UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MOLINARI et al,	:	08-CV-4539 (CPS)
Plaintiffs,	:	
-against-	:	United States Courthouse Brooklyn, New York
MICHAEL R. BLOOMBERG, et al,	:	January 5, 2009 4:30 p.m.
Defendants.	:	

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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE CHARLES P. SIFTON
UNITED STATES SENIOR DISTRICT JUDGE

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(Open court.)

COURTROOM DEPUTY: All rise.

(Judge Sifton takes the bench.)

THE COURT: This is Molinari.

I'm sorry. Do we have somebody who wants to be heard in the back of the courtroom?

All right. There are a few preliminary matters. I've got several applications; one by Mr. Jose Adames to intervene, another by the Partnership for New York City Inc. for leave it to appear amicus, and a similar application by the Independence Party.

Given the other matters that are before us presented by the present parties and the fact that I'm not sure that all of the present parties have had an opportunity to react or respond to the amicus applications and application for intervention, I'm going to reserve decision on those applications. If I determine that an amicus would be of assistance in resolving the issues that have already been extensively briefed by the existing parties, I'll inform you and give you an opportunity to submit papers if you haven't already. And, also on the intervention, give Mr. Adames a chance to have had his say on the issues.

But I'd like to turn to the issues that are fully briefed and responded to by all of the present participants in the litigation, namely the City's motion to dismiss the

complaint and both sides' cross-motions for summary judgment.

In the orders of priority that are involved in the two types of applications, I'm going to hear first from the City on their motion to dismiss the complaint. I'll then give the defendants an opportunity to respond to that application and to argue the plaintiffs' motion for summary judgment, and then we'll go on with the City's response in support and opposition to the summary judgment motion.

So let's get started with the defendants' representative.

MR. KITZINGER: Good afternoon, your Honor. Steve Kitzinger, New York City Law Department, for defendants Mayor Bloomberg, Speaker Quinn, Council of the City of New York and the City of New York, as for neither the Board of Elections nor its president James Sampel takes a substantive position on this.

THE COURT: Can everybody hear? If not, maybe you can just take a seat and use the microphone that's on your table.

MR. KITZINGER: We are here today not on an electoral voting case, but merely on a dispute as to whether or not state law reserves legislative authorities -- or allows a local legislative body, here the City Council, to enact such legislation, a fact that Mr. Mastro himself acknowledged in an op-ed piece in the New York Times on October 8th of last year

all dressed up in the guise of constitutional claims.

In an effort to reverse their loss in the political arena, plaintiffs asked this Court to turn aside decades of settled state law including controlling precedent from the New York Court of Appeals. Notwithstanding, recognizing the plaintiffs' stated need for expedition in order to achieve finality as to the validity of Local Law 51, the Term Limits Amendment, and also recognizing that it has not yet been pre-cleared by the U.S. Department of Justice and, therefore, plaintiffs' claims are not yet ripe for adjudication pursuant to the constitution's case of controversy requirement found in Article III, defendant suggests that this Court should reserve judgment on the federal claims pending a grant of pre-clearance and decline to exercise supplemental jurisdiction over the state law claims and dismiss them.

Given that all of the state law issues have been extensively briefed, this will permit plaintiffs, should they so desire, the opportunity to litigate the state law claims swiftly and conform with substantial adherence concerning both the subject matter of their claims, as well as one that routinely provides for highly-expedited final appellate review.

THE COURT: Could you slow down just a minute?

And maybe the people in the back of the courtroom can find a seat up here in the front row.

(Pause in the proceedings.)

THE COURT: Go ahead.

MR. KITZINGER: Plaintiffs' complaint consists of twelve distinct claims; four of which are brought under the U.S. Constitution, eight of which are brought under state or local law. Taking them -- breaking them apart in such a way, it's clear that three claims brought under the First Amendment and the one claim brought under the Fourteenth Amendment, due process clause, are all without merit.

The First Amendment protects the process concerning petitions, not the results. Plaintiffs seek to enshrine the result of the 1993 referendum which led to the enactment of term limits with a cloak of legislative inalterability through a tortured and distorted reading of the process. Their First Amendment claims are that the Local Law 51 deprives them of the right to vote effectively and chills their First Amendment right to free speech and deprives them of the ballot access. None of these claims have any merit.

Plaintiffs suggest and concern their claim that they've been deprived of their right to vote effectively is that the right to vote effectively means, in essence, that they must achieve, their vote must achieve the desired results. That's not what case law says the vote effectively means. Case law makes clear that the right to vote effectively means only that a vote that is cast is to be

counted for the purpose for which it was cast.

The votes cast in the 1993 and 1996 referenda were, in fact, cast and canvassed in accordance with state law and led to the enactment and retention of the Term-Limits Law. In fact, contrary to plaintiffs' argument, the First Amendment would allow for advisory referenda. In fact, it's my understanding that the State of Illinois has such a very claim.

New York also sometimes runs into such examples, such as the 1993 referenda concerning the secession of Staten Island. Their voters voted to establish a charter for the city of Staten Island, and the City Council effectively ignored that referenda by failing to pass a home rule message to allow for state action to create a separate municipality.

In sum and substance, the right to vote, effectively, does not enshrine or preserve or protect the results of any vote. It merely says 'the vote must be canvassed for the purpose for which it was cast.'

With regard to their claim that Local Law 51 chilled their speech, they have no cognizable injury. All political votes have a winner and a loser. The lack of success in the political arena does not constitute a chill on one's First Amendment rights. If it were, government at all levels would be completely paralyzed by litigation by advocates whose positions did not prevail in the legislative body.

Plaintiffs also claim that there was retaliation against the voters for passing the Term-Limits Law. There is no retaliation. There is no censorship or no viewpoint discrimination.

First, it's worth noting that the members of the council who were in office when the Term-Limits Law was enacted in 1993 are not the same people who are in office today. Moreover and more significantly, the council always had the authority to amend the Term-Limits Law under controlling state law and State Court of Appeals precedent, just as the voters have always had the ability to vote the members of the council out of office.

Plaintiffs still have every right to advocate as they so desire. They make seek to place another name on the ballot. They may place someone who voted in favor of Local Law 51. In fact, it's been reported that just such is already happening. There's been no chill whatsoever on plaintiffs' First Amendment rights.

With regard to their claim that their right to access the ballot has been impeded. Again, the First Amendment protects against procedural hurdles being imposed. Here, Local Law 51 imposes no procedural hurdle to the initiative process, or to getting on the ballot to run for office. All Local Law 51 does is it changes the qualifications of those persons entitled to run for office.

The plaintiffs had access to the ballot in 1993 and 1996. They can get it again. Every case the plaintiffs rely on for this claim relates to the process of getting an initiative on the ballot. It relates to the gathering of signatures, the framing of ballot questions and so forth. Plaintiff cites not a single case that supports their claim that the First Amendment protects initiatives generally, and quite to the contrary, cases cited by defendants in their papers including Walker, Marijuana Policy Project, Taxpayers United and Save Palisade Fruitlands are all circuit-level precedent saying just the opposite. The state appellate courts have spoken on the issue and come out the same way, in the Pony Lake, Weingarten and Van Ness cases.

