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

AGENDA
COMMISSIONERS MEETING
TUESDAY, MAY 26, 2009
AT 1:30 P.M.

1. Minutes
   a) 05/05/09
   b) 05/12/09

2. Marcus Cederqvist
   a) HAVA Update
   b) Election Commissioners' Association Summer Conference
   c) Agency Letterhead
   d) Moving Commissioners' Meetings to the EVS Conference Room, Beginning July 7, 2009

3. Steve Richman
   a) Authorization for Meeting with Office of Court Administration

4. Steve Ferguson
   a) Disaster Recovery Plan

5. John Ward
   a) Vacancy Report

For Your Information

- NYS Board of Elections Weekly Status Report for the Week of May 14, 2009 through May 21, 2009
- Voter Assistance Commission Bi-Monthly Open Meeting – Thursday, May 28, 2009 1:00 pm to 3:00 pm
- A. 1438/S. 4378
- Letter from the U.S. Department of Justice, Civil Rights Division
- The Council of The City of New York, Finance Division – Hearing on the Fiscal 2010 Executive Budget for the Board of Elections, May 18, 2009
- In the Supreme Court of the United States, Brief of Amici Curiae Jurisdictions that have Bailed Out Under the Voting Rights Act in Support of Appellees
- Election Law Update – 2009

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

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

May 21, 2009

TO: **The Commissioners of Elections**

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

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

RE: **Authorization to Request Meeting with NYS Chief Administrative Judge regarding September 2009 Primary and Runoff Primary Elections**

In each municipal election year (since 2001), the Board has requested a meeting with the Chief Administrative Judge of the State of New York to request sufficient judicial coordination and resources to enable the Board to make a determination if a runoff primary is required 14 days after the September Primary. Attached is a copy of the letter sent in 2005 which resulted in a meeting with then Chief Administrative Judge Lippman and other OCA Administrative Judges and support staff by the Board, including Commissioner Umane, then Executive Director Ravitz, myself and Steve Kitzinger from the Law Department.

Each such meeting resulted in the establishment of a special Election Part with citywide jurisdiction to manage any post- primary

challenges. In 2001, then Queens Administrative Judge Stephen Fisher was designated and in 2005, Justice Leslie Leech, then the Administrative Judge for NYS Supreme Court, 11th Judicial District (Queens) was designated, as the Coordinating Justice for this Special Term of NYS Supreme Court (then in the 1st, 2nd, 11th and 12th Judicial Districts – i.e. – New York City).

In addition, Supreme Court Justices in each county within the City were designated to act as the coordinating judge's deputy in the event that a citywide challenge was commenced and there was the need for prompt judicial resolution of selected issues, to enable the Board to complete the canvass and recanvass and make a determination if the statutory requirements for a runoff primary were met. Several backup Justices in each county were also designated.

I hereby ask for your authorization to write to the State's Chief Administrative Judge, Ann Pfau and request just such a meeting for this election cycle.

Thank you for your consideration and understanding in this matter.

Attachment

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

June 8, 2005

Hon. Jonathan Lippman
Chief Administrative Judge
Office of Court Administration
State of New York
25 Beaver Street
New York, NY 10004

Dear Chief Administrative Judge Lippman:

I am writing to you on behalf of the Board of Elections in the City of New York. We respectfully request that you once again convene a meeting with the appropriate Judges and staff of your office and the Commissioners and staff of this Board of Elections to discuss, plan and review procedures to be established for the September 13, 2005 Primary Election and possible citywide Runoff Primary on September 27, 2005.

As you recall, in 2001 through the cooperative efforts of your office, special procedures were implemented with respect to Post-Primary judicial activities that would impact on the Board's ability to:

(a) determine if a Runoff Primary is required for any of the three citywide offices (Mayor, Comptroller and Public Advocate); and
(b) conduct such a required Runoff Primary(s) on September 27th.

[Note: These procedures were implemented using Administrative Transfer Orders 130 through 140 of 2001, issued by the Honorable Joan B. Carey, Deputy Chief Administrative Judge of the NYS Unified Court System for the New York City Courts.]

Specifically, a single Justice of the New York State Supreme Court (Hon. Stephen Fisher, Queens County) was designated to hear any applications relating to the canvass and recanvass of votes in the September primary that could affect the canvass/recanvass for any if the citywide offices. Also, the Office of Court Administration developed a contingency plan to provide additional Judges and judicial support personnel to supervise any contested canvass or recanvass in each of the City's five boroughs, in order to help insure that a Runoff primary could be conducted, if needed.

As we all now know, the events of September 11, 2001 resulted in unique and extraordinary circumstances including the rescheduling of both the Primary and Runoff Primary that year. It is clear that the extensive consultations between your office and colleagues and the Board as well as our mutual pre-planning efforts enabled all of us to respond in an effective fashion to those events, which we hope and pray will never have to be repeated.

This year, we anticipate a significant number of contested Primary elections throughout the City. This increases the potential for litigation which could impact on the Board's ability to determine the outcome of a specific citywide primary, the need for a Runoff Primary and the ability to conduct such a Runoff Primary fourteen (14) days after the first Primary.

Therefore, the Board respectfully requests that in this municipal election year, we again undertake the process that proved successful in 2001. Please be so kind as to have a member of your staff contact me to set a time for our first meeting for this election cycle at your earliest possible convenience.

On behalf of the Board of Elections in the City of New York, I want to thank you and your colleagues at the Office of Court Administration for their cooperation and assistance during the past four years. We look forward to continuing to work with you and your colleagues in 2005, as we all seek to insure that the rights of all of New York City's voters are protected and their ability to cast their ballots preserved and enhanced.

With sincere best wishes, I am

Very truly yours,

THE BOARD OF ELECTIONS IN THE CITY OF NEW YORK

By:_____
STEVEN H. RICHMAN, GENERAL COUNSEL

Copies: Hon. Joan B. Carey, Deputy Chief Administrative Judge for New York City Courts
Maria Logus, Esq., Executive Assistant to the Deputy Chief Administrative Judge for New York City Courts

Commissioners of Elections in the City of New York
John Ravitz, Executive Director
George Gonzalez, Deputy Executive Director
Pamela Perkins, Administrative Manager
Steven Denkberg, Counsel to the Commissioners
Charles Webb, III, Counsel to the Commissioners
Joseph LaRocca, Coordinator, Candidate Records Unit

Michael A. Cardozo, Esq., Corporation Counsel of the City of New York
Thomas Crane, Esq., Assistant Corporation Counsel of the City of New York in charge of the General Litigation Division

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

DATE May 26, 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	Joseph Duffy	Computer Opp.	Tech	Rep.	$37,444	$35,661
7	Roselie DeDomenico	Clerk.	Qns	Dem.	$27,111	$25,820

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

May 22, 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 May 21, 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 5/14/09-5/21/09

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 in jeopardy and behind schedule.

Contracting with Voting System Vendors

Status of tasks in this category: *on schedule*

- Contract extensions for both NYSTEC contracts have been drafted and presented to OGS and SBOE. Requested extensions will be for three additional years.
- The vendor contract amendments are being reviewed at OSC, having been approved by the Office of Attorney General.

Testing, Certification, and Selection of Voting Systems & Devices

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

- Overall progress of testing :
  - NYSTEC continues to assist in the testing effort with SysTest to clarify and resolve testing issues. Any critical issues will be reported to SBOE as they may occur.
  - Weekly conference calls continue between NYSTEC, SBOE & SysTest to answer any questions about test case review, testing issues and other questions.
  - Testing of the voting systems by SysTest continues Dry run testing has progressed in accordance with the time schedule.

- The SBOE is working with the DOJ and the Attorney General on finalizing correspondence by which a joint request will be made for Judge Sharpe to order the pilot program as outlined in the Board's proposal and amend the implementation time line.

- SBOE staff continues to develop the various procedures required for a successful pilot program.

Delivery and Implementation of Voting Systems & Devices

Status of tasks in this category: on schedule

HAVA COMPLAINT PROCESS

NYC HAVA Complaint

On May 19th the NYC BOE responded to the State Board's Steering Committee's request for information. The SBOE staff is currently discussing the points made by NYC in an effort to determine how next to proceed.

County – FYI

CITY OF NEW YORK
VOTER ASSISTANCE COMMISSION

VAC Bi-Monthly Open Meeting
HOSTED BY: Mayor's Office of Veterans' Affairs
Thursday, May 28th, 2009, 1:00 p.m. – 3:00 p.m.
Mayor's Office of Veterans' Affairs, 346 Broadway, 8 West (across Federal Plaza)
Conference Room 801

Agenda:

Roll Call	
Approval of Minutes (March 25 Meeting)	
Executive Director's Report	Onida Coward Mayers
NYC Board of Elections Report	Marcus Cederqvist
Campaign Finance Board	Jihee Suh
Department of Education	Melissa Gendler
Old Business	
New Business	
Public Comment	
Adjournment	

Speakers:

Stacey Cumberbatch – 2010 Census
Carmen Matias – 2010 Census

Testimony: Anyone who wishes to testify, please call Ms. Bibi Yusuf at (212) 788-8384. Please note that, due to the expected volume of testimony, we asked that one person per organization testify and testimonies must be kept less than four (4) minutes.

Entrance: 346 Broadway (persons with Mayor's Office ID), (108 Leonard Street, general public)

Subways: 4,5,6 to Brooklyn Bridge/City Hall; N, R, 6 to Canal Street; 1,9 to Franklin Street; 2,3,A,C,E to Chambers – All within walking distance to location.

Buses: M1 or M6, southbound to Broadway and Leonard Streets or north bound to Worth and Church Streets

By Car: Due to heavy traffic, street closings due to construction and parking difficulties, driving is not recommended.

VAC 100 Gold Street • 2nd Floor • New York, NY 10038-1605 • Tel: (212) 788-8384 • Fax: (212) 788-3298 • www.nyc.gov/voter

Original

VOTER ASSISTANCE COMMISSION

BI-MONTHLY OPEN MEETING

40 RECTOR STREET

NEW YORK, NEW YORK

WEDNESDAY, MARCH 25, 2009

1:00 P.M.

P R E S E N T:

JEFFREY F. KRAUS, Chair
DAVID CONTRERAS
ARIEL DVORKIN
MELISSA GENDLER, Department of Education
JANE KALMUS
ONIDA COWARD MAYERS
ROBERT J. McFEELEY
GLENN MAGPANTANY
CHRIS OLDENBURG
MICHAEL PASTOR
LORETTA PRISCO
STEVEN RICHMAN, Board of Elections
BRETT ROBINSON
JIHEE SUH, Campaign Finance Board

***NOTE: Names and designations of speakers were not provided.

P R O C E E D I N G S

(Time noted: 1:00 p.m.)

CHAIRPERSON KRAUS: Good afternoon. This meeting of the New York City Voters Assistance Commission will come to order.

My name is Jeffrey Kraus; I'm the chair and a mayoral appointee. As we do not yet have a quorum, I would like to proceed out of order on the agenda and begin with the Reverend Joseph Parkes, Chair of the New York City Campaign Finance Board, our host here today.

Thank you for having us.

CHAIRPERSON PARKES: Thank you for honoring us with your presence. As mentioned, I'm Joe Parkes, honored to serve as chair of the New York City Campaign Finance Board. My other job is president of the New York High School in East Harlem.

On behalf of the board, I would like to welcome all members of the commission and all members of the public here today. I'm very pleased to host this bimonthly meeting of the Voters Assistance Commission and to be with you.

An important part of the work of the

commission is to encourage New Yorkers to register and to vote. In light of the mission of the Campaign Finance Board to enhance the role of New York City residents in the electoral process, we greatly appreciate the commission's work, and it's work in bringing together to help increase participation by all New York City residents in the democratic process.

We look forward to an ongoing partnership with the commission. Welcome and thank you, and have a great meeting.

(Applause.)

CHAIRPERSON KRAUS: Thank you. I don't know how often the chair gets applauded.

(Laughter.)

My experience has not been the case.

CHAIRPERSON PARKES: Certainly not in this room; maybe elsewhere.

CHAIRPERSON KRAUS: What I would like to do, since we don't yet have a quorum, is go through the executive director's report; Ms. Onida Coward Mayers.

MS. MAYERS: Good afternoon. It is that time of year again. We are certainly getting ready

for Voter Awareness Month. It's another big election year, and that's exciting news for VAC. Really, from the last federal elections, we are trying to continue on that momentum, to hold on to that momentum for as long as possible; and try to get more and more people involved in voter awareness, voter education, increasing our outreach program and Voter Awareness Month in our flagship program.

What we are doing is, last year we had over 120 events during Voter Awareness Month, and over 300 for the entire year. That's documented.

In terms of undocumented, we can't even count, because it got to a point where there was so much happening and there was so much excitement in the air that we were just trying to facilitate the needs of organizations and individuals, to try to reach out to as many New Yorkers as possible.

The area that we are concentrating on right now is Youth Voter Education Day, something we piloted last year. And we really want to build upon youth voter education this year.

Part of what we have done is, we're working with the Department of Youth and Community

VAC - Bimonthly Open Meeting - 3/25/09

Development to really reach out to as many groups as possible; youth groups; and make sure that on this day, which is October 6, 2009, that there will be voter education activities for youth groups all around the city.

Last year, as you might remember, we kicked it off with a student panel discussion on the importance of the 2008 elections. And we also provided curriculum via our website for teacher access to provide lessons on that day.

And there was really a pretty good response to it. But this year we needed a stronger machine to partner with us to get the word out. So working with DYCD, we are very fortunate because they have hundreds and hundreds of contractors.

And we realized that many of these contractors are supposed to have a voter education element; but it is not quite happening, because they don't have the structure and the materials and everything they need.

So it turns out to be a very nice marriage, where we are able to give them information and we are able to train their directors, from the department heads at DYCD to the

actual executive directors and coordinators of the programs all around the City.

So, we are really hoping there will be a much larger push this year, that there will be -- I don't want to say a minimum -- a great number of events on Youth Voter Education Day, which will be October 6th. That's ongoing, and you will hear about those developments, as well.

The other piece that we've started to concentrate on is, last year we went to summer events that were held in public housing developments around the city. We conducted voter registration drives, we went to some of their community centers and tried to hold voter education forums. Commissioner McFeeley presented at one of them.

And what we found was that we needed more help again in this area. We needed the machine of the department to really help us to get the word out to the residents there also.

So this year we have begun to have meetings with the executives at NYCHA on ways that we can involve civic engagement and understanding what's happening with the electoral process in your

community.

So they are working with us to make sure we will be able to do that and have a greater level of exposure; that the community centers there will be able to offer, whether it's voter registration or voter education; and they too will have materials on hand so that residents can find out and have a better sense of what the elections continue to be all about.

To that end, also, we will continue with partnerships that we have had. For instance, I see some of our Local Law 29 groups are here with us; and one great partner has been HPD -- Reginald Evans is here; thank you for coming.

And he was the person who launched the Taking it to the Streets campaign last year, where they went on -- I can't even say how many corners throughout the City, and set up a table to give out information about the services that they offer. And they were also kind enough to allow us to send representation along with them, and so we conducted voter registration drives wherever they went.

They are going to continue that this year, and part of what we are doing is, we've gone

to DYCD to ask them to work on that program, and that way we will expand upon the Taking it to the Streets voter registration, a component of it, also. That will continue.

And so, then, the next thing is, since this is a municipal election, we are going back to our video voter guide program, which we offered in 2005, launched in 2005 and piloted.

And I have to say that, probably in 2007, possibly right after it, Elizabeth from the Campaign Finance Board and I met, and we really started to go through the success of the VPG areas that we felt we could strengthen, and ways that we could work together.

So while the Campaign Finance Board was our host today, they have always been supportive of our efforts as we've worked together very well. We really strengthened how we could partner for the Video Voter Guide.

And if you remember, the Video Voter Guide is a platform for candidates to be able to share their election message. It is a nonpartisan program that's run; and it is a wonderful resource for voters that, in the privacy of their own homes,

they can watch via television everyone running for office.

It's broken down by borough. You can watch your own borough. We have citywides, we have borough-wides, and we have the City Council races. It's also a wonderful opportunity to find out more about those people seeking office and seeking to represent you.

It is not only on television, but we also offer it on the website. So that way you had an opportunity to surf the web see who they were.

This year, with the assistance of the Campaign Finance Board, they will serve in the capacity of our front office. Since they have the best relationship with the candidates, they will be able to reach out to candidates.

And in the same way they offer the wonderful printed guide, they will be able to offer to candidates -- if you are interested in being part of the Video Voter Guide -- as well as helping to schedule candidates; also, helping to promote the Video Voter Guide program. So, thank you to the director, Amy Loprest.

This year, also, what will be different

is that we are seeking production partners. And last year, as you know -- the last municipal election, NYC-TV, which is also a major partner in this, they produced it. They will continue on as producers of the program, but we are seeking places where we will actually hold the production of it. So, that is going on as we speak.

