

## Fusion Voting

*Conservative Party of New York State v.  
New York State Board of Elections  
(Jed S. Rakoff, S.D.N.Y. 1:10-cv-6923)*

Two months before the 2010 general election, which included an election for governor of New York, the state's Conservative Party and the state's Working Families party filed a federal complaint in the Southern District of New York challenging how minor parties would receive credit for votes in favor of their candidates that were also the candidates of other parties.<sup>1</sup> A candidate nominated by more than one party was listed separately on the ballot for each nomination.<sup>2</sup> Lever voting machines mechanically prevented a voter from voting for the same candidate more than once, but the state had switched to optical-scan voting, which allowed for multiple votes for the same candidate to be counted as a single valid vote.<sup>3</sup> The plaintiffs called this form of double-voting fusion voting.<sup>4</sup> The party receiving credit for the vote was going to be the first party listed on the ballot, and parties were listed in the order of votes received in the last gubernatorial election.<sup>5</sup> A party's right to appear on the ballot also was determined from the votes it received in the last gubernatorial election.<sup>6</sup>

It was initially thought that New York's attorney general would represent the defendants, but he determined that this case was not within his responsibilities.<sup>7</sup>

The court assigned the case to District Judge Jed S. Rakoff.<sup>8</sup> It is Judge Rakoff's practice to communicate with the parties on how the case will move forward within a week of the case's filing.<sup>9</sup> At the time this case was filed, Judge Rakoff did this by telephone, but he now does it by email.<sup>10</sup>

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1. [Complaint](#), *Conservative Party of New York State v. New York State Bd. of Elections*, No. 1:10-cv-6923 (S.D.N.Y. Sept. 14, 2010), D.E. 1; [Conservative Party v. Walsh](#), 818 F. Supp. 2d 670, 672 (S.D.N.Y. 2011); see David W. Chen, *Before Vote, City Officials Fretted About New System*, N.Y. Times, Sept. 16, 2010, at A27.

2. [Conservative Party](#), 818 F. Supp. 2d at 671; [Order Denying Preliminary Injunction](#) at 1–2, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Oct. 15, 2010), D.E. 41, available at 2010 WL 4455867.

3. [Conservative Party](#), 818 F. Supp. 2d at 674; [Order Denying Preliminary Injunction](#), *supra* note 2, at 2 n.2; Transcript at 6–7, 17, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Sept. 30, 2010, filed Nov. 5, 2010), D.E. 43 [hereinafter Sept. 30, 2010, Transcript].

4. [Complaint](#), *supra* note 1, at 1–2.

5. [Conservative Party](#), 818 F. Supp. 2d at 671–74; [Order Denying Preliminary Injunction](#), *supra* note 2, at 1–2 & n.1.

6. [Conservative Party](#), 818 F. Supp. 2d at 674.

7. Sept. 30, 2010, Transcript, *supra* note 3, at 22; Interview with Hon. Jed S. Rakoff, May 9, 2012.

8. [Docket Sheet](#), *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Sept. 14, 2010).

Tim Reagan interviewed Judge Rakoff for this report by telephone on May 9, 2012.

9. Interview with Hon. Jed S. Rakoff, May 9, 2012.

10. *Id.*

After telephone consultation with the parties,<sup>11</sup> Judge Rakoff scheduled a case-management conference for September 30, which was 16 days after the complaint was filed.<sup>12</sup> At the conference, Judge Rakoff expressed concern about how close to the election the action had been filed<sup>13</sup> and curiosity about whether the risk of injury was de minimus.<sup>14</sup> Judge Rakoff wanted legal briefing first, to be followed by an evidentiary hearing if the legal briefing did not resolve the case.<sup>15</sup>

In response to Judge Rakoff's concerns about timeliness, the plaintiffs filed a motion for a preliminary injunction on Friday, October 1.<sup>16</sup> The defendants filed their opposition brief a week later.<sup>17</sup> Judge Rakoff asked the parties to exchange preliminary witness lists for the possible evidentiary hearing over Columbus Day weekend,<sup>18</sup> and Judge Rakoff held a discovery status conference on Tuesday, October 12.<sup>19</sup>

