

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NAACP NEW YORK STATE CONFERENCE,
as an organization and representative
of its members, NATIONAL COALITION ON
BLACK CIVIC PARTICIPATION, as an
organization and representative of
its members, FAMILIES UNITED FOR
RACIAL AND ECONOMIC EQUALITY, as an
organization and representative of
its members, WORKING FAMILIES PARTY,
as a political party and
representative of its members,
VIVIAN BOSIER, ANITA BURSON, and
SHEILA DUNCAN,

10 Civ. 2950 (FB) (RML)

**ANSWER TO
AMENDED COMPLAINT**

Plaintiffs,

-against-

NEW YORK STATE BOARD OF ELECTIONS,
JAMES A. WALSH, DOUGLAS A. KELLNER,
EVELYN J. AQUILA, and GREGORY P.
PETERSON, in their official
capacities as Commissioners of the
NEW YORK STATE BOARD OF ELECTIONS,
TODD D. VALENTINE and ROBERT A.
BREHM, in their official capacities
as Executive Directors of the New York
State Board of Elections, NEW YORK
CITY BOARD OF ELECTIONS, and JOSE
MIGUEL ARAUJO, NAOMI BARRERA, JULIE
DENT, NANCY MOTTOLA-SCHACHER, JUAN
CARLOS POLANCO, MICHAEL J. RYAN,
J.P SIPP, GREGORY C. SOUMAS, JUDITH
D. STUPP and FREDERIC M. UMANE,
in their official capacities as
Commissioners of the New York City
Board of Elections,

Defendants.

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Defendants New York State Board of Elections (the "State Board"), James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila and Gregory P. Peterson, Commissioners of the State Board, Todd D. Valentine, and Robert A. Brehm, Executive Directors of the State Board (collectively "State defendants"), by their attorney, ANDREW M. CUOMO, Attorney General of the State of New York, as and for their answer to the amended complaint herein, filed on September 2, 2010, allege:

1. Deny the allegations in paragraph 1 of the amended complaint, except admit that plaintiffs seek the enumerated relief.

2. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations contained in paragraph 2 of the amended complaint regarding the reference to a "debacle," and admit the remaining allegations in that paragraph.

3. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 3 of the amended complaint.

4. Admit the allegations in the first three sentences of paragraph 4 of the amended complaint, and deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the fourth sentence of that paragraph.

5. Deny the allegations in the first sentence of paragraph 5 of the amended complaint, deny the allegations in the second sentence of that paragraph, except admit that the ballot scanners

that are the subject matter of this action do not "automatically return an over voted ballot," deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the third sentence of that paragraph, except admit that the ballot scanners that are the subject matter of this action do not "automatically return an over voted ballot," deny the allegations in the fourth sentence of that paragraph, except deny knowledge or information sufficient to form a belief with respect to the truth of the allegations concerning "jurisdictions in other states."

6. Deny the allegations in the first sentence of paragraph 6 of the amended complaint, and deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the second and third sentences of that paragraph.

7. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the first sentence of paragraph 7 of the amended complaint, and respectfully refer to the materials cited therein for the contents thereof, and deny the allegations in the second sentence of that paragraph.

8. Deny the allegations in the first sentence of paragraph 8 of the amended complaint, deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the second sentence of that paragraph, except admit the allegations in that second sentence that there exist various options "for setting

the machines," deny the allegations in the third sentence of that paragraph, except deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in that third sentence concerning "other jurisdictions," state that "setting the machines" to return overvoted ballots would also "comply with HAVA's mandate," state that the ballot scanners that are the subject matter of this action explicitly alert the voter to an overvote and provide an opportunity to correct an overvote, and further state that defendants are in compliance with HAVA.

9. Deny the allegations in the first sentence of paragraph 9 of the amended complaint, deny the allegations in the second sentence of that paragraph regarding purported "harms," except admit that "the Board has publicly discussed its overvote procedure," and deny the allegations in the third sentence of that paragraph, except state that the ballot scanners that are the subject matter of this action explicitly alert the voter to an overvote and provide an opportunity to correct an overvote.

