



**STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL**

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December 6, 2011

Honorable Gary L. Sharpe
James T. Foley U.S Courthouse
445 Broadway, Room 441
Albany, NY 12207-2926

Re: *United States v. State of New York, et al.*
Northern District of New York
10-CV-1214 (GLS)

Dear Judge Sharpe:

As the Court is aware, the Department of Defense recently denied New York State's application for a waiver of the 45-day deadline for transmitting UOCAVA ballots for the 2012 federal non-presidential primary and general elections. The State's prematurity argument with respect to the 2012 federal elections is thus no longer viable. Several important issues do, however, remain before the Court.

As set forth in the State's memorandum of law in opposition to the United States' motion for supplemental and permanent relief, New York does not dispute that, given the fact of the waiver denial, the federal non-presidential 2012 primary should be held at least 80 days before the 2012 general election to insure compliance with UOCAVA. As the State also pointed out, however, the United States seeks additional relief that goes beyond that required to guarantee compliance with federal law and which, if granted, would improperly infringe on the State's prerogative to set its own UOCAVA-compliant primary date. Specifically, the federal government asks the court to direct that the State propose a new primary date, and any other necessary election calendar adjustments, within ten days of the issuance of a remedial order. As explained in the State's opposition papers, the ten-day deadline would deprive the Legislature of a reasonable opportunity to develop a revised primary schedule. Instead, the Court can issue a remedial order requiring that the primary election be scheduled for a date prior to August 18, 2012, and then should set a status conference for a later date to allow the Court sufficient time to take any necessary action to insure UOCAVA compliance in 2012 if a new primary date has not been set by that date.

In its reply papers, the Proposed-Intervenor New York State Senate, requests that the Court grant relief significantly beyond that sought by the United States by ordering that the primary be held in August 2012. The State Senate would thus have the Court involve itself -- to a far greater extent than contemplated by even the federal government -- in an area traditionally

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left to the states. See Bush v. Hillsborough County Canvassing Board, 123 F. Supp.2d 1305, 1317 (N.D. Fla. 2000) (requiring compliance with UOCAVA but declining to "legislate the intricacies of state election procedures" in its remedial order). Further, the Legislature is best suited to resolve the implementation issues that would arise from the setting of dates for state and federal primaries. An order directing that the primary be held before August 18, as requested by the United States, insures UOCAVA compliance; the State should be allowed to set the specific date.

Should the Court, at some point, nonetheless deem it appropriate to direct that the primary be conducted on a particular date, it should be mindful that there is a widely held view -- among elected officials of both major political parties and public interests groups -- that an August primary date could significantly disrupt election operations in a manner that could be avoided by holding the primary in June. It should also be noted that, for many years, New York's primary elections were held in June. Although the State of New York does not take a position as to the appropriate primary date, and remains hopeful of a legislative solution, the Court should have before it the fullest record upon which to render a decision should it reach the primary date issue. Accordingly, annexed to this letter are (1) a letter signed by the Speaker of the New York State Assembly and (2) an affidavit from the bi-partisan Election Commissioners' Association, to which the Speaker refers, each of which offers a factual basis and rationale for holding the primary in June. In addition, several civil rights and civic groups (Dkt. 38) and the Election Commissioners' Association (undocketed) have already submitted letters to the Court in support of a June primary. Any determination by the Court as to the primary date would involve the consideration of a highly complex pre-election process. The State, therefore, urges the Court to take into account the information in support of a June primary should it be deemed necessary to impose a Court-ordered date.

Finally, the State respectfully submits that any order regarding the primary election schedule be limited to 2012, thus affording the State Legislature and the Governor an opportunity to set the primary dates for future primaries.

Thank you for your consideration of this matter.

Respectfully yours,

S/ Jeffrey M. Dvorin

Jeffrey M. Dvorin

Assistant Attorney General

Bar Roll No. 101559

cc: All attorneys of record via CM/ECF



SHELDON SILVER
Speaker of the Assembly

**THE ASSEMBLY
STATE OF NEW YORK
ALBANY**

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December 2, 2011

Honorable Gary L. Sharpe
James T. Foley U.S. Courthouse
445 Broadway
Albany, NY 12207-2924

Dear Judge Sharpe:

On behalf of the New York State Assembly, I write to explain why we, along with the New York State Election Commissioner's Association, and a host of good government groups, believe that a June primary election, rather than an August one, offers the greatest potential for voter participation and practical logistical efficiency while simultaneously discouraging widespread voter suppression.