Thank you.

CHAIRPERSON KRAUS: Any questions?

MR. McFEELEY: Scheduling, in regard to that. Since it's our responsibility to supervise and take care of the voter's guide, is there a time frame on when to start that?

MS. MAYERS: When it will begin? August.

MR. RICHMAN: Can you give us the total cost of the nonmandated discretionary program, what it will cost the City to produce the voter's guide?

MS. MAYERS: Right now, we're looking for sponsors for that production; so the production assistance will be taken on by whoever agrees to do it. So, it would not be a cost that we would incur. As I said, the Campaign Finance Board has agreed to help us with the scheduling of it, so

that cost would remain there.

MR. RICHMAN: Is there a total cost to the City, how many tax dollars will be spent?

MS. MAYERS: Not yet.

CHAIRPERSON KRAUS: Now that we have a quorum, I'll go back to the beginning of the agenda for the roll call. I'm Jeffrey Kraus, mayoral appointee and chair. We will proceed from my left and go to my right.

MS. GENDLER: I'm Melissa Gendler, DOE.

MR. MAGPANTANY: Glen Magpantany, citywide appointee.

MR. McFEELEY: Bob McFeeley.

THE SPEAKER: (Inaudible.)

MR. RICHMAN: Steve Richman, general counsel to the Board of Elections, representing Marcus Cederqvist.

MS. KALMUS: Jane Kalmus, vice chair of the Voters Assistance Commission.

MR. CROWLEY: Anthony Crowley, for the Mayor's Office.

MR. PASTOR: Michael Pastor, Corporation Counsel.

MS. SUH: Jihee Suh.

VAC - Bimonthly Open Meeting - 3/25/09

CHAIRPERSON KRAUS: Thank you.

The next item on the agenda is approval of the minutes of the transcript of the December 11th hearing.

Are there any corrections, issues?

(At this point, Mr. Richman made remarks in relation to the December 11 meeting. These remarks were personally very offensive to this reporter, who reported and transcribed that meeting. As such, Mr. Richman's remarks are omitted.

The reporter found Mr. Richman's comments to be thuggish, ill-mannered, false, inflammatory, boorish and spoken out of ignorance.

Mr. Richman was not present at the December 11 meeting and obviously does not understand the difficulties of auditorium acoustics. Inaudibles, shown in the original transcript as "..." were inevitable, as both audience members and panel members often spoke neither clearly nor into the microphones.

At that meeting, some audience speakers did not identify themselves coherently and read very rapidly off of prepared sheets. Not all

VAC - Bimonthly Open Meeting - 3/25/09

members of the panel had place cards identifying themselves; not all panel members spoke clearly or directly into the microphones; this is the way most VAC meetings are.

Nevertheless, the transcript was as well done as possible, given what the reporter had to work with, and overwhelmingly accurate. A more precise job was not possible under the circumstances. Therefore, The requested emendations to the December 11 transcript, done by this reporter, were very minimal in terms of content and coherence, basically changing the ellipses "..." to "Inaudible.")

CHAIRPERSON KRAUS: Certainly there were a number of omissions. What I think might be appropriate is that we table consideration of this and ask for the reporting company to go back, review their notes and review the comments, and see if we can come up with a more accurate account of what occurred.

As far as the suggestion regarding taking of minutes, rather than the transcript, that certainly is a good suggestion and we'll take the opportunity, perhaps, to consider that at our next

VAC - Bimonthly Open Meeting - 3/25/09 meeting.

Is there any objection to tabling the minutes?

We agree to table it.

Thank you.

The next item is the New York City Board of Elections report, Mr. Richman.

MR. RICHMAN: Thank you, Mr. Chairman.

On behalf of the executive director and the commissioner of the board, we wanted to bring you back up to date.

As you know, we conducted three special elections in February, for members of the City Council, for vacancies that have not been funded. As a special election has been scheduled for April 21st in the Bronx to fill the Bronx Borough Presidency, again, that's an issue that we resolved and conducted an election without any funds.

The board plan is to continue to incur expenditures and forward the bill to the City. We have advised the Office of Management and Budget of that in a letter to the director on January 7. No response was forthcoming.

We have then advised the Speaker and

the Mayor of this problem, along with the other appropriate elected officials of the City and the State, and the Department of Justice.

As the board testified two weeks ago before the Council, the conduct of fair, honest and open elections is a fundamental right in our democracy. And the cuts made by the City in the board's budget in fiscal year 2009 and the further reductions imposed in the Mayor's preliminary budget for the fiscal year 2010, at a critical time, has put our democracy in this city in peril.

As a result of the City's actions, the commissioners have been placed in an untenable position of either fulfilling their legal obligations despite adequate funding, or deciding collectively that the City's failure to adequately fund elections vitiates their legal obligations, thereby resulting in the disenfranchisement of voters within this city.

The cost of the proposed cuts in a full citywide election this year, we will leave it to others to decide. To not conduct an election this year that protects the rights of the voters of the City is of paramount interest of the board.

VAC - Bimonthly Open Meeting - 3/25/09

It is an understatement at best when the board states that "We need the support from the systems to succeed." The board is continuing its options at this point, but the cost of a $17 million cut will not only cripple the ability of the board to handle its statutory duties and the processes of voter registration and conducting elections; it will virtually eliminate outreach education, particularly as we're about to embark on the transition to a new voting system.

And the board as such will ask for the support of each community group, and ask this commission to weigh in and provide us with the necessary funding so the people can exercise their right to vote in this city.

CHAIRPERSON KRAUS: Questions for Mr. Richman?

MR. McFEELEY: I have a question about the special election in Staten Island of the 49th District. My concern was along the lines of, I understand the judge placed the extra candidate back on the ballot before the election, which caused undue hardship to the board.

So my concern was more about the

ballots that were tossed because of the use of the wrong ballots at one specific poll site.

Doesn't the board usually do a roving inspection of all the sites, and didn't they notice wrong ballots were being used at that site?

MR. RICHMAN: Again, we're talking about over 11,000 paper ballots used. We had 8 ballots where an inspector, despite the new ballots, prior to the opening of the polls and special instructions, failed to follow instructions.

The only thing I could tell you about that site, thanks to the cooperation of the New York Police Department, you are right. They received a decision at 2:30 in the afternoon, beforehand. Adding it to the ballot was physically impossible.

What has happened was that a set of ballots for the ballot marking devices was printed. When the petitioner first filed for tests required by State law, and those ballots, about 40,000 of them, were sitting in a printer's warehouse in Rochester.

The printer put them on the truck to be driven down to the City. They were delivered to

the Staten Island office at 10:00. We then divided them among poll sites, made deliveries to NYPD between 1:00 and 2:00 a.m.; and they insured that prior to the opening of the polls, each of the 88 poll sites, the new ballots with the proper candidates on there and special instructions were placed in the hands of the inspectors.

In every public school site that evening, the machines were sealed. You couldn't use the voter machines and the ballots boxes were reprogrammed.

In the 20-some private sites, that change in the sealing took place between 5:30 a.m. and 8:00 a.m. on the day of the election. The poll workers, this is the first time in recent history that an entire election was conducted on paper ballots.

The fact that 8 ballots were improperly distributed out of the 11,000 ballots that were cast is attributed to the inspectors and the work of the board staff and the Police Department to make sure there wasn't a greater problem.

As you know, if the margin exceeded 8, we're glad that it didn't.

VAC - Bimonthly Open Meeting - 3/25/09

It concerns me for every ballot that gets tossed. Maybe somewhere along the line there will be procedures that if we do go to paper, there will be things to learn; and clearly this requires much more extensive training and hands on experience on the part of the inspectors.

They didn't have that. They did it with a 1-page sheet of instruction, and you had 88 poll sites functioning rather flawlessly. I think the candidates in doing the count found some small errors and omissions made by poll workers and the voters. In the end, every valid vote was counted.

CHAIRPERSON KRAUS: Any other questions?

MS. KALMUS: Mr. Richman, we need to know what the Board of Elections intends to do about the crisis you just described.

Would you let us in on what your intentions are?

MR. RICHMAN: We have testified. We would be happy to make copies available --

MS. KALMUS: Please do.

MR. RICHMAN: -- on the 12th. It will be easy to give a copy. And we can send it to you. We have communicated this to the governor of the

State of New York, the legislature, with letters, to the Assembly and the Senate, urging them to consider a mandatory statutory formula to fund elections throughout the State.

We have made the case clear to the City Council and now it's up to the City Council and the Mayor to respond, or put the voting rights in jeopardy.

MS. KALMUS: Please make sure that every member of the Voter Assistance Commission receives that transcript. Otherwise, we are not going to be able to cooperate with you in the future.

CHAIRPERSON KRAUS: I'll arrange to make copies.

MS. KALMUS: Printed; not just e-mail.

CHAIRPERSON KRAUS: Absolutely.

Any other questions or comments?

Thank you.

The next item on the agenda is the State Finance Board.

MS. SUH: On February 24th, a special election was held for City Council seats in Districts 21 and 32 in Queens, and a district in Staten Island.

VAC - Bimonthly Open Meeting - 3/25/09

The Campaign Finance Board contributed a total of $82,615 (?) in public matching funds to qualifying candidates. These qualifying candidates were participants in the City Campaign Finance Program, which amplifies the impact of small campaign contributions. All three of the candidates -- one of these was a direct participant in the program.

In the other special election coming up next month for the Bronx Borough President, two candidates running are also participating in the Campaign Finance Program.

In addition to the candidates in the special election this past year, candidates for the 2009 citywide elections have been submitting campaign finance information to the board. Last week we had approximately 216 candidates in the 2009 citywide elections filing their scheduled disclosure statements to the board.

All of these candidates, including candidates not participating in the program, were required by law to provide a report of all financial activity for their campaign, covering the period January 12, 2009 to March 11, 2009.

VAC - Bimonthly Open Meeting - 3/25/09

Based on the disclosure statements filed thus far, we're seeing more individual contributions given to candidates in the number of small contributions at this stage of the election year compared to the last citywide election year in 2005.

As part of the Campaign Finance Board's role to make the campaign finance information of the candidate readily accessible to the public, we have been preparing to allow for investigation of the campaign's searchable database by making it more user friendly with search options. This database is accessible from the website and contains the candidate's financial information submitted to the board.

Lastly, another part of the voter education effort is the debate program, organized by this board, who administers this debate program for citywide offices. Candidates are provided a forum, and participating candidates are asked to appear only to discuss issues important to the public.

The debate program is sponsored by organizations selected by the board, sponsors not

affiliated with any particular party candidate or public official. Earlier this year we accepted applications to sponsor the debate program for the 2009 citywide elections.

Further information about the debate program, along with the other items we have reported today, is available on our website.

Thank you.

CHAIRPERSON KRAUS: Any questions?

There being no questions, the Department of Education.

MS. GENDLER: Good afternoon. I'm the newest member of the commission. We do family advocacy in my office, through the Department of Education. My office worked closely with Onida for Youth Voter Day. We are going to do outreach.

I'm excited to be the newest member of the commission and hope to continue working in the effort, especially for high school seniors that are 18 and getting ready to do their first voting. I'm very excited.

CHAIRPERSON KRAUS: Thank you.

Welcome, and we look forward to having you at the subsequent meetings.

VAC - Bimonthly Open Meeting - 3/25/09

The next item is old business.

Any old business?

Any new business?

MR. McFEELEY: I happened to be perusing the websites and happened to notice a report that was issued by the Comptroller's Office, which I asked to be included in the package to all the commissioners to peruse, issued March 6. If no one had a chance to read it, I thought they might find it interesting reading.

It's about trying to update the Board of Elections' database and some of the complaints the Comptroller's Office also had. So I thought it of interest for you guys to peruse.

CHAIRPERSON KRAUS: Thank you for providing that information. I hope everybody will look at that by the next meeting.

Any other new business?

The next item is public comments, the opportunity for general public comments, for people to come forward.

Is there anyone here for that purpose?

If there are no public comments -- and it looks like there isn't -- I would entertain a

VAC - Bimonthly Open Meeting - 3/25/09

motion to adjourn.

MS. KALMUS: Moved.

CHAIRPERSON KRAUS: All in favor say "Aye."

(A chorus of "Ayes.")

Opposed?

Abstentions?

Motion carries.

This meeting is adjourned. Thank you for coming.

(Time noted: 1:27 p.m.)

Tankoos Reporting
www.tankoos.com

Direct Dial: 516.741.5235
Fax: 516.741.1460

One Penn Plaza
Suite 4715
New York, NY 10119

C E R T I F I C A T I O N

I, Jeffrey Shapiro, a Shorthand Reporter and Notary Public, within and for the State of New York, do hereby certify that I reported the proceedings in the within-entitled matter, on Wednesday, March 25, 2009, at 40 Rector Street, 6th Floor, New York, New York, and that this is an accurate transcription of these proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 8 day of April, 2009.

Jeffrey Shapiro

JEFFREY SHAPIRO

Tankoos Reporting
www.tankoos.com

Direct Dial: 516.741.5235
Fax: 516.741.1460

One Penn Plaza
Suite 4715
New York, NY 10119

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

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

TO: Peter J. Kiernan, Esq.
Counsel to the Governor of the State of New York

FROM: Steven H. Richman
General Counsel

RE: A. 1438/S. 4378

DATE: May 20, 2009

The Board of Elections in the City of New York is in receipt of the e-mail message sent to the Board on Friday, May 15, 2009 by the Legislative Secretary of your office concerning A. 1438.

The Board of Elections in the City of New York URGES THE GOVERNOR TO APPROVE A. 1438.

This bill, was Proposal 2009-03 of the Board of Elections in the City of New York 2009 Recommend Revisions in the Election Law and was introduced in both the Senate and Assembly at our request.

I want to take a moment and provide you with the circumstances which led the Commissioners of Elections in the City of New York to make enactment of this legislation a high priority.

For the November 2005 General Election an independent nominating petition was filed with the Board of Elections in the City of New York

seeking to nominate, using the same petition, candidates for both Brooklyn and Queens Borough President for the Reform Party. All the petitions carried both candidates' names and the offices they both sought, (Borough President, albeit in different boroughs of the City).

The Board of Elections removed the candidates (following notice and a hearing) finding that, as a result of the configuration of the petitions, the petitions did not contain a sufficient number of valid signatures and the defect was not curable. The Board believed then as it does now, that the New York State Legislature intended that each designating or nominating petition would seek to place the name of only one candidate for each public office/party position using the same petition; not allowing for multiple candidates for the same office in different political subdivisions.

Notwithstanding the Board's determination, and our understanding of the Legislature's intent, New York State Supreme Court, Kings County, in a matter captioned *Popkin v. Umane, et. al., [Index No. 70030/05]* and the Appellate Division, Second Department [*22 AD2d 613(2nd Dept. 2005)]* determined that the petition was not defective and the candidates would appear on the ballot.

If the bill now before you is not enacted, then a single designating or independent nominating petition could place on the ballot candidates for the New York State Senate and/or Assembly (for example) for the entire City of New York [30 State Senate Districts and/or 65 Assembly Districts] or in all 51 City Council Districts. Similarly, one single petition could seek to qualify candidates for District Leader or State Committee in an entire county.

In fact, during the 2006 Election Cycle, such a petition was submitted to the Board seeking to designate candidates for Judge of the Civil Court in multiple municipal court districts in Manhattan. This resulted in a series of complex litigation matters which created additional (yet unnecessary if this bill is enacted) work for both the Board of Elections in the City of New York and the judicial system.

The Board believes that enactment of this bill reestablishes what was the intention of the Legislature with respect to designating and independent nominating petitions.

Therefore, the Commissioners of Elections in the City of New York strongly urges the Governor to SIGN A. 1438 into law for the reasons set forth herein.

Note: The Board wants to take this opportunity to advise you that upon the Governor's approval of this bill, it has to be submitted for pre-clearance, pursuant to the Voting Rights Act of 1965, as amended, [42 U.S.C. 1973(c)].

As always, if you have any questions or require additional feel free to contact me.

Copy: **Commissioners of Elections in the City of New York**
Marcus Cederqvist, Executive Director
George Gonzalez, Deputy Executive Director
Pamela Perkins, Administrative Manager
John Owens, Esq., Director of Campaign Finance Enforcement
Charles Webb, Esq., Counsel to the Commissioners
Steven Denkberg, Esq., Counsel to the Commissioners

U.S. Department of Justice
Civil Rights Division

Comnty
F42

CC:MSR:ER:maf
DJ 166-012-3
2007-0266

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

May 18, 2009

Spencer Fisher, Esq.
Senior Counsel
City of New York Law Department
100 Church Street
New York, New York 10007

Steven H. Richman, Esq.
General Counsel
Board of Elections
32 Broadway
New York, New York 10004-1609

Dear Messrs. Fisher and Richman:

This refers to your March 16, and 31, 2009, letters concerning our inquiry regarding the procedures for conducting the 2007 special vacancy elections for the City of New York in Bronx, Kings, and New York Counties, New York. We received your correspondence on March 17, 2009; supplemental information was received on March 31, 2009.

