

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

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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, :
: No. 10-cv-2950 (FB) (RML)

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. :
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X

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO
COMPEL DEFENDANT STATE BOARD TO REQUEST CERTAIN ELECTION
INFORMATION FROM COUNTY BOARDS FOR PRESERVATION AND
PRODUCTION**

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Plaintiffs NAACP New York State Conference, the National Coalition on Black Civic Participation, Families United for Racial and Economic Equality, Vivian Bosier, Anita Burson and Sheila Duncan (collectively “Plaintiffs”) respectfully submit this Memorandum of Law in support of their Motion To Compel Defendant State Board to Request Certain Election Information from County Boards for Preservation and Production.¹

PRELIMINARY STATEMENT

Plaintiffs brought this action to challenge the decision by the State Board and City Board to program the State’s optical-scan voting machines in a way that dramatically increases the likelihood that voters will inadvertently cast “overvotes” that prevent their votes from being counted. As alleged in the Amended Complaint, the Defendants’ election process violates Section 2 of the Voting Rights Act because it will cause – and likely has caused – the disproportionate invalidation of minority voters’ ballots in “overvoted” contests.

In this motion, Plaintiffs challenge the State Board’s refusal to obtain basic election data from county boards of election and produce this data to Plaintiffs. The requested data – narrowly limited to include only the number of votes, overvotes, and voters’ responses to the offending overvote message on Election Day – are indisputably central to the Court’s ability to evaluate Plaintiffs’ claim. Nevertheless, the State Board has indicated that it will make no effort to collect this information from the county boards of election.

The State Board’s refusal is irrational and contrary to law. The State Board does not dispute its own authority to obtain the information – indeed, its counsel acknowledged at the Court’s recent conference that the State Board could request it from county boards if it chose to

¹ Defendants are the New York State Board of Elections (the “State Board”), James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila, Gregory P. Peterson, Todd D. Valentine, Robert A. Brehm, the New York City Board of Elections (the “City Board”), 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 (collectively “Defendants”).

do so. Nor could the State Board reasonably suggest otherwise: its statutory oversight over the county boards of election, its legal right to direct the county boards of election to collect and report precisely such data, and its practical ability to obtain it are well established.

In response to the State Board's failure to comply with its discovery obligations, Plaintiffs have attempted to obtain the information directly from each county board of elections, either by subpoena or by Freedom of Information Law ("FOIL") request. While responses have varied, the county boards have generally indicated that the information is within their possession. Obtaining it, however, would require Plaintiffs to engage in at least 57 separate negotiations, each of which could, in the end, require litigation to enforce either the subpoenas in this Court, or the demands of New York's FOIL law in other courts around the State. The case law is clear that Plaintiffs need not run such a burdensome and inefficient gauntlet to obtain information that is squarely within the State Board's control and can be easily obtained and produced.

Requiring the State Board to request this information from the county boards to comply with its federal discovery obligations would impose no burden on the State Board beyond that of requesting it from the county boards via email. The State Board requests information from county boards on a regular basis and cannot complain about doing so for this purpose.

Accordingly, Plaintiffs respectfully request that the Court grant this motion and "so order" the attached proposed order.

BACKGROUND

In implementing a voting system with the State's new machines, the State Board deliberately declined to adopt the available built-in safeguards that would protect against "overvoting."² See Am. Compl. ¶ 28. Protections against overvoting are expressly called for

² The result of an overvote is that the voter's vote for that contest is not counted. See N.Y. Elec. Law § 7-106 (ballot instructions); see also § 7-122 (same).

under the Help America Vote Act of 2002 (“HAVA”) and New York law, *see* 42 U.S.C. § 15481(a)(1)(A)(iii), N.Y. Elec. Law § 7-202(1)(d), and are crucial to preventing the disenfranchisement of voters. However, the ImageCast and DS200 machines now used throughout New York State have been configured so that they will *not* automatically return an overvoted ballot for correction. *See* Am. Compl. ¶ 31. Instead, the ImageCast and DS200 machines respond to ballots containing overvotes by displaying a confusing message that encourages voters to cast the ballot without correcting the overvote (referred to hereafter as the “‘overvote’ message”). *See id.*, Ex. A. As a result, determining how each voter responded to this message on Election Day – either by casting the ballot and thereby invalidating his or her vote for at least one contest, or by choosing to have his or her ballot returned for correction – is critical to assessing the discriminatory impact of the Defendants’ policy.

