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COURT OF APPEALS

STATE OF NEW YORK

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IN THE MATTER OF BETHANY KOSMIDER,

Respondent,

-against-

NO. 41

MARK WHITNEY, AS COMMISSIONER OF THE  
ESSEX COUNTY BOARD OF ELECTIONS,

Respondent,

ALLISON MCGAHAY, AS COMMISSIONER OF  
THE ESSEX COUNTY BOARD OF ELECTIONS,  
ET AL.,

Appellants.

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20 Eagle Street  
Albany, New York  
May 1, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Appearances: (Cont.)

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Karen Schiffmiller  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Okay, the final appeal on  
2 this afternoon's calendar is appeal number 41, The Matter  
3 of Kosmider v. Whitney.

4 Good afternoon, counsel.

5 MR. MANNING: Good afternoon. My name is Daniel  
6 Manning. I'm the county attorney for the County of Essex.  
7 I'm also the attorney for appellant William B. Ferebee, who  
8 was succeeded by Randy Preston, then - - - then succeeded  
9 by Shaun Gillilland, Chairman of the Board of Supervisors  
10 of the County of Essex, and also the Appeals Officer for  
11 the County of Essex.

12 I'm here today asking that this court reverse the  
13 decision - - -

14 CHIEF JUDGE DIFIORE: Counsel, before you begin  
15 your argument - - -

16 MR. MANNING: Yes.

17 CHIEF JUDGE DIFIORE: Do you care to reserve any  
18 rebuttal time?

19 MR. MANNING: I do not want to reserve.

20 CHIEF JUDGE DIFIORE: Thank you.

21 MR. MANNING: Since I have only five minutes,  
22 I'll try - - - thank you.

23 CHIEF JUDGE DIFIORE: I'll extend you by half a  
24 minute; go ahead.

25 MR. MANNING: Okay, no, that's fine.



1           We're asking that you reverse the decision of the  
2           Appellate Division Third Department in this matter,  
3           principally because it is the clear intent of Section 3-  
4           222(2), that voted ballots must not be disclosed by FOIL,  
5           but must be - - -

6           JUDGE RIVERA: Just before you go further - - -

7           MR. MANNING: Right.

8           JUDGE RIVERA: - - - can I just clarify, did  
9           petitioner Kosmider request printouts or just a digital  
10          version of those ballots - - -

11          MR. MANNING: I believe she requested - - -

12          JUDGE RIVERA: - - - or copies?

13          MR. MANNING: - - - a digital version.

14          JUDGE RIVERA: Okay. So all you had to do was  
15          press "send" and give it to her?

16          MR. MANNING: Some - - - something simple - - -

17          JUDGE RIVERA: Something like that.

18          MR. MANNING: - - - like that, yes, I don't know  
19          if it's just- - -

20          JUDGE RIVERA: But it - - - it didn't require  
21          printing them up and sending it - - -

22          MR. MANNING: No, it did not, but I don't - - -

23          JUDGE RIVERA: Okay.

24          MR. MANNING: - - - see where that's relevant - - -

25          -



1 JUDGE RIVERA: No, no, I just want to know.

2 MR. MANNING: Okay.

3 JUDGE RIVERA: And then my other question is, are  
4 there state board of election procedures that I can read  
5 expressly that say how one preserves - - - how the county  
6 has to preserve?

7 MR. MANNING: I - - - I am not aware of that  
8 either, Your Honor.

9 JUDGE RIVERA: Okay. And the county board  
10 doesn't have separate procedures for preservation?

11 MR. MANNING: They do. What happens is, when the  
12 removable memory cards - - - there are two in the machine -  
13 - - one is taken out, locked in a bag, and within three or  
14 four days, that's downloaded onto the county EMS system,  
15 which is a computer system, and it sits there. Those  
16 removal - - - the other removable memory card is left in  
17 the machine and is used in the recanvass. And the - - -  
18 then eventually these - - - both of these memory cards are  
19 wiped clean, so that the only things that do exist are the  
20 EMS - - - on the EMS - - - computer and system, and the  
21 actual voting ballots.

22 JUDGE RIVERA: How - - - and how long do you keep  
23 it on the EMS computer?

24 MR. MANNING: That I do not know. I would guess  
25 probably for quite some time just in case.



1 JUDGE RIVERA: Is it at least the two years for  
2 the ballots themselves?

3 MR. MANNING: I can't affirmatively speak to  
4 that, but I would - - - I would suppose yes, since - - -

5 JUDGE RIVERA: Thank you.

6 MR. MANNING: But getting back to my argument, in  
7 our opinion, voted ballots and copies of voted ballots,  
8 whether it be a paper copy or an electronic copy are all  
9 one in the same.

10 JUDGE STEIN: Well - - -

11 JUDGE FAHEY: Well, is there - - - is there  
12 anything in the law that defines "voted ballot"?

13 MR. MANNING: No, voted ballot is - - - there's  
14 no - - - definition, however, there's no preclusion. The  
15 first Section of 3-222(1), relates only to removable memory  
16 cards and their sealing and reuse. That's it. Then you  
17 take the next lock - - -

18 JUDGE STEIN: But didn't Subsection 2 previously  
19 refer to write-in ballots, and isn't there some legislative  
20 history that - - - that the reason why it was changed to  
21 voted ballots, was to save the cost of storing unused  
22 ballots? Would - - - do you agree with that?

23 MR. MANNING: I know that it - - - there was - -  
24 - the change was - - - there was a change in that section  
25 from voted ballots to - - -



1 JUDGE STEIN: And if - - - if that's true - - -

2 MR. MANNING: - - - from write-in to - - -

3 JUDGE STEIN: - - - then how does that lead us to  
4 a clear legislative intent to define voted ballots as  
5 meaning both paper ballots as well as these electronic  
6 versions?

7 MR. MANNING: I would argue that the clear  
8 reading of "voted ballots" would include a copy of the  
9 voted ballot, which is a paper copy, and an electronic  
10 copy, which is also just a copy.

11 JUDGE STEIN: Well, but isn't that the point is  
12 that - - - that under - - - under FOIL, we have to show a  
13 clear legislative intent. And that this is - - - that  
14 there is - - - that there's some ambiguity here, so how can  
15 we translate that into a clear legislative intent?

16 For example, it seems to me that - - - that the -  
17 - - the question, other than the question of whether these  
18 are voted ballots or not, which is the ultimate question,  
19 but - - - but one step before that is, what is the purpose  
20 of the preservation of the - - - of the - - - what's the  
21 purpose of the - - - these rules? Is it to prevent  
22 tampering? Or is it for confidentiality purposes? Because  
23 I think that depending upon how you come out on that  
24 question, you get a different answer to whether it's FOIL-  
25 able or not.

1                   And you know, it - - - the - - - the history is,  
2                   is that we had paper ballots, and that if somebody gets  
3                   ahold of them, they can easily be tampered with. Whereas,  
4                   once something is preserved on a hard drive somewhere, then  
5                   giving out images of it doesn't affect the original.

6                   MR. MANNING: I would argue that even though it's  
7                   stored on electric - - - on a hard drive, electronically,  
8                   that that could be tampered with at any time. We know that  
9                   - - -

10                  JUDGE FAHEY: Well, it'd be a question of if - -  
11                  - if the information could be accessed, the integrity of  
12                  the ballot has become an ongoing issue in this country - -  
13                  - not - - - forget about just these elections. So - - - so  
14                  assuming that's - - - that not - - - not that that could  
15                  happen here, but the integrity of the ballot is an  
16                  underlying issue that we should address, it doesn't mean we  
17                  should abandon FOIL, so in - - - in the light of this  
18                  threat. So the government still has to be free, and it has  
19                  to be open to be effective.