The information received on March 31, 2009, is necessary for our review and recommences the sixty-day review period under Section 5. Therefore, by June 1, 2009, we will either make a determination of these changes or request specific items of additional information necessary to complete our review under Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.39

Sincerely,

Christopher Coates
Chief, Voting Section

Comm Mtg – FY2

THE COUNCIL OF THE CITY OF NEW YORK

Finance Division

Hearing
on the Fiscal 2010 Executive Budget
for the
Board of Elections

May 18, 2009

Hon. Christine C. Quinn
Speaker

Hon. David I. Weprin
Chair, Committee on Finance

Hon. Helen Sears
Chair, Committee on Governmental Operations

Preston Niblack
Director

Jeffrey Rodus
First Deputy Director

Andy Grossman
Deputy Director

Board of Elections (003)

Agency Overview

The Board of Elections (The Board or BOE) conducts, as specified by State Law, all elections within the City of New York. The Board has a central office and five borough offices. The Board receives and examines candidates' petitions, registers voters either by mail or on specified registration days, and keeps current the City's voter registration lists. The Board holds and keeps minutes of all of the Commissioners' meetings on the Board of Elections.

Agency Highlights

- **Help America Vote Act of 2002 (HAVA).** The Help America Vote Act (HAVA) calls for the modernization and improved administration of elections. HAVA has many components, such as creating a statewide computerized, interactive voter registration list, providing accessible voting machines at each poll site and offering financial incentives to states that modernize their voting systems.

  All HAVA-participating states were required to comply with the law by the November 2004 general election. However, since New York received a one-time compliance waiver from the Federal government, the deadline for full HAVA compliance was extended until the September 2006 primary election.

  In February of 2006, the Department of Justice (DOJ) sued New York State for its failure to comply with HAVA. On June 2, 2006, as part of the settlement of the HAVA lawsuit, the United States District Court for the Northern District of New York (Court) issued a Remedial Order (order) accepting the New York State Board of Elections (State Board) plan for partial HAVA compliance for the 2006 election cycle, and setting forth future deadlines for full HAVA compliance.

  Specifically, the Court required the State Board to present a plan to the Court by September 28, 2007, for placing one fully accessible voting system in every poll site statewide. Since the State Board of Commissioners was unable to develop a plan that a majority of the Commissioners would approve, the State Board submitted two plans to the Court. Subsequently, on November 5, 2007, DOJ moved for an order requiring the State to take immediate and specific steps to become compliant with the order and HAVA. More importantly, DOJ effectively moved for the appointment of a receiver to achieve HAVA compliance if the Court decided that the State was unable to comply with the requirements of the Order and HAVA on its own. Finally, on January 16, 2008, the Court issued a Supplemental Remedial Order (Supplemental Order), which among other things required the State Board to deploy a Ballot Marking Device (BMD) in every polling place throughout the State and replace all lever voting machines by the fall 2009 primary and general elections.

  The Council urges the State to ensure that the State Board is taking all necessary steps to fully implement HAVA according to the terms outlined by the Court in the Supplemental Order. In particular, the State Board must comply with all Court ordered implementation deadlines to ensure that local Boards of Election are able to take the necessary steps to implement permanent voting systems for 2009 and beyond. The State must also ensure that all state and local Board of Elections

staff, including poll workers, will be sufficiently prepared to educate and assist voters as the State replaces its lever machines with new, sophisticated voting technology. More specifically, the State must ensure that local Boards of Elections have State-certified voting machines from which to choose so that the new machines may be properly deployed in 2009.

Although the City Board of Elections has conducted voting machine demonstrations and held a public hearing to allow comment from the public, at present the prospect of meeting the court-ordered implementation of new voting machines by the September 2009 election is dubious. As of early March, the State Board of Elections still had not certified any machines, making it impossible for any local board to select, procure and test them. Similarly delayed is the required training for voting machine technicians and poll workers, as well as necessary public education efforts. The Board's executive staff is highly concerned that due to circumstances clearly beyond its control, the agency will be out of compliance with the mandates of the Department of Justice, the federal courts, or both. According to the City Board, these entities are aware of these compliance issues (but oddly silent on them) since the State Board of Elections is mandated to submit weekly status reports to them.

City Council Legislative Agenda Items

- **Full-Face Ballot Requirements.** The New York City Council urges the State Legislature to amend State Election Law Section 7-104, to better enable counties to comply with HAVA. Particularly problematic is the State's current requirement that an entire ballot must appear on one page, also known as a full-face ballot.

  Modern, user-friendly voting systems are simply not consistent with the full-face ballot requirement. Further, many of the voting system vendors currently under consideration by the State Board of Elections are not manufacturing voting systems with the full-face ballot specifications. Therefore, unless the election law is amended, there is a strong possibility that the equipment procured in New York State will be more expensive and less rigorously tested than voting systems used by other jurisdictions throughout the country.

  Keeping the full-face ballot requirement may also hamper efforts to provide the level of access for persons with disabilities that HAVA requires. Specifically, since requirements dictate the ballot be displayed on one screen, it is probable that the font used will be so small that visually impaired voters may have difficulty casting their votes independently and in a meaningful manner. Finally, the full-face ballot requirement may present problems with the number of alternative languages that the ballot must be translated into, an especially troublesome factor in New York City where the City Board of Elections is legally required to translate the ballot in at least four languages.

- **Electronic Voter Registration.** The New York City Council calls on the State Legislature to amend State Election Law Section 5-210, to permit electronic voter registration. Currently, in order for a voter's registration to become effective, a potential voter must complete a voter registration form and either mail it to a local Board of Elections or return it to a local Board office in person. In New York City, for example, many local agencies, such as the Department of Motor Vehicles, are permitted to distribute voter registration forms, although the voter remains responsible for mailing in or returning the form to the local Board. The Council urges the State to consider permitting voter registration via the Internet.

- **Election Day Registration.** The New York City Council calls upon the State Legislature to enact legislation to allow voter registration at any time up to, and including, Election Day. Currently, State law requires potential voters to register at least twenty-five days before an election to be eligible to participate in that election. This requirement often has the effect of preventing otherwise qualified individuals from casting a ballot. Election Day Registration would increase citizen participation in the electoral process, a longstanding goal of the Council.

- **Early Voting and No-Excuse Absentee Voting.** The New York City Council calls upon the State Legislature to enact legislation allowing early voting and no-excuse absentee balloting. Early voting is the process by which voters can cast their vote prior to Election Day. Early voting can take place remotely, such as by mail, or in person, usually in designated early voting polling stations. The availability and time periods for early voting vary based on jurisdiction and type of election. Similarly, no-excuse absentee balloting allows any registered voter to vote absentee in advance of Election Day without having to state a reason for their need or desire to vote via an absentee ballot. Voters in jurisdictions utilizing no-excuse absentee balloting enjoy many of the benefits of more traditional early voting at a reduced cost and with less of a pre-election day administrative burden. Generally speaking, the goal of early voting and no-excuse absentee balloting is to increase democratic participation and relieve congestion at polling stations on Election Day, while also allowing those scheduled to be away from their state or district for work, family-related business, or other reasons to cast a ballot.

Other Issues

- **Pay Equity.** For several years, the BOE has been advocating for an increase in the salaries of its employees. Several years ago, the Board conducted a study showing that when compared to the salaries of the surrounding county Boards and those of the City's Campaign Finance Board, New York City BOE employees' salaries were among the lowest overall. The Board has sought a baseline addition of $7 million to properly fund its salary costs. According to the Board, this is particularly vital given the substantial increase in required job expertise and training associated with election modernization and the Help America Vote Act.

- **Captial Budget Funding.** The federal government appropriated HAVA funds to states to modernize their voting systems. That act made available $220 million to the State of New York; New York City is expecting to get approximately $92 million of the total funding. Of this amount, the City has already accessed approximately $23 million for the purchase of ballot marketing devices, leaving approximately $69 million. Sensing that this sum may be insufficient, the Mayor's Office of Management and Budget (OMB) has budgeted an additional $50 million in City tax-levy funds for the purchase of new voting machines. HAVA requires at least one machine per election district (ED); when an ED's population is more than 800, the ED must have more than one machine. The City has 6,111 election districts, many of which require additional machines. The City Council will be monitoring the sufficiency of Capital funds that will be required to purchase new voting machine systems.

  The City's Capital Budget also includes an additional sum of $47.2 million for other purposes, including the outfitting of office and warehouse space.

Expense Budget Overview

Fiscal 2009
The Mayor's Fiscal 2009 Preliminary and Executive Plans included a combined $6.5 million across-the-board PS and OTPS budget reduction, but did roll over $8.12 million in HAVA funds from Fiscal Year 2008. While there were significant concerns on the part of the Board of Elections regarding the cuts, especially in light of the Board's requests for new needs funding that went unmet, the 2008 elections, including the high-volume November Presidential Election, were conducted without major incident. The Board reports that such a performance was only made possible through round-the-clock efforts, much of which were performed on overtime.

The agency now reports a structural deficit in Fiscal 2009 of approximately $7 million, approximately the same amount as the PEGs imposed on the agency ($6.5 million). The largest portion of this deficit stems from Personal Services over-spending. The Board has indicated that OMB's own data showed that PS spending through February 20, 2009 ($18,721,800) is more than $5 million above the budget projection of $13,635,500. Whereas OMB funded in the Executive Plan the discrete costs associated with the special election for Bronx Borough President, it did not provide new need funding to cover the aforementioned multi-million dollar deficit. Rather, OMB reports, the agency will close its accounting for Fiscal 2009 in a deficit condition. The stated rationale for this unusual maneuver is OMB's sense that the special election brought about unfunded costs beyond the agency's means, while the agency's baseline funding was sufficient to run last Fall's elections.

As of the January Plan, the Board's current-year (Fiscal 2009) budget was impacted by its unfunded requirements to run several special elections, including those for vacant City Council positions and the recently-vacated Bronx Borough President position. Whereas the Board estimated that the Council special elections cost just over $1 million, while the borough president election was likely to cost just under $3 million, the Executive Plan included $2.5 million to fund the borough president special election.

Fiscal 2010
The January Plan included another substantial PEG for the BOE that would lower the agency's operating budget by more than $5 million per year beginning in Fiscal 2010. As Fiscal 2010 will include citywide elections (that may include one or more run-off elections) and the possible introduction of new voting machine systems, it remains to be seen whether the agency's proposed Expense Budget of $86.2 million will be sufficient, though this sum does include a rollover of $14.9 million in surplus HAVA funds from Fiscal 2009.

	2008 Actual Expenses	2009 Adopted Budget	2010 Preliminary Budget	2010 Executive Budget
Spending				
Personal Services	$24,714,455	$19,800,036	$17,543,014	$17,543,014
Other than Personal Services	$55,961,752	$69,365,767	$54,305,722	$68,675,379
Total	**$80,676,207**	**$89,165,803**	**$71,848,736**	**$86,218,393**
Funding				
City	NA	$89,165,803	$71,848,736	$86,218,393
Total	**NA**	**$89,165,803**	**$71,848,736**	**$86,218,393**
Headcount				
Full-time Positions	336	319	319	319

Executive Budget Overview

November and January Plan

Personal Services

- **Across-the-Board PS Reduction.** The January Plan contained a single $5.4-million PEG for the Board, split between PS and OTPS units of appropriation. The value of the PS portion is approximately $2.4 million in Fiscal 2010 and $2.5 million in Fiscal 2011 and the outyears.

- **Fringe Offset Reduction.** In order to give the agency PEG credit, the PEG action described above includes fringe benefit savings that should be properly accounted for not in BOE's budget, but in the City's Miscellaneous Budget. To reflect the neutral impact on BOE's budget that would result from theses fringe benefit savings, an offsetting sum totaling $106,626 in Fiscal 2010 increasing to $273,540 in Fiscal 2013 is being added back to the BOE's budget as an adjustment.

Other Than Personal Services

- **Across-the-Board OTPS Reduction.** The January Plan contained a single $5.4 PEG for the Board, split between PS and OTPS units of appropriation. The value of the OTPS portion is approximately $3 million in Fiscal 2010 and $2.9 million in Fiscal 2011 and the outyears.

- **Poll Site Access Improvement.** The November Plan included one-time funding of $208,000 in Fiscal 2009 for poll site access improvement.

Executive Plan

- **Rollover of Surplus Fiscal 2009 HAVA Funding.** The Executive Plan rolls over from Fiscal 2009 to Fiscal 2010 the sum of $14.9 million in surplus HAVA funding.

- **Bronx Borough President Special Election.** The Executive Plan includes one-time funding of $2.5 million to fund costs associated with the special election for Bronx Borough President. No specific new needs funding was included to cover the Fiscal 2009 costs of City Council special elections.

- **Surplus Funding for Leases.** The Executive Plan removes approximately $2.9 million in surplus lease funding from the Board's baseline budget beginning in Fiscal 2010.

PS and OTPS – Units of Appropriation 001 & 002

	2008 Actual Expenses	2009 Adopted Budget	2010 Preliminary Budget	2010 Executive Budget
Spending				
001 – Personal Services	$24,714,455	$19,800,036	$17,543,014	$17,543,014
002 – OTPS	$55,961,752	$69,365,767	$54,305,722	$68,675,379
Total	**$80,676,207**	**$89,165,803**	**$71,848,736**	**$86,218,393**
Funding				
City	NA	$89,165,803	$71,848,736	$86,218,393
Total	**NA**	**$89,165,803**	**$71,848,736**	**$86,218,393**
Headcount				
Full-time Positions	336	319	319	319

No. 08-322

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General
of the United States of America, et al.,

Appellees.

**On Appeal From The
United States District Court For The
District Of Columbia**

BRIEF OF *AMICI CURIAE* JURISDICTIONS THAT HAVE BAILED OUT UNDER THE VOTING RIGHTS ACT IN SUPPORT OF APPELLEES

J. GERALD HEBERT
Counsel of Record for Amici Curiae
J. GERALD HEBERT, P.C.
5019 Waple Lane
Alexandria, VA 22304
(703) 628-4673

LUCY PHILLIPS
Counsel for Amicus Washington County Registrar
205 Academy Drive
Abingdon, VA 24210
(276) 525-1370

GEORGE WARREN SHANKS
Counsel for Amicus Page County Registrar
MILLER, EARLE & SHANKS, PLLC
136 General Drive, Suite 200
P.O. Box 246
Luray, VA 22835
(540) 745-4511

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

STATEMENT OF INTEREST[1]

Amici curiae are several Virginia jurisdictions (hereafter "*Amici* Bailed Out Jurisdictions")[2] which over the last decade have bailed out from coverage under the special provisions of the Voting Rights Act. See 42 U.S.C. § 1973b. *Amici* Bailed Out Jurisdictions have a special interest in the bailout issues raised in this case and a unique perspective on these issues. Each jurisdiction has gone through the bailout process, has been found eligible to bailout by the United States Department of Justice and the DC courts, and each has in fact bailed out. *Amici* Bailed Out Jurisdictions believe that their views about the bailout

---

[1] Counsel for the *Amici* here, J. Gerald Hebert, served as co-counsel to Travis County, Texas, in the district court. Travis County is a Defendant-Intervenor and Appellee in this case. Mr. Hebert withdrew as co-counsel for Travis County with the consent of the County, and advised the Clerk of this Court by letter dated January 22, 2009, that he had done so and would be filing a brief on behalf of certain *amici curiae* in this Court (supporting Appellees, including Travis County). A copy of the January 22 letter is appended as Exhibit A.

No counsel for a party authored any part of this brief. No person or entity other than *amici* or their counsel contributed monetarily to the preparation and submission of this brief. Correspondence from counsel of record for Appellees and Appellants consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] *Amici curiae* herein are the Registrars of Voters for the following local governments in Virginia, each of whom was responsible for pursuing the bailout in the political subdivision: Amherst, Essex, Middlesex, Page, Shenandoah, and Washington counties, and the City of Salem.

process and how it actually works will inform the Court in a way none of the existing parties is able.

SUMMARY OF ARGUMENT

Upon passage of the Voting Rights Act in 1965, each of the *Amici* Bailed Out Jurisdictions adapted to the Act's special provisions, particularly the preclearance procedures set forth in Section 5 of the Act, 42 U.S.C. § 1973c. They did so by incorporating the preclearance process into our routine procedures for implementing any change that affected voters. Over the course of the next three decades, *Amici* and the political subunits within our jurisdictions built the preclearance process into the adoption of all voting and election changes.

Except for *Amicus* Shenandoah County, which bailed out in 1999, all of the other *Amici* Bailed Out Jurisdictions have bailed out in the last three years. As detailed below, the process was not costly, administratively burdensome, or difficult. As for cost, our experience is that the total cost of obtaining a bailout was approximately $5000. That total cost included staff time gathering the relevant data and the filing of bailout documents in the DC court.

