

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY OF NEW  
YORK STATE and WORKING FAMILIES  
PARTY,

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 Co-Executive Directors of the New York State  
Board of Elections

Defendants.  
-----X

10 CIV 6923 (JSR)  
ECF Case

**MOTION OF THE CITY  
ORGANIZATIONS OF THE  
NEW YORK INDEPENDENCE  
PARTY FOR LEAVE TO  
BRIEF AS *AMICI CURIAE***

The City Organizations of the New York Independence Party respectfully move for leave to file the Proposed Memorandum of Law of *Amici Curiae*, annexed hereto as Exhibit A. Annexed hereto as Exhibit B is the declaration of Cathy L. Stewart in support of this motion, and annexed hereto at Exhibit C is a Proposed Order.

The City Organizations of the New York Independence Party are interested in this litigation for the reasons set forth in the declaration of Cathy L. Stewart annexed as Exhibit B.

The City Organizations of the New York Independence Party respectfully seek leave to file an *amici curiae* brief in order to provide perspective from the vantage point of the Independence Party organizations of New York City and their members on the impact of New York Election Law Sec. 9-112(4) in light of the decision of defendants on how to treat over voting on the new optical scan voting system. The City Organizations

of the New York Independence Party believe that their *amici curiae* submission provides important perspective that is distinct from that provided in the parties' submissions and will assist the Court.

"There is no governing standard, rule or statute prescribing the procedure for obtaining leave to file an *amicus* brief in the district court." *Onondaga Indian Nation v. New York*, No. 97-CV-445, 1997 WL 369389, at \*2 (N.D.N.Y. June 25, 1997) (internal quotation marks omitted). Rather, the district court has broad discretion to permit the submission of *amicus* briefs in a given case. *See Zell/Merrill Lynch Real Estate Opportunity Partners Ltd. P'ship III v. Rockefeller Ctr. Props., Inc.*, No. 96 CIV. 1445 (JFK), 1996 WL 120672, at \*4 (S.D.N.Y. Mar.19, 1996). *See also Russell v. Bd. of Plumbing Exam'rs of the County of Westchester*, 74 F.Supp. 2d 349, 351 (S.D.N.Y. 1999) (noting that "[t]he Court has the discretion to determine the extent and manner of the participation of an *amicus*"). Given their experience in efforts to achieve political reform and in their status as New York's largest minor party, the City Organizations of the New York Independence Party are well qualified to offer assistance to the Court on the issues raised in its *amici curiae* brief.

WHEREFORE, the City Organizations of the New York Independence Party respectfully request that this Court enter an order in the form annexed hereto, and grant such other or further relief as the Court deems appropriate.

Dated: New York, New York  
September 29, 2010

/s/  
By: \_\_\_\_\_  
Harry Kresky

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New York, NY 10107  
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*Attorney for Amici Curiae  
City Organizations of the New York  
Independence Party*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY OF NEW  
YORK STATE and WORKING FAMILIES  
PARTY,

10 CIV 6923 (JSR)  
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Plaintiffs,

-against-

**MEMORANDUM OF LAW OF THE  
CITY ORGANIZATIONS OF THE  
NEW YORK INDEPENDENCE  
PARTY AS *AMICI CURIAE***

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; NEW YORK STATE BOARD  
OF ELECTIONS;

Defendants.

-----X

INTRODUCTION

The New York City organizations of the Independence Party (hereinafter “NYCIP”) submit this *amicus curie* brief in support of plaintiffs' motion for a preliminary injunction seeking to declare invalid New York Election Law Section 9-112(4) and the intended practice by defendants pursuant to it to award the vote of a voter who inadvertently votes for a candidate on more than one ballot line to the first ballot line on which the voter voted for that candidate. As ballot lines are ranked with the major parties first, followed by minor parties in order of their vote in the last gubernatorial election, plaintiffs and the NYCIP are prejudiced.

