

DATE FAX SENT: 8/28/09

TIME FAX SENT: 3:05 ~~2:40~~ A.M. P.M.

NOTE: IF YOU HAVE ANY PROBLEMS WITH THIS TRANSMISSION, PLEASE  
CALL THE ABOVE SENDER AT. ( ) \_\_\_\_\_

The documents accompanying this transmission are intended only  
for the use of the person or office to whom it is addressed  
and may contain information that is privileged, confidential,  
or protected by law. you are hereby notified that any copying,  
dissemination or distribution of this communication is  
prohibited.

At an IAS Term, Special Election Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28<sup>th</sup> day of August, 2009.

P R E S E N T:

HON. DAVID I. SCHMIDT

Justice.

-----X

IN THE MATTER OF THE APPLICATION OF

ERLENE J. KING,

Petitioner,

- against -

Index No. 700035/2009

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondent.

-----X

The following papers numbered 1 to 4 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3-4 _____
Reply Affidavits (Affirmations) _____	_____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, petitioner Erlene J. King brings this proceeding, by order to show cause dated August 24, 2009, seeking a judgment directing respondent the Board of Elections in the City of New York to "include the name of petitioner Erlene J. King and to reprint the absentee ballots for the 45<sup>th</sup> Council

District to be used in the Democratic Party Primary Elections to be held September 15, 2009." Oral argument of petitioner's application was held before the court on August 27, 2009.

"Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made . . . defendants" (CPLR 1001[a]). Further, "[w]hen a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned . . ." (CPLR 1001[b]). Moreover, the issue of non-joinder may be raised at anytime by any party or by the court on its own motion (see *Figari v New York Tel. Co.* 32 AD2d 434, 438 [1969]). Although the parties do not address the issue of non-joinder, the court, sua sponte, finds that there are those, heretofore not named as parties, who may have a genuine interest in and/or may be inequitably affected by the outcome of this proceeding. More specifically, the court finds that any judgment in this proceeding will have an impact on the current candidates running for the same district seat.

Accordingly, it is

ORDERED that the proceeding is held in abeyance and the matter is adjourned so as to allow joinder of all necessary parties. Petitioner is directed to join all the other candidates on the ballot for the 45<sup>th</sup> council district, namely Ernest Emmanuel, Dexter A. McKenzie, Kendall Stewart, Samuel Taitt and Jumaane D.

Williams as party respondents in this proceeding. In light of the practicalities involved, petitioner is directed to make service of the Order to Show Cause dated August 24, 2009, all other papers in this proceeding and a copy of this order upon the proposed respondents personally under CPLR 308 (1) by Monday, August 31, 2009. The matter is returnable before this court at Special Election Part I to be held at the Supreme Court Courthouse, 360 Adams Street, Brooklyn, New York, Room 541, on the 1<sup>st</sup> day of September, 2009 at 10:30 a.m.. Any failure by petitioner to join all the above-named necessary parties will result in the dismissal of this proceeding under CPLR 3211(a)(10).

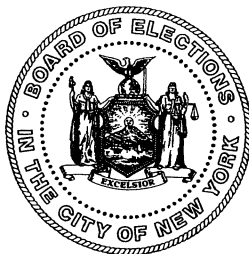
The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

FYI



STEVEN H. RICHMAN  
GENERAL COUNSEL

TEL: (212) 487-5338  
FAX: (212) 487-5342  
E-MAIL:  
srichman@boe.nyc.ny.us


## BOARD OF ELECTIONS

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

## MEMORANDUM

**DATE:** August 27, 2009

**TO:** Shelia Del Giorno, Chief Clerk, Staten Island  
Anthony Andriulli, Deputy Chief Clerk, Staten Island

**FROM:** Steven H. Richman, General Counsel 

**RE:** Memorandum of Agreement with the NYS Division of  
Military and Naval Affairs for use of the Staten Island  
Armory for the 2009-2010 Election Cycle

**COPY:** ✓ The Commissioners of Elections  
Marcus Cederqvist, Executive Director  
George Gonzalez, Deputy Executive Director  
Pamela Perkins, Administrative Manager  
John Owens, Esq., Director of Campaign Financial  
Reporting Enforcement  
Rosanna Rahmouni, Coordinator, Election Day Operations  
Steven Denkberg, Counsel to the Commissioners  
Charles Webb, Counsel to the Commissioners  
Temporary Legal Staff – Christopher Manos & Diana  
Scopelliti

OGC Files

**Attached hereto is a copy of a letter dated August 24, 2009 from Robert G. Conway, Jr., Counsel to the New York State Division of Military and Naval Affairs (DMNA), wherein he transmits a fully executed Memorandum of Agreement relating to the Designation of a Poll Site at the New York State Armory, 321 Manor Road, Staten Island, NY 10314-2498 (hereinafter, "the Armory") for the period of May 1, 2009 through May 1, 2010 and the use thereof.**

**In his letter, he also advises that the Staten Island Chief Clerk will be contacted by the DMNA's Non- Military Use Coordinator to execute two non- military use agreements for the Primary and General Elections.**

**ACTION ITEM:**

**The Chief Clerk and Deputy Chief Clerk should also request (on a contingent basis) a similar agreement (to that for the Primary on September 15) for the potential run-off Primary Election on September 29, 2009.**

**Thank you for your cooperation and understanding in this matter. If you have any questions, please contact me.**

**Attachments**





STATE OF NEW YORK  
DIVISION OF MILITARY AND NAVAL AFFAIRS

330 OLD NISKAYUNA ROAD  
LATHAM, NEW YORK 12110-3514

DAVID A. PATERSON  
GOVERNOR  
COMMANDER IN CHIEF

JOSEPH J. TALUTO  
MAJOR GENERAL  
THE ADJUTANT GENERAL

Direct Telephone: (518) 786-4540  
E-mail: Robert.Conway1@us.army.mil

August 24, 2009

Legal Affairs

Steven H. Richman, Esq.  
General Counsel  
Board of Elections in the City of New York  
Executive Office, 32 Broadway  
New York, NY 10004-1609

RECEIVED  
GENERAL COUNSEL  
BD. OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 27 PM 1:10

Re: Memorandum of Agreement relating to the Designation of Poll Site at the New York State Armory, 321 Manor Road, Staten Island, NY 10314-2498 (hereinafter, "the Armory") for the period of May 1, 2009 through May 1, 2010; Primary Election on September 15, 2009 and General Election on November 3, 2009.

Dear Mr. Richman:

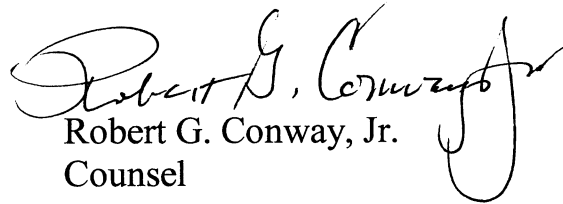
Thank you for your letter of August 21, 2009, and the proposed Memorandum of Agreement (MOA) referenced above. On behalf of the Division of Military and Naval Affairs (DMNA) I have signed the MOA and am returning the original, fully executed copy as an enclosure herein.