As for the bailout *process*, *Amici* found the process relatively easy and without any undue burden. Essentially *Amici* Bailed Out Jurisdictions gathered the necessary information and data supporting bailout from records we maintained in the ordinary

course of business. Our counsel then submitted that information to the United States Department of Justice, which then conducted its own independent review. We advertised the bailout in our community media and posted notices in post offices, as required by law. See 42 U.S.C. § 1973b. After we were notified by the Department of Justice that our jurisdiction had met the bailout requirements, our legal counsel filed suit and the necessary bailout papers in the DC Court.

Bailout is also achievable even if a County discovers during the bailout process that one or more of its political subunits is not in full compliance with the Voting Rights Act. During the course of the bailout process, for example, several of the *Amici* Bailed Out Jurisdictions discovered that some of their political subunits had inadvertently failed to submit certain, relatively minor voting changes for Section 5 review. In such cases, our bailout counsel promptly made a preclearance submission to the Department of Justice, preclearance was granted *nunc pro tunc*, and the bailout process was then completed.

In sum, contrary to claims made by Appellant and some of the *Amici* supporting Appellant, bailout is neither impossible, administratively burdensome, nor costly.

ARGUMENT

I. IMPLEMENTATION OF THE VOTING RIGHTS ACT IN VIRGINIA AND ITS SPECIAL PROVISIONS

The passage of the Voting Rights Act brought about major changes in the Virginia electorate. The Act immediately suspended Virginia's literacy test and eliminated the State's poll tax for federal elections. This Court's 1966 decision in *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966) invalidated the Virginia poll tax for state elections. As a result of these developments, there was throughout the Commonwealth a "major surge in black registration and voting . . . in the 1960's." Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990, p. 277 Chandler Davidson and Bernard Grofman, eds., 1994, Princeton University Press (hereafter "Quiet Revolution").

The passage of the Voting Rights Act in 1965, particularly the preclearance provisions of Section 5 of the Act, also had an immediate impact on the way local governments in Virginia such as ours conducted our business. Each of the *Amici* Bailed Out Jurisdictions had the sole responsibility to register voters for our local government (including the registration of voters for all political subunits within our borders). Each time *Amici* herein wanted to make a change in any voting standard, practice or procedure, we made a submission of such proposed change to the Department of Justice for preclearance. None of the *Amici*

here ever sought judicial preclearance from the DC court.

Amici Bailed Out Jurisdictions quickly adjusted to the Act's special provisions in one important way: we incorporated the preclearance process into our routine procedures for making any change that affected voters. Thus, it became standard operating procedure for voting officials in our jurisdictions to include the preclearance process in any timeline for implementing voting changes. It simply became routine practice for us to make a submission to the United States Attorney General whenever preclearance was required.

The preclearance submissions from political subdivisions such as *Amici* here were usually written by the County or City voting registrar, or some other election official in our County or City government offices, such as the City/County Electoral Board or the City/County Attorney. Our correspondence described the proposed voting change, provided whatever relevant statistical information we had which supported the preclearance request, and listed representatives of the minority community who could verify that they did not believe that the proposed changes were discriminatory. The preclearance process was straightforward, and not a single objection was ever interposed by the United States Attorney General to any voting changes made by any of the *Amici* Bailed Out Jurisdictions.

II. THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT AND THE IMPACT ON BAILOUT

When the Voting Rights Act was amended in 1982 to permit local governments like *Amici* here to bailout, the Congress rightly believed that "[a] substantial number of counties may be eligible to bail out when the new procedure goes into effect." S. Rep. No. 97-417 at 53. Indeed, one voting rights expert, "Mr. Armand Derfner[,] presented a chart compiled by the Joint Center for Political Studies. It showed a reasonable projection of 25 percent of the counties in the major covered states being eligible to file for bailout on the basis of their compliance with the objective criteria in the compromise bill." *Id.* And the Assistant Attorney General for the Civil Rights Division at the time, William Bradford Reynolds, testified to the same effect and his projected number of jurisdictions eligible to bailout in 1982 was "virtually identical to those in the Joint Center's estimate." *Id.*

Interestingly, following the amendments and extension of the Voting Rights Act in 1982 expanding the opportunity for bailout, not a single jurisdiction bailed out until 1997. In that year, the City of Fairfax, Virginia became the first jurisdiction to obtain a bailout pursuant to the criteria set forth in the 1982 amendments to the Voting Rights Act. Upon obtaining a bailout, the City of Fairfax explained through its counsel that it had sought a bailout because it was proud of its record of equal registration and voting opportunities, and a bailout gave the City a public

and official declaration that all aspects of the City's political process were equally open to all its citizens. See J. Gerald Hebert, City of Fairfax Obtains Voting Rights Act Bailout, National Cities Weekly, November 24, 1997, available at http://www.highbeam.com/DocPrint.aspx?DocId=1G1:20097806.

And even today, while no jurisdiction subject to the Voting Rights Act's special provisions has sought a bailout and been rejected, only 17 jurisdictions have sought a bailout. The attached chart (Exhibit B hereto) lists these 17 bailed out jurisdictions and the dates that each bailout was granted.

III. THE BAILOUT PROCESS IS NEITHER COSTLY, BURDENSOME, NOR TIME-CONSUMING

A. The Fact That Only 17 Jurisdictions Have Bailed Out Is Not An Indication That the Bailout Provisions Are Not Working

So if Congress and voting rights experts predicted in 1982 that roughly 25% of the covered jurisdictions were eligible to bailout, why have there been only 17 bailouts since that time? *Amici* offer several explanations.

"[M]any local officials are unaware of the bailout option."[3] As more and more jurisdictions become aware of the bailout opportunity, the number of jurisdictions bailing out should increase.

Indeed, within three years of the City of Fairfax's bailout in 1997, two additional jurisdictions (Frederick and Shenandoah counties, Virginia) bailed out. See Appendix at Exhibit B. In the last three years alone (2006-2008), seven jurisdictions have bailed out, so it would appear that more jurisdictions are becoming aware of the bailout opportunity. *Ibid.*

Appellant makes much of the fact that all of the bailouts have come from Virginia. See Appellants' Brief at 25. The reason, we believe, that bailouts have occurred only in Virginia is that it is very much a local issue for us. Once Fairfax opened the bailout door in 1997, word of bailout provisions started to slowly spread throughout our state, and other local governments interested in a bailout eventually followed suit. News of Fairfax's bailout and those bailouts that followed became a topic of conversation at meetings of Virginia's local government attorney association and annual meetings of Virginia local election officials. Counsel who has handled all the bailouts made presentations about the process at

---

[3] "Bailout Under the Voting Rights Act", J. Gerald Hebert, in *America Votes!* (American Bar Association, 2008) (Benjamin E. Griffith, ed.) at 325 (hereafter "*America Votes!*").

these meetings.[4] The fact that bailouts have thus far been limited to Virginia has more to do with these particularized local factors than with any perceived uniqueness in our governmental structures.

Appellant has surmised, incorrectly, that the fact bailouts have occurred only in Virginia is due to the fact that there is something "idiosyncratic" or different about our local government structures that makes bailout easier for political subdivisions in our state than in other states. See Appellant's Brief at 25. This is incorrect.

Virginia's County governments are structured much like County governments in other states. They include other political subunits of government, such as towns, utility districts, and school boards. Some states, like Texas, may have counties that contain more political subdivisions than Virginia's counties do. But others, like Georgia, North Carolina, South Carolina, and Mississippi, are structured much the same as Virginia's counties. Thus, County governments in a number of the other covered states under the Voting Rights Act are in much the same position

[4] Counsel for *Amici* Bailed Out Jurisdictions has represented all seventeen of the Virginia jurisdictions that have bailed out thus far. The fact that counsel has his law practice in Virginia and has made appearances at statewide conferences in Virginia where local election officials have been present (including County and City attorneys) is also an additional explanation of why bailouts have thus far been limited to Virginia.

as Virginia's counties when it comes to seeking and obtaining a bailout.

Virginia's cities, however, do differ from municipalities in other covered jurisdictions in one respect: cities are independent governmental entities separate from the counties they are located within. Accordingly, independent cities in Virginia run their own municipal affairs, including the maintenance of their own voter register rolls for City elections (County residents are not permitted to vote in City elections and vice versa). As a result, Virginia is the only covered state where cities may bailout, because they are separate political subdivisions which register voters.

Of the 17 bailouts in Virginia, however, only 4 have been by independent cities. See Exhibit B. Thus, Appellant's arguments that unique characteristics of Virginia local governments or its independent cities explain why Virginia-only jurisdictions have bailed out simply do not hold water.

In any event, the number of jurisdictions seeking bailout would likely increase if the Department of Justice were to make a concerted effort to disseminate information about bailout to covered jurisdictions. As counsel for *Amici* Bailed Out Jurisdictions explained to Congress in 2005, "If the DOJ were to include guidance about the bailout process and requirements with preclearance letters, where appropriate, to educate jurisdictions and make similar information clearly available under an appropriate

heading on its website for those jurisdictions unfamiliar with the bailout statute and rules, there would likely be an increase in the number of jurisdictions that seek bailout over the course of the next 25 years as compliance improves." An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing of the Senate Committee On The Judiciary, 109th Cong., 1st Sess. 177 (May 9, 2006) (Statement of Ted Shaw).

Furthermore, as explained below, the reasons that more jurisdictions have not exercised the bailout option is not attributable either to the cost involved or to the difficulty of the bailout process. To the contrary, the cost is affordable and the process of obtaining a bailout is relatively easy and straightforward for a jurisdiction that has operated in compliance with the Voting Rights Act.

B. A Bailout Is Financially Feasible

"Local officials may mistakenly believe that bailing out is not cost-effective or is administratively difficult." *America Votes!*, *supra*, at 326. Neither belief is well-founded.

As for costs, when voting officials within a jurisdiction seeking a bailout are willing to undertake the simple task of gathering the relevant data on their own rather than paying outside counsel to do so, "the legal fees for the entire process of obtaining a

bailout are less than $5000." The Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Oversight Hearing of the House Committee On The Judiciary, Subcommittee On The Constitution, 109th Cong., 1st Sess. 90 (October 20, 2005) (Statement of J. Gerald Hebert). See also *America Votes!*, *supra*, at 326.

Furthermore, when a County or City bails out, all political subunits within the jurisdiction receive a bailout at that time. See 42 U.S.C. § 1973b. Thus, the one-time cost of a bailout for a County (or a Virginia City) and *all* its political subunits is affordable, even for relatively small jurisdictions like *Amici* Bailed Out Jurisdictions.

C. The Bailout Process Is Neither Cumbersome Nor Complicated

Nor is the *process* of obtaining a bailout administratively difficult or complicated. Once our jurisdictions decided to seek a bailout under the Voting Rights Act, we first assembled data and information from our files to determine if we met the bailout criteria that were set forth in the Voting Rights Act. We did so under guidance from counsel. Under the Act, gathering voting and election data will "assist the court in determining whether to issue a declaratory judgment under this subsection[.]" 42 U.S.C. § 1973b(a)(4).

The data and information we gathered included information that we maintain in the ordinary course of business, such as the number of voters in each voting precinct, the number of voters who turned out at the polls in past elections, and the number of minority persons who have worked at the voter registration office, electoral board, or served as poll officials. We also gathered past election results, particularly for those elections which involved a minority candidate. Finally, we assembled information on the various opportunities and methods persons in our communities can utilize to become registered voters. Often, such information about voter registration opportunities is set forth on our local government website and thus instantly accessible.

We also regularly maintain in our files correspondence we have sent to and received from the United States Department of Justice regarding Section 5 preclearance. These letters helped demonstrate that the *Amici* Bailed Out Jurisdictions complied in a timely fashion with the preclearance requirements under the Act.

The final data we collected to support our bailout request was information that tends to show that all persons within our jurisdictions enjoy an equal opportunity to participate effectively in the political process. To do this, we simply gathered: publicly available census data off the internet; described the method of election (*e.g.*, at-large, single-member districts) for our City or County, and the elective bodies within it; and identified the location and convenience of voter

registration sites and polling place locations for our voters.

Once we assembled this data, and it was not very time-consuming to do, we submitted the data to the Attorney General for review and verification. The Attorney General then undertook an independent investigation in our community to verify our bailout eligibility. We understand that local leaders in the minority community within our jurisdictions were interviewed by Justice Department personnel to obtain their views on our bailout request.

We also published Notice of our intention to bailout and posted the Notice in all appropriate post offices, as the bailout provisions require. See 42 U.S.C. § 1973b(a)(4) ("The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices."). In some of our jurisdictions, we held public hearings on the proposed bailout to give interested persons in our communities an opportunity to learn why we were seeking a bailout, to ask questions about the process, and to inform our voters of their opportunity to intervene in a bailout action if they so desired.

Upon the Department of Justice's determination that our political subdivisions were eligible to bailout, counsel for the *Amici* Bailed Out jurisdictions drafted the necessary court papers and submitted them to the

D.C. Court for approval. The entire bailout process for *Amici* Bailed Out Jurisdictions was smooth, transparent, and straightforward.

IV. JURISDICTIONS SEEKING BAILOUT CAN BRING POLITICAL SUBUNITS WITHIN THEIR BORDERS INTO COMPLIANCE WITH THE VOTING RIGHTS ACT DURING THE BAILOUT PROCESS

Appellant and *Amicus Curiae* Georgia Governor Sonny Perdue make the claim that an insurmountable hurdle to bailout is the fact that a State or a County lacks the power to force political subunits to comply with Section 5. See Appellant's Brief at 25-26. See Perdue Brief at 22-26. *Amicus Curiae* Georgia Governor Sonny Perdue further claims that "it is practically impossible for any jurisdiction to bail out of coverage." See Perdue *Amicus* Brief at 20-25. Neither of these claims is correct.

The argument that a State or a County is unable to obtain a bailout because it lacks the ability to bring non-compliant political subunits within their borders into compliance with Section 5 shows a fundamental lack of understanding of how the bailout process actually works. First, as the Department of Justice's Section 5 Guidelines make clear: "Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority. When one or more counties or

other political subunits within a State will be affected, the State may make a submission on their behalf." 28 C.F.R. § 51.23(a). So all a State or County has to do when faced with a Section 5 noncompliant political subunit is to "make a submission on their behalf." *Ibid.* Indeed, as explained below, this actually happened to several of the political subdivisions which have bailed out.

In *Amici* Bailed Out Jurisdictions' experience with the bailout process, we gathered data that we felt supported a bailout for our jurisdictions. We then notified the Department of Justice (DOJ) that we intended to seek a bailout and DOJ then conducted its own investigation to verify our bailout eligibility. Sometimes, in gathering data on our own and sometimes upon independent investigation by DOJ, *Amici* Bailed Out Jurisdictions discovered that a political subunit within our jurisdiction had failed to fully comply with the Voting Rights Act (*e.g.*, by making a timely preclearance submission of a voting change). In every instance when that happened, the political subunit was promptly brought into compliance with the Voting Rights Act by the County seeking a bailout. The County simply asked counsel to make a Section 5 preclearance submission on the political subunit's behalf, preclearance was obtained, and the bailout was completed. For example, in Shenandoah County, Virginia (one of the *Amici* here), which bailed

out in 1999,[5] the County discovered during the course of gathering information supporting the bailout that the County itself and a number of towns within the County had failed to submit voting changes for preclearance review. Specifically, the County had failed to submit one special election for preclearance review, and four towns within the County had failed to submit over 30 annexations for Section 5 review. But Shenandoah County encountered no difficulty in bringing the political subunits into compliance with Section 5 of the Voting Rights Act.[6] The County's legal counsel promptly submitted *all* of these changes for Section 5 review, and all were precleared by the Attorney General after his review showed no discriminatory purpose or effect. Thus, the County was able to use the bailout process to bring about compliance with Section 5 *nunc pro tunc*. Upon preclearance of these previously unsubmitted changes, and on the basis of other information supplied by Shenandoah County demonstrating compliance with the Voting Rights Act, the bailout process went forward and the Attorney General consented to the bailout judgment.

---

[5] See *Shenandoah County, VA v. Reno*, No. 1:99CV00992 (D.D.C. October 15, 1999) (consent judgment and decree).

[6] The Stipulation of Facts that was signed by the parties and filed in *Shenandoah County, VA v. Reno, supra*, details these previously unsubmitted changes and how they were precleared during the bailout process. See *Shenandoah County, VA v. Reno*, No. 1:99CV00992 (D.D.C. October 15, 1999) (Stipulation of Facts at ¶23).