In an effort to preserve and obtain this critical information, Plaintiffs served document requests on Defendants on August 4, 2010. *See* Plaintiffs’ First Request For the Production of Documents dated Aug. 4, 2010 (“Document Requests”) (attached hereto as Exhibit A). Included among them was a request for “precinct-level” data regarding the results of the 2010 primary and upcoming general elections, including information about the total number of votes cast in each contest and the total number of overvotes cast in each contest. *See id.* ¶ 1. Precinct-level data is necessary to assess and demonstrate the disproportionate impact of Defendants’ overvote policy on African-American and Latino voters. Plaintiffs’ request was made prior to the 2010 primary and general elections, but expressly contemplated production of data relating to those elections as it became available. *See id.* ¶¶ 1, 13.

Out of an abundance of caution, Plaintiffs wrote to the State Board and City Board on August 26, 2010 to confirm that this information would be preserved and produced to Plaintiffs

in this matter. *See* Aug. 26, 2010 Letter to J. Graber (attached hereto as Exhibit B); Aug. 26, 2010 Letter to S. Kitzinger (attached hereto as Exhibit C). Once again, these letters specifically requested “precinct-level” data regarding the results of the 2010 primary and general elections, as well as information regarding voters’ responses to the overvote message. *Id.*

Defendants have not provided formal responses to these discovery requests. The City Board confirmed by email and orally that it would preserve the information requested. The State Board indicated, however, that (1) because of this year’s primary and general elections, it would be too burdensome to gather and produce any of the requested information until some unidentified future time, and that (2) at least with respect to the data regarding overvotes and voters’ responses to the “overvote” message, the State Board would not obtain such data from the county boards of election.

In order to expedite its access to and to preserve the needed information, and without waiving its right to obtain the information requested directly from the State Board, on September 14, 2010, Plaintiffs served subpoenas on six county boards of election seeking data relating to votes and overvotes cast, responses to the challenged overvote message, and other relevant information. *See* Notice of Service of Subpoena (Docket No. 8). Plaintiffs also served FOIL requests on county boards of election for each of the remaining 51 counties in New York State, excluding the counties in New York City. *See, e.g.,* FOIL Request (attached hereto as Exhibit D.) With these requests, Plaintiffs attempted to procure directly from the county boards of election (as non-parties) what they had previously requested from the State Board.

The responses of the county boards of election to Plaintiffs’ FOIL requests have varied, but Plaintiffs have yet to receive through the FOIL process data that is sufficient to show the number of overvotes by election district, assembly district or precinct, for even a single county,

although a small number of counties have made this basic information available on their websites, independent of the FOIL requests. Several counties have indicated that, although the number of overvotes is collected in the election-day log created by the machines, they do not normally run reports collecting this information and they are unwilling to do so in response to Plaintiffs' FOIL requests. Plaintiffs continue to receive responses and are following-up with many counties, but the responses received to date establish without doubt that this process will be needlessly inefficient, burdensome, and not likely to yield the information to which Plaintiffs are entitled to prove their claims. A representative sample of these responses are included here (without attachments) as Exhibit E.

The responses of those county boards of elections on which Plaintiffs served subpoenas are similarly problematic. Three of the six counties have served objections. While conversations with those counties have indicated that they are willing to work with Plaintiffs to provide certain data, each county appears to have a different appetite for providing this information. As such, relying on subpoenas has proven to be an uncertain and inefficient method to gather this crucial information. In the case of both the FOIL requests and these subpoenas, Plaintiffs anticipate that ancillary litigation would be necessary – in this Court and in State Supreme Courts across New York – to enforce these demands for data and obtain even a portion of the information to which Plaintiffs are entitled.

The Court held an initial conference with the parties on November 3, 2010. Prior to the conference, Plaintiffs presented Defendants with a proposed order ("Proposed Order") (attached to Plaintiffs' Notice of Motion as Exhibit A)³ directing the State Board to: (1) instruct the various county boards of election to provide certain information regarding overvotes and voters'

³ In light of the Court's order at the initial status conference, the Proposed Order now seeks production of the requested information at the time Defendants must respond to Plaintiffs' discovery requests, January 18, 2011.

responses to the “overvote” message to the State Board, and (2) to produce that information to Plaintiffs. At the conference, counsel for the State Board confirmed the State Board’s authority to procure the information from the county boards and, in fact, indicated that counsel for the State Board might recommend or suggest to the State Board that it request the information sought by Plaintiffs. Yet, contrary to the Court’s well-established authority to order parties to obtain and produce information within their control pursuant to Federal Rules of Civil Procedure 34 and 37, counsel for the State Board asserted that this Court was powerless to order the State Board to do so. Accordingly, the Court set a briefing schedule for the instant motion.

