UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

GINO MALDONADO, JOAN GILL, and ELIZABETH YEAMPIERRE,	:	Case No. CV 05-5158
Plaintiffs,	:	Hon. Sandra J. Townes
v.	:	
GEORGE PATAKI, NEW YORK CITY BOARD OF ELECTIONS, and THE STATE OF NEW YORK,	:	
Defendants.	:	

AMENDED MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* CITIZENS' UNION OF THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Richard J. Davis
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for *Amicus Curiae*

Citizens Union of the City of New York hereby respectfully moves for leave to file the attached brief as *amicus curiae* in the instant case.[1] The consent of the attorney for the plaintiff has been obtained.

To further its goal of ensuring good governance for the citizens of New York, *amicus* is very interested in any actions which call into question the integrity of the judiciary, particularly where issues affecting the rights of minority communities are implicated. *Amicus* therefore wishes the Court to hear its views on the instant case, in which the voting rights of over 800,000 minority voters in Kings County have been denied. *Amicus* has attached the brief it wishes to file to the Amended Motion for Leave to File hereto.

Citizens Union's brief addresses: (1) the factual background of scandal involving the Kings County judiciary; (2) whether the denial of a primary allows Plaintiffs a claim under the Voting Rights Act where the primary is the only opportunity for meaningful choice for minority voters; and (3) whether Plaintiffs' claim under the Voting Rights Act vindicates New York's compelling state interest in maintaining public confidence in New York's court system.

For all of the foregoing reasons, Citizens Union requests that this Court grant it leave to file an *amicus* brief.

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[1] During a discussion with Your Honor's chambers on December 5, attorneys for Citizens Union were encouraged to file the original motion for leave immediately with the understanding that the brief would be filed on December 7 in accordance with the briefing deadline in this case. The Attorney General, however, has taken the position that Citizens Union needs to file a proposed brief in connection with this motion. In order to accede to the demands of the Attorney General's office, Citizens Union now files this amended motion and attaches the completed brief it respectfully wishes to be filed should this Court grant leave to file.

Dated: December 6, 2005
New York, New York

Respectfully submitted,

/s Richard J. Davis

Richard J. Davis
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Citizens Union of the City of New York was founded in 1897 to fight the corrupt influence of Tammany Hall on the government of New York City. Since then, it has championed the cause of good government in both City Hall and Albany. Citizens Union has advanced numerous efforts advocating campaign finance reform, improved voting procedures, appropriate City Charter revisions, reforms in the operations of the State Legislature, and more. Among the essential interests of Citizens Union is a judiciary that is honest, respected by the public, and immune from political influence and deal making. As such, Citizens Union is interested in any actions which call into question the integrity of the judiciary, particularly where issues affecting the voting rights of minority communities are implicated.

PRELIMINARY STATEMENT

This case deals with the corruption of the judiciary in Kings County by local party leaders, and how the State Legislature has now transferred the power to select a critical member of the judiciary — a Surrogate Judge — from the voters to those very leaders. While there are many fine and honest judges working in Kings County, revelations of favoritism, bribery, and campaign finance violations over the past three years have damaged the reputation for integrity, fairness, and justice that the citizens of Kings County expect and deserve from their courts. Instead of reacting to these developments with a spirit of reform, the Defendants deliberately created a second Surrogate Court judge for Kings County this past June via legislation that would avoid a primary election for this position. The legislation that created this new judgeship not only violates all ethical standards, but the Voting Rights Act of 1965 (the "VRA"), as well; by

eliminating the primary, Defendants denied the minority voters of Kings County a meaningful opportunity to cast a vote for Surrogate.