This type of flexible approach by the United States Attorney General is exactly what was envisioned by the bailout provisions. As the legislative history to the 1982 amendments explained: "This safeguard will permit evidence to be presented of voting rights infringements which have not previously been the subject of a judicial determination. However, such violations would not bar bailout if 'the plaintiff establishes that any such violation were trivial, were promptly corrected, and were not repeated.'"[7]

Similarly, two other jurisdictions that have bailed out, Roanoke and Warren counties, Virginia, had a total of 13 previously unsubmitted and unprecleared changes at the time they initiated bailout proceedings. In both instances, the unsubmitted changes (some of which had been undertaken by political subunits) were submitted for preclearance by the County, and following preclearance, the bailout process was successful. See J. Gerald Hebert, An Assessment of the Bailout Provisions of the Voting Rights Act, in Voting Rights Act Reauthorization of 2006, at 277 (Appendix A) (Henderson ed., 2007).

That Shenandoah, Roanoke and Warren counties all were permitted to bailout despite the existence of previously-implemented, but unsubmitted changes (including many changes by political subunits thereof)

---

[7] S. Rep. No. 97-417, at 53, *reprinted in* 1982 U.S.C.C.A.N. at 231.

shows that the current bailout provisions are both flexible and workable for covered jurisdictions. While Congress made clear that a political subdivision cannot bailout if it has violated "any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color" in the past ten years, it also permitted political subdivisions who registered voters to pursue bailout in limited circumstances even where minor voting rights infractions existed and those trivial issues could be quickly resolved, as they were in these three Virginia counties.[8]

Thus, *Amici* Bailed Out Jurisdiction's own real world experience shows that a jurisdiction that inadvertently failed to submit voting changes for preclearance but implemented the changes anyway (such as happened in Shenandoah and Warren counties) were not barred from obtaining a bailout even though implementation of the unprecleared changes constituted technical violations of the preclearance provisions of the Voting Rights Act. Such "violations" were deemed inadvertent and fell into the "trivial" category.

Moreover, it is not the case that bailout is "practically impossible[.]" Perdue *Amicus* Brief at 20. Our own bailouts prove that local governments like ours that register voters and conduct elections can establish

---

[8] 42 U.S.C. § 1973b(a)(3) (2005).

full compliance with the Voting Rights Act over at least a ten-year period. And *Amici* here are unaware of anything that would not permit a substantial number of counties in Georgia (or any other State subject to the special provisions of the Voting Rights Act for that matter) from seeking a bailout today and making such a showing.

It is true that in some political subdivisions, bailout will not be possible because a proposed voting change submitted for preclearance has drawn an objection by the Attorney General or was rejected by the District of Columbia court. But that is as it should be. After all, if an objection has been interposed or a declaratory judgment denied under Section 5, it is because the submitting authority failed to show that its submitted change was not free of a racially discriminatory purpose or effect. See 42 U.S.C. § 1973c. And that is precisely the prophylactic impact that Congress intended Section 5 to have, and it is one that this Court has consistently noted and upheld: "[Section 5] must, of course, be interpreted in light of its prophylactic purpose and the historical experience which it reflects." *McDaniel v. Sanchez,* 452 U.S. 130, 151 (1981). See also *McCain v. Lybrand*, 465 U.S. 236, 246 (1984), and *City of Rome, Georgia v. United States*, 446 U.S. 156, 202 (1980).

CONCLUSION

For the foregoing reasons, the judgment of the three-judge court of the United States District Court for the District of Columbia should be affirmed.

Dated: March 2009

Respectfully submitted,

J. GERALD HEBERT
Counsel of Record for Amici Curiae
J. GERALD HEBERT, P.C.
5019 Waple Lane
Alexandria, VA 22304
(703) 628-4673

GEORGE WARREN SHANKS
Counsel for Amicus Page County Registrar
MILLER, EARLE & SHANKS, PLLC
136 General Drive, Suite 200
P.O. Box 246
Luray, VA 22835
(540) 745-4511

LUCY PHILLIPS
Counsel for Amicus Washington County Registrar
205 Academy Drive
Abingdon, VA 24210
(276) 525-1370

EXHIBIT A

LAW OFFICES OF J. Gerald Hebert, P.C.
J. Gerald Hebert, Attorney at Law
5019 Waple Lane
Alexandria, VA 22304
(703) 628-4673
website: www.voterlaw.com

January 22, 2009

The Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
Washington, DC 20543

Re: No. 08-322, *NW Austin Municipal Utility District No. 1 v. Mukasey*

Dear Mr. Suter:

The Court noted probable jurisdiction in this appeal on January 9, 2009.

I serve as co-counsel for Travis County, Texas, one of the appellees in the above-referenced appeal. In that capacity, my co-counsel (Mr. Renea Hicks) and I were co-signatories to a motion to affirm submitted on behalf of numerous appellees-intervenors on November 26, 2008 I also served with Mr. Hicks as co-counsel to Travis County in the district court.

I am writing to advise the Court that I am withdrawing as counsel for Travis County in this appeal. Travis County has consented to the withdrawal. It is my intention to file a brief in this case on behalf of certain *amici curiae* who will be aligned with Travis

County. Travis County will continue to be represented in this Court by Mr. Hicks. In any *amici curiae* brief that I file in this appeal, I will include a footnote referencing my prior representation of Travis County.

Thank you for your attention to this matter.

Sincerely,

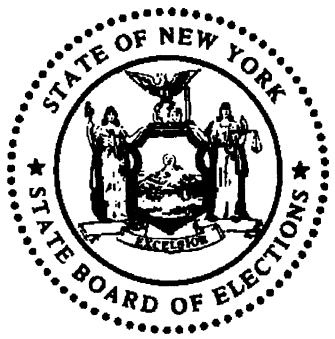
/s/ J. Gerald Hebert
J. Gerald Hebert

cc counsel of record

EXHIBIT B

Jurisdictions That Have Bailed Out Since 1982
Extension and Amendments to the Voting Rights Act

Jurisdictions (All In Virginia)	**Bailout Granted Date**
Fairfax City	October 21, 1997
Frederick County	September 9, 1999
Shenandoah County	October 15, 1999
Roanoke County	January 24, 2001
Winchester City	May 31, 2001
Harrisonburg City	April 17, 2002
Rockingham County	May 21, 2002
Warren County	November 25, 2002
Greene County	January 19, 2004
Augusta County	November 30, 2005
Salem City	July 27, 2006
Botetourt County	August 28, 2006
Essex County	January 31, 2007
Page County	September 15, 2008
Washington County	September 23, 2008
Middlesex County	January 4, 2008
Amherst County	August 13, 2008



ELECTION LAW UPDATE -2009-

Prepared by:
The Office of Special Counsel

Kimberly A. Galvin
Special Counsel

Paul Collins
Deputy Counsel

TABLE OF CONTENTS

INTRODUCTION

The Election Law Update is designed to be used as a guide by election officials regarding key election issues. It is based upon a search for reported cases as well as unreported cases that the State Board is a party to or made aware of.

The Update is not an exhaustive review of every election law case. It is a starting point. It is not intended to replace the need to seek the advice of counsel. Please feel free to contact our office if you are aware of any cases that should be listed or if you require any additional information.

VOTING

Voting issues fall into three main categories:

1) Registration and enrollment (who can vote at a particular election);
2) How a candidate gets on the ballot; and
3) Casting the ballot (how a person actually casts their vote).

Registration and Enrollment

In order to vote in an election in New York State, a person must be registered to vote. N.Y.S. Const. Art II § 5; EL §5-100. Registration with the County Board of Elections will be sufficient for a person to vote in all races for public office that occur where they are a resident. N.Y.S. Const. Art II §6.

Residency

In determining residency, the Board may consider the applicant's financial independence, business pursuits, employment, income sources, residence for income tax purposes, age, marital status, residence of parents, spouse and children, if any, leaseholds, sites of personal and real property owned by the applicant, motor vehicle and other personal property registration and such other factors that it may reasonably deem necessary to determine the qualification of an applicant to vote within the Board's jurisdiction. EL §5-104(2). "The crucial factor in determining if an individual is qualified to register and vote from a particular residence is whether he or she has manifested an intent to adopt that residence as a permanent and principal home coupled by his or her physical presence there, 'without any aura of sham.'" *Thompson v. Karben*, 295 A.D. 2d 438, 439 (2nd Dep't 2002 *citing*, *People v. O'Hara*, 96 N.Y. 2d 378, 385 (2001), *quoting*, *Matter of Gallagher v. Dinkins*, 41 A.D. 2d 946, 947 (2d Dep't 1973); *aff'd*, 32 N.Y 2d 839.

Dual Residency

A person having two residences "may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law." *Ferguson v. McNab*, 60 N.Y.2d 598, 600 (1983); also In October of 2008 the Appellate Division, Third Department decided, *Willkie v. Delaware County Board of Elections*,(55 AD3d 1088) which authorizes a choice of voting place for those who own or maintain dual residences rejecting a limited interpretation that voting rights may only be premised upon "domicile":

Although the plain language of the statute-and opinions expressed in dissent over the years (*see* *People v. O'Hara*, 96 N.Y.2d 378, 386-390, 729 N.Y.S.2d 396, 754 N.E.2d 155 [2001, Rosenblatt, J., dissenting]; *Matter of Bressler v. Holt-Harris*, 30 N.Y.2d 529, 530-532, 330 N.Y.S.2d 379, 281 N.E.2d 176 [1972, Jasen, J., dissenting]; *Matter of Gallagher v. Dinkins*, 41 A.D.2d 946, 947-948, 343 N.Y.S.2d 960 [1973, Martuscello, J., dissenting],*affd.* 32 N.Y.2d 839, 346 N.Y.S.2d 268, 299 N.E.2d 681 [1973]; *Matter of*

Gladwin v. Power, 21 A.D.2d 665, 249 N.Y.S.2d 980 [1964, Steuer, J., dissenting])-would support respondent's interpretation of "residence" as the equivalent of domicile, requiring a finding that the individual has more significant contacts to that place than any other, the Court of Appeals has not interpreted the statute so narrowly. Indeed, it is clear that the Election Law "does not preclude a person from having two residences and choosing one for election purposes provided he or she has 'legitimate, significant and continuing attachments' to that residence" (*Matter of Isabella v. Hotaling*, 207 A.D.2d 648, 650, 615 N.Y.S.2d 945 [1994],*lv. denied* 84 N.Y.2d 801, 617 N.Y.S.2d 135, 641 N.E.2d 156 [1994], quoting *Matter of Ferguson v. McNab*, 60 N.Y.2d 598, 600, 467 N.Y.S.2d 192, 454 N.E.2d 532 [1983]; *see People v. O'Hara*, 96 N.Y.2d at 385, 729 N.Y.S.2d 396, 754 N.E.2d 155).

"The crucial determination whether a particular residence complies with the requirements of the Election Law is that the individual must manifest an intent, coupled with physical presence 'without any aura of sham' " (*People v. O'Hara*, 96 N.Y.2d at 385, 729 N.Y.S.2d 396, 754 N.E.2d 155, quoting *Matter of Gallagher v. Dinkins*, 41 A.D.2d at 947, 343 N.Y.S.2d 960; *see Matter of Shafer v. Dorsey*, 43 A.D.3d 621, 622, 840 N.Y.S.2d 843 [2007],*lv. denied* 9 N.Y.3d 804, 842 N.Y.S.2d 780, 874 N.E.2d 747 [2007]). Election Law § 5-104(2) provides that, "[i]n determining a voter's qualification to register and vote, the board [of elections should] consider, in addition to the [voter's] expressed intent, his [or her] conduct and all attendant surrounding circumstances relating thereto," including, among other things, "business pursuits, employment, income sources, residence for income tax purposes, age, marital status, residence of parents, spouse and children, ... sites of personal and real property ..., motor vehicle and other personal property registration, and other such factors that it may reasonably deem necessary."

In *Matter of Shafer v. Dorsey*, (43 AD3d 621, leave denied, 9 NY3d 804 (2007)) in the context of a candidate challenge under Election Law 16-102, the Court denied the challenge on a finding of dual residency affording the candidate the right to choose from which of his residences he would run, "with emphasis on Dorsey's 'express intent and conduct'... and finding no fraudulent or deceptive motive in Dorsey's choice of residence." See also *Matter of Johnson v. Simpson* (43 AD3d 478, leave denied 9 NY3d 804 (2007).

As the Second Circuit observed in *Wit v. Berman*, 306 F.3d 1256, 1262-1263 (2d Cir. 2002) "New York has responded to this administrative difficulty [persons with multiple homes] in a pragmatic way. New York courts have held that, rather than compel persons in appellants' circumstances to establish to the satisfaction of a registrar of voters or a court that one home or the other is their principal, permanent residence, they can choose between them." See also, *People v. O'Hara*, 96 N.Y.2d 378, 385 (2001) ('[A]n individual having two residences may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law." (quoting *Ferguson v. McNab*, 60 N.Y.2d 598, 600 (1983)). This pragmatic approach lessens the burdens on registrars, who in most cases need only verify an address, and on people like appellants, who otherwise might be turned down at both places and have to go to court in order to be able to vote anywhere."

Parties

The term "party" means any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor. Election Law §1-104 (3). The term "major political parties" means the two parties which polled for their respective candidates for the office of governor the highest and next highest number of votes at the last preceding election for such office. Election Law §1-104 (24).

Changing Enrollment

Any registered voter may submit a change of enrollment, switching political parties or joining a political party at any time. However, the change does not become effective until the Tuesday following the general election provided it was submitted at least 25 days before the election. EL §5-304(3). Such delay in enrollment changes has been held to be constitutional. *See, VanWie v. Pataki*, 87 F. Supp 2d 148, (N.D.N.Y. 2000).

Affiliated Voters

Voters may choose to not enroll in a political party but rather be listed with a political organization. *See, Green Party of New York State v. New York State Board of Elections,* 389 F. 3d 411 (2d Circ. 2004). Voters may also choose to be unaffiliated with any party or organization. The voter would write in the name of the group they want to affiliate with on the "other" line on the voter registration form. However, the board of elections is only required to keep lists of those organizations which placed a candidate for governor on the ballot at the last gubernatorial election.

Political Party Enrollment and the Closed Primary

Generally, only those voters enrolled in a political party may vote in that party's primary election or participate in that party's caucus. EL §§ 8-302(4), 6-108(3) (towns), 6-204(4) and 15-108(2)(d) (villages). However, a party may choose to allow non-party members to vote in their primary election as specified by party rule. *State Committee of the Independence Party v. Berman*, 294 F. Supp. 2d 518 (S.D.N.Y. 2003). Where the Independence Party of Richmond County rules were silent with respect to non-party members voting in a party's primary, the Court held that the Executive Committee could adopt an ad-hoc resolution allowing the unaffiliated voters of Richmond County to vote for Independence Part candidates for Richmond County public offices in the primary election. *Independence Party of Richmond County v. Nero,* 332 F. Supp. 2d 690 (2d Cir. 2005)

Casting the Ballot

Ballots shall be provided for every election at which public or party officers are to be nominated or elected. EL §7-100. Ballots are cast in two ways, directly on a voting machine or on some type of paper ballot. Whenever there are more offices or candidates than can fit on the voting machine, the board of elections may provide for the use of separate paper ballots for such offices. EL §7-200(4). Requiring a minor party's primary election to appear on a paper ballot is ". . . a minor burden regulating the mechanics of the electoral process, and can be amply justified by the State's interest in conducting

efficient, fair and orderly primaries in a variety of political parties of different sizes." *Green Party of the State of New York v. Weiner*, 216 F. Supp. 2d 176, 191 (S.D.N.Y. 2002).

Polling Place Accessibility

Two identical cases were brought by the New York Attorney General against the boards of elections in Delaware and Schoharie counties, *New York v. County of Delaware*, 82 F. Supp 2d 12 (N.D.N.Y. 2000); *New York v. County of Schoharie*, 82 F. Supp 19 (N.D.N.Y. 2000) (A third case brought against Otsego county was settled). The District Court in granting a preliminary injunction found that (1) the county board could be sued because of its role in selecting polling sites and (2) compliance with federal and state building requirements for handicapped accessibility would have to be implemented by counties to the extent "feasible." The applicability of these cases beyond these two counties has not been established.

Write-In Voting

Write-in voting is required when there is a contested primary election for public office. Election Law §7-114(3).

A voter need not write in the first and last name of a candidate in every situation; the standard is whether the election inspectors can reasonably determine the intent of the voter when they cast their ballot. *Guilianelle v. Conway*, 265 A.D. 2d 594 (3rd Dep't 1999).

Write-in votes must be cast in the appropriate place on the machine. *Tylec v. Iwanicki*, 266 A.D. 2d 886 (4th Dep't 1999) *citing*, *Haynie v. Mahoney*, 48 N.Y. 2d 718, 719 (1979). No write-in ballot shall be voted for any person for any office whose name appears on the machine as a nominated or designated candidate for the office or position in question; Election Law §8-308(2). *Francis v. Palombo*, 2 A.D. 3d 1148 (3rd Dep't 2003).