20                  So two things, first off, you've got a two rule -  
21                  - - two-year rule; does that undermine that? And the  
22                  second thing is, is there was an affidavit, I think, by Mr.  
23                  - - - I'm not sure if I'm saying his name - - - Mr.  
24                  Ferebee, and he talked about the effects of giving access  
25                  to the ballot in a number of process that - - - to the





1 ballot images in a number of processes that would be  
2 affected in election immediately afterward. If you did  
3 this, say, within two or three weeks in the elections. He  
4 talked about things like the three-percent audit that could  
5 take place, the canvass of the absentee ballots, the  
6 canvass of the special ballots, the canvass of the  
7 affidavit ballots. I'm assuming the military ballots also.  
8 All - - - all that information would be available prior to  
9 any recanvass. Is that your understanding of the - - - the  
10 effects on possible finality could take place as a result  
11 of that?

12 MR. MANNING: A - - - a couple of things on - - -

13 JUDGE FAHEY: That's the way I read Ferebee's  
14 affidavit, so address that for me.

15 MR. MANNING: Okay. I'd - - - I'd like to skip  
16 just quickly and I'll - - - I will get to that, but to  
17 address the intent question, since that's very important.  
18 If you look at the statute - - - the Election Law as a  
19 whole, and the statute that come before it, 9-200s through  
20 - - - there are all these procedure - - - all these  
21 instances where either the candidate or a chairman or even  
22 a lay person has an opportunity to attend the canvass,  
23 attend the there-percent audit, attend the canvass of the  
24 absentee ballots, and the recanvass, and also the  
25 certification.



1                   16-112 of the Election Law also permits through  
2 the Supreme Court and an order, where there's a judge who  
3 makes a decision whether this should be given out or not,  
4 the ability to take a look at these ballots.

5                   JUDGE FAHEY: I see.

6                   MR. MANNING: However, to allow FOIL just a - - -  
7 a blanket FOIL request access to these, what are  
8 essentially copies, in my opinion, of voted ballots. They  
9 are not - - - which could be tampered with. I - - - I  
10 believe it - - -

11                  JUDGE FAHEY: Well, let's assume it - - - let's  
12 assume, but there'd be copies of a canvass. You still have  
13 the originals.

14                  MR. MANNING: We still have the originals.

15                  JUDGE FAHEY: But then it would turn into a  
16 question of which was true and which wasn't.

17                  MR. MANNING: Absolutely.

18                  JUDGE FAHEY: Okay.

19                  MR. MANNING: Either - - - either one could be  
20 tampered with. The originals could be tampered with. You  
21 know, there are all sorts of strange things that - - -

22                  JUDGE RIVERA: Well, that's why you have the  
23 redundancies. And that - - - that certainly was a question  
24 when - - - when you went to - - - that this kind of - - -

25                  MR. MANNING: Yes, we don't have the same, and I



1 think that's just one of - - -

2 JUDGE RIVERA: - - - digitized voting. You have  
3 the redundancies because you have the original ballot.  
4 You're right; it could be tampered with. The whole point  
5 is to try and secure it, as Judge Stein was asking about  
6 that other question, secure it, so they don't get opened  
7 and they don't get tampered with. Whereas, the digitized,  
8 if - - - if it makes it to that server without having been  
9 tampered with, because that's possible too, then you'd have  
10 to hack into the whole system, so that's why you build in a  
11 bunch of redundancies. I get that.

12 But - - - I'm not really clear how a copy of  
13 something on your server is the voted ballot. Is a voted  
14 ballot being - - -

15 MR. MANNING: Clearly, what if - - -

16 JUDGE RIVERA: - - - that material that someone  
17 voted on.

18 MR. MANNING: What if someone asks for a copy of  
19 a voted ballot? It's the same, in my opinion, the paper -  
20 - -

21 JUDGE RIVERA: But that's not what the section  
22 says. It doesn't say voted ballots and all copies.

23 MR. MANNING: But I - - - I think it's implied.  
24 If - - - if - - - if you can't - - - if you can only  
25 examine - - -



1 JUDGE RIVERA: What - - - what allows one to  
2 imply from this section that voted ballots can be read as  
3 voted ballots and all copies?

4 MR. MANNING: The - - - it - - - it goes on to  
5 say that they can only be examined. So you get to look at  
6 the voted ballot under Section 3-222. You don't get to  
7 take it home. You get - - - don't get to - - - to take - -  
8 - take a picture of it.

9 JUDGE RIVERA: - - - avoids tampering, sure.

10 MR. MANNING: Right. And so a logical extension  
11 of that is you can't give someone a copy of that voted  
12 ballot. And I - - - tampering is one reason, I believe, in  
13 - - - in the legislative history - - -

14 JUDGE RIVERA: After two years you can sell it,  
15 right?

16 MR. MANNING: You could sell it and you could  
17 discard of it.

18 JUDGE WILSON: Well, I wanted - - - I wanted to  
19 ask you about that. What is it you can sell? Is it the  
20 envelopes or is it the ballots?

21 MR. MANNING: The way I read the law, I think you  
22 can sell the ballots - - -

23 JUDGE WILSON: Do you know if any - - - has - - -  
24 has anyone ever sold - - -

25 MR. MANNING: - - - but I don't know if anyone's



1 ever sold them. I think they're usually disposed of or  
2 destroyed.

3 JUDGE WILSON: Do you have any idea what the  
4 legislature was thinking about when they authorized the  
5 sale of something?

6 MR. MANNING: No, I do not, and I don't - - - I  
7 don't think it's a good idea, but it's not my call.

8 JUDGE RIVERA: Well, the suggestion is that it  
9 might be used for research and you want the original  
10 ballots.

11 MR. MANNING: Right, right, but you could in  
12 small primaries where there are one - - -

13 JUDGE RIVERA: It may be very well - - - it may  
14 very well be now that given that the - - - you have the  
15 electronic copies, that most researchers would be happy not  
16 to pay for the printing costs upfront, and just send it - -  
17 - send the copies digitally.

18 MR. MANNING: Right. It is our position on the  
19 voted ballot - - - and - - - and any copy of that voted  
20 ballot, whether it be electronic, paper copy, can't be  
21 disseminated - - - can't be examined without a court order.  
22 If - - - what would happen if the paper ballots would - - -

23 CHIEF JUDGE DIFIORE: Are you saying we're not in  
24 the FOIL world?

25 MR. MANNING: I'm saying we're not in the FOIL



1 world.

2 CHIEF JUDGE DIFIORE: We're in Election Law  
3 world?

4 MR. MANNING: I'm saying the statute - - - I  
5 don't mean to interrupt; I'm sorry.

6 CHIEF JUDGE DIFIORE: Okay.

7 MR. MANNING: That the Election Law, throughout  
8 the whole process provides for opportunities to take a look  
9 at ballots and to be a part of the process. And if you  
10 have a legitimate reason, whether it's a machine  
11 malfunction, whether it's a criminal action - - - whether  
12 it's fraud, whether it's a very, very close race, and you  
13 want to make an application under 1-16 or 16-112, a judge  
14 makes a determination there.

15 Same would be here. Rather than just give a  
16 blanket FOIL request - - -

17 JUDGE RIVERA: But that's to contest and confirm.  
18 You might want a - - - you might want access to these  
19 public records for other purposes, like a researcher.