The DMNA non-military use (NMU) coordinator, Mrs. Gayle Carpenter, is making contact with Ms. Sheila Del Giorno, Chief Clerk of the Staten Island Board of Election, to execute two NMU agreements (attached

as appendices to the MOA) pertaining to the use of New York State armory on Staten Island as a location for district polling places for the Primary (September 15, 2009) and the General (November 3, 2009) Elections this fall.

Thank you for your cooperation and your courtesy in resolving this matter.

Sincerely,

  
Robert G. Conway, Jr.  
Counsel

Encl.

cc: Ms. Gayle Carpenter, DMNA Facilities Directorate, Non-military Use Coordinator

RECEIVED  
GENERAL COUNSEL  
BD. OF ELECTIONS  
IN THE CITY OF NEW YORK  
FREDERIC M. UMANE  
PRESIDENT  
2009 AUG 27 PM 1:11  
JULIE DENT  
SECRETARY



JOSE MIGUEL ARAUJO  
JUAN CARLOS "J.C." POLANCO  
JAMES J. SAMPEL  
NANCY MOTTOLA-SCHACHER  
NAOMI C. SILIE  
J.P. SIPP  
GREGORY C. SOUMAS  
JUDITH D. STUPP  
COMMISSIONERS

## BOARD OF ELECTIONS

IN  
THE CITY OF NEW YORK  
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NEW YORK, NY 10004-1609  
(212) 487-5300  
[www.vote.nyc.ny.us](http://www.vote.nyc.ny.us)

MARCUS CEDERQVIST  
EXECUTIVE DIRECTOR  
GEORGE GONZALEZ  
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS  
ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN  
GENERAL COUNSEL  
Tel: (212) 487-5338  
Fax: (212) 487-5342  
E-Mail:  
[srichman@boe.nyc.ny.us](mailto:srichman@boe.nyc.ny.us)

# MEMORANDUM OF AGREEMENT

*between the*  
**BOARD OF ELECTIONS IN THE CITY OF NEW YORK**  
*and*  
**THE DIVISION OF MILITARY AND NAVAL AFFAIRS  
OF THE STATE OF NEW YORK**  
for the use of  
**New York State Armory,  
321 Manor Road, Staten Island, NY 10314-2498  
as a Poll Site**  
for the period of **May 1, 2009 through May 1, 2010**

The Board of Elections in the City of New York ("the Board") and the New York State Division of Military and Naval Affairs ("DMNA"), pursuant to the authority vested in each of them respectively by the Laws of the State of New York hereby agree to this Memorandum of Agreement following the Board's designation of the **New York State Armory, 321 Manor Road, Staten Island, NY 10314-2498 (hereinafter, "the Armory")** as a poll site for the 2009-2010 election cycle (May 1, 2009 through May 1, 2010), [including the 2009 Primary Election on September 15, 2009, potential Run-Off Primary on September 29, 2009, the 2009 General Election on November 3, 2009 and any other Special Elections called for the Election Districts assigned by the Board to use the Armory as a Poll Site as called

by the appropriate Executive authority of the State of New York or City of New York] which will govern the use of the Armory as a poll site and the charges to be paid by the Board for the 2009-2010 election cycle. Note: That any reference to a Primary Election also includes the Run-Off Primary Election and any reference to a General Election also includes any Special Election.]


1. The Board agrees to use its best efforts to insure that delivery and retrieval of the voting equipment that will be used in the Armory will be delivered and retrieved during the normal working hours of the Armory (7:30 AM to 4 PM), thus making it unnecessary for DMNA to incur overtime costs. However, unforeseen events may, on a rare occasion, necessitate the Board to request that DMNA make the Armory available for a delivery or retrieval outside the Armory's normal hours of operation, but we will do all in our power to prevent that situation from occurring.
2. DMNA agrees to waive the \$1,400.00 daily rent for any election event.
3. DMNA agrees to reduce the utilities' cost (i.e. light and water) for a Primary Election from \$252.00 to \$54.00. Heating cost has not been calculated into the September utilities' cost.
4. DMNA agrees to reduce the utilities' cost (i.e. light, water, and heat) for a General Election from \$252.00 to \$90.00.
5. DMNA agrees to reduce the janitorial cost (i.e. keeping restrooms and public areas clean throughout polling hours 6 a.m. through 9 p.m.) from \$150.00 to \$120.00 for each Primary or General Election.
6. DMNA agrees to reduce the personnel augmentation fee from \$1567.50 to \$663.50 per day for each Election. This entails overtime and extra employees cost for opening the Armory earlier at 5 a.m. and closing it at 11 p.m. (for facility clean up and detailed premises security check). Additionally, this cost covers the facilitation of access to the Armory's limited public parking areas, and enhance the safe movement of people from the public parking lot to the entrance of the Armory.

7. Additionally, the Board acknowledges that DMNA considers any Primary and/or General Election conducted by the Board during the term of this agreement (2009-2010 election cycle) to be "off year" elections. The Board further acknowledges that DMNA will require that during an election cycle when State and/or Federal offices are contested will necessitate the recalculation of the personnel augmentation fee listed above for such elections.
8. DMNA agrees to eliminate the separate charge of 250.00 per Election for janitorial supplies (i.e. paper products and cleaning supplies for restrooms and public area maintenance).

The DMNA represents and the Board acknowledges that the above adjustments represent an overall reduction per Election Day cost from \$3528.50 to \$846.50 for a Primary Election Day and to \$882.50 for a General Election Day. [The worksheets which show the computation of rental charges for the Primary Election, September 15, 2009 and the General Election, November 3, 2009 are attached and made an appendix to this Memorandum of Agreement].

In witness whereof, we have set our signatures on the dates indicated as authorized representatives of our respective agencies:

FOR THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK:

  
\_\_\_\_\_  
Steven H. Richman, General Counsel

Date: August 21, 2009

FOR THE DIVISION OF MILITARY AND NAVAL AFFAIRS OF THE STATE OF NEW YORK:

  
\_\_\_\_\_  
Robert G. Conway, Counsel

Date: August 24, 2009

Armory:  
Lease #:  
Purpose:

State Island Armory Date: 5 June 09  
Lessee: SI Board of Elections  
PRIMARY ELECTION - 9/15/09

Rental Classification:

<input type="checkbox"/> Commercial	<input type="checkbox"/> Vending	<input type="checkbox"/> Unit Member	<input type="checkbox"/> M-P, TV
<input type="checkbox"/> Noncommercial	<input type="checkbox"/> Youth	<input type="checkbox"/> Veterans	<input type="checkbox"/> Other
<input type="checkbox"/> Secondary School	<input type="checkbox"/> Fitness	<input checked="" type="checkbox"/> Government	

Charges:

Base Charges:		Number of Days	Rate per Day	Sub-Total
Room				
Drill Hall <u>Only</u> <u>(hallway &amp; bedrooms)</u> <u>included</u>		1	1,400	1,400
Other Use Charges:				
Food Concessions:				
Souvenir Concessions:				
Portable Bar Charge:				
Total Base Charges				<u>waived</u> <del>1,400</del>
Additional Charges:		Hrs.	\$ per hour	
Liabilities:				
Heat Costs			<u>nil</u>	
Light Costs		18	2.00	36.00
<del>additional water</del>		18	1.00	18.00
Janitorial <u>clean-up</u>				
Overtime			\$35.00	
Temp. Svc.		8	\$15.00	120.00
Total Janitorial				120.00
Security/Parking & Exterior				
Overtime			\$35.00	
Temp. Svc.		22	\$15.00	330.00
Total Security				330.00
<u>open/close armory</u>				
Vehicle Movement:				
Overtime		9.5	\$35.00	332.50
Temp. Svc.			\$15.00	
Total Vehicle Movement				332.50
Surcharges:				
Janitorial Supplies	<u>none provided</u>			
Sub Total				836.50
Surety Bond	\$10.00 per \$1,000			10.00
Grand Total				846.50

Remarks: 5am - 11pm (1/2 hour open 1/2 close before & after lessee occupies bldg)  
18 hours

Verbal Confirmation OICC/AOICC

Worksheet for Computation of Rental Charges

Armory:

Staten Island

Date: 5 June 09

Lease #:

Lessee:

S.I. Board Elections

Purpose:

General Election

11/3/09

Rental Classification:

<input type="checkbox"/> Commercial	<input type="checkbox"/> Vending	<input type="checkbox"/> Unit Member	<input type="checkbox"/> M-P, TV
<input type="checkbox"/> Noncommercial	<input type="checkbox"/> Youth	<input type="checkbox"/> Veterans	<input type="checkbox"/> Other
<input type="checkbox"/> Secondary School	<input type="checkbox"/> Fitness	<input checked="" type="checkbox"/> Government	

Charges:

Base Charges:

Room	Number of Days	Rate per Day	Sub-Total
Drill Hall Only - <u>(hallway + bathrooms included)</u>	1	1,400	1,400

Other Use Charges:

Food Concessions:

Souvenir Concessions:

Portable Bar Charge:

n/a
n/a
n/a

Total Base Charges

waived 1,400

Additional Charges:

Liabilities:

Heat Costs

Light Costs

~~Additional Water~~

Janitorial Clean-up

Overtime

Temp. Svc.

Hrs. \$ per hour

18	2.00
18	2.00
18	1.00

	-\$35.00
8	\$15.00

30.00
36.00
18.00

120.00
--------

Total Janitorial

120.00
--------

Security Parking + exterior

Overtime

Temp. Svc.

Open/Close armory  
~~Vehicle Movement:~~

Overtime

Temp. Svc.

	-\$35.00
22	\$15.00

9.5	\$35.00
	\$15.00

330.00
--------

Total Security

330.00
--------

332.50
--------

Total Vehicle Movement

332.50
--------

Surcharges:

Janitorial Supplies

none provided

Sub Total


872.50
--------

Surety Bond

\$10.00 per \$1,000

10.00
-------

Grand Total

882.50
--------

Remarks:

Sum - 11 pm (1/2 hour open 1/2 hour close before  
18 hours - + after lessee occupies bldg)

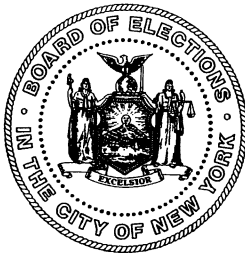
Verbal Confirmation  
OICC/AOICC

RECEIVED  
GENERAL COUNSEL  
BD. OF ELECTIONS  
IN THE CITY OF NEW YORK

2009 AUG 27 PM 1:11



Com mt  
Ry 2



FREDERIC M. UMANE  
PRESIDENT

JULIE DENT  
SECRETARY

JOSE MIGUEL ARAUJO  
JUAN CARLOS "J.C." POLANCO  
JAMES J. SAMPEL  
NANCY MOTTOLA-SCHACHER  
NAOMI C. SILIE  
J.P. SIPP  
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  
[www.vote.nyc.ny.us](http://www.vote.nyc.ny.us)

MARCUS CEDERQVIST  
EXECUTIVE DIRECTOR

GEORGE GONZALEZ  
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS  
ADMINISTRATIVE MANAGER

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Fax: (212) 487-5342  
E-Mail:  
[srichman@boe.nyc.ny.us](mailto:srichman@boe.nyc.ny.us)

August 27, 2009

Hon. Fern A. Fisher  
Deputy Chief Administrative Judge  
For New York City Courts  
Office of Court Administration  
State of New York  
111 Centre Street, Room 1240  
New York, N.Y. 10013

Dear Justice Fisher:

I am writing to you on behalf of the Board of Elections in the City of New York to advise you and your colleagues, the administrative judges of New York State Supreme Court in the various counties within the City of New York of the calendar relating to the November 3, 2009 General Election.

Pursuant to the authority vested in it by the Election Law of the State of New York, this Board adopted the enclosed Independent Nominating Petition Rules governing the process for independent nominating petitions for the November 3, 2009 General Election on May 12, 2009. The Attorney General of the United States granted pre-clearance pursuant to Section 5 of the Voting Rights Act of 1965 on July 8, 2009. The Calendar of Filing Dates for said Independent Nominating Petitions Primary Election was approved by the Commissioners on July 14, 2009.

Justice Fern A. Fisher  
August 27, 2009  
Page 2

Under the Election Law, proceedings relating to designating petitions must be commenced by **September 1, 2009** or three (3) business days after the Board of Elections hearing where an independent nominating petition is invalidated. The Board has scheduled hearings on challenges to independent nominating petitions for **Tuesday, September 8, 2009.**

As always, if you, your staff, the Presiding and Administrative Judges or their staffs have any questions or require additional information, please call me directly at (212) 487-5338.

I want to thank you in advance for your cooperation, assistance and understanding in this matter.

