

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY, by MIKE LONG,  
its Chairman, and PAUL ATANASIO, its  
Treasurer; WORKING FAMILIES PARTY,  
by ROBERT P. MASTER, its Chairperson,  
DANIEL CANTOR, its Executive Director,  
and DOROTHY SIEGEL, its Treasurer; and  
TAXPAYERS PARTY, by DAVID NEZELEK  
and RUS THOMPSON,

10 Civ. 6923 (JSR)

Plaintiffs,

-against-

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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**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW**  
**IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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Plaintiffs respectfully submit this supplemental brief in response to two issues that were raised for the first time at the January 31, 2011 oral argument on Defendants' Motion to Dismiss the Complaint. Both questions relate to Plaintiffs' proposed remedy of requiring Defendants to (a) provide voters with notice and a meaningful opportunity to correct double-votes; and (b) use a counting rule that does not discriminate against minor political parties for any remaining double-votes. (*See* Second Am. Cplt., Prayer for Relief.)

### **I. Plaintiffs' Proposed Remedy Does Not Raise Privacy Concerns**

At the hearing, the Court asked whether a remedy requiring New York's voting systems to notify voters of double-votes and to return double-voted ballots for correction would raise privacy concerns by causing voters to show their completed ballots to poll workers. Voters will not need poll worker assistance to understand why their ballots are returned if the machines are configured to clearly notify affected voters that they voted for a candidate on more than one party line in the contest in question, and that the ballot will be returned so that the voter can correct it, by selecting the candidate on only one party line for that contest. As Plaintiffs allege in their Second Amended Complaint (¶ 63), New York's voting systems are capable of being programmed to so notify voters; indeed, the machines are currently required to similarly notify voters of an error in the case of an over-vote. (*Id.* ¶ 59.)

### **II. Plaintiffs' Proposed Remedy Would Not Lead to Long Lines at the Polls**

At the hearing, Defendants speculated that a remedy notifying voters of double-votes and providing them with an opportunity to correct their ballots would lead to long lines at the polls. Defendants are mistaken. While the Complaint alleges that there were and will continue to be a significant number of double-votes in New York elections (*see* Second Am. Cplt. ¶¶ 45-51), the alleged number ranges from approximately 0.718% to 4.35% of all votes cast. At most, therefore, Plaintiffs' remedy would cause between 1 in 140 voters and 1 in 25 voters to be asked to correct their ballots.<sup>1</sup> While either of these numbers would produce many double-votes statewide, neither should lead to substantially longer lines in any one polling place. More importantly, it cannot be the case that Defendants have a legitimate interest in ensuring that voters do not properly cast ballots so as to reduce the length of lines at the polls.<sup>2</sup> In any event,

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<sup>1</sup> Those who do not wish to correct their ballots would not lose their votes; they could submit double-voted ballots, as is typically done across the country in the case of over-votes. Under New York law, even if the machines are programmed to return double-voted ballots and a voter leaves the polling place without correcting the ballot, the ballot must still be hand-counted in all contests where the voter's intent can be discerned. *See Stewart v. Chatauqua County Bd. of Elections*, 14 N.Y.3d 143, 149 (2010).

<sup>2</sup> Contrary to Defendants' contention, the ballot does not instruct voters not to double-vote, nor does it inform them of the consequences of doing so. The words "mark in *one of the squares*" to the right of a candidate's name appear nowhere on the ballot or in § 7-106 of New York's Election Law (which lays out the requirements for paper ballots cast in the polling place). The instructions "vote for one" and "vote once" on a ballot do not adequately warn voters against double-voting. A reasonable voter could understand those instructions to mean, for example, that they should vote for one candidate on as many party lines as they wish. Such an interpretation is reinforced by the mandated over-vote instruction, which separately provides: "If

because the standard of review is not rational basis, Defendants must do more than simply posit a hypothetical government interest that *might* justify avoiding a particular remedy. *Cf. Price v. New York State Bd. of Elections*, 540 F.3d 101, 110-11 (2d Cir. 2008) (rejecting State's justification for law imposing minor burden on plaintiffs).

**Conclusion**

Accordingly, Plaintiffs respectfully submit that Defendants have no legitimate, let alone compelling, interest in avoiding Plaintiffs' proposed remedy of requiring Defendants to notify voters that they have double-voted and providing them with a meaningful opportunity to correct their ballots. In addition, regardless of whether there is notice and opportunity to correct double-voted ballots, Defendants raise no significant objections to Plaintiffs' proposed remedy of selecting a counting rule for any remaining double-voted ballots that does not discriminate in favor of major political parties.

Dated: New York, New York  
February 3, 2011

Respectfully submitted,

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you select a greater number of *candidates* than there are vacancies to be filled, your ballot will be void for that public office, party position or proposal.” § 7-106 (6) (emphasis added).