The defendants argued that the plaintiffs' proposed remedies would require cumbersome last-minute reprogramming of the vote scanning machines, and even the plaintiffs' alternative proposal of posted warning signs would require Justice Department approval in some places and would be otherwise cumbersome.<sup>20</sup> On October 15, Judge Rakoff denied the preliminary injunction motion because the plaintiffs had waited until too close to the election to seek it.<sup>21</sup>

The case continued after the election.<sup>22</sup> Following first<sup>23</sup> and second<sup>24</sup> amended complaints, Judge Rakoff denied New York's motion to dismiss, concluding that the plaintiffs had articulated colorable constitutional claims.<sup>25</sup> After settlement conferences in May 2011 conducted by Magistrate Judge Frank Maas<sup>26</sup> and

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11. Sept. 30, 2010, Transcript, *supra* note 3, at 22.

12. Sept. 30, 2010, Transcript, *supra* note 3.

13. *Id.* at 8.

14. *Id.* at 10–11, 16–19, 29.

15. *Id.* at 21.

16. [Preliminary Injunction Brief](#), *Conservative Party of New York State v. New York State Bd. of Elections*, No. 1:10-cv-6923 (S.D.N.Y. Oct. 1, 2010), D.E. 24; [Preliminary Injunction Motion](#), *id.* (Oct. 1, 2010), D.E. 19; *see* Sept. 30, 2010, Transcript, *supra* note 3, at 22–23.

17. [New York Brief](#), *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Oct. 8, 2010), D.E. 36; *see* Sept. 30, 2010, Transcript, *supra* note 3, at 21.

18. Sept. 30, 2010, Transcript, *supra* note 3, at 28–29.

19. Transcript, *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Oct. 12, 2010, filed Nov. 5, 2010), D.E. 42; *see* Sept. 30, 2010, Transcript, *supra* note 3, at 27–29.

20. [Order Denying Preliminary Injunction](#), *supra* note 2, at 2–3.

21. *Id.* at 4–5; [Conservative Party v. Walsh](#), 818 F. Supp. 2d 670, 672 (S.D.N.Y. 2011).

22. [Docket Sheet](#), *supra* note 8.

23. [First Amended Complaint](#), *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Dec. 20, 2010), D.E. 56.

24. [Second Amended Complaint](#), *id.* (Feb. 3, 2011), D.E. 72.

25. [Conservative Party](#), 818 F. Supp. 2d at 678 (“plaintiffs had adequately alleged that the Statute and Regulation severely burdened their First and Fourteenth Amendment rights and the State had not yet established, at a minimum, that the State had chosen the least restrictive alternative to achieve its purported justification”); [Order Denying Motion to Dismiss](#), *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Feb. 20, 2011), D.E. 74.

26. [Docket Sheet](#), *supra* note 8 (noting settlement conference on May 2, 2011).

Judge Rakoff,<sup>27</sup> Judge Rakoff signed a consent judgment on September 8, 2011.<sup>28</sup> Among other provisions, New York agreed to reprogram its vote scan machines to alert voters who vote for the same candidate more than once, and New York agreed to prepare polling-place notices of the consequences of double voting.<sup>29</sup> The consent decree also awarded the plaintiffs \$199,000 in attorney fees.<sup>30</sup>

Had this case required more immediate action than it did on filing, it might have been referred to the court's duty-day judge, known in the district as the Part I judge.<sup>31</sup> Approximately every eighteen months, judges in the district's Manhattan courthouse sign up, in order of seniority, for two weeks of duty days.<sup>32</sup> Part I responsibilities include miscellaneous and emergency matters in civil and criminal cases.<sup>33</sup>

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27. *Id.* (noting settlement conference on May 6, 2011).

28. [Consent Judgment](#), *Conservative Party*, No. 1:10-cv-6923 (S.D.N.Y. Sept. 8, 2011), D.E. 86; see Sam Roberts, *Minor Parties Succeed in a Voting Dispute*, N.Y. Times, Sept. 10, 2011, at A22.

29. [Consent Judgment](#), *supra* note 28.

30. *Id.*

31. Interview with Hon. Jed S. Rakoff, May 9, 2012.

32. [S.D.N.Y. R. Div. of Bus. 3](#); Interview with Hon. Jed S. Rakoff, May 9, 2012.

33. [S.D.N.Y. R. Div. of Bus. 3](#).