Absentee Voting

Mere proof that an absentee ballot voter is in the county on the day of the election is not sufficient to void the ballot, a challenger must show that the voter did not have a "good-faith belief" that they would be absent from the county on election day. *Sherwood v. Albany County Board of Elections*, 265 A.D. 2d 667 (3rd Dep't 1999). Failure to complete the information required for the absentee ballot will void the ballot. *Carney v. Davignon*, 289 A.D. 2d 1096 (4th Dep't 2001) *citing*, Election Law § 8-302 (3)(e)(ii), *Kolb v. Casella*, 270 A.D. 2d 964 *lv. denied*, 94 N.Y. 2d 764. Residents of Puerto Rico are not entitled to absentee ballots to vote for the office of President of the United States. *Romeu v. Cohen*, 265 F.3d 118 (2d Circ. Ct. Aps. 2001).

Review of Cast Ballots

Ballots where voters marked outside the voting square may not be counted. *Kolb v. Casella*, 270 A.D. 2d 964 (4th Dep't 2000); *Boudreau v. Catanise*, 737 N.Y.S. 2d 469 (App. Div. 4th Dep't 2002), *citing*, Election Law § 9-112 (1), *Pavlic v. Haley*, 20 A.D. 2d 592 , aff'd. 13 N.Y. 2d 1111, *Kolb v. Cassella* 270 A.D. 2d 966.

Ballots may not be counted where (1) signature on the envelope is "substantially different" from the signature on the voter's registration card, or (2) the voter failed to fill out the affidavit ballot envelope. *Kolb v. Casella*, 270 A.D. 2d 964 (4th Dep't 2000), *citing*, *Hosley v. Valder*, 160 A.D. 2d 1094 (3rd Dep't 1990).

Canvassing Ballots

Affidavit Voting

Affidavit ballots cast by voters at the wrong election district, but who were at the correct polling place should be counted. However, affidavit ballots cast by voters who were at the wrong election district and at the wrong polling place should not be counted. *Panio v. Sunderland*, 2005 NY Lexis 101 (NYS Ct. Of Aps. 2005).

Review of the Primary Election

The party seeking to challenge a primary election must establish the ". . .existence of irregularities 'which are sufficiently large in number to establish the probability' that the result of the election was affected." *Thompson v. Board of Election of the County of Rockland,* 287 A.D. 2d 667 (2d Dep't 2001).

Review of the General Election

The State Supreme Court is without jurisdiction on a challenge to the general election results. Only the Attorney General can challenge the results of a general election through a quo warranto action commenced pursuant to Executive Law § 63-b. *Delgado v. Sunderland*, 97 N.Y. 2d 420 (2002). Plaintiff must demonstrate an intentional government action before a federal court can entertain a challenge to an election. Unfortunate but unintended irregularities, such as a malfunctioning voting machine, are not grounds for challenging an election. *Shannon v. Jacobonite*, 394 F. 3d 90 (2d Circ. 2005).

The Supreme Court lacks jurisdiction to conduct its own canvass and determine a winner before the Board of Elections has conducted its canvass. *Testa v. Ravitz*, 84 NY2d 893 (1994). However, where the petitioners objected to the County Board's invalidation of seven absentee ballots, the Court of Appeals held that the Supreme Court does have jurisdiction and the authority to direct a recanvass or the correction of an error. *Alessio v. Carey*, 2008 Slip Op 1417 (February 15, 2008).

PETITIONS

This section highlights issues related to designating and independent petitions. It is divided into sections covering the basic form of the petition, candidate related issues, petition signer issues and subscribing witness issues. There are also sections covering opportunity to ballot petitions and alterations made to petitions.

Form of Petition

Petitions shall be in substantially the form set forth in the Law. EL §§ 6-132(1), 6-140.

The test of compliance should be whether or not the petition form contains the required information. A slight rearrangement as to how the information is presented or an insignificant deviation in the wording would not be a fatal defect. *See, Matter of Irvin v. Sachs*, 129 A.D. 2d 827 (2nd Dep't 1987).

Number of Signatures Needed

The number of signatures required for a particular office is determined from the enrollment lists released immediately preceding the signature gathering period, notwithstanding any subsequent reduction in the established number of enrolled voters. *Horwitz v. Egan*, 264 A.D. 2d 454 (2nd Dep't 1999).

The ballot access requirement of signatures from five percent of the relevant voter group ordinarily does not violate constitutional rights. *McMillan v. New York City Board of Elections*, 234 F.3d 1262 (2d Circ. 2000) *citing, Prestia v. O'Connor*, 178 F. 3d 86, 87 (2d Circ. 1999).

Cover Sheets

If there is substantial compliance and no evidence of confusion to either the voters or the board of elections, there is no basis to invalidate petitions for failure to comply with the petition cover sheet requirements. *Siems v. Lite*, 307 A.D. 2d 1016 (2nd Dep't 2003); *See also, Magelaner v Park*, 32 A.D. 3d 487 (2d Dep't 2006). A candidate must be notified and given the opportunity to cure any defects in a cover sheet. *Pearse v. New York City Board of Elections*, 10 A.D. 3d 461 (1st Dept. 2004).

Page Numbers

The pages of a petition shall be numbered. Election Law §6-134(2). Generally, the failure to number the sheets of a petition will invalidate the petition. *Braxton v. Mahoney,* 63 N.Y.2d 691 (1984).

There is a split in the Departments as to the correctability of the failure to number the pages of a petition.

The Second Department has held that no cure was allowed for a failure to number pages and the

longstanding strict compliance with the page numbering requirement was upheld. *Jaffe v. Visconti,* 242 A.D. 2d 345 (2nd Dep't 1997), *leave to appeal denied,* 90 N.Y.2d 805.

The Fourth Department has taken the opposite view: "The three-day cure provision for designating petitions is available for technical violations of the regulations, including the omission of page numbers." *May v. Daly*, 254 A.D. 2d 688 (4th Dep't 1998), *leave to appeal denied,* 92 N.Y.2d 806. The court cited a lower court decision which allowed the new three day cure provision to apply when page numbers were missing, *Farrell v. Sunderland*, 173 Misc.2d 787 (Sup. Ct. Westchester County 1997) but failed to cite *Jaffe*.

The Third Department citing the *May* decision of the 4th Department allowed the three day cure provision of the election law to apply even when the page numbers were omitted. *Bonnett v. Miner*, 275 A.D. 2d 585 (3rd Dep't 2000).

Preamble

Date of election must be stated accurately and correctly. *Sternberg v. Hill*, 269 A.D. 2d 730 (3rd Dep't 2000); *Purtell v. Kuczek* 129 Misc.2d 166 (Sup. Ct. Montgomery County 1985) *aff'd.*, 112 A.D.2d 1092; *O'Connor v. Salerno,* 105 A.D.2d 487 (3rd Dep't 1984).

Committee to Fill Vacancies

The failure to list a committee to fill vacancies shall not be a fatal defect. EL §6-134(8). However, if a vacancy occurs which may be filled by a committee on vacancies and no committee is listed, the petition fails and the vacancy cannot be filled. Election Law §6-134(8); *Tinari v. Berger,*196 A.D.2d 798 (2nd Dep't 1993), *leave to appeal denied*, 82 N.Y.2d 656.

Petition listing different committees to fill vacancies will not invalidate the petition when no vacancy has occurred. *Pascazi v. New York State Board of Elections*, 207 A.D.2d 650 (3rd Dep't 1994), *leave to appeal denied*, 84 N.Y.2d 802. A petition which names a committee on vacancies is not invalid because of the disqualification of one of the members of the committee on vacancies. *Brennan v. Power*, 307 N.Y. 818 (1954). But if it only has one eligible member, it is the functional equivalent of no committee. *Markel v. Smolinski,* 89 A.D.2d 1052 (4th Dep't 1982), *aff'd*, 57 N.Y.2d 743; *see also*, *Hensley v. Efman*, 192 Misc. 2d 782 (Sup. Ct. Nassau County 2002) (death of one of the three members of vacancy committee invalidated the committee).

A candidate may be a member of the committee on vacancies. *Brandshaft v. Coveney,* 96 A.D.2d 914 (2nd Dep't 1983).

Committee on vacancies may fill a vacancy created by the post- primary declination of an independent candidate by filing documents as soon as practicable as provided in Election Law §6-158(13). *Cipolla v. Golisano,* 84 N.Y.2d 450 (1994).

Candidate

Qualifications for Office

Boards must assume that the candidate meets constitutional and statutory qualification requirements. *Application of Lindgren*, 232 N.Y. 59 (1921). Nomination of a candidate who is constitutionally and statutorily ineligible to serve is a nullity. *Brayman v. Stevens*, 54 Misc. 2d 974 (Sup. Ct. Dutchess County 1967) *aff'd*, 28 A.D. 2d 1095; Election Law § 6-122.

Running for Two Offices

"It is well settled that one may not run for two public offices where one would be precluded from holding both offices at the same time." *Lawrence v. Spelman*, 264 A.D. 2d 455 (2nd Dep't 1999) *citing, Burns v. Wiltse*, 303 N.Y. 319 (1951).

Over Designations

If the petition contains a greater number of candidates than there are offices to be elected the entire petition is invalid. Election Law §6-134(3). Such an over designated petition cannot be saved by having the extra candidates decline. *Elgin v. Smith*, 10 A.D. 3d 483 (4th Dept. 2004).

Residency of Candidate

There is no state law requirement that a candidate (for a local office) be a resident of the district in which election is sought at the time the petition is filed. *Weidman v. Starkweather,* 80 N.Y.2d 955 (1992); and *Clark v. McCoy,* 196 A.D.2d 607 (2nd Dep't 1993) *leave to appeal denied*, 82 N.Y.2d 653.

Registration of the Candidate

There is no requirement that a person must be registered to vote to be a candidate for public office. *See,* Public Officers Law §3.

Enrollment and Authorization of the Candidate

If the candidate is not enrolled in the political party whose nomination they are seeking, they must have a certificate of authorization from the party to be the party's candidate, unless they are running for judicial office. Election Law §6-120(4). *Dorfman v. Meisser,* 56 Misc. 2d 890 (Sup. Ct. Nassau County 1968) aff'd., 30 A.D.2d 684 *aff'd.*, 22 N.Y.2d 770. Failure to file the authorization of a non-party member invalidates the underlying designating petition. *Maurer v. Monescalchi*, 264 A.D. 2d 542 (3rd Dep't 1999). There was no violation of a candidate's constitutional rights when a party does not file an authorization. *Rider v. Mohr*, 2001 WL 1117157 (W.D.N.Y. 2001).

Candidate's Identifying Information

Candidate must be identifiable from information provided. The law requires candidate's name, office being sought, place of residence, and post office address if not identical. Election Law §§6-132 (designating); 6-140 (independent); *see also, Ferris v. Sadowski,* 45 N.Y.2d 815 (1978).

Name

The name that a candidate uses on his or her petition is the name that will appear on the ballot. *See*, Election Law § 7-102. A candidate may be put on the petition and ballot under a name he or she has adopted in good faith and by which he is recognized in the community. *In re Steel,* 186 Misc. 98 (Sup. Ct. New York County 1946) *aff'd.*, 270 A.D. 806. The use of a nickname such as "Tom" for Thomas, "Jack" for John may be used on petition. *Gumbs v. Board of Elections*, 143 A.D.2d 235 (2nd Dep't 1988), *appeal denied*, 72 N.Y.2d 805. *See also Innamorato v Friscia*, 2007 N.Y. Misc Lexis 457 (Sup Ct Richmond County, February 5, 2007) ("Manny" for Emanuel) "In connection with the designation of a candidate on official ballots, the word "name" as used in the Election Law should be afforded its plain, ordinary and usual sense." *Lewis v. New York State Bd. of Elections*, 254 A.D. 2d 568 (3rd Dep't 1998) (citations omitted). Characterizations and designations before or after a candidate's name on an official ballot are generally impermissible. *Id.* Misspelling of name of candidate is not fatal absent intent to mislead. *Harfmann v. Sach,* 138 A.D.2d 551 (2nd Dep't 1988), *appeal denied*, 72 N.Y.2d 810. The failure to include the appellation "Jr." is no basis to invalidate the designating petition where there is no showing of any confusion upon the voters as to the candidate's identity. *Reagon v. LeJune*, 307 A.D. 2d 1015 (2nd Dep't 2003.)

Address of Candidate

Each sheet of petition must properly state place of residence. *Winn v. Washington County Board of Elections,* 196 A.D.2d 674 (3rd Dep't 1993), *leave to appeal denied*, 82 N.Y.2d 654. The statute does not require the candidate's address to include the town, city or village or any other political subdivision in which the candidate resides. *Finkelstein v. Cree*, 2003 N.Y. Misc. LEXIS 1074 (Tompkins County Sup., Ct. August 6, 2003). The address information must be sufficient to identify the candidate without misleading or confusing the signatories to the petition. *Eisenberg v. Strasser*, 307 A.D. 2d 1053 (2nd Dept. 2003).

Residence of Candidate

Candidate must reside at address shown on petition. *Finneran v. Hayduk,* 64 A.D.2d 937 (2nd Dep't 1978); *aff'd.* 45 N.Y. 2d 797; *Bastone v. Cocco*, 270 A.D. 2d 950 (3rd Dep't 1996), *leave to appeal denied*, 88 N.Y., 2d 971; *Brigandi v. Barasch,* 144 A.D.2d 177 (3rd Dep't 1988) *appeal denied*, 72 N.Y.2d 810; *see also, Walkes v. Farrakhan*, 286 A.D. 2d 464 (2d Dep't 2001).

Title of Office

"It is settled that the name of the public office or party position sought must be clearly set forth on the designating petition." *Bliss v. Nobles*, 297 A.D. 2d 457, 457-458 (3d Dep't 2002) *citing* Election Law

§6-132(1); *Dunlea v. New York State Board of Elections*, 275 A.D. 2d 589, 590 (3d Dep't 2000). *Parker v. Savago*, 143 A.D. 2d 439, 441 (3d Dep't 1988). "The name of the office set forth in a candidate's designating petition may be described in a variety of ways provided that the description thereof is specific enough . . .to preclude any reasonable probability of confusing or deceiving the signers, voters or board of elections." *Lozano v. Scaringe*, 253 A.D. 2d 569 (3rd Dep't 1998), *leave to appeal denied*, 92 N.Y.2d 806, (citations omitted). *See also, Shaffer v. Norris*, 275 A.D. 2d 881 (4th Dep't 2000). Title of office need not be exact but must be identifiable. *Jacobson v. Schermerhorn,* 104 A.D.2d 534 (3rd Dep't 1984); *Denn v. Mahoney,* 64 A.D.2d 1007 (4th Dep't 1978). The petition as a whole may be read to determine the town of the office sought. *Carreto v. Sunderland*, 307 A.D. 2d 1004 (2nd Dep't 2003). A description of an office has two components, the title and the geographic territory covered by the office. *Dunlea v. New York State Board of Elections*, 275 A.D. 2d 589 (3rd Dep't 2000).

When districts overlap, the petition must clearly identify which office is being sought. "Because both a Member of the Assembly and a delegate to the judicial convention are selected from the 127th Assembly District (*see* Election Law § 6-124), simply denoting the geographic territory without reference to the title of the public office or position sought is not "'sufficiently informative . . . so as to preclude any reasonable probability of confusing or deceiving the signers, voters or board of elections'" *Hayes v New York State Board of Elections*, 32 A.D.3d 660 (3d Dept 2006) *citing Matter of Dipple v Devine*, 218 A.D.2d 918, 918-919, (1995), *lv denied* 86 N.Y.2d 704, 631 N.Y.S.2d 608, (1995).

Signer of Petition

Law requires date, name of signer, residence, and town or city. Election Law §§6-132 (designating); 6-140 (independent); *see also, Berger v. Acito,* 64 A.D.2d 949 (3rd Dep't 1978), *appeal denied*, 45 N.Y.2d 707. All columns must be completed if applicable and signature must be in ink *In re. Bialis*, 92 N.Y.S. 2d 450 (Oneida County. Ct. 1949) - otherwise fatal defect for that signature.

Date

Signature on a petition must bear the date it was made. *De Barardinis v. Sunderland*, 277 A.D. 2d 187 (2d Dep't 2000). The date is a matter of prescribed content, strict compliance is required. *Vassos v. New York City Board of Elections*, 286 A.D. 2d 463 (2d Dep't 2001). Signatures dated after date of witness statement cannot be counted. *Velez v. Nienes*, 164 A.D. 2d 931 (2nd Dep't 1990) (dated before witness valid); *McNulty v. NcNab*, 96 A.D. 2d 921 (2nd Dep't 1983) (dated after witness invalid); EL §§ 6-130, 6-138(2); *Nunley v. Cohen,* 258 A.D. 746 (2nd Dep't 1939).

Name

Printed name may appear above or below signature, however, failure to print the name is not a fatal defect. Election Law §6-134(13). Printed rather than signed names are valid since signature includes a printed name. *Controneo v. Monroe County Board of Elections,*166 Misc.2d 63 (Sup. Ct. Monroe County 1995).