In addition to being the most populous of all of New York's counties, Kings County also has the highest number of New Yorkers who are non-white. Because of their numbers, minority voters in Kings County have the ability to significantly influence the outcome of elections in Kings County by voting for their preferred candidates in the primary and general elections. Indeed, Kings County voters have recently demonstrated that, when given the opportunity, they are willing to select for a Surrogate position a woman who is a qualified minority candidate as well as a reformer. But by eliminating the primary for Surrogate, Defendants nullified the ability of minority voters to affect the outcome of the race and thereby denied them their right to vote. This act was a violation of Section 2 of the VRA, which requires that the state neither deny nor abridge the right of any citizen to vote on account of their race or color. 42 U.S.C. § 1973(a).

Plaintiffs have, *inter alia*, moved this Court to declare that the legislation creating the Surrogate was in violation of the VRA and to enjoin the certification of the Surrogate. Moreover, the political circumstances surrounding his election are so flagrantly corrupt that New York's compelling state interest in keeping the judiciary free from political manipulation warrants that the Court act to prevent further damage to the judiciary. For both of those reasons, and for the reasons laid out by Plaintiffs in their motion papers, the Court should rule in favor of the Plaintiffs on all issues.

STATEMENT OF FACTS

The establishment of a second Surrogate for Kings County is only the latest event in a series of political scandals that have embroiled the Kings County judiciary. Over the past three years, at least four justices on the Kings County Supreme Court have been the subject of scandal; two have been indicted, a third has pled guilty to bribery and is serving a prison sentence, and a fourth was removed from his office for ethics violations. Additionally, the Kings County Surrogate was removed from office in June of this year after it was discovered that he had used his office to enrich a personal friend and political supporter. All of this has unfolded in the shadow of a major corruption case involving the alleged sale of judgeships by the Kings County Democratic party machine and its deposed leader, former Assemblyman Clarence Norman, Jr., to candidates who wished to gain the party's endorsement. Given this context, any legislative interference which enhances the local Democratic Party's control of the Kings County judiciary should be viewed by the Court with great concern and suspicion.

A. The Unfolding Scandal Involving The Kings County Judiciary And The Kings County Democratic Party

On June 29, 2005, Kings County Surrogate's Court Judge Michael Feinberg was removed from the bench by the New York Court of Appeals for actions that "debased his office and eroded public confidence in the integrity of the judiciary." In the Matter of Michael H. Feinberg, 5 N.Y. 3d 206, 216 (2005). In particular, Feinberg appointed a close friend and political supporter as counsel to the Public Administrator – a position that has historically been used by political parties to enrich their supporters – and then proceeded to award him more than $8.5 million in fees between 1997 and 2002

without reviewing them for reasonableness as required by statute. According to the Court, Feinberg's actions "demonstrate[d] an unacceptable incompetence in the law." Feinberg, 5 N.Y. at 215.

Former Surrogate Feinberg was not the first to bring scandal upon the Kings County Surrogate's Court. Feinberg's immediate predecessor, Bernard Bloom, was censured in 1995 for similar conduct.

The Surrogate's removal, however, was only one of many causes of reduced public confidence in the Kings County judiciary. In the last three years alone, the following members of the Kings County Supreme Court have run afoul of the law:

- Justice Gerald Garson was indicted *twice* in 2003, once for taking gifts in return for favorable judgments in divorce and child custody cases, and once for bribery. He is still awaiting trial on those indictments.

- Justice Michael Garson, Gerald's cousin, was indicted in 2004 for stealing hundreds of thousands of dollars from his elderly aunt. He too is awaiting trial on that indictment.

- Justice Victor Barron pleaded guilty in 2002 to bribery, and is currently serving a 3-to-9-year sentence in Edgecombe Correctional Facility in Washington Heights.

- Justice Reynold Mason was removed from his position by the state's highest court in May, 2003 for, among other things, subletting his rent-stabilized apartment, improperly dipping into an escrow account for the rent and then refusing to cooperate with an inquiry into the arrangement by the state Commission on Judicial Conduct. Nancie L. Katz, *Misconduct Fells Another B'klyn Judge*, N. Y. DAILY NEWS, May 2, 2003.

