UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN DeROSIER,

Plaintiff,

-against-

DUSTIN M. CZARNY, ET AL.

Defendants.

NOTICE OF MOTION

118-CV-0919

(GLS/DEP)

PLEASE TAKE NOTICE that upon the accompanying Declarations of Thomas Connolly, and C. Harris Dague with all exhibits thereto, the accompanying Memorandum of Law, and upon all the pleadings and proceedings herein, Defendants Kosinski, Kellner, Spano and Peterson ("AG Defendants"), on December 27, 2018, will make a motion at the United States District Court, Northern District of New York on submission of the papers only, pursuant to Federal Rule of Civil Procedure 56 for an order granting AG Defendants' request for summary judgment dismissing Plaintiff's Complaint in its entirety. AG Defendants note that the schedule for Opposition and Reply papers has been agreed upon by the parties and set forth by stipulation at CM/ECF Dkt. No 14.

Dated: Albany, New York
October 26, 2018

BARBARA D. UNDERWOOD
Attorney General of the State of New York
Attorney for Defendants
The Capitol
Albany, New York 12224-0341
By: s/ C. Harris Dague
C. Harris Dague
Assistant Attorney General, of Counsel
Bar Roll No. 513292
Telephone: (518) 776-2621

To: Jeremy Colby, Esq. (Via CM/ECF)
Benjamin Yaus, Esq. (Via CM/ECF)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN DeROSIER,

Plaintiff,

-against- 18-CV-0919

GLS/DEP

DUSTIN M. CZARNY, ET AL.

Defendants.

STATEMENT PURSUANT TO RULE 7.1(a)(3)

Pursuant to Rule 7.1(a)(3) of the Local Rules of this Court, Defendants contend that as to the following material facts, no genuine issue exists:

1. The New York State Board of Elections ("Board") was established in 1974 as a bipartisan agency vested with the responsibility for administration and enforcement of all laws relating to elections in New York State. See www.elections.ny.gov/AboutSBOE.html (last accessed Oct. 9. 2018); see also N.Y.L. 1974, Ch. 604, §7; N.Y. Elec. Law §3-102.

2. The Board also regulates disclosure and contribution limits of a Fair Campaign Code intended to govern campaign practices. Id.

3. As part of its responsibilities, the Board offers assistance to local election boards and investigates complaints of possible statutory violations. Id.

4. In addition, the Board is charged with the preserving citizen confidence in the democratic process and enhancing voter participation in elections. Id.

5. The motivation to protect the New York voters from intimidation and undue influence at the polls and the overall sanctity, fairness and accuracy of elections continues to this day, through the work, oversight and guidance of the Board. Declaration of Thomas E. Connolly ("Connolly Decl."), sworn to October 26, 2018, ¶¶ 7, 11, 21.

6. Defendants Peter Kosinski and Douglas Kellner are Commissioners and Co-Chairs of the Board; Defendants Andrew Spano and Gregory Peterson are Board Commissioners (collectively "AG Defendants").

7. Subsequent to the Supreme Court's decision in Minnesota Voters Alliance v. Mansky. 138 S. Ct. 1876 (June 15, 2018) the Board issued the first of two guidance documents to the local and county boards of election, in advance of the 2018 primary and general elections. Connolly Decl. ¶13, Ex. 1 ("First Guidance").

8. The guidance was first sent to all local and county boards of election, including representatives from co-Defendant Onondaga County, on or about June 20, 2018. Id. ¶ 14.

9. The First Guidance addresses the Minn. Voters. decision noting that "per State Board of Elections Guidance, New York's Anti-Electioneering Statute (Election Law § 8-104(1)) is still valid". Id. at Ex. 1.

10. The guidance document goes on to explain why, noting: "Generally, a person cannot wear apparel that contains the name of a candidate, political party, independent body or direct reference to a ballot proposal on the ballot which contextually seeks votes.". Id.

11. The guidance further explains the narrow parameters of the electioneering prohibition: "Under New York Law, persons wearing clothing or donning buttons that include political viewpoints – i.e. support of the Second Amendment, Marriage Equality, Environmental Sustainability, Immigration Reform, Support for Voter ID Laws… do not violate New York's

electioneering prohibition unless the issue itself is unambiguously on the ballot in the form of a ballot proposal." Id.

12. The New York State Poll Worker Training Manual states, "**[v]oters** may wear political attire when casting their vote". Id. Ex. 2 at 11 (emphasis in original).

13. This portion of the manual is highlighted for the worker using a large exclamation point. Id.

14. The New York City Poll Worker's Procedure Manual, as based on Board guidance, includes instructions to poll workers that "poll watchers" are not permitted to "electioneer in any manner within 100 feet of any poll site entrance. This includes soliciting votes or distributing, wearing or carrying political literature, posters, banners or buttons, etc. showing a candidate or party's name." Id. Ex. 3 at 10.

15. Electioneering is defined in the manual as "efforts to encourage voters to vote a certain way…". Id. Ex. 3 at 86.

16. On October 3, 2018, in advance of the up-coming general elections, the Board re-issued guidance re-asserting the scope and application of the Anti-Electioneering Law. Id. Ex. 4.

17. The guidance states:

> This prohibition on political banners, buttons, and posters and placards applies only in the narrow context of the prohibition on electioneering within the polling place and the one hundred foot radial. That is to say, to constitute a violation of New York law a banner, button, poster or placard must constitute electioneering….
>
> An electioneering communication is one which seeks the election of a candidate or vote for a political party or independent body on the ballot within the poll site…Accordingly, a violation…must contain the name of a candidate, political party, independent body or direct reference to a ballot proposal on the ballot which contextually seeks votes….
>
> New York's anti-electioneering law was intended to prevent the political

campaigns from intruding into the polling place. It was not designed to prohibit political expression generally. New York has long interpreted its anti-electioneering law as not prohibiting political messages. Id.

Dated: Albany, New York
October 26, 2018

BARBARA D. UNDERWOOD
Attorney General of the State of New York
Attorney for AG Defendants
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By: s/ C. Harris Dague
C. Harris Dague
Assistant Attorney General, of Counsel
Bar Roll No. 513292
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN DeROSIER,

Plaintiff,

-against-

DUSTIN M. CZARNY, ET AL.

Defendants

DECLARATION OF THOMAS E. CONNOLLY

18-CV-0919

(GLS/DEP)

THOMAS E. CONNOLLY, on the date noted below and pursuant to §1746 of title 28 of the United States Code, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

1. I am the Director of Election Operations for the New York State Board of Elections (the "Board" or "BOE"). I have held this position since 2017, and before that was the Deputy Public Information Officer for the New York State Board of Elections. All told, I have served at the New York State Board of Elections more than seven years. In my capacity as Director of Election Operations I am responsible for the oversight of the Elections Operations Unit of the New York State Board of Elections ("Unit"). Among other things, the Unit provides advice and furnishes training materials to County Boards of Elections in relation to the conduct of elections, including election day operations at poll sites. I am a not a named party to this action.

2. I submit this Declaration in support of Defendants Peter Kosinski, Douglas Kellner, Andrew Spano and Gregory Peterson's (collectively "AG Defendants") motion for summary judgment. The matters contained in this Declaration are true to my knowledge, except as to those matters alleged on information and belief and, and as to those matters, I believe them to be true.

3. Peter Kosinski and Douglas Kellner are Commissioners and Co-Chairs of the Board; Defendants Andrew Spano and Gregory Peterson are Board Commissioners.

4. The Board was established in 1974 as a bipartisan agency vested with the responsibility for administration and enforcement of all laws relating to elections in New York State. *See* L. 1974 c. 604; Election Law § 3-102; www.elections.ny.gov/AboutSBOE.html (last accessed Oct. 9. 2018).

5. The Board also regulates disclosure and contribution limits and administers a Fair Campaign Code intended to govern certain campaign practices. Id.

6. As part of its responsibilities, the Board offers assistance to local election boards and investigates complaints of possible statutory violations. Id.

7. In addition, the Board is charged with the preserving citizen confidence in the democratic process and enhancing voter participation in elections. Id.

8. New York elections are subject to the mandate of the New York State Election Law, which is codified at N.Y. Elec. Law §§1-100, et. seq. (Arts. 1 - 17).

9. Article 8 of the law governs the specific "conduct of elections". Id. This includes, details regarding the dates and hours of voting (§8-100), organization, set up and restrictions at the polls and polling places (§8-102, §8-104), and educational opportunities available at polling places (§8-106).

10. Section 8-104(1) includes a prohibition on electioneering conduct in and around the polling place.

11. One of the Board's primary goals in every election cycle is to ensure a safe and fair polling place so that all eligible New York voters can cast their ballot free from intimidation, undue influence and corruption, so as to protect the overall sanctity, fairness and accuracy of elections.

12. The Board achieves this goal, at least in part, by providing the local and county boards of election with guidance regarding the administration of §8-104(1)'s Anti-Electioneering provisions.

13. For example, subsequent to the Supreme Court's decision in Minnesota Voters Alliance v. Mansky the Board issued the first of two guidance documents to local and county boards of election, in advance of the 2018 primary and general elections. See Ex. 1 ("First Guidance").

14. The guidance was first sent to all local and county boards of election, including representatives from co-Defendant Onondaga County, on or about June 20, 2018.

15. The guidance document explains that §8-104(1) is limited in its scope to encompass only a prohibition on electioneering conduct related to a candidate or ballot proposal on the election day ballot. The provision is not a general ban on the donning of political apparel, buttons, placards or posters. Id.

16. To this end the guidance document specifically states that "under New York Law, persons wearing clothing or donning buttons that include political viewpoints – i.e. support of the Second Amendment, Marriage Equality, Environmental Sustainability, Immigration Reform, Support for Voter ID Laws.... do not violate New York's electioneering prohibition unless the issue itself is unambiguously on the ballot in the form of a ballot proposal." Id.

17. In addition to guidance documents provided by the Board as contained in Exhibit 1, the Board also issues training materials to the local and county boards to assist with the training of polling place workers.

18. For example, the Board published and provided to the counties the New York State Poll Worker Training Manual. Ex. 2. With respect to the issue of polling place attire for voters or poll watchers the manual states, "**[v]oters** may wear political attire when casting their vote". Id. at pg. 11 (emphasis in original).

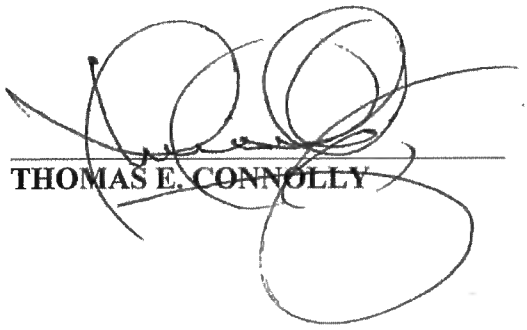
19. Similarly, the New York City Poll Worker's Procedure Manual, as based on Board guidance, includes instructions to poll workers that "poll watchers" are not permitted to "electioneer in any manner within 100 feet of any poll site entrance. Ex. 3 at 10. This includes soliciting votes or distributing, wearing or carrying political literature, posters, banners or buttons, etc. showing a candidate or party's name." Id. Electioneering is defined in the manual as "efforts to encourage voters to vote a certain way…". Id. at 86.

20. On October 3, 2018, in advance of the up-coming general elections, the Board re-issued guidance re-asserting the scope and application of the Anti-Electioneering Law. Ex. 4 ("Second Guidance"). The guidance states:

> This prohibition on political banners, buttons, and posters and placards applies only in the narrow context of the prohibition on electioneering within the polling place and the one hundred foot radial. That is to say, to constitute a violation of New York law a banner, button, poster or placard must constitute electioneering…An electioneering communication is one which seeks the election of a candidate or vote for a political party or independent body on the ballot within the poll site…Accordingly, a violation…must contain the name of a candidate, political party, independent body or direct reference to a ballot proposal on the ballot which contextually seeks votes…

21. New York's anti-electioneering law, as codified at §8-104(1), was intended to prevent the political campaigns from intruding into the polling place. It was not designed to prohibit political expression generally. New York has long interpreted its anti-electioneering law as not prohibiting political messages but as guarding against ballot-specific electioneering on election day.

Albany, N.Y.
October 25, 2018



THOMAS E. CONNOLLY

EXHIBIT 1

McCann, William (ELECTIONS)

From:	ele.sm.CoExeDir
Sent:	Wednesday, June 20, 2018 9:18 AM
To:	Brehm, Robert (ELECTIONS); Valentine, Todd (ELECTIONS)
Cc:	Quail, Brian (ELECTIONS); Galvin, Kimberly (ELECTIONS); Cartagena, Nicholas (ELECTIONS); McCann, William (ELECTIONS); Connolly, Thomas (ELECTIONS); Lovullo, Brendan (ELECTIONS); Couser, Cheryl (ELECTIONS); Conklin, John (ELECTIONS); Cross, William D (ELECTIONS)
Subject:	Apparel at Poll Site Guidance

Dear Commissioners and Directors:

As you may know, the United States Supreme Court has just recently held in *Minnesota Voters Alliance v Mansky* that Minnesota's law banning "political" apparel at poll sites was unconstitutional.

This has no direct impact on New York law, as our law, prohibits "electioneering" (meaning statements for, or against, a candidate or referendum on the ballot). A similar portion of the Minnesota law was found by the Supreme Court to be valid.

In light of the *Minnesota* decision and an impending primary on June 26, 2018, what follows is a brief review of New York's law on the subject of electioneering.

New York Law

Election Law § 8-104 (1) prohibits "electioneering within the polling place, or in any public street, within a one hundred foot radial" from the designated entrances to a polling place. The statute further provides that "no political banner, button, poster or placard shall be allowed in or upon the polling place." *See also* Election Law §§ 5-206 (9) (prohibiting electioneering at local registration); 17-130 (4) (providing for electioneering as a misdemeanor).

This prohibition on "political banner[s]," "button[s]," and "poster[s] and placard[s]" applies only in the narrow context of the prohibition on "electioneering within the polling place" and the "one hundred foot radial." That is to say, to constitute a violation of New York law a banner, button, poster or placard must constitute "electioneering."

An "electioneering" communication is one which seeks the election of a candidate or a vote for a political party or independent body on the ballot within the poll site. Accordingly, a violation of New York's prohibition on electioneering banners, buttons, posters and placards typically must contain the name of a candidate, political party, independent body or direct reference to a ballot proposal on the ballot which contextually seeks votes.

Application of New York Law to Political Apparel

Persons wearing clothing or donning buttons that include political viewpoints – i.e. support of the Second Amendment, Marriage Equality, Environmental Sustainability, Immigration Reform, Support for Voter ID Laws— do not violate New York's electioneering prohibition unless the issue itself is unambiguously on the ballot in the form of a ballot proposal.

New York's anti-electioneering law was intended to prevent the political campaigns from intruding into the polling place. It was not designed to prohibit political expression generally. New York has long interpreted its anti-electioneering law as not prohibiting political messages. "Voters may wear political attire when casting their vote. After casting their vote, all voters must leave the polling site." *New York Poll Worker Training Program*, p.11 (rev. 2010). The *New York City Basic Poll Worker Manual* similarly defines electioneering as "efforts to encourage voters to vote a certain way and includes distributing, wearing or carrying political literature, posters, banners or buttons or soliciting votes." P. 86.

Please contact us with any questions.

Robert A. Brehm
Co-Executive Director
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40 North Pearl Street, Suite 5
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40 North Pearl Street, Suite 5
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518-474-6236 todd.valentine@elections.ny.gov

Minnesota Voters Alliance v Mansky

- The Court held that a Minnesota law regulating voters' political attire violates the First Amendment.
- The Court found that Minnesota's law was too vague. Any apparel with a political message could have been banned under the Minnesota law.
- Per State Board of Elections Guidance, New York's Anti-Electioneering Statute (Election Law § 8-104 (1)) is still valid.
- Generally, a person cannot wear apparel that contains the name of a candidate, political party, independent body or direct reference to a ballot proposal on the ballot which contextually seeks votes.
- Under New York Law, persons wearing clothing or donning buttons that include political viewpoints – i.e. support of the Second Amendment, Marriage Equality, Environmental Sustainability, Immigration Reform, Support for Voter ID Laws....do not violate New York's electioneering prohibition unless the issue itself is unambiguously on the ballot in the form of a ballot proposal.

EXHIIBIT 2

NEW YORK STATE
Poll Worker Training Program

Student

Last Revised: 06.22.10

Lesson 102.3 What to Wear

It is election day and you are ready to serve at the polls, but what are you allowed to wear and bring? This lesson identifies the appropriate attire to wear at a polling site.

Acceptable Attire

On election day, poll workers should dress comfortably, but tastefully.

- Men are encouraged to wear collared shirts
- Women may wear Capri pants or slacks
- Patriotic clothing that does not suggest political affiliation, candidate, or issue is acceptable

Unacceptable Attire

The following items of clothing are not appropriate to wear:

- Jeans
- Shorts
- Political or campaign items of any type
- Anything that suggests a political party affiliation
- Anything that promotes a candidate or an issue
- Perfumes or aftershave, which may affect sensitive people

- ***Voters*** may wear political attire when casting their vote.
- After casting their vote, all voters must leave the polling site.

EXHIBIT 3

Board Of Elections In The City Of New York

BASIC POLL WORKER MANUAL

2016/2017 CERTIFICATION PERIOD

v. 2016A

IN CASE OF EMERGENCY:
In case of an emergency evacuation, follow the instructions of the Police Officer and Coordinator and go to the emergency meeting place posted at poll site entrances.

Poll Watchers, Observers and Media

Poll Watchers CAN:

- Arrive at 5:00 a.m. before the unlocking and examination of any voting machine to verify no votes have been cast and that the ballot boxes and ballot bin liner cases are empty.
- Compare ballot to sample ballot poster.
- Examine the Voter Registration List as long as they do not interfere with the Inspectors or election proceedings.
- Observe the closing of the polls and the return of canvass.
- Challenge individual voters on the basis of signature authenticity, residence, multiple voting, or qualification to vote. See "Voter is Challenged" in the IF/THEN charts for ED Inspector Serving the Voters.
- Report possible violations to the Coordinator, Inspector, Police Officer, or Board of Elections.

Poll Watchers CANNOT:

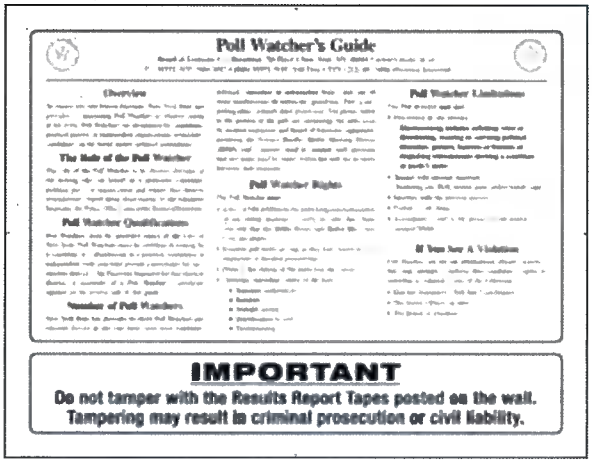
- Interfere with the election process.
- Electioneer in any manner within 100 feet of any poll site entrance. This includes soliciting votes or distributing, wearing or carrying political literature, posters, banners or buttons, etc. showing a candidate or party's name.
- Tamper with election materials including any posted official signs and/or results tape.
- Protest a vote ruling.
- Accompany a voter to the privacy booth, BMD, or scanner.

Examples of "Interfering with the election process":

- Talking to poll workers while voters are present
- Talking to voters who are voting
- Carrying on any conversation that may create a distraction or disturbance
- Electioneering

If a Poll Watcher Breaks a Rule:

- Show them the rules posted at the entrance of the poll site and remind them of the specific rule they are violating.
- If the poll watcher refuses to comply with the rules, the Coordinator should call the Borough Office.
- If necessary the Police Officer can be asked for assistance.


Poll Watcher's Guide

IMPORTANT

Do not tamper with the Results Report Tapes posted on the wall. Tampering may result in criminal prosecution or civil liability.

Glossary

Election Day Team – consists of all the poll workers, police, AD Monitors, and others working together to ensure voters' rights to vote.

Electioneering – efforts to encourage voters to vote a certain way and includes distributing, wearing or carrying political literature, posters, banners or buttons or soliciting votes. Electioneering is prohibited within 100 feet of the poll site entrance.

Election Night Reporting (ENR) – Coordinator uploads PMDs into tablet to transmit results to Board of Elections.

Election Security Code – password used to open the polls on the scanner. Located in Scanner Police Envelope

Emergency Ballot Procedure – goes into effect when all of the scanners at a poll site break down. Voters place their scannable ballots into the scanner's Emergency Ballot Box slot. Special procedures are used on how to handle these ballots at closing.

Excess Emergency Ballot – extra ballots that are left over at the end of counting during Emergency Ballot procedures.

Exit Polls – voters are asked how they voted AFTER exiting the polls.

F

Floor Plan – (see Poll Site Floor Plan).

G

General Election – any registered voter may vote in this election regardless of party.

Grey Transport Bag – canvas bag containing the Voter Registration List, Return of Canvass and Street Locator by ED. At closing, the Voter Registration List and any other secure election documents must be sealed and returned in this bag. Located in ED Supply Cart.

H

Hand Tally – a hand count of votes cast.

HAVA – Help America Vote Act that addresses accessibility of the voting process.

HAVA ID Codes – are listed on the front of the Voter Registration list. Indicates the code an inspector must enter in the registration list when a voter is required to provide ID.

I

ID Requirements – ONLY voters with "ID REQ." next to their name on the Voter Registration List are required to show ID when voting for the first time.

Information Clerk – poll worker greeting voters at entrance and directing them to the correct ED table or poll site.

Information Clerk Envelope – contains supplies and instructions. Located in the lowest ED/AD Supply Cart.

Information Clerk Handbook – contains job procedures and comes in Information Clerk Supply Envelope. Located in the lowest ED/AD Supply Cart.

Inside Signage – posted in Poll Site by Information Clerk. Located in Inside Signage Supply Envelope in the lowest ED/AD Supply Cart.

Interpreter – poll worker who assists non-English speakers by translating information provided by other poll workers, or on the ballot, in mandated languages.

Interpreter Journal – contains forms used to tally the number of voters assisted during the day and record other questions. Located in the Interpreter Supply Envelope.

Interpreter Journal Return Envelope – used to return all journal pages to the Coordinator at close of polls. Located in the Interpreter Journal.

EXHIBIT 4

Brehm, Robert (ELECTIONS)

From:	ele.sm.CoExeDir
Sent:	Wednesday, October 3, 2018 9:36 AM
To:	Brehm, Robert (ELECTIONS); Valentine, Todd (ELECTIONS)
Cc:	Quail, Brian (ELECTIONS); Galvin, Kimberly (ELECTIONS); Cartagena, Nicholas (ELECTIONS); McCann, William (ELECTIONS); Connolly, Thomas (ELECTIONS); Lovullo, Brendan (ELECTIONS); Couser, Cheryl (ELECTIONS); Conklin, John (ELECTIONS)
Subject:	Apparel at Poll Site Guidance Reminder

Dear Commissioners and Directors:

As you may know, the United States Supreme Court recently held in *Minnesota Voters Alliance v Mansky* that Minnesota's law banning "political" apparel at poll sites was unconstitutional.

This has no direct impact on New York law, as our law prohibits "electioneering" (meaning statements for, or against, a candidate or referendum on the ballot). A similar portion of the Minnesota law was found by the Supreme Court to be valid.

In light of the *Minnesota* decision and the up-coming General Election on November 6, 2018, what follows is a brief review of New York's law on the subject of electioneering.

New York Law

Election Law § 8-104 (1) prohibits "electioneering within the polling place, or in any public street, within a one hundred foot radial" from the designated entrances to a polling place. The statute further provides that "no political banner, button, poster or placard shall be allowed in or upon the polling place." *See also* Election Law §§ 5-206 (9) (prohibiting electioneering at local registration); 17-130 (4) (providing for electioneering as a misdemeanor).