The Supreme Court has said over and over again, as far back as Luther v. Borden, that unless state or local government violates a federally-protected right, state and local bodies have great latitude in managing its affairs. In the Sailors case, Luther v. Borden and The Seattle School District all support the proposition. And as set forth above, there's not a single case that support plaintiffs' proposition that the First Amendment or any other provision in the Constitution enshrines or protects or otherwise preserved the results of a ballot initiative, as plaintiffs would have this Court find.

None of plaintiffs' First Amendment claims have any

merit whatsoever.

As to their Fourteenth Amendment claim the due process clause protects against fundamental unfairness. That's a very high hurdle. Fundamental unfairness has been held to encompass acts that deprive the ability of people to vote, deprive people of the ability to cast a vote. It includes the closing of poll sites without notice, changing rules for ballot access at the last minute to deprive potential candidates of access to the ballot, or even eliminating the election all together.

Plaintiffs are trying to shoehorn their conflict claim into this category of fundamental unfairness, and it just doesn't fit. It's the proverbial square peg trying to be jammed into that round hole.

Moreover, if this were to be the case, all legislation at all levels would then be subject to constitutional challenge.

THE COURT: I take it you're persuaded by your adversary that what they're arguing here is not a procedural due process claim, but a substantive one, and you're addressing that, right?

MR. KITZINGER: Yes, your Honor. I believe we addressed that in our papers as well.

THE COURT: Well, the answer to the procedural claim is, as your adversary has noted, is we don't have any property

here to be deprived of. But go ahead.

MR. KITZINGER: That's correct, your Honor, but the complaint was written with a broad stroke. So we wanted to make sure we addressed every possible contention.

THE COURT: Go ahead.

MR. KITZINGER: In sum, just like with the First Amendment claim, the Fourteenth Amendment claim does not serve to protect or preserve the results of the 1993 referenda with any sort of cloak of legislative inalterability. The federal claims have no merit whatsoever. This Court should ultimately dismiss them. Although because the Local Law 51 has not yet been pre-cleared, defendants suggest that the proper approach would be to reserve decision on the federal claims pending the grant of pre-clearance by the Department of Justice, because only at such time would a case of controversy arise.

Now, moving ahead to the state law claims.

THE COURT: Before you get to the state law.

Supposing you didn't have the state law provision which your adversaries say prohibits a naked effort by incumbents to extend their term of office. Wouldn't the Fourteenth Amendment be an appropriate avenue to enforce the same rights? That is, isn't a naked effort by incumbents to remain in office a violation of substantive due process?

MR. KITZINGER: Yes, if it were, your Honor, such as the example set by plaintiffs in Bonas where the incumbents,

what they did was not protect their ability to remain in office, but preserve their place in office. They actually eliminated an election.

THE COURT: There you go.

MR. KITZINGER: That's not what was done here. Come November of this year, voters in the City of New York will head to the polls and will cast their vote, and they may support the incumbents. They may turn them out.

Historical precedent is that in 1961, the mayor of Buffalo was voted out when term limits were extended there. That was the Term Limits Amendment that led to the Benzow v. Cooley decision.

More recently, in Troy, the members of the City Council there were -- many of the members of the City Council were voted out there once they changed the Term-Limits Law.

This does not, contrary to plaintiffs' position, does not preserve the incumbent's position for another four years. They still have to be re-elected. There is no due process violation. There's no fundamental unfairness. No rules of the game have been changed. It really is just that simple. It just merely changed the qualification of those who are entitled to seek a place on the ballot.

Now, moving on to the state law claims, which again defendants believe this Court, in order to afford the expedited review in a timely fashion of these claims, should

dismiss and allow plaintiffs, if they so desire, to re-file in state court are also without merit. Many of these arguments have, in fact, been raised before by Mr. Mastro in other litigation.

These state law claims can be broken down into two distinct groups. The first set of claims is that the City Council and the Mayor lack the authority under state law to enact Local Law 51. The second group is that there is a conflict that violated Chapter 68 of the City Charter which requires the abrogation of the law. Neither group of claims have any merit.

The statutory claims, plaintiff suggested, Local Law 51 constitutes a curtailment of the power of members of the City Council, particularly junior members, those who would not be term-limited at the end of this year, because their influence may be less than it would be had more senior members had to leave office and the council been repopulated with junior members. Mr. Mastro made that very argument in the Golden case. That argument was accepted by the Supreme Court judge, but rejected by the Appellate Division with a three-one decision. That argument, I don't even believe, was mentioned. I think it was just dismissed as saying it has no merit, and that is because curtailments relate to the power of the office, not the influence of the individual.

Local Law 51 does not, in and of itself, alter or in

any way diminish the authority or the power of the office of a member of the City Council. It goes without saying that it doesn't diminish the power of the Mayor, the borough presidents, the control of the public advocate either.

The Second Department not only rejected this argument in Golden, it also rejected a similar argument in Holbrook, which is a more recent Second Department case cited in our brief. The Holbrook case had to do with whether or not you could hold a second office, and the Second Department determined that it was not a curtailment; it was merely a qualification for office that did not require a referendum.

To support their claim, plaintiffs rely on the case of Heeran. In that case, you had a three-member board that the legislative body changed to a five-member board. Thereby, directly diluting the value of the votes cast by each member of that board. They used to have one-third of the vote, and then they had one-fifth of the vote.

THE COURT: This is a civilian complaint review board?

MR. KITZINGER: I couldn't understand you.

THE COURT: The board you're talking about.

MR. KITZINGER: I don't remember which precise board it was, but it was an upstate municipality.

They added two members of the board, which offset and diminished the value of the votes of others. It would be

as if the Mayor were to sign legislation putting 30 of his appointees on the City Council to sway legislation; that adding members of the council might serve to diminish the power and the curtailed powers of members of the council. That's not what happened here.

Plaintiffs' next claim with regard to statutory authority to enact Local Law 51 is that Local Law 51 alters the form, composition and/or membership of the City Council. Well, the plaintiffs searched far and wide for cases that interpret one of each of those words. They ignore the plain language of Local Law 51 which clearly does not alter the form, membership or composition of the council. Again, merely changes the qualification of individuals who are afforded the opportunity to run for office.

Similarly, they simply ignore the legislative history of Section 23 of the Municipal Home Rule Law. I won't rehash the entire history, but suffice it to say that the change in 1964 with the enactment of the Municipal Home Rule Law, which replaced the City Home Rule Act and a number of other acts, was not intended in any way, shape or form to alter or change in any way the referenda requirements. Contemporaneous memoranda relating to legislation make that clear, as does the Municipal Home Rule Law itself.