10. Deny the allegations in paragraph 10 of the amended complaint, except admit the allegation in the first sentence in the footnote to that paragraph that the State Board intended to, and did, submit the overvote procedure to the United States Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act, state that the United States Attorney General did preclear the overvote procedure challenged in this action, and state that the

allegations in the second sentence in the footnote constitute a representation with respect to plaintiffs' future intentions to which no response is required.

11. Deny the allegations in paragraph 11 of the amended complaint that this Court has jurisdiction over the State Board, an agency of the Executive Department of the State of New York which asserts and is entitled to Eleventh Amendment immunity from suit, admit that plaintiffs rely on the cited statutes to invoke jurisdiction over the named State officials, and deny that plaintiffs are entitled to relief under the provisions of law enumerated in that paragraph.

12. Deny the allegations contained in paragraph 12 of the amended complaint with respect to purported "omissions" and purported "effects" that will allegedly occur, except admit that venue is proper pursuant to the cited statute.

13. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 13 of the amended complaint.

14. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 14 of the amended complaint.

15. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 15 of the amended complaint.

16. Admit the allegation in paragraph 16 of the amended complaint that plaintiff is a registered voter, and deny knowledge or information sufficient to form a belief with respect to the truth of the remaining allegations in that paragraph.

17. Admit the allegation in paragraph 17 of the amended complaint that plaintiff is a registered voter, and deny knowledge or information sufficient to form a belief with respect to the truth of the remaining allegations in that paragraph.

18. Admit the allegations in paragraph 18 of the amended complaint that plaintiff is a registered voter, and deny knowledge or information to form a belief with respect to the truth of the remaining allegations in that paragraph.

19. Admit the allegation in paragraph 19 of the amended complaint that the State Board is a State agency with powers and duties as prescribed by law, and refer to the provisions of law cited for the contents thereof.

20. Admit the allegations in paragraph 20 of the amended complaint.

21. Admit the allegations in the first sentence of paragraph 21 of the amended complaint, deny the allegations in the second sentence of that paragraph, and state with respect to the allegations in the second sentence of that paragraph that Robert A. Brehm has been "designated by the State" as the Chief Election Officer for federal purposes.

22. Admit the allegation in paragraph 22 of the amended complaint that the New York City Board of Elections is constituted pursuant to N.Y. Election Law § 3-200, and refer to the statute for the contents thereof, and in connection with the reference in that paragraph to the City Board's 2008 annual report, refer to the report for the contents thereof.

23. Admit the allegations in paragraph 23 of the amended complaint.

24. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 24 of the amended complaint, except admit that plaintiffs furnished a copy of the complaint to the Attorney General's Office.

25. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 25 of the amended complaint, except admit the passage of HAVA, and refer to that statute for the contents thereof.

26. Deny the allegations in the first sentence of paragraph 26 of the amended complaint, except admit that the State "was sued by the Department of Justice," deny the allegation in the second sentence of that paragraph that "that lawsuit ended," except admit that various "agreement[s]" have been made with the DOJ concerning HAVA implementation, admit the allegations in the third sentence of that paragraph, and deny the allegations in the fourth sentence of that paragraph.

27. Admit the allegations in paragraph 27 of the amended complaint.

28. Deny the allegations in the first sentence of paragraph 28 of the amended complaint, except deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in that sentence concerning other "jurisdictions," and deny the allegations in the second sentence of that paragraph, and deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the third sentence of that paragraph.

29. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 29 of the amended complaint referring to "zero," and admit the remaining allegations in that paragraph.

30. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 30 of the amended complaint.

31. Deny the allegations in the first sentence of paragraph 31 of the amended complaint, except admit that the ballot scanners that are the subject matter of this action do not "automatically return" an overvoted ballot, and deny the allegations in the second sentence of that paragraph, except state that in the case of an overvote the ballot scanner will display a notice for the voter to return the

ballot to be corrected or to have the ballot scanner accept and count the ballot for such votes as are eligible to be counted.