At the outset, it is my belief that the Legislature should and can come to an agreement which is in full compliance with the MOVE act. To that end, I ask the Court to grant us time, a short period, to set a date as required. However, should this Court determine that it is constrained to fix a new primary day for all New York State federal, state, and local elections at this time, the Assembly strongly believes that such a primary election should be held on the fourth Tuesday in June.

The Assembly has consistently authored and supported legislation intended to increase voter turnout, access, and overall participation in our election process. It is our continued commitment to these principles and opposition to policies that suppress voter participation that we support a primary in June.

It is well known that voters, notably those living in urban centers, traditionally take annual vacations away from their homes in July or August. Therefore, a primary election in July or August would undoubtedly have a widespread and deleterious effect of suppressing voter turnout in important primary elections.

The Assembly views a June primary as not only ensuring higher voter participation but also as the most effective way to ensure full and meaningful compliance with all aspects of the MOVE Act.

New York's election law is extraordinarily rigid, linear, and sequential. That is to say that the Election Law mandates that each step in the responsible and effective administration of an orderly primary election is predicated upon the completion of a required preceding step. Each essential step is dictated by the date of the Primary Election.

The Election Law's structure being what it is, an August primary day is simply unworkable from a practical and logistical standpoint. An August primary is easily scheduled and administered on paper. The actual administration of such an election is quite a different matter.

The foundational goal of the MOVE Act is to ensure the participation of members of our Armed Forces and Americans living abroad (UOCAVA voters). To that end, local boards of election mail ballots to UOCAVA voters 45 days before a federal election. In 2012, the general election is scheduled to be held on November 6. UOCAVA general election ballots must therefore be mailed on or before September 22 (though likely September 21 as September 22 is a Saturday).

Before any general election ballots can be printed and mailed pursuant to the MOVE Act, the results of the primary election must be ascertained and the general election ballots certified. New York State Board of Election certification of the general election ballot must be completed 54 days before the general election and local certification 53 days before. This leaves eight days for the production, printing, preparation, and transmission of UOCAVA ballots to ensure MOVE Act compliance. Lawsuits, machine malfunctions, and counting of paper ballots in contested primaries all carry with them the potential to delay this all-important general election ballot certification. This problem is further exacerbated in an August 14 primary scenario. A June primary would go a long way towards mitigating some of these potential pitfalls and better ensure MOVE Act Compliance.

Logistical obstacles are also multiplied when considering an August. These include locating alternative polling sites to replace schools that are closed in July and August, identifying and training new election inspectors who may be away in August, and the inability to hold judicial conventions as currently mandated in statute.

The pendency of this issue before this Court and this Court's capacity to order a single primary for federal, state, and local offices notwithstanding, the Assembly asserts that we, along with our colleagues in the Senate, have a responsibility to make the law and policy determinations regarding the rescheduling of primary day. The concept of legislative prerogative supports such a proposition.

With the legislative session set to commence on January 4, 2012, and the Governor's ability to call a special session before that time, surely enough time remains before the start of a revised political calendar for to craft a legislative solution. Ballot access procedures connected to a fourth Tuesday in June Primary would begin on the last day of February.

The Assembly feels so strongly regarding the utter disruptiveness of an August primary that should this Court order one, we would then, as a last resort, be compelled to advocate for a separate state and local primary for September.

Thank you in advance for your careful consideration of the New York State Assembly's position on this very important matter.

Sincerely,


SHELDON SILVER
Speaker

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
Plaintiffs,

Case No. 10-CV-1214
Judge Gary L. Sharpe

v.

STATE OF NEW YORK, et al.
Defendants.

DECLARATION OF LAURA P. COSTELLO and JERRY O. EATON
as OFFICERS OF THE NEW YORK STATE ELECTION COMMISSIONERS' ASSOCIATION

Pursuant to 28 U.S.C. § 1746, LAURA P. COSTELLO and JERRY O. EATON, each for him and herself, declare the following:

1. LAURA P. COSTELLO is the President of the New York State Election Commissioner's Association (hereinafter "ECASNY"), and JERRY O. EATON is the First Vice-President of the NYSECA, and as such submit this declaration.

2. ECASNY is a bipartisan organization consisting of the respective two election commissioners from each of New York State's 62 counties. The Preamble to ECASNY's By-Laws provides that ECASNY is dedicated to the following precepts: The preservation of the integrity of the ballot; the easiest possible access to the ballot by the voters; programs to promote greater voter participation; promotion and enactment of laws for the more effective conduct and administration of elections within the State of New York; the enactment of laws that guarantee the voting public fair, open and honest elections.