This provision relates to structural concerns, not the identity of the individuals. Also, it's worth noting that

this claim is entirely inconsistent with plaintiffs' other arguments. Plaintiffs' other arguments claim, suggest that this law preserves the membership inviolate of the council. So on one hand, they argue that Local Law 51 violates the constitution because it preserve inviolate the membership and the identity of the individuals serving in office, but, on the other hand, that it violates state law because it changes the identity or inhibits the change of identity of the individuals.

Finally, plaintiffs also ignore that there's an election at which every member of the council who seeks to run for re-election will have to stand before the voters in his or her district and the Mayor will have to stand by the voters of the City of New York and seek re-election. They are not granted an additional four years, as plaintiff so suggests.

That leads to the final statutory argument that the Local Law 51 was enacted in violation of the Home Rule Law, that it changes the term of office. Now, prior to the amendment of this act -- the enactment of Local Law 51, the term of office for mayor and city council was four years. Following its enactment, it remains four years. The term of office has not changed.

Plaintiffs suggest the term should be interpreted as to mean not the amount of time one is allowed to serve following an election, but the duration of the period that one

is permitted to serve in toto regardless of intervening elections; prior to the term limits eight years, now twelve years. That's an absurd interpretation.

Plaintiffs even go so far as to analogize that Local Law 51 to a law that would serve to extend the two four-year terms to two six-year terms and simply abrogate an intervening election and allow them to serve for twelve years with only being elected twice. There's no basis in fact, in law, in common sense for such an interpretation of a term.

Plaintiffs then claim that the Court of Appeals decision in Roth v. Cuevas abrogated the Benzow v. Cooley. The Benzow case, as your Honor will recall, is a case in which the New York Court of Appeals specifically stated that term limits are not a subject of mandatory referenda. That just didn't happen.

In Roth, the courts there were asked to interpret Section 10 of the Home Rule Law and the provision about relates to terms of office. The decision there was not that term limits was the subject of mandatory referenda, but whether or not local law could be adopted concerning term limits, and the courts there held that it could, that term limits was the proper subject of local legislation. It in no way suggested, and it cannot be read to so suggest, that it was the subject of mandatory referenda.

THE COURT: Excuse me just a minute.

Why don't you all come on up and take a seat up here in the jury box if there's no other place?

(Pause in the proceedings.)

THE COURT: Go ahead.

MR. KITZINGER: The easy and the clearest way to tell us that that was not what was intend was that following Roth, the Second Department in Golden, again argued by Mr. Mastro where he asserts the same claim, rejected this analysis and cited to Benzow as stating that the amendment to the Term-Limits Law from 2002, Local Law 20 in 2002, did not require a referenda and cited to Benzow which said term limits do not require a referenda.

Mr. Mastro's clients in that case asked the New York Court of Appeals to review what Mr. Mastro and his clients would contend would be clear error in not recognizing that Roth v. Cuevas was abrogating Benzow. Obviously, the Court of Appeals declined the invitation. Thereafter, the Second Department, again citing Benzow, determined in Holbrook that the law did not require, that the laws discussed in Holbrook did not require a refernda, again citing Benzow and Golden, that the law did not abrogate Benzow.

Nothing in the Municipal Home Rule Law can be read to suggest that term limits is the subject of mandatory referenda. It can only be read to conclude that it's the proper subject for local legislation.

In Court of Appeals precedent, Caruso, which actually is historically very similar, says local law is a local law. It doesn't matter how it was enacted, whether it's enacted by voter initiative or by legislative act. No one form of local law is entitled to any greater dignity than any other.

In Caruso, there was a voter initiative that led to the enactment of the provision of the New York City Charter concerning the Civilian Complaint Review Board. In the 1980s, about 15 to 20 years after that provision was passed, the City Council altered it and it was challenged stating, arguing that the City Council lacked the authority to alter laws that arose, that were enacted through voter initiatives. The Court of Appeals soundly rejected that argument.

Plaintiffs now come before your Honor and ask your Honor to sit as an appellate court over the Court of Appeals and just throw away settled precedent of New York Law. As your Honor is well-aware, that is not the role of the District Court. The Supreme Court just last year in Reilly v. Kennedy said where the high State Court has spoken on an issue of law, the District Courts are bound to follow it.

It's clear every case cited by plaintiffs or defendants that the City Council had the authority to enact Local Law 51, and the Mayor was within his authority to sign it. Therefore, all of those claims should be dismissed if the

Court were to retain jurisdiction over them, which, of course, defendants, to allow for prompt resolution, believe should be referred to the State Court.

Now, the other group of claims the plaintiffs have led to a conflict, an alleged conflict of interest that plaintiffs claim that members of the City Council and the Mayor were operating under.

First plaintiffs bring the claim under Chapter 68 of the Charter of the City of New York. That provision does not afford a private right of action to these plaintiffs. Plaintiffs have not said it and they cannot cite to even a single case that supports their theory that there's a private right of action under Chapter 68, and there have been no cases that hold there's a private right of action under Chapter 68.

The New York Court of Appeals in Sheehy set forth the test to determine whether or not there's a private right of action under -- whether or not the Court should apply a private right of action under state or local law.

First you have to prove that you're a member of the class sought to be protected. Here, Chapter 68 is clear that it's just simply to promote the policy of good government. It's not directed at any single class of people. The plaintiffs fail that test.

The next test is would a private right promote the purpose of the statute. The answer is no, because there would

be no private right of enforcement because the courts could not impose penalties as set forth in the scheme set forth in Chapter 68. There's simply no avenue in the general proposition to deal with the alleged conflicts that arise under Chapter 68.

Finally, it has to be consistent with the legislative scheme. The legislative scheme in Chapter 68 is comprehensive. It allows for city employees to seek advisory opinions from which they are guaranteed shelter from the penalty if the Conflicts of Interest Board rules that it's not a conflict.

THE COURT: You said that the plaintiffs don't cite any cases for recognizing a private right of action, but how do you deal with the Town of Tuxedo case in which the town board's approval of a development project was overturned with the application of citizens of the town?

MR. KITZINGER: Your Honor, Tuxedo and Zagoreos and Baker, none of them related to a statutory conflict under local law that allowed for a private right of action. That was a common law policy basis claim which plaintiffs have not alleged here, and even if they were to allege it, a common law claim, it would still fail because in each of those cases, the benefit afforded to the conflicted members of the legislative body was personal in nature. It was not afforded to them in the capacity as a public officer.

In Tuxedo Park, the benefit was not that they didn't approve their cache or standing in the community. It was that the company that employed them was going to benefit greatly financially.

THE COURT: And the difference here is that the salary of a city council member is not that great?

MR. KITZINGER: Your Honor, they have to be elected. They have to stand for re-election. It comes down to that.

The ability to improve one's standing in the community is not the private or personal interest addressed by these conflict laws or cases. It's simply not what they go to. They go to whether or not there is a conflict in one's capacity as an individual, not whether or not it benefits the office or the officeholder while office-holding.

The Conflicts of Interest Board opinions is also entitled to great deference in the interpretation of Chapter 68. They're created for the purpose of interpreting Chapter 68. They've done so many times. They have great expertise and experience in this.