The wrongs committed by these judges were uncovered as part of a larger investigation into the sale of judicial offices in Kings County by the local Democratic party. In March 2003, Kings County District Attorney Charles J. Hynes began a broad

investigation into the nomination of judicial candidates by the party, arguing at the time that the process by which judges were selected by the party was a "sham." Andy Newman & Kevin Flynn, *2 Brooklyn Democrats Indicted in Judicial Corruption Case*, N.Y. TIMES, November 18, 2003. The investigation led to a 22-count joint indictment of county leader Clarence Norman and Democratic Party Executive Director Jeffrey Feldman, alleging grand larceny by extortion and attempted grand larceny by extortion, coercion, and attempted coercion. People v. Feldman, 7 Misc. 3d 794, 796. The indictment describes how Norman and Feldman threatened two judicial candidates with the withdrawal of the party's endorsement if the candidates did not pay for various campaign expenses through vendors handpicked by the party. In particular, the candidates were expected to contribute $100,000 each to pay for mass mailings, automated telephone calls, and ads on cable television and local newspapers. Feldman, 7 Misc. 3d at 799 (2005). Although a trial on these charges has yet to commence, Norman has already been deposed as party leader and forced to resign his seat in the Assembly, following his conviction this past September for violating campaign finance laws. Anemona Hartocollis, *Top Brooklyn Democrat Convicted of Campaign Violations*, N.Y. TIMES, Sep. 28, 2005.

B. The Creation Of A Second Surrogate For Kings County

The general furor that resulted from the District Attorney's investigation encouraged several insurgent candidacies for Kings County judgeships. One of those insurgents, Margarita López Torres – a Kings County Civil Court judge whose endorsement by the party had been withdrawn in 2002 after she publicly asserted her independence from the County party leadership – entered the race for Surrogate. Given

the political climate, local party leaders were concerned that López Torres stood a good chance of defeating their own preferred candidates in the September 13th primary. The party's concern was well-founded, as López Torres ultimately won by 102 votes and went on to win in the general election.

In Albany, however, the Kings County Democratic Party was able to mitigate the loss it foresaw if López Torres won the primary by inducing the State Legislature to create a second Surrogate for Kings County. As such, even if López Torres won the primary and general election, the party would be able to control a second Surrogate, allowing it to both reward a faithful partisan and retain access to the profitable business of the Surrogate's Court. As the New York *Post* reported, the timing was hardly coincidental; "when a reform-minded Civil Court judge announced she would run for surrogate this year, party leaders suddenly struck a deal with the governor to create a second surrogate seat. And they timed the creation of the seat to ensure that their favored candidate wouldn't have to run in a primary." Jim Hinch, *B'klyn Dems Courting Trouble With Pal Pick*, N.Y. POST, October 11, 2005.

The legislation creating the second Surrogate was designed not to take effect until August 1, 2005, which was after the deadline for a primary to take place. In this way, the State Legislature ensured that rather than the voters selecting a candidate, the County party would invoke N.Y. Election Law § 6-116, which requires that party leaders nominate candidates in the absence of a primary election. Norman did just that, picking Assemblyman Frank R. Seddio, an attorney with no judicial experience, as the party's candidate for the second Surrogate. At the time, the New York *Daily News* commented on the irony of Norman "virtually handpicking one judge even as he

appear[ed] before another on felony charges." Nancy Katz & Joe Mahoney, *Dem Boss In Trouble & Control*, N.Y. DAILY NEWS, Sep. 16, 2005.

Seddio, who was also nominated by the Republican and Conservative parties, was elected Surrogate along with López Torres, in the general election. In light of the process that led to Seddio's nomination and election, it is clear that the minority voters of Kings County, who constitute a majority of all eligible voters in the county, were denied any meaningful right to vote for the second Surrogate. In fact, New York City Mayor Michael R. Bloomberg correctly summarized the situation by writing that "one Brooklyn judge will begin a 14-year term in a new judgeship that was created in a back-room deal *that prevented the voters from having any vote on who the candidate would be.*" Michael R. Bloomberg, Editorial, *My New Mission*, N.Y. DAILY NEWS, November 13, 2005 (emphasis added).

