

JENNER & BLOCK

February 10, 2012

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VIA ECF

Hon. Frederic Block
Senior District Judge
U.S. District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Michael W. Ross
Tel (212) 891-1669
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Hon. Robert M. Levy
Magistrate Judge
U.S. District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ***NAACP New York State Conference v. N.Y.S. Board of Elections,***
No. 10-cv-2950(FB)(RML) (E.D.N.Y.)

Dear Judges Block and Levy:

We respectfully submit this letter to advise the Court that Plaintiffs in the above-captioned matter have reached a settlement agreement with the “State Defendants”¹ in this matter.

As set forth in the Amended Complaint, Plaintiffs brought this action to challenge the use of a display message that appears on optical-scan voting machines that increases the risk that

¹ State Defendants are the New York State Board of Elections (the “State Board”), as well as State Board Commissioners James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila, and Gregory P. Peterson, and State Board Co-Executive Directors Todd D. Valentine and Robert A. Brehm.

The “City Defendants” are the New York City Board of Elections (the “City Board”), as well as City Board Commissioners Jose Miguel Araujo, Naomi Barrera, Julie Dent, Nancy Mottola-Schacher, Juan Carlos Polanco, Michael J. Ryan, J.P. Sipp, Gregory C. Soumas, Judith D. Stupp, and Frederic M. Umane. Plaintiffs have not reached a settlement with respect to their claim against the City Defendants.

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voters will inadvertently cast “overvotes.” Machines record overvotes when they read a voter’s ballot as including more than the permitted number of votes for a particular contest. The result of an overvote is that the voter’s vote is not counted for that contest.

Since the status conference before the Court on November 3, 2010, Plaintiffs and the State Defendants have worked cooperatively toward settlement. This cooperation resulted in the development of a new “overvote message” that provides voters with an opportunity to correct a ballot which contains overvotes and “usability testing” of that message by recognized experts to evaluate voter behavior in response to the message. The new overvote message should significantly reduce the risk that voters mistakenly cast more than the permitted number of votes for a given contest.

Plaintiffs and the State Defendants jointly and respectfully request that the Court “so order” the attached “Stipulation Of Settlement, General Release And Order Of Dismissal” and dismiss Plaintiffs’ claims against the State Defendants.

Sincerely,

Michael W. Ross / RTA

Michael W. Ross

cc: counsel of record (via ECF)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NAACP NEW YORK STATE CONFERENCE,
as an organization and representative : 10 Civ. 2950 (FB) (RML)
of its members, NATIONAL COALITION ON :
BLACK CIVIC PARTICIPATION, as an :
organization and representative of :
its members, FAMILIES UNITED FOR :
RACIAL AND ECONOMIC EQUALITY, as an :
organization and representative of :
its members, VIVIAN BOSIER, :
ANITA BURSON, and SHEILA DUNCAN, :

Plaintiffs, :

-against- :

NEW YORK STATE BOARD OF ELECTIONS, :
JAMES A. WALSH, DOUGLAS A. KELLNER, :
EVELYN J. AQUILA, and GREGORY P. :
PETERSON, in their official :
capacities as Commissioners of the :
NEW YORK STATE BOARD OF ELECTIONS, :
TODD D. VALENTINE and ROBERT A. :
BREHM, in their official capacities :
as Executive Directors of the New York :
State Board of Elections, NEW YORK :
CITY BOARD OF ELECTIONS, and JOSE :
MIGUEL ARAUJO, NAOMI BARRERA, JULIE :
DENT, NANCY MOTTOLA-SCHACHER, JUAN :
CARLOS POLANCO, MICHAEL J. RYAN, :
J.P SIPP, GREGORY C. SOUMAS, JUDITH :
D. STUPP and FREDERIC M. UMANE, :
in their official capacities as :
Commissioners of the New York City :
Board of Elections, :

Defendants. :

-----X

**STIPULATION OF SETTLEMENT,
GENERAL RELEASE AND ORDER OF DISMISSAL**

WHEREAS plaintiffs commenced this action against, *inter alia*, the New York State Board of Elections (the "State Board"); James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila, and Gregory P. Peterson, in their official capacities as Commissioners of the State board; Todd D. Valentine and Robert A. Brehm, in their official capacities as Executive Directors of the State Board ("State defendants"), challenging, *inter alia*, their practice and procedure for handling overvotes under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973;

WHEREAS plaintiffs and State defendants previously reached an agreement-in-principle to settle this matter and, accordingly, executed an Interim Standstill Agreement Pending Final Stipulation Of Settlement dated December 1, 2011 ("Interim Agreement");

WHEREAS counsel for plaintiffs and State defendants having conferred on the issue of reasonable attorneys' fees, expenses and costs, and reviewed applicable record evidence and documentation in support thereof; and

WHEREAS the parties desire to resolve this matter without the further expense, delay, inconvenience and uncertainty of protracted litigation;

NOW, THEREFORE, IT IS HEREBY STIPULATED, AGREED AND ORDERED as follows:

1. Subject to the terms of this stipulation, this action is dismissed with prejudice as against State defendants.

2. State defendants shall provide for the optical scan voting machines in use in the state to be upgraded so that each voter receives clear notice when the voter has overvoted. Specifically, the voting machines in use throughout New York State shall display the following overvote message, containing the exact language and substantially the same layout (the "Overvote Message"), as the overvote messages described in subparagraph 2a and 2b as follows:

- a. For any overvote cast on a DS-200 voting machine, the voting machine shall display the overvote message contained in Appendix A attached hereto.
- b. For any overvote cast on an ImageCast voting machine, the voting machine shall display the overvote message contained in Appendix B attached hereto.