ARGUMENT

I. Defendant State Board Should be Compelled to Obtain and Produce the Information in the Proposed Order

A. The Data Requested is Discoverable Under Rule 26(b)

The information at issue here is indisputably relevant to Plaintiffs’ claims that the challenged overvote message disproportionately affects African American and Latino voters. This information includes: (1) the number of votes cast in each geographic subdivision; (2) the number of overvotes in each contest; and (3) voter responses to the overvote error messages challenged by Plaintiffs. *See* Document Requests ¶ 1 (attached hereto as Exhibit A); Aug. 26, 2010 Letter to J. Graber (attached hereto as Exhibit B). Courts have routinely recognized the importance of such data – and the statistical analyses that rely upon such data – in proving disparate impact upon minority groups. *See, e.g., Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 576 (2d Cir. 2003) (citing relevance of statistical evidence in disparate impact cases under various statutes); *see also Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275–77 (2d Cir. 1994) (citing expert testimony in Section 2 case, including

statistical analysis). Defendant State Board has not – and cannot – dispute the relevance of this information.

B. Defendant State Board Has “Control” Over the Data Under Rule 34

Defendant State Board cannot credibly claim that it does not have “control” over the requested information within the meaning of Rule 34. The State Board has the “legal right” as well as the “practical ability” to obtain the information requested by Plaintiffs. Rule 34 requires no more.⁴

Under Federal Rule of Civil Procedure 34(a), “a party may serve on any other party a request within the scope of Rule 26(b)” to produce “items in the responding party’s possession, custody, or control.” In the context of Rule 34, “control” is “construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought upon demand.” *S.E.C. v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 (S.D.N.Y. 2000); *see also Linde v. Arab Bank, PLC*, 262 F.R.D. 136, 141 (E.D.N.Y. 2009) (“Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand.”) (citation omitted); *United States v. Stein*, 488 F. Supp. 2d 350, 363 (S.D.N.Y. 2007) (“[E]very circuit to have considered the question has held that ‘control’ under the federal rules of procedure includes the legal right to obtain the documents in question.”).

⁴ Notably, for Plaintiffs to establish the State Board’s “control” over the requested information, Plaintiffs need not go so far as to establish the State Board’s control over *the county boards themselves*. Under Rule 34, “[a] party can have a legal right to obtain documents from another person or entity that the party does not otherwise control.” *Engel v. Town of Roseland*, No. 3:06-cv-430, 2007 WL 2903196, at *4 (N.D. Ind. Oct. 1, 2007). This Court has recently affirmed this general principal in *Leser v. U.S. Bank Nat’l Ass’n*, No. 09-CV-2362 (KAM)(ALC), 2010 WL 1945806 (E.D.N.Y. May 13, 2010), in which Judge Carter granted a motion to compel a party to produce documents of non-parties which the party did not “own” or “control.” Judge Carter reasoned that, “[a]lthough Plaintiff may not own or control the named entities, his affiliation with them in this instance gives him control over the requested documents as that term is defined in relation to discovery obligations.” *Id.* at *2. Here, although the State Board’s pervasive oversight and authority over the county boards are sufficient to show the State Board’s control over the county boards, Plaintiffs need only show the State Board’s legal right and practical ability to obtain the requested documents.