INTEREST OF AMICI

As is set forth in the declaration of Cathy L. Stewart, the NYCIP seeks to bring before the Court their views on the role played by New York State’s unique fusion voting system and its importance to the increasing number of voters who are disaffected from the two major parties.

The NYCIP respectfully submits that the actions of defendants challenged in this litigation undermine the integrity of the fusion system to the advantage of the major parties and to the detriment of the NYCIP, plaintiffs and the 2,962,519 million New York State voters who are not enrolled in a major party.<sup>1</sup>

The NYCIP consists of the duly constituted governing bodies of the Independence Party in Bronx, Kings, New York, Queens and Richmond counties, constituting the five boroughs of the City of New York. Some 105,238 New York City voters are enrolled in the Independence Party which has a statewide enrollment of 413,855. The next largest party in New York State is the plaintiff Conservative Party with an enrollment of 146,221 statewide and 20,151 in New York City.<sup>2</sup> The Independence Party is row C on the ballot as a result of its consistently having secured the highest vote for its candidate for governor of any minor party. Further, the Independence Party ran its own candidate for governor in 1998 and 2002.

Pursuant to Section 6-120(3) of the New York Election Law, the NYCIP has the right to allow a non-aligned candidate who is a member of another political party to run on the Independence Party line in citywide elections. *Conroy v. State Committee*, 10 N.Y.3d 896 (2008). The NYCIP exercised that authority in 2001, 2005 and 2009 to run Michael R. Bloomberg as its candidate for Mayor. In each of those years, Mr. Bloomberg also ran on the Republican Party line. In 2001 and 2009 the Independence Party provided Mr. Bloomberg's margin of victory securing 59,091 votes for him in 2001 and 150,073 in 2009.<sup>3</sup> Bloomberg's percentage of the vote on the Independence Party line was the highest for a cross-endorsed mayoral candidate on a minor party line since Newbold Morris polled 14.4% on the Liberal Party line in 1949.<sup>4</sup>

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<sup>1</sup> <http://www.elections.state.ny.us/EnrollmentCounty.html>

<sup>2</sup> <http://www.elections.state.ny.us/EnrollmentCounty.html>

<sup>3</sup> <http://vote.nyc.ny.us/results.html>

<sup>4</sup> Interview with Richard Winger of *Ballot Access News*.

In the case of *Independence Party of Richmond County v. Graham*, 332 F. Supp. 2d 690 (S.D.N.Y. 2004), app. dismissed, 413 F.3d 252 (2005), the Richmond County organization won the right to include nonaligned voters in its primaries. The NYCIP does not hew to a traditional minor party agenda, but has sought to give voice to the City's 751,442 nonaligned voters. Indeed, it supported nonpartisan municipal elections with full recognition that should they be adopted in New York City, it would lose their valuable ballot line.

### ARGUMENT

New York is one of 12 states that allow fusion voting for state office.<sup>5</sup> Under this system minor parties are able to use their ballot line to advance an agenda that is often distinct from those of the major parties. Historically, minor parties have tended to orient towards one or the other of the major parties. Thus, plaintiff Working Families Party has oriented towards the Democratic Party and seeks to influence it in a pro-labor direction, while plaintiff Conservative Party orients towards the Republican Party and seeks to move its agenda to the right. The NYCIP has used its growing strength in New York City politics to champion a reform agenda that includes nonpartisan municipal elections, nonpartisan administration of elections, nonpartisan redistricting, and same day voter registration. It has reached out strongly into the black, Latino and Asian communities to bring independent politics into these traditionally Democrat-aligned constituents. In this year's election party status is also being sought by the Green Party, the Freedom Party, Taxpayers Party, Rent is too Damn High Party, the Libertarian Party and Anti-Prohibition Party.

