

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

-----X
NAACP NEW YORK STATE CONFERENCE, :
as an organization and representative 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 - :

No. 10-cv-02950

NOTICE OF SERVICE OF
SUBPOENAS DUCES
TECUM

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, :
:

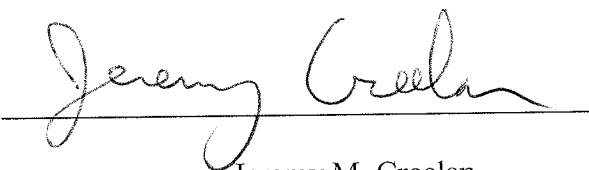
Defendants. :
:

-----X

Please take notice that pursuant to Federal Rule of Civil Procedure 45, Plaintiffs will
serve the attached subpoena duces tecum upon the Albany County Board of Elections; Erie

County Board of Elections; Monroe County Board of Elections; Nassau County Board of Elections; Onondaga County Board of Elections; and Suffolk County Board of Elections.

Dated: New York, New York
September 14, 2010

By:  /epb

Wendy Weiser
Lawrence Norden
Myrna Pérez*
Brennan Center for Justice
at New York University School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
(212) 998-6730

Jeremy M. Creelan
Eric P. Brown**
Prashant Yerramalli**
Joshua S. Sellers***
JENNER & BLOCK LLP
919 Third Avenue, 37th Floor
New York, New York 10022
(212) 891-1600

*Admission in New York pending

Attorneys for Plaintiffs

** Not admitted in Eastern District
of New York

*** Not admitted in New York

UNITED STATES DISTRICT COURT

for the

Northern District of New York

NAACP, New York State Conference, et al.

Plaintiff

v.

New York State Board of Elections, et al.

Defendant

Civil Action No. 10-cv-02950

(If the action is pending in another district, state where:
Eastern District of New York)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Albany County Board of Elections
32 North Russell Road, Albany, NY 12206

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

Place: Jenner & Block LLP
919 Third Avenue, 37th Floor
New York, NY 10022

Date and Time:

12/02/2010 1:00 pm

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 09/14/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Jeremy Creelan
Attorney's signature

1 epb

The name, address, e-mail, and telephone number of the attorney representing (name of party) NAACP, New York State Conference, et al., who issues or requests this subpoena, are:
Jeremy Creelan, Jenner & Block LLP, 919 Third Avenue, 37th Floor, New York, NY 10022

Civil Action No. 10-cv-02950

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

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

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

\$ _____.

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

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

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Contempt.* The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

SCHEDULE A

DOCUMENTS REQUESTED

Plaintiffs serve this subpoena on the Albany County Board of Elections because it is likely to possess information pertinent to the issues in this action as a result of its role in administering and recording the results of elections in New York State. Please produce the following documents related to the September 14, 2010 and November 3, 2010 elections in accordance with the definitions and instructions that appear below:

1. Documents sufficient to provide data showing the total number of votes cast in each contest, distinguishing between votes cast on the Election System & Software DS200 or the Dominion Voting Systems Corporation ImageCast (collectively the “Optical-scan Voting Machines”) and those cast by absentee and affidavit ballot. This data should provide the number of votes cast in each precinct, election district or Assembly district, whichever is the smallest geographic subdivision for which the Optical-scan Voting Machines record votes.

2. Documents sufficient to provide data showing the number of Overvotes cast (i.e. votes invalidated because of Overvoting) in each contest, distinguishing between votes cast on the Optical-scan Voting Machines and those cast by absentee and affidavit ballot. This data should provide the number of votes cast in each precinct, election district or Assembly district, whichever is the smallest geographic subdivision for which the Optical-scan Voting Machines record votes.

3. Documents sufficient to provide data showing the number of spoiled ballots cast in each precinct, election district or Assembly district, whichever is the smallest geographic subdivision for which the Optical-scan Voting Machines record votes.

4. Copies of spoiled ballots cast in each precinct, election district or Assembly district, whichever is the smallest geographic subdivision for which the Optical-scan Voting Machines record votes.

5. Documents sufficient to provide data showing voters' responses to the overvote message provided by the Optical-scan Voting Machines (i.e., how many voters, when confronted with the overvote message provided by the Optical-scan Voting Machines, chose to cast overvoted ballots and how many chose to have their ballot returned to them). This data should provide the number of votes cast in each precinct, election district or Assembly district, whichever is the smallest geographic subdivision for which the Optical-scan Voting Machines record votes.

6. Shapefiles, as defined in Definition #3 below, showing the geographic boundaries of each precinct, election district or Assembly district, whichever is the smallest geographic subdivision for which the Optical-scan Voting Machines record votes.

7. All documents prepared for poll workers, or individuals responsible for training poll workers, in connection with the administration of elections to be conducted using the Optical-scan Voting Machines, including training manuals, schedules, supervisor lists, FAQs, and guidelines.

8. All documents, including documentation of communications, regarding the testing or public demonstrations of the Optical-scan Voting Machines.

DEFINITIONS

1. "You" and "Your" mean the Albany County Board of Elections and persons employed by or acting on its behalf.

2. “Overvote” means the casting of more than the maximum permitted number of votes in a given electoral contest.

3. “Shapefiles” means geospatial vector data files used in conjunction with the computer program ArcGIS, having file extensions .shp, .sbx, .sbn, .prj, .shx., or .dbf.

INSTRUCTIONS

1. The obligations and rules of construction set forth in Federal Rule of Civil Procedure 45 are incorporated in these requests. A copy of Rule 45 sections (c), (d) and (e) is attached to the subpoena.

2. If paper copies are supplied in lieu of inspection of originals, all documents that cannot be copied legibly shall be produced for inspection in their original form.

3. To the extent documents are maintained in electronic formats, this request calls for production in electronic format. Documents maintained in electronic formats should be produced in their native formats as they currently exist.

4. If, in responding to the subpoena, you identify any ambiguity in construing a request, definition or instruction, please describe the matter deemed ambiguous and set forth the construction applied in responding to the subpoena.

5. If a document responsive to the subpoena has been transferred to the custody or control of another person or entity, please provide the name and address of such other person or entity and the date and circumstances of the transfer.

6. You may withhold from production in response to the subpoena any documents, including electronically stored information, that is protected by the attorney-client privilege provided you comply with Federal Rule of Civil Procedure 45(d)(2).