20 MR. MANNING: You might, but it's my opinion,  
21 that the entire Election Law taken with - - - together with  
22 this section, shows that legislative intent and I - - - I  
23 truly believe that - - -

24 JUDGE FEINMAN: Just - - - just one thing I want  
25 to clarify. When you - - - if you do turn over these



1 ballots or the electronic record, whether in paper or  
2 electronic form, if you were to turn them over, that  
3 doesn't compromise the identity of any individual voter and  
4 how that individual voter voted? Other - - - unless he or  
5 she voted by absentee ballot, and you know, signed her name  
6 and address on the envelope.

7 MR. MANNING: In certain circumstances, it could  
8 compromise that voter's secrecy.

9 In a primary election, we - - - our county has  
10 approximately 38,000 people in it. Some of our districts  
11 only have one voter on the conservative line. I think - -  
12 - I think if I checked, it was ten or so, or two voters.  
13 So you could easily go to the poll books, see who voted,  
14 and then if you have the - - - that information from the  
15 electronic ballot image, you would be able to determine who  
16 voted, how that person voted in the primary, in - - - and,  
17 since it's a primary, you could carry that further, if you  
18 were an unscrupulous person, and - - -

19 JUDGE STEIN: You could do that, in - - - in your  
20 view of the statute, after two years anyway, right?

21 MR. MANNING: After two years, yes, but - - -

22 JUDGE STEIN: Yeah, okay.

23 MR. MANNING: - - - I think the - - -

24 JUDGE STEIN: So the ballot is no longer secret  
25 at that point.



1 MR. MANNING: It is no longer secret at that  
2 point, but I think that was an attempt by the legislature  
3 to come to a finale there, and say, okay, now we're - - -  
4 we want to protect the integrity of the ballot by the  
5 statute, and we also want to have finality in our election  
6 process. So after the two-year period, yes - - -

7 JUDGE STEIN: Well, the courts have said - - -

8 MR. MANNING: - - - well, actually it says - - -  
9 but - - -

10 JUDGE STEIN: The courts have said that, but  
11 where - - - where - - - where do you see in any of the  
12 legislative history that the legislature thought that that  
13 was one of the purposes?

14 MR. MANNING: Well, I gleaned that from Mr.  
15 Kozinsky, Peter Kozinsky's affidavit. Basically, in his  
16 interpretation of the - - - the predecessor to 3-222.

17 JUDGE RIVERA: But you have finality, because the  
18 Election Law provides for that process. The fact that  
19 someone requests copies by FOIL, and then says, aha, that -  
20 - - something is wrong with the count, you've still got to  
21 go through the Election Law process to indeed show that  
22 something is wrong with the count, so I - - - I'm not  
23 really clear I understand your concern about the integrity  
24 of the process and what becomes the final count.

25 MR. MANNING: I agree that - - - with - - - with





1 what you just said. However, if I'm a candidate, and I'm  
2 elected, and somebody's going on a fishing expedition and  
3 they don't have to have - - - justify why they want to take  
4 a look at these ballots, then that - - - that's  
5 problematic. Also, there could be frivolous actions - - -  
6 and then - - -

7 JUDGE FAHEY: Well, in a FOIL situation, any - -  
8 - any legitimate candidate would be able to go into court  
9 and say, my opponent, I want to see the ballots. You - - -

10 MR. MANNING: Yes.

11 JUDGE FAHEY: You'd be able to do that. That's  
12 not the problem.

13 MR. MANNING: That's not FOIL.

14 JUDGE FAHEY: No, it's more of being open to the  
15 public or the media, and that - - - that's really what the  
16 issue is, but - - -

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 JUDGE FAHEY: Thank you.

19 MR. MANNING: Thank you very much.

20 CHIEF JUDGE DIFIORE: Counsel?

21 Thank you, Your Honor.

22 CHIEF JUDGE DIFIORE: You're welcome.

23 JUDGE WILSON: Do you know anything about the  
24 sold ballots?

25 MR. WALSH: Excuse me, Your Honor?



1 JUDGE WILSON: Do you know anything about sold  
2 ballots? Selling ballots, anything?

3 MR. WALSH: Your Honor, the - - - the legislature  
4 said that you could either sell the ballots or you can  
5 dispose of them. So after two years, it's up to the  
6 elections commissioners and how they'd like to deal with  
7 it, so they don't sell ballots, Your Honor.

8 I think that that was in there on some thought  
9 that maybe an academic would like to get in and do study  
10 and do research and - - - and buy those ballots, so they  
11 can do that type of academic research. But by and large,  
12 the general rule is the elections commissioners dispose of  
13 them, when they no longer have to carry them forward. What  
14 may - - -

15 JUDGE RIVERA: You're saying there's no mandate  
16 to sell them if someone says I'd like to purchase them?

17 MR. WALSH: Correct, Your Honor.

18 JUDGE RIVERA: You could - - - they could  
19 literally say, well, I don't want to sell it to you and  
20 just destroy them.

21 MR. WALSH: Yes, Your Honor.

22 So, and well, good afternoon, and - - - and may  
23 it please the court, I'm James Walsh. I'm arguing on  
24 behalf of Commissioner McGahay who's the Elections  
25 Commissioner from Essex County. I'd like to reserve one



1 minute if I may, Your Honor.

2 CHIEF JUDGE DIFIORE: You may.

3 MR. WALSH: So, Your Honor, I think that - - -

4 JUDGE RIVERA: Do you think that most - - - most  
5 counties do, if there's a request, provide - - - provide  
6 these copies, correct?

7 MR. WALSH: Your Honor, I've done Election Law  
8 for twenty-five years; this - - - this is my practice area,  
9 and I've never known of a county to sell. I've known the  
10 counties to dispose of the ballots as soon as they're able  
11 to. They don't want to store them.

12 They hold on to them for the two years, and the  
13 legislature said in the statute they hold on to them for  
14 two years, because the legislature wants to have a court  
15 proceeding by competent jurisdiction - - - a court of  
16 competent jurisdiction order it, which is only a Supreme  
17 Court that can order that, by the way. Or a legislative  
18 committee can come in and look at it. So if either the  
19 senate or the assembly is really worried about the results  
20 of an election, and they want to dig in and look, they can  
21 say, give it to us; turn it over to us, because that's  
22 built into the statute as well.

23 But I think that the - - - here on Law Day, the  
24 great thing that we've got, is we've got this one case,  
25 it's got two really interesting public policy issues, and



1           there's two of them. The first one is, as the court has  
2           pointed out, the balancing effect between FOIL and public  
3           disclosure and transparency for what the - - - the - - -  
4           how government operates, as opposed to the privacy of the  
5           individual, the privacy of the ballot, and - - - and the  
6           security of my franchise.

7                         JUDGE STEIN: But that's - - - that's one - - -  
8           that's one of the core questions here. Is that - - - is  
9           that what the legislature was intending to protect.  
10          They're - - - they're not talking about the - - - the title  
11          of the statute says "preservation." It doesn't say  
12          confidentiality. And I - - - I think there's a strong  
13          argument to be made here that the purpose of this was to  
14          prevent tampering. This was all established before we had  
15          electronic voting, and that now that we have electronic  
16          voting, there isn't the same need to protect the copies,  
17          once - - - once the original is preserved.

18                        MR. WALSH: Your Honor, I would - - - I would  
19          disagree only because you can't guarantee you're going to  
20          preserve them, because there's two things that have  
21          happened simultaneously. One is we went from voting on  
22          mechanical machines. You used to pull the lever on  
23          everybody you wanted to vote, and then you would slide the  
24          big lever at the bottom, which adjusted a mechanical  
25          machine, and you had a recount and a canvass on the back.