Under Rule 37, if a party fails or refuses to respond to document requests under Rule 34, the requesting party may move to compel the production of those documents. *See* Rule 37(a), (d); *White v. City of New York*, No. 08-cv-2238 (KAM)(MDG), 2009 WL 3233121, at *1 (E.D.N.Y. Oct. 2, 2009) (“[A] party may move to compel under Rule 37(d) for failure to respond to interrogatories and document requests”). Courts have routinely ordered production of documents in the “control” of a party, even where that party did not have actual possession of the documents at the time of the request. *See, e.g., Fairfield Fin. Mortgage Group v. Luca*, No. 06-cv-5962 (JS)(WDW), 2008 WL 5001105, at *4 (E.D.N.Y. Nov. 19, 2008) (ordering defendant to produce documents in possession of nonparty because “[d]ocuments are under a party’s control when it has the right, authority or practical ability to obtain them from a non-party.”); *Leser v. U.S. Bank Nat’l Ass’n*, No. 09-cv-2362 (KAM)(ALC), 2010 WL 1945806, at *1 (E.D.N.Y. May 13, 2010) (granting motion to compel over objection that party did not possess requested documents because Rule 34 “require[s] parties to produce items in their ‘possession, custody, and control,’ not simply those in their immediate possession.”).

In particular, courts have frequently done so where the information at issue was possessed by non-parties from which a government party had the legal right to obtain, and practical access to, the information. *See In re: Zyprexa Prod. Liab. Litig.*, 254 F.R.D. 50, 58 (E.D.N.Y. 2008) (ordering state defendants to obtain and produce medical records possessed by non-party insurance companies); *Compagnie Francaise d’Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co.*, 105 F.R.D. 16, 33–35 (S.D.N.Y. 1984) (noting that foreign government could be required to turn over records possessed by non-party agencies); *United States v. Stein*, 488 F. Supp. 2d 350, 364 (S.D.N.Y. 2007) (ordering government to obtain and produce non-party documents that government had legal right to obtain); *Dep’t of Econ. Dev. v.*

Arthur Andersen & Co. (U.S.A.), 139 F.R.D. 295, 301 (S.D.N.Y. 1991) (noting that the British Department of Economic Development could be required to produce documents from any agency or department of the British government).

Here, Defendant State Board indisputably has the “legal right to obtain the documents requested upon demand.”

To begin with, the State Board has the “authority and responsibility for the execution and enforcement of all laws relating to the elective franchise.” *López Torres v. New York State Bd. of Elections*, 411 F. Supp. 2d 212, 242 (E.D.N.Y. 2006), *aff’d*, 462 F.3d 161 (2d Cir. 2006), *rev’d on other grounds*, 552 U.S. 196 (2008) (quoting *In re: New York State Bd. of Elections*, 373 N.Y.S. 2d 420, 423 (N.Y. App. Div. 1975)); *see also* N.Y. Elec. Law § 3-104(1) (giving the State Board “jurisdiction of, and responsib[ility] for, the execution and enforcement of . . . statutes governing campaigns, elections and related procedures”). The State Board has the general “power and duty” to “issue instructions and promulgate rules and regulations relating to the administration of the election process.” N.Y. Elec. Law § 3-102(1). Under these broad grants of authority over elections, the State Board plainly possesses the right and ability to obtain election data from the county boards that administer those elections.

Further, New York Election Law expressly empowers the State Board to exercise broad oversight, as well as extensive investigatory and examination authority, over the county boards. For example, New York State Election law gives the State Board the power to “visit boards of elections, examine their procedures and records and direct that any such procedures be modified in any manner consistent with the provisions of this chapter.” N.Y. Elec. Law § 3-102(2). The county boards are also required by statute to submit reports to the State Board in a variety of areas. *See, e.g.*, N.Y. Elec. Law § 3-401(4) (requiring county boards to submit reports on

appointment of election coordinators); *id.* § 5-600(5) (requiring county boards to submit report of registration record discrepancies); *id.* § 5-614(7) (requiring county boards to report cancellation and removal actions from eligible voter list, and requiring State Board to establish format and timing for such reports); *id.* § 8-508(2)(g) (permitting State Board to require inclusion of information in voter “challenge report” that it deems appropriate).

The State Board’s publicly-available annual reports confirm its oversight control over the county boards of elections, and its ability to garner the requested data from the county boards. In its 2009 Annual Report, for example, the State Board expressly confirmed that “[t]he Board’s mission consists of the oversight of each County Board of Elections and the Board of Elections in the City of New York” *See* Cover Letter, N.Y.S. Board of Elections, 2009 Annual Report.⁵ The State Board has also routinely reported that its Election Operations and Services Unit has “one prime area of responsibility – the oversight and support of the State’s 62 County Boards of Elections.” 2003 Annual Report, at 11; *see also* 2008 Annual Report, at 10. In other words, any suggestion by the State Board in this matter that it does not have sufficient control over the county boards to obtain the requested data is directly contravened not only by State law but also by its own public statements.⁶

In the exercise of such control, New York Election Law also *requires* the State Board to “promulgate rules and regulations setting minimum standards for computerized record keeping

⁵ The annual reports for the New York State Board of Elections are available online at: <http://www.elections.state.ny.us/Publications.html> (last visited on November 17, 2010).