32. Admit the allegations in paragraph 32 of the amended complaint, and state that the ballot scanners that are the subject matter of this action explicitly alert the voter to an overvote and provide an opportunity to correct an overvote.

33. Admit the allegations in paragraph 33 of the amended complaint, and refer to Exhibit A of the amended complaint for the contents thereof.

34. Admit the allegations in paragraph 34 of the amended complaint.

35. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 35 of the amended complaint regarding "people in line," admit the allegation in that paragraph that pressing the green button will cause the ballot to be cast, and admit the allegation in that paragraph that pressing the red button will cause the ballot to be returned.

36. Admit the allegation in the first sentence of paragraph 36 of the amended complaint, and state that poll workers are trained to respond to voter inquiries, deny the allegations in the second sentence of that paragraph, deny the reference in the third sentence of that paragraph to an allegedly "confusing and counterintuitive message," and admit the remaining allegations in that third sentence.

37. Deny knowledge of information sufficient with respect to the truth of the characterizations in paragraph 37 of the amended complaint, admit the allegations in the first and sentences of that paragraph regarding the message, deny the allegations in the third sentence of that paragraph, refer to the provision of law referred to for the contents thereof, and state that the ballot scanners that are the subject matter of this action explicitly alert the voter to an overvote and provide an opportunity to correct an overvote.

38. Deny knowledge of information sufficient with respect to the truth of the allegations in paragraph 38 of the amended complaint.

39. Deny the allegations in paragraph 39 of the amended complaint, except admit that the State Board met on February 18, 2010, and refer to the minutes of the meeting for the contents thereof.

40. Deny knowledge of information sufficient with respect to the truth of the allegations in paragraph 40 of the complaint.

41. Deny knowledge of information sufficient with respect to the truth of the allegations in paragraph 41 of the amended complaint.

42. Deny the allegations in paragraph 42 of the amended complaint, except admit the allegation in that paragraph that there were "conference calls."

43. Deny the allegations in the first sentence of paragraph 43

of the amended complaint, deny knowledge or information sufficient to form a belief with respect to the characterizations in the second sentence of the amended complaint, and refer to the "pollworker training manual" referred to in that second sentence for the contents thereof, deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the third sentence of that paragraph, and deny the allegations in the fourth sentence of that paragraph.

44. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 44 of the amended complaint.

45. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 45 of the amended complaint.

46. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 46 of the amended complaint.

47. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 47 of the amended complaint.

48. Admit upon information and belief the allegations in the first sentence of paragraph 48 of the amended complaint, deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the second sentence of that

paragraph concerning voters in Florida counties, and deny the allegations in that second sentence referring to a "confusing message."

49. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 49 of the amended complaint.

50. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 50 of the amended complaint.

51. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the first sentence of paragraph 51 of the complaint, and deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the second sentence of that paragraph, except admit that "homogenous precinct, ecological regression and ecological inference analyses" are "three common approaches" to analyzing voting data.

52. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 52 of the amended complaint.

53. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 53 of the amended complaint.

54. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 54 of the amended complaint.

55. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 55 of the amended complaint.

56. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 56 of the amended complaint.

57. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the first sentence of paragraph 57 of the amended complaint, and deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the second sentence of that paragraph, except admit the allegations of that second sentence with respect to the previous use of lever-operated machines.

58. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the first sentence of paragraph 58 of the amended complaint regarding what occurred "previously," and deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the second sentence of that paragraph.

59. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 59 of the

amended complaint.

60. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in paragraph 60 of the amended complaint.

61. Deny the allegations in paragraph 61 of the amended complaint, except deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in that paragraph concerning "other jurisdictions."

62. Admit the allegations in the first sentence of paragraph 62 of the amended complaint, deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the second and third sentences of that paragraph, and refer to the documents referred to in the second and third sentences for the contents thereof.

63. Deny the allegation in paragraph 63 of the amended complaint that a change in the overvote procedure would not cause "delay in preparations for the upcoming elections," and admit the allegation in that paragraph with respect to "recertification."