ARGUMENT

I. PLAINTIFFS' CLAIM FOR RELIEF UNDER THE VOTING RIGHTS ACT SHOULD BE UPHELD BECAUSE THE MINORITY VOTERS' RIGHTS TO VOTE IN THE PRIMARY HAVE BEEN DENIED

Section 2 of the VRA is violated when a group is denied the right to vote on account of race or color. 42 U.S.C. § 1973(a). Because the Democratic primary for Surrogate was the only meaningful vote in which Plaintiffs could participate, their right to vote was denied. Defendants wrongly characterize participation in the primary as unprotected by the right to vote. Defendants further contend that since the statute allows the party's Executive Committee members, who are themselves elected, to nominate the candidate in the absence of a primary, Plaintiffs therefore were, in effect, given a voice in the selection of the Surrogate candidate.

Defendants' argument does what the law does not, and should not, do – it ignores reality. In Kings County, which is dominated by the Democratic Party,[1] the primary vote is considerably more important than the general election; it is in fact the *only* meaningful election in which Kings County residents can participate. Moreover, the State Legislature here deliberately structured the creation of this judgeship in order to avoid a primary election for the obvious reason *that they did not want to provide the voters with the opportunity to select a candidate in these circumstances.* The fact that the Executive Committee may have been selected by the voters – who when they voted had no notion that they were in any way choosing who should be the Surrogate – is totally irrelevant. Where the right to vote is concerned, mechanistic arguments of the sort offered by Defendants must yield to a commonsensical and realistic understanding of what the true effects of the Defendants' conduct have been. Failure to do so invites the serious erosion of the right to vote. As such, the Court should recognize that the right to vote protects the right to vote in the primary election in Kings County, and that the choice of party candidate by the Executive Committee was a negation – not a realization – of the voters' rights.

A. The Right To Vote Includes The Right To Vote In A Primary Election Where The Primary Represents The Only Meaningful Choice Exercised By Citizens

Defendants argue that the VRA has not been violated since there is no right to vote in the primary, and as such, Plaintiffs have not been denied their right to vote. This argument entirely mischaracterizes the right which Plaintiffs are asserting and

[1] A majority of Kings County voters have selected the Democratic candidate for U.S. President in each of the last 12 elections, including nearly 75% for John Kerry in 2004.

which forms the bases of both their complaint and motion for a preliminary injunction. It is true that there is no right to vote in a primary if the state does not provide for one by law in advance of a general election, but where the state *has* established a primary, the right to participate in the primary is protected by the U.S. Constitution. Since the right to vote includes the right to cast a meaningful ballot, it is particularly important that the Court protect the right to participate in the primary, which here is plainly the decisive vote.

It is true that the Constitution does not mandate that states employ any particular procedure when nominating a political party's candidate for office. Rather, the states are given "wide discretion in the formulation of a system for the choice by the people . . ." United States v. Classic, 313 U.S. 299, 311 (1941). As such, primaries, caucuses, or political conventions are all equally valid means of choosing a party nominee. American Party of Texas v. White, 415 U.S. 767 (1974). The Defendants correctly note that in this regard "[t]he right to vote, *per se*, is not a constitutionally protected right..." and as such, does not create a right to choose candidates through a primary. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36, n. 78 (1973).