3. It is the county election commissioners, acting in their official capacity, and their boards of elections that have the ultimate responsibility to meet the 45 day pre-election ballot transmission requirement of the Military and Overseas Voting (MOVE) Act.

4. Long before the US Department of Justice (DOJ) brought this supplemental application for compliance, the ECASNY at its January 25, 2011 meeting voted overwhelmingly to recommend to the New York State Legislature and the Governor that in light of the MOVE Act, the date for New York's primary should be moved from the second Tuesday in September to the fourth Tuesday in June. A June primary allows meaningful compliance with the federal MOVE Act and ensures enough time between the primary election and general election to resolve ballot access disputes and create and test ballot accuracy. (See March 8, 2011 letter to Speaker Silver and attached October 3, 2011 communication to Judge Sharpe previously sent to the Court).

5. While an August Primary date may work on paper, experience has shown that a late primary will likely produce late primary certifications that would still preclude our ability to get our military and special federal voters their general election absentee ballots in a timely fashion.

6. The main issue is the ability to finalize the general election ballots early enough to permit sufficient time to draft the ballots, translate, proof, produce and timely transmit accurate ballots to all military and special federal voters in compliance with the MOVE Act.

7. We respectfully remind the Court that under New York State Election Law, a military voter is entitled to a ballot which includes all local races and propositions which further complicates the creation of the military ballot in a timely fashion. Military voters deserve no less and we support that determination.

8. Simply moving the date to conduct the Primary election 3 to 4 weeks earlier doesn't resolve all of the issues impacting timely military and special federal ballot transmission. As set forth in our October 3rd letter and proposed calendar, a realistic time period to conduct post-primary election canvass, recanvass and audit requirements is 21 days after the primary election for counties outside of NYC and 28 days after the primary election in New York City, rather than the existing 15 days election law mandates. Also, the MOVE Act requirement to transmit the ballots no later than 45 days before the general election is 14 days earlier (45th day falls on a Saturday and is moved earlier to Friday) than the current NYS Election Law mandate of 32 days before.

9. A prime example of post primary election delays which affect the county boards of Elections' ability to get out military and special federal absentee ballots is the history of this litigation. In 2010, under an Order from this Court to get military and special federal ballots out by October 10th, (26 days after the September 14th Primary Election), thirteen county boards of elections were unable to do so despite their best efforts.

10. In most instances the delay is occasioned by state court litigation directed at the primary election or other ballot access issues. Additionally, the New York State Election Law allows an otherwise late declination where the candidate is subsequently nominated for a different office (for example, a nomination from a judicial convention held 7 to 13 days after the primary is the basis for the declination of prior nominations). The next issue in this scenario is the time afforded for the substitution of the new candidate for the declined nomination which is now vacant.

11. In contested primaries when there are administrative or judicial challenges to; the machine count, the right of voters who cast affidavit (provisional) ballots, the absentee ballots themselves, as well as the propriety of the county board of elections having issued the absentee ballot, and the canvass and recanvass of such election, the timely completion of the essential tasks

necessary to certify a winner impacts the time required to prepare and transmit military and special federal absentee ballots.

12. In a United States Senate or congressional district race such challenges would constitute a major issue and would take considerable time to resolve. We believe, based upon our hands-on experience, that a time frame in excess of the 25 days is required between the last date to conduct the August 2012 Primary Election (as provided in the DOJ proposed order) and the time frame we believe necessary for the date upon which the New York State Board of Elections (NYSBOE) to finalize the candidates to appear on the general election ballot while still affording the county boards of elections sufficient time to meet the 53-day pre-general election deadline referenced in our letter to the court and proposed calendar.

13. The United States Senate seat and 16 of the current 29 congressional district boundaries extend beyond a single county. As such, the county boards of elections must complete their post-primary election canvass and certification processes and forward completed results to the NYSBOE which has the responsibility to aggregate the vote totals and certify the winners. The federal election ballot certification is sent by the NYSBOE to the county boards of elections where the task of building ballot styles begins. This process is much more complicated than might appear to those not familiar with the process in order to assure that the correct combination of candidates appears on the ballot for each election district within the county, and that these same candidates for the same election districts are properly coded into the software that formats the ballot scanning devices and the ballot marking devices. In addition, many counties are required to translate the ballot into additional languages. The ballot marking devices must also include audio that verbally lists the name of each candidate for those voters who use the audio ballot feature of the ballot

marking devices. State regulations and proper election administration practices require that there be thorough logic and accuracy testing of the set-up of each machine prior to each election event.