A wife cannot sign as "Mrs. John Jones". She must use her name. She can sign as "Mrs. Mary Jones". *Lydan v. Sullivan*, 269 A.D. 942 (2nd Dep't 1945).

Signatures which only include the first name are invalid where they do not match the signatures in the poll ledgers. *Fusco v. Miele*, 275 A.D. 2d 426 (2nd Dep't 2000).

Residence

Residence of the signer should be their residence at the time they signed the petition. *Dye v. Callahan*, 42 A.D.2d 916 (3rd Dep't 1973). An address is acceptable if it matches the address listed in the board's registration list. Some latitude should be given if the address does not match but it appears that they are one and the same. *Regan v. Toole,* 63 N.Y.2d 681 (1984). It is not fatal if address does not contain the hamlet since the town is given. *Grancio v. Coveney,* 60 N.Y.2d 608 (1983). Customary abbreviations of addresses are acceptable. Election Law §6-134 (15). There is an opportunity to show post office address is correct. Election Law §6-134 (12). Where no such proof is provided that the postal address and the residence address are one and the same, the signatures are invalid. *Ligammari v. Norris*, 275 A.D. 2d 884 (4th Dep't 2000).

The residence address of the signatures on the designating petition is adequate and does not warrant invalidation of the designating petition where "there has been substantial compliance with the statutorily prescribed format" *Toporek v Beckwith*, 32 A.D.3d 684 (4th Dep't 2006), *quoting*, (*Matter of Belak v Rossi*, 96 A.D.2d 1011, 1012, 467 N.Y.S.2d 100, *lv denied* 60 N.Y.2d 552). The *Toporek* Court went on further to say that ""[T]he Election Reform Act of 1992, amending section 6-134 (2) of the Election Law . . ., provides for liberal construction of the residence address requirement". *Toporek* at 685 citing, *Matter of Regan v Starkweather*, 186 A.D.2d 980, 981. Indeed, "where the information sought is apparent on the face of the form and the defect cannot possibly confuse, hinder or delay any attempt to ascertain or to determine the identity, status and address of the witnesses, the defect is not such as to mandate invalidation of all signatures on each of the several pages"" *Toporek* at 685, *citing, Matter of Weiss v Mahoney*, 49 A.D.2d 796, 797.

Town or City

Signers to petition must provide town or city, as required by statute. *Stoppenbach v. Sweeney*, 98 N.Y. 2d 431 (2002), *citing Matter of Frome v. Board of Elections of Nassau County*, 57 N.Y. 2d 741, 742-743 (1982); *See also*, *Stark v Kelleher*, 32 A.D.3d 663 (3d Dep't 2006) . Name of village or hamlet not acceptable. *See, Zobel v. New York State Board of Elections*, 254 A.D. 2d 520 (3rd Dep't 1998); *Ptak v. Erie County Board of Elections*, 307A.D. 2d 1072 (4th Dep't 3003). Do not need to specify whether the municipality is a "town" or a "city". *Hinkley v. Egan*, 181 Misc. 2d 921 (Sup. Ct. Dutchess County. 1995). Strict compliance with the town or city requirement serves the purpose of facilitating the discovery of fraud and allows for rapid and efficient verification of signatures within the short time frame the election law allows. *Zobel v. New York State Bd. of Elections*, 254 A.D. 2d 520 (3rd Dep't 1998). If petition does not have a separate column for a town but the column for the address has the name of the town, for example, the address column is entitled "Town of Guilderland residence", it is valid because it contains all the required information. *Sheehan v. Aylward,* 54 N.Y.2d 934 (1981).

A designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed. Election Law § 6-130. There is no requirement, however, that a signer list the hamlet or particular geographic area within the town or city in which he or she resides. *Gonzalez v Lavine*, 32 A.D. 3d 483 (2d Dep't 2006), *citing Matter of Grancio v Coveney*, 60 N.Y.2d 608, 610-611; *Matter of Cheevers v Gates,* 230 A.D.2d 948, 949. The Appellate Division held that the Supreme Court improperly determined that five signatures were invalid because the signers either omitted or incorrectly listed the hamlet within the town in which they reside. "Since the signers provided all the information required by Election Law § 6-130, including their correct street addresses and the towns in which they reside, their signatures were valid." *Gonzalez*, supra.

Signed Previous Petition

Signatures of persons who signed a previous designating, nominating or opportunity to ballot petition for the same office cannot be counted. Election Law §6-134(3); *McNulty v. McNab,* 96 A.D.2d 921 (2nd Dept 1983); *Angelo v. Marino*, 308 A.D. 2d (2nd Dep't 2003); *DiCicco v. Chemung County Board of Elections*, 93 N.Y. 2d 1008 (1999).

Witness Statement

Residency of Witness

A witness to a designating petition or an independent nominating petition must be a registered voter residing in New York State or a notary public. Election Law §§ 6-132 (designating petitions), 6-140 (independent petitions). The requirement in the Election Law that a subscribing witness must be a resident of a political subdivision has been ruled unconstitutional. *Lerman v. Board of Elections in the City of New York*, 232 F. 3d 135, 145 (2d Circ. 2000) *cert. denied*, 535 U.S. 915; *see also LaBrake v. Dukes*, 96 N.Y. 2d 913 (2001) (designating petitions; *Chou v. New York State Board of Elections*, 332 F. Supp. 2d 510 (EDNY 2004); McGuire v. Gamache, 5 NY3d 444 (2005) (independent nominating petitions). In using the statutorily mandated form of nominating petition for Independent Body Nominations pursuant to 6-140 the language "I am also qualified to sign the petition" may be crossed out by a witness who is not qualified to sign the petition and an explanation stated as to why the witness is qualified to carry the petition but such cross out and explanation **must** be initialed by the witness. (In reviewing the *Lerman, LaBrake, McGuire* and *Chou* cases, please note that the Court did not rule on witness residency requirements under Election Law §15-108 (village petitions).

Party of Witness

The subscribing witness to a designating petition must be an enrolled member of the party. Election Law §6-132(2). The party enrollment of subscribing witness is a substantive requirement. *Hoshhauser v. Grinblat*, 307 A.D. 2d 1007 (2nd Dep't 2003) *citing, Staber v. Fidler*, 65 N.Y. 2d 529 (1985).

Witness Address and Identification Information

Witness need only provide town or city below signature and need not include this information on line in witness statement for witness address. *Barrett v. Brodsky,* 196 A.D.2d 603 (2nd Dep't 1983), *leave to appeal denied,* 82 N.Y.2d 653. Witness may have two different addresses within the same petition provided that both were accurate when the page was witnessed. *McManus v. Relin,* 286 A.D. 2d 855 (4th Dep't 2001).

Where a candidate who was a witness to a petition failed to complete the witness identification information below the witness signature line (town or city and county) the court found that since the petition already contained sufficient information at the top of the sheet to identify the witness, ". . . omission of redundant witness information was an inconsequential violation of the statute." *Hurst v. Board of Elections of Broome County,* 265 A.D. 2d 590 (3rd Dep't 1999) *citing, Matter of Pulver v. Allen,* 242 A.D. 2d 398 (3d Dep't 1997) *lv. denied,* 90 N.Y. 2d 805; *see also, Curley v. Zacek,* 22 A.D. 3d 954 (3d Dep't 2005).

The Appellate Division has reiterated that where the witness failed to provide their town or city of residence, "such an error is not a fatal defect, particularly where the complete residence address of the subscribing witness appears elsewhere on the same page of the petition. *Arcuri v Hojnacki,* 32 A.D.3d 658 (3d Dep't 2006). The Court went onto distinguish the Court of Appeals' decision in *Matter of Stoppenbach v Sweeney* (98 N.Y.2d 431 [2002]); "inasmuch as that case involved an unremedied inaccuracy in the designation of the town or city by the actual signatories to the petition, not by a subscribing witness. Accordingly, we find no reason to disturb Supreme Court's decision."

Completion of Witness Information

The failure of a subscribing witness to fill in all information on witness statement invalidates all signatures on that page of petition. *Sheldon v. Sperber,* 45 N.Y.2d 788 (1978), *but see, Hoare v. Davis,* 207 A.D.2d 309 (1st Dep't 1994) (court allowed incorrect address of witness if no showing of deceit or fraud); *Pulver v. Allen,* 242 A.D. 2d 398 (3rd Dep't 1997), *leave to appeal denied,* 90 N.Y.2d 805. The information may be filled in by someone else but it should be completed before the subscribing witness signs the witness statement or in the presence of the witness. Election Law §6-134 (9). Information below the witness signature may be filled in by someone other than the witness, before or after the witness signs. Election Law §§6-132(2) and 6-140(1)(b); *see also, Pulver v. Allen,* 242 A.D. 2d 398 (3rd Dep't 1997), *leave to appeal denied,* 90 N.Y.2d 805.

Number of Signatures

Law requires identification data including number of signatures on sheet. *Bernhardt v. Sachs,* 57 A.D.2d 598 (2nd Dep't 1977). If number of signatures stated in witness statement is missing, entire sheet should be invalidated. *Esse v. Chiavaroli,* 71 A.D.2d 1046 (4th Dep't 1979) *but see, Etkin v. Thalmann,* 287 A.D. 2d 775 (3d Dep't 2001) (court allowed corrections to the number of signatures contained in the witness statement if it was filed before the petition filing period had expired). If number of signatures stated in witness statement is understated, count only the number stated. Election Law §6-134 (11). If the number is overstated, entire sheet is invalid. *Krueger v. Richards,* 93 A.D. 898 (2nd Dep't 1983) *aff'd* 59 N.Y.2d 680.

Witnessing Another Petition

If the witness has witnessed another petition for a different candidate for the same office but has not signed another petition, he or she may witness a petition for another candidate for the same office. *Sinagra v. Hogan,* 97 A.D.2d 643 (3rd Dep't 1983) *aff'd.,* 60 N.Y.2d 811. If the witness has signed a petition, he or she may not witness the petition of another candidate for the same office. *Gartner v. Salerno,* 74 A.D.2d 958 (3rd Dep't 1980), *appeal denied,* 49 N.Y.2d 704; *see also, Sinagra v. Hogan,* 97 A.D.2d 643 (3rd Dep't 1983) *aff'd.,* 60 N.Y.2d 811; *Rue v. Hill,* 287 A.D. 2d 781 (3d Dep't 2001).

Signing and Dating

Witness statements must be signed and dated. *Pabian v. McNab,* 9 Misc.2d 995 (Sup. Ct. Suffolk County 1957) *aff'd.,* 4 A.D.2d 834, *aff'd.* 3 N.Y.2d 888; *Higby v. Mahoney,* 48 N.Y.2d 15 (1979). The omission of the date on subscribing witness statement is fatal. *McKay v.* Cochran, 264 A.D. 2d 699 (2nd Dep't 1999), *Klemann v. Acito,* 64 A.D.2d 952 (3rd Dep't 1978) *aff'd.,* 45 N.Y.2d 796.

Signatures Taken by Notary or Commissioner of Deeds

If a signature is taken by a notary or commissioner of deeds, they must include their title or the sheet is invalid. *Fuentes v. Lopez,* 264 A.D. 2d 490 (2nd Dep't 1999), *Hunter v. Compagni,* 74 A.D.2d 1000 (4th Dep't 1980).

Failure to use the notarial stamp does not render the sheet invalid. *McKay v. Cochran,* 264 A.D. 2d 699 (2nd Dep't 1999); *see,* Executive Law §142-9 (defects which do not invalidate a notary).

If a signer is not sworn by the notary or commissioner of deeds, the signature of the person not sworn is invalid. *Napier v. Salerno,* 74 A.D.2d 960 (3rd Dep't 1980); *Boyle v. New York City Board of Elections,* 185 A.D.2d 953 (2nd Dep't 1992). *Leahy v. O'Rourke,* 307 A.D. 2d 1008 (2nd Dep't 2003).

The omission of the date on a notary statement renders page invalid. *Weiss v. Mahoney,* 49 A.D.2d 796 (4th Dep't 1975). However, a witness statement completed by a notary on the reverse side of a petition, while not the preferred form, does not warrant invalidation. *Bay v. Santoianni,* 264 A.D. 2d 488 (2nd Dep't 1999).

The signatures collected by a notary public who refused at trial to answer questions concerning the administration of oath to signatures and could not recall if he committed forgery, were invalidated. *McCoy v. Jenkins,* 242 A.D. 2d 349 (2nd Dep't 1997).

Signatures taken by a commissioner of deeds knowingly acting outside the boundaries of their commission are invalid. *Shuboney v. Monroe County Board of Elections,* 297 A.D. 2d 462 (4th Dept. 2002).

Alterations

Uninitiated alterations or corrections may be made to information on the signer's line, except the signature and date. Election Law §6-134 (6).

Alterations to the Signers Line

Alterations or corrections made in the signature line need not be initialed if not made to the signature or date. Election Law §6-134 (6). Other alterations or corrections must be initialed and should be dated. *Andrews v. Albany County Board of Elections,* 164 A.D.2d 960 (3rd Dep't 1990); *King v. Sunderland,* 175 A.D.2d 896 (2nd Dept 1991). Alterations to the signers date is permitted ". . .where the subscribing witness signed her initials next to the date corrections, such corrections are inconsequential and did not invalidate the signatures. *Strenberg v. Hill*, 269 A.D. 2d 730, 731 (3rd Dep't 2000).

Material Alteration

If unexplained material alteration is made to witness statement, the entire page should be invalid. *Jonas v. Velez,* 65 N.Y.2d 954 (1985); *Magee v. Camp* 253 A.D. 2d 573 (3rd Dep't 1998); *Berger v. Acito,* 64 A.D.2d 949 (3rd Dep't 1978), *appeal denied*, 45 N.Y.2d 707; *Nobles v. Grant,* 57 A.D.2d 600 (2nd Dep't 1977) *aff'd.*, 41 N.Y.2d 1048; *but see, Pulver v. Allen,* 242 A.D. 2d 398 (3rd Dep't 1997); *McGuire v Gamache*, 22 A.D. 3d 614 (2d Dep't 2005).

The alteration must be material, thus, unexplained alteration in witness statement changing "Reed Street" to "Reed Avenue" does not invalidate the petition sheet. *Pericak v. Hooper,* 207 A.D.2d 1003 (4th Dep't 1994). An overwriting which did not change what was originally written is not an alteration. *Schroeder v Smith*, 21 A.D. 3d 511 (2d Dep't 2005).

An affidavit may be submitted at time of filing to explain alterations but it may not be used to cure omissions. *Hunter v. Compagni,* 74 A.D.2d 1000 (4th Dep't 1980).

If incorrect information is crossed out and correct information put in the witness statement, but is not initialed or explained, the entire sheet is invalid. *Quinlin v. Pierce*, 254 A.D. 2d 690 (4th Dep't 1998); *Shoemaker v. Longo,* 186 A.D.2d 979 (4th Dep't 1992), *leave to appeal denied*, 80 N.Y.2d 755; *but see, Pulver v. Allen,* 242 A.D. 2d 398 (3rd Dep't 1997), *leave to appeal denied*, 90 N.Y.2d 805.

Opportunity to Ballot Petitions

Opportunity to ballot (OTB) petitions are filed to create a primary election when there otherwise would not have been one. EL §6-164. The opportunity to ballot does not put a candidate's name on the ballot, but rather allows voters the ability to write in a candidate's name. EL §6-164. A technically deficient designating petition is not a prerequisite for an OTB petition. *Coopersmith v. Hershberger*, 264 A.D. 2d 453 (2nd Dep't 1999). An OTB petition may be filed even when there is a valid designating petition has been filed. *Mullane v. Bauer*, 286 A.D. 2d 460 (2d Dep't 2001). Signature on an OTB petition is invalid if voter previously signed a valid petition for the same office. *Rabadi v. Galen*, 307 A.D. 2d 1014 (2nd Dept. 2003).

Failure to list a committee to receive notices on an OTB petition is a fatal defect. *Werner v. Castiglione*, 286 A.D. 2d 553 (3d Dep't 2001); *Lent v. Katz*, 307 A.D. 2d 1009 (2nd Dep't 2003).

NOMINATIONS

This section describes issues effecting caucuses.

Caucuses

Posting Notice of Caucus

In a village election case, the court in reviewing the posting requirements for the notice of a party caucus stated that, "the requirement for posting and filing of notice is obviously designed to ensure that the public, and more importantly to party nominations, the enrolled voters of the party, are adequately informed of the intention of the representatives of one of its political parties to fill a position on the ballot of an election affecting the voters of that municipality." *Korniczky v. Sunderland,* 175 Misc. 2d 912 (Sup. Ct. Westchester County 1998). The court went on to say that, "the court views the notice requirements as mandatory in nature, and concludes that failure to strictly comply with such requirements voids the nomination." *Id. See also, Scanlon v. Turco*, 264 A.D. 2d 863 (3rd Dep't 1999). Failure to post or file the notice of caucus with the town clerk or the county board of elections renders the caucus and, consequently, the purported nominations invalid. *Gage v. Hammond*, 309 A.D. 2d 1061 (3rd Dept. 2003); *Chevere v. Sunderland*, 303 A.D. 2d 428, (2nd Dep't 2003).