This does not mean, however, that there is *no right* to vote in a primary election if the state has established a primary as the appropriate means of choosing a party's candidate. The Supreme Court has explicitly held that where the state has established a primary election prior to a general election for the U.S. Congress, the Constitution protects both the right to vote in the primary *and* general elections. Classic, 313 U.S. at 318 ("Where the state law has made the primary an integral part of the

procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, s. 2.").[2]

The Constitution's protection of the right to vote in a primary is grounded in a realistic understanding of the politics surrounding a primary, as well as an overriding concern for the meaning – and not simply the mechanics – of the right to vote. In interpreting the right to vote, the Supreme Court has recognized that the primary election empowers all of the members of a political association with the right to choose the direction and the standard-bearer of their political group. The primary is therefore "not merely an exercise or warm-up for the general election, but an *integral part* of the entire election process . . ." Storer v. Brown, 415 U.S. 724, 735 (1974) (emphasis added). In fact, the Supreme Court has noted on more than one occasion that "[t]he moment of choosing the party's nominee . . .is 'the critical juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.'" California Democratic Party v. Jones, 530 U.S. 567, 575 (2000) (citing Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 216 (1986)).

This concern is heightened in districts where one party enjoys such political dominance that other political parties have no real chance of winning a general

[2] Although Classic deals with the election of federal officeholders under Art. I, Sec. 2 of the Constitution, there is no indication in the case law that the Court's reasoning would not also apply to a primary election for state and local officeholders, as in the instant case. See Perry v. Cyphers, 186 F. 2d 608 (5th Cir. 1951) (following Classic and holding that minority voters had the right to participate in party primary for nomination of county and precinct officers because the primary election effectively controlled the outcome of the general election).

election. In those districts, it is the primary election that actually determines the ultimate winner, while the general election operates merely as a *pro forma* ratification of the primary vote. The Supreme Court has held that in districts such as those, the right to vote *must* cover the primary election in addition to the general election. Classic, 313 U.S. at 318 ("Where the state law has made the primary an integral part of the procedure of choice, *or where in fact the primary effectively controls the choice*, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, s. 2.") (emphasis added). In the instant case, the Republican Party did not even field a competing candidate.

Even if Classic did not specifically protect the right to vote in a primary that operates as the *de facto* general election, that right would be protected since the right to vote includes "not just the right to cast a ballot, but also the right to a meaningful opportunity to have that ballot affect the political process." Martinez v. Bush, 234 F. Supp. 2d 1275, 1349 (S.D. Fla. 2002); see also David v. Garrison, 553 F. 2d 923, 925 (5th Cir. 1977) (holding that minority voters protected by the 15th Amendment must be given "some meaningful participation in the electoral process, not just the right to cast a vote that can be completely ignored...merely because an election system is so operated as to make that vote meaningless in the election outcome"). As such, where the only meaningful opportunity for voters to express their preferences for candidates is through a primary election, the right to vote in that primary must be offered constitutional protection.

There is no question that Kings County is a district in which the result of the Democratic primary controls the result in the general election. The only candidate

nominated by the Republicans for Surrogate in Kings County during this past election was Frank R. Seddio – the very same Frank R. Seddio who was nominated for Surrogate by the Kings County Democratic party leaders.[3] It is clear then that the general election for Surrogate was a predetermined exercise without any real value; no other political party aside from the Democrats competed for the office. As a result, the only ballot that could affect the outcome of the race was cast by voters in the Democratic primary on September 13. Voters had a right to vote in the primary election for Kings County Surrogate because that vote was integral to the electoral process and constituted the only meaningful exercise of a citizens' right to vote, since it effectively controlled the ultimate choice for Surrogate.

B. The Right To Vote Is Not Meaningfully Upheld Simply Because Kings County Democrats Voted For Democratic Party Executive Committee Members

Defendants point out that statutes such as N.Y. Election Law § 6-116, which permit the party's Executive Committee to pick the candidate when a primary is not held, are constitutional. Considering the circumstances which surround the creation of the second Kings County Surrogate, however, these arguments cannot justify Defendants' broader contention that the nomination of Seddio by the Executive Committee did not abridge or deny Plaintiffs' right to vote.

