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May 6, 2022

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VIA ECF

The Honorable Judge Ronnie Abrams
United States District Court
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *DCCC v. Kosinski, et al.*, Civil Action No.: 22-cv-1029 (RA)

Dear Judge Abrams:

Counsel for Plaintiff DCCC and Defendants Peter S. Kosinski, in his official capacity as Co-Chair of the State Board of Elections; Douglas A. Kellner, in his official capacity as Co-Chair of the State Board of Elections; Andrew J. Spano, in his official capacity as Commissioner of the State Board of Elections; Anthony J. Casale, in his official capacity as Commissioner of the State Board of Elections; Todd D. Valentine, in his official capacity as Co-Executive Director of the State Board of Elections; and Kristen Zebrowski Stavisky, in her official capacity as Co-Executive Director of the State Board of Elections, (“Defendants” and with Plaintiff DCCC, the “Parties”), in the above-referenced action jointly submit this letter pursuant to the Court’s Order and Notice of Initial Conference (ECF No. 24), and in advance of the initial status conference scheduled for May 13, 2022.

Nature of the Action

Plaintiff:

This case concerns New York State Board of Elections’ (the “State Board”) consistent, systemic practice of rejecting thousands of absentee ballots cast by otherwise qualified, registered voters in New York for technical errors, and even errors that are no fault of the voters’ own, in violation of the U.S. Constitution and federal law. In this case, Plaintiff challenges the State Board’s treatment of: (1) “Wrong Church Ballots,” i.e., ballots cast by voters at a polling place other than the one to which they are assigned; (2) absentee ballots timely returned at a polling location outside of the voter’s home county; (3) absentee ballots that are missing a USPS postmark; and (4) absentee ballots flagged for rejection due to curable, technical defects unrelated to a voter’s eligibility to vote (collectively, “Ballot Rejection Practices”). The Ballot Rejection Practices disenfranchise New York voters and disproportionately burden identifiable subgroups of New York’s population—in particular, minority voters, young voters, and voters who live in urban areas of the state.

Plaintiff alleges that Defendants' enforcement of the Ballot Rejection Practices violates the Due Process Clause of the Fourteenth Amendment; imposes an undue burden on the right to vote in violation of the First and Fourteenth Amendments; violates the Equal Protection Clause of the Fourteenth Amendment; and violates the Civil Rights Act because the State rejects ballots for mere technical defects that are immaterial to determining whether a voter is eligible to vote in New York.

Plaintiff seeks declaratory and injunctive relief that would protect the fundamental right to vote by requiring Defendants to (a) direct local election boards to count absentee ballots that are timely submitted to an election office, polling location, drop box, or other official location outside of the voter's county and/or district of registration, (b) direct local election boards to count (or, as appropriate, permit the cure of) otherwise valid ballots that were rejected due to errors facilitated or caused by an election official, (c) direct local election boards to count (or, as appropriate, permit the cure of) timely returned and otherwise valid absentee ballots that are missing a postmark, (d) direct local election boards to give all voters who submit ballots with technical deficiencies notice and a pre-rejection opportunity to cure where the established cure procedure would adequately protect the state interested served by the violated ballot specification, and (e) implement guidance and training to ensure that the canvass of absentee and affidavit ballots is consistent throughout the state and otherwise complies with federal law.

Defendants:

This case concerns a series of alleged voting irregularities arising in prior elections, including the extremely unusual 2020 election, that involved supposed errors of non-parties, including voters themselves, the United States Postal Service and officials from County Boards of Elections that Plaintiff alleges can be charged to Defendants and to the State Board. In virtually all instances identified by Plaintiff, the alleged voting infirmity has been either addressed by changes in State law, resulted from individual voters' errors that have been re-characterized by Plaintiffs as voting official errors, errors of the United States Postal Service, or otherwise reflect legislative policy decisions that have been found permissible by the courts.

In any event, Plaintiffs fail to allege ongoing violations of federal law that are properly redressable by this Court.

Jurisdiction and Venue

Plaintiff:

Plaintiff brings this action pursuant to 52 U.S.C. § 10101 and 42 U.S.C. §§ 1983 and 1988 to redress the deprivation, under the color of state law, of their rights under the Civil Rights Act and the First and Fourteenth Amendments to the U.S. Constitution. This Court has subject matter jurisdiction to hear Plaintiff's claims pursuant to 28 U.S.C. §§ 1331 and 1343.

Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the transactions, events, and omissions giving rise to this action occurred in this judicial district.

This Court has the authority to grant declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. Further, this Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure.

Plaintiff DCCC's principal place of business is in the District of Columbia, which is also its place of incorporation.

Defendants:

Defendants contest the Court's continued subject-matter jurisdiction, given that the Eleventh Amendment deprives the Court of subject matter jurisdiction absent an ongoing violation of federal law for which the Court could order prospective, injunctive relief against a state official.

Contemplated and Outstanding Motions

Plaintiff:

Plaintiff contemplates filing a motion for preliminary injunction.

Defendants:

Defendants contemplate filing a motion for summary judgment at the conclusion of discovery.

Motion to Intervene:

On March 31, 2022, the Republican National Committee, the National Republican Congressional Committee, and the New York Republican State Committee (collectively, the "Republican Committees") filed a motion to intervene in this case (ECF No. 61). The motion is now fully briefed and pending before the Court. *See* ECF Nos. 62 - 64.

Discovery

Plaintiff:

The Parties will submit a Proposed Plan, which includes their proposed schedule for discovery. Plaintiff intends to seek discovery regarding Defendants' practices, guidance, policies and procedures for accepting, canvassing and counting absentee ballots.

The Parties anticipate that discovery will involve the production of electronically stored information ("ESI") and confidential information. Accordingly, the Parties are negotiating the terms of separate proposed confidentiality and electronically stored data production orders.

Defendants:

The parties are negotiating proposed ESI and confidentiality stipulations; Defendants intend to seek discovery concerning the specific allegations raised in the Complaint and in support of contentions that any alleged election irregularities in prior elections are ongoing and fairly traceable to the Defendants such that the Court could order prospective, injunctive relief as against them.

Settlement

The Parties are amenable to settlement, but have not yet engaged/are just beginning to engage in substantive settlement discussions.

Length of Trial

Plaintiff:

At this time, Plaintiff estimates a trial of three to five days.

Defendants:

Defendants estimate a trial of two to three days.

Dispositive or Novel Issues

Plaintiff:

This case does not present any novel legal issues.

Defendants:

This case presents a novel approach by Plaintiff of offering discrete past acts and omissions by third-parties in prior elections in an attempt to hold state election officials liable and to obtain prospective injunctive relief.

Respectfully submitted,

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| <p><u>/s/ Aria C. Branch</u> Marc E. Elias* Aria C. Branch* Haley Costello Essig** Joshua L. Harris* Graham White* Spencer McCandless* Tyler L. Bishop* ELIAS LAW GROUP LLP 10 G Street NE, Suite 600 Washington, DC 20002</p> <p>Andrew G. Celli, Jr. Nairuby L. Beckles EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP 600 Fifth Avenue, 10th Floor New York, New York 10020</p> <p><i>Counsel for Plaintiff</i></p> <p><i>*Admitted Pro Hac Vice</i> <i>** Pro Haca Vice Forthcoming</i></p> | <p><u>/s/ Seth J. Farber</u> Letitia James Attorney General for the State of New York</p> <p>Seth J. Farber Special Litigation Counsel 28 Liberty Street New York, New York 10005</p> <p><i>Counsel for Defendants</i></p> |
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