1 You change it.

2 JUDGE STEIN: But that's why there's backup.  
3 There's the - - - now there's the paper and the image.

4 MR. WALSH: Yes, Your Honor.

5 JUDGE STEIN: And - - - and it's preserved. So  
6 if one goes awry, we have the other, right?

7 MR. WALSH: If God forbid somebody who puts the  
8 ballots into a bag and gets into a car accident and it  
9 burns up, you still have data preserved on the machine in a  
10 separate storage device. So you have the ability to go  
11 through and look when you need to.

12 JUDGE STEIN: So if you send a copy of that  
13 image, you still have the preserved - - -

14 MR. WALSH: You - - - you have two - - - you have  
15 - - -

16 JUDGE STEIN: You have the record on the hard - -  
17 - on - - - I don't know computer-talk very much, but I'm  
18 going to say hard drive.

19 MR. WALSH: Right, so each electronic machine,  
20 when you put your ballot in, it scans it in. It makes a  
21 count as to how that ballot was. So your voted ballot goes  
22 into the bin, and electronically the machine stores, and it  
23 puts it on two separate memory devices, and you have the  
24 ballot underneath. One of the ballot devices goes back to  
25 do the canvass on election night, so the boards of

1 elections know what they're doing with it. The other one  
2 stays with the machine.

3 Boards have different policies on whether you  
4 remove the ballots or not. Most ballots stay with the  
5 machines, and they travel with the machines; when the  
6 machines are picked up, they go. Some don't. So you have  
7 a - - - you have a structure fire in the - - - the place  
8 where they're being stored, the church, the school, or  
9 wherever it is, burns down to the ground, and it destroys  
10 the machine. We've taken one of the removables down.

11 So the - - - the - - - the I - - - I've talked a  
12 little bit about the privacy issue, and I - - - there's - -  
13 - there's a couple of issues I want to get to, but the  
14 finality issue is the other one that you have here. You -  
15 - - you need to have finality of elections. I've been  
16 involved in many recounts, starting in - - -

17 JUDGE RIVERA: Yeah, but that's how you have it  
18 through the Election Law. The Election Law provides for  
19 that process. We're talking about FOIL and access to  
20 public records.

21 MR. WALSH: Sure, Your Honor, and then what  
22 happens is, when you look at the ballots, and you say, boy,  
23 this one shouldn't have been counted; that one shouldn't be  
24 counted, and we were decided by two votes, and now I found  
25 three discrepancies and I should really be the winner, and

1           then I call - - -

2                       JUDGE RIVERA:  There's a - - - and there's a  
3           process under the Election Law, and perhaps they have an  
4           opportunity to challenge it; perhaps they don't.

5                       MR. WALSH:  Well, you know, Your Honor, they  
6           wouldn't, because - - -

7                       JUDGE RIVERA:  But it's not the voted ballot.  
8           It's a copy.

9                       MR. WALSH:  It - - - it's a copy, but they would  
10          take that as proof to go in with - - - to the Attorney  
11          General with a quo warranto proceeding under the Executive  
12          Law, Section 63-b, which allows you to then go in and say,  
13          hey, the wrong guy got seated; can you please remove him  
14          and put me in?  And then the issue with that is, all of the  
15          decisions that have been made by that body, are they  
16          legitimate, are they not legitimate, and how do you  
17          proceed?

18                      So the public has that interest - - -

19                      JUDGE GARCIA:  Counsel, I'm sorry.  Without those  
20          copies, let's say - - - say now you don't get this under  
21          the FOIL, and you want to challenge the election, and I  
22          just don't know this, how would you do that?  You're a  
23          candidate.  You believe something happened.  You want those  
24          ballots.  You have to go to a Supreme Court judge?

25                      MR. WALSH:  You go to Supreme Court and you ask



1 to see them. Now - - -

2 JUDGE GARCIA: And what's the showing you need to  
3 make?

4 MR. WALSH: Generally, you've got to show that  
5 there's some type of irregularity that would allow you to  
6 get to look at those ballots that are the voted ballots.  
7 Because you only get to rely upon the totals. You don't  
8 get to look at the voted ballots, unless the court grants  
9 you that.

10 JUDGE GARCIA: So now if we go the other way, and  
11 these go out; they're FOIL-able. You get these - - - can  
12 you go into Supreme Court and then challenge an election  
13 based on these copies or whatever you're getting under  
14 FOIL?

15 MR. WALSH: I would argue you could, except for  
16 you've got very narrow time frames, Your Honor. You've - -  
17 - you've - - -

18 JUDGE FEINMAN: I was going to ask you that. How  
19 do the time frames under the Election Law line up with the  
20 time frames under FOIL, and - - - and - - - because when  
21 you align them, isn't it true, basically, that the Election  
22 Law time frame is going to move a lot faster than the FOIL  
23 law?

24 MR. WALSH: Yes.

25 JUDGE FEINMAN: And therefore the - - - the use





1 of FOIL to sort of, you know, undermine the Election Law  
2 proceeding is perhaps an illusory problem.

3 MR. WALSH: I - - - I think the - - -

4 JUDGE FEINMAN: I don't know if I quite worded it  
5 - - -

6 MR. WALSH: I - - - I understand, Your Honor, and  
7 I think that my - - - my answer would be that the - - - the  
8 legislature decided in 16-116 there is no more important  
9 piece of - - - of litigation in the courthouse than the  
10 election matters. They're supposed to be taking over  
11 everything. That's the precedence. And they need to be  
12 taking over everything, because of our need to have a  
13 timely, accurate result of - - - of - - - for public  
14 confidence in the election system and our government.

15 So what my - - - my position to - - - to be is  
16 you can't use FOIL as an end-run around the Election Law,  
17 and especially with a race, which is decided by one or two  
18 votes - - -

19 JUDGE FAHEY: So what you mean, if I'm correct  
20 then, is that you got fifteen days after the election to do  
21 a number of things. You fail to meet that burden in  
22 fifteen days, but then you FOIL the results of the  
23 election, and you have up to four months then. That's what  
24 you're saying by an end-run.

25 MR. WALSH: Yeah - - - yes, Your Honor.



1 JUDGE FAHEY: All right, yeah.

2 MR. WALSH: And - - - and - - - and what will  
3 happen is, you'll get into the end of November, and the  
4 board of elections will certify one winner, and now you've  
5 got a certified winner, that is going to be presented as  
6 that's the - - -

7 JUDGE FAHEY: So - - - so - - - so a party could  
8 conceivably have blown their opportunity to go into court  
9 under the Election Law to challenge the election, but could  
10 then get the information regarding the election under FOIL.  
11 But let's say that's true. Let's just speculate. So  
12 that's true; that happens. Somebody else is in the seat.  
13 You lose. Tough luck, you blew the - - - it happens all  
14 the time in the Election Law. You blew - - - you blew the  
15 statute of limitations; you don't get it.

16 So then somebody brings a FOIL action, and they  
17 say, well, I might be able to not challenge his seating,  
18 but I want everybody to know they didn't win the election.  
19 I won the election, and here's these three ballots, and one  
20 was mismarked or some - - - it - - - it happens,  
21 particularly in minor party cases.

22 Why is that wrong? Why shouldn't we allow that?

23 MR. WALSH: It erodes the public confidence in  
24 our elections, and it erodes the public confidence in  
25 government.



1 JUDGE FAHEY: Well, here's - - - here's - - -  
2 here's a rule.

3 MR. WALSH: The people - - - you have - - -

4 JUDGE FAHEY: Truth doesn't erode anything. It's  
5 mistruths that - - - that erode things. So if the truth is  
6 that - - - that the election is undermined by a fact that's  
7 in contest, then that fact should be out there. And the  
8 next time, whoever's running, and those two people will  
9 have to deal with it, whatever it is.