This prohibition on "political banner[s]," "button[s]," and "poster[s] and placard[s]" applies only in the narrow context of the prohibition on "electioneering within the polling place" and the "one hundred foot radial." That is to say, to constitute a violation of New York law a banner, button, poster or placard must constitute "electioneering."

An "electioneering" communication is one which seeks the election of a candidate or a vote for a political party or independent body on the ballot within the poll site. Accordingly, a violation of New York's prohibition on electioneering banners, buttons, posters and placards typically must contain the name of a candidate, political party, independent body or direct reference to a ballot proposal on the ballot which contextually seeks votes.

Application of New York Law to Political Apparel

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New York's anti-electioneering law was intended to prevent the political campaigns from intruding into the polling place. It was not designed to prohibit political expression generally. New York has long interpreted its anti-electioneering law as not prohibiting political messages. "Voters may wear political attire when casting their vote. After casting their vote, all voters must leave the polling site." *New York Poll Worker Training Program*, p.11 (rev. 2010). The *New York City Basic Poll Worker Manual* similarly defines electioneering as "efforts to encourage voters to vote a certain way and includes distributing, wearing or carrying political literature, posters, banners or buttons or soliciting votes." P. 86.

Please contact us with any questions.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN DeROSIER,

Plaintiff,

-against-

DUSTIN M. CZARNY, ET AL.

Defendants.

DECLARATION

18-CV-0919

GLS/DEP

C. Harris Dague, on the date noted below and pursuant to Section 1746 of title 28 of the United States Code, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

1. I am Assistant Attorney General for the State of New York and appear in this action on behalf of Barbara D. Underwood, Attorney General for the State of New York, the attorney for Defendants Peter Kosinski, Douglas Kellner, Andrew Spano and Gregory Peterson ("AG Defendants") in this action.

2. I make this Declaration in support of AG Defendants' Motion for Pre-Answer Summary Judgment.

3. Annexed hereto and incorporated herein as Exhibit 1 is a true and correct copy of selections from the Public Papers of NY Governor David B. Hill, 1890, Annual Message, State of NY Executive Chamber, Jan. 7, 1890.

4. Annexed hereto and incorporated herein as Exhibit 2 is a true and correct copy of 7 Jud. Not. 21, Judicial Notice, Summer 2011, "Ballot Reform and the Election of 1891", Sheridan, David.

5. Annexed hereto and incorporated herein as Exhibit 3 is a true and correct copy of NY History, Vol. 42, No. 3 (July 1961), "The Politics of Ballot Reform in NY 1888-1890", Bass, Herbert.

6. Annexed hereto and incorporated herein as Exhibit 4 is a true and correct copy of selections from NY Senate Minority Report, No. 26, Jan. 31, 1890, Sens. Jacob Cantor & W.L. Brown.

7. Annexed hereto and incorporated herein as Exhibit 5 is a true and correct copy of NY Senate Dissenting Report, No. 28, Jan. 31, 1890, Sen. Norton Chase.

Albany, NY
October 26, 2018

s/ C. Harris Dague
C. Harris Dague
Bar Role # 513292

EXHIBIT 1

PUBLIC PAPERS

OF

GOVERNOR HILL,

1890.

ANNUAL MESSAGE.

STATE OF NEW YORK.

EXECUTIVE CHAMBER,

ALBANY, *January* 7, 1890.

To the Legislature:

You begin to-day a new period of law-making, confronted with responsibilities inherited from previous Legislatures and facing public questions well deserving your careful consideration and your intelligent disposition. Some of these I desire to present to your attention, bespeaking for them that faithful and impartial deliberation which a proper sense of official responsibility demands, and hoping that their discussion may have some influence in securing your wise action. I trust that they will all be approached in that spirit which seeks to render the best service to the people who have honored us with their confidence.

ENUMERATION AND APPORTIONMENT.

It will be the first duty of the Legislature to provide for an enumeration of the inhabitants of the State. This duty is first and paramount to all others, because it is an obligation

Members of Assembly, while New York, with a population sixteen times as great, has only eight times as many Assemblymen. Cattaraugus county, with probably not more than 67,000 inhabitants, is represented by two members, while Erie county, with four times as many inhabitants, is represented by only five members. The counties in which the cities of New York, Brooklyn, Troy, Albany, Syracuse, Rochester and Buffalo are situated comprise, by a safe estimate, fifty-three per cent. of the population of the State, yet their representation in the Assembly is only forty-two per cent. of the whole. Under a fair apportionment New York would be entitled to thirty-three Members of the Assembly, instead of twenty-four, and Brooklyn would have seventeen instead of twelve. The section of the State below the Harlem river would be represented by fourteen Senators instead of eleven, while the city of Buffalo and Monroe county would each have a Senator of its own.

Upon the growth and prosperity of its cities depend in a large degree the influence and importance of the State. To hamper and check their growth by denying them fair representation in the Legislature is political tyranny unworthy of patriotic men.

Electoral Reform.

The attention of the Legislature is again urged to the desirability of some changes in the laws relating to our system of elections. Excellent as these laws now are, surpassing in the scope and exactness of their requirements the statutes of most other States, they have been found insufficient to protect the secrecy and purity of suffrage. We have election boards, equitably constituted, in which

all parties are represented; our ballots are all required to be of white paper and of specified uniform type, caption and indorsement; no marks are permitted thereon to distinguish one ballot from another; each party is entitled to watchers and challengers; the provisions for a fair count are satisfactory and ample; the guarantees for securing prompt and accurate returns are adequate; tumults and disturbances around the polls are guarded against and are of rare occurrence; and every voter, not subjected to intimidation, has a perfect right and the fullest opportunity to cast an absolutely secret ballot if he so desires. Yet in spite of these excellent provisions our laws do not reach the two great evils which attend our elections — intimidation and corruption. These flourish unchecked, bringing shame upon our State, rendering our elections a mockery and threatening even the integrity and existence of our political institutions. It is, indeed, a sad allegation, which is made and not denied, that in some parts of our State at the recent Presidential election corruption was so unrestrained that the scenes at the polls resembled an auction more than an election; and that in other places intimidation was so prevalent and undisguised, particularly at some of our manufacturing centers, that employes were virtually driven to the polls and were actually instructed by their employers as to what tickets they should vote No public service can be more patriotic than that which seeks to guard suffrage from such abuses.

It is conceded by good citizens everywhere, I think, that all legislation intended to improve our election laws should have for its main purpose the correction of these two evils — corruption and intimidation. All other objects sought to be attained are of subordinate importance and

should not be permitted to delay or prevent the accomplishment of this great reform. To the methods which are suggested the Legislature will do well to give careful consideration, adopting that which, free from constitutional and other proper objections, offers the simplest and most practicable remedy for the existing evils.

Many well-meaning citizens and political associations, impressed by the necessity for some remedial legislation, are just now urging the adoption of what is known as the Australian system of voting, and apparently believe that it will furnish a panacea for all the pernicious practices which now surround our elections. If this belief is well founded, there ought to be no prejudice against adopting the system merely because it has been successfully tried in foreign countries. It does not follow, however, that because the Australian system seems to be well adapted to the governments of Australia and England, and is superior to the systems which previously existed there, it can be appropriately applied to our institutions without its material modification. Those governments are founded upon the theory that the State should undertake to perform every service that it can perform, while the true theory of our institutions is that the State should do nothing that can better or as well be done by the free and untrammeled action of the individual citizen. To vest the greatest control and power of interference in the government is the object of their laws, while the intent of ours is to confer upon the people the largest liberty and the greatest personal privileges consistent with the public welfare. It should not be forgotten, also, that universal suffrage does not exist in Australia and Great Britain, but the election systems there are based

upon a restricted suffrage. That this difference of conditions is recognized by the friends of the Australian system in this country is shown by the fact that the system, in its entirety, has not been adopted by any State in the Union. Several States, with Constitutions more friendly to it than our own, have enacted what is called the Australian system, but only after material and vital modifications. This adaptation by various States of different features of the system appears to have produced a confused impression in the public mind as to what the system really is. Before discussing, therefore, the advisability of its adoption in whole or in part by our own State, I desire to remind the Legislature of its distinguishing features. My own opinion is that many of these are admirable, while others are decidedly objectionable, constitutionally and otherwise. The principal provisions of the Australian law are as follows:

First. It requires that each election district shall be provided with a polling-booth, and that each polling-booth shall have separate compartments, which shall be so constructed as to screen any voter therein from observation, and shall be furnished with pencils for the use of voters. Each voter shall enter the polling-place alone and before voting shall retire alone to one of these compartments, and from there proceed, unattended by anyone, directly to where the ballot-box shall be and deliver his ballot, which he has prepared, to the presiding officer, who shall forthwith deposit it in the ballot-box, and the voter shall then quit the polling-booth. This requirement applies to *all* elections.

Second. It requires a registration in each district of all the electors who claim a right to vote therein, which

registration or "list of voters" shall be produced at the polling-place on the day of election, and no elector can vote unless his name is found upon such list.

Third. It provides a method of nominating candidates, and requires that before any person can become a candidate at any election he must before nomination day be nominated by a limited number of electors, who are to sign a writing to that effect which is called a "nomination paper," and at the foot of which the consent of the candidate must be subscribed; and this paper is to be delivered to an officer called a "returning officer;" and if, upon the expiration of the time limited for nominations, it appears that there are no greater number of candidates duly nominated than are required to be elected, the returning officer shall declare such candidate or candidates to be duly elected, without having any election at all; but in case more such candidates shall have been duly nominated, then an election shall be ordered and held.

Fourth. All candidates are required to advance to the proper election officers certain sums of money, estimated and fixed by such officers, with which to pay for the ballots and meet the other expenses of the election. The ballots, while thus furnished nominally or ostensibly by the authorities at public expense, are, in fact, paid for by the various candidates from the funds so advanced by them.

Fifth. It provides for an *exclusively* official ballot, which is to be printed and furnished at the polls by the returning officer, and which is to contain the names of those candidates, and no others, who have been duly nominated in manner aforesaid. No other ballot can be

voted. No elector can vote a ballot prepared by himself at his own home or elsewhere. He must vote the one officially supplied, or he cannot vote at all. No pasters are allowed to be used. No elector can write upon the ballot the name of any candidate. Electors must vote for some of the candidates who have been nominated, or not vote at all. The names of all the candidates for the various offices must be upon one ballot. If parties or candidates omit, through accident, inadvertence or any other reason, to present their nominations within the limited time allowed for that purpose, there is no remedy. The death or resignation of a candidate after the date limited for nominations has expired creates a vacancy which cannot be filled, and the opposing candidate takes the election by default. The returning officer primarily has the sole custody of all the ballots, and before they are delivered to the electors he is to write his initials on the face thereof; and one ballot is to be delivered to each elector, who, upon receiving the same, is to retire into the compartment before-mentioned, and there prepare his ballot by making a cross in the square opposite the name of the candidate for whom he intends to vote. Then, as described above, he is to hand his ballot to the presiding officer of the election. There is no provision for voting by illiterate or other persons who are unable to read the ballot, except in cases of blindness, when an agent of the blind elector may accompany and assist him.

The foregoing are the substantial features of the election system now existing in Australia. As before stated, it has not been adopted *in its entirety* anywhere in this country. In several States its principal provisions have

been enacted, but not, however, without essential modifications. The system adopted in each State thus far seems to be distinct in itself, and each one differs in divers particulars from the other. It is respectfully suggested that, in framing a system for this State, unnecessary changes in our present election laws should be avoided as far as possible, and only those innovations made which are believed to be absolutely essential to accomplish the reform desired.

It should be borne in mind that the enactment at this time of a partisan election law is not possible, nor is it desirable. Every attempt to engraft provisions upon the proposed law in regard to which there is not a general concurrence of favorable sentiment should be avoided. It is evident that, whatever measure is finally secured at this session, it must be one which will meet the approval of the leading men of both parties. It is not a difficult task, when approached in the right spirit, to discover those features of the Australian system which it is desirable should be incorporated into our laws.

First. I recommend the adoption of the secret compartment system, whereby every voter shall be compelled to enter a private compartment for the purpose of examining or preparing his ballots, and from which he shall proceed directly to the ballot-box unattended by anyone.

This is the essence and the particularly distinguishing feature of the Australian system. Its essential value is readily apparent. There can be no direct intimidation if the voter can select his ballot unobserved, and its contents are unknown except to himself. There will be little or no bribery if the briber can not know to a reasonable certainty how the person bribed actually votes. It

is wholly unlikely that the briber will accept the word of the voter as to what ticket the latter voted. There is little mutual confidence in such cases, and the absence of actual knowledge as to what ballots are really cast tends to prevent corruption. Of course, if the briber, without any personal knowledge on his part, is willing to accept the statement of the voter as to how the latter voted, then it will be impossible to prevent corruption under this system or under any other system that can be devised.

Incidentally, I suggest that the private booths or compartments should be specifically described by statute. Their construction should be regulated by explicit directions contained in the law itself. They should be uniform throughout the State, and in their construction very little discretion should be left to election officers. The law should be so plain, simple and explicit on this point that it can everywhere be accurately carried out.

One of the faults of both the "Linson" and "Saxton" bills of last winter was that neither of them sufficiently described or regulated the form, size, plan or manner of construction of the booths or compartments. The shelves or compartments provided for in the Massachusetts law proved defective. From a careful investigation of the operation of that law, which I recently instituted, I learn that the compartments were wholly open or not inclosed in front, and that the sides were so low that voters easily conversed with each other over them, and were not of sufficient length to prevent voters at adjoining shelves exchanging tickets thereunder. Under the Kentucky law the compartments resemble a sentry-box, and the voter enters and closes the door.

It is desirable that the compartment should have four sides inclosed — one side to open and shut as a door — and that those sides should be of sufficient dimensions to prevent all communication between the adjoining compartments. Thus absolute secrecy and privacy may be secured. A door in front, swinging each way, at least seven feet high and extending within a foot of the floor would make a proper means of ingress and egress. The voter should be absolutely screened from observation, and the interior of the compartment itself should be exposed only a foot or so near the floor, sufficiently to enable one to see at all times whether the compartment is occupied.

Whatever differences of opinion may exist as to other features of the proposed law, there ought not to be any question as to the propriety of the adoption of the secret compartment plan as herein outlined. It can be successfully operated no matter what kind of ballots are used, whether official or unofficial, or both. This has been demonstrated in Wisconsin and in Connecticut.

The proposition for a secret compartment is an independent one and can stand alone. It effectively reaches the two great evils of bribery and intimidation against which it is specially aimed, and does not assume to remedy any minor abuses which may exist. I believe that the adoption of this single feature would secure the chief benefits of true electoral reform, and it will be a public misfortune if the Legislature shall insist upon coupling with it provisions of doubtful propriety or constitutionality.

There may properly accompany the enactment of the secret compartment plan suitable provisions forbidding

any electioneering within any polling-place or within 100 feet or other reasonable distance therefrom; prohibiting any elector from showing the contents of his ballot at the polling-place, or placing any mark thereon by which it may be afterwards identified as the one voted by him; requiring that no person shall remove any ballot from any polling-place before the closing of the polls; and making a violation of these provisions a misdemeanor. Any other regulations or restrictions having sincerely for their purpose the facilitating of honest elections, by which compulsory secrecy of voting may be better secured, and which do not unnecessarily infringe upon the rights of electors, may very properly be added to the foregoing requirements.

Second. Whatever system is adopted should be applied to all elections — general, municipal and local.

This is so in Australia, in England, and in most of the States which have adopted a new system. There is no propriety in having two distinct systems in force at the same time — with which the people must familiarize themselves — one applicable to general elections and the other applicable to a portion of the municipal and local elections. Bribery and intimidation are not confined to any locality; they are supposed to exist to some extent everywhere in the State — in the country as well as in the cities — and are associated with local as well as State elections. If they can be suppressed or mitigated by a wise statute, that statute should be applicable to wherever they exist. These propositions are so self-evident that any enactment which contains such discriminations must necessarily be regarded as defective.

The "Saxton" bill of last year, and that also of 1888,

were each open to the charge of lacking uniformity in their operation, because by their express terms they did not apply to municipal or local elections in towns or villages having less than 7,000 population. The advocates of the measure refused to obviate this objection, but strenuously insisted upon this discrimination for reasons which have never been satisfactorily explained.

Third. A general registration of electors throughout the whole State should accompany the secret compartment system of voting.

It ought not to require any argument to demonstrate the propriety of this course. Such registration is required in Australia; it is required in Great Britain. Every State in this country which has adopted any portion of the Australian system has also provided that a registration of electors shall accompany it. In fact, it is an indispensable part of the machinery for absolutely securing compulsory secrecy in voting. The ballot clerks must necessarily be some distance from where the ballot-boxes and the inspectors are, and if every person who presents himself to the ballot clerks to receive ballots must be given them without question, or else the proceedings be stopped to investigate his right to exercise the suffrage, then fraud, confusion and delays are likely to occur. The same inquiry might have to be repeated when the person offers his vote to the inspectors. The absence of registration would complicate and endanger the success of the proposed system of voting. The "Saxton" bill of last year recognized that difficulty so far, at least, as elections for town and village officers are concerned, because it declared that the act "should not apply to such elections in towns and villages where

there is no provision by law for the registration of voters."

But, aside from this consideration, such registration is demanded in the interest of honest elections. In framing a comprehensive remedial statute our efforts to correct existing abuses should not be confined to ballot reform alone, but should include whatever important changes are desirable in our entire electoral system to purify elections. Electoral reform presents a more comprehensive, broader and higher object than mere ballot reform. Annual personal registration is now required in the two great cities of New York and Brooklyn. This is not proposed to be disturbed or extended. In the other cities of the State and in villages having over 7,000 population (also in a few towns covered by special statutes), a registration is required or allowed, but not always a personal registration, and when the name of the elector is once placed on the list it continues thereon until he dies, removes, or fails to vote, the list being revised and corrected each year by the inspectors. No registration whatever is now required or allowed (save in a very few instances above referred to), in any towns or villages containing less than 7,000 population, a class which includes most of the towns and villages throughout the State. There is much illegal voting in these sections in every hotly-contested election, especially in presidential elections and in counties adjoining other States, sufficient, it is believed, to control the result in the State in many instances.

It is often urged that no registration is necessary in the country districts, because the voters are all known to each other. This is only partially true, however.

Some of the election districts are very large in population as well as in territory, and personal acquaintance with many electors is practically impossible. The universal testimony is that, especially in presidential elections, scores of voters turn up in these towns whom nobody knows, and whose indentity it is difficult to ascertain. They arrive on horseback or in wagons, vote quickly and disappear. There is no opportunity at the time definitely to determine their residence and there are no facilities at hand for detaining them so that the suspicions which their actions have aroused may be investigated. A registration would remedy all this, and no tenable objection can be urged against it, save that it would cause a trifling and occasional inconvenience, which it is the duty of the elector to undergo for the public good in the promotion of honest elections.

In the State of Massachusetts a registration is required everywhere — in the country as well as in the city districts. The provisions of existing registration laws applicable to our interior cities should be extended to all the towns and villages of our State.

While the desirability of a general registration everywhere is practically conceded by an almost unanimous public sentiment, yet it is urged in some quarters, as an excuse for the refusal to incorporate it in a bill relating to a secret ballot, that it may more appropriately be included in a separate enactment. This objection is entirely without force. In framing a ballot act it is important to know, in advance, whether or not a general registration is contemplated, as its provisions must be varied accordingly. Legislators or others, doubtful of the propriety of the proposed ballot act, might conclude to

favor it, if a registration should be included in it, and are, therefore, fairly entitled to know the whole scheme in order to determine their action. Besides, there is no valid reason presented why a provision for registration should not be included. Those who object to it may be unaware of the fact that the much-praised Australian ballot act itself contains elaborate provisions for a general registration of voters. (See part 1 of the Australian Electoral Act of 1879, sections 5 to 45.) This is an excellent precedent, which may be safely followed.

Fourth. I recommend that provision be made for both official and unofficial ballots.

Grave objections exist to an exclusively official ballot. Secrecy of voting can be compelled just as well without it, and no sufficient reason exists why it should be insisted upon. There is, however, no objection to candidates being nominated by petition as well as by party conventions; neither is there serious objection to having ballots printed at public expense — to be called "official ballots" — and duly furnished to the electors at the polling-places, thereby always insuring an abundance of ballots and enabling any person to become a candidate without expense to himself, so far as the cost of ballots is concerned; but unofficial ballots should be permitted also.

The only two arguments worthy of notice in favor of an exclusively official ballot are these: First, to prevent a failure of ballots, it being claimed that candidates or workers sometimes destroy or suppress the party ballots. Second, to remove the pretense or necessity of any assessments upon candidates for the expense of printing ballots, and of employment of workers to distribute them.

These objects can be as well accomplished by official

ballots, which are not exclusive, as they can by exclusively official ballots.

It is clear that the furnishing of official ballots at public expense will not relieve parties or candidates from much expense, because nearly every bill that has been proposed, embracing the official ballot, including the "Saxton" bill of last winter, expressly provides that the elector may bring into the polling-place an unofficial sample ballot, for the purpose of aiding him in the preparation of his official ballot. If the propriety of this provision is conceded, the question arises, who is to pay for the printing of these sample ballots which the electors are permitted to use? Of course, they must be provided by parties and candidates, and thus the principal argument for an official ballot, namely, the saving of expense, falls to the ground, as it would cost as much for unofficial sample ballots as it costs at present for the printing of ballots. Besides, if electors are to be permitted to bring with them to the polls, and take into the booths, sample ballots, and candidates are permitted to pay the expense thereof, there seems to be no good reason why unofficial ballots may not be voted, and thus all this circumlocution avoided.

Right here it may be added, that in the recent elections in Massachusetts under the new ballot law of that State, which permits electors to carry sample official ballots into the booth for use in preparing their official ballots, there were more ballots printed, official and sample, than were ever printed under the old law. The number printed for distribution by the State was about 700,000, but at least as many again were printed upon the orders of political committees, individual candidates

and the Ballot Act League. The printing establishment which furnished the official ballots also furnished 400,000 sample ballots for candidates and committees, while the Ballot Act League alone distributed 250,000 additional sample ballots. I am told that among experienced and capable observers of the working of the new law in Massachusetts the impression is general that the law will not obviate the expenditure of money by committees and candidates for purposes of printing, but that more money will be expended than under the old system.

That portion of the Australian system which requires candidates, as a condition of their candidacy, to deposit certain sums of money with which to pay for ballots and other expenses of elections, seems to be regarded as objectionable in this country, and is rejected by common consent, and need not, therefore, be further considered.

Those other provisions of the same system which provide that if only one candidate is nominated for an office within the required time, the one so nominated must be declared elected without having any election whatever; and the further provision that the election officers are to place their initials on the backs of the ballots when they are delivered to the voters, thus virtually substituting a mere promise of secrecy in the place of secrecy itself, must also be rejected — the first as incompatible with our institutions, and the second as an unnecessary and clearly unconstitutional invasion of the rights of citizens. If only official ballots are proposed to be used, it follows that nominations must cease some time before an election — at least eight or fifteen days — and, although a candidate may resign or die within that period, his name must still be printed on the ballots.

In that event, under the Australian system proper, the other candidate, if he receives any votes at all, is elected, as there is no provision for voting by pasters or writing, the true theory of that system being that electors must vote for one of the candidates nominated, or not vote at all. It may be assumed that this portion of the Australian system will also have to be repudiated, and voting by pasters or writing permitted; but still there remains the difficulty that candidates cannot be nominated after the specified time and that only by pasting or writing their names on the ballot can they be voted for at all.