Very truly yours,



STEVEN H. RICHMAN  
General Counsel

Copies:

*(with enclosure)*

Hon. Ann T. Pfau, Chief Administrative Judge, New York State  
Office of Court Administration

Hon. Luis A. Gonzalez, Presiding Justice, Appellate Division of New  
York State Supreme Court, First Department

Hon. A. Gail Prudenti, Presiding Justice, Appellate Division of New  
York State Supreme Court, Second Department

Justice Fern A. Fisher  
August 27, 2009  
Page 3

Copies (continued):

*(with enclosure)*

Administrative Judges:

Hon. Joan B. Carey, New York County Supreme Court, Civil Term

Hon. Barry Salman, Bronx County Supreme Court,  
Civil Term

Hon. Sylvia Hinds-Radix, Kings County Supreme Court, Civil  
Term

Hon. Jeremy S. Weinstein, Queens County Supreme Court

Hon. Philip G. Minardo, Richmond County Supreme Court

Hon. David Schmidt, Justice Presiding, Special Election Part,  
Kings County Supreme Court

Maria Logus, Esq., Chief of Staff for the Deputy Chief  
Administrative Judge for New York City Courts

Susan Harkavy, Deputy Clerk, Appellate Division, Second  
Department

Lawrence H. Birnbaum, Esq., Chief Court Attorney, NYS Supreme  
Court - New York County

Howard Leventhal, Esq., Special Referee, NYS Supreme  
Court - New York County

Kenneth Schiffrin, Esq., Principal Court Attorney, NYS Supreme  
Court- Kings County

Robert Dioga, Court Attorney-Referee, NYS Supreme Court –  
Richmond County

Anthony D'Angelis, Chief Clerk, NYS Supreme Court- Queens  
County

John Segretti, Esq., NYS Supreme Court - Bronx County

Todd Valentine, Esq., Co-Executive Director, NYS Board of  
Elections

Stanley Zalen, Esq., Co-Executive Director, NYS Board of  
Elections

Justice Fern A. Fisher  
August 27, 2009  
Page 4

Thomas Crane, Esq., Assistant Corporation Counsel of the City of  
New York in charge of the General Litigation Division  
Stephen Kitzinger, Assistant Corporation Counsel of the City of  
New York

*(without enclosure)*

**BOARD OF ELECTIONS IN THE CITY OF NEW YORK**

Commissioners of Elections

Marcus Cederqvist, Executive Director

George Gonzalez, Deputy Executive Director

Pamela Perkins, Administrative Manager

John Owens, Director, Campaign Financial Reporting Enforcement

Steven Denkberg, Counsel to the Commissioners

Charles Webb, III, Counsel to the Commissioners

Troy Johnson, Coordinator, Candidate Records Unit

Temporary Legal Staff: Christopher Manos

Diana Scopelliti

*Com mtg  
Pg 2*

# FAX TRANSMISSION

Supreme Court State of New York  
88-11 Sutphin Blvd.  
Jamaica, New York 11435

## REVISED

**To:** Lesley Berson, Esq.  
Joseph Dubowski, Esq.  
Thomas V. Ognibene, Esq.  
Steven H. Richman, Esq.  
Kimon C. Thermos, Esq.

**Date:** August 27, 2009

**Fax #:** 212-788-0367  
718-746-6356  
718-355-9126  
212-487-5342  
718-777-9069

**Pages:** 5, including this cover sheet.

**From:** HON. LAWRENCE V. CULLEN

**Subject:** Election Law

COMMENTS:

Please see attached Short Form Order Index No. 20187/09 and do not call chambers.

Also, inform all parties involved.

Thank you.

THE INFORMATION CONTAINED IN THIS FACSIMILE TRANSMITTAL IS PRIVILEGED AND CONFIDENTIAL, AND IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL NAMED ABOVE AND OTHERS WHO HAVE BEEN SPECIFICALLY AUTHORIZED TO RECEIVE SUCH. IF THE RECIPIENT IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, OR IF ANY PROBLEMS OCCUR WITH TRANSMISSION, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE: (718) 298-1083 THANK YOU.

Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN  
Justice

ELECTION PART K

-----X  
In the Matter of the Application of

Index No.: 20187/2009

BART HAGGERTY,

Motion Date: 8/24/09

Candidate-Aggrieved,

Motion Cal. No.: 1

-and-

JOHN F. HAGGERTY JR.,

Motion Seq. No.: 2

Petitioner-Objector,

-against-

**Short Form Judgment**

JAY S. GOLUB,

Candidate,

-and-

THE NEW YORK CITY BOARD OF ELECTIONS,

Respondents,

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid the Designating Petition Purporting to designate the Respondent-Candidate for the Party Position of Male Member of the Republican State Committee 28<sup>th</sup> Assembly District, Queens County, New York in the Republican Party Primary Election to be held on September 15, 2009, and to Restrain the said BOARD OF ELECTIONS from Printing and Placing the Name of Said Candidate Upon the Official Ballots of Such Primary Election.

-----X  
The following papers numbered 1 to 4 read on this Order to Show Cause and Petition to invalidate designating petitions.

PAPERS  
NUMBERED

Order to Show Cause-Verified Petition.....	1 - 2
Memorandum in Opposition-Exhibits.....	3 - 4

Upon the foregoing papers and the hearing held before this Court on the 24<sup>th</sup> day of August, 2009, and continued on the 26<sup>th</sup> day of August, 2009, the aforesaid Order to Show Cause and Petition is determined as follows:

By way of background, an Order to Show Cause and Petition to Invalidate a Designating Petition was previously filed by the Petitioner on the 29<sup>th</sup> day of July, 2009. A hearing was held on the 14<sup>th</sup> day of August, 2009 before the Hon. Roger N. Rosengarten. As a result of said hearing, an Order was issued by Justice Rosengarten wherein said Petition was denied and dismissed.

On or about the 18<sup>th</sup> day of August, 2009, the Board of Elections' figures, showing valid petition signatures for the Candidate Golub, were revised downward by 53, leaving the Candidate herein with a total of 510 declared to be valid petitioners.

Petitioner submits the instant Order to Show Cause and Petition seeking to invalidate an additional 17 signatures on the grounds that the Board of Elections wrongfully determined that those 17 signatures were listed as "Not as Stated" with respect to whether they constituted "Signed Another Petition for Same Office" (hereinafter referred to as SAPS).

Petitioner alleged that with respect to the revision concerning the 53 signatures, that said revision was made after the hearing held on August 14, 2009 and, therefore, was not known nor litigated before Justice Rosengarten. With respect to the alleged 17 SAPS, in the initial Petition a line by line review of approximately 600 signatures (which included the said 17 SAPS) was requested, in addition to the allegations of fraud and allegations that the candidate signed more than one petition. While a hearing was held on the 14<sup>th</sup> day of August, 2009, Petitioner alleges that their request for a line by line review was not ruled on, and therefore, said issue remains open for this Court's determination.

This Court duly notes that the instant Order to Show Cause and Petition was submitted to Justice Rosengarten on the 19<sup>th</sup> day of August, 2009. Justice Rosengarten was familiar with this matter and signed the instant Order to Show Cause<sup>1</sup>, having at that time the discretion to also deny or dismiss the same.

Respondents submitted a Memorandum in Opposition to said Order to Show Cause and Petition, arguing that the Petition should be dismissed on four grounds: (I) the Order to Show Cause is jurisdictionally defective in that service of process was not made pursuant to the Order; (II) the Order to Show Cause is jurisdictionally defective because it failed to comply with CPLR §2217(b) which requires that an ex parte application shall be accompanied by an affidavit stating whether there was any prior application made with respect to the relief sought therein; (III) the relief requested is time-barred under §16-102 of the Election Law; and (IV) the relief requested is barred by the doctrine of res judicata, and issue preclusion or collateral estoppel.

---

<sup>1</sup> Justice Rosengarten is on vacation and this Court was assigned to hear this matter on the return date.