Fusion voting and the corresponding number and diversity of minor parties has greatly enriched New York's political environment. It has empowered voters to do more than simply chose one of the candidates offered by the major parties. It allows voters, in particular those not

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<sup>5</sup> *Id.*

aligned with a major party, to both contribute to the vote total of the candidate of their choice and to deliver a distinctive political message. The strength and clarity of the message depends on an accurate count of the votes cast on each party line. In the 2009 Mayoral election campaign workers for the Independence Party approached voters at the polls with the following message: “Mike Bloomberg is an independent and you can vote for him on the Independence Party line.” They added, “It will help us continue to grow the Independence Party, if you vote for him on Column C.” One hundred and fifty thousand New Yorkers (150,073 to be exact) did so. These voters not only helped re-elect the Mayor, but registered their desire for political reform and independent, nonpartisan governance. These benefits of fusion voting would be undermined if defendants are allowed to proceed to arbitrarily assign votes to major party lines.

In New York State the election commissioners on the State and county level are chosen by the leaders of the two major parties. New York State Constitution, Article II, Sec. 8, Election Law, Secs. 3-100, 3-200 and 3-204. Arguably, this helps insure that the decisions of the State and local Boards of Election do not favor one major party over another. Indisputably, it insures that those who administer our elections are less than sensitive to the rights of minor parties and their members and nonaligned voters. This is evident in the set of decisions that gave rise to this lawsuit. A State Board of Elections more representative of the State's voters would have insured that the voting machines were programmed so as not to negate votes cast on minor party lines. The new voting equipment could have been easily programmed to do so, by treating a vote cast for the same candidate on more than one line as an over vote, rejecting the ballot and allowing the voter to vote again. This is how a vote for two different candidates for the same office is supposed to be treated. A more representative Board of Elections would have publicized the

particular problems raised by Election Law Section 9-112(4) and sought and recommended a legislative corrective the problem.<sup>6</sup>

In the face of such less than “benign neglect,” plaintiffs have sought recourse to the federal district court. The NYCIP joins with them in requesting that the court exercise its civil rights jurisdiction to redress this deprivation of the rights of plaintiffs, the NYCIP and New York’s 2,962,519 minor party and non-aligned voters.

CONCLUSION

For all of the above reasons and those set forth in plaintiffs' submissions, it is respectfully submitted that the district court should grant plaintiffs' motion for a preliminary injunction.

Dated: New York, NY  
September 29, 2010

Respectfully submitted,

LAW OFFICE OF HARRY KRESKY

/s/

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by Harry Kresky  
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New York, NY 10107  
(212) 581-1516  
em: hkresky@harrykresky.com

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<sup>6</sup> As is set forth in the declaration of Cathy L. Stewart submitted herewith, representatives of the New York City Board of Elections attended a meeting of the executive committee members of the NYCIP organizations to demonstrate the new machines. While the situation generated by voting for more than one candidate was discussed by the representatives, no mention was made of the situation at bar, voting for a candidate on more than one line. And this was the case at a demonstration before a group of minor party leaders.



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SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY OF NEW  
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-against-

**DECLARATION IN SUPPORT  
OF MOTION OF THE CITY  
ORGANIZATIONS OF THE  
NEW YORK INDEPENDENCE  
PARTY FOR LEAVE TO  
BRIEF AS *AMICI CURIAE***

NEW YORK STATE BOARD OF ELECTIONS;  
JAMES A. WALSH, DOUGLAS A. KELLNER,  
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PETERSON, in their official capacities as  
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ROBERT A. BREHM, in their official capacities  
as Co-Executive Directors of the New York State  
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Defendants.

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I, Cathy L. Stewart, declare as follows:

1. I am the Chairperson of the New York County Independence Committee, the duly elected county committee of the Independence Party in Manhattan.
2. I make this declaration in support of the motion of the five duly constituted governing bodies of the Independence Party in Bronx, Kings, New York, Queens and Richmond counties, the five boroughs of the City of New York, to file a memorandum of law and otherwise participate as *amicus curiae* in this litigation.
3. These committees, to be collectively referred to as the "NYCIP," (New York City Independence Party) are The New York County Independence Committee of the Independence Party of the State of New York, The Bronx County Independence Committee of the Independence Party of the State of New York, The Richmond County Committee of the

Independence Party of the State of New York, The Queens County Independence Committee of the Independence Party of New York and The Kings County Independence Party County Committee of the Independence Party of the State of New York.