Any system is objectionable which prevents parties or individual electors from nominating candidates at any period before election and voting for them by a printed ballot up to the very closing of the polls; and this objection is inherent to an exclusively official ballot and cannot be cured. If official ballots alone are permitted to be used, it is apparent that the placing of the sole custody thereof in the hands of the respective county clerks of the various counties, and in the city of New York in the hands of the Clerk of the Bureau of Elections, is vesting a dangerous power in such officers, and one which is liable to abuse. These officers are, of course, partisans, and over two-thirds of them belong to the same political party. It may be safely asserted that the officers belonging to one party ought never to be charged with the exclusive responsibility of printing and distributing ballots for their political opponents. The crime, fraud, negligence, or mere inadvertence of a single officer might prevent an election in a whole county or in the great city of New York, and a State or presidential election might be determined thereby.

The objection is not that these results are likely to occur, but that they are rendered possible. No one officer should be vested with such vast power.

In order to mitigate this objection the provision has been proposed that *fac-simile* unofficial ballots may be used in case the official ballots are not furnished, or the supply becomes exhausted; but then the query arises, when and how are these *fac-simile* ballots to be furnished? It is clear that, in order to provide for the contingencies mentioned, they would have to be procured in advance and at the expense of the candidates, and thus again one of the principal arguments in favor of official ballots, to wit, the saving of expense to candidates, and preventing assessments upon them for printing, falls to the ground and becomes wholly untenable, as the expense would be greater under the requirements of the proposed system than at present.

There are, however, three constitutional objections to an exclusively official ballot, such as was provided for in the perfected "Saxton" bill of last year.

First. The right to vote cannot be made dependent upon nominations being made and certificates thereof duly executed and filed.

The right of voting is not conferred by statute. It is given by the Constitution itself in article 2, section 1, wherein it is declared that every male citizen, twenty-one years of age and possessing certain requisite qualifications of residence, "shall be entitled to vote * * * for all officers that now are or hereafter may be elective by the people."

The Legislature cannot restrict the right of suffrage thus established. It cannot restrict it directly or

indirectly. It cannot make the right of an elector to vote dependent on the action or non-action of those upon whom the law imposes no duty. It is conceded that if no nominations are made in a certain district, or if made are not duly certified within the required time, then, according to the provisions of this system, the elector cannot vote. Unless there are nominations made no official ballots can be printed and no others can be voted.

The Legislature has no power to take away from an elector his right of suffrage because politicians see fit in certain districts to abstain from signing and filing certifications of nomination.

Second. It is unconstitutional to require an elector to vote for the candidate of his choice by making upon the exclusively official ballot a cross (thus, ×), opposite the name of such candidate, and prohibiting him from voting in any other manner.

This provision concededly disfranchises one entire class of electors, to wit, those who are unable to read and write. It establishes an educational qualification not authorized by the Constitution. According to the proposed system, every elector who votes must receive his ballots at the polling-place from the official ballot clerk, and then retire to one of the booths and mark the names of those for whom he desires to vote. If the elector cannot read the names on the ballots, he can not so mark them. Hence he cannot vote.

The Legislature has no right in framing a statute to consider the question whether the doctrine of manhood suffrage, which has been so long established in our organic law, is wise or unwise. It is sufficient that the Constitution makes no distinction between the educated

and the uneducated, the poor and the rich, the native and the naturalized citizen, the elector who can speak and write our language and one who cannot, but its generous provisions guarantee the right of suffrage to "every male citizen of the age of twenty-one years" who has resided the requisite time in the State, in the county and in the election district in which he offers to vote. The Legislature cannot add to these qualifications.

The Massachusetts Ballot Act is not open to this objection, because in that State the Constitution itself requires every elector to be able to read and write the English language. It is unnecessary to argue this point. The bare statement of it is sufficient to show that it is unanswerable.

The Court of Appeals of Kentucky, in the case of *Rogers* v. *Jacob, Mayor, et al.*, has recently decided that just such a provision was in violation of the Constitution of that State.

It is clear that a statute cannot annex an educational or other qualification not explicitly provided for in the Constitution, either by declaring it in express terms or by prescribing tests which the elector cannot meet by reason of his being illiterate.

Third. It is unconstitutional to require an elector to vote an exclusively official ballot containing the names of *all* the candidates nominated.

The Constitution of 1821, as well as section 5 of article 2 of the Constitution of 1846, which is now in force, each contained the following provision:

"All elections by the citizens shall be *by ballot*, except for such town officers as may by law be directed to be otherwise chosen."

The very word "ballot" implies secrecy, according to all judicial decisions.

At the time of the adoption of each of these Constitutions there was but one meaning which, by common usage, could be given to the term "ballot." It was that which the Legislature had incorporated in a statutory enactment. Section 8, article 2, title 4, chapter 6, part 1, of the Revised Statutes, defines the word "ballot" as follows:

"The ballot shall be a paper ticket, which shall contain written or printed, or partly written and partly printed, *the names of the persons for whom the elector intends to vote*, and shall designate the office to which each person so named is intended by him to be chosen."

The language of the Constitution, "all elections shall be by ballot," referred to the kind of ballot then in use, the definition of which was contained in the Revised Statutes.

The constitutional provision, according to all sound principles of construction, must be deemed to have embraced exactly this definition, the same as if it had contained the very language of the Revised Statutes above cited. The Constitution, in effect, says: The "ballot" shall contain "the names of the persons for whom the elector intends to vote." By necessary implication the Constitution says that the ballots shall contain no other names.

It is not intended to argue this proposition, but simply to state it. I do not believe that the Legislature has the power to direct that the ballot must contain the names of all the candidates for whom the elector does *not* desire to vote. The constitutional right to vote

a ballot containing the names and *only* the names of those for whom the elector desires to vote, has existed in this State for over sixty years. It is submitted that electors cannot be divested of that right by a mere statute.

The foregoing constitutional points are taken from the briefs of several able jurists which have been submitted to me, and inasmuch as they coincide entirely with my own convictions, I have taken the liberty of adopting nearly their exact language in presenting the same to the Legislature.

An exclusively official ballot, whether desirable or vicious, may, of course, be secured by an amendment of the Constitution, but until that has been accomplished it is submitted that it cannot be adopted in this State.

These constitutional and other objections before mentioned can all be obviated by eliminating from any proposed measure those provisions which provide for an exclusively official ballot and substituting in their stead provisions for both official and unofficial ballots.

There is no sort of difficulty in framing a satisfactory measure under which both kinds of ballots can be used, so that the whole system can work harmoniously together. It should be provided that the ballots should be printed in the same form as at present, except that the width and length thereof should be prescribed; that nominations may be made by parties and individuals, and that the names of the candidates so nominated and certified within a reasonable time before an election shall be printed upon ballots at public expense — to be known as "official ballots" — and furnished at the polling places, each set of nominations to be printed separately, and a set of

such ballots shall be delivered by the ballot clerks to each elector upon his entering the polling-place, who shall receive the same and enter the private compartment, provided for that purpose, to assort and prepare his ballots, and after preparing the same he shall proceed unattended directly to the ballot-box and deliver his ballots so prepared to the election officer, and then depart. And it should be further provided that parties and individuals may also provide their own ballots — to be called "unofficial ballots" — containing the names of candidates who may have been nominated, as aforesaid, by petition or otherwise, or nominated at any time or not nominated at all, and electors may bring the same with them, and upon entering the polling-place the electors so bringing their ballots with them shall, nevertheless, be handed by the ballot clerks a full set of the official ballots aforesaid, which they shall receive, and shall then enter the said private compartment and from there proceed directly to the ballot-box and deliver to the proper officers whatever ballots they may have therein prepared or which they brought with them and which they desire to vote. It should be further provided that each elector should remain in the booth at least one minute and not over five minutes, and that upon departing from the private compartment he shall leave therein all the ballots except those he proposes to vote, and his intentional failure so to do should be declared a misdemeanor.

As an additional precaution for securing greater secrecy, it has been suggested that suitable envelopes might be provided at public expense and placed in the custody of the ballot clerks, whose duty it should be to deliver one with each set of official ballots to the electors as they

enter the polling-place; and that such electors shall place the ballots which they have prepared, official or unofficial, in this envelope, seal it and hand the same to the election officer, as hereinbefore described. The official and unofficial ballots being exactly alike in size, form and indorsement, as outlined above, the necessity for such envelopes is not absolute; but there is no possible objection to it, and as an additional safeguard for secrecy it may be advisable to adopt it.

It will be observed that an official ballot, without being exclusive, fulfills all the purposes for which an exclusively official ballot was first proposed, and it is difficult to discover a valid reason why, when an official ballot is permitted, there should still be interposed objections to unofficial ones. The privilege of an unofficial ballot, which an elector can prepare at his own household with the assistance of his family or friends, if necessary, and which he can take with him to the polls in his "vest pocket" or otherwise, is a right which I firmly believe the electors of the State do not desire to surrender. It is a right especially dear to old men, to independent voters, to naturalized citizens who read, speak and write the English language very imperfectly, to poor men or others who are so unfortunate as to be illiterate, but who do not desire to expose their illiteracy to others than their own families, and to many other electors who desire more than a few brief moments in which to prepare their ballots. The existence of an unofficial ballot does not affect the question of secrecy one way or the other. It has been urged in some quarters that a briber can give an elector an unofficial ballot, and then the elector, after voting, can bring away

with him his official ballot as evidence that he voted the ballot which the briber gave him. The clear answer to that is, first, that the briber has, after all, only the word of the elector as to how he voted, as the ballots here proposed would all be alike in form — the official and the unofficial as well — and the mere fact that the elector returned with a set of tickets, not voted, would prove nothing, as he could easily obtain any number of sets of tickets, and the briber would have no means of knowing where, when or how he obtained them, or how he, in fact, voted; and, second, the measure as here outlined contains a provision forbidding the bringing away from the polls of any ballots after voting. The suggestion of this argument against the unofficial ballot looks like straining a point upon which to base an objection when one does not, in fact, exist.

The system of both official and unofficial ballots would operate without any friction, and would preserve the present form of ballot to which the people are accustomed. There is nothing of substantial benefit to be accomplished by a bare change of form, and it is electoral reform rather than mere ballot reform which is imperatively demanded.

This thought leads to the suggestion that there are other desirable provisions which ought to accompany any complete and comprehensive measure on this subject, as numerous statutes upon kindred topics should be avoided, and one enactment should embrace all the important legislation which is desirable upon the subject-matter.

(1.) The Massachusetts statute entitled "An act to facilitate voting by employes" should be included. It provides, in substance, that all employes in manufacturing,

mechanical or mercantile establishments shall be entitled to a period of two hours on election day in which to vote at any general election.

(2.) That species of intimidation frequently resorted to before important elections by the use of political "pay envelopes" in which to pay employes their wages, should be specifically prohibited and heavy penalties imposed for a violation.

(3.) Each candidate and the executive committee of each political party should be required to publish an itemized, verified statement of all the moneys expended by them in each campaign, and the particular purposes of such expenditures. I recommended this in my Annual Message of one year ago, and I reiterate it now.

(4.) Legal facilities should be afforded whereby a successful candidate who can be shown to have obtained votes by bribery on the part of himself, his agent or his political committees, may be ousted from office by the defeated candidate, and the latter given the office in his stead, provided it appears that neither the defeated candidate nor his committees have used any corrupt means to promote his election. This would encourage prosecutions, and put a premium upon honest candidacy.

The two last provisions (3 and 4), above recommended, are taken from the "Corrupt Practices Act" of Great Britain, which has accomplished more for the purification of elections in England than any other reform that has ever been tried. It is the universal testimony there that these two provisions have rendered large expenditures on the part of wealthy candidates extremely dangerous and unprofitable.

(5.) It should be provided that election districts should

not contain over three hundred voters, and means should be afforded for enforcing such a provision. The necessity for small election districts becomes imperative under the proposed secret compartment plan of voting.

It is to be hoped that the Legislature will enter upon the preparation of a proper measure actuated by the sole purpose of accomplishing something practical for the good of the State, uncontrolled by partisan considerations and uninfluenced by unintelligent clamor. The cause of true reform is not promoted by loud declamation or by unseemly protestations of attachment on the part of its professed friends. Over-zealousness becomes suspicious in such cases, and invites the conclusion that partisan advantage or cheap reputation is the object sought, rather than sincere anxiety for the public weal. There is, unfortunately, more or less selfishness, intolerance, fanaticism, ignorance and hypocrisy which attach themselves to every reform movement, and electoral reform has not been without barnacles of these kinds. Conspicuous among such apparent advocates, but real obstructionists, are men who have no sympathy with universal suffrage, and who would restrict it if they could; doctrinaires who, though never having passed a day at the polls, believe themselves capable of framing a law which will correct all abuses, and who obstinately refuse to accept suggestions from men of practical experience; and demagogues, who, having felt the popular pulse, seek the public ear at every opportunity, and, parrot-like, repeat the cry for "ballot reform," with no appreciation of the difficulties involved in its solution, ignorant of the details of any measure proposed, unable or unwilling to comprehend the constitutional objections encountered, and

ready to impute unpatriotic and base motives to thoughtful and cautious men, who decline to acknowledge the wisdom of every innovation suggested under the alluring name of reform. It is unfortunate that so praiseworthy a cause should be injured by such questionable and ostentatious championship. It will be unfortunate if influences which spring from these narrow and bigoted sources shall prevent the Legislature and the Executive from agreeing upon a proper law for the correction of the great evils which now exist.

THE PROHIBITION AMENDMENT.

Two years ago there was proposed in the Legislature an amendment to the Constitution known as the prohibition amendment, which was agreed to by a majority of the members of each House. That amendment was as follows:

ARTICLE —.

SECTION 1. No person shall manufacture for sale, or sell or keep for sale as a beverage, any intoxicating liquors, whether brewed, fermented or distilled. The Legislature shall by law prescribe regulations for the enforcement of this article, and shall provide suitable penalties for its violation.

Under the express provisions of the Constitution relating to amendments (Article 13, sec. 1) this amendment is "referred" to the present Legislature for action thereon. The propriety of its approval for the second time is one of the questions which must necessarily engross your attention.

I do not believe that the people of the State favor the adoption of this amendment. Their sentiments upon this question have been tested and expressed too frequently to leave much doubt as to their position. They are opposed to prohibition, but believe in the

EXHIBIT 2

7 Jud. Notice 21

Judicial Notice
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Featured Article

BALLOT REFORM AND THE ELECTION OF 1891
Good Law, Unintended Consequences

David Sheridan [a1]

IN THE NEW YORK STATE senatorial elections of 1891, two great forces converged: the urge for reform and the lust for power. That clash has shaped New York's approach to election law for more than a century.

New York State's Ballot Reform Law of 1890 [1] was intended to eradicate what was then widespread vote-buying. The proponents of the legislation reasoned that no one would try to bribe a voter without some way to verify that the bribe-taker (by definition dishonest) [2] had actually carried out his part of the bargain. [3] The law was intended to make this verification impossible. Before the Ballot Reform Law, ballots had been printed by the parties. [4] 4 Not coincidentally, it was frequently possible to determine for whom a voter was casting his ballot by observing the exterior of the folded ballot as it was being cast, or the interior of the ballot when it had been unfolded and was being counted. The Ballot Reform Law provided that all ballots were to be printed by the government with identical ink on paper of identical size, shape, and color. Each ballot listed only one party's candidates. Under the Ballot Reform Law, before a voter entered the voting booth, the ballot clerks gave him one ballot for each party that had nominated candidates. In the booth, the voter selected the ballot he wished to cast, then folded all of the ballots in the same manner, so that the only mark visible was the pre-printed official "indorsement," which consisted only of the name of the town or city and the number of the election district where the ballot was used, and a facsimile signature of the county clerk. Upon leaving the booth, the voter deposited his chosen ballot in the ballot box and the remaining ballots in a box for unvoted ballots. Since the ballot that was cast looked ***22** identical to the ballots that were discarded, no observer at a polling place could determine the candidates for whom the voter had cast his ballot. [5] No election inspector was permitted to allow a voter to place in the ballot box a ballot that did not bear the proper, official indorsement, unless official ballots were unavailable. [6] If official ballots were unavailable, the inspectors or the voters were to prepare substitutes as similar to the official ballots as possible, but without the indorsement. [7]

When the ballot boxes were opened, if an election inspector were to declare his belief that a particular ballot had been marked with the intent that it be identified, the ballot would be counted, but it would be preserved for a possible challenge. [8] A ballot marked by a voter, or by any other person to the knowledge of the voter, with the intent that it be identified as the one cast by the voter, was void. [9]

Absolute control of New York State government was the goal of the Democrats in 1891. Going into the election, the Democrats controlled the Assembly by six seats, and the Republicans had only a two-seat margin in the State Senate. Democrat David B. Hill, in his last year as Governor, could cap his career in state office by leaving the Democrats in control of not only the governorship, but also both houses of the legislature.

Hill had strenuously opposed the idea that all ballots should be printed by the government. He had vetoed an act requiring a "blanket ballot"--that is, a ballot bearing the names of all candidates for all offices, on which a voter would have indicated his choice by a mark. [10] He finally signed the 1890 law only because it allowed voters to use "pasters;" these were strips of paper bearing the names of the voter's chosen candidates, which were prepared in advance, brought by the voter to the polls, and pasted inside a government-printed ballot. Pasters, Hill said, were "especially dear to old men, to independent voters, to naturalized citizens, who read, speak, and write the English language very imperfectly, to poor men or others who are so unfortunate as to be illiterate, but who do not desire to expose their illiteracy to others than their own families, and to many electors who desire more than a few brief moments in which to prepare their ballots." [11] Moreover, Hill distrusted those who would be in charge of officially printed ballots. Such persons were, after all, partisans; the "crime, fraud, negligence, or mere inadvertence of a single officer" could, he said, determine the outcome of an election. [12]

In 1891, the 25th Senatorial District comprised Onondaga and Cortland Counties. The Republican candidate was Rufus Peck; the Democrat was John H. Nichols. Some days before the election, as prescribed by law, the official ballots arrived at the Onondaga County Clerk's Office, where, again as prescribed by law, they were inspected, sorted, and sent to the offices of the various town clerks, whence, on election day, they were delivered to the polling places for each election district. By crime, fraud, negligence, or mere inadvertence, some election districts in Onondaga County received Republican ballots that were intended for another election district in the same town. Since, pursuant to the Ballot Reform Law, each ballot was indorsed with the name of the town and the number of the election district in which it was to be used, and since only Republican ballots were delivered to the wrong districts, an observer who knew of the mixup and who saw a voter casting a ballot indorsed with the number of the wrong election district would know that the voter had cast a Republican ballot. [13]

If anyone at the polling places noticed the problem no record was made of it before the votes were cast, during the voting, or when the votes were counted. None of the Republican ballots that were counted was preserved for a challenge, although, as required by law, a sample of each ballot was attached to the election officials' report for each election district. The Republican sample ballot in each district at issue bore the wrong district number. The attorney for Peck later said that the mistake was not discovered until the morning of Election Day and that the ballots could not be exchanged to correct the error because of the "long distance between the polling places." [14]

As luck would have it, if the Republican ballots bearing the wrong district number were counted, then Peck, the Republican, would win. If not, then Nichols would win and, moreover, the Democrats would control the Senate. On November 17, Peck obtained an order from Onondaga County Supreme Court Justice George N. Kennedy, a Republican, requiring the Onondaga County Board of Canvassers, which the Democrats controlled, to show cause why it should not be directed to issue a certificate in accordance *23 with the returns from the towns and wards, which would give Peck the victory. The order was returnable "immediately after service." Justice Kennedy heard argument on November 17 and, on November 18, granted the Republicans the requested relief. The certificate was filed on November 19 with the Onondaga County Clerk. [15]

The New York Times report of Justice Kennedy's order anticipated that the next battle would be fought in the Senate in Albany where, the paper surmised, the Democrats would assert, among other things, that Peck had forfeited his United States citizenship by voting in a Canadian election while living in Canada during the Civil War. [16] Governor Hill, however, had not given up on Onondaga County justice, although he wanted no more of Onondaga County Justices. In a letter dated November 25, 1891, Hill asked Brooklyn Democratic boss Hugh McLaughlin to find a Supreme Court Justice in the Second Judicial Department "who has the pluck and courage and ability to hold an extraordinary special term [in Onondaga County] on Friday." As Governor, Hill could designate the lucky, plucky justice to hear some election motions. Hill wrote:

> *We simply ask him to decide according to law as his judgment may dictate ... This is important for the public interest and for the interest of the Democratic party. It involves the control of this State for many years to come.* [17]

In addition to writing McLaughlin, Hill met on November 25 with Brooklyn District Attorney James W. Ridgway. That evening, Ridgway met with McLaughlin (presumably delivering Hill's letter), and wired Hill that the two should be able to give Hill the name of a **judge** that same night. [18] (It is not clear from the letter whether the **judge** referred to by Ridgway in the telegram was for Onondaga County or for one of the other legislative election cases. At the time, in addition to the Onondaga **Senate** race, Hill was directing Democratic strategy with regard to an Assembly seat in Onondaga and Cortland Counties [19] and **Senate** seats in Duchess, Columbia, and Putnam Counties, [20] Rensselaer and Washington Counties, [21] and Steuben, Chemung, and Allegany Counties. [22])

However, Ridgway and McLaughlin seem not to have been able to immediately locate a Supreme Court justice willing and able to meet their needs. Justice Pratt, one of the **judges** under consideration, was hunting on Long Island, and Justice Dykeman was in such bad condition that his physician would not permit him to travel even to White Plains. When Justice Pratt returned he, too, proved to be too sick to travel; he was "having to use an instrument to draw off his water every two hours," Ridgway reported to Hill. [23]

In a letter dated November 28 to William Kirk of Syracuse, one of Hill's operatives, Hill seemed uncertain that he could find a downstate justice to hear the **Senate** case in Onondaga County, although he hoped to get one for Tuesday, December 1. He directed Kirk to have the Onondaga County Democrats bring a ***24** proceeding before a **judge** other than Justice Kennedy for a writ requiring the Onondaga County canvassers to reconvene and report the results without counting the Peck votes at issue. Hill anticipated that Special Term and an extraordinary General Term might deny him relief, but believed that the Court of Appeals would find in his favor. Hill feared that if the application were brought before Justice Kennedy, he would "hold the case for delay." Hill wrote:

> *Any other fair **judge** will deny it promptly, in case he does not decide in our favor. It is useless to argue the case at special term or at general term. Let those arguments be merely pro forma .... I hope to get an extraordinary Special Term next Tuesday for Syracuse. Will advise you as soon as it is arranged. Our Democratic **judges** seem to be busy, sick or timid; but I hope to get one with sufficient backbone to decide according to law.* [24]

Hill was confident of getting "justice" from the Court of Appeals, as long as the case was decided before January 5, when the **Senate** would organize. [25]

Hill's plan to litigate the issue regarding the ballots in Onondaga County was not met with immediate enthusiasm by the attorneys for the Democrats. Nichols was represented by, among others, Louis Marshall, one of the finest lawyers of the day. In a letter to Hill dated November 30, 1891, O.U. Kellogg, one of Marshall's associates, gave three reasons why they doubted their chances of success. [26] First, although Section 31 of the Ballot Reform Law laid down the rule that ballots lacking the official indorsement should not be counted, the ballots in question did bear an official (albeit incorrect) indorsement. [27] Second, although Section 31 provided that if an election official declared at or immediately after the canvass of the votes his belief that a ballot had been marked with the intent to be identifiable, the ballot should be preserved for review in a mandamus proceeding, no official had so declared, nor had the questioned ballots been preserved. Third, although Section 35 voided a ballot marked by a voter, or by any person with the knowledge of the voter, with the intent that it afterwards be identified as one voted by him, establishing a voter's knowledge and intent would be difficult. Kellogg suggested that Hill consider having the State Board of Canvassers, which was completely under the control of the Governor, issue a certificate of election to Nichols. This would give the Governor (through

a Democratic majority) control over organization of the **Senate**, "and then let Peck come in and contest." However, if, before the State Board met, the courts ruled against the Democrats, then "the State Board of Canvassers could not with good grace ignore the decision or the **Senate** reject [Peck]." [28] Hill, confident of success in the Court of Appeals if nowhere else, opted for litigation. [29]

Meanwhile, Hill had found his **judge**. He appointed Supreme Court Justice Morgan J. O'Brien, a New York City Democrat, to an extraordinary special term in Onondaga County, and it was to O'Brien that the Democrats brought their case. [30] Justice O'Brien was only 39 years old and had been on the bench for less than four years. [31] On Tuesday, December 1, O'Brien granted Nichols an order requiring the County Board of Canvassers to show cause why they should not be required to report a canvass without the votes cast for Peck. [32] Nichols alleged, among other things, that "improper endorsements were placed on said ballots" with the intent that they be identifiable, but he offered no evidence to back up this assertion. [33] The Board had 17 Democratic members and 16 Republican members. In the answer on behalf of the Board, the Democrats admitted the essential facts alleged in Nichols's papers and asked the court to determine whether the Board should have included the Republican votes at issue. [34] In a separate answer, the Republican members of the Board admitted the ballot mixup, denied fraud or intent that the ballots be identifiable, asserted ***25** that the ballots could not be challenged because they had not been treated as invalid and had not been preserved, and asserted that the November 18 writ by Justice Kennedy was res judicata as to the issues raised by Nichols. [35] The Republicans also submitted affidavits from election inspectors (presumably Republicans) in each district in question, each of which stated that on Election Day, no official Republican ballots bearing the official indorsement had been delivered to the polling place, nor had there been delivered to the polling place ballots prepared by the Town Clerk in a format as close as possible to the official ballots, together with an affidavit by the Town Clerk of the circumstances. So, the election inspectors averred, they had given the voters ballots as similar in form as possible to the official ballots; those ballots had been identical to the official ballots, except that the wrong election district was indorsed, and no one objected. [36] This description by the Republicans of what they did tracked the language of Section 21 that allowed the use of unofficial ballots if official ballots were not available. There was also an affidavit from the County Clerk saying that any mixup had been inadvertent. [37]

The case was argued before Justice O'Brien on December 3. [38] On behalf of Nichols, Attorney David McClure conceded that the voters who had cast the ballots in question had thought that they were voting a legal ticket, but contended that in fact they had been wrong. He implied that the misdelivery of the ballots had been "a mistake made on purpose," the "mistake" apparently having been made by someone in the County Clerk's Office, and the purpose having been to enable Republican leaders to "see if a man was bribed if he delivered the goods." In response, William Nottingham noted that the law provided that in certain contingencies written ballots could be used. Had they been used, he asked, would there have been any problem in identifying them; if not, then what became of the claim in this case that the ballots were illegal because they could be identified? On December 4, 1891, Justice O'Brien ruled for the Democrats. [39]

In an interview, Justice O'Brien described his appointment to the extraordinary special term as "personally ... embarrassing and displeasing [but] obligatory." [40] When he arrived in Syracuse, he had found the situation "delicate," but he consulted immediately with Justice Kennedy to avoid conflict. [41] The **judges** and the lawyers got on well enough that the night before Justice O'Brien returned to New York City, they all enjoyed a dinner at the Vanderbilt Hotel in Syracuse. [42]

The General Term of the Third Department convened as promised by Hill. [43] The parties submitted on the papers below, and the General Term affirmed without opinion. The case the went to the Court of Appeals.