This Court having commenced a hearing on the 24<sup>th</sup> day of August, 2009 and the respondents having put their arguments on the record, the Court reserved decision regarding same.

With respect to respondent's argument that service of process was not properly effectuated, the Order signed by Justice Rosengarten on August 19, 2009 directed that the Order to Show Cause and the papers upon which it is granted be served upon opposing counsel on August 20, 2009.

Respondent argues that service was improper in that Petitioner served the aforesaid papers upon Vincent Tabone, Esq., at his residence on August 20, 2009, and that Mr. Tabone is not the attorney of record, rather Kimon Thermos, Esq., is the attorney of record for respondent.

It has been established, however, that Mr. Tabone, among several other attorneys, had appeared in this matter on behalf of the respondent. It is further evident from the transcript of the hearing held on the 14<sup>th</sup> day of August, 2009, that Mr. Tabone appeared as attorney for Respondent-Candidate, and, upon information and belief, placed his home address on the record. The instant Order to Show Cause was served on Mr. Tabone on August 20, 2009 by affixing the same to the door of his home address. Further, it is clear that the papers were received by not only Vincent Tabone, Esq., but also Kimon Thermos, Esq., as both counsel were present before this Court on the return date of the Order to Show Cause, to wit: August 24, 2009, and both actively participated in the conference and hearing pertaining to the merits.

In The Matter of Gregory v. Board of Elections, 59 NY2d 668, the Court of Appeals affirmed an Order holding that active participation on the merits waived any challenge to service. Accordingly, this Court finds that jurisdiction over the necessary parties had been obtained.

With respect to respondent's argument that the instant Order to Show Cause is jurisdictionally defective because there was no notification of prior proceedings pursuant to CPLR §2217(b), the Court disagrees. The intent of said section is to prevent judge shopping. Herein, however, the instant Order to Show Cause was signed by Justice Rosengarten four days after a hearing was held before him.

Moreover, failure of a petitioner to comply with CPLR §2217(b) in an ex parte application is a mere irregularity. (See, Floccher v. Magnelli, 106 NYS2d 305; Terry v. Green, 53 Misc.10).

Addressing respondent's last two arguments, to wit: the relief requested is time barred and barred by the doctrine of res judicata, the transcript of the hearing held before Justice Rosengarten reveals that there was no testimony presented regarding a line by line review, even though requested in the initial Petition. Inasmuch as there was no ruling, the doctrines of res judicata and collateral estoppel are not applicable. Further, since the request was timely made in the first Petition, the instant Order to Show Cause is not time barred. Accordingly, the Court finds that the instant Order to Show Cause and Petition are properly before this Court.



Now addressing the merits of the Petition before this Court, pursuant to the testimony of the Chief Clerk of the Board of Elections, Barbara A. Conacchio, taken on the 24<sup>th</sup> day of August, 2009, there was a recalculation pertaining to 53 signatures and, accordingly, those 53 signatures as stated above are charged against Candidate Golub.

Regarding the signators alleged to have signed another petition, this Court ordered the Board of Elections to review those 17 signatures and report its findings to the Court, said examination having taken place on the 25<sup>th</sup> day of August, 2009 at the Board of Elections headquarters under the supervision of the Chief Clerk and Deputy Chief Clerk, and in the presence of each side hereto.

On the 26<sup>th</sup> day of August, 2009, the Board of Elections submitted a written report to the Court and to each side, the results of which were the invalidation of eight (8) signatures and the sustaining of seven (7) signatures.<sup>2</sup> The Court, at the request of Petitioner, examined, *in camera*, the latter seven (7) signatures and found that said signatures were not the same. Accordingly, pursuant to the report rendered by the Board of Elections report there are an additional eight (8) signatures which are deemed invalid.

The Court finds that as a result of the revised calculations of the Board of Elections and the invalidation of eight further signatures the Candidate has a total of 502 signatures, and accordingly his name will remain on the ballot.

Accordingly, it is hereby

**ORDERED AND ADJUDGED** that the Petition is granted to the extent that the total amount of five hundred and sixty three (563) signatures on the designating petitions of Jay S. Golub, as previously certified by the New York City Board of Elections in and for the County of Queens, are reduced in number to five hundred and two (502) signatures for the reasons herein above enumerated; and it is further

**ORDERED AND ADJUDGED** that said number of five hundred and two (502) signatures to meet the requirements set forth for the placement of Jay S. Golub on the official ballots to be used in the Republic Primary Election for Male Member of the Republican State Committee, 28<sup>th</sup> Assembly District, Queens County. Accordingly petitioner's prayer to exclude said Candidate's name from the ballot is denied.

A copy of this Short Form Judgment is being faxed to the parties herein.

Dated: August 27, 2009

  
LAWRENCE V. CULLEN, J.S.C.

<sup>2</sup> The Board of Elections further found one contested signature was already ruled "As Stated" and one contested signature was not included in the specification, for a total of 17.

Comm MTL  
FyZ

# FAX TRANSMISSION

Supreme Court State of New York  
88-11 Sutphin Blvd.  
Jamaica, New York 11435

**To:** Lesley Berson, Esq.  
Joseph Dubowski, Esq.  
Thomas V. Ognibene, Esq.  
Steven H. Richman, Esq.  
Kimon C. Thermos, Esq.

**Date:** August 27, 2009

**Fax #:** 212-788-0367

**Pages:** 5, including this cover sheet.

718-355-9126  
212-487-5342  
718-777-9069

**From:** HON. LAWRENCE V. CULLEN

**Subject:** Election Law

COMMENTS:

RECEIVED  
GENERAL COUNSEL  
BD. OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 27 PM 3:54

Please see attached Short Form Order Index No. 20187/09 and do not call chambers.

Also, inform all parties involved.

Thank you.

THE INFORMATION CONTAINED IN THIS FACSIMILE TRANSMITTAL IS PRIVILEGED AND CONFIDENTIAL, AND IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL NAMED ABOVE AND OTHERS WHO HAVE BEEN SPECIFICALLY AUTHORIZED TO RECEIVE SUCH. IF THE RECIPIENT IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, OR IF ANY PROBLEMS OCCUR WITH TRANSMISSION, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE: (718) 298-1083 THANK YOU.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN  
Justice

ELECTION PART K

-----X

In the Matter of the Application of

Index No.: 20187/2009

BART HAGGERTY,

Motion Date: 8/24/09

Candidate-Aggrieved,

Motion Cal. No.: 1

-and-

JOHN F. HAGGERTY JR.,

Motion Seq. No.: 2

Petitioner-Objector,

-against-

JAY S. GOLUB,

Candidate,

-and-

THE NEW YORK CITY BOARD OF ELECTIONS,

Respondents,

For an Order Pursuant to Sections 16-100, 16-102 and 16-116 of the Election Law, Declaring Invalid the Designating Petition Purporting to designate the Respondent-Candidate for the Party Position of Male Member of the Republican State Committee 28<sup>th</sup> Assembly District, Queens County, New York in the Republican Party Primary Election to be held on September 15, 2009, and to Restrain the said BOARD OF ELECTIONS from Printing and Placing the Name of Said Candidate Upon the Official Ballots of Such Primary Election.