3. State defendants shall endeavor in good faith to ensure that all optical scan voting machines that are upgraded in accordance with paragraph 2 of this stipulation are certified for use as soon as reasonably possible. If the upgrading and certification processes are not completed by September 1, 2012, State defendants shall notify plaintiffs on that date.

4. Once the voting machines are upgraded in accordance with paragraph 2 above, and certified for use in accordance with paragraph 3 above, State defendants shall use their best efforts to direct the county boards of election, and the New York City Board of Elections, to implement the new Overvote Message as soon as practicable.

5. State defendants shall endeavor in good faith to have all optical scan voting machines upgraded in accordance with paragraph 2 above, certified in accordance with paragraph 3 above, and fully implemented in accordance with paragraphs 4 above, in time for the 2012 General Election.

6. State defendants will notify plaintiffs' counsel by September 1, 2012 if they are unlikely to implement the terms of paragraphs 2 through 5 of this stipulation in time for the 2012 General Election. In that situation, State defendants shall work with plaintiffs in good faith to develop a temporary, alternative method to notify voters about overvoting, in a form that is reasonably consistent with the Overvote Message, before and during the 2012 General Election.

7. Plaintiffs and State defendants acknowledge that the changes in voting procedures in New York State pursuant to this stipulation are subject to preclearance pursuant to

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Both counsel for plaintiffs, the Brennan Center for Justice at New York University School of Law (the "Brennan Center"), and Jenner & Block LLP ("Jenner & Block"), agree not to seek attorneys' fees, expenses and costs in connection with Voting Rights Act § 5 preclearance, notwithstanding the payment set forth in paragraph 8 below. State defendants will submit an application for preclearance under Section 5 of the Voting Rights Act of 1965 to the United States Department of Justice within five (5) business days of this stipulation being so-ordered.

8. Within 120 days of receipt by counsel for State defendants of a copy of this fully executed stipulation so-ordered by this Court, State defendants shall pay co-counsel for plaintiffs the Brennan Center the sum of \$71,000, and shall pay co-counsel for plaintiffs Jenner & Block the sum of \$4,728.02.

9. The payments to be made pursuant to paragraph 8 above shall be in full satisfaction of all of plaintiffs' claims for attorneys' fees, expenses and costs in this action as against State defendants, with respect to both the Brennan Center and Jenner & Block, through and including the date that this stipulation is so-ordered.

10. Payment of the sums set forth in paragraph 8 is subject to the approval of all appropriate State officials pursuant to N.Y. Public Officers Law § 17.

11. Plaintiffs release and forever discharge State defendants, more specifically, the State Board (including but not limited to any units, subdivisions or bureaus thereof), and all individually-named State officials in their individual and official capacity, as well as their present, future and former agents, from any and all claims that were brought in this action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a), or that could have been brought at the time this action was filed to challenge the overvote message in use in New York under 42 U.S.C. § § 1983, 1988, 2201 and 2202; the N.Y. Election Law; the New York State Code of Rules & Regulations; and the United States Election Assistance Commission's Voluntary Voting System Guidelines. Plaintiffs and their counsel hereby release the State defendants from any and all claims for attorneys' fees, expenses and costs arising in connection with this action and incurred through and including the date this stipulation is so-ordered.

12. Nothing herein shall constitute an admission by any State defendant of any act or omission by any such State defendant that deprived plaintiffs of any right, or

of failing to perform any duty, under the constitutions, statutes, rules, regulations or other laws of the United States or the State of New York.

Dated: New York, New York BRENNAN CENTER FOR JUSTICE
February 10, 2012 AT NEW YORK UNIVERSITY
SCHOOL OF LAW

Attorneys for Plaintiffs

By:



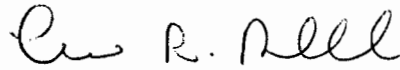
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(212) 998-6730

Dated: New York, New York JENNER & BLOCK LLP
February 10, 2012 **Attorneys for Plaintiffs**
By:

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Dated: New York, New York ERIC T. SCHNEIDERMAN
February 10, 2012 Attorney General of the
State of New York
Attorney for State Defendants
By:



LISA R. DELL
JOEL GRABER
Assistant Attorneys General
120 Broadway - 24th Floor
New York, NY 10271-0332
(212) 416-8645
FAX (212) 416-6009

Dated: Brooklyn, New York
February __, 2012

SO ORDERED:

U.S.D.J.