Plaintiffs simply disagree with the determination of the Conflicts of Interest Board. So they say it's entitled to no deference because clearly if they disagree with it, it's contrary to the plain language of the statute. It's simply not the case.

All of the cases in which a conflict was held to

be -- to create a situation in which a law or an enactment had to be overturned all related to the members of the legislative body's lives outside of their role as a legislator. They all related to personal employment, private ownership of land, and so on and so forth.

Again, plaintiffs had every opportunity to raise a common law conflict claim. They cited Tuxedo Park and Zagoreos in other cases when we were in State Court in October. They simply chose not to assert this claim. They chose to hang their hat on Chapter 68, and that's where it must lie.

It's well-recognized and established that the courts should not try and untangle a legislator's personal motives for his or her votes. Again, the private and personal benefit is prohibited and distinctive from the political interest. For example, gerrymandering. Gerrymandering has been recognized by the Supreme Court of the United States as a permissible basis for redistricting. Furthermore, all politicians who seek re-election or election to a higher office must act in a manner that increase his of her standing or cashè in the community. They simply must. It's a political reality that unless you do that, people will not vote for you.

Plaintiffs go so far as to suggest that such acts constitute an inherent conflict and, therefore, everything

must be disregarded. Any act that serves to increase or improve one's standing in the community or political cache constitutes a conflict. Well, that simply cannot be the case, and no conflict has ever been found to support that proposition. Courts have said it's okay to improve your conditions of employment, to increase your salary or benefits and to authorize you to obtain other employment. Those all have a benefit to the individual officeholder, but as an officeholder. Again, all the cases cited by the plaintiffs relate solely to benefits obtained by the legislators in question in their personal private capacity.

None of their cases claims have any merit whatsoever, and in the event this Court elects to consider them should dismiss them all.

Thank you, your Honor.

THE COURT: Okay. Mr. Mastro, are you going to speak to the defendant?

MR. MASTRO: Thank you, your Honor. And if I may, first let me thank your Honor for seeing us and for seeing us on an expedited schedule.

And if I may ask the Court's permission, we have some charts that we intended to use today. I can hand them up to the Court and others here as an aid to the Court while I give my argument.

THE COURT: Okay. This is simply to, as we say to

witnesses, assist you in expressing yourself. We're not holding a hearing.

MR. MASTRO: Thank you, your Honor. It's much appreciated.

THE COURT: Why don't you, if you have copies of this, these can be projected on the overhead which would permit people in the back of the courtroom to look at them.

MR. MASTRO: That's fine, your Honor. I had so much I wanted to say that the type gets a little small. So that's why the handup will be helpful to the Court, I hope.

THE COURT: Good. Well, we've have both. Also we've got it up here on the monitor.

MR. MASTRO: Your Honor, when I think about this case, I'm reminded of what Talleyrand wrote, that 'the hardest thing to say farewell to is power.' That summarizes the essence of this case. The hardest thing for this term-limited mayor and this term-limited council majority to say, when local law compelled them to say good-bye, is farewell to power, and that's really at the core of this case. Because I didn't hear Mr. Kitzinger say once, until your Honor finally asked him, a word about the self-interested nature of this piece of legislation, of this act. It goes to the heart of why there are constitutional infirmities here, why state and local law require a mandatory referendum, and why, as a matter of well-established New York public policy, the violations of

local conflict laws require invalidation of this legislation.

Now, your Honor, you put it best, your Honor. This case is about, as you asked Mr. Kitzinger, the naked effort by incumbents to remain in office.

Now, your Honor, I'm blessed to be here today with more than a dozen of my clients, and the first words out of Mr. Kitzinger's mouth were that this is not an election law case. This is not a voting rights case.

Well, I think there's more than a dozen clients who are here today, some of them serving on the City Council, term-limited or otherwise, many of them voters, candidates, the heads of third-parties in the state, would find it shocking to hear that this legislation, which at the eleventh hour has so altered the electoral landscape, is not an election law case, is not a Voting Rights Act case. It is at its very core, your Honor.

Now, if I may very briefly. What makes this case unique? So different than the way Mr. Kitzinger mischaracterized it, both in his papers and here at the argument. It is not a case that involves any kind of radical proposition about referenda never being able to be changed by subsequent legislation.

It is absolutely about once the law permits referenda, First Amendment and due process rights attach to that legal right. The First Amendment applies with full

force, and due process applies with full force to both the ability to vote on referenda and place them on the ballot once they're legally permitted and on the denial of that right. And what we have here is an action that involves a discrete category of laws that trigger particular constitutional concerns because they involve voter-imposed limitations on the core powers and tenures of their local elected official and cannot, therefore, be left to the self-serving whim of those same elected officials without offending well-established constitutional principles.

Your Honor, it comes down to this: A term-limited mayor and a term-limited council majority took it upon themselves to overturn the twice voter-ratified two-term limit and award themselves the prospect of a third term in office, and they did that even though, your Honor, there was more than ample time last fall and there remains time to this day to have put that question back to the voters to decide had those term-limited elected officials had the will or even the inclination to do so. But, your Honor, they wanted the certainty for themselves as term-limited officials to be sure that they got that third term opportunity that otherwise was denied them under existing local law twice ratified by the voters.

And, your Honor, it's more egregious than that because we know from public statements at the time, we know

from the very amendment that occurred to the legislation that this council passed, we know from the Mayor's own public commitment at the time these are undisputed facts, your Honor. They have acknowledged the Mayor made this public limit. They have acknowledged in their admissions that the legislation was subsequently amended to reflect this.

This is a one-time only deal for Mayor Bloomberg term-limited and these council majority term-limited. That was the expectation when they passed the bill, putting into the legislation by amendment specific provisions to reflect all bets are off once this is put back to the voters if a majority of them approve going back to the two-term limit. And then Mayor Bloomberg, before he signed the bill, making a public commitment, his words, a public commitment, that he was going to appoint a charter revision commission so that this legislation, the issue of whether two or three terms is appropriate and, quote, to put on the ballot the ability for the public to either reaffirm what we have today or to change.

In other words, your Honor, it's good enough for future generations of officeholders to be put back in the voters' hands to restore what the voters had twice done before, but not for Mayor Bloomberg and for the term-limited council majority. They had to have the certainty that they were getting their third term opportunity. So they made a conscious choice out of naked self-perpetuation, naked

incumbent protection to vote themselves the opportunity for another term, but to say 'don't worry, we'll let the voters subsequently, after we're re-elected, decide on restoring the two-term limit that they've twice ratified.' Your Honor, that is the most naked self-protection of local elected officials I've seen in my lifetime here in New York City, and it's exactly that circumstance that has caused the Supreme Court and the Second Circuit and other circuit courts to repeatedly say the First Amendment is violated under such circumstances and due process is violated under such circumstances.