First, it is clear that someone voting to select an Executive Committee member is in no way passing judgment on who should be a Surrogate. The offices bear

[3] The only other candidates besides López Torres and Seddio to garner votes were write-in candidates. Lawrence Knipel amassed 3 write-in votes, the most of any other candidate aside from the two actual winners.

no relationship to each other. The fact that in a true emergency such a committee may select a candidate does not justify circumventing the electoral process as was done here. New York Election Law § 6-116 is properly used when filling an unanticipated vacancy due, perhaps, to the sudden resignation or death of a candidate. Here, the statute was manipulated by Defendants to deny voters the right to choose the candidate of their choice for Surrogate. At bottom, there can be no doubt that Defendants denied Plaintiffs the ability to cast a meaningful vote for Surrogate, and the opportunity to elect the members of the Kings County Democratic Party Executive Committee did not compensate for that loss.

II. NEW YORK HAS A COMPELLING STATE INTEREST IN FAVOR OF MAINTAINING PUBLIC CONFIDENCE IN NEW YORK STATE'S COURT SYSTEM

New York has a strong public policy "mandat[ing] that insofar as practicable both selection for and performance in judicial office shall be free from political manipulation." Rosenthal v. Harwood, 35 N.Y. 2d 469, 475 (1974). To that end, New York's highest court recently held that "preserving the impartiality and independence of our state judiciary and maintaining public confidence in New York State's court system" is nothing less than a "compelling state interest." In re Raab, 100 N.Y. 2d 305, 312 (2003). In so holding, the Court made clear that New York has an important interest in "the prevention of the appearance of corruption stemming from public awareness of the opportunities for abuse." Id. at 314. New York's judicial institutions must execute their responsibility for upholding clean government and untarnished courts by striking down those actions that bring the judiciary into disrepute and destroy public confidence in the courts.

In Rosenthal, the Court of Appeals invalidated a provision of the internal laws of a political party that limited judicial nominations by that party to candidates who agreed in advance to refuse the nomination of any other political party. The Court found such a practice inimical to the function of a judge and therefore unethical, since it would "compel him to take a partisan position not essential to his candidacy under the present political system of selecting Judges by election." Rosenthal, 35 N.Y. 2d at 474. In discussing the issue, the Court noted that:

> [w]hile all that is unethical is not illegal, that which would command unethical conduct violates public policy and is invalid for that reason. . . It is one thing for the law to leave to one the option of whether to behave morally or ethically; it is quite another for our court to close its eyes to the exertion of pressure by a public or quasi-public body, such as a political organization subject to and operating within the framework of the Election Law, to do an unethical act. Such inaction would be tantamount to the law's lending its sanction to a practice in violation of public policy.

Rosenthal, 35 N.Y. 2d at 474. Here, a political organization has acted improperly while operating within the framework of the Election Law. It has worked with the State Legislature to create a second Surrogate in order to protect its access to power and the lucrative business associated with the Surrogate's Court. It deliberately denied voters an opportunity to vote, who then showed their dismay with their party leaders' rampant corruption by voting for a reform candidate – who also was a minority – for the existing Surrogate judgeship. It permitted the party's indicted leader to play a central role in picking the actual candidate for office while he was on trial for campaign finance violations.

Defendants, who enabled the Kings County Democratic party to engage in these activities, violated the VRA by crafting legislation that stripped minority voters of

the right to vote for Surrogate. Taken together, all of this works to degrade and erode public confidence in the Kings County judiciary. The Court should not sanction acts taken by a political organization in direct contravention of the state's compelling public policy in favor of a clean judiciary; it should enjoin the certification of the election results.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in greater detail in Plaintiffs' papers, *amicus* Citizens Union of New York respectfully requests that this Court rule for the Plaintiffs in all respects.

Dated: December 6, 2005
New York, New York

Respectfully submitted,

/s Richard J. Davis

Richard J. Davis
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Attorneys for *Amicus Curiae*