⁶ The responsibility of a State-level agency over local entities administering its mandate is well recognized in New York. *See Thomasel v. Perales*, 78 N.Y.2d 561, 570 (N.Y. 1991) (holding State Department of Social Services responsible for violation by New York City Department of Social Services, as the “local arm of the single State administrative agency”); *Tormos v. Hammons*, 687 N.Y.S.2d 336, 337 (N.Y. App. Div. 1999) (same). In *United States v. New York*, 255 F. Supp. 2d 73, 80 (E.D.N.Y. 2003), Judge Block held that the State Office of Temporary and Disability Assistance and the State Office for Aging were responsible for ensuring compliance by their local district offices, run by municipal governments, with the federal mandate of the National Voter Registration Act of 1993. Federal courts have reached the same conclusion with respect to other New York State agencies. *See id.* (citing cases).

systems maintained by county boards of elections.” N.Y. Elec. Law § 3-103(1). The State Board has, in turn, required that voting systems used by counties electronically record the very type of information over which it now claims to have no control, by requiring that voting systems are capable of, for example, “accumulating and reporting a count of the number of ballots tallied for an election district and votes cast for each candidate,” N.Y. Rules & Reg. § 6209.2(a)(10), and that the system provide “electronic records” that are “able to be exported for auditing or analysis on standards-based and/or information technology computing platforms,” *id.* § 6209.2(f)(13).

In addition to its oversight over the county boards, the State Board has also been granted broad investigatory authority over any matter relating to New York Election Law. The State Board has been granted authority to “conduct any investigation necessary to carry out the provisions of this chapter,” N.Y. Elec. Law § 3-102(3), to “study and examine the administration of elections within the state,” *id.* § 3-102(9), to “take all appropriate steps to encourage the broadest possible voter participation,” *id.* § 3-102(14), and to “perform such other acts as may be necessary to carry out the purposes of this chapter,” *id.* § 3-102(17).

These powers provide more than sufficient authority for the State Board to seek the requested information from the county boards. Needless to say, whether the State Board’s “overvote” message deprives certain voters of the franchise in contravention of federal and state law is a matter directly pertaining to the conduct of elections in New York and falls well within any one of the general or investigatory powers granted to the State Board – *e.g.*, to “study and examine the administration of elections within the state,” *id.* § 3-102(9), or to “perform such other acts as may be necessary to carry out the purposes of this chapter,” *id.* § 3-102(17). With respect to overvote protections specifically, as New York law requires the State Board to

implement such protections, *see id.* § 7-202(1)(d), the State Board is authorized to gather information relevant to such protections from the county boards as part of an “investigation necessary to carry out the provisions of this chapter,” *id.* § 3-102(3).

Not surprisingly, the State Board has regularly exercised its rights to obtain information and records from county boards of elections. Among other things, the State Board requires county boards to:

- submit reports of the number and accessibility of polling locations, N.Y. Rules & Reg. § 6206.3;
- submit reports of ballot accounting and absentee ballots, *id.* §§ 6210.10, 6211.11;
- prepare audit and other reports relating to prevention of errors and internal security, *id.* § 6210.11; and
- retain reports of computer-operator intervention and to produce reports on absentee ballots, *id.* § 6211.10.

In its annual reports, the State Board further describes “the collection, recording and validating of all election results” from county boards by the State Board’s Election Operations and Services Unit. *See* 2006 Annual Report, at 8; 2007 Annual Report, at 11; 2008 Annual Report, at 12; 2009 Annual Report, at 26. Beyond this routine data collection from county boards, moreover, the State Board’s annual reports have described “the collection of miscellaneous data and interim vote results, by way of gathering and sharing information from the various counties involved in several court-ordered impoundment matters.” 2006 Annual Report, at 8; *see also* 2009 Annual Report, at 17 (reporting collection of various types of information from the county boards, including, “samples of ballot layouts, notices to candidates, confirmation of pre-election testing, training materials, inspector manuals, voter education materials, and other documentation”).