***26** In his brief to the Court of Appeals, Nottingham, on behalf of Peck, argued that "the only conclusion at which a rational mind can arrive is that if any ballots [bearing the number of the wrong election district] were voted, it came about from an inadvertent mistake in the distribution of the official ballots by the County and Town Clerks ..." [44] Nottingham stated correctly that it was not disputed that the ballots had been official, the voters who had used them had been without fault, no other ballots had been available, and the voters who had used the ballots had intended in good faith to vote for Rufus Peck for **Senate**. [45] The practical question, asserted Nottingham, is "whether these twelve hundred and eighteen electors shall be disenfranchised by a trivial mistake ... to which the inspectors of election were in no manner parties, and of which these electors were the innocent victims." [46]

Nottingham pointed out that each contested ballot complied with the literal terms of the legal requirement that each ballot bear "the designation of the polling-place for which the ballot is prepared." [47] The delivery of a ballot to a polling place other than the one for which it had been prepared did not alter this fact. Therefore, he concluded, the ballots were within the letter of the law.

Nottingham noted that Section 21 of the Ballot Reform Law provided that if the official ballots were not available at the polling place, voters could use unofficial ballots, printed or written, "made nearly as possible in the form of the official ballots ...." If one considered the Republican ballots bearing the wrong district number not to be the "official ballots" for that district then, under the circumstances, they had certainly been made "as nearly as possible" in the form of the official ballots. Therefore, he argued, Section 21 authorized their use as unofficial ballots. Of course, he said, if the election inspectors had noticed that the wrong ballots had been delivered, then instead of allowing voters to use the wrongly labeled official ballots as unofficial ballots, they could have directed the voters to sit down and write out ballots "as nearly as possible in the form of the official ballots," but bearing the correct number of the election district. However, to have done so with the official (albeit misdelivered) ballots at hand, Nottingham argued, would have put the voters "in great peril of being committed to some institution for the care of the mentally enfeebled without the intervention of a jury or physician." [48] As Marshall had anticipated, Nottingham argued that only an intentional marking for purpose of identification was prohibited by the law. [49]

Finally, Nottingham argued that the right to vote was as venerable as constitutional government, but the secrecy of the vote "has not been considered an inseparable incident in any age or country." [50] Since the key objective of the Ballot Reform Law had been to ensure the secrecy of the vote, Nottingham wisely placed this argument near the end of the brief, and made it summarily.

Marshall, (With O.U. Kellogg also on the brief) on behalf of Nichols, established his theme on page 10 of his brief:

> *The purpose of the [Ballot Reform] [A]ct is clearly stated in its title, which is a fair index of its contents. It is to promote the independence of voters and to enforce the secrecy of the ballot.* [51]

He explicitly disclaimed two of the three arguments recited in Kellogg's letter to Hill, and relied only on the argument that the ballots should not ***27** be counted because they did not bear the proper indorsement. [52] He argued that "[t]he provisions, with reference to indorsement, were carefully worded and designed to maintain, at all hazards, as a profound secret, the contents of the ballot." If those provisions were not followed, "it would be a matter of utmost simplicity for poll workers, watchers, and inspectors to learn, to an absolute certainty, the contents of every ballot voted, and in this manner to mark each ballot as effectually as though it had been labeled by the voter himself." This, Marshall argued, was why under Section 29 of the Act an improperly indorsed ballot, like an intentionally marked ballot, could not be deposited in the ballot box, and why Section 31 provided that no ballot without the proper indorsement was to be counted. [53]

Marshall noted that Section 21 of the Ballot Reform Law applied only if the official ballots did not arrive, or were destroyed. In those circumstances, Section 21 directed the town or city clerk to prepare ballots as nearly in form as possible to the official ballots, but without the indorsement, plus a sworn statement that the ballots had been prepared by the clerk, in which case the ballots could be used at the polling place. [54] However, Marshall pointed out, the ballots in question purported to be official ballots, bearing an official indorsement. They were, he said, calculated to mislead the voter into thinking that he was voting an official ballot. (This argument was a little dicey, since Point I of Marshall's brief was that the ballots were invalid because they did not bear the official indorsement.) [55] For substitute ballots to be used, they had to bear no indorsement, and the facts had to be established by affidavit. Marshall asserted, regarding the appellant's position (and respondent's response to it), as follows:

> *The position taken by the appellants is, therefore, virtually this: Official ballots were furnished by the proper officers, bearing an improper indorsement. Because they were thus improperly indorsed, it is claimed that such official ballots might, under the pretense that they are unofficial ballots, be employed for the purpose of working the very mischief which the act seeks to prevent. For, if the indorsement is improper, in which it does not designate the polling place at which the ballot is to be used, and cannot, therefore, be received or counted, how is it possible that such ballot can be received and counted as an unofficial ballot, because it does not bear the correct indorsement?* [56]

Further (and more to Marshall's principal point), there was no attempt to create uniformity between the Republican ballots, on the one hand, and those of the Democratic, Prohibition, and Socialist candidates on the other. This lack of uniformity breached the secrecy of the ballot.

The case was argued before the Court of Appeals on December 15, 1891. [57] Nottingham, on behalf of Peck, posed and answered what he perceived to be the key question in the case:

> *The practical question upon this branch of the case is whether these 1,218 electors shall be disenfranchised by a trivial mistake, not in the printing but in the mere manual functions of distributing the official ballots to the several election districts of a town, and of which they were the innocent victims? ... If there was any mistake [in distributing the ballots] it was an inadvertence. The voters should not be deprived of their votes because of that .... I submit that it is more important that a man should vote than that it would be a secret ballot. These arguments would make a subordinate feature of voting to the chief one. [sic] Would you disenfranchise 1,100 voters?* [58]

On Nichols's behalf, Marshall staked his case on the importance of adhering to the letter of the law, even when doing so might work a seemingly inequitable result in a particular case, and on the importance of the secret ballot. He began:

> *The question is as to the efficiency of the ballot-reform law .... What was the intention of the ballot reform law? It was to promote the importance of the vote and ensure the secrecy of the ballot .... Frequently, the rights of individual voters have to give way to the general good. The intent of the law is to have a uniform ballot.* [59]

***28** At the close of argument, **Judge** Gray noted that "the trouble really arose from the fact that a separate ballot must be provided for each political party." (Governor Hill had consistently opposed a "blanket" ballot, and had vetoed a ballot reform measure that had mandated it. [60] In any event, Florida's experience in the 2000 Presidential election shows that having the names of all candidates on one ballot does not necessarily prevent ballot controversies. [61])

On December 29, 1891, the Court of Appeals handed down its decision in Nichols. No party to the case had credibly contended that the voters who cast their ballots in favor of Peck had been at fault. Nonetheless, the majority opinion of the Court of Appeals, by **Judge** O'Brien, cast the question posed by the case as follows:

> *The question now before us is whether those citizens of Onondaga county, who used the ballots, which the canvassers in this case have been ordered by the Supreme Court to reject, have so far neglected to observe the forms and regulations prescribed by law for voting at elections, that their votes so cast must be held to be void .... [I]t is the duty of this court to declare the law as it finds it; and if a fair consideration of the language used in the statute, and its general policy, should result in the exclusion of the ballots in question, it may be said that it was not the first time that a citizen attempted to exercise a right, and either through neglect, mistake, or ignorance, failed in the accomplishment of his object.* [62]

The Court correctly noted that the Ballot Reform Law had been a matter of great public interest and debate, and capably described its purpose and method:

> *[T]he principal mischief which the statute was intended to suppress, was the bribery of voters* ***29** *at elections, which had become an intolerable evil, and this was to be accomplished by so framing the law as to enable, if not compel, the voter to exercise his privilege in absolute secrecy. When it was made impossible for the briber to know how his needy neighbor voted, the law makers reasoned that bribery would cease.* [63]

The Court reasoned that "any construction of this statute which would permit ballots to be cast and counted that would reveal the way the voter using them voted, should be avoided as contrary to the true policy and intent of the law." [64] The court noted that the indorsement was to be the only mark visible on a ballot when it was being deposited in the ballot box, and emphasized the requirement that indorsements be uniform. It continued:

> *The ballots in question were cast in utter disregard of this important provision of the statute .... The indorsement upon them differed from the regular indorsement on all the other ballots used or voted at the same polling place, and, as they were used or voted by but one of the parties that had made nominations ..., the voters who used them necessarily disclosed to the election officers, watchers, and such of the bystanders as could and desired to observe, the candidates voted for, and thus not only the letter of the statute was disregarded, but its very purpose and intent defeated.* [65]

The Court stated, albeit without any support in the record, that "it is scarcely possible that the means of distinguishing them from all the other ballots used were not known to ... many of the voters who used them." [66] Even if the voters did not know, the Court concluded that:

> *[t]he plain words of the statute ... made it the duty of the election officers, when offered one of these ballots, ... to refuse it. This would not defeat the right of the elector to vote, because he could still prepare and tender a ballot with the proper indorsement.* [67]

To the contention that its decision would disenfranchise voters who had cast their ballot in good faith, the Court answered that the law could not help them, and they should be more careful next time. "The law," the Court explained, "contemplates that the elector will not blindly rely upon anyone, not even the election officers, in the preparation of the ballot." [68] (Actually, by abolishing all but official ballots, the Ballot Reform Law in fact required voters for the first time to rely upon the government in the preparation of the ballot.) It was the duty of the voters to see that "so important a part of the ballot as the indorsement" conformed to the statute. [69]

Once the voters were aware of the improper indorsement, those desiring to vote Republican could have used paster ballots on the Democratic, Socialist, or Prohibition ballots. [70] (There is no evidence in the record that any such pasters had been prepared or were available in the districts in question. Since the government was preparing the ballots and since, under Section 25, a voter could write in a name on an official ballot, there was little incentive for a voter to bring a "paster.") However, the Court concluded, even if the voters did not know and had no way of knowing that the ballots

were improperly indorsed, it was still better that their vote be deemed ineffectual than that the fundamental purpose of an important public statute be disserved and the door thrown open to a revival of the evils that the statute sought to prevent.

In a concurring opinion, Chief **Judge** Ruger, joined by **Judge** Gray, smelled a rat. He contended that the Republicans in Onondaga County had intentionally mixed up the ballots so that they could determine who had voted for whom, and could enforce party discipline. [71] Since the law made revealing one's vote to anyone in a polling place a misdemeanor, the Republican voters were, in **Judge** Ruger's view, criminals. **Judge** Ruger also twisted the law's knife into the bleeding hearts of those who had advocated for the Ballot Reform Law. He said:

> *But it is urged that a strict construction of the law must result in disfranchisement. This is true, but the law plainly contemplates such a result, and who can complain, except those* ***30** *who are opposed to any restrictions whatsoever upon the action of an elector? No advocate of the Reform Ballot Law can justly criticize a result which was in the minds of its authors when the law was drafted and enacted.* [72]

Regardless of one's view of the outcome of the case, the Court majority's decision to blame the voters was unseemly, at best. The record did not support any contention that any of the voters had known of the problem with the indorsements. Even if they had, it is highly unlikely that they would have known the correct action to take. According to the Court's decision, each Republican voter apparently had to conclude that there were at the polls neither official ballots nor ballots that had been prepared by local officials but that were "unofficial" in the sense that they did not bear the official indorsement, so that the correct procedure was for each Republican voter to prepare his own ballot, which presumably would have borne the names of the same candidates as the government-printed ballots that were not being used. [73]

As a practical matter, as McClure pointed out in Onondaga County Supreme Court, these hand-made ballots would not have been identical to the official ballots cast for Democrats and minor party candidates, so an observer would have been able to determine who had voted for the Republicans. An alternative would have been for the Republican voter to make a "paster," and paste it into another party's ballot. Since a "paster" had to be printed in the same type face as the regular ballots, a paster could not be made on the spot. [74] Since, by law, a voter was to receive an official ballot, there was no incentive for a Republican voter to prepare a Republican paster in advance.

A question addressed by neither the parties nor the courts was what the Democratic voters should have done, and what the courts should have done with the Democratic votes. A voter who, in the districts in question, had cast a ballot with the correct indorsement was, in effect, telling those present that he was not voting a Republican ballot. Given the small number of votes for the Socialist and Prohibitionist candidates, he was all but telling those present that he was voting Democratic. But would it be fair to punish a Democratic voter when the error was on the Republican ballot? Recall that, before entering the voting booth, each voter was given one ballot for each party, and that the voter had the duty of folding each ballot so that all looked identical. One ballot was placed in the ballot box and the others were placed in the discard box. If the consequence of the incorrect indorsement of the ballot of one party was that the secrecy of the ballot was breached, then would it not be fair to require all voters--Democratic and Republican--to determine that all ballots were properly indorsed? If the Democratic voters breached this duty, should they not have suffered the same fate as the Republican voters? If both the Republican and Democratic votes in the districts in question had been voided, then Peck would have been elected by a margin of 248 votes. [75] However, the text of the law did not support this approach. Section 31 of the Ballot Reform Law said plainly, "No ballot that has not the printed official indorsement shall be counted ...." The text of the law refers to ballots that are counted and not ballots that are discarded.

In a separate concurrence, **Judge** Gray took a more forthright view of the case. Even if, as "it may be conceded," the misdelivery of the ballots had been a mistake, and even if the voters had been blameless, the Ballot Reform Law, by its plain terms, required that the ballots in question be held invalid. [76] He reluctantly concluded that the Court should not

bend, break or ignore the terms of the Law in order to save the ballots that plainly had been intended to be cast for Peck and that would have changed the results of the election, for to do so would eviscerate the Law. He said:

> *This is not a case for the court to strain after explanation, in order to remedy an apparent hardship; when to do so simply results in emasculating a provision of the law, the existence of which is calculated to exclude all attempts at fraudulent or corrupt practices at the polls. It will not do to break down any of the provisions of this law framed against a possible corrupt vote, lest in so doing the way be left open for a more radical destruction. The people are supremely interested in protecting the citizen* ***31** *voter against the prostitution of his character in the casting of a venal ballot.*[77]

Judges Andrews and Peckham wrote in dissent. (**Judge** Finch also dissented, without opinion.) **Judge** Andrews wrote that not only was there nothing in the record to support fraud, but that the parties had stipulated it out of the case.[78] He dismissed as contrary to the record any idea that the mixup had been discovered at any polling place by any voter or bystander.[79]

He said that it was "[in]conceivable that it was the intention of the legislature ... to place upon the voter the responsibility of ascertaining whether an official ballot delivered to him corresponds in every particular, in form, size, and indorsement, with the description in the statute at the peril, in case of misjudgment, of a forfeiture of his vote."[80] He argued that the purpose of Section 31 of the Ballot Reform Law, which provided that ballots not bearing the official indorsement should not be counted, was to prevent the use of unofficial ballots, a situation not relevant to the case at hand, since the ballots that had been used had in fact been official. He said that the purpose of putting the number of the election district on a ballot was to ensure that the county clerk prepared and distributed enough ballots to each district, as required by law, not to identify a ballot as official. Since the ballots had been official, he said, nothing in the law gave the election inspectors the right to reject them. He opined that the Court's decision would cause more fraud than it prevented, since "[c]orrupt officials can, with reasonable safety, tamper with the distribution of ballots and allege mistake, which it will be hard to disprove."[81]

In dissent, **Judge** Peckham started with the position that "[w]here any particular construction which is given to an act leads to gross injustice or absurdity, it may generally be said that there is fault in the construction and that such an end was never intended or suspected by the framers of the act," and found the majority's construction one which "certainly tends to bring the law itself into contempt."[82] Like Andrews, he offered a number of constructions of the Law that would not have required the invalidation of the votes at issue.

Nichols was one of two decisions handed down by the Court of Appeals on the same day that resulted in a state **Senate** seat going to a Democrat who undoubtedly had received fewer votes than his Republican opponent. In the other case, *People ex rel. Sherwood v. State Board of Canvassers*,[83] the Court held that the victorious Republican candidate in the 27th senatorial district, who early in 1891 had been appointed a park commissioner in Hornellsville, was an "officer under a city government" and, therefore, under Article 3, Section 8, of the State Constitution, ineligible for state legislative office. The Democratic candidate was seated by the **Senate**. The judgment of the ***32** Republicans in nominating their candidate is difficult to fathom and the outcome of the case is difficult to fault, even if, during his campaign, the Democrat had pledged not to contest the Republican's eligibility if the Republican won the election.

An even more notorious case decided that day also went in favor of the Democrats. In *People ex rel. Daley v. Rice*,[84] also decided on December 29, 1891, the Court issued what the State Board of Canvassers perceived as (or persuaded themselves to interpret as) an order that did not effectively prevent the State Board from awarding the **Senate** seat in the 15th district to a Democrat based upon what was widely regarded as a fraudulent canvass of votes in Dutchess County.[85]

At the end of the day, Hill had slain the reformers with their own sword, gaining control of the state **Senate**. He went off in triumph, more or less, to the United States **Senate**. Deputy Attorney General Isaac **Maynard**, who had represented the State Board of Canvassers in *Nichols, Sherwood* and *Derby*, and had both advised the Democrats and appeared for the State Board of Canvassers in *Daley*, had done his boss's bidding well. He was named by Hill to the Court of Appeals in January 1892.

Their glory proved transitory, however. On March 23, 1892, the New York City Bar Association issued a scathing report condemning **Maynard's** conduct in the *Daley* case.[86] When **Maynard** ran for election to the Court of Appeals in 1893, he lost by more than 100,000 votes, "a staggering margin at the time."[87] His defeat was said to have been "the turn of the tide that was to give the Republicans sixteen unbroken years of complete control of the State government."[88]

The Democrats were so unpopular following the events of 1891, and Hill was deemed so much at fault, that the Democratic party insisted that he run for Governor in 1894, in part because no one else would.[89] He lost by more than 150,000 votes. Having regained control of the State, the Republicans, not surprisingly, declined to re-elect Hill to the **Senate** in 1896. He was never again a candidate for public office.[90]

The court session of December 29, 1891, was the last public appearance of Chief **Judge** Ruger, who died January 14, 1892, at his home in Syracuse.[91]

Judge O'Brien, who decided the *Nichols* case at special term, went on to have a distinguished career.[92] He was, among other things, a trustee of the New York City public schools, Corporation Counsel of the City of New York, and Presiding Justice of the Appellate Division. For his considerable charitable and civic work, he was, among other honors, knighted by the Pope and named a Chevalier of the Legion of Honor by the French Government. Upon his death in 1937, the New York Times remarked that the most important work of his early career was the *Nichols* case.[93]

The Ballot Reform Law was repealed in 1892, but its replacement, a codification of the Election Law, included the former law's most important provisions, and added a new one: The official indorsement on a ballot was no longer to include the number of the election district.[94] The year 1892 saw another important development: In a municipal election in Lockport, New York, voters first used a lever-operated voting machine.[95]

The Ballot Reform Law of 1890 was the culmination of a long struggle by reformers in New York State against what they perceived as widespread corruption of the electoral process by machine politicians. The great change that the Law wrought in New York is evidenced by the fact that no opinion in *Nichols* cited a New York case in support of its construction of the law. The majority opinion cited nine cases from five states in support of its holding that the letter of the law should be enforced, even if, in the specific case before the court, the law would seem to thwart the will of the majority of the electorate.[96] The outcome of *Nichols* therefore was very much in step with other states' interpretation of their election reform laws.

Although *Nichols* was last cited in an election context in 1909, its core principle endures. As the Court of Appeals said in *Gross v. Albany County Board of Elections*[97] more than 100 years after *Nichols*, "Broad policy considerations weigh in favor of requiring strict compliance with the Election Law ... [for] a too-liberal construction ... has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process."[98] But the contrary urge also endures. In *Gross*, 27 absentee voters did exactly what they had been told to do by election officials of both parties, ***33** but their ballots were nonetheless invalidated because the election officials had been wrong. The dissent in *Gross* urged flexibility:

> *Experience has shown that too many elections have been touched, if not infused, by fraud, and that we need rules to keep the process honest. To be sure, some rules require the most stringent enforcement if the system is to function. Others, however, can and should tolerate some flexibility. This is particularly so when, as here, the strict application of the rule does not further the Election Law's objectives. We have, at times, construed the Election Law's rules to disenfranchise voters. When we did, it was because we felt that on balance a more permissive interpretation would threaten the process or future elections. Thus, while I do not see the majority's opinion as grudging or as evincing a hidebound, technical character, the scales here tip in favor of the voter.* [99]

The majority in *Gross* replied as follows:

> *The dissent suggests that the challenged absentee ballots should be canvassed despite the Board's departure from the qualification process because the voters who cast the ballots were innocent of any wrongdoing. This is certainly true in the sense that the voters' reliance on the Board's mistake was understandable-- but this same rationale could be applied virtually any time a board fails to comply with statutory directives governing voting. Reliance on board actions or directives will almost always be reasonable since few voters have sufficient familiarity with the Election Law to catch an error and most have little reason to question voting procedures. Thus, an exception predicated on voter innocence would swallow the rule, effectively relieving election officials of their obligation to adhere to the law. For these reasons, we agree with the Appellate Division majority that to overlook a substantive error of this magnitude would invite future impermissible deviation from statutory requirements that have been devised to ensure fair elections.* [100]

Over the years, legal reforms such as the Ballot Reform Law, have been largely successful in eradicating bribery of individual voters. Legal reform and technological advances have resulted in retail vote purchases being replaced by media buys. Campaign spending has increased greatly, while any direct financial benefit to individual voters has largely disappeared. [101] The apparent economic inefficiency and, at least arguably, unfairness of this system are plausibly justified on grounds of morality and public policy. [102] The recent decision of the United States Supreme Court in *Citizens United v. Federal Election Commission*, [103] freeing corporations from certain restrictions on campaign spending, seems likely to further this trend.