14. The date for determination of Primary winners is critical. As set forth in our calendar, the NYSBOE certification of the candidates to appear on the general election ballot must be completed 54 days before the general election with local certification 53 days before. This time frame allows eight days for the production, printing, preparation and transmission of the military and special federal ballots to enable full compliance with the 45 day pre-election deadline.

15. In order for the NYSBOE to meet its 54 day pre-general election deadline, all certified primary election results must be received at the NYSBOE in sufficient time before the 54 day pre-election deadline to allow it to complete the aggregation of primary election results, determine the primary election winners and certify the general election candidates and offices.

16. Experience has shown that this entire process is frequently interrupted by candidates who obtain state court injunctions which slow the process and preclude the act of certification of the contested nomination pending the determination of such litigation.

17. Setting aside timing issues discussed above, there are logistical considerations that favor a June as opposed to August primary. A significant number, if not a majority, of polling locations are situated in schools. Those schools are largely unstaffed or closed during the summer months of July and August. Many school buildings are also not air conditioned and inspectors working 17 hour days during the hottest month of the year in those conditions may prove intolerable.

18. Running a primary election requires a large number of trained election inspectors and related essential temporary election workers. A significant number of such individuals vacation with their families during the traditional summer months of July and August.

19 Other obstacles are raised should the federal primary be held in August and the state primary remain in September including: the need for two general election absentee ballots for use by military voters, the added \$50 million expense to conduct an additional primary election, the overlapping responsibility for the boards of elections to complete critical state primary election day and post-primary election day requirements during the same time period immediately leading up to the general election MOVE Act absentee ballot transmission mandate, and confusion to voters that three primary elections and a general election in such close proximity will create.

20. Splitting the primaries by requiring either a June or August federal office primary and maintaining state office September primary election will require two absentee ballots to be provided to military voters; a federal office ballot transmitted no later than 45 days (September 22nd) before the general election containing candidates for federal offices, and a state and local office ballot transmitted in accordance with New York State Election Law no later than 32 days before the general election. New York State Election Law provides for military voters to be able to vote for both federal level candidates and state/local level candidates and proposals.

21. Such dual sending of military ballots will also require the county boards of election to track the transmission and receipt of such ballots and file multiple ballots for each voter returning both ballots. Existing absentee ballot computer management systems do not readily accommodate such tracking. Such dual ballots will also increase voter confusion and county board of election staff confusion that could possibly lead to voter disenfranchisement.

22. Further conflict occurs as the absentee ballot computer management systems will need to complete recording information relative to such voters only eligible to vote in the September 11th state office primary election, but also be updated to record information relative to

the voters qualified to receive a general election federal absentee ballot just 11 days after the September 11th state office primary election.

23. It will cost an estimated \$50 million in added expense to conduct both a federal office primary election and a state office primary election. This will include the dual expense for poll site rent, inspector and other election worker pay, voting system election programming, logic and accuracy testing, transportation cost and the expense to print and mail absentee ballots and print election day ballots. There are added expenses to county boards of elections to pay overtime and hire and train additional temporary workers which would be necessary to complete each respective primary elections pre-election and post-election requirements, especially if the two primary elections are held in close proximity to one another.

24. Simply put, New York's electronic voting machines are programmed for each election. As part of that programming, the voting systems must be subjected to and pass logic and accuracy tests conducted after the various ballot styles are created, proofed and loaded into the machines. As we indicated in our October 3rd communication, all issues relative to the finalization of the *election day* ballots must be resolved 35 days before an election so that logic and accuracy testing can occur in an orderly fashion before the voting systems are sealed, prepared for shipping and shipped to the various polling locations in time for such use on election day.

25. As indicated in paragraph 8, it takes 28 days after the primary election for the NYC Board of Elections to complete its post-primary election requirements. That time period coupled with the 35 day pre-election requirement to finalize the *election day* ballot provides a 63 day period in between elections that is reasonably necessary to accommodate the clearing from the voting systems of the records of the previous primary election and the resetting, testing and certification of those same systems for use at the next election. Superimposing that 63 day period before the

State's local primary election date of September 11th and after the MOVE Act compliant April 24th Presidential Preference Primary would result in an available date range of June 26th to July 11th which dates fall 29 days after the Presidential Primary and at least 35 days before any new election could be conducted. For that available 16 day time window, a June 26th primary election is preferable as a July primary brings with it all of the poll site availability, machine delivery and staffing issues of an August primary, exacerbated by the July 4th holiday.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of December 2011.


LAURA P. COSTELLO


JERRY O. EATON