RECEIVED  
GENERAL COUNSEL  
BD. OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 27 PM 3:54

-----X

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On or about the 18<sup>th</sup> day of August, 2009, the Board of Elections' figures, showing valid petition signatures for the Candidate Golub, were revised downward by 53, leaving the Candidate herein with a total of 510 declared to be valid petitioners.

Petitioner submits the instant Order to Show Cause and Petition seeking to invalidate an additional 17 signatures on the grounds that the Board of Elections wrongfully determined that those 17 signatures were listed as "Not as Stated" with respect to whether they constituted "Signed Another Petition for Same Office" (hereinafter referred to as SAPS).

Petitioner alleged that with respect to the revision concerning the 53 signatures, that said revision was made after the hearing held on August 14, 2009 and, therefore, was not known nor litigated before Justice Rosengarten. With respect to the alleged 17 SAPS, in the initial Petition a line by line review of approximately 600 signatures (which included the said 17 SAPS) was requested, in addition to the allegations of fraud and allegations that the candidate signed more than one petition. While a hearing was held on the 14<sup>th</sup> day of August, 2009, Petitioner alleges that their request for a line by line review was not ruled on, and therefore, said issue remains open for this Court's determination.

This Court duly notes that the instant Order to Show Cause and Petition was submitted to Justice Rosengarten on the 19<sup>th</sup> day of August, 2009. Justice Rosengarten was familiar with this matter and signed the instant Order to Show Cause<sup>1</sup>, having at that time the discretion to also deny or dismiss the same.

Respondents submitted a Memorandum in Opposition to said Order to Show Cause and Petition, arguing that the Petition should be dismissed on four grounds: (I) the Order to Show Cause is jurisdictionally defective in that service of process was not made pursuant to the Order; (II) the Order to Show Cause is jurisdictionally defective because it failed to comply with CPLR §2217(b) which requires that an ex parte application shall be accompanied by an affidavit stating whether there was any prior application made with respect to the relief sought therein; (III) the relief requested is time-barred under §16-102 of the Election Law; and (IV) the relief requested is barred by the doctrine of res judicata, and issue preclusion or collateral estoppel.

---

<sup>1</sup> Justice Rosengarten is on vacation and this Court was assigned to hear this matter on the return date.

This Court having commenced a hearing on the 24<sup>th</sup> day of August, 2009 and the respondents having put their arguments on the record, the Court reserved decision regarding same.

With respect to respondent's argument that service of process was not properly effectuated, the Order signed by Justice Rosengarten on August 19, 2009 directed that the Order to Show Cause and the papers upon which it is granted be served upon opposing counsel on August 20, 2009.

Respondent argues that service was improper in that Petitioner served the aforesaid papers upon Vincent Tabone, Esq., at his residence on August 20, 2009, and that Mr. Tabone is not the attorney of record, rather Kimon Thermos, Esq., is the attorney of record for respondent.

It has been established, however, that Mr. Tabone, among several other attorneys, had appeared in this matter on behalf of the respondent. It is further evident from the transcript of the hearing held on the 14<sup>th</sup> day of August, 2009, that Mr. Tabone appeared as attorney for Respondent-Candidate, and, upon information and belief, placed his home address on the record. The instant Order to Show Cause was served on Mr. Tabone on August 20, 2009 by affixing the same to the door of his home address. Further, it is clear that the papers were received by not only Vincent Tabone, Esq., but also Kimon Thermos, Esq., as both counsel were present before this Court on the return date of the Order to Show Cause, to wit: August 24, 2009, and both actively participated in the conference and hearing pertaining to the merits.

In The Matter of Gregory v. Board of Elections, 59 NY2d 668, the Court of Appeals affirmed an Order holding that active participation on the merits waived any challenge to service. Accordingly, this Court finds that jurisdiction over the necessary parties had been obtained.

With respect to respondent's argument that the instant Order to Show Cause is jurisdictionally defective because there was no notification of prior proceedings pursuant to CPLR §2217(b), the Court disagrees. The intent of said section is to prevent judge shopping. Herein, however, the instant Order to Show Cause was signed by Justice Rosengarten four days after a hearing was held before him.

Moreover, failure of a petitioner to comply with CPLR §2217(b) in an ex parte application is a mere irregularity. (See, Floccher v. Magnelli, 106 NYS2d 305; Terry v. Green, 53 Misc.10).

Addressing respondent's last two arguments, to wit: the relief requested is time barred and barred by the doctrine of res judicata, the transcript of the hearing held before Justice Rosengarten reveals that there was no testimony presented regarding a line by line review, even though requested in the initial Petition. Inasmuch as there was no ruling, the doctrines of res judicata and collateral estoppel are not applicable. Further, since the request was timely made in the first Petition, the instant Order to Show Cause is not time barred. Accordingly, the Court finds that the instant Order to Show Cause and Petition are properly before this Court.

Now addressing the merits of the Petition before this Court, pursuant to the testimony of the Chief Clerk of the Board of Elections, Barbara A. Conacchio, taken on the 24<sup>th</sup> day of August, 2009, there was a recalculation pertaining to 53 signatures and, accordingly, those 53 signatures as stated above are charged against Candidate Golub.

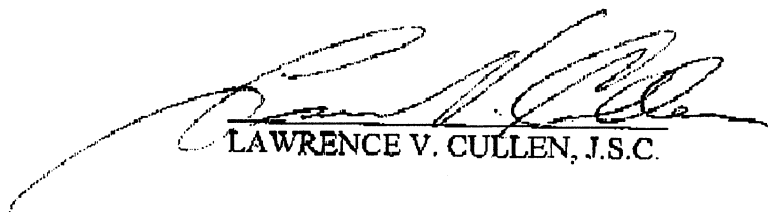
Regarding the signators alleged to have signed another petition, this Court ordered the Board of Elections to review those 17 signatures and report its findings to the Court, said examination having taken place on the 25<sup>th</sup> day of August, 2009 at the Board of Elections headquarters under the supervision of the Chief Clerk and Deputy Chief Clerk, and in the presence of each side hereto.

On the 26<sup>th</sup> day of August, 2009, the Board of Elections submitted a written report to the Court and to each side, the results of which were the invalidation of eight (8) signatures and the sustaining of seven (7) signatures.<sup>2</sup> The Court, at the request of Petitioner, examined, *in camera*, the letter seven (7) signatures and found that said signatures were not the same. Accordingly, pursuant to the report rendered by the Board of Elections report there are an additional eight (8) signatures which are deemed invalid.

The Court finds that as a result of the revised calculations of the Board of Elections and the invalidation of eight further signatures the Candidate has a total of 502 signatures, and accordingly his name will remain on the ballot.

A copy of this Order is being faxed to the parties herein.