Your Honor, if I may briefly, first coming to the First Amendment point. I just wanted to address one other thing that Mr. Kitzinger said before I return to the substance of my argument. He kept saying repeatedly, your Honor, I think he said it five or six times during his argument, 'no harm no foul because there's going to be an election later. There's going to be an election in 2009. So the scoundrels can be voted out.' Of course, two reasons why that doesn't wash under the First Amendment and due process.

Reason number one, the damage is done. The chill has occurred. These voters, and we have affidavits from a number of them, saying that they are less likely to participate in the future. Their faith in their local democracy is shaken. These candidates who've sworn under oath, again the City doesn't contest this, that they wouldn't

have run before because they would have faced an incumbent and now they face the daunting task if they continue of running against an incumbent.

We have Professor Briffault, an expert on urban government and law from Columbia University who's done an analysis of these issues, and he has found that when term limits took hold, before term limits, you had 40 percent of the races for City Council seats where there was no contest at all, primary or general election. With term limits, you had contested races in virtually every district at every phase, primary or general election. And undisputed fact, political and practical reality, more than 98 percent of City Council members get re-elected. That's the pattern over the last decade.

So you have the chill that has occurred from this, chilling voters and candidates and third parties. You have the practical reality of incumbent protection and incumbents so routinely being re-elected to the City Council.

Now, your Honor, let me go to the First Amendment first because this really comes to the core of it, your Honor. The First Amendment requires a balancing of interests, and what makes this case is unique is that in that balance comes the self-interest of local elected officials that has so skewed voting and electoral prospects.

Your Honor, Anderson versus Celebrezze, balancing

test. You have to examine both the character and magnitude of the asserted injury. I think that the asserted injury here to First Amendment rights, those who vote and fought on either side of the term-limits issue, those candidates who thought they'd be running for open seats, those third parties who depend on that competition, I think the burden is enormous from this legislation on voting in electoral prospects and that they were denied even the opportunity for this question to go back on the ballot before the 2009 election cycle. You have to balance the burden against whatever interest the State has put forward as justifications for the burden imposed by its rule. I didn't hear Mr. Kitzinger put forward a single interest or justification here.

You have to look at both the legitimacy and strength of those interests, as to which he was silent, and, your Honor, you have to look at the extent to which those interests make it necessary to burden the plaintiffs' rights. This is the balancing test applied in First Amendment cases, Election Voting Rights Act, First Amendment rights.

Now, your Honor, I'm going to take each in turn.

Determine the legitimacy and strength of the interest at stake. Mr. Kitzinger has not offered you any supposed interest, but in their brief, they made a passing reference to, what they referred to as, giving voters the option of seasoned leadership. That's the quote, seasoned

leadership.

Well, your Honor, that's the same thing as the justification that Ohio officials put forward in the Williams v. Rhodes case and also in the Libertarian Party case, that they were going to promote political stability. That was their words, that the legal structure on elections and voting there was designed to create political stability for the entrenched interests who ran the state.

Your Honor, guess what the court said there? The Supreme Court said that that was not a legitimate interest, political stability. Favoring incumbents, incumbent protection was not a legitimate interest, political stability. Yet the city here says a synonym. It says 'offer them seasoned leadership.' That's saying incumbent protection in another name. It is the embodiment of self-interest and self-perpetuation to say only this class, Mayor Bloomberg and the term-limited City Council majority, should have a third-term opportunity for seasoned leadership. The only seasoned leadership --

THE COURT: Well, step back just one pace.

MR. MASTRO: Certainly, your Honor.

THE COURT: And tell me why the same complaint couldn't be made about seniority regulations by the legislature or why doesn't this involve the interests all incumbents have in establishing a good record and running on

the record? How do you distinguish between just, again I'll use the term, naked incumbency claims and claims that 'the voters can look at my record, can consider my experience and my,' as you argue on behalf of the junior members of the council, 'my length of service in deciding whether to put me back there or not'?

MR. MASTRO: Well, your Honor, there's distinction to be drawn between those two categories, and I would submit to --

THE COURT: Well, that's what I'm asking you.

MR. MASTRO: I would submit to your Honor that the distinction comes down to this: That there was an existing law, public policy in New York City that a two-term limit was to be imposed on all elected officials so that you wouldn't have career politicians. That's been the state of the law in New York City since 1993, and that's what the voters did. The council put it back on the ballot as to themselves, recognizing that they had to put it on the ballot in '96 to try to go to a three-term limit for themselves and they lost that.

Your Honor, that's a different issue. That's a different issue. Doing by legislation, reversing that by legislation at the eleventh hour when parties are preparing to vote and run and prepare for that election cycle based on existing law where there was going to be an open seat is a

very different question in terms of First Amendment chill and in terms of incumbent protection than saying seniority may matter or serving well may matter when you actually run for re-election. We wouldn't be here today, your Honor, if this was solely about somebody arguing 'I am somebody who served well. So I should do better in an election.'

The election will result --

THE COURT: Well, the City ought to be allowed the choice. Essentially, the incumbents are asking that when you go out to the election that they be on the ballot with the newcomer and on a record which, let's not ignore the fact that the record is now going to include the record of rejecting the earlier results of two, as you point out, two referenda, and that record may or may not be favorable or be accepted by the electorate.

MR. MASTRO: Understood, your Honor. But we're not talking here just about the debate about justifications of whether term limits are a good thing or not a good thing. What we are talking about here is that term limits existed under local law by referendum twice imposed by the voters. And when you do the balancing test under the First Amendment, when you look at the due process considerations, you have to consider the legitimacy of the state interests advanced compared to the burden, and you also have to consider, this is Anderson versus Celebrezze, the extent to which those

interests make it necessary to burden the plaintiffs' rights.

Here, your Honor, it was absolutely not necessary to burden any of the plaintiffs' or the public's rights to decide this question. There was plenty of time to put it to the voters in time for the 2009 cycle. If the Mayor and the term-limited council members were right, they would have made their case to the people in a referendum they would have put on the ballot already and that we still hope to see happen by the spring of this year. But, your Honor, instead they chose to burden those rights to cut the voters and candidates who were already running out of that process, to not take the risk that they might not succeed in persuading the public. So they chose to burden and take it upon themselves, acting in their self-interest, to perpetuate themselves in office to say 'we're giving it to ourselves.'

THE COURT: So you're saying, essentially, there was a less restrictive way of accomplishing all of this? We could have had a referendum first, and then if the Mayor and the city councilmen won the referendum, then they could run on the record?

MR. MASTRO: Absolutely right, your Honor.

THE COURT: But then you're talking, something I thought you disowned in your papers was strict scrutiny.

MR. MASTRO: No, your Honor, it's not a strict scrutiny question.