10 But I thought the integrity of the ballot issue  
11 was the more compelling issue from your point of view,  
12 which is that if - - - if access to these things are being  
13 given out before, as Mr. Ferebee said, before the number of  
14 - - - in a challenged election, the number of recounts are  
15 complete, whether they're absentee, special elections,  
16 military ballots, or in the case of the three percent that  
17 you're looking at, if the elections say within a hundred  
18 votes, then you're doing another recount.

19 And they take long enough so that you could be  
20 within the statute of limitations and also complete under  
21 FOIL as Judge Garcia and Judge Feinman have pointed out.  
22 So that creates an integrity of the ballot issue, and  
23 that's why I'm wondering, shouldn't that process be always  
24 completed before you can FOIL something? That's what I  
25 want you to drive at.



1 MR. WALSH: I - - - I think you have to, Your  
2 Honor, and I think you have to have that completed - - -

3 JUDGE FAHEY: But why? Why - - - why would the  
4 integrity of the ballot be undermined in that position - -  
5 - in that situation?

6 MR. WALSH: Your Honor, it's not only an  
7 integrity of the ballot, but it's the secrecy of the  
8 ballot. It's the secrecy of the ballot and - - - and I'll  
9 come back to - - -

10 JUDGE FAHEY: Well, I - - - I consider those  
11 things the same thing.

12 MR. WALSH: Well, so if - - - to - - - to use the  
13 example that this isn't just for Essex County, this is for  
14 every place. So in Hamilton County, where you have forty  
15 people in - - - in the Integrity Party, and you've got one  
16 person in one ED, and if they show up and vote, you know  
17 how they voted. If - - -

18 JUDGE STEIN: But if - - - but if - - - if the  
19 board of elections can sell these ballots at some point,  
20 then at some point, where - - - whether it's - - - I mean,  
21 and the time frames have changed throughout the years,  
22 throughout this legislative history. It was six months at  
23 some point. But at some point, you can sell it. Then what  
24 is - - - I don't understand what the secrecy means. Once  
25 it's out, it's out, and then everybody knows how you voted,

1 even if it's two years later.

2 MR. WALSH: Okay.

3 JUDGE STEIN: So - - -

4 MR. WALSH: But - - - but Your Honor, I would say  
5 that if we look at the headlines today, we see that - - -  
6 that the - - - the New York Times as well as the Post  
7 yesterday, Governor Cuomo is upset with the New York City  
8 Board of Elections, for releasing data that's personal  
9 data, "an unwarranted invasion into personal privacy",  
10 which is one of those exclusions under FOIL. That just the  
11 data, the name, the enrollment, where they live, and what  
12 their date of birth is, that - - - that the Governor is  
13 saying that's - - - that's personal information; it  
14 shouldn't be released. Now we can go in and get the - - -  
15 the vote.

16 JUDGE STEIN: Was that argued here? Was that  
17 argued here or was that given as a basis for denying the  
18 FOIL request?

19 MR. WALSH: I - - - I don't believe that was  
20 given as a basis for denying, Your Honor. I think what the  
21 basis for the denial was, that this an Election Law matter,  
22 and as an Election Law matter, the - - - the Article 3-  
23 222(1) and (2) says, you can't have access to that. So I -  
24 - - I think I - - -

25 JUDGE RIVERA: I - - - I'm still - - - I'm sorry.



1 I still don't understand this argument that somehow turning  
2 over the digital versions of the ballot - - - that digital  
3 copies of that ballot will reveal what any particular  
4 individual's vote was. Right, when they're scanned,  
5 they're randomized anyway.

6 MR. WALSH: But Your Honor, the ballots have the  
7 town and the election district printed on them. It's  
8 printed there.

9 JUDGE RIVERA: Yeah.

10 MR. WALSH: So in that small party, in the minor  
11 party, where there's two people who vote, and they both  
12 vote for candidate A, you know how both of those people  
13 voted - - -

14 JUDGE RIVERA: I don't - - - I don't - - -

15 MR. WALSH: - - - or if only one person votes - -  
16 -

17 JUDGE RIVERA: I don't understand how the ballot  
18 show that they voted for them. Someone else could have  
19 voted for them. I - - - I'm not - - -

20 MR. WALSH: Because - - -

21 JUDGE RIVERA: You mean, because only two people  
22 voted, is that what you mean?

23 MR. WALSH: - - - in that town and in that  
24 election district, only two people voted.

25 JUDGE RIVERA: Only two people voted and there's



1           only two copies, that's their vote. Is that what you mean?

2                   MR. WALSH: Yes, Your Honor.

3                   JUDGE RIVERA: They're the only two who voted?

4                   MR. WALSH: Correct, or - - - or if you've got  
5           two registered voters and only one shows up and vote, now  
6           you know how they voted. And that secrecy is - - - is the  
7           - - - the thing that what - - - I think we need to protect.

8                   JUDGE FEINMAN: But isn't that already the case.  
9           I mean, I - - - take the Democratic Party in New York  
10          County. That's where I'm from. That's my experience. And  
11          - - - and you got - - - you know, you're petitioning, you  
12          know, for - - - for things like county committee and - - -  
13          and these sort of very, sort of, low, down the ballot  
14          position.

15                   And you get these election districts and you're  
16          trying to seat a county committee and there's a lot of  
17          election districts - - - one registered member of the  
18          Democratic Party or one registered member of the Republican  
19          party. It doesn't really matter. You're still going to  
20          know how that person voted, if you have a contested county  
21          committee race. Now that may not be a common thing; it  
22          happens in New York County.

23                   MR. WALSH: Well, well, I - - - respectfully I'll  
24          disagree, Your Honor, because you're - - - you're insulated  
25          by the pool, because you'll have thousands of people



1 casting ballots, and then you can't track back to how any  
2 one individual went.

3 When you're in a big county like that, you have  
4 thousands of votes cast in an election district - - -  
5 hundreds of votes - - - excuse me, hundreds of votes cast,  
6 but when you're in a small county, and in an upstate county  
7 in the minor parties, you get one person in an election  
8 district. You have 500 people in an election district, 300  
9 people in an election district. Those - - - the - - - the  
10 pool is big enough that you can't tell how any one person  
11 voted in that primary or that election. You - - - you - -  
12 - because it's - - - it's all of the people. But when only  
13 one person votes in the town of Willsboro in the third ED  
14 for the Conservative Party - - -

15 JUDGE RIVERA: Well, I think as Judge Stein  
16 suggested, if you had that kind of a request, with that  
17 kind of a district, maybe you have an argument about  
18 confidentiality, but that's not the argument that was the  
19 basis here.

20 I just want to ask you one more - - - I noticed  
21 the red light has gone on, but I'm circling back to a  
22 question I had for you before about whether or not other  
23 counties actually released them. Are you - - - I thought  
24 in the record there's an affidavit from Douglas Kellner  
25 that - - - as far as he knew - - - counties do turn it





1 over; Essex is the only one that doesn't.

2 MR. WALSH: That - - - that's not true, Your  
3 Honor. In fact, there - - - there are - - - there - - -  
4 there's a split decision, because the Committee on Open  
5 Government has given the advice that you got to release  
6 these. Some commit - - - some counties have; other  
7 counties haven't. And the reason that - - - that - - -  
8 that's an advisory opinion. That's not law; that's not  
9 something that they're required to do.

10 But I think that the - - - the Committee on Open  
11 Government has failed to look at that unwarranted invasion  
12 of personal privacy. Because you - - - you're not just  
13 applying to Manhattan or to the Democratic primary in  
14 Manhattan. You're talking about places where two people  
15 vote, one person votes, four people vote. And if they all  
16 go the same way, you know how they all voted.