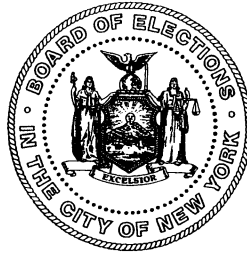
Dated: August 27, 2009



LAWRENCE V. CULLEN, J.S.C.

<sup>2</sup> The Board of Elections further found one contested signature was already ruled "As Stated" and one contested signature was not included in the specification, for a total of 17.

Comms  
F47



FREDERIC M. UMANE  
PRESIDENT

JULIE DENT  
SECRETARY

JOSE MIGUEL ARAUJO  
JUAN CARLOS "J.C." POLANCO  
JAMES J. SAMPEL  
NANCY MOTTOLA-SCHACHER  
NAOMI C. SILIE  
J.P. SIPP  
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  
www.vote.nyc.ny.us

MARCUS CEDERQVIST  
EXECUTIVE DIRECTOR  
  
GEORGE GONZALEZ  
DEPUTY EXECUTIVE DIRECTOR

PAMELA GREEN PERKINS  
ADMINISTRATIVE MANAGER

STEVEN H. RICHMAN  
GENERAL COUNSEL  
Tel: (212) 487-5338  
Fax: (212) 487-5342  
E-Mail:  
srichman@boe.nyc.ny.us

**VIA TELEFAX (718) 722-7887**

August 26, 2009

Alter & Barbaro  
26 Court Street  
Suite 1812  
Brooklyn, NY 11241  
Attn: B. Mitchell Alter, Esq.

RE: Marquez Claxton, Candidate for  
Member of the City Council, 31<sup>st</sup>  
Council District, Democratic Party

Gentlemen:

The Board of Elections received your letter dated August 25, 2009 yesterday afternoon. The Commissioners of Elections at their open public meeting held yesterday afternoon, upon careful consideration and deliberation denied your request in accordance with the provisions of the New York State Election Law and consistent with the Board's duly established policies and procedures.

As an initial matter, it is the Board's understanding that the Order directed that Ms. Claxton be placed on the ballot, not the military, absentee or special ballots. In fact, Ms. Claxton has been placed on the Primary Ballot (both on the printed strip for use in the lever voting machine and on the Primary Day standby paper ballots used as both emergency and affidavit

ballots). Therefore, the Board has complied with the Order entered in New York State Supreme Court. There is no basis in law or fact to threaten to seek to hold this Board in contempt of court.

New York State Election Law requires that the absentee ballot be “as nearly as practicable” in the same form as the ballot voted in the district on primary election day. N.Y. Elec. Law § 7-122(1)(a). Please note that pursuant to New York State Election Law, the Commissioners of Elections in the City of New York voted to print absentee ballots on August 5, 2009. N.Y. Elec. Law § 4-114. By that vote the Board determined which candidates were duly designated or nominated to be placed on the absentee ballot for the September 15, 2009 primaries. This determination of the Board is “final and conclusive.” N.Y. Elec. Law § 7-122(4).

While a board of elections or a court of competent jurisdiction may decide after this “final and conclusive” determination that a candidate was improperly placed on an absentee ballot, resulting in votes for that candidate not being counted in the election, nothing in the New York State Election Law provides a mechanism under which a candidate may be added to the absentee ballot after the Board’s determination.

In addition, the Board of Elections is required by Section 10-108 of the New York State Election Law to mail military ballots to eligible voters no later than thirty-two days before the Primary Election. In this instance, the Board complied with that statutory requirement. Section 10-116 of the Election Law requires the Board of Elections in the City of New York to determine the names of all candidates appearing on the military ballot at least three days before the first day for the distribution of military ballots. Once again, the Board complied with that statutory requirement. That Section further provides that “The failure of the county board of elections to include the name of any candidate... on the military ballot shall in no way affect the validity of the election with respect to the office for which the nomination was made or the validity of the military ballot as to any other matter”.

Further, Section 7-123(2) of the Election Law provides that the ballots for military voters shall be in the same form as those used by absentee voters in the election district of the military voter, while Title III of the Election Law provides for special ballots in the same form as an absentee ballot and Section 11-304 of the Election Law requires them to be cast and canvassed in the same manner as an absentee ballot.

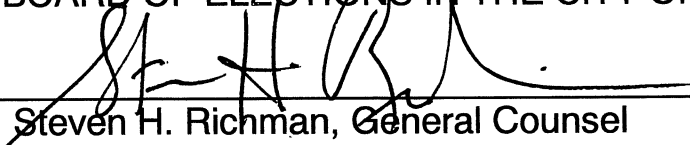


Based on the foregoing statutory provisions, the Board of Elections in the City of New York does not reprint or remail any military, absentee or special ballot after they have been printed. This Board will strongly oppose any attempt to compel the Board to engage in an act not permitted by the Election Law.

Thank you for your attention and understanding in this matter.

Very truly yours,

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK

By:   
Steven H. Richman, General Counsel

Copy: The Commissioners of Elections in the City of New York  
Marcus Cederqvist, Executive Director  
George Gonzalez, Deputy Executive Director  
Pamela Perkins, Administrative Manager  
John Owens, Director, Campaign Financial Reporting  
Enforcement  
Steven Denkberg, Counsel to the Commissioners  
Charles Webb, III, Counsel to the Commissioners  
Troy Johnson, Coordinator, Candidate Records Unit  
Temporary Legal Staff  
  
Marilyn Richter, Esq., Deputy Chief, General Litigation  
New York City Law Department



State of New York  
Court of Appeals

Comm mb  
F17

Stuart M. Cohen  
Clerk of the Court

Clerk's Office  
Albany, New York 12207

Decided August 25, 2009

Mo. No. 2009-983

In the Matter of Israel Martinez,  
&c.,

Appellant,

v.

Frederic M. Umane, et al.,  
Respondents,

Grisela Laraja, &c.,  
Respondent.

On the Court's own motion, On the Court's  
own motion, appeal dismissed, without  
costs, upon the ground that the two-  
justice dissent at the Appellate Division  
is not on a question of law (CPLR  
5601[ a ] ).

Motion for leave to appeal denied.

-----  
In the Matter of Grisela Laraja,  
&c.,

Petitioner,

v.

Israel Martinez, &c., et al.,  
Respondents.

RECEIVED  
GENERAL COUNSEL  
BD. OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 28 PM 4:54

# State of New York

## Court of Appeals

*At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-fifth day of August, 2009*

**Present,** HON. JONATHAN LIPPMAN, *Chief Judge, presiding.*

---

Mo. No. 2009-983  
In the Matter of Israel Martinez,  
&c.,  
Appellant,  
v.  
Frederic M. Umane, et al.,  
Respondents,  
Grisela Laraja, &c.,  
Respondent.

-----  
In the Matter of Grisela Laraja,  
&c.,  
Petitioner,  
v.  
Israel Martinez, &c., et al.,  
Respondents.