Again, what Anderson sets up and what Burdick followed as well and what the Second Circuit said in the Price case, and again the City remains silent on Price, is you have to apply this balancing test. It's not pure strict scrutiny. The greater the burden, the stricter the scrutiny, but in any event, when you're burdening those First Amendment right, you have to have some important and legitimate interests. In fact, when you're talking about something that amounts to incumbency protection where they had an alternative to not burden the voters and they, nevertheless, said 'I'm not going to take any risk. I'm going to burden the voters and just vote myself another term,' they've --

THE COURT: I've always had a problem with these weighing tests. On the one hand, I've got an incumbent who says 'I want to run on my record,' and on the other hand, I've got somebody who says 'my right to vote or my right to speech is being encumbered.' And you ask judges in this sort of situation, as you say, to weigh one against the other, and it's, among other things, it seems to me, extremely subjective for a judge to be the one to say 'well, this one weighs more heavily than that one,' when we're really not talking about weights and measures. We're talking about different interests that are very difficult to convert into some common denominator and come up with an equal side.

MR. MASTRO: I appreciate the Court's concern, and

I --

THE COURT: I was hoping you'd sympathize.

MR. MASTRO: And, your Honor, that's exactly what I'm going to try to do because, your Honor, I think the case law is so well developed in this area that it makes the calculation of the balance easier because the Supreme Court has expressly held in Williams v. Rhodes, and the Sixth Circuit again in the Libertarian Party case, that this notion of continuing the prevailing powers that be, their seniority or the political stability, that that is not a legitimate interest, not a legitimate interest, not a reasonable basis for burdening First Amendment rights. So I think the case law makes clear that that's not something that it's entitled to any great weight when you are altering the electoral and voting landscape out of self-interest as the incumbents.

Number two, your Honor, the Price case is very instructive because there, the Second Circuit in a case where it struck down New York's law prohibiting the use of absentee ballots in one particular type of contest, county committee elections. There the Second Circuit made very clear that where there is at least some burden on First Amendment rights, even if minor and there is no overriding, Second Circuit's words, important state interests or substantive justification for the restrictions imposed, that law has to be struck down. Here to me, your Honor, the Second Circuit made very clear the

path that must be taken. The Second Circuit recognized that where there is at least some burden and no substantive justification or important state interest, you have to strike it down even when the burden is minor. Here the burden is severe, but the proffered interest in the context of self-interested incumbents engaged in naked protectionism, that's illegitimate. It's not entitled to any weight.

So, your Honor, I think that both the Supreme Court and the Second Circuit made the balancing that much easier for your Honor. And I would just conclude, in the context of the First Amendment claims and then go on to due process, that in choosing to vote themselves this opportunity for a third term and cutting the voters out who twice ratified a two-term limit, you can't justify your actions on the basis that it's seasoned leadership or stability. That is an excuse the Supreme Court found illegitimate in Williams because it's the embodiment of self-interest, self-protection and perpetuation. It cannot stand and justify the severe burden imposed on First Amendment rights. Nullifying two votes, keeping the current question away from the voters for no apparent reason other than the certainty of the results when they could have put it to the voters and, therefore, avoided this entirely, and made their case directly to the people as the people have twice decided it, and its chilled voters and candidates in their future political speech.

So, your Honor, that's why we believe we have such a strong First Amendment claim, but it is coupled, your Honor, with a very strong due process claim as well because, as your Honor already noted in questioning Mr. Kitzinger, there is a well-established body of Supreme Court case law and Circuit case law that says that colorable claim lies for substantive due process when there be a patent or fundamental unfairness, whether or not there's a rational reason for the locality's actions, and naked efforts to protect incumbents are not fair or rational bases. They are the epitome of patent and fundamental unfairness.

The Bonas case, it seems to me, your Honor, are right on point, and Mr. Kitzinger's attempts to distinguish it miss the mark for the following reason. In Bonas, the voters passed a referendum. It changed from odd to even years. It left a short gap when the cycles changed. Now, the local elected officials said 'why should we put the town to the expense of having to do an additional election for such a short cycle. We'll have political stability. We'll stay in office for that additional period.' Those might have sounded like perfectly rational reasons, but the First Circuit made crystal clear 'no, they aren't. They're patently and fundamentally unfair because you're acting in your self-interest to perpetuate yourself in office.' And to say 'oh, but they didn't stand for election for that brief period

of time,' the people here, the incumbents will stand for election, is to, in essence, given the practical realities in New York, make a distinction without a difference since virtually a hundred percent of incumbent council members get re-elected each cycle and there are huge amounts, 40 percent or more, of undisputed races of incumbents. So when those council members who are incumbents and are term-limited voted themselves another term and didn't put this question back to the voters to decide who twice imposed them, some 40 percent of them will never even face a challenge, in all likelihood based on the short history that we have of term limits.

I add one other thing, your Honor. What makes this so important is that term limits are not something that every day they have a practical effect. They come up in a cycle every eight years. We've only had the cycle run once, and that was during the prior mayor's tenure, and at the end of that tenure, people raised that there was a crisis after 9/11 and maybe he should stay in office, but fortunately, democracy doesn't change with the wind depending upon what the circumstances are at the time. Democracy is a rock. And our democracy didn't crater in 2001, and it shouldn't crater in 2009 which is the first cycle where people elected under term limits actually would face term limits and there would be a wholesale change in the composition and membership of the City Council and in major elected offices.

So, your Honor, I think this falls squarely within the due process cases, and the Supreme Court in Randell, Second Circuit in Landell and other courts and jurists have repeatedly noted that incumbent protection is not a legitimate basis for legislation.

THE COURT: Refresh my recollection. Was there an effort to contest, either in the City Council or otherwise, the term limits in the context of the 9/11 crisis or not?

MR. MASTRO: Your Honor, there was a, for a brief period of time, about a week, there was discussion of whether the council or state legislative level there could be an alteration of term limits, and the idea was abandoned for all the right reasons.

THE COURT: All right. And you're drawing a comparison, I suppose, between the defendants' asserted reason for doing it this time, which is we're in an economic crisis and we need an expert businessman?

MR. MASTRO: Exactly, your Honor.

It all comes back to the same thing, your Honor. Those are hollow excuses in the face of preserving our local democratic structure and respecting the will of the people and the voters and not allowing our local elected officials to self-interestedly take it upon themselves by legislative fiat to give them another term. That's the core of the due process problem.

THE COURT: Do you want to address these state municipal law claims?

MR. MASTRO: I do and, your Honor, I'll try to be brief, if I may.

Your Honor, because I have some familiarity with these types of claims from a prior litigation that has been mischaracterized.

THE COURT: So your adversary says.

MR. MASTRO: And I should always draw such comfort as my adversary from having barely survived three to two in those prior litigations. Two judges saw it my way in that prior litigation. And the law in question there, your Honor, was what the City Council itself described at the time as correcting an unequal disqualification, an anomaly in the existing Term-Limits Law to address an inequity that a handful of members would get less than the eight years the voters intended under term limits and that, therefore, to give that handful of members the opportunity to serve at least eight years, and the Appellate Division specifically noted this. This was not an overturning of the two-term eight-year limit. This was a correction, according to the Court, consistent with what the voters intended with a two-term eight-year limit. And, your Honor, even at that tweak, two out of five justices who reviewed the question at the time agreed with me that even that tweak violated New York State and local law.