17 JUDGE GARCIA: Can you tell a sequence from the  
18 copies? If there's five people who voted, and you get what  
19 you want under this FOIL request, can you tell 1 through 5,  
20 or you don't know that?

21 MR. WALSH: You - - - you - - - you cannot, Your  
22 Honor, because what happens is, that they will jumble the  
23 images, and on - - - but what will happen is, you know  
24 which ED in - - - in the town, so you - - - you will know  
25 if - - - so if two people vote, and one's in one ED and



1 one's in the other ED, you'll know how they both vote. So  
2 again, this isn't something that you really concern about  
3 the - - - the privacy.

4 And I - - - I want to hit one more thing. That  
5 the legislature saw fit to say to election officials, it's  
6 a crime if you figure out how somebody voted and you reveal  
7 that or you - - -

8 JUDGE RIVERA: You could redact it, you know.

9 MR. WALSH: Your Honor?

10 JUDGE RIVERA: You could redact. You could  
11 redact information that might reveal - - -

12 MR. WALSH: You - - - well - - -

13 JUDGE RIVERA: - - - someone's vote.

14 MR. WALSH: I - - - I - - - Your Honor, I'm  
15 talking - - - it - - - it's illegal for an election  
16 official to reveal how somebody votes. When you're - - -  
17 when you're - - - when you're not looking at the ballots on  
18 the machines, we're looking at the absentee ballots, where  
19 we're opening those small universes of one or two ballots  
20 in one ED, and they all go the same way, well, then you  
21 know, because you know who the universe of the people who  
22 voted, if they all voted the same way, we know how they  
23 voted. It's illegal to reveal how they voted. So the - - -  
24 - the legislature has saw fit to ensure that A, you can't  
25 reveal it, and if you do, it's a crime. Thank you.



1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 Counsel?

3 MR. NOVACK: Good afternoon, and happy Law Day.

4 CHIEF JUDGE DIFIORE: Thank you, sir.

5 MR. NOVACK: Daniel Novack for respondent Bethany  
6 Kosmider.

7 I feel like I'm sensing some confusion from the  
8 court on this issue of identifying voters. I have to  
9 confess; I'm extremely confused by this. We have to voter  
10 roll, and we have certified totals. If there's a town with  
11 one person in it, and we know the voter roll, and we know  
12 the vote, we can connect them. This information will not  
13 provide anything new that isn't already completely public.

14 Now if there are smaller - - -

15 JUDGE RIVERA: You mean, that any time anyone  
16 could ask to see the voter roll?

17 MR. NOVACK: Correct, and that's not - - -

18 JUDGE RIVERA: After the election?

19 MR. NOVACK: Correct, and that's not disputed  
20 here.

21 So in - - - my understanding is in towns where  
22 that is a factor, where you have the local, you know, race  
23 that maybe draws one or two voters, period, they often  
24 times will group up with other districts, so that there's  
25 some practical anonymity. FOIL is a flexible law as - - -



1 as one of the points made here was that redaction is a  
2 possibility. These are really extreme scenarios. They're  
3 not really contemplated by the statute, certainly not by  
4 this statute, nor - - - nor by FOIA - - - but FOIL, but  
5 they're certainly workable.

6 What we're looking at here is not that situation.  
7 The vast majority of situations don't even resemble this.  
8 It's true that some jurisdictions are not releasing this  
9 data. Essex County actually released it the year before my  
10 client requested it. In 2014, they saw fit to release it;  
11 in 2015, they unfortunately denied it. New York City  
12 routinely releases this data. So if - - - if anything,  
13 Essex County - - -

14 JUDGE RIVERA: I'm sorry. Those - - - those  
15 examples of Essex County doing it in the past were all  
16 pursuant to a FOIL request?

17 MR. NOVACK: Your Honor, the - - - the record on  
18 this is a little bit fuzzy. My client originally made the  
19 request informally and then they decided to treat it as a  
20 FOIL request. So I'm not certain the mechanics of how they  
21 viewed it in 2014, but it was tantamount to a FOIL request.  
22 In fact, the same individual, who had successfully  
23 petitioned for it in 2014, asked again in 2015, and was  
24 denied. So Essex County has recently come to the view that  
25 this is not releasable, certainly - - -



1 JUDGE RIVERA: They released it in 2014, and was  
2 that the only year?

3 MR. NOVACK: I don't know if it had gone out in  
4 years prior, but I know it's in - - - certainly in the  
5 record that it had gone out in 2014, and then it was  
6 subsequently denied in 2015.

7 The parade of horrors that has been suggested  
8 has never come to pass. We're not living in a status quo,  
9 where Ms. Kosmider's seeking to overturn the state's  
10 interpretation. In fact, we're just trying to clarify for  
11 the outlier counties that are not routinely releasing this,  
12 or inconsistently releasing it.

13 If I could get to the - - - the core issue here  
14 of the purpose of the statute, animating it. I think  
15 that's the most important question. Judge Stein pointed to  
16 the title of the - - - of the statute, whose title is  
17 "preservation of ballots and records of voting machines."  
18 Nothing about secrecy; nothing about confidentiality.

19 The bill jacket memorandum says that it was de -  
20 - - the - - - it was occasioned to adapt the law "to  
21 reflect the change from mechanical lever voting systems to  
22 the new electronic voting systems" and to establish  
23 "procedures designed to ensure that election data recorded  
24 on the new voting systems are safeguarded and protected  
25 throughout the tabulation process." The legislative intent

1 is plain as day. It's on - - - it's in the bill. It's in  
2 the title. There's nothing about confidentiality.

3 Now, as to - - -

4 JUDGE WILSON: If it would be - - - if it would  
5 be purely public, then what sense do we make of the court  
6 order provisions?

7 MR. NOVACK: Well, that - - - where that applies  
8 for an extremely limited duration.

9 Now, nowhere in the - - -

10 JUDGE WILSON: Yeah, but doesn't that imply some  
11 measure of confidentiality?

12 MR. NOVACK: It's not - - - it's - - -  
13 confidentiality is - - - is a byproduct of the protection  
14 of these ballots. Now until the machine - - - the - - -  
15 the memory card is removed. It's - - - and - - - and per,  
16 I believe it was Judge Rivera's question, procedures, those  
17 procedures are referenced in respondent's brief. It's  
18 Election Law, I believe, 9 - - - excuse me - - - 9-106.

19 Throughout the - - - throughout the procedures,  
20 they do differentiate between - - - the voted ballots and  
21 the memory card.

22 JUDGE FAHEY: Well, what - - - what's - - - to go  
23 back to Judge Wilson's question - - -

24 MR. NOVACK: Sure.

25 JUDGE FAHEY: - - - what's - - - what's the



1 purpose of the two-year rule in your mind?

2 MR. NOVACK: It's that - - -

3 JUDGE FAHEY: You got to go to court for two year  
4 - - - within two years to get it - - - to get it, and you  
5 got to get a court order to see the ballots.

6 MR. NOVACK: The ballots - - -

7 JUDGE FAHEY: It doesn't say electronic ballots;  
8 it doesn't - - - it says voted ballots. So what do you got  
9 to - - - well, what's the purpose of it?

10 MR. NOVACK: The - - - the purpose is the  
11 security of those paper ballots. The paper ballots are the  
12 backstop of our elections.

13 JUDGE FAHEY: Well, you say the security of paper  
14 ballots. What if we just said the security of the ballot,  
15 period?