4. Each is an unincorporated association.

5. I make this declaration to explain to the Court the interest the NYCIP has in this litigation concerning the validity of New York Election Law Section 9-112(4) and the intended practice by defendants pursuant to it to award the vote of a voter who inadvertently votes for a candidate on more than one ballot line to the first ballot line on which the voter voted for that candidate.

6. The NYCIP seeks to bring before the Court their views on the role played by New York State's unique fusion voting system and its importance to the increasing number of voters who are disaffected from the two major parties.

7. They respectfully submit that the actions of defendants challenged in this litigation undermine the integrity of the fusion system to the advantage of the major parties and to the detriment of the NYCIP, plaintiffs and the 2,962,519 million New York voters who are not enrolled in a major party.<sup>1</sup>

8. New York is one of 12 states that allow Fusion voting.

9. Under this system minor parties are able to use their ballot line to advance an agenda that is often distinct from those of the major parties. Historically, minor parties have tended to orient towards one or the other of the major parties.

10. Thus, plaintiff Working Families Party has oriented towards the Democratic Party and seeks to influence it in a pro-labor direction, while plaintiff Conservative Party orients towards the Republican Party and seeks to move its agenda to the right.

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11. In this year's election party status is also being sought by the Green Party, the Freedom Party, Taxpayers Party, Rent is too Damn High Party, the Libertarian Party and Anti-Prohibition Party.

12. Some 105,238 New York City voters are enrolled in the Independence Party which has a statewide enrollment of 413,855. The next largest party in New York State is the plaintiff Conservative Party with an enrollment of 146,221 statewide and 20,151 in New York City.<sup>2</sup>

13. The NYCIP has used its growing strength in New York City politics to champion a reform agenda that includes nonpartisan municipal elections, nonpartisan administration of elections, nonpartisan redistricting, and same day voter registration.

14. The NYCIP has reached out strongly into the black, Latino and Asian communities to bring independent politics into these traditionally Democrat-aligned constituents.

15. The Independence Party is row C on the ballot as a result of its consistently having secured the highest vote for its candidate for governor of any minor party.

16. Further, unlike the other minor parties, the Independence Party ran its own candidate for governor in 1998 and 2002.

17. In the 2009 Mayoral election campaign workers for the Independence Party approached voters with the follow message: "Mike Bloomberg is an independent and you can vote for him on the Independence Party line." They added, "It will help us continue to grow the Independence Party if you vote for him on Column C." One hundred and fifty thousand New Yorkers (150,073, to be exact) did so.<sup>3</sup>

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<sup>2</sup> <http://www.elections.state.ny.us/EnrollmentCounty.html>

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18. These voters not only helped re-elect the Mayor, but registered their desire for political reform and independent, nonpartisan governance.

19. On September 2 of this year, representatives of the New York City Board of Elections attended a meeting of the executive committee members of the NYCIP to demonstrate the new machines. While the situation generated by voting for more than one candidate was discussed by the representatives, no mention was made of the situation at bar, voting for a candidate on more than one line. And this was the case at a demonstration before a group of minor party leaders.

20. As is more fully set forth in the proposed memorandum of law submitted herewith, without the relief sought by plaintiffs herein, the political power of the city organizations will be reduced and ability of voters to fully express their political preference, not just for a candidate, but for a party will be undermined.

21. And, of course, while unlikely, the failure to allow full tabulation of votes on the Independence Party line and those of the other plaintiffs in the upcoming gubernatorial election may cost them ballot status.

22. Our candidate for Governor, Andrew Cuomo, is also running on the Democratic Party and Working families Party lines.

I declare under penalty of perjury pursuant to 28 U.S.C. Sec. 1746 that the foregoing is true and correct.

Dated: New York, NY  
September 29, 2010

/s/

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CATHY L. STEWART

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