And, your Honor, the City Council told us at the time, and this should tell us volumes about why we're right that this is subject to mandatory referendum. The City Council told us at the time of that legislative tweak, that, quote, any major change to the Term-Limits Law would have to be done by ballot initiative or voter approved charter revision, their words, not mine. Mayor Bloomberg vetoed that bill initially. He said it was inappropriate and that it was not right for the City Council, knowing what the law was, to change the law to their own advantage.

So we have local elected officials, the Mayor and the City Council, both telling voters publicly that 'this is a question that has to go to you.' We have a history of this going to the voters in '93 and '96. The City Council itself recognizing it had to go to the voters when it wanted to change term limits in '96. That history is something that, your Honor, those public assurances are something that your Honor can take into account in interpreting both state and local law.

Let me briefly say, your Honor, in the Golden case, we never litigated the issue of membership or composition of the legislative body because it involved only a handful of council members, but, your Honor, I think there could be, in this case where there's to be a wholesale change in the council and a 70 percent turnover, I don't think there's any

question on the plain language of the mandatory referendum statute under state law that this particular change in term limits to change what would have been a 70 percent automatic turnover in the membership of the council falls squarely within changes in the membership or composition of a legislative body.

On the plain language of the statute and Mr. Kitzinger's response to me, your Honor, is a hollow one. He says look at the legislative history of the Municipal Home Rule Law going back to 1964 when there were some changes made in that law, and he says at the time, people said it's substantially the same as it used to be. Except in the minor ways in which it was specifically changed, they have meaning. This is one of those ways in which it was specifically changed, and it isn't minor at all. So yes, it was substantially the same in most of the words, but this change was made from membership. It used to say "form." They changed it to "membership" for a reason. Member has plain meaning under New York law. The New York Court of Appeals told us so in the Forti case, when in a case about the state legislature being exempted from state ethics rules and whether this was fair to the rest of the state employees, the Court made very clear what it understood change in membership to be. It's reconstituted every two years with an attendant change in membership. When you change wholesale the membership of the

body, as you do when you undue the Term-Limits Law, you are changing the membership or composition of the body.

Now, your Honor, our papers go into great detail on term of elective office and power of an elective office. I will say this, your Honor. The distinction that Mr. Kitzinger makes about term of office and relying on the Benzow case, misplaced. Because Roth v. Cuevas, a subsequent case, found that the term limits question was appropriate to go on the ballot because it related to, quote, terms of office of a public officer.

How then, if you're going to change term limits and you have a mandatory referendum for the term of office, are you not changing terms when you overturn term limits in this way? The New York Court of Appeals never addressed it, and their failure to grant leave late in the election cycle, in July of the election cycle, is no reflection on the merits, as your Honor knows. So we believe that it's quite clear that the trend in New York involves term of elective office.

And Benzow, just one last thing about Benzow, decided in 1960 where the Buffalo City Council disinterestedly decided that the mayor should get another term. There's the rub in their position. This is the City Council and the Mayor self-interestedly deciding they should get another term, and that falls so squarely within the heart of the municipal Home Rule Law's mandatory referendum provisions. You've got eleven

or twelve different categories of mandatory referenda that relate to core powers and tenures in office because you can't leave those to local elected officials to decide for themselves because they are going to aggrandize and perpetuate and accumulate.

The fact that term limits, the specific words "term limits," are not in that statute is no surprise and no comfort because term limits, when the Municipal Home Rule Law was passed in 1924, didn't exist as a concept in New York State governance. They were not on the map. They really didn't come on the map until the early 1990s in any significant way in New York State and in New York City. So, your Honor, we believe that the state of New York law is clear in exactly the opposite direction of what Mr. Kitzinger says.

And in terms of power of an elective office, your Honor pointed it out before when you asked me about seniority and the like. Changing term limits so the current term-limited mayor and council majority retain their positions as speaker and committee chairs and all of that clearly advantages those more senior members, vis-a-vis the junior members who will never rise to power. That's what Letitia James has explained, Councilwoman James, in her affidavit and what Councilman de Blasio has explained in his.

In Heeran v. Scully, your Honor, that's where all the way up to the New York Court of Appeals they recognize

that diluting in any way or diminishing the power of one office vis-a-vis others by, in that case, expanding the size of the local body that that affected powers of the office and that you have to look as a practical matter at the effect. So we believe that this particular change, not the one in Golden where it affected only a handful of council members, but this one where it affects the Speaker and 35 other members affects powers.

Finally, your Honor, we didn't hear a word from Mr. Kitzinger on the question of under local law that this is now a mandatory subject of referendum, and that is because, your Honor, when the voters adopted term limits in 1993, they did more than just adopt a two-term limit. They separately adopted as the public policy of the City of New York to limit to not more than eight consecutive years the time elected officials can serve, so that elected representatives are not career politicians.

Now, the only way to interpret that provision, separate provision, is that the voters were saying 'now it's public policy in New York. You, legislators, can't just overturn it without violating the public policy of New York. You have to put it back to us as voters.' And that's what both the lower court and one of the justices on the Appellate Division recognized already in the Golden case, and we believe that it's crystal clear that the voters intended to make this

the public policy of New York City that would have to go back to them for a vote.

Now, your Honor, on the conflicts issue, your Honor, if I can be briefly heard on that, because Mr. Kitzinger is making a distinction that doesn't exist in our papers. We have brought a declaratory judgment action seeking to have this piece of self-serving legislation that violated city conflict laws declared invalid and voided precisely because of well-established New York law, from the Court of Appeals on down, that as a matter of public policy in this state, legislation passed in violation of conflict rules. The spirit or the letter - Tuxedo actually involved violating the spirit of those laws - has to be voided as a matter of public policy. It's not a private right of action question at all. We're not seeking money damages or we're not seeking to have that law enforced specifically as it could be by the Conflicts Board sanctioning any individual in government. We are bringing what is a classic declaratory judgment action to have a piece of legislation declared invalid as a violation of public policy.

THE COURT: I think I've got your argument, and it's getting late.

MR. MASTRO: Thank you, your Honor. It's much appreciated, your Honor. Thank you.

THE COURT: Let's see if Mr. Kitzinger has anything

further you want to say by way of reply or response. Go ahead.

MR. KITZINGER: Yes, your Honor. Very briefly. Thank you.

Plaintiffs put forth this need and requirement that there be a referendum and suggest that it could still happen. That is a fanciful concept. So many discretionary acts would have to occur before that could happen. It's pure fancy and is of no matter to this Court.

With regard to plaintiffs' reliance on the balance test in Anderson. The reason I didn't address that is because it's not relevant to this case. Anderson applies to the regulation of elections process. Plaintiffs here contest the result. That's why it's not relevant. Nonetheless, the Mayor and the Council did set forth the public policy and the basis for the enactment of Local Law 51 which was to allow the population of the City of New York, in this time of fiscal crisis that hits very hard, the opportunity to retain current management. It's not a requirement that they do so. It's the opportunity.