Meanwhile, at least in New York State, the actual balloting process has for the most part remained mired in the 19th-century technology of the lever-operated voting machine. [104] However, the advent of electronic voting systems, hastened by the Help America Vote Act of 2002 [105] and other laws viewed by some as reforms, promises to usher in an era in which votes may be miscast or miscounted by the megabyte rather than merely by the bushel. In the brave new world of free spending and electronic voting, the unanticipated consequences of the Ballot Reform Law may serve to remind us that reform comes at a price and that, as the late Charlie Torche would remind patrons of the bar of the University Club in Albany, "Honesty is no substitute for experience." [106]

Footnotes

a1 *David Sheridan is a graduate of Cornell University and University of Buffalo Law School. He is a solo practitioner in Delmar, NY. Previous publications include "Zeran v. AOL and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet," 61 Albany L. Rev. 147 (1997).*

1 **N.Y. Laws 1890, ch. 262, as amended in many important respects by N.Y. Laws 1891, ch. 296.**

2 A voter who kept a promise to vote as the briber wished was dishonest as to the voting process; a voter who breached his promise was dishonest toward the briber.

3 *Cf. Hill Explains His Views*, N.Y. Times, January 8, 1890: "It is wholly unlikely that the briber will accept the word of the voter as to what ticket the latter voted. There is little mutual confidence in such cases ..." (All citations to the New York Times are to the Times's archive available on the internet. The archive does not give the edition, section, or column, and in most cases does not give the page.)

4 Early efforts to require parties to print identical-looking ballots were not viewed as a success. *See* N.Y. Laws 1880, ch. 366, § 1.

5 N.Y. Laws 1890, ch. 262, §§ 1, 16, 17, 24, & 25, as amended by N.Y. Laws 1891, ch. 296, §§ 5, 6, 11, & 12.

6 N.Y. Laws 1890, ch. 262, § 29, as amended by N.Y. Laws 1891, ch. 296, § 15.

7 N.Y. Laws 1890, ch. 262, § 21.

8 *Id.*, as amended by N.Y. Laws. 1891, ch. 296, § 16. A voter could identify a ballot as his own, and thereby earn his bribe, by, for example, writing in his own name as a candidate in an uncontested or lightly contested race. *See infra* note 33.

9 N.Y. Laws 1890, ch. 262, § 35, as amended by N.Y. Laws 1891, ch. 296, § 18.

10 Governor Hill had vetoed an act under which each ballot would have borne the names of all of the candidates for each office. The voter would have marked the names of the candidates for whom he intended to vote. Hill noted that the when the state constitution was enacted, guaranteeing election by "ballot," a "ballot" was, by statute, "a paper ticket, which shall contain written or printed, or partially written and partially printed, the names of the persons for whom the elector intends to vote, and shall designate the office to which each person so named is intended by him to be chosen." Hill argued that this form of "ballot" therefore was guaranteed by the constitution, and that under the statute, a "ballot" contained only the names of those persons for whom the voter intended to vote. *Hill Explains His Views*, N.Y. Times, January 8, 1890.

11 *Hill Explains His Views*, N.Y. Times, January 8, 1890. To belabor the obvious, "pasters" were also dear to machine politicians because a party worker could ensure that an illiterate elector voted properly by giving the elector a "paster," some glue, and whatever inducement the worker thought appropriate under the circumstances. At the polling place, a voter wishing to use a "paster" was given one ballot for each party with a candidate. The voter glued his "paster" inside one of those ballots, folded all of the ballots, deposited the ballot with the "paster" in the ballot box, and deposited the other ballots in the discard box. Laws 1890, ch. 262, § 25, as amended by Laws 1891, ch. 296, § 12. The Ballot Reform Law also provided for write-ins.

12 *Id.*

13 Given the relatively small number of votes cast for third party candidates, it was also possible after the factto tell with near certainty who voted for the Democrat. For example, in the first district of Camillus, Peck received 159 votes, Nichols received 147 votes, and the third party candidate received 19 votes. If an observer saw a voter cast a ballot bearing the correct district number, the chances were 147 out of 166 that he had voted for Nichols. This circumstance was not relied upon by the Republicans in arguing their case, which is described hereafter. *See* Record on Appeal at 89-90, *People ex rel. Nichols v. Board of County Canvassers of Onondaga County*, 129 N.Y. 395 (1891), which is available in the New York State Library/ Manuscripts & Special Collections Unit.

14 *The Onondaga Mistake*, N.Y. Times, December 16, 1891.

15 *Peck's Certificate Filed*, N.Y. Times, November 20, 1891.

16 *Id.*

17 Letter dated November 25, 1891, from David B. Hill to Hon. Hugh McLaughlin. Hill papers, Box 56, volume 4. (Citations are to the David Bennett Hill Papers, 1872-1926, which are available in the NYS Library/Manuscripts & Special Collections Unit.)

18 Letter dated November 26, 1891, from James W. Ridgway to David B. Hill. Box 4, folder 3.(*See* n.17 for italics full citation)

19 *People ex rel. Munro v. Board of County Canvassers of Onondaga County, 129 N.Y.469 (1891); People ex rel. Ryan v. Board of County Canvassers of Onondaga County*, 129 N.Y. 652 (1891).

20 *People ex rel. Daley v. Rice*, 129 N.Y. 449 (1891).

21 *People ex rel. Derby v. Rice*, 129 N.Y. 461 (1891).

22 *People ex rel. Sherwood v. State Board of Canvassers*, 129 N.Y. 360 (1891). A succinct summary of the entire election litigation is available at www.archive.org/details/davidbhillleadin01newy (visited 2/6/10).

23 Letter dated November 26, 1891, from James W. Ridgway to David B. Hill. Box 4, folder 3.(*See* n.17 for full citation)

24 Letter dated November 28, 1891, to State Committeeman William B. Kirk of Syracuse. Box 56, volume 4. (*See* n.17 for full citation)

25 ***Preparing for the Struggle,*** N.Y.Times, January 5, 1892.

26 Letter of O.H. Kellogg to Hill, dated November 30, 1891, Box 56, volume 4. Kellogg was associated in the case with Marshall, and stated that he had consulted with Marshall before reporting to Hill. (*See* n.17 for full citation)

27 Kellogg in fact referred to "§ 35," but he clearly intended to refer to Section 31.

28 As it turned out, the State Board of Canvassers had no such scruples. In another case arising from the Senatorial races of 1891, *People ex rel. Daley v. Rice*, 129 N.Y. 449 (1891), the Court of Appeals noted that there were uncontradicted allegations that a return from the Dutchess County Board of Canvassers, which resulted in a majority for the Democratic candidate, was based upon an illegal action by the County Board. The Court of Appeals held that the trial court "would have the power to command the state canvassers to canvass without regard to such a return," and that "the court should not permit it to be canvassed." *Id.* at 460. The Court of Appeals handed down its decision December 29, 1891. Later that day, the State Board of Canvassers nonetheless declared the Democratic candidate the winner on the basis, in part, of the Dutchess County canvass. *See* W. Brookfield et al., ***The Theft of the Senate,*** N.Y. Times, January 5, 1892. *See also David B. Hill and the 'Steal of the Senate,'* 1891, New York History at 299 ff. Far too late for it to change the results, the State Board of Canvassers was held in contempt and fined $831.28, which was the amount of the complainants' costs and expenses in the contempt proceeding--a small price to pay for complete control of the government of the State of New York. *See People ex rel. Platt v. Rice,* 144 N.Y. 249 (1894).

29 The letter from Kellogg concluded by saying that it would be delivered to Hill by Mr. Marshall's clerk, "who will wait for a reply and if you desire we shall proceed in the line suggested in the letter to Mr. Kirk, tell him to wire us 'to go ahead,' and we will understand it and will go on as you suggested." Although Hill's telegram is not in the archives, it apparently gave the "go ahead," because the Democrats sued the next day.

30 ***A Talk With Justice O'Brien,*** N.Y. Times, December 6, 1891.

31 ***Morgan J. O'Brien Dead at Age of 85,*** N.Y. Times, June 17, 1937, at 23.

32 *See* Record on Appeal at 1 in Nichols, supra note 13.

33 Record on Appeal at 8 *People ex rel. Nichols v. Board of County Canvassers of Onondaga County,* 129 N.Y. 395 (1891). By contrast, in bitterly contested litigation in Dutchess County, the Democrats submitted allegations that, on a number of pasters, a Republican party official had crossed out the name of a candidate for **judge**, and had substituted the name of a voter, and that these pasters then appeared on ballots that had been cast and canvassed. The Democrats alleged that pasters were intended to identify the person who cast the ballot (which was used to vote for a number of offices in addition to the judgeship), so that the voter could be paid for his vote. *See* Record on Appeal at 104-106, *People ex. rel Daley v. Rice,* 129 N.Y. 449 (1891).

34 Record on Appeal at 17-20 in Nichols, ***supra*** note 33.

35 ***Supra*** at 21-29.

36 *Supra* at 35-63.

37 *Supra* at 63.

38 *Takes The Papers*, Syracuse Evening Herald, December 3, 1891, at 1 (4th ed.).

39 *See* Record on Appeal at 108 in Nichols, *supra* note 33.

40 *A Talk With Justice O'Brien*, N.Y. Times, December 6, 1891.

41 *Id.*

42 *Id. See also Reacting on the Democrats*, N.Y. Times, December 6, 1891, which names Democratic State Committeeman William Kirk as the sponsor of the dinner, and attributes his sponsorship to his pleasure at O'Brien's decision. Forty-five years later, in O'Brien's obituary, the Times reported that the dinner was given in Justice O'Brien's honor by the Republican lawyers. *See Morgan J. O'Brien Dead at Age 85*, N.Y. Times, June 17, 1937, at 23.

43 The parties stipulated to submit the case to the General Term of the Third Department in Albany on December 8, 1891, with the same force and effect as if submitted to the General Term of the Fourth Department. *See* Record on Appeal at 117 in Nichols, *supra* note 33.

44 Brief for Appellant at 7, *People ex rel. Nichols v Board of County of Canvassers of Onondaga County, supra*, 129 N.Y. 395.

45 *Id.* at 8.

46 *Id.* at 8-9.

47 *Id.* at 27.

48 *Id.* at 29.

49 *Id.* at 30.

50 *Id.* at 31.

51 Brief for Respondent at 10 in Nichols, *supra* note 44. The full title of the act is: "An act to promote the independence of voters at public elections, enforce the secrecy of the ballot, and provide for the printing and distribution of ballots at public expense."

52 *Id.* at 37.

53 *Id.* at 13.

54 *Id.* at 34.

55 *Id.* at 9.

56 *Id.* at 35-36.

57 The report of the argument of the Nichols case is from *The Onondaga Mistake*, N.Y. Times, December 16, 1891. The Official Report of the case lists the date of argument as December 11, whereas the dateline on the article indicates that the case was argued December 15. Other election cases were argued before the Court of Appeals on December 11. The Onondaga County case was on the calendar for Friday, December 11, but was not reached that day, and was argued when the court reconvened the following Tuesday. *Election Cases*, Syracuse Evening Herald, December 11, 1891, at 1 (4th ed.). 1

58 *The Onondaga Mistake,* The New York Times, December 16, 1891

59 At oral argument, Marshall also opined that the County Clerk had intentionally mixed up the ballots, and contended that the voters "must have noticed that the Republican ballots were different from the others given him." There was, however, no direct evidence for either contention.

60 *The Ballot Reform Veto*, N.Y. Times, April 1, 1890. *See supra* notes 10-11.

61 *Bush v. Gore*, 531 U.S. 98 (2000).

62 129 N.Y. at 401-02.

63 *Id.* at 403.

64 *Id.*

65 *Id.* at 405.

66 *Id.* at 406.

67 *Id.* at 407. This argument was somewhat disingenuous since the Court did not address what a voter who did not know that he was casting a distinguishable ballot was supposed to do if the election officer did not refuse it. Presumably, the voter who did not know would do what the voters in the case did, which was leave the polling place under the erroneous belief that they had cast a valid ballot.

68 *Id.* at 408.

69 *Id.*

70 *Id.* at 409.

71 *Id.* at 420-21.

72 *Id.* at 426.

73 N.Y. Laws 1890, ch. 262, § 21: If the ballots to be furnished to any town or city clerk, as herein provided, shall not be delivered at the time above mentioned, or if after delivery they shall be destroyed or stolen, it shall be the duty of the said clerk of such town or city to cause other ballots to be prepared as nearly in the form prescribed in section seventeen as practicable, but without the indorsement, and upon receipt of ballots thus prepared from said clerk, accompanied by a statement under oath that the same have been so prepared and furnished by him, and that the original ballots have so failed to be received, or have been so destroyed or stolen, the inspectors of election shall cause the ballots so substituted to be used at the election. If from any cause, neither the official ballot nor ballots prepared by the town or city clerk as herein prescribed shall be ready for distribution at any polling place, or if the supply of ballots shall be exhausted before the polls are closed, unofficial ballots, printed or written, made as nearly as possible in the form of the official ballots, may be used ....

74 N.Y. Laws 1890, ch. 262, § 25.

75 Peck won Cortland County by 770 votes. *See* Record on Appeal at 66 in Nichols, *supra* note 33. Before the Republican votes at issue were discarded, Nichols won Onondaga County by 388 votes, *See id.* at 85-86, giving Peck a margin of victory in the Senatorial district of 382 votes. The Court's decision cost Peck 1,252 votes. *Id.* at 89-104. Voiding Nichols's votes in the election districts in question would have cost Nichols 1,118 votes, giving Peck a margin of victory of 248 votes in the Senatorial district.

76 129 N.Y. at 428.

77 *Id.* at 432.

78 *Id.* The parties in Nichols stipulated that "in the event of fraudulent intent in the distribution of the ballots being deemed material by the appellate courts, then the relators shall have the right to waive such question of fact, and no objection to their waiving such question of fact shall be raised by the respondents in the cases." This was done "for the purpose of having the questions of law involved in these proceedings referred to speedily decided by the courts ...." Record on appeal at 114, *People ex rel. Nichols v Board of County Canvassers of Onondaga County*, 129 NY 395 (1891). Both Nichols and Peck had brought a proceeding, so each was both a relator and a respondent.

79 129 N.Y. at 435.

80 *Id.* at 439. The opinion as reported uses the word "conceivable," but the context makes clear that the **judge** intended "inconceivable."

81 *Id.* at 443-444.

82 *Id.* at 445.

83 129 N.Y. 360 (1891).

84 129 N.Y. 449 (1891).

85 *Supra* note 28 for a discussion of Daley. In Sherwood it was clear that more voters had cast ballots for the Republican, and in Nichols it was clear that more voters tried to cast ballots (valid or invalid) for the Republican. If one believes the Republicans' allegations in *Daley*, then it appears that more voters cast ballots for the Republican in that election as well. However, since the State Board of Canvassers certified the Democrat the winner before any judicial decision as to the facts, and the **Senate** seated him, there was no conclusive proof either way.

86 The Bar Association's report is bound with the record in Daley in volume 862, case 10 of the bound records and briefs of the Court of Appeals in the New York State Library. That volume also contains a record of the contempt proceedings against Dutchess County Clerk Storm Emans in connection with the election involved in Daley.

87 Jason C. Rubinstein, *Isaac Horton **Maynard*** in The **Judges** of the New Court of Appeals: A Biographical History 258 (Albert M. Rosenblatt ed., Historical Society of the Courts of New York 2007).

88 Francis Bergan, The History of the New York Court of Appeals 1847-1932 at 144 (Columbia Univ. Press 1985), quoting Roscoe C.E. Brown, Political and Governmental History of New York State 3:365, 375 (Ray Smith 1922).

89 Herbert J. Bass, I am a Democrat: The Political Career of David Bennett Hill 242-43 (Syracuse Univ. Press 1961).

90 *Id.* at 245.

91 Suzanne Aiardo, *William Crawford Ruger* in The **Judges** of the New York Court of Appeals: A Biographical History, *supra* note 87, at 229.

92 The description of his career is from *Morgan J. O'Brien Dead at Age of 85*, N.Y. Times, June 17, 1937, at 23

93 *Id.*

94 N.Y. Laws. 1892, ch. 680, § 81.

95 *Republicans Carry Lockport*, N.Y. Times, April 13, 1892. *See also* Mary Wittenburg, *A Better Ballot?*, Christian Science Monitor, November 3, 2003.

96 *Reynolds v. Snow*, 67 Cal 497 (1885)(voter crossed out office and name on printed ballot, and wrote in name but no office; write-in vote not counted); *Fields v. Osborne*, 60 Conn. 544 (1891)(ballots which contained office, and name of candidate for that office, which was not part of that election invalid as to all offices and candidates); *Talcott v. Philbrick*, 59 Conn. 472 (1890)(ballots issued by Republican Party, labeled "Citizens Party," but bearing the names of the same candidates as on the Republican Party ballot, invalid because the law requires the ballot to bear the name of the party that issued it); *Perkins v. Caraway*, 59 Miss. 222 (1881)(ballot on which names of candidates for legislature were less than 1/5 inch apart were invalid as to all candidates for all offices); *Oglesby v. Sigman*, 58 Miss. 502 (1880)(ballots with marks on inside invalid); *Steele v. Calhoun*, 61 Miss. 556 (1894)(ballots with dotted line across face invalid as bearing an illegal "distinguishing mark"); *Ledbetter v. Hall*, 62 Mo. 422 (1876)(same as West) *West v. Ross*, 53 Mo. 350 (1873)(statute required election **judges** at polling place to number ballots; ballots inadvertently not numbered were invalid);; *State ex rel Mahoney v. McKinnon*, 8 Ore. 493 (1880)(voter-prepared ballot on colored paper invalid because ballots are to be on white paper).

97 3 N.Y.3d 251 (2004).

98 *Id.* at 258 (2004), quoting *Matter of Staber v. Fidler*, 65 N.Y.2d 529, 534 (1985).

99 3 N.Y.3d at 261 (Rosenblatt, J. dissenting)

100 3 N.Y.3d at 260.

101 *See, e.g.*, Charles Lewis, The Buying of the President 2004 (Perennial 2004).

102 As a general proposition, it seems unfair that so many--the media, consultants, pollsters, paid canvassers, etc.--feast on the campaign expenditure pie, yet it is a crime for a voter to take even the tiniest bite. See N.Y. Election Law 7-102(7) & (9), 7-142, 7-144. It is particularly unfair that office holders and candidates are allowed to solicit and accept hundreds of thousands of dollars from individuals, corporations, and political action committees, and to say with as straight a face as they can muster that the money will not influence their votes, while a citizen who openly sought cash contributions from candidates would undoubtedly be considered to be prostituting his franchise, regardless of what he said. Law and society thus treat politicians as more moral than the average citizen. Does this distinction comport with experience? Recall that the premise of the Ballot Reform Law and the rationale of the *Nichols* decision was that ballot secrecy would remove any incentive for bribery. If one truly believes that technology renders a ballot secret, then the prohibition against payment to voters is unnecessary. Retention of the current prohibition against a potential voter promising to vote in exchange for payment would remove any moral obligation that a voter might feel. A requirement that payment to a voter be made before the election day would further ensure that a candidate retained no leverage as a voter was actually casting his ballot.

103 *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

104 *Supra* textual discussion herein preceding endnote 95.

105 Pub. L. No. 107-252, 116 Stat. 1666, codified at 42 USC §§ 15301 et seq.

106 Kenneth Salzmann, Albany Scrapbook 42 (Aurania 1985). Charlie Torche was an "Albany lawyer, pol, mingler-extraordinaire, and living legend." *Id.* at 41.

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EXHIBIT 3

THE POLITICS OF BALLOT REFORM IN NEW YORK STATE, 1888-1890

HERBERT J. BASS*

ONE of the major objectives of American political reformers of the latter part of the nineteenth century was the elimination of the corruption, fraud, bribery, and intimidation all too often attendant on voting. In the late 1880's, a movement to remove this blemish from the democratic process through the adoption of the Australian ballot, or some variation of it, gained considerable strength, and provided the focal point for a number of political struggles of the era. Because the federal structure of American government leaves almost entirely to the states the determination of the methods and qualifications for voting, the reform battle had to be fought and won not once, but again and again in the several states. Ultimately, of course, the movement for ballot reform was crowned with success; but this eventual success was by no means assured until after the initial victories had been achieved in those states which formed the first battlegrounds.

Because of the existence of reform groups in New York which were actively championing a change in the ballot laws, the Empire State was one of the first in which the agitation was carried over into the political arena.[1] In no state was the battle more bitterly waged, nor its outcome more in doubt, than in New York. This was so partly because the reform was still novel in the United States at the time; it was so partly because the issue was inevitably interwined with the web of existing political circumstance and vested party and personal interests; it was so in large measure because of the adamant and clever opposition of David B. Hill, a calcu-

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lating opportunist from Elmira who had risen to the mastery of the New York Democratic party and the governorship of the Empire State.

The reasons for the eruption of the ballot reform issue in New York and its dominance as the major legislative issue of the late 1880's are not hard to find. The disparity between the ideal of a free and secret ballot on the one hand and the reality of the shameful practices which debased elections on the other had long been a sore point in New York politics.[2] The wholesale fraud of the Tweed era had led to some relief in the form of registration laws, which did succeed in dealing with some of the more obvious and flagrant abuses of the ballot box. In two important respects, however, the election laws were still deficient. While they prescribed the form and details of the ballots, they said nothing about who should print and distribute them; and they contained no safeguards for secrecy in voting. Through these loopholes poured abuses more subtle, and for that reason more dangerous, than the open violations of the previous decades.

Since the law was silent on the question of the printing and distribution of ballots, the task was willingly assumed by each political party. This system of privately printed ballots was an important factor in the continuing power of the machines. The ballots were distributed by the machine captains of each election district to the residents of his territory. These residents then chose between the Republican and Democratic ballots, depositing the one of their choice on election day. This system enabled the machines to poll a large illiterate vote, for the non-writer had merely to drop his prepared ballot in the box. Moreover, this simplicity in voting encouraged straight party voting, with the result that many inefficient men at the bottom of the ticket, if not at the top as well, were put into office.

The private ballot system also invited a number of abuses. Each district captain had it in his power to "knife" a candidate simply by covering his name with a paster of his opponent before distributing the ballots. Few indeed were those who took the trouble to examine their ballots, or for that

matter who would know that a change had been made, if they did examine it.

The method of ballot distribution led to another evil. Since "trading" and "knifing" were so easy, candidates were forced to take precautions against these acts of treachery. Each district leader and captain had to be paid for his services rendered in distributing the ballots. This payment was also regarded as a premium on an anti-knifing insurance policy. The payments were made to the political machines, which then distributed the money to the party workers. Thus, candidates were assessed anywhere from ten dollars up per election district, with the assessment for some offices, including judgeships, running as high as $15,000 to $20,000.[3] This practice was deplorable, but the more realistic acknowledged that "so long as our election system remains as it now is, money must be raised to get the vote out, *and those who dance must be the ones to pay the piper.*" [4] Moreover, the size of these assessments meant that only the wealthy or those who were willing to milk their offices to offset campaign expenses could afford to run for office. It amounted to little more than sale of office.