16 MR. NOVACK: Well, the ballots are still secure.  
17 There's nothing - - -

18 JUDGE FAHEY: Well, I understand the argument,  
19 but - - - but - - -

20 MR. NOVACK: Sure.

21 JUDGE FAHEY: - - - but for disclosure purposes,  
22 it matters under FOIL, not - - - not so much in any other  
23 context. We can - - - we can create secure ballots and  
24 still disclose them. The question is, is it required. So  
25 first two years, ballots have to be secured. Why would we

1 give a greater security to paper ballots than to electronic  
2 ballots?

3 MR. NOVACK: Because, Your Honor, the paper  
4 ballots can't be reproduced freely with a click of a  
5 button. They have to sit in that lockbox, so they are  
6 protected from loss or tampering.

7 JUDGE RIVERA: Well, there's only one ballot.  
8 You have copies, but there is only one ballot.

9 MR. NOVACK: Correct, Your Honor.

10 JUDGE RIVERA: I only touch one thing when I go  
11 to vote.

12 MR. NOVACK: Correct, Your Honor. And so the  
13 memory card, once it's been uploaded, the procedures state  
14 that it'll be put in a sealed envelope. It'll go to the  
15 county board of elections. It gets put onto a hard drive.  
16 Your Honor is correct; it goes on a hard drive. And there  
17 is sits. Once that has been - - -

18 JUDGE WILSON: Would you - - - would you agree  
19 that the voted ballots is meant to distinguish vote - - -  
20 blank ballots essentially that haven't been voted? Is that  
21 what was meant by voted ballots?

22 MR. NOVACK: Your Honor, the way that the  
23 procedures and the law talks about voted ballots, it's  
24 clear they're talking about the - - - the paper ballots  
25 that have been filled out by voters. They talk about





1 putting them - - - voted ballots going into boxes where  
2 they'll be sealed against reuse. The memory cards are  
3 provided for - - -

4 JUDGE WILSON: How many ballots are there that  
5 are - - - voted?

6 MR. NOVACK: Your Honor - - -

7 JUDGE WILSON: Plenty, no?

8 MR. NOVACK: Sure, Your Honor, I - - - I believe  
9 the other - - - the statutes reference other types of  
10 ballots that haven't come in, like absentee, military,  
11 special federal, or special - - -

12 JUDGE FAHEY: Yeah, but those are all voted  
13 ballots.

14 JUDGE WILSON: Those are voted, aren't they?  
15 Yeah.

16 MR. NOVACK: They're - - - they're not in - - -  
17 they - - - they don't possess them in that moment,  
18 necessarily.

19 JUDGE FAHEY: No, but they are voted ballots.  
20 There are blanks that are filled in in each one of those.  
21 It's a question of when they get counted.

22 MR. NOVACK: Correct.

23 JUDGE RIVERA: What about ballots that someone  
24 makes a mistake on and gets canceled out. What is that  
25 considered? A voted ballot or something else?



1 MR. NOVACK: So I - - - I think it - - - it's - -  
2 - it would be useful to understand the difference between  
3 how the - - - how these ballot images are being  
4 characterized by opposing counsel and what they really are.  
5 These are not merely copies of the - - - of the ballots.  
6 They're not like a - - - a pure photocopy.

7 They are actually a - - - the - - - as they come  
8 through the machine, they are scanned, and then they are  
9 digitally watermarked, with a "cast vote record" is what  
10 it's called. That digital watermark tells the election  
11 authorities how the machine interpreted the result. So  
12 whether it was rejected because of an extraneous mark, they  
13 didn't fill out the bubbles correctly, et cetera, or in  
14 which case, it was filled out correctly, which candidate  
15 the machine believed was voted for.

16 So there actually are - - - are not the same, and  
17 therefore the - - - the reasons why you would want them, go  
18 beyond simply photocopying a ballot. Doesn't - - - it  
19 doesn't tell you - - - photocopying a ballot, which my  
20 client is not attempting to do here, would only tell you  
21 what the ballot looks like. It wouldn't help you to  
22 understand how the machines are working.

23 As I referenced in the brief, there are lots of  
24 reasons to want to look in things. You could have a purely  
25 academic purpose of wanting to see vote splitting



1 behaviors. I referenced one - - - one article in  
2 particular that looked at that.

3 You could also want to know whether or not the  
4 error rate in the machines is unacceptably high. These  
5 machines are understood to have an error rate. It is  
6 small, but in a close election, it might be the difference  
7 between understanding, you know, whether or not it should  
8 have gone into that manual recount territory. You could  
9 also want to know whether or not there was tampering.

10 So there's a lot of reasons to want to see these  
11 data. Frankly, under FOIL, it's irrelevant. You can look  
12 at them for any good reason or a bad one and the argument  
13 that finality would be undermined or that it would be an  
14 end-run - - - it simply doesn't track. We have a separate  
15 set of procedures for challenging elections. My client is  
16 not challenging the 2015 election. We're way past the - -  
17 - the range where that would be appropriate. There's a  
18 separate statute of limitations that would reflect that.

19 JUDGE FAHEY: Well, that was what Judge Garry  
20 said at the Appellate Division, if I understood her  
21 correctly. She basically said the two years are up. They  
22 should have the ballots anyway.

23 MR. NOVACK: Your Honor, I believe that  
24 concurring - - -

25 JUDGE FAHEY: Judge Aarons.



1 MR. NOVACK: That's right. So Your Honor, I  
2 believe that concurring opinion, while it agreed that the -  
3 - - with - - - with the majority, that these are  
4 disclosable and that there's a separate tracking  
5 legislatively for the voted paper ballots and the - - - the  
6 data that is on a - - - on memory cards or hard drive, that  
7 she didn't need to decide whether - - - go into issues of -  
8 - - of - - - definitionally of how long things have to be  
9 held onto and such.

10 So it's a little bit of a - - - of a side issue.  
11 Frankly the important issue here is - - -

12 JUDGE RIVERA: Well, but the - - - the problem  
13 is, as - - - as they argue it, the statute doesn't mandate  
14 that they turn it over after two years anyway. It would  
15 still have been a voluntary choice on their part, and  
16 they've chosen not to, or they could choose not to.

17 MR. NOVACK: For the paper ballots, for sure,  
18 certainly. And - - - and that's - - -

19 JUDGE RIVERA: No, I'm saying with respect to the  
20 concurrence. The two-year issue is one that they say, I  
21 assume they're saying, it doesn't matter, because they  
22 don't have to turn it over.

23 MR. NOVACK: And - - - and to the extent that  
24 that - - - this raises issues of mootness, it's just - - -  
25 it's not appropriate here, because first - - - it's - - -



1 it's taken years to get to this point. This is a very live  
2 issue. There's a number of counties that are looking to  
3 this court - - -

4 JUDGE RIVERA: She requested it within the two  
5 years?

6 MR. NOVACK: Yes, Your Honor.

7 JUDGE STEIN: Would you - - - would you just  
8 address the - - - the concern that's been raised here about  
9 being able to access these digital images before the  
10 tabulation process is complete?

11 MR. NOVACK: Yes. So I think there's a very  
12 elegant response to this, which is that FOIL has a five-day  
13 rule. You make your request; you get it in five days. So  
14 there's plenty of time for the board of elections to walk  
15 the memory card over to the appropriate computer and upload  
16 it.