Appendix A

You filled in too many ovals in 6 contests

These votes will not count:

| In the contest for | You chose | You are allowed |
|-----------------------------------|------------------|------------------------|
| Governor/Lt Governor | 3 candidates | 1 |
| Representative in Congress | 2 candidates | 1 |
| State Senator | 2 candidates | 1 |

There are 3 other errors on this ballot. To proceed, press Next.

Next

**You filled in too many ovals in 3 more contests
These votes will not count:**

| In the contest for | You chose | You are allowed |
|------------------------|--------------|-----------------|
| Town Supervisor | 3 candidates | 1 |
| Town Clerk | 2 candidates | 1 |
| Member of Town Council | 5 candidates | 4 |

Previous

Press Previous to go back

Return your ballot

Press RETURN to get your ballot back and ask an inspector for a new one.

Return

Ignore message. Cast ballot

Ignore this message and cast your ballot with votes that will not count.

Cast

03/08/2011 03:47:00pm

You filled in too many ovals in 3 contests
These votes will not count:

| In the contest for | You chose | You are allowed |
|----------------------------|--------------|-----------------|
| Governor/Lt Governor | 3 candidates | 1 |
| Representative in Congress | 2 candidates | 1 |
| State Senator | 2 candidates | 1 |

Return your ballot

Press RETURN to get your ballot back and ask an inspector for a new one.


Return

Ignore message, Cast ballot

Ignore this message and cast your ballot with votes that will not count.

Cast

Appendix B





You filled in too many
ovals in this many
contests: 6


These votes will not count

Governor/Lt Governor
You chose 3
You are allowed 1

Representative in Congress
You chose 2
You are allowed 1

Ballots cast: 65535






You filled in too many
ovals in 4
more contests.


These votes will not count

State Senator
You chose 2
You are allowed 1

Town Supervisor
You chose 3
You are allowed 1

Ballots cast: 65535






You filled in too many
ovals in 2
more contests.

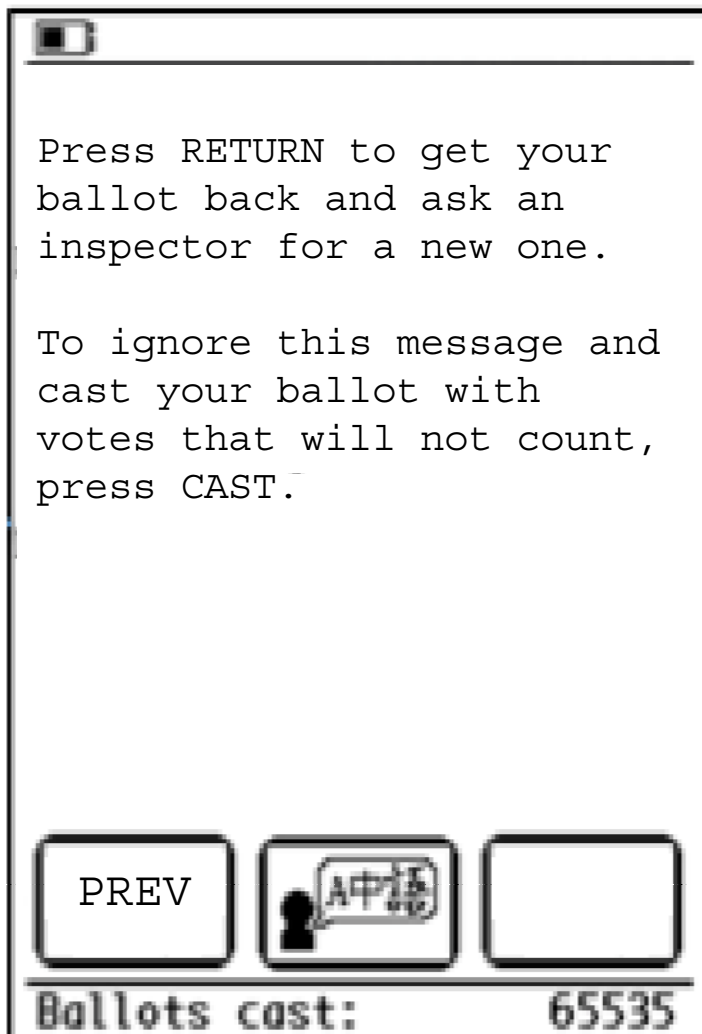
These votes will not count


Town Clerk
You chose 2
You are allowed 1

Member of Town Council
You chose 5
You are allowed 4

Ballots cast: 65535








You filled in too many
ovals in this many
contests: 1

These votes will not count

State Senator
You chose 2
You are allowed 1

Press RETURN to get your
ballot back and ask an
inspector for a new one.

Ballots cast: 65535