The availability of a referendum where such is authorized by state law does not require it. Plaintiffs suggest that the mere availability of the referendum, of a referendum on term limits requires, mandates that state law requires that a referendum be held. Roth v. Cuevas says no

such thing, and neither does the First Amendment.

Plaintiff suggests this is a one-shot deal. It's not. The language, including Local Law 51, about it being repealed upon a referendum reverting to a two-term term limit is no different than stating what the law is. Any matter that is subject to referendum under state law can be changed by referendum. It simply has no legal import.

Plaintiffs' repeated reliance on Williams v. Rhodes is completely misplaced. That case from 1968 was an equal protection case. Their repeated citation to these cases after proclaiming loudly to this Court that this was not an equal protection case is the clear evidence that the First Amendment does not support their claims. There's no invidious discrimination here, and the equal protection cases cited by plaintiff simply do not apply.

Mr. Mastro also referred to the events following September 11th in which it was suggested that maybe Mayor Giuliani should remain in office but that they decided that democracy should prevail. Well, actually, what really happened is the speaker of the state assembly said it's not going to happen. There was a recognition that this would alter the term of the office, would extend Mayor Giuliani's term beyond four years. Therefore, falling clearly within Municipal Home Rule Law 23 requiring a referendum. That couldn't happen in the time frame suggested, and it wasn't

going to happen by legislative amendment to the Home Rule Law. It had nothing to do with democracy prevailing and the grace of --

THE COURT: I'm sorry. I'm not following your distinction between incumbent Mayor Giuliani's term being extended and the current incumbent mayor.

MR. KITZINGER: Because there Mayor Giuliani graciously offered to extend his term by four months to guide the city through the troubled time without being elected. He sought to actually have his term extended without being re-elected to serve as mayor beyond the expiration of his term.

THE COURT: I see.

MR. KITZINGER: Your Honor, Benzow, plaintiffs say 'well, you wouldn't find term limits included in the Home Rule Law because in 1924 when it was adopted, term limits were not part of the political discourse and the dialogue.' Well, actually, it was the City Home Rule Act that was enacted in 1924 and the Municipal Home Rule Law that came to being in 1964, a mere three years after Benzow was decided by the New York Court of Appeals.

Plaintiffs put such stock in the change from "membership," from "form" to "membership" that that requires the term limits be included within the confines of Section 23 of the Home Rule Law, but they fail to acknowledge that the

state legislature did not include term limits in that, in the ambit of the section. They could have said term limits. They just had the Court of Appeals rule on it. They didn't.

The Second Circuit has instructed district courts where the high court of a state has not ruled, they should follow intermediate appellate courts, and those decisions should be respected. There's no intermediate appellate courts that distinguish Golden. Plaintiffs claim it's merely a tweak. Well, it wasn't merely a tweak, and the Appellate Division did not sustain Local Law 27 of 2002 because it was merely a tweak. They sustained it, citing Benzow, saying term limits are not the subject of a mandatory referendum. It was that simple.

Plaintiffs also rely on Professor Briffault's analysis. Well, setting aside the fact that plaintiffs' abjective failure in complying with the requirements of the Federal Rules of Civil Procedure relating to expert testimony, which this must be what it purports to be, Professor Briffault did not account for the U.S. Supreme Court's decision in Lopez Torres which says if it's one party rule or incumbents win, that's not the constitutional problem. It's simply not something the Constitution is concerned with. As long as they stand for election, it's a fair election and the process is fair, the federal courts have no business interfering.

Now, the Supreme Court has also recognized that

incumbents protect themselves to the use of gerrymandering. It's not new. It's not startling.

There's something else that strikes a chord with plaintiffs' argument, and they keep saying the term-limited mayor and council enacted this in the eleventh hour. Well, query: If they did this four years ago during their first terms of the two-term limit, would it have constituted a constitutional violation, or would it have violated state law? Would it change plaintiffs' analysis?

At the end of the day, had they done this four years ago, they would still be afforded the opportunity to run for a third term of office, as are the junior members, the so-called junior members of the council who are only in their first term. They should be considered equally as conflicted if the conflict were to exist, which it doesn't, because they get afforded the opportunity to get all the said benefits the plaintiffs suggest that the, quote/unquote, conflicted members will get now. Their arguments hold no water. Anderson doesn't apply. Their equal protection cases don't apply.

THE COURT: All right. I think we're going over ground you've been over already.

Anything else?

MR. KITZINGER: Your Honor, one last thing.

They cite to Price. Price again applied Anderson appropriately because that was an election regulation. The

use of absentee ballots is not a referendum. Plaintiffs have failed to cite to a single reference. They don't acknowledge the Stone case out of Arizona where the referendum, they tried to do the same thing, expand the requirements, mandatory referendum, and the Circuit Court said absolutely not. That's not what the Constitution mandates.

Plaintiffs have no viable claims, and ultimately, all of their claims should be dismissed.

Thank you, your Honor.

THE COURT: All right.

MR. MASTRO: Your Honor, may I have just one minute to explain why this can get on the ballot practically and realistically? I'll be very brief.

THE COURT: All right. But then I'm going to reserve decision and issue a written opinion as quickly as I can.

What else did you want to say?

MR. MASTRO: And I thank your Honor for that.

Your Honor, just on the practical reality of putting this on the ballot. It is true that the Mayor and the Council timed their action to preclude the voters by petition from being able to get it onto the ballot in a general election cycle, but fortunately, and that's under Municipal Home Rule Section 37. Fortunately, there are separate provisions under the same Municipal Home Rule for a charter commission to put

something on the ballot. And this was one of the closest votes in the City Council history. So it's still absolutely possible that with a very small shift in that council vote, knowing that the only way this goes on the ballot is by -- the only way this gets approved is by referendum, that that will happen and a charter commission, as Bill de Blasio, councilman, explains, who sponsored this legislation, in his affidavit, puts it get the legislation out of committee, which is sitting there right now waiting to be passed and gets this to a charter commission to put on the ballot as quickly as possible and 60 days later it's on the ballot. So we could have a vote on this in May in plenty of time for the 2009 election cycle.

And we really appreciate your Honor hearing us and expediting the case. Much, much appreciated.

MR. ADAMES: If you can give me one minute. My name is Jose Adames.

THE COURT: Mr. Adames, I don't know if you were here earlier.

MR. ADAMES: Yes.

THE COURT: I said I'm going to consider your application. I have received one set of papers in opposition to it. I'm going to resolve it. If I determine that you should be permitted to intervene, I'll accept papers and argument from you, but at this point --

MR. ADAMES: Just one minute, your Honor.

THE COURT: Please don't intervene before you've been given leave to intervene.

All right. Thank you.

MR. MASTRO: Thank you, your Honor.

MR. KITZINGER: Your Honor, if I may, Mr. Adames' case, Magistrate Katz issued a report and recommendation that the Court might find enlightening. If I may hand it up.

THE COURT: Well, if you want to offer it, I'll take a look at it.

MR. KITZINGER: Thank you, your Honor.

(Time noted: 6:08 p.m.)