VACANCIES

A vacancy in a nomination or a designation may only occur upon a declination by the candidate, the death of the candidate, the disqualification of the candidate from holding the office, or a tie vote at a primary election. Election Law § 6-148 (1).

Certification of Vacancies

In a case coming out of the 1996 Molinari congressional seat vacancy, the court invalidated an independent petition because signatures collected before the vacancy in the office was certified by the State Board of Elections were not valid and could not be counted. *Vitaliano v. D'Emic*, 243 A.D. 2d 662 (2nd Dep't 1997), *leave to appeal denied*, 90 N.Y.2d 812. The court indicated that the signatures could only have been collected after the State Board of Elections certified the existence of the vacancy. If the certification of vacancy is filed late, again the case here, the candidate's remedy is to commence a proceeding to compel filing of the certificate. *Vitaliano* at 663. The court did not address the statutory language for such petitions which clearly states that the time to begin collecting signatures begins to run from the date of the vacancy. *See,* Election Law §6-158 (10).

Disqualification

Notice of a violation of the Hatch Act prohibition on Federal employees from running for public office will disqualify a candidate. *Parete v. Hunt*, 287 A.D. 2d 777 (3d Dep't 2001).

Substitutions

A candidate may be substituted when a designated candidate has declined the designation. *See*, Election Law § 6-148. The designating petition of a person not enrolled in the party is not valid, however, unless a Wilson-Pakula authorization has been filed. *See*, Election Law § 6-120. "In the absence of a valid designating petition, a declination does not create a vacancy within the meaning of the Election Law." *Hunter v New York State Board of Elections*, 32 A.D.3d 662 (3d Dep't 2006) (*see Matter of Leemhuis v State of New York, Bd. of Elections*, 186 A.D.2d 863, 588 N.Y.S.2d 816, 588 N.Y.S.2d 1022 [1992], *affg on op below* 155 Misc. 2d 531, 588 N.Y.S.2d 980 [1992]; *Matter of Nowik v Jablonski*, 133 A.D.2d 874, 875, 520 N.Y.S.2d 427 [1987]; *Matter of Gdanski v Rockland County Bd. of Elections*, 97 A.D.2d 744, 744-745, 468 N.Y.S.2d 53 [1983]).

CHALLENGES

This section addresses issues raised in challenging petitions through the objection process and by court action.

Objections

The board of elections is a purely ministerial board and "they had no power to deal with objections involving matters not appearing upon the face of the papers." *Application of McGovern*, 291 N.Y. 104 (1943) *citing*, *Matter of Frankel v. Cheshire*, 212 A.D. 664, 671 (2d Dep't 1925). Objections which allege fraud or forgery should not be ruled on by the board of elections but can only be ruled on by a court of competent jurisdiction. *See*, *Bednarsh v. Cohen*, 267 A.D. 133 (1st Dep't 1943), *appeal denied*, 267 A.D. 760, *appeal denied*, 292 N.Y. 578.

Standing to Object

Independent Petitions

Any qualified voter can challenge an independent nominating petition as a citizen objector. *Doran v. Scranton*, 49 A.D.2d 976 (3rd Dep't 1975). The objections must be signed by the objector. *Banker v. Apfeldorf*, 93 A.D.2d 848 (2nd Dep't 1983).

Objections to Petitions

Although an objector must be a registered voter in order to file objections, they do not have to be enrolled in the political party of a candidate for public office in order to file objections against the candidate. Election Law §6-154(2); *Matter of Van Sleet,* 16 N.Y.2d 848 (1965); *see also, Bonelli v. Bahren,* 196 A.D.2d 866 (2nd Dep't 1993) (objector to a certificate of authorization has standing as a registered voter eligible to vote for the public office); *Queens County Republican Committee v. New York State Board of Elections*, F. Supp. 2d 341 (E.D.N.Y. 2002) (upholding constitutionality of non-party members to object to petition for public office).

Nominations for Party Position

However, if the nomination is for party position and not for public office, the objector must be an enrolled member of that party. Election Law §6-154(2); *Bennett v. Justin,* 51 N.Y.2d 722 (1980). If the objector objects to the method of nomination (caucus or primary), the objector must be an enrolled member of the party. *Stempel v. Albany County Board of Elections,* 60 N.Y.2d 801(1983). A non-member of a political party lacks standing to challenge that party's compliance with it's own rules. Matter of Nicolai v. Kellher, et al. 45 AD3d 960 (3d Dept. 2007) See also, Matter of Fehrman v. NYSBOE, et al. 2008 NY Slip Op. 1611 (February 25, 2008) where the non-member not only lacked to standing to challenge the party rules, but further lost his standing to challenge as an aggreived candidate pursuant to Election Law §16-102 when he abandoned his assertion that he was the party's candidate and instead argued that the party had not validly nominated any candidate. In Occhipinti v. Westchester Co. Bd of Elecs., 2008 Slip Op 2440 (March 14, 2008) the non-party petitioner, who was a political party chairman, did have standing to commence a proceeding challenging to the alleged failure to comply with the requirements governing nomination by party caucus in Election Law §15-108(2)(a).

Judicial Nominating Conventions

In a proceeding challenging the validity of certificates of nomination and substitition relating to a judicial nominating convention, the petitioner could not maintain standing as an aggrieved candidate pursuant to Election Law §16-102 since he was not a member of the party and did not allege that, but for the purported irregularities in the manner by which the nominating convention was conducted, he would have received the nomination Nicolai v. McKay 45 AD3d 965 (3rd Dept 2007).

County Committee

An objector to a petition for county committee must be enrolled to vote in the election district of the committee position to which they are objecting. *Lucariello v. Niebel,* 72 N.Y.2d 927 (1988); *see also, Galow v. Dutchess County Board of Elections,* 242 A.D. 2d 344 (2nd Dept 1997); *Cantatore v. Sunderland,* 196 A.D.2d 606 (2nd Dep't 1993).

When Objections Must be Received

General objections must be filed with board of elections within three days of the filing of the petition and the specifications of objections must be filed within six days of the filing of the general objections. EL §6-154(2).

The three days begin to run from the date that the petition is received by the board. *Miele v. Reda,* 243 A.D. 2d 566 (2nd Dep't 1997), *leave to appeal denied*, 90 N.Y.2d 811; *Benson v. Scaringe,* 84 A.D.2d 603 (3rd Dep't 1981), *appeal denied*, 54 N.Y.2d 609. The six days for specifications run from the date that the general objections are received at the board, if they are personally brought into the board, or from the date of the postmark of the general objections if they are mailed. *Bush v. Salerno,* 51 N.Y.2d 95 (1980). The courts may not extend the time to file specifications of objections. *Breitenstein v. Turco*, 254 A.D. 2d 566 (3rd Dep't 1998).

The time limits for filing of objections to certificates of nomination, authorization, acceptance, declination, substitution, etc. would also be measured from the date of receipt of the certificate. *Pierce v. Breen,* 86 N.Y.2d 455 (1995) (court allowed objections to a certificate of

nomination to be filed within three days of last day to file the certificate when the certificate was filed before the first day the certificate was permitted to be filed).

Postmarks

If filing objections by mail they must be properly postmarked. The absence of a postmark on the envelope is a fatal defect. *Raimone v. Sanchez*, 253 A.D. 2d 506 (2nd Dep't 1998), *leave to appeal denied*, 92 N.Y.2d 806.

Rehearing

Once the board has made a determination on the petition, it may not reopen a hearing even if it receives new evidence after the hearing is closed. *Schneeberg v. New York State Board of Elections,* 78 A.D.2d 559 (3rd Dep't 1980) *rev'd on other grounds*, 51 N.Y.2d 814.

Service of Objections on the Candidate

Failure to adhere to a rule of the board of elections which requires service of the objections upon the candidate ". . .deprived the board of jurisdiction to properly consider the objections and thereafter to rule to invalidate the petition." *Young v. Thalmann*, 286 A.D. 2d 550 (3d Dep't 2001).

Court Actions

Election matters are brought in the Supreme Court of the county involved. For our purposes, the Supreme Court is the lowest level court in the system. It is also the court with the broadest or widest jurisdiction, or authority and is generally in session on a daily basis. Most election matters are started by filing and serving an Order to Show Cause which requires the parties to appear before a judge on a specific day. Usually, any hearing the judge is inclined to hold will happen on that date. Decisions are often delivered orally from the bench the same day, or, if written, within a day or two, depending upon the judge's schedule.

If the losing party is so inclined, they can appeal the decision to the appropriate appellate division. The appellate divisions have specific blocks of time when they hear appeals, and will sometimes set aside specific days during that block of time for hearing elections cases. In the lower court, one judge hears the matter and makes the decision. At the appellate division, there is a five judge panel which hears the matter and renders a written opinion as expeditiously as possible.

The last level of appeal within the state system is to the Court of Appeals, which is the court of last resort. The number of days set aside for elections matters by this court is very limited. There is a very formal procedure whereby parties ask permission to bring an appeal. It has been several years since the Court of Appeals has heard an elections matter.

Table summarizing the types of election related court actions.

Election/ Proceeding	Who Can Bring	Time to Commence	Proper Court	Election Law Section
Primary/Invalidate designating or OTB Petitions	aggrieved candidate; objector; party chairperson in a contested primary	Within 14 days of last day to file petition	Supreme Court	§§16-100; 16-102(1)(2)
Primary/Validate designating or OTB Petitions	candidate; committee to receive notices on OTB	Within the later of 14 days of last day to file or 3 days of invalidation	Supreme Court	§§16-100; 16-102(1)(2)
Primary Results	aggrieved candidate; chairman of party committee	Within 10 days of primary	Supreme Court	§§16-100; 16-102(1)(2)
General/Caucus proceedings or certificate of nomination	aggrieved candidate; enrolled objector for proceedings challenge; objector for challenge to certificate	Within 10 days of filing of certificate of nomination	Supreme Court or County Court	§§16-100; 16-102(1)(2)

General/invalidate nominating petition	aggrieved candidate; objector	Within 14 days of last day to file	Supreme Court or County Court	§§16-100; 16-102(1)(2)
General/validate nominating petition	aggrieved candidate	Within the later of 14 days of last day to file or 3 days of invalidation	Supreme Court or County Court	§§16-100; 16-102(1)(2)
General/Judicial Convention proceedings or certificate of nomination	aggrieved candidate; enrolled objector if challenge to proceedings; party chairperson; objector if challenge to certificate	Within 10 days of holding of convention	Supreme Court	§§16-100; 16-102(1)(2)
Special Election/Certificat e of Nomination by Party Committee	objector; aggrieved candidate	Within 10 days of filing of certificate	Supreme Court or County Court	§§16-100; 16-102(1)(2)
Special Election/Invalidate nominating petition	aggrieved candidate; objector	Within 7 days of last day to file	Supreme Court or County Court	§§16-100; 16-102(1)(2)
Special Election/ Validate nominating petition	aggrieved candidate	Within the later of 7 days of last day to file or 3 days of invalidation	Supreme Court or County Court	§§16-100; 16-102(1)(2)
Village Elections/invalidat e designating or independent nominating petition	aggrieved candidate; objector; party chairperson in a contested primary	Within 7 days of last day to file	Supreme Court or County Court	§§15-138; 16-100; 16-102(1)(2)
Village Election/validate designating or independent nominating petition	aggrieved candidate	Within the later of 7 days of last day to file or 3 days of invalidation	Supreme Court or County Court	§§15-138; 16-100; 16-102(1)(2)
Village Elections: Casting/Canvassin g or refusal to cast/canvass ballots	candidate; chairman of party committee; voter whose ballot was not cast/canvassed	Within 10 days of the election	Supreme Court or County Court	§§16-100; 16-106(1)(5)

All other Elections: Casting/Canvassing or refusal to cast/canvass ballots	candidate; chairman of party committee; voter whose ballot was not cast/canvassed	Within 20 days of the election	Supreme Court	§16-106(1)(5)
General/Challenge return of canvass on statewide proposition	attorney general; chairman of party state committee	Within 20 days of election or alleged erroneous statement or determination	Supreme Court	§§16-100; 16-106(3)(5)
Right of individual to be registered	registered voter in subject county; the state board of elections	No limitation in the Election Law; within 4 months of the registration under CPLR §217	Supreme Court or County Court	§16-108(1)
Challenge board's denial to register individual	aggrieved voter	No limitation in the Election Law; within 4 months of the registration under CPLR §217	Supreme Court or County Court	§16-108(1)
Challenge board's denial to issue absentee ballot or application for same	aggrieved voter	No limitation in the Election Law; within 4 months of the registration under CPLR §217	Supreme Court or County Court	§16-108(4)
Challenge denial of right to vote	aggrieved voter	No limitation in the Election Law; within 4 months of the registration under CPLR §217	Supreme Court or County Court In First & Second Departments, supreme court justices must be assigned to sit at local BOEs or other locations for this purpose; it is discretionary in the rest of the state.	§16-108(3)(6)

Table summarizing the New York State Court System.

NYS COURT OF APPEALS
Highest level state court, also called court of last resort.

APPELLATE DIVISION
The statewide appellate court is the Appellate Division, which is divided into four departments. Each department is made up of several judicial districts. The departments, and the districts and corresponding counties are listed in the following table.

First Department
1st JD
New York [Manhattan]
12th JD
Bronx

Second Department
2d JD:
Richmond [Staten Island]
Kings [Brooklyn]
9th JD:
Dutchess
Orange
Putnam
Rockland
Westchester
10th JD:
Nassau
Suffolk
11th JD:
Queens

*Chapter 690 of the Laws of 2007 creates a 13th JD consisting of the county of Richmond. The 2d JD will consist solely of Kings County.

Third
Department

3d JD:

Albany	Chenango
Columbia	Cortland
Greene	Delaware
Rensselaer	Schoharie
	Sullivan
	Ulster

4th JD:

Clinton	
Essex	St..Lawrence
Franklin	Saratoga
Fulton	Schenectady
Hamilton	Warren
Montgomery	Washington

6th JD:
Broome
Chemung
Madison
Otsego
Schuyler
Tioga
Tompkins

Fourth Department
5TH JD:
Herkimer Jefferson
Lewis

7th JD:
Cayuga Livingston
Monroe Ontario

8th JD:
Allegany Cattaraugus
Chautauqua Erie
Onondaga Oneida
Oswego Seneca
Steuben
Yates Wayne
Genesee Niagara
Orleans Wyoming

SUPREME COURT
Located in each county, this is a court with general, or wide jurisdiction or authority

CAMPAIGN FINANCIAL DISCLOSURE

This section describes court actions that impact the area of campaign financial disclosure.

Party Money in a Primary

There were two recent Court decisions related to Election Law § 2 - 126, "Party Funds - Restrictions on Expenditures." Election Law 2-126 prohibits a political party from spending money in a primary election; either its own (intra) or another party's (inter). These Court decisions found the statute to be unconstitutional.

In a State Court case which involved one party spending money in another party's primary (inter-party spending), the trial court found that the Working Families Party violated 2-126 by spending money relative to the Democratic Party Primary for District Attorney. The Appellate Division agreed with the Trial Court that the statute was violated by the Working Families Party. However, the Appellate Division found the statute, which is a blanket prohibition on party funds in a Primary, as applied, was unconstitutional, and reversed the decision of the Trial Court. The Appellate Division, held that the 2-126 expenditure limits, as applied to the Working Families Party, unconstitutionally burdened its First Amendment rights of political expression and association. *Avella v. Batt*, 33 AD3d 77, (3d Dep't 2006).

In a separate case, the Federal District Court agreed that Election Law 2-126 violated First Amendment protections afforded speech, expression and association. *Kermani v. New York State Board of Elections*, WL 2190716 (USDC NDNY 2006). On a motion for a preliminary injunction, plaintiffs stated that they wanted to spend party funds within their own primary election (intra party spending). They claimed that they were unconstitutionally prohibited by 2-126 and feared enforcement of the statute by the State Board of Elections. The District Court found that the plaintiffs established a likelihood of success on its claim that 2-126 violated their First Amendment protections of speech, expression and association. The Court prohibited and enjoined the State Board from enforcing the provisions of 2-126 as to independent expenditures by political parties in primary elections, and stayed application of the preliminary injunction for one year until July 25, 2007 as it applies to coordinated expenditures and contributions (transfers). The State Board is prohibited from enforcing 2-126 as to independent expenditures by a political party in a Primary, and that after July 25, 2007, the State Board will be prohibited and from enforcing the provisions of 2-126 with regards to coordinated expenditures and contributions (transfers) by political parties in a Primary.