17 There's - - - the - - - the period that the - - -  
18 that the legislature was concerned about was literally upon  
19 taking the memory card out, and inputting into it. That  
20 process, the record reflects, is only supposed to take - -  
21 - it's supposed to happen the same day. So it's - - - it's  
22 - - - you can't really realistically get up in front of it.  
23 Now, if that was ever a concern, the - - - the - - - the -  
24 - -

25 JUDGE STEIN: But that might be - - - but so then



1 under your interpretation, the image might be available,  
2 though, before the canvassing and recanvassing and all that  
3 happened. That was - - - that was what - - -

4 MR. NOVACK: That - - - that certainly could be  
5 possible, if that - - - if that process - - -

6 JUDGE RIVERA: And is that - - -

7 MR. NOVACK: - - - plays out.

8 JUDGE RIVERA: Why isn't that a concern?

9 MR. NOVACK: I - - - I think it's the opposite of  
10 a concern. It's wonderful for our democracy that we'll  
11 have more information, not less. If - - - if it turns out  
12 that this information - - -

13 JUDGE GARCIA: Does that make an end run around  
14 that whole process about going to a judge, and having a  
15 judge look at whether you're entitled to access that? If  
16 you can just FOIL it in five days, then anybody can just  
17 bring an action, why would you ever go to Supreme Court?  
18 Why wouldn't you just FOIL everything?

19 MR. NOVACK: Presumably, you'd only be able to  
20 bring an action if you found an actual irregularity.

21 JUDGE GARCIA: Right, but isn't that process now  
22 set up so that it goes through a Supreme Court judge?

23 MR. NOVACK: It - - -

24 JUDGE GARCIA: Now you'll just FOIL. Why would  
25 you ever go to a Supreme Court judge? You'll just FOIL.



1 MR. NOVACK: So to - - - to - - - to answer that  
2 question, I would - - - I would sort of invert that. I  
3 think it's wonderful that people will actually go into  
4 these processes knowing what's on the data, rather than  
5 have to have to blindly go in there. This will act as an  
6 important gatekeeping function, if anything, because people  
7 will have the answer before they have to go to court and  
8 allege some sort of nebulous, you know, concerns of what -  
9 - - what happened.

10 JUDGE STEIN: You're not saying that applies to  
11 the paper ballots?

12 MR. NOVACK: No, Your Honor. This is only - - -  
13 this - - - this is - - - again, just to reemphasize - - -

14 JUDGE RIVERA: You're only going to go into court  
15 after you know what the results are.

16 MR. NOVACK: Why would you go in - - -

17 JUDGE RIVERA: If the results align with what you  
18 think the - - - the digital copies show, what would be the  
19 point of it?

20 MR. NOVACK: Precisely, Your Honor. If there's  
21 no more questions, I think that's it.

22 CHIEF JUDGE DIFIORE: Thank you.

23 MR. NOVACK: Thank you.

24 MR. NOVACK: Counsel?

25 MR. WALSH: Thank you, Your Honor.



1                   Your Honor, to respond to two points. The - - -  
2                   the FOIL is a mechanism - - -

3                   JUDGE RIVERA: Did the - - - were the ballots  
4                   turned over in 2014? I just want to make that - - -

5                   MR. WALSH: Excuse me, Your Honor?

6                   JUDGE RIVERA: Were the copies of the - - -  
7                   digital copies were turned over in 2014? There seems to be  
8                   a little uncertainty.

9                   MR. WALSH: They were turned over, Your Honor.  
10                  And they were - - -

11                  JUDGE RIVERA: Is that the only time?

12                  MR. WALSH: They were turned over relying upon  
13                  the opinion from the Committee on Open Government, without  
14                  a review of what the Election Law was, which was 3-222.

15                  JUDGE RIVERA: But was that - - - is that the  
16                  only time?

17                  MR. WALSH: Yes, Your Honor. That was the only  
18                  time.

19                  JUDGE RIVERA: Thank you.

20                  MR. WALSH: So I think that I - - - the - - - the  
21                  issue that I think the court is - - - and I'd - - - I'd ask  
22                  the court to consider - - - is that the legislature has saw  
23                  fit to say, the only way you have access to examine these  
24                  ballots is by order of a competent - - - a court of  
25                  competent jurisdiction.





1           The only court of competent jurisdiction that has  
2           the ability to preside over a canvass or recanvass or look  
3           at ballots is the Supreme Court of this - - - according to  
4           Election Law Section 16. So the only way you get access to  
5           the ballots is by coming to court and getting an order.  
6           You have to institute a special proceeding to ask the judge  
7           for that.

8           I was denied looking at the ballots when I asked  
9           Judge Reilly in Schenectady County in the Supreme Court  
10          matter, because he said I didn't make a showing. And what  
11          happens is, the - - - the regulations and rules of the  
12          state board of elections tell commissioners, you do a  
13          three-percent audit. If three percent of your machines,  
14          the votes tally what the machines says they tally, you're  
15          done. If you see there's discrepancies, then you do a five  
16          percent audit. You expand the audit to more.

17          The cases where courts have ordered the - - - the  
18          ability for the parties to get to look at the ballots have  
19          only been in places where there were discrepancies. They  
20          said upon the three percent, there was a problem. Upon the  
21          five percent, there was a problem. We're going to look at  
22          everything, because we're not sure about the system, and  
23          the accuracy of the system.

24          So that a court order is required to get to those  
25          ballots and look at it. I think the dissent in the Third



1 Department got it right that these ballots require court  
2 order. The reason they require court order is because the  
3 legislature wants to protect that data - - -

4 JUDGE RIVERA: Yeah, but - - - that's what I'm  
5 saying. You'd still have to satisfy that process. So I  
6 get the copy of - - - I request it through FOIL. I get the  
7 copies. You're still doing the count. Why - - - why am I  
8 going to go to court? I don't know what the count is. I  
9 don't know what position has been taken yet on the results.

10 MR. WALSH: Your Honor, you do, because they  
11 release election night the results of what they believe the  
12 machines say.

13 JUDGE RIVERA: Yes, but until they're formal, I -  
14 - - and I don't know if there's an audit that's going to be  
15 done or anything else, right?

16 MR. WALSH: Well, we - - - we - - - and - - - and  
17 we have time frames that are set up under the Election Law  
18 to do that. We wait - - - we don't canvass, generally  
19 speaking, the - - - the military ballots or the - - - the -  
20 - - many times the - - - the - - - the other absentee  
21 ballots - - -

22 JUDGE RIVERA: That's what I'm saying. Wouldn't  
23 it be premature? Wouldn't I get thrown out of court if I'm  
24 going in when there's not yet a determination as to the - -  
25 - the - - - the final results of the election?



1 MR. WALSH: Your Honor, I've - - - I've gone into  
2 court the day before the election when I've got polling  
3 data that says on a statewide race that you're within plus-  
4 or-minus one - - - one percent on a statewide race. Courts  
5 have ordered for everything to be impounded so we can go  
6 slow and we can sort it out, and if we're wrong, we  
7 withdraw, but if we're not wrong, we want to have it - - -

8 JUDGE RIVERA: Okay. So if you can do that based  
9 on that information, why wouldn't someone be able to do  
10 that based on digital images that might be even better than  
11 what you got?

12 MR. WALSH: Your Honor, that - - - that - - - I'm  
13 not ask - - - I'm - - - I'm talking about a - - - a  
14 securing over the race in general. That's - - - I'm not  
15 getting an order to look at the ballots. You don't get an  
16 order to look at the ballots. You rarely have I - - -  
17 rarely does the Supreme Court order, that we get to look at  
18 the ballots. And the legislature said the only way you  
19 look at the ballots is when the Supreme Court orders it.

20 It's not by FOIL; it's by the order of the court,  
21 and I think that's really what - - - what - - - what's  
22 important here, and that's the public policy. The - - -  
23 the full disclosure - - - what - - - what the FOIL says you  
24 let people see transparency in government. The secrecy of  
25 the ballot, protecting the ballot, the legislature has



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said, by court order, you get to see the ballots.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. WALSH: Thank you, Your Honor.



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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of In the Matter of Kosmider v. Whitney, No. 41 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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