UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY OF NEW YORK STATE and WORKING FAMILIES PARTY,

Plaintiffs,

-against-

NEW YORK STATE BOARD OF ELECTIONS; JAMES A. WALSH, DOUGLAS A. KELLNER, EVELYN J. AQUILA, and GREGORY P. PETERSON, in their official capacities as Commissioners of the New York State Board of Elections; TODD D. VALENTINE and ROBERT A. BREHM, in their official capacities as Co-Executive Directors of the New York State Board of Elections

Defendants.

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10 Civ. 6923 (JSR)

REPLY DECLARATION OF DANIEL CANTOR

DANIEL CANTOR declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Executive Director of the Working Families Party, a Plaintiff in the case. I submit this reply declaration in further support of Plaintiffs' motion for a preliminary injunction, and specifically to respond to Defendants' argument that we engaged in inexcusable delay in bringing this lawsuit. *See* Opp. Br. at 24-25.

2. I first became concerned about how the Board of Elections counted double-votes when I began to consider the implications of the new paper ballot, to be used with the new optical scanner machines, in the beginning of summer of 2010. I had not previously thought about this issue because the old lever voting machines did not

physically allow a voter to pull two levers for any office, even two levers for the same candidate, and the small number of people voting by absentee or affidavit ballot was not significant enough to trigger any concern.

3. The governing statute, New York Election Law § 9-112(4), does not clearly explain how the State treats double-votes. Indeed, the second sentence of this provision is a garbled mess that does not appear to even make grammatical sense. Granted, I am not a lawyer, but I doubt that even a trained lawyer could be confident in his or her understanding of what this provision means.

4. On or about July 23, 2010, I called the State Assembly and eventually spoke with Kathleen O'Keefe, a member of the Assembly's central staff and a specialist in election law. During our first conversation, she told me that double-votes were not counted for either party.

5. A few days later, however, Ms. O'Keefe called me back and told me that she had to revise the answer that she had given me. She then explained that although the statute said that double-votes should not be counted for either party, the Board of Elections' "custom" was to count double-votes only for the major parties.

6. I was extremely surprised by Ms. O'Keefe's explanation, as I could not believe that the Board would adopt such a patently discriminatory policy and blatantly violate the statute.

7. I also tried to get more information from the Board of Elections. I eventually spoke with Douglas Kellner, a Co-Chair of the Board of Elections, and a named Defendant in this action. I related to Mr. Kellner what Ms. O'Keefe had

explained to me. Mr. Kellner insisted that Ms. O'Keefe was wrong and that he was certain that double-votes were not counted for either party.

8. Several days later, however, Mr. Kellner called me back and told me that he had looked into the matter further and determined that the statute required double-votes to be counted only for the major parties, but that I should not be concerned because he was not familiar with any instances of double-voting in past elections. Mr. Kellner could not, however, address my concern that the number of double-votes would be significantly greater in this election because of the new optical scanner machines.

9. By this time, I was extremely confused about what the law on double-votes was and about how the Board was applying that law. I decided that it was necessary to seek to seek legal advice on this matter, and I approached the Brennan Center for Justice to ask them to investigate the Board's double-vote policy and, if necessary and appropriate, to commence litigation on my party's behalf.

10. I understand from my attorneys that they then researched the issue, including by reaching out to various public officials to determine what the operative double-vote policy is, and by attempting to determine if there is any legislative history shedding light on the meaning of the very confusing language in New York Election Law § 9-112(4). The Brennan Center also informed me that, as a relatively small non-profit organization, they could not agree to commence litigation on this issue unless a qualified law firm was willing to serve as co-counsel and to take the lead in bringing the case. It took several weeks for the Brennan Center to secure the agreement of Emery Celli Brinckerhoff & Abady LLP to join the case.

11. After my attorneys had conducted the necessary background research to determine that we had a constitutional claim, and after they had secured the assistance of co-counsel Emery Celli Brinckerhoff & Abady LLP, we promptly filed the instant lawsuit.

12. I understand from my attorneys that, after we commenced this lawsuit and served Defendants on or about September 14, 2010, more than two weeks elapsed before an initial conference was held due to Defendants' delay in securing counsel and making themselves available to set a briefing schedule.

13. I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
October 13, 2010

DANIEL CANTOR