The lack of secrecy in voting also led to a number of abuses. Machines could easily check on their members, and so maintain their grip on them. Bribery was also made easy. The voter was in full view of everyone in the voting room when he dropped his ballot into the box. Since each party's ballots were distinguishable,[5] the briber could see for himself that the vote was delivered as contracted for. These circumstances also made easy the intimidation of workers by employers who made continued employment contingent upon casting ballots as instructed.

The unhealthy influence of the political machine and the flagrance of these abuses led to widespread agitation for ballot reform. In response to this agitation, and taking its cue from the successful operation of the Australian ballot abroad, the Commonwealth Club, a New York reform group embracing members of all political faiths, drew up a bill designed to plug the loopholes in the existing election laws.

This measure was approved by a number of other prominent reform organizations and was introduced into the 1888 New York State legislative session by Senator Charles T. Saxton, a Republican.

In its final form, the Saxton bill provided that all ballots were to be printed at public expense, and distributed only by the ballot clerks at the polls. Each party which polled more than three per cent of the vote in the previous election would automatically qualify for a place on the printed ballot. If a person was unaffiliated, or if a new party wished to enter the field, a place on the ballot could be secured on the presentation of a petition with one thousand signatures. There was also to be a space left blank for write-in votes. As a safeguard against fraudulent ballots, it was provided that no ballot would be valid unless it was initialed by the ballot clerk.

A number of other safeguards were set up to insure secrecy of the ballot. Each voter was required to make out his ballot in a private booth within a five minute period. No one was to be allowed to see the ballot as it was dropped into the box. To prevent circumvention of this provision, it was made a misdemeanor for a voter even voluntarily to show his ballot to anyone else. The only exceptions to this rule were invalids, illiterates, or others who for some reason were not able to make out the ballots by themselves. In such cases, the ballot clerk was permitted to help in the voting process.[6]

The measure, while certainly not perfect, was a major step toward a truly secret ballot. Near the end of the session, it was passed by a comfortable margin in each house and was sent to the Governor.

The fate of the Saxton bill now rested in the hands of David B. Hill. As the days dragged on with Hill taking no action on the bill, the optimism of its supporters gave way to uncertainty and anxiety. Hill's silence bode ill for ballot reform. Despite the demands of the reform press for action, Hill continued to delay, holding private hearings on the measure. Then, after the legislature had adjourned, he vetoed the bill.

Hill's veto message[7] consumed some fifteen pages, in which the Governor elaborately set forth his objections. These objections were directed chiefly at the official ballots and fell into two broad categories: practicability and constitutionality. For one thing, the Governor declared, the public assumption of the cost of printing and distributing the ballots would impose an unnecessary burden upon the taxpayers. While it would increase taxes it would bring about no corresponding benefits, for the assessment of candidates would continue in order to meet other campaign expenses. Moreover, Hill predicted, ballots printed at public expense would invite "adventurers" to gather a thousand names on a petition—or only a hundred for a local office—and thereby compel the state to print all of their ballots. The number of candidates at each election would thus increase many fold and would unnecessarily confuse the voters.

Hill's constitutional objections to the bill were based on the postulate that the legislature must not in any way impinge upon the citizens' suffrage beyond the restrictions set forth in the state constitution. Certain features of this bill, claimed the Governor, contained within them the seeds of possible infringement of suffrage rights and were, therefore, unconstitutional. A voter might be deprived of his vote in any of a number of ways. A ballot clerk, either intentionally, or unwittingly, might void a ballot simply by failing to initial it. Failure of the proper officials to deliver the ballots to the polling places would deprive citizens of their franchise. Since no changes or substitutions could be made on the ballots within fifteen days of the election, the death, declination, or disability of a candidate within that period would deprive the voter of a choice between candidates. The time limit of five minutes was inadequate for the slow, the aged, and the undecided to make their choices. And the compulsory disclosure of his choices to the ballot clerk deprived the illiterate voter of his secret ballot. It did not matter that most of these contingencies were unlikely to occur; as long as they were remotely possible, held Governor Hill, the bill was unconstitutional.

Hill added many more minor defects in the bill to his list of objections and stressed the fact that the proposed system had not as yet been tried anywhere in the United States. Its foreign origin—it was widely known as the Australian ballot—was the target for an attack by the Governor. He fulminated against this "mongrel foreign system" whose prohibition of even a voluntary disclosure of one's ballot would deprive the voter of the right to converse and "electioneer" at the polls, a traditional right which he traced back to the New England town meetings.

Some of Hill's arguments were not unreasonable; others were specious. But it was plain that if excuses for a veto had not existed, Hill would have invented them. He had no intention of signing this bill into law. The real objection to the bill was not to be found in the veto message, but in the character of the Democratic urban vote. A substantial part of this vote came from the organized efforts of the machine, especially among the illiterate. The official ballot would severely hamper the organization's ability to poll its full strength and would cut into the Democratic column on election day. Insofar as the bill dealt with bribery, intimidation, and gross corruption, Hill was probably not unsympathetic. If a bill to eliminate them while, at the same time, preserving the main lines of the existing system had been presented to him, he would probably have signed it.[8] But as long as any such scheme was tied to an exclusively official ballot, Hill would reject it as an assault upon his party's interests.

Hill's veto of the Saxton bill inevitably threw the whole question into the gubernatorial campaign of 1888. It is hard to believe, of course, that the Republican party, under the leadership of Boss Platt, really favored ballot reform as a principle, although it is clear that the reform wing of the party did. Yet, sensing the potency of the issue, the Republicans took it up as their own in this campaign.

While their gubernatorial candidate, Warner Miller, a temperance man, hammered away at Hill's veto of a high license bill designed to curb the liquor traffic,[9] other Republican orators directed their fire at Hill's veto of ballot reform.

The Governor had never wanted electoral reform, they charged, and the arguments in his veto message were both weak and spurious. Much of the anti-Hill press, which included not only Republican organs but independents like the *New York Times*, *Harper's Weekly*, and the *Nation*, took up the cry. *The Nation* asserted that electoral reform would never be realized as long as the executive chair was occupied by a man who characterized the secret ballot as "a mongrel foreign system." [10]

These continued assaults by the opposition press and politicians apparently caused Hill considerable concern. It was difficult to estimate just how much electoral support his veto might cost him, but already some straws were in the wind. There was an indication that some of organized labor, on whom Hill was depending heavily for support, might have been alienated. In early October, a local of the Knights of Labor, number 1965, of Elmira, Hill's home town, published a broadside censuring Hill for his veto of the Saxton ballot reform and Fassett anti-bribery bills, and Hill quickly dispatched a labor friend to the scene to repair the damage.[11] For his own part, Hill reiterated in his campaign speeches that he had vetoed the bill only because of its unconstitutional and unsound provisions.[12] Thousands of copies of his veto message, including an appendix by Nelson Waterbury, a Richfield Springs jurist, upholding Hill's constitutional views, were circulated as campaign handbills,[13] and Hill arranged for an elaborate defense of his veto to be sent to many newspapers.[14]

It is worth noting that the Governor at no time took the ground that he opposed ballot reform as such; it was only this particular bill that he opposed, because of its unsound and unconstitutional features. On the contrary, Hill asserted that he "would cheerfully approve a well-considered measure" of ballot reform, if one were presented to him. That Hill did not feel that he could overtly oppose ballot reform as such is an indication of the strength that the movement had already attained.

The effectiveness of the Republican assault on Hill's veto

is, of course, difficult to measure. But if Hill's veto had left him vulnerable to the oratorical and editorial thrusts of Republicans and Independents, it also brought more solidly behind him an important block of votes. While Hill would normally expect the support of the Democratic city machine as the regularly elected candidate of the party, his veto of the Saxton bill insured him against any possible lukewarmness. The organization now had a vital interest in keeping in office the man who stood between them and this crippling act, and their efforts on Hill's behalf throughout the 1888 campaign were unstinting. Moreover, the veto of the bill had preserved for that year at least the ability of the machines to deliver an undiminished vote.

Election day, 1888, saw Hill triumphant in his quest for re-election by some 19,000 votes. It was clear, however, that Hill's veto of the Saxton bill and his subsequent re-election would not still the demand for ballot reform. On the contrary, as the legislative session of 1889 approached, it was evident that support for ballot reform was large and growing, and Hill recognized that his adamant position on the Saxton bill was no longer tenable. Some measure of electoral reform would plainly have to be conceded. The problem was to bend with the movement without bowing to it, to grant some limited change while at the same time preserving the vital interests of the Democratic party.

That Hill devoted fully two-fifths of his annual message to the legislature to this subject was a measure of his concern. In his message,[15] Hill spelled out just how far he would retreat. While New York's election laws "as a whole are not excelled by any in the country," declared the Governor, the incontrovertible evidence that "vast and unusual sums of money" were raised by high-tariff advocates "for the purpose of debauching the electors" in 1888 had pointed up the "imperative" need for some change in these laws. There were two major abuses which had occurred in 1888 and which the legislature should now seek to remedy: bribery and intimidation.

Bribery, continued the Governor, although forbidden and

punishable by law, had continued to flourish because of the difficulty of detection. What was needed, therefore, was an amendment which would decrease the opportunities for bribery at the polls. Hill suggested how this might be done: a "reasonable distance from the polls should be set aside or reserved by ropes, or barriers of some kind," within which only peace officers and one elector at a time would be permitted to enter. Inside this roped-off area would be a private booth or compartment in which each voter would prepare his ballot alone. Then, still alone, the voter would proceed to the ballot box and deposit his ballots. "The value of such a provision," stated the Governor, "consists not in *permitting* the elector to cast a secret ballot, but *compelling* him to do so." Since a briber is less likely to pay for a vote which he cannot be sure will be cast as promised, this form of corruption would be frustrated.

These proposals, Hill continued, would also deal effectively with the second evil, intimidation. The enforced secrecy would serve to free a workingman from the scrutinizing gaze of his employer. To safeguard the employee further in his right to vote freely, Hill urged the legislature to punish as a crime the use of pay envelopes which threatened employees with loss of jobs if they should fail to vote as directed. The use of this device in the presidential elections of two months before had been widespread, the Governor asserted, and only by taking drastic steps could it be stopped.

Hill had several other recommendations on the subject of electoral reform, which, while peripheral, were intended to counter the unfavorable impression left by his veto of the Saxton bill. The excessive use of money in elections could be checked, suggested Hill, by requiring each candidate for office at a general election to file with the secretary of state within ten days after his election a verified statement of all moneys expended by him to aid his election during the canvass. Failure to do so should be sufficient cause to forfeit his office. To make it easier for employees in manufacturing, mechanical, or mercantile establishments in the state to go to the polls and vote, he recommended a law setting aside a

two hour period on election day when such employees could leave their work to vote, without suffering a loss of pay for time away from work. Such a law had already been enacted in Massachusetts and had worked well, the Governor noted. Also, to prevent confusion at the polls, Hill urged that election districts be limited to three hundred inhabitants instead of including as many as one thousand, as was commonly the case.

This far Hill would willingly go, and indeed, he would gladly lead the way. On one point, however, he remained adamant. Under no circumstances would he countenance a law providing for an exclusively official ballot. He did modify slightly his absolute refusal of the previous year to allow any ballots at all to be furnished at public expense. While still doubting the wisdom of this innovation, he now conceded that it might be an experiment worth trying. The right of the state, county, or city to furnish ballots, however, must not be exclusive, but should be a right shared concurrently with parties, candidates, and individuals.

Thus Hill stated to the legislature the limit of his concessions. Anything beyond this he would regard as too radical, as an attempt to overturn a system which had stood the test of years and replace it with "an entirely new and untried system." This he would never accept. His warning to the legislature was veiled but unmistakable. "If too much shall be attempted," he cautioned, "it is to be feared that nothing at all may be actually accomplished."

It was obvious within a week of Hill's message that the Republican legislature intended neither to heed his warnings nor to accept his recommendations. As soon as the senate was organized, Senator Saxton reintroduced his ballot bill which, with a few minor changes and one major innovation, was substantially the same measure Hill had vetoed the year before. The new feature in this bill was the so-called blanket ballot. Instead of having a separate ballot bearing the name of each party's candidates for office, it was proposed that one large ballot should contain the names of all the candidates for each office. Party affiliations of the candidates would be

designated next to each name. The voter would cast his ballot by marking an "X" next to the name of his choice for each office.

Hill tried desperately to block this bill and prevent it from reaching his desk. Because of the growing appeal of the electoral reform movement, a veto would be unpopular, and Hill was committed to a veto. While the bill was in committee, Hill prevailed upon Judge Nelson Waterbury, the jurist who had agreed with Hill's veto on constitutional grounds the previous year, to journey to Albany and argue at the bill's hearing for an acceptable substitute.[16]

The major move in Hill's counteroffensive was the introduction of his own bill in mid-March by Senator John J. Linson. Simultaneously letters went out to Democratic editors advising that the Linson bill was acceptable to the Governor, and inviting the united support of the Democratic press for this measure. The party was not going to drag its feet and maintain a negative position on ballot reform: "The Democratic members of the Legislature, instead of merely opposing the Saxton Bill, propose to make a fair fight for that of Senator Linson." [17]

Hill's lieutenants in the assembly and senate, especially Assemblyman William Sheehan, Senator James F. Pierce, and Senator Jacob A. Cantor, fought hard for his bill, using all the parliamentary devices at their command, but their efforts were of no avail. The Republicans had no intention of letting slip from their grasp this opportunity to make the Governor squirm. At least as desirous of reaping a political harvest from Hill's discomfort as of effecting a real reform, the Republican caucus took up the Saxton bill as a party measure, and in April pushed it through both houses on a straight party vote.[18]

The fact that no Democrat voted for the bill was a confirmation, if any were needed, of Hill's intentions. His veto came as a surprise to no one. The only thing which had not been predicted days before was the message's inordinate length. Most of the twenty-six printed pages[19] were consumed by a rehearsal of the Governor's objections to the Saxton

bill of the previous year and a repetition of his recommendations to the legislature. Almost every feature of the new bill was the target of criticism. The Governor reserved his bitterest polemic for the exclusively official ballot and the "newfangled" blanket ballot, which he denounced as "cumbersome, expensive, impractical, and unconstitutional."

The message was as labored as it was long, and much of the reasoning was neither cogent nor plausible. Some of the arguments which Hill recited against the exclusively official ballot betrayed his anxiety to find excuses for a veto. The argument that ballots printed and distributed at public expense might not be delivered to the polls on time was as specious this year as last. Hill seemed to be grasping at straws when he suggested that the official ballot, dependent for candidates on party nominations, could be the instrument for total disfranchisement: if parties should fail to nominate, no names would appear on the ballot, and the electorate would have no one to vote for. That this Alice-in-Wonderland situation was rather unlikely to occur in nineteenth century New York the Governor conceded; but the existence of the merest possibility that it might, he insisted, rendered the bill unconstitutional. Hill also indulged in an exercise in semantics, suggesting that the blanket ballot was not constitutional because it was not within the meaning of the word "ballot" at the time the voting provision in the constitution was written.

Hill vetoed this bill, of course, for the same reason that he had vetoed a ballot reform bill the year before. In some ways, in fact, that previous bill was less objectionable, for the new blanket ballot was an additional obstacle to polling the full illiterate vote. Hill would accept reform, but there was always a higher desideratum: ". . . in framing a measure the rights of the Democratic party should be preserved," he wrote a friend on July 17, 1889. "I want a bill that is right, and that will protect our voters, or else I do not want any at all." [20] Although the veto was unpopular, Hill regarded it as vital to the interests of the Democratic party in the state.

Thus, for the second time in two years, Hill had blocked

ballot reform in New York. Since his term as governor would not expire for another two years, and since even then there could be no certainty that a Democratic governor, similarly ill-disposed toward the measure, would not succeed him, the fate of meaningful ballot reform in New York, at least for the near future, must have seemed to its advocates uncertain at best. Yet at the very time when Hill's conception of the interests of the state Democracy seemed to doom the measure, his personal political ambitions, along with the growing popular appeal of the movement, were actually creating a counter-pressure which was enhancing the prospects for enactment.

Hill's re-election to the governorship of a key state in 1888, coupled with Grover Cleveland's loss of the presidency and his failure to carry that same state, had vaulted him into prominence as a major possibility for the Democratic presidential nomination of 1892. The wily Elmiran had already begun to cultivate the friendship and support of Democrats the country over through an extensive correspondence, visits, and public addresses. By 1890, those Democrats who were shopping for a new standard-bearer were being familiarized with the name and record of David B. Hill. His audience now far transcended his own state's boundaries—watchful, waiting, some hopeful, some critical, but all evaluating. Hill was acutely conscious of this audience, and was eager to impress it favorably. Yet the awkward position in which Hill found himself on the ballot reform issue was likely to do anything but impress favorably.

It was a tiger by the tail. Hill had taken a strong, almost contemptuous stand against the Saxton bill in 1888, but the movement had not wilted. As the pressure for a reform measure had mounted, Hill had been forced to retreat from his more untenable arguments. His original contention that there was no need for revision in the electoral laws was transformed into an assertion that a change was "imperative." From his 1888 objection to restricting the "right of the people to converse with and electioneer one another at the polls," he had moved a year later to the position that a voter should

be *compelled* to cast a secret ballot. From a complete rejection of publicly printed ballots as a needless and fruitless expense, he conceded that official ballots would be acceptable, as long as ballots were not exclusively official.[21]

These concessions had neither pacified nor beguiled advocates of ballot reform. The movement continued to gain adherents all over the nation.[22] In Hill's own state, clubs sprang up with ballot reform as their cry. Pressure mounted within his own party, and prominent Democrats and Democratic newspapers endorsed the reform. Rumblings of discontent grew louder, when influential Democratic organizations like the Young Men's Democratic Club of New York joined the movement.[23] Even one of Hill's staunchest newspaper supporters, the New York *World*, publicly differed with him on the exclusively official ballot.[24] The great success of the new ballot law in neighboring Massachusetts, operating for the first time in 1889, added the weight of proven practicability to the demand for reform.

Hill was fully aware of the dangers in the ballot reform issue. He knew that his political future on the national level demanded either a positive identification with the issue, or at least a neutralization of its political effects.[25] Yet an approval of the Saxton bill in its existing form would imply an admission of earlier contumaciousness; and the official blanket ballot still gravely threatened Democratic voting strength. Hill's objections had already been trimmed to a minimum. There was nothing for him to do now but to stick by his guns, attempt to justify his position, and hope for the best. And this was the position that he now took.

To the legislature he again expressed his earnest desire for reform.[26] His sole objections were again directed against two features of the Saxton bill: the exclusively official ballot and the blanket ballot. This time, however, Hill relegated to the background all objections based on grounds of practicability and feasibility, and retreated to the ultimate defensive position, that of personal constitutional objections, already stated in his previous vetoes.

The Republican legislature again, however, refused to

permit Hill to maneuver out of his tight spot, and in 1890 once more passed the Saxton bill in essentially the same form as the previous year.

There seemed to be no way out of the spot. Throughout the bill's course in the legislature and while it lay on Hill's desk awaiting action, there were constant reminders of the drift of opinion on the subject. Mass meetings demanded the reform in increasingly violent tones. Even if Hill were ready to dismiss these meetings as opposition-inspired, he must have been disturbed by the appearance at the executive mansion of representatives of thirty-four Knights of Labor assembly districts who urged him to approve the bill. The popular demand for ballot reform was dramatized when a gigantic petition, weighing one-half ton and bearing some 77,000 signatures from New York City and Brooklyn alone, was carried by fourteen men to the floor of the legislature, there to rest during the debates.[27]

Hill had had enough. He was even willing, if necessary, to approve the bill as it stood, if a way could be found to save face and keep his earlier opposition from appearing petty, partisan, and obstructionist. Hill found that way. Shortly after the bill reached his desk, Hill sent a special message to the legislators.[28] As they well knew, he pointed out, he agreed with the objectives of the bill, but he could not approve it because of a "deep-seated and controlling" conviction that some of its provisions were unconstitutional. Then Hill opened the escape hatch for himself. "I have, however, no mere pride of opinion in this matter, and will cheerfully acquiesce where convinced that my views are unsound." Since the matter was of such great importance, Hill suggested that it be referred to the Court of Appeals for an informal opinion. Such a move was not without precedent, noted the Governor, and a joint resolution by the legislature requesting such an opinion could settle, once and for all, the constitutionality of the controversial provisions. The message breathed a spirit of fairness and conciliation.

It was a shrewd political stroke. If the Republican legislators refused to do as Hill requested, at least some of the onus

for a veto would be put upon them. If they did refer the question to the jurists, Hill would escape all the pitfalls of the issue and emerge practically unscathed. A Court opinion agreeing with him would give him complete vindication. An adverse opinion would allow him to bow gracefully to the verdict of a judicial body, which had set at rest his "deep-seated and controlling" constitutional misgivings, and he could then proceed to approve the bill cheerfully. If the Court were to split, Hill could exercise his judgment and choose whichever course he deemed wisest.

The legislature, seeing through the clever escape which Hill had fashioned, blocked it as best they could by sending the proposal to committee. Six days later the Governor vetoed the Saxton bill, reciting once again his objections, and making much of the legislature's refusal to submit the bill to a judicial opinion. In rejecting his sincere offer, fulminated Hill, the Republicans showed their contempt for the best interests of the people. Their hypocrisy in framing a bill which they knew must be vetoed was now fully exposed, he asserted. Since the Republican obstructionism had prevented him from setting at rest his own objections to the bill, he had no choice but to veto it.[29] This tactic eased the pressure somewhat, although it was observed that if he had really wished an opinion, he could himself have asked the jurists, without a resolution from the legislature.

For all his cunning, inventiveness, and agility, however, the Governor still held the wrong end of the stick. He realized that, although he had managed to throw sand in many eyes, he remained in a poor position on ballot reform. At this point, however, aid arrived from an unexpected quarter. Through the efforts of the Ballot Reform League (a group of private citizens) and an incredible Republican blunder, Hill was rescued.

Through the good offices of the Ballot Reform League, a series of conferences were held between members of the League, Senator Saxton, and Governor Hill. Anxious to salvage some measure of reform, the proponents of the Sax-

ton bill decided to accept half a loaf, and worked out a compromise which satisfied Hill's demands.

The proposal, accepted by both Hill and Senator Saxton, resolved the impasse previously presented by the exclusively official ballot and the blanket ballot. The new measure incorporated certain features of the blanket ballot, but separated them into strips, each separate strip containing the names of only one party's nominees. A blank strip was provided for those who wished to write in other candidates. The person who wished to vote a straight ticket merely deposited the strip which listed his party's nominees. These were the only ballots allowed, for the measure provided for an exclusively official ballot. No party or individual could supply other ballots. In their stead, however, they could supply pasters, which, when pasted onto the official ballots, became themselves official. The paster was considered the choice of the voter, regardless of which party strip it was pasted on. In this way the illiterate voter was cared for. Armed with a paster in his pocket, the non-reader could enter the voting booth, pick any of the strips out of the pack and affix his paster to it.[30]

This bill was promptly introduced in the senate and received immediate consideration. Hill was pleased with the compromise, and using the veto of a minor bill as his vehicle, he announced his intention of accepting it:

> . . . A general act [he wrote] relative to the form of ballots and the manner of voting is now pending in the Senate, with fair prospects, as I am advised, of its passage by the Legislature. The act seems to meet with general approbation, and if passed in its present shape will probably become a law, inasmuch as it has been freed from constitutional and other objections which heretofore have made similar measures obnoxious to a part of the Legislature and to the Executive.[31]

It is doubtful that Hill was attempting to trick the Republicans into a false move with this declaration of intention. In all probability he meant to do no more than ease the bill on its course, salvage what he could by calling attention to his

readiness to approve a bill which heeded his constitutional objections, and once for all be done with this troublesome issue. Yet even Hill's most cunning ruses rarely resulted so favorably for him. The Republicans, up to now holding the whip hand on ballot reform, now threw away all their advantage with an incredible blunder.

