

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF NEW YORK  
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12 TRANSCRIPT OF EXCERPT of DECISION AND ORDER  
13 BEFORE THE HONORABLE RICHARD J. ARCARA  
14 UNITED STATES DISTRICT CHIEF JUDGE  
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25 Held on October 31, 2008, at 10:17 p.m.

1       I'm going to render a decision and it will be as follows.  
2       It will be oral: As the parties are aware, the Plaintiffs seek  
3       a mandatory injunction which would alter the status quo, asking  
4       the Court to reverse a State Court Order to remove John Powers'  
5       name from the ballot. Where a mandatory injunction relief is  
6       sought, the Second Circuit applies a heightened standard  
7       requiring the moving party to show a clear or substantial  
8       likelihood of success on the merits, in addition to irreparable  
9       harm. This heightened standard also applies when the moving  
10      party is seeking an injunction against a government action.  
11      There is no question that the irreparable harm standard is  
12      met in this case. The Court also believes that the plaintiffs  
13      have shown a clear or substantial likelihood of success on the  
14      merits of its Qualification Clause claim, that is, the Court is  
15      persuaded by the Fifth Circuit's reasoning in Texas Democratic  
16      Party versus Benkiser, at 459 F.3d 582 (5th Cir. 2006).  
17      Plaintiffs have shown that the New York Election Law Section  
18      6-122, as applied by the New York State Board of Elections in  
19      this case, violates the Qualification Clause of the United  
20      States Constitution, Article 1 Section 2 Clause 2 by creating a  
21      pre-election residency requirement. The plain language of the  
22      inhabitanacy requirement of Article 1 Section 2 shows that a  
23      candidate for the House of Representatives must only be an  
24      inhabitant of the state when elected. See Texas Democratic  
25      Party V. Benkiser, 459 F.3d at page 582. The inhabitanacy

1 requirement of the Qualification Clause relates to the time of  
 2 the election of a candidate of office; it does not impose any  
 3 pre-election residency requirements. Although not argued by  
 4 the plaintiff, the state's action also violates Article 1 of  
 5 Section 5 Clause 1 of the United States Constitution because  
 6 under that provision, it is solely for Congress, not a state  
 7 court to determine who is qualified to serve in Congress. By  
 8 deciding that Mr. Powers is not qualified at this juncture, the  
 9 state court is intruding on Congress's right to make that  
 10 determination.

11 Further, as we discussed during oral argument here, the  
 12 Court now does not believe that the Rooker-Feldman Doctrine  
 13 applies because as the Supreme Court recently made clear, the  
 14 Rooker-Feldman does not apply where the parties were not  
 15 plaintiffs in the underlying state court action, See Lance  
 16 versus Dennis, at 546 U.S. 459 (2006). Both Mr. Robert  
 17 Matthews and the Republican party are not parties to the state  
 18 court action. Therefore, Rooker-Feldman does not bar this  
 19 court's consideration of the issue.

20 Moreover, at least as to Mr. Matthews, there has been no  
 21 showing that he is in privity with the parties to the state  
 22 action involving Mr. Chris Lee, therefore, at least as to him,  
 23 he is not barred from bringing this lawsuit under principles of  
 24 collateral estoppel.

25 Because the Court finds that the plaintiffs have established

1 a substantial likelihood of success on the merits of their  
2 Qualification Clause claim, the Court will grant the TRO.

3 As a further basis for granting the TRO, the Court finds  
4 that the plaintiffs have shown a substantial likelihood of  
5 success on the merits of their due process claim and equal  
6 protection claims. They claim that without a TRO, those  
7 absentee ballot voters like Mr. Matthews who have already cast  
8 their ballot will be disenfranchised.

9 The election has already started, at least as to the  
10 absentee ballot holders. You cannot change the parties after  
11 the election has started. This would be no different than if  
12 the election had been stopped on November 4th at 2 p.m. to  
13 remove Mr. Powers' name from the ballot. You simply can't  
14 change the parties on the ballot after the voting has started.  
15 To do so disenfranchises those voters, like Mr. Matthews, who  
16 has already cast his ballot.

17 In sum, the Court finds that the plaintiffs have established  
18 that they will suffer irreparable harm absent a TRO and a  
19 substantial likelihood of success on the merits of their  
20 claims. This Court will grant the relief requested.

21 I have signed a temporary restraining order, a copy is dated  
22 tonight at about 10:25. Copies of the order will be available  
23 to counsel following the adjournment when the Court adjourns.

24 Thank you, ladies and gentlemen. The court will be in recess.

25 (Proceedings concluded at 10:23 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct  
transcription, to the best of my ability, from the electronic  
sound recording of the proceedings in this matter.

S/Yvonne M. Garrison, RPR  
YVONNE M. GARRISON, RPR  
Official Reporter  
U.S.D.C., W.D.N.Y.