The State Board has thus demonstrated in countless ways both its “legal right” and its “practical ability” – *i.e.*, its “control” within the meaning of Rule 34 – to collect the election data at issue. *See In re: NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007) (“[D]ocuments

are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action."), *quoted in In re: Zyprexa Prod. Liab. Litig.*, 254 F.R.D. 50, 58 (E.D.N.Y. 2008). It has not, and cannot, now deny such "control."

C. Granting Plaintiffs' Motion is the Most Efficient and Least Burdensome Means to Gather the Requested Information

Plaintiffs have already sought to procure the requested information through demands to the county boards of elections. As described above, these requests have been met largely with resistance and delay. As noted, Plaintiffs expect that ancillary litigation will be necessary in many counties simply to enforce those subpoenas and requests. The burden on both Plaintiffs and the courts in this State would be enormous and entirely unnecessary. Yet the State Board would have Plaintiffs continue to pursue these dozens of individual requests to county boards of elections in order to obtain data which the State Board itself could more effectively gather simply by directing those entities to provide it.

In *In re: Zyprexa Products Liability Litigation*, 254 F.R.D. 50 (E.D.N.Y. 2008), Judge Mann rejected precisely such a position taken by a government party. Five state agencies had "vehemently" opposed compliance with certain document requests seeking medical records, arguing that the plaintiffs should have instead subpoenaed numerous non-party insurance companies for those records. *Id* at 56. The Court concluded that documents in the companies' possession were "within the control" of the governmental agencies for the purpose of Rule 34 because those agencies had the legal and practical ability to obtain the documents. *Id.* at 58. While acknowledging that the plaintiffs had the ability to issue individual subpoenas to each insurance company, Judge Mann held that "it does not follow . . . that [the requesting party] should be required to do so where another lawful, more efficient means of obtaining the records

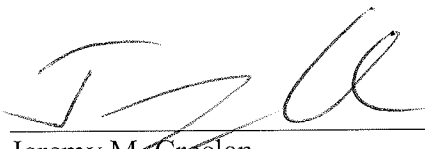
exists” and where requiring individual subpoenas “would complicate and prolong the discovery process.” *Id.*

While the burdens of trying to obtain the election data from each county board are virtually insurmountable, the State Board’s “burden” in requesting and producing the same data from the county boards is non-existent. Indeed, the Proposed Order asks no more of the State Board than that it send an email, letter, or memo to the county boards requesting information relevant to this case, obtain that information as it so often does when it requests data from the county boards, and then produce the results to Plaintiffs.⁷ In short, the State Board cannot cite any meaningful burden in opposition to this motion.

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion to compel should be granted and the Proposed Order accompanying this motion should be so ordered. Plaintiffs’ Proposed Order directs Defendant State Board to (1) obtain from the county boards of election precinct-level data showing the number of votes cast, the number of overvotes cast, and voters’ responses to the overvote message displayed by the new machines, and (2) produce this information to Plaintiffs by January 18, 2011.⁸

Dated: November 17, 2010

By: 

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⁷ Notably, much of the same election data will also be sought from the State Board in litigation that is now pending before Judge Rakoff in the Southern District of New York. *See Conservative Party of New York State v. New York State Board of Elections*, No. 10-cv-6293 (JSR) (S.D.N.Y.). In that case, two political organizations have challenged the State Board’s procedure for determining which political party receives credit for a vote, when a voter casts a vote for the same candidate more than once. Pending a motion to dismiss, discovery in the *Conservative Party* case is scheduled to commence on December 13, 2010, and will conclude on March 14, 2010.

⁸ If the City Board, as a party to this action, would expressly agree to provide the requested information to Plaintiffs directly, Plaintiffs would have no objection to excluding the City Board from the scope of the collection undertaken by the State Board.

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2010 the foregoing document was caused to be served via electronic notification via the Court's ECF system upon the following registered participants in the above captioned matter:

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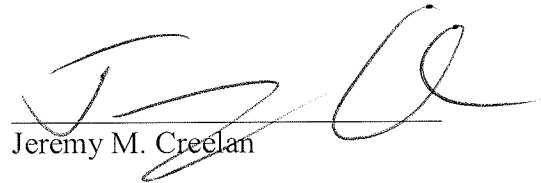
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