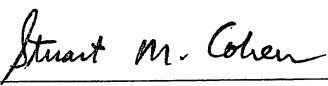
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GENERAL COUNSEL  
BO. OF ELECTIONS  
IN THE CITY OF NEW YORK  
2009 AUG 28 PM 4: 54

The appellant having filed notice of appeal and a motion for leave to appeal to the Court of Appeals in the above title and due consideration having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that the two-justice dissent at the Appellate Division is not on a question of law (CPLR 5601[a]); and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

  
Stuart M. Cohen  
Clerk of the Court

ORIGINAL

Comm Mtg  
FY 9

Short Form Order/ Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: ROGER N. ROSENGARTEN,  
JUSTICE.

ELECTION PART B

-----X  
In the Matter of the Application of

Index No. 20160/09

**DEBORAH HEINICHEN**

Motion Date: 8/14/09

Petitioner-Objector

Calendar No. 29

-against-

Motion Seq. # 001

**STEVEN J. COLORUNDO and JOAN M. VOGT**

Respondent-Candidates

-and-

**THE NEW YORK CITY BOARD OF ELECTIONS**

-----X  
The following papers numbered 1 to 2 read on this petition to invalidate designating petitions.

Order to Show Cause - Verified Petition..... 1 - 2

Upon the foregoing papers it is ordered that this petition is decided as follows:

Upon the application of the petitioner-objector made on the record to withdraw this petition it is

**ORDERED and ADJUDGED** , that the Petition is hereby dismissed.

Dated August 13, 2009

  
\_\_\_\_\_  
ROGER N. ROSENGARTEN, J.S.C.

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: ROGER N. ROSENGARTEN,  
JUSTICE.

ELECTION PART B

*Com mtg  
Ry 2*

-----x  
In the Matter of the Application fo:

Index No. 20158/09

**RUBY K. MUHAMMAD**

Motion Date: 8/14/09

Petitioner-Objector

Calendar No. 34

-against-

Motion Seq. # 001

**MYRNA P. LITTLEWORT and KEVIN LI**

Respondent-Candidate

-and-

**THE NEW YORK CITY BOARD OF ELECTIONS**

Respondent

-----x  
The following papers numbered 1 to 2 read on this petition to invalidate designating petitions.

Order to Show Cause - Verified Petition..... 1 - 2

Upon the foregoing papers it is ordered that this petition is decided as follows:

Upon the application of the petitioner-objector made on the record to withdraw this petition it is

**ORDERED and ADJUDGED** , that the Petition is hereby dismissed.

Dated August 19, 2009

  
\_\_\_\_\_  
ROGER N. ROSENGARTEN, J.S.C.

*Comments  
FYS*

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: ROGER N. ROSENGARTEN,  
JUSTICE.

ELECTION PART B

-----x

Index No. 21179/09

In the Matter of the Application fo:

Motion Date: 8/14/09

**KEVIN LI and MYRNA LITTLEWORT**

Calendar No. 35

Petitioner-Candidates

Motion Seq. # 001

-against-

**THE NEW YORK CITY BOARD OF ELECTIONS**

-and-

**RUBY K. MUHAMMAD**

Objector-Respondent

-----x

The following papers numbered 1 to 2 read on this petition to invalidate designating petitions.


Order to Show Cause - Verified Petition.....1 - 2

Upon the foregoing papers it is ordered that this petition is decided as follows:

Upon the application of the petitioner-candidates made on the record to withdraw this petition it is

**ORDERED and ADJUDGED** , that the Petition is hereby dismissed.

Dated August 14 2009

  
\_\_\_\_\_  
ROGER N. ROSENGARTEN, J.S.C.

*Comm 144  
FV2*

NEW YORK SUPREME COURT - QUEENS COUNTY

**ORIGINAL**

PRESENT: ROGER N. ROSENGARTEN,  
JUSTICE.

ELECTION PART B

-----x  
In the Matter of the Application of:

Index No. 20193/09

**ANTHONY P. NUNZIATO and JOANNE R MUGNO**

Motion Date: 8/14/09

Candidates-Aggrieved

Calendar No. 32

-and-

Motion Seq. # 001

**MANUEL J. CARUANA**

Petitioner-Objector

-against-

**FRANK P. MESSANO and ROSEMARIE IACOVONE**

Candidates

-and-

**THE NEW YORK CITY BOARD OF ELECTIONS**

Respondents

-----x  
The following papers numbered 1 to 2 read on this petition to invalidate designating petitions.

Order to Show Cause - Verified Petition.....1 - 2

Upon the foregoing papers it is ordered that this petition is decided as follows:

Upon the application of the petitioner-objector the candidates-aggrieved made on the record to withdraw this petition it is

**ORDERED and ADJUDGED** , that the Petition is hereby dismissed.

Dated August 14, 2009  
*J*

  
\_\_\_\_\_  
ROGER N. ROSENGARTEN, J.S.C.

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: ROGER N. ROSENGARTEN,  
JUSTICE.

ELECTION PART B

-----x  
In the Matter of the Application of:

Index No. 20187/09

**BART HAGGERTY**

Motion Date: 8/14/09

Candidate-Aggrieved

Calendar No. 30

-and-

Motion Seq. # 001

**JOHN F. HAGGERTY Jr.**

Petitioner-Objector

-against-

**JAY S. GOLUB**

Candidate

-and-

**THE NEW YORK CITY BOARD OF ELECTIONS**

Respondent

-----x  
The following papers numbered 1 to 2 read on this motion to this petition to invalidate designating petitions.

Order to Show Cause - Verified Petition.....1 - 2

Upon the foregoing papers it is ordered that this motion is decided as follows:

For the reasons set forth upon the record the within petition is denied. Accordingly, it is

**ORDERED and ADJUDGED**, that the petition is hereby dismissed.

Dated 8/14/09

  
\_\_\_\_\_  
ROGER N. ROSENGARTEN, J.S.C.



Case 14  
142

Short Form Order/Judgment

ORIGINAL

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: ROGER N. ROSENGARTEN,  
JUSTICE.

ELECTION PART B

In the Matter of the Application of :

-----x Index No. 20162/09

**JAY S. GOLUB**

Motion Date: 8/14/09

Candidate-Aggrieved

Calendar No. 34 31

-against-

Motion Seq. #001

**BART J. HAGGERTY Jr.**

Respondent-Candidate

-and-

**THE NEW YORK CITY BOARD OF ELECTIONS**

Respondent

-----x  
The following papers numbered 1 to 2 read on this motion to this petition to invalidate designating petitions.

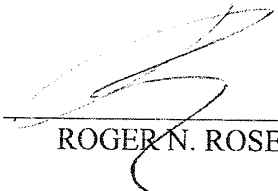
Order to Show Cause - Verified Petition.....1 - 2

Upon the foregoing papers it is ordered that this motion is decided as follows:

For the reasons set forth upon the record the within petition is denied. Accordingly, it is

**ORDERED and ADJUDGED**, that the petition is hereby dismissed.

Dated August 14, 2009

  
\_\_\_\_\_  
ROGER N. ROSENGARTEN, J.S.C.