Reluctant finally to let Hill off the hook, a Republican caucus decided to drop the acceptable compromise measure and replace it with a bill which was objectionable to the Governor and would be sure to be rejected by him. The substitute measure was pushed through the senate the following day. This exhibition of contumaciousness stirred a veritable hornet's nest in the independent press, both the *Times* and the *Evening Post* of April 23, 1890, belaboring the Republicans for their cheap political antics.[32] Hill girded himself for battle and sent out letters to Democratic editors announcing his readiness to fight in view of the Republican repudiation of the compromise.[33]

The Republicans were quick to see their error, and hastily receding from their antagonistic position, supported the compromise measure, which then passed the senate by a unanimous vote. The awakening, however, was too late, for their greed had already cost them dearly. In attempting to squeeze one last drop from the ballot reform issue, they had cast doubt upon the sincerity of their original support of it and lent credence to Hill's earlier charge of hypocrisy. In three days they had forfeited much of the credit for ballot reform which would otherwise have been theirs.[34]

The bill was whisked through the assembly and Hill signed it immediately, using the occasion for an attack on Republican obstructionism and for a justification of his earlier vetoes.[35] It is not likely that Hill convinced anyone with his assertion that his fight for real ballot reform had finally been rewarded with victory, but by gaining this compromise, and with the aid of his opponents' tactical blunder, he did succeed in neutralizing the toxic political sting of the issue.

In an article in *The Forum* of January, 1892, a year and a half later, a staunch advocate of ballot reform, comparing

the ballot acts of those states which had by then adopted the reform, characterized the New York law as "the poorest and most unfair" in the nation.[36] To many, however, it must have seemed less remarkable that the law left much to be desired than that it had been enacted at all. In subsequent years, the triumph of the reform was made more complete by amendments to the act of 1890; but this act was the initial success for the reform movement in the Empire State, and as such, a most important one. It was no small victory that out of the entangled web of political circumstances and vested party interests the ballot reform movement had succeeded in placing an act on the statute books. It was no less a victory—and not without irony—that this first step toward ballot reform had been finally signed into law by the man who, more than any other, had effectively opposed the movement.

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[1] Although the secret ballot was adopted throughout Australia between 1856 and 1877, and in England in 1872, it seems to have attracted scanty attention in the United States until the late 1880's. The Michigan legislature considered secret ballot proposals in 1885 and 1887, but both bills failed of enactment. The first state to adopt an Australian ballot act was Kentucky (Feb., 1888), but this law applied only to the city of Louisville. It was in Massachusetts, where as in New York important reform groups agitated for the measure, that the first statewide secret ballot law was adopted (May, 1888). See Eldon Cobb Evans, *A History of the Australian Ballot System in the United States* (Chicago, 1917), pp. 17-20.

[2] For a general treatment of the subject of electoral reform, with some attention to New York State, see Evans, *ibid.*; also see 1888 pamphlet by The Society for Political Education, *Electoral Reform* (copy in N. Y. State Library, Albany), and William M. Ivins, *Machine Politics and Money in Elections in New York City* (New York: Harper and Brothers, 1887), pp. 37-38.

[3] *Ibid.*, chapters iii and iv, especially pp. 54-58.

[4] "Paying the Piper," *Harper's Weekly* Vol. XXXI (Aug. 6, 1887), p. 554.

[5] The law prescribed that the ballots of all parties must be white, but this was circumvented by using different shades of white.

[6] The Society for Political Education, *op. cit.*, p. 1-22.

[7] Charles Z. Lincoln, ed., *Messages from the Governors*, Vol. VIII, pp. 566-80. D. S. Alexander errs in stating that Hill's motive for vetoing the Saxton bill was to win further support in his quest for the Democratic presidential nomination of 1888. The veto came on June 9; the Democratic National Convention met on June 8, and by this time Hill had long since been out of the running. See De Alva Stanwood Alexander, *Four Famous New Yorkers* (New York: Henry Holt and Co., 1923), pp. 105-106.

[8] The so-called Fassett anti-bribery bill, passed during the session, had many defects, and was vetoed by Hill. See Lincoln, ed., *op. cit.*, pp. 598-603.

[9] The so-called Crosby bill. This veto, along with ballot reform, and

Hill's alleged connection with a scandal relating to the construction of the Croton dam aqueduct, were the major issues for the Repubicans.

10 *The Nation*, Vol. XLVII (Oct. 11, 1888), p. 285.

11 Elmira Local Assembly 1965, Knights of Labor, *David B. Hill. Knights of Labor Repudiate and Denounce Him.* Oct. 2, 1888. Library of Congress Broadsides. Hill papers, Hill to R. S. Soper, Oct. 4, 1888. The Hill papers (G. S. Bixby collection) are in N. Y. State Library, Albany.

12 For example, speeches in Binghamton, Sept. 19; Elmira, Sept. 20; Canandaigua, Sept. 27; Rochester, Sept. 28; Auburn, Sept. 29; and Cooper Union, New York City, Oct. 8. Copies in Hill papers.

13 Hill papers, William G. Rice to Murtha, Oct. 6, 1888.

14 *The Nation*, Vol. XLVII (Oct. 11, 1888), p. 285.

15 Lincoln, ed., *op. cit.*, pp. 662-696.

16 Hill papers, Hill to Nelson Waterbury, Jan. 24, 1889.

17 New York *Times*. Mar. 15, 1889; Hill papers, Rice to William Purcell, Mar. 14, 1889; Rice to Charles Dana, Mar. 14, 1889; Rice to E. P. Bailey, Mar. 14, 1889.

18 New York *Times*, Apr. 10, 26, 1889.

19 Lincoln, ed., *op. cit.*, pp. 762-789.

20 Hill papers, Hill to Frank Jones, July 17, 1889.

21 Lincoln, ed., *op. cit.*, pp. 664, 578, 666, 576-77, 667.

22 In this one year—1889—ballot reform laws were enacted in seven states: Indiana, Minnesota, Missouri, Montana, Rhode Island, Wisconsin, and Tennessee. Evans, *op. cit.*, p. 27.

23 New York *Times*, Feb. 26, 1889. Former New York City mayor W. R. Grace, Grover Cleveland, and other prominent Democrats endorsed ballot reform.

24 Timothy Shaler Williams papers (N. Y. Public Library), T. S. Williams to George Eggleston, Jan. 6, 1890.

25 See interview of an "intimate friend" of Hill in New York *Times*, Nov. 18, 1889. Hill was also inquiring about the court decisions on the ballot acts of other states. Hill papers, Hill to Robert Taylor, Dec. 9, 1889.

26 Lincoln ed,., *op. cit.*, pp. 895-920.

27 New York *Herald*, Jan. 17, Feb. 9, 1890; New York *Times*, Mar. 4, 29, 1890.

28 Lincoln, ed., *op. cit.*, pp. 946-49.

29 *Ibid.*, pp. 949-67.

30 New York *Times*, Apr. 19, 22, 1890.

31 Lincoln, ed., *op. cit.*, p. 973.

32 New York *Times*, Apr. 23, 1890; New York *Evening Post*, Apr. 23, 1890.

33 Williams papers, Williams to Andrew McLean, Apr. 22, 1890. Copies to William Purcell, M. H. Northrup, E. P. Bailey, and St. Clair McKelway.

34 New York *World*, Apr. 25, 1890; New York *Times*, Apr. 23, 25, 1890. The bill as finally passed incorporated Hill's recommendations for limiting election districts to one per three hundred inhabitants, setting aside two hours on election day to allow employees to vote, and making the use of pay envelopes for purposes of intimidation a crime.

35 Lincoln, ed., *op. cit.*, pp. 1005-1015.

36 Joseph Bishop ,"The Secret Ballot in Thirty-three States," *The Forum*, XII (Jan., 1892), p. 595.

EXHIBIT 4

[SENATE, No. 25.]

STATE OF NEW YORK.

No. 26.

IN SENATE,

JANUARY 31, 1890.

MINORITY REPORT

OF THE

COMMITTEE ON SENATE BILL No. 18, COMMONLY KNOWN AS THE "LINSON BILL," TO SECURE ELECTORAL REFORM.

ALBANY, *January* 31, 1890.

To the Senate:

The undersigned dissent from the report of the majority of the committee and recommend the passage of Senate bill No. 18, commonly known as the "Linson" bill to secure electoral reform.

We believe the enactment of the so-called "Saxton" bill would be unconstitutional and mischievous. We believe that it would practically disfranchise thousands of voters. We do not believe that it will secure the absolute secrecy and purity of the ballot. We believe it infringes unjustly upon the rights and privileges of citizens.

We favor the passage of the so-called "Linson" bill for the following reasons:

1. Because it provides for voting in secret compartments, thereby insuring the absolute independence and privacy of the elector.

2. Because it forbids electioneering within 100 feet of the polls, thereby securing order and quiet at elections.

3. Because it compels candidates for office to file sworn statements of their election expenses, thereby discouraging lavish expenditure and party assessments.

4. Because it provides that successful candidates may be ousted when fraud or corruption can be proved against them or their political agents.

5. Because it provides that official ballots may be used, thereby insuring a sufficient number of ballots and allowing candidates to have their ballots printed at public expense.

6. Because it also provides for unofficial ballots, thereby securing to every elector the privilege of preparing his ballot at his home and carrying it with him to the polls, as well as relieving the Australian system from the objection of unconstitutionality so far as the feature of an exclusively official ballot is concerned.

7. Because it prevents intimidation by the use of "pay envelopes," and other devices.

8. Because, while embodying all necessary provisions for preventing bribery and corruption, it affords the greatest liberty and protection to the voter consistent with such provisions.

9. Because it extends to all elections in the State an equitable system of registration.

We believe, in short, that the "Linson" bill is the most complete, the most efficacious and the most practicable measure which has ever been presented to the Legislature for the correction and prevention of election evils, and in this belief we heartily recommend its passage.

The "Linson" bill, with a few amendments which have been made thereto since it was introduced, is hereto attached as a part of this report.

JACOB A. CANTOR,
W. L. BROWN,
Committee.

EXHIBIT 5

STATE OF NEW YORK.

No. 28.

IN SENATE,

JANUARY 31, 1890.

DISSENTING REPORT

FROM BOTH THE

MAJORITY AND MINORITY REPORTS OF THE COMMITTEE ON GENERAL LAWS IN RELATION TO THE BALLOT REFORM BILLS.

To the Senate:

I feel constrained to dissent from both the majority and minority reports of the committee on general laws in relation to the ballot reform bills, although it is with much reluctance that I assume a position which may, in the minds of some, seem to indicate an obstinate adherence to individual opinion. But while the committee all agree that such reform is necessary, only four members are in accord as to the methods of securing it, and as two others unite in advocating their particular views, I deem it only proper that I should submit for the consideration of the Senate the reasons why I am dissonance with both the majority and minority.

All right thinking men concede the necessity of a prompt and entire change in our elective system, and nowhere has the attention of the public been so strongly drawn to the subject as in the annual message of Governor Hill to the Legislature, at the opening of the present session. He sums up the situation accurately and graphically, in these words: "These [the evils of intimidation and corruption] flourish unchecked, bringing shame upon our State, rendering our elections a mockery, and threatening even the integrity and existence of our political institutions." In the face of this strong and truthful language, I feel it my duty to yield, as far as I consistently can, my individual preferences in matters of detail to the will of the majority, in order that some kind of effective legislation can be secured, believing this to be no time for dilatory and futile

objections to what are on the whole the wise and seemingly adequate provisions of the so-called "Saxton" bill. But it seems to me that that measure is almost fatally defective in two or three most important particulars. It is simply a ballot reform act. What the people demand is an *electoral* reform, not a mere change in the style and manner of casting ballots, but a broad measure covering the entire system of elections. The question which agitates the public mind is not "Shall we or shall we not adopt the Australian system?" but "Shall we or shall we not have electoral reform?" The Australian system is not a fetich to be worshipped because it obtains in England, nor for that reason is it a thing to be abhorred, but if there is anything of good in it which can be adapted to our institutions, let us by all means adopt it, and there is contained in it, to my mind, no better thing to secure the purity of elections than its provisions for the registration of electors. (Part 1 of the Australian Electoral Act of 1879, sections 5 to 45.)

The right of suffrage is not inherent, but one conferred. No man although he is a citizen of the State, and twenty-one years of age, can cast a vote until he has complied with certain well-known provisions of law, and no means have been discovered to ascertain whether such compliance exists so effectively as a registry law; and it seems to me, therefore, that before we begin to say how a person shall vote it should first be determined whether or not he has any right to vote. Registration is the corner stone in every structure of election systems, and if it is a just and proper thing for the city of Albany, it is eminently as just and proper for the village of Clyde.

After registration logically follows the method of procedure in elections, and I concur in the report of the majority in that they recommend the "Saxton" bill as the best yet offered to provide therefor. But there should, in my opinion, be added thereto those sections of the "Linson" bill in reference to intimidation, corrupt practices and the ousting from office of men elected by violation of the proposed new law. Intimidation is almost as great an evil under our existing system as corruption, and should be as zealously provided against. While the "Saxton" bill, if enacted, would give us an almost perfect machinery for elections, it is weak in making no provision for the filing by candidates of a statement of their election expenses, nor for the speedy trial of the title to office secured by violations of its terms. For these reasons, I withhold my concurrence in the majority report, and I can not agree with the minority, because the Linson bill fails to provide for an exclusive official ballot.

All of which is respectfully submitted.

NORTON CHASE.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN DeROSIER,

Plaintiff,

-against- 18-CV-0919

DUSTIN M. CZARNY, ET AL. (GLS/DEP)

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF AG DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO FRCP 56

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Date: October 26, 2018

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PRELIMINARY STATEMENT

Plaintiff, John DeRosier commenced this action as a facial challenge to portions of New York's Election Law that exclude electioneering activity in or around the polling place during an election. N.Y. Elec. Law §§8-104(1), 17-130(4) & (23) ("Anti-Electioneering Laws"). Specifically, Plaintiff claims that New York State's statutory prohibition on political banners, buttons, posters or placards inside or within 100 radial feet of a polling place constitutes an unconstitutional infringement of the First Amendment.

Plaintiff's claim is based exclusively on the recent United States Supreme Court decision in Minnesota Voters' Alliance v. Mansky (see Compl. ¶¶47-48), which struck down a Minnesota election law banning "political" apparel inside polling places as unconstitutionally vague and not properly defined by State guidance. 138 S. Ct. 1876 (June 15, 2018). Relying on Minn. Voters, Plaintiff attempts to compare New York's Anti-Electioneering statute with Minnesota's stricken apparel law, arguing that language similarities between the two dictates a declaration of unconstitutionality.

But the challenged New York law actually succeeds in the very places that the Minn. Voters Court found the Minnesota law deficient. That is, the subject provisions of N.Y. Elec. Law are far more discerning than their Minnesota counterparts, as they only prohibit electioneering conduct and attire that is directly related to issues or candidates appearing on the actual ballot and do not prohibit unrelated political expression. Thus, despite Plaintiff's reliance on Minn. Voters, the distinctions between the New York and Minnesota laws actually renders the Supreme Court's precedent favorable to New York. Further, the Supreme Court has routinely upheld similar, narrowly drawn laws prohibiting electioneering conduct upon finding a compelling State interest

in protecting the sanctity, fairness and accuracy of the American election process.

As developed throughout this Memorandum of Law and all supporting materials hereto New York's narrowly drawn prohibition on specified electioneering conduct and the subsequent State guidance delineating the boundaries of the law, passes Constitutional muster under Minn. Voters and its precedential forerunners. Defendants Kosinski, Kellner, Spano and Peterson are therefore entitled to a grant of summary judgment pursuant to FRCP 56 on all causes of action.

STATEMENT OF RELEVANT FACTS AND LAW

As this matter strictly contemplates an issue of statutory and legal interpretation, the relevant facts are narrow, straightforward and not in dispute.

The New York State Board of Elections ("Board") was established in 1974 as a bipartisan agency vested with the responsibility for administration and enforcement of all laws relating to elections in New York State. See www.elections.ny.gov/AboutSBOE.html (last accessed Oct. 9. 2018); see also N.Y.L. 1974, Ch. 604, §7; N.Y. Elec. Law §3-102. The Board also regulates disclosure and contribution limits of a Fair Campaign Code intended to govern campaign practices. Id. As part of its responsibilities, the Board offers assistance to local election boards and investigates complaints of possible statutory violations. Id. In addition, the Board is charged with the preserving citizen confidence in the democratic process and enhancing voter participation in elections. Id. Defendants Peter Kosinski and Douglas Kellner are Commissioners and Co-Chairs of the Board; Defendants Andrew Spano and Gregory Peterson are Board Commissioners (collectively "AG Defendants"). Declaration of Thomas E. Connolly ("Connolly Decl."), sworn to October 25, 2018, ¶3.

New York elections are subject to the mandate of the New York State Election Law. N.Y. Elec. Law §§1-100, et. seq. (Arts. 1 - 17). Article 8 of the law, originally codified by the New

York State Legislature in 1890, governs the specific "conduct of elections". Id. This includes, details regarding the dates and hours of voting (§8-100), organization, set up and restrictions at the polls and polling places (§8-102, §8-104), and educational opportunities available at polling places (§8-106).

As relevant to this matter, §8-104(1) includes a prohibition on electioneering conduct in and around the polling place and states in pertinent part:

> While the polls are open no person shall do any electioneering within the polling place, or in any public street, within a one hundred foot radial measured from the entrances designated by the inspectors of election, to such polling place or within such distance in any place in a public manner; and no political banner, button, poster or placard shall be allowed in or upon the polling place or within such one hundred foot radial. §8-104(1).

Closely related to §8-104(1)'s proscription of electioneering activity is §17-130 of the Election Law, which sets forth criminal penalties for prohibited election conduct, including electioneering. As challenged by this lawsuit, §17-130(4) and §17-130(23) states in pertinent part:

> Any person who…Electioneers on election day…within one hundred feet…from a polling place…is guilty of a misdemeanor.

These Anti-Electioneering laws were codified by the New York State Legislature as far back as 1890. See N.Y.L. 1890, Ch. 262 § 35, as amended N.Y.L. 1891, Ch. 296; see also Silberberg v. Board of Elec. of NY, 272 F. Supp. 3d 454, 476 (SDNY 2017) ("Expressive activities have been restricted at polling sites in New York since the adoption of the Australian ballot reforms in 1890"). The legislative history of the law illustrates that it was born from a desire to "protect the secrecy and purity of suffrage" in New York, by guaranteeing that "every voter, not subjected to intimidation, has a perfect right and the fullest opportunity to cast an absolutely secret ballot if he so desires". Declaration of C. Harris Dague, executed October 26, 2018 ("Dague Decl.") Ex.

1 [Pub. Papers, Gov. Hill, Jan. 7, 1890] at 7-8; Ex. 2 [7 Jud. Not. 21, Judicial Notice, Summer 2011, "Ballot Reform and the Election of 1891", Sheridan, David]; Ex. 3 [NY History, Vol. 42, No. 3 (July 1961), "The Politics of Ballot Reform in NY 1888-1890", Bass, Herbert]. As recently recognized by the New York District Court for the Southern District "in New York, prior to the enactment of the statute, vote buying and voter intimidation were rampant". Silberberg, 272 F. Supp. 3d at 471.

The electioneering prohibition codified in 1890 coincided with the Legislature's adoption of private voting booths, and the two elements were deemed necessary to combat the "two great evils of bribery and intimidation", with the stated purpose of "facilitating…honest elections". Dague Decl. Ex. 1 at 13-16. Even Legislators opposed to aspects of the ultimately codified Election Law, still favored the proscription of electioneering at or within 100 feet of the polls. See Dague Decl. Ex. 4, Minority Report of Sens. Cantor and Brown at 1 (favoring adoption of alternate bill that included prohibition on electioneering at §32, pg. 13); Ex. 5, Dissenting Report of Sen. Norton Chase at 2 ("Intimidation is almost as great an evil under our existing system as corruption, and should be zealously provided against").

The motivation to protect the New York voters from intimidation and undue influence at the polls and the overall sanctity, fairness and accuracy of elections continues to this day, through the work, oversight and guidance of the Board. Connolly Decl. ¶¶ 7, 11, 21; see also Silberberg, 272 F. Supp. 3d at 471 (Board demonstrated at evidentiary hearing that election law measures "remain critical to combatting vote buying and voter intimidation" to this day).

On June 14, 2018, the United States Supreme Court decided Minnesota Voters Alliance v. Mansky. 138 S. Ct. 1876 (June 15, 2018). The holding and pertinent elements of this decision are discussed in detail below. Subsequent to the decision in Minn. Voters, the Board issued the first

of two guidance documents to the local and county boards of election, in advance of the 2018 primary and general elections. Connolly Decl. ¶13, Ex. 1 ("First Guidance"). The guidance was first sent to all local and county boards of election, including representatives from co-Defendant Onondaga County, on or about June 20, 2018. Id. ¶ 14.

The First Guidance addresses the Minn. Voters. decision noting that "per State Board of Elections Guidance, New York's Anti-Electioneering Statute (Election Law § 8-104(1)) is still valid". Id. at Ex. 1. The guidance document goes on to explain why, noting:

> Generally, a person cannot wear apparel that contains the name of a candidate, political party, independent body or direct reference to a ballot proposal on the ballot which contextually seeks votes.

The guidance further explains the narrow parameters of the electioneering prohibition:

> Under New York Law, persons wearing clothing or donning buttons that include political viewpoints – i.e. support of the Second Amendment, Marriage Equality, Environmental Sustainability, Immigration Reform, Support for Voter ID Laws…. do not violate New York's electioneering prohibition unless the issue itself is unambiguously on the ballot in the form of a ballot proposal. Id.

The limited scope of the Anti-Electioneering provisions of §8-104(1) is further emphasized in the training materials provided to poll workers that is published and shared by the Board. Id. at ¶ 17, Exs. 2-3. To wit, the New York State Poll Worker Training Manual unambiguously states, "**[v]oters** may wear political attire when casting their vote". Id. Ex. 2 at 11 (emphasis in original). This portion of the manual is highlighted for the worker using a large exclamation point. Id.

Similarly, the New York City Poll Worker's Procedure Manual, as based on Board guidance, includes instructions to poll workers that "poll watchers" are not permitted to "electioneer in any manner within 100 feet of any poll site entrance. Id. Ex. 3. This includes soliciting votes or distributing, wearing or carrying political literature, posters, banners or buttons,

etc. showing a candidate or party's name." Id. Ex. 3 at 10. Electioneering is defined in the manual as "efforts to encourage voters to vote a certain way…". Id. Ex. 3 at 86.

On October 3, 2018, in advance of the up-coming general elections, the Board re-issued guidance re-asserting the scope and application of the Anti-Electioneering Law. Id. Ex. 4. The guidance states:

> This prohibition on political banners, buttons, and posters and placards applies only in the narrow context of the prohibition on electioneering within the polling place and the one hundred foot radial. That is to say, to constitute a violation of New York law a banner, button, poster or placard must constitute electioneering… An electioneering communication is one which seeks the election of a candidate or vote for a political party or independent body on the ballot within the poll site…Accordingly, a violation…must contain the name of a candidate, political party, independent body or direct reference to a ballot proposal on the ballot which contextually seeks votes…
>
> New York's anti-electioneering law was intended to prevent the political campaigns from intruding into the polling place. It was not designed to prohibit political expression generally. New York has long interpreted its anti-electioneering law as not prohibiting political messages. Id.

Plaintiff initiated the instant action on August 3, 2018 as a facial challenging to NY Elec. Law §§8-104(1), §17-130(4) and §17-130(23). Plaintiff's Complaint states that he "wishes to wear political buttons expressing support for his favored candidates and/or conservative causes". Compl. ¶5.