64. Deny the allegations in the first sentence of paragraph 64 of the amended complaint, deny knowledge or information sufficient to form a belief with respect to the truth of the characterizations in the second sentence of that paragraph, and refer to the statute referred to in that second sentence for the contents thereof.

65. Deny knowledge or information sufficient to form a belief with respect to the truth of the reference to "indeed" in paragraph 65 of the amended complaint, and refer to the provisions of law cited in that paragraph for the contents thereof.

66. Deny the allegations in the first sentence of paragraph 66 of the amended complaint, admit that the second sentence of that paragraph quotes a State law, and refer to that law for the contents thereof.

67. Admit the allegations in paragraph 67 of the amended complaint, except refer to the provision of law referred to for the contents thereof.

68. Deny the allegations in paragraph 68 of the amended complaint.

69. Deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in the first sentence of paragraph 69 of the amended complaint, admit the allegations in the second sentence of that paragraph that plaintiffs have made those allegations, except state that such allegations are without merit, and deny the allegations in the third sentence of that paragraph.

70. Deny the allegations in the first sentence of paragraph 70 of the amended complaint referring to an "unnecessary burden," and deny knowledge or information sufficient to form a belief with respect to the truth of the remaining allegations in that first

sentence, deny the allegations in the second sentence of that paragraph, deny the allegations in the third sentence of that paragraph, except deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in that third sentence purporting to describe plaintiffs' organizations, and deny the allegations in the fourth sentence of that paragraph.

71. Deny the allegations in the first sentence of paragraph 71 of the amended complaint, and deny the allegations in the second sentence of that paragraph, except deny knowledge or information sufficient to form a belief with respect to the truth of the allegations in that second sentence referring to "the organizations' regular activities."

72. Deny the allegations in paragraph 72 of the amended complaint.

73. Repeat and reallege their responses previously set forth herein.

74. Admit that paragraph 74 of the amended complaint quotes a federal statute, and refer to the statute for the contents thereof.

75. Deny the allegations in paragraph 75 of the amended complaint.

76. Deny the allegations in paragraph 76 of the amended complaint.

77. Deny the allegations in paragraph 77 of the amended complaint.

FIRST DEFENSE

78. The State Board is an agency within the Executive Department of the State of New York, as expressly provided by N.Y. Elec. Law § 3-100(a).

79. By reason of the foregoing, the State Board asserts and is entitled to Eleventh Amendment immunity from suit in this action.

SECOND DEFENSE

80. The State Board is not a "person" for purposes of 42 U.S.C. § 1983.

THIRD DEFENSE

81. New York conducted its primary election on September 14, 2010, and will conduct its general election on November 2, 2010.

82. The election apparatus is now far advanced at great expense in State and local resources.

83. New York's procedure with respect to overvotes was established long before this action was filed on June 28, 2010.

84. By reason of the foregoing, plaintiffs' request for an injunction is barred by laches.

FOURTH DEFENSE

85. A person seeking to invoke federal jurisdiction must establish his or her standing to sue under Article III § 2 of the United States Constitution, which limits the courts to hearing actual cases or controversies.

86. To establish standing, the party must set forth, *inter alia*, specific facts indicating an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical.

87. The amended complaint alleges the mere potential for voter confusion in upcoming elections with respect to overvotes.

88. By reason of the foregoing, plaintiffs lack standing to maintain this action.

FIFTH DEFENSE

89. The amended complaint fails to state a claim upon which relief can be granted.

SIXTH DEFENSE

90. Insofar as this Court may declare any infirmity in the State's overvote procedure, the "permanent state-wide injunction" requested in WHEREFORE Clause ¶ B of the amended complaint would be unnecessary and superfluous.

SEVENTH DEFENSE

91. To the extent that WHEREFORE Clause ¶ B requests an injunction against State officers in their "personal or individual capacities," rather than in their official capacities, the amended complaint fails to state a claim upon which relief can be granted as against such State officers.

WHEREFORE, State defendants respectfully request that the amended complaint be dismissed, and that this Court grant such other and further relief as it may deem just and proper.

Dated: New York, New York
October 1, 2010

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By:



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