ARGUMENT

POINT I

THE ANTI-ELECTIONEERING PROVISIONS OF NY ELECTION LAW ARE CONSTITUTIONAL UNDER THE FIRST AMENDMENT AND WHOLLY CONSISTENT WITH MINN. VOTERS AND OTHER SUPREME COURT PRECEDENT

The sole issue before this court is whether the provisions of New York's Election Law

that prohibit electioneering inside or within a 100-foot radial of the polls violates the First Amendment. Currently, all 50 States employ laws curbing various forms of speech in and around polling places [Minn. Voters, 138 S. Ct. at 1883] and similar anti-electioneering laws have withstood First Amendment scrutiny and been upheld by the Supreme Court. See e.g Burson v. Freeman, 504 US 191, 196-197 (1991). New York's Anti-Electioneering laws and the unambiguous Board guidance concerning these provisions make clear that the laws are narrowly drawn to combat only ballot-specific electioneering conduct at the polls and do not otherwise infringe upon political or other speech in violation of the First Amendment.

A. LEGAL STANDARDS

As an initial matter, because Plaintiff is making a facial challenge to a statute he must demonstration that there are "no set of circumstances exists under which the Act would be valid." Webster v. Reproductive Health Services, 492 U.S. 490, 524 (1989). That is, a challenged law should not be invalidated "on a facial challenge based upon a worst-case analysis that may never occur". Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 514, 110 S. Ct. 2972, 2980-81 (1990). For facial challenges, whenever "fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." Id.

As set forth above, the Anti-Electioneering laws in question apply at two different locations at the polling place – "within the polling place" and "in any public street, within a 100 foot radial measured from the entrances" of such polling place. §8-104(1). By this lawsuit, Plaintiff challenges the electioneering prohibition at both of these locations. Compl. ¶ 47. Pursuant to the well-developed Supreme Court jurisprudence on this subject matter, the applicable legal standards differ depending on the site of the law, as both sites are classified as different legal forums.

The area inside the polling place is a "nonpublic" forum – a "space that is not by tradition

or designation a forum for public communication". Minn. Voters, 138 S. Ct. at 1884; see also Burson, 504 US at 196-197; Silberberg, 272 F. Supp 3d at 476 ("The Court concludes that [polling sites] are non-public fora"). A polling place is "at least on Election Day, government controlled property set aside for the sole purpose of voting". Id. at 1885. In nonpublic forums, "the government has much more flexibility to craft rules limiting speech". Id. at 1884. The government is free to "impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy". Id. at 1876, citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 US 788 (1985).

As such, the "the government may reserve [a nonpublic forum] for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view". Id.; citing Perry Ed. Assn. v. Perry Local Ed. Assn., 460 US 37 (1983). Thus, the Supreme Court applies a hybrid standard that asks whether the challenged law is "reasonable in light of the purpose served by the forum" – when adjudicating matters involving areas inside the polling place. Id.

The area outside the polling place – the public streets within a 100-foot radial of the polling place – may be subject to a different level of forum-based scrutiny. With some disagreement[1] and noted evolution of the law by various Circuit Courts[2], the 100-foot radial area around a polling

[1] While a plurality of the Burson Court held the 100-foot area outside a polling place to be a public form, in his concurring opinion Justice Scalia determined that the subject area outside the polling place is more properly categorized as a "nonpublic forum". Burson, 504 US at 214 (Scalia, J.). Justice Scalia argued that areas adjacent to polling are not traditionally "devoted to assembly and debate" as necessary to be deemed public fora, but, to the contrary, have historically been subject to restriction during elections. Id. This history of restriction, in Scalia's opinion, renders the areas nonpublic and subject to lessor scrutiny. Id. at 216.

[2] Various decisions subsequent to Burson indicate that not all areas leading to and from a polling place are traditional public fora. See, e.g., United Food and Comm. Workers Local 1099 v. Sidney, 364 F.3d 738, 750 (6th Cir. 2004) (holding that parking lots and walkways leading to polling locations on public and private property were not traditional public fora); Embry v. Lewis, 215 F.3d 884, 888-89 (8th Cir. 2000) (concluding that a grassy area next to a sidewalk on school property that was apportioned for the election was a nonpublic forum); Liberty Twp. Tea Party v. IBEW, 2010 U.S. Dist. LEXIS 142835, at *14-16 (S.D. Ohio Oct. 28, 2010) (IBEW property loaned to Board of Elections

place has been deemed a "public" forum. Burson v. Freeman, 504 US 191, 198-211 (1991). With the designation of the area as a public forum, the legal standard inquiry turns on a determination of the challenged law's content neutrality. Id. A content neutral law may be subject to "time, place, and manner" regulation. Id. As New York's Anti-Electioneering law prohibits speech related to political candidates and issues on the actual ballot, they are not content-neutral "time, place and manner" restrictions. Id. (finding Tennessee anti-electioneering law to be not content-neutral). Such a "content based restriction on political speech in a public forum" is subject to strict scrutiny. Id. at 198. That is, to pass Constitutional muster the law must be "necessary to serve a compelling state interest and…narrowly drawn to achieve that end". Id.

Regardless of the level of Constitutional scrutiny applied to the challenged New York Election law provisions, the result is the same. The Anti-Electioneering laws do not violate the First Amendment, as the State has a historically recognized interest and necessity in protecting the sanctity, fairness and freedom of elections that includes a right to prohibit electioneering activity at and around polling places.

B. NEW YORK'S ANTI-ELECTIONEERING LAWS ARE CONSTITUIONAL

1. Election Law §8-104(1) and §17-130(4), (23) Are Ballot-Specific, Anti-Electioneering Prohibitions, Not General Apparel Bans

As a threshold matter, it is important to understand the precise scope of the challenged statutory provisions. While Plaintiff attempts to liken the challenged portions of the Election Law to the general "apparel ban" in Minnesota Voters (Compl. ¶¶34, 37), New York's law is exclusively aimed at banning ballot-specific electioneering conduct within the polling place. That is, §8-104(1) does not implicate a general apparel ban or impact speech, political or otherwise,

for election designated a "limited public forum").

beyond what is "unambiguously on the ballot". Connolly Decl. Ex. 1, 4. This distinction is critical – as it formulates the very basis for Plaintiff's entire reliance on Minn. Voters, and the appropriate application of the law.

To understand the explicit scope of the challenged provisions the Court need look no further than the plain language of the laws, their legislative history, and the official Board guidance.

In the same sentence § 8-104(1) proscribes "electioneering" conduct, and then specifies this to include the use of political banners, buttons, posters or placards. Under the canons of statutory construction where acts of a violation are incorporated within one sentence of a statute, it is assumed that the Legislature did not intend to create multiple different offenses. See United States v. Arreola, 467 F.3d 1153, 1158 (9th Cir. 2006) (Use of same sentence proscribed two different acts that violate the statute, not two separate violations); see also United States v. Street, 66 F.3d 969, 974 (8th Cir. 1995) ("The statute lists all of the acts of violation in one sentence, and imposes a single penalty for all of them, a construction which indicates that Congress did not mean to create more than one offense"); Terry v. Atlas Van Lines, Inc., 679 F. Supp. 1467, 1472 (N.D. Ill. 1986) ("The court cannot accept an interpretation in which two clauses in the same sentence conflict, especially in the face of a more reasonable construction which avoids this result"). As such, §8-104(1)'s prohibition on banners, buttons, posters and placards must be interpreted in conjunction with the proscription on electioneering – not as unrelated, separate prohibitions on speech.

Moreover, the limited scope of §8-104(1) is further buoyed by §§17-130(4) & (23), also challenged by this suit. Both of these provisions deal exclusively with "electioneering" conduct on Election Day – providing the penological ramification for a violation of §8-104(1). It is, of

course, a fundamental rule of statutory construction that a statute must be construed as a whole, with words and sentences of a section interpreted with reference to different parts of the same act as if they were in the same section. Pietrafesa v. First Am. Real Estate Info. Servs., 2007 U.S. Dist. LEXIS 15785, at *17-18 (N.D.N.Y. Mar. 6, 2007) (Kahn, J.). Viewed in the context of §§17-130, Plaintiff's attempt to shoehorn §8-104(1) as a general political apparel ban to bolster his claim is exposed as improper[3].

As detailed above (Statement of Facts) this plain language construction is consistent with the legislative history of the Anti-Electioneering laws. The statutory prohibitions were created with the intent of "guarding suffrage from [the] abuses" of intimidation and corruption and the "facilitating of honest elections". Dague Decl. Ex. 1 [Pub. Papers Gov. Hill] at 8, 16. The legislative history does not contemplate a separate or distinct apparel proscription – but rather only a ban on electioneering conduct, imposed in conjunction with the creation of private voting booths to guard against impropriety and influence. Id. at 13-16.

Finally, the official guidance from the Board demonstrates the limited scope of the challenged provisions. The Board's guidance illustrates that §8-104(1) is exclusively an electioneering ban – and not an unmoored prohibition on political apparel or speech. Through its guidance, the Board has routinely made the determinate scope of the law clear:

- "Generally, a person cannot wear apparel that contains the name of

[3] Further evidence of the limited scope of §8-104(1) can be found in looking at a companion statute housed in the NY Education Law. Education Law §2031-a, which governs education elections states "while the polls are open no person shall do any electioneering within the polling place, or within one hundred feet therefrom in any public street, or within such distance in any place in a public manner and no banner, poster or placard on behalf of or in opposition to any candidate or issue to be voted upon shall be allowed in or upon the polling place or within one hundred feet therefrom during the election". This proscription follows Election Law §8-104(1) nearly verbatim and makes clear that both are limited to electioneering conduct exclusively. Where "statutes relate to the same general subject so as to be *in pari material* they are to be construed together". McKinney's Statutes, Constr. & Interpretation §126; see also ACLU v. DOD, 40 F. Supp. 3d 377, 387 (S.D.N.Y. 2014) ("Statutes *in pari material* are to be interpreted together, as though they were one law. This is because courts generally presume that Congress is knowledgeable about existing law pertinent to legislation it acts")

> a candidate, political party, independent body which contextually seeks votes". Connolly Decl. Exs. 1 and 4.
>
> - "Under New York Law, persons wearing clothing or donning buttons that include political viewpoints … do not violate [§8-104(1)] unless the issue is itself unambiguously on the ballot in the form of a ballot proposal". Id.

The Board guidance provided to poll workers further emphasizes the distinction between ballot-specific electioneering and a more broad general apparel ban. The New York State Poll Worker Training Manual unambiguously states, "**[v]oters** may wear political attire when casting their vote". Connolly Decl. Ex. 2. Similarly, the New York City Poll Worker's Procedure Manual instruct poll workers that the prohibition applies only to electioneering conduct, which is defined only as "efforts to encourage voters to vote a certain way…". Id. Ex. 3 at 86.

Despite Plaintiff's best efforts to lump them together, New York's Anti-Electioneering laws are simply not the same as the broad Minnesota apparel ban stricken by the Supreme Court in Minn. Voters. The portion of the Minnesota law reviewed by the Supreme Court maintained that "a political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day". Minn Voters, 138 S. Ct. at 1863, citing Minn. Stat. Ann. § 211B.11(1). Unlike New York's law, the provision was not contained in the same sentence as a ban on electioneering conduct, but rather in a stand-alone sentence. Id. As such, the Court characterized the stricken Minnesota law as the "political apparel ban" throughout its decision – treating it separately from any anti-electioneering language. Id. at 1883, 1884, 1886, 1887.

Additionally, the Supreme Court expressly noted that Minnesota's law was not anchored by any "official guidance" resulting in "haphazard interpretations" by the State and a consequent "indeterminate scope of the political apparel provision". Id. 1889. The lack of State guidance resulted in enforcement ambiguity, wherein a Minnesota poll worker would be forced to "maintain

a mental index of the platforms and positions of every candidate and party on the ballot" to determine which apparel violated the law. Id. at 1889-1891. The Court listed an array of organizations (the ACLU, AARP, Ben and Jerrys) and issue statements ("All Lives Matter", a "rainbow flag", the "text of the Second Amendment") and noted that even the "State's top lawyers struggled" to say what constituted prohibited groups and issues under the apparel ban. Id.

This is decidedly not the case with the challenged New York laws. As discussed throughout, §8-104(1) concerns electioneering activity exclusively and features ample, specific State guidance not present in the Minnesota case. New York's law does not suffer from any of the ambiguity that concerned the Minn. Voters' Court, as the Board has made it abundantly clear that apparel or buttons featuring "political viewpoints [such as] support of the Second Amendment, Marriage Equality, Environmental Sustainability, Immigration Reform, Support for Voter ID Laws do not violate New York's electioneering law". Connolly Decl. Ex. 1. New York's laws do not require the interpretation of "top lawyers" or place any onus on the poll worker beyond knowing which specific candidates or referendums are on the actual ballot such that voters do not electioneer for votes for specific candidates or ballot-issues.

Plaintiff's misunderstanding of New York's law and attempt to liken it to Minnesota's "apparel ban" is on full display in his Complaint, as he rhetorically asks: "But what about 'MAGA' buttons? Or 'Don't tread on me'? 'SCOPE'? 'NRA'? 'Black lives Matter'? (sic) 'Feel the Bern'?". Compl. ¶ 28. New York's law does not suffer from ambiguity surrounding any of these issues. The simple answer to all of these questions is that none of them would trigger the anti-electioneering prohibition, as they are neither candidates nor ballot proposals, but political or social viewpoints that can be displayed on apparel at and around the polls. Connolly Decl. ¶ 21, Ex. 1.

Appreciating the scope of New York Anti-Electioneering law and the intrinsic differences

between it and the stricken Minnesota "apparel ban" is critical in applying the proper legal standards. New York's narrowly tailored, ballot-specific electioneering proscription satisfies even the most stringent Constitutional scrutiny for many of the reasons that Minnesota's indiscriminate "political apparel ban" failed.

2. Electioneering Prohibition "Within the Polling Place"

As set forth above, Plaintiff is challenging both sites covered by the Anti-Electioneering laws – inside and within 100-foot radial outside the polling place. As the Supreme Court contemplates different levels of Constitutional scrutiny for each of the two different sites, they must be analyzed separately.

With respect to New York's prohibition on ballot-specific electioneering, including donning apparel, banners, buttons, posters, or placards, inside the polling place, the Supreme Court deems this area a "nonpublic forum" and applies a "reasonableness" analysis to such challenges. See supra Point A, citing Minn. Voters, 138 S. Ct. at 1884 and Burson, 504 US 191, 196-197 (1991). The standard asks whether the challenged law is "reasonable in light of the purpose served by the forum". Id. at 1876, citing Perry Ed. Assn. v. Perry Local Ed. Assn., 460 US 37 (1983).

The unquestioned purpose of the area inside a polling place on Election Day is "voting". Id. at 1885. The area has been accorded the legal status of a "special enclave, subject to greater restriction". Id. 1886, quoting, Int'l Soc'y for Krishna Consciousness v. Lee (for citation "ISKCON"), 505 US 672, 680 (1992). Such restrictions may include "restrictions that exclude political advocates and forms of political advocacy". Id., citing Cornelius, 473 US at 800 ("Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities"); Greer

v. Spock, 424 US 828 (1976) ("The guarantees of the First Amendment have never meant that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please").

In light of the recognized purpose of the polling place on Election Day, the State's interest in curbing electioneering activity is abundantly reasonable. The Supreme Court has long recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society". Reynolds v. Sims, 377 US 533 (1964). The prominence of voting rights in the pantheon of American freedoms is second to none, as "other rights, even the most basic, are illusory if the right to vote is undermined". Westberry v. Sanders, 376 US 1, 17 (1964). The Supreme Court has routinely recognized that "no right is more precious in a free country than that of having a voice in the election of those who make the laws". Id.

Accordingly, the overwhelming precedent dictates that the States have a "compelling" interest in both protecting voters at the polls from confusion and undue influence and preserving the integrity and reliability of the election process. See EU v. San Francisco Cty Dem. Central Comm., 489 US 214, 223 (1989) (A State "indisputably has a compelling interest in preserving the integrity of its election process"); see also Burson 504 US at 199 ("[A] State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process"); Silberberg, 272 F. Supp 3d at 461 ("The State of New York has a compelling interest in preventing vote buying and voter coercion. The State's interest in the integrity of its elections is paramount").

Application of these principles here strongly favors a finding of Constitutionality. New York's Anti-Electioneering law advances New York's interest in insulating voters from undue influence, intimidation, confusion and even corruption at the polling place, in an attempt to

promote fairness and accuracy of the State's elections. Connolly Decl. ¶¶ 7, 11, 21; Dague Decl. Exs. 1, 4, 5; see also Silberberg, 272 F. Supp 3d 454 (Finding NY Election Law provision, §17-130(10), that prohibits sharing of marked ballots with another person by photograph on social media to be constitutional under First Amendment, as part of State's compelling interest in preventing voter coercion and intimidation). This is evident in the scope of the law, its Legislative History and the Board guidance, all of which illustrate the State's laser-focused interest in preventing the political campaigns from intruding into the polling places.

New York's narrow prohibition on conduct and displays intended to influence voters on ballot-specific candidates and measures is a reasonable measure to protect the purpose of the nonpublic forum. See Burson, 504 US 191 (Tennessee law prohibiting electioneering conduct outside polls declared Constitutional under First Amendment); See also, Cornelius, 473 US 788 (Rule restricting public advocacy groups from campaigning in annual Federal employee charity drive upheld under First Amendment); Greer, 424 US 828 (Prohibition on political solicitations on military base upheld under First Amendment); ISKCON, 505 US 672 (Regulation limiting distribution of literature and solicitation at an airport to areas outside the terminals upheld under First Amendment).

(a) The Impact of Minn. Voters on Application of the Legal Standard

In spite of Plaintiff's misguided reliance on the case, Minn. Voters is fully consistent with the hybrid scrutiny "reasonableness" analysis above, as it actually endorses a State's right to ban electioneering conduct in a polling place. While the case struck down Minnesota's ill defined, overly broad, "political apparel ban" – the Court acknowledged a State's right to codify more narrowly drawn prohibitions on conduct at the polls. See Minn. Voters, 138 S. Ct. at 1887 – 1891. To this end, the Minn. Voters' plurality expressly acknowledged the constitutionality of excluding

"some form of advocacy…from the polling place". Id. at 1887. The Court went on to remark that a polling place can rightfully be designated by the States as "an island of calm in which voters can peacefully contemplate their choices". Id.

> Casting a vote is a weighty civil act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction. Id. at 1888.

As if it was speaking about New York's Anti-Electioneering law specifically, the Court explained that a "State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most". Id.

The plurality concluded that "in light of the special purpose of the polling place itself [a State] may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand". Id.

The Minnesota Court was rightfully preoccupied with elements of the Minnesota "apparel ban" that are decidedly not features of the New York Anti-Electioneering law. The apparel ban's rank ambiguity, it's not being tethered to ballot-specific electioneering conduct, and its lack of clarifying State guidance, ultimately rendered the law untenable under the First Amendment. See generally, Minn. Voters. In contrast, the challenged New York law is not a general political apparel ban, it is intrinsically different as a narrowly tailored anti-electioneering prohibition and it excels in the same areas that Minnesota's law failed, i.e. ample Board guidance, narrowness of scope. In line with its own past precedent, the Minnesota Voters Court expressly endorsed the

several States' ability to pass laws like §8-104(1) and 17-130(4) & (23).

3. Electioneering Prohibition "Within a 100 Foot Radial" Outside the Polling Place

Plaintiff also challenges the provision of §8-104(1) that prohibits electioneering, including the donning of apparel, buttons, placards or posters "within a one hundred foot radial" of the polling place. Comp. ¶ 35. As set forth above, the Supreme Court has deemed the 100-foot radial area outside of the polling place to be a "public forum"[4]. Burson, 504 US 191, 196-198 (1991). The appropriate legal test for a "content based restriction on political speech in a public forum" is strict scrutiny. Id. at 198. Under this standard, a law must be found "necessary to serve a compelling state interest and…narrowly drawn to achieve that end". Id.

The Supreme Court's decision in Burson is both controlling and instructive here, as applying the strict scrutiny standard to a highly analogous Tennessee anti-electioneering law. Burson, 504 US 191. The Burson Court analyzed the constitutionality of a Tennessee election law that "prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place". Id. at 193. Like New York, Tennessee deems violation of this prohibition a misdemeanor. Id.

The Burson Court acknowledged the exacting nature of strict scrutiny, but held that laws providing protections to other constitutional rights "embodied in government proceedings", such as voting, represent one of the limited areas where strict scrutiny can be overcome. Burson, 504 US at 198, citing Sheppard v. Maxwell, 384 US 333, 361-63 (1966) (Outlining restrictions on speech of trial participants that courts may impose to ensure a fair trial).

While the Court noted that reconciling "the right to engage in political discourse with the

[4] Noting the aforementioned precedential disagreement with this position, designating the area as a "nonpublic forum". Burson, 504 US at 214 (concur, Scalia, J.).

right to vote – a right at the heart of our democracy" is difficult, it ultimately held in favor of the Tennessee prohibition protecting voters' rights at and around the polls. Id. The Court reached this conclusion by first acknowledging the primacy of voting and free elections in the pecking order of protected American liberties. Id. ("No right is more precious in a free country than that of having a voice in the election of those who make the laws"). Accordingly, the Court found that States have a "compelling interest in protecting voters from confusion and undue influence". Id. at 199.

Upon concluding that Tennessee possessed a compelling interest in protecting voters and elections, the Court turned its attention to whether the electioneering proscription was "necessary to serve the asserted interest". Id. The necessity prong turned on the Court's recognition of America's long history of fighting a "persistent battle against two evils: voter intimidation and election fraud". Id. at 206. Because of this on-going battle, the Court noted that "all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments". Id. In light of these factors, the Court held that Tennessee's 100-foot prohibition satisfies the necessary element of strict scrutiny, as "some restricted zone is necessary in order to serve the States' compelling interest in preventing voter intimidation and election fraud".

The same analysis should be employed in the instant action. New York's prohibition on electioneering outside the polling place is a direct analogue to Tennessee's law -- it applies in precisely the same location, employs the same scope of prohibition, and was codified to address identical voter protection concerns. Certainly, New York has the same compelling interest in protecting its voters as the Burson plurality found Tennessee had. Id.; see also Silberberg, 272 F. Supp 3d at 471 ("Preventing [the] … evils [of vote buying and voter intimidation] and upholding the integrity of New York's elections is a compelling state interest"). Moreover, as §8-104(1)

shares the same 100-foot radial distance and electioneering conduct proscription as Tennessee[5], it too is necessary to achieve the State's interest. The Court need look no further than Burson to deem the outside the polls portion of New York's Anti-Electioneering law constitutional.

Finally, as Plaintiff acknowledges, the Minn. Voters case has no application on this element of his claim, because that case does not address the areas outside the polling place. Compl. ¶ 35; Minn. Voters 138 S. Ct. at 1886 (Court engages exclusively in analysis of interior of polling place). Moreover, as set forth above, Minn. Voters actually employs the lessor "reasonableness" analysis. As, under Burson, it is clear that §8-104(1) satisfies strict scrutiny, the law would clearly also exceed the lower standard, if applied.

Both elements of New York's Anti-Electioneering law pass the Constitutional muster of a First Amendment analysis, regardless of the level of scrutiny applied. The overwhelming Supreme Court precedent favors New York's reasonably narrow approach to protecting voters and insuring the sanctity and propriety of free elections.

CONCLUSION

For all the foregoing reasons[6] the AG Defendants are entitled to summary dismissal of the Complaint in its entirety.

[5] Similarly, NY Elec. Law § 17-130(4) & (23), also challenged, announce the same misdemeanor penalty as was considered and approved under Burson.

[6] To the extent Plaintiff's Complaint seeks other than declaratory or prospective injunctive relief from the AG Defendants in their official capacities (see Compl. "Wherefore" Clause at D "other relief that this Court deems just"), such claims must also be dismissed under the sovereign immunity provisions of the Eleventh Amendment. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).

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