UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY OF NEW YORK STATE, WORKING FAMILIES PARTY, and TAXPAYERS PARTY OF NEW YORK,

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)

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

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Plaintiffs respectfully submit this memorandum of law in opposition to Defendants' motion to dismiss the Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Defendants have now abandoned their untenable arguments that they are entitled to sovereign immunity and that they are not acting under color of state law. Instead, Defendants seek to erect two new procedural roadblocks to adjudicating the constitutionality of their double-vote rule – capacity and standing – neither of which entitles them to dismissal at the pleading stage. On the merits, Defendants continue to ignore and mischaracterize controlling precedent, including both the case law establishing the substantive constitutional principles that govern as well as the standard of review under which they must be applied. Most critically, Defendants ignore two indisputable propositions of law that are controlling here: that the First Amendment and the Equal Protection Clauses protect the right to have one's votes counted fully and accurately, regardless of the effect of the votes on the outcome, and that they prohibit discrimination against minor political parties absent a compelling state justification. Defendants' motion should be rejected, and this lawsuit should proceed to discovery.

FACTS

New York Election Law § 1-104(b) defines a "party" as "any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor." Whether a political party achieves full-fledged "party" status is important because only full-fledged "parties" are guaranteed placement on the ballot. Parties that did not reach the 50,000 vote threshold in the most recent gubernatorial race are considered "independent bodies" that must go through the labor- and cost-intensive process of submitting nominating petitions to place candidates on the ballot. N.Y. Election Law §§ 1-104(b), 6-138.

The number of votes that a party receives in a gubernatorial election is also important because it determines the order in which the parties will appear on the ballot for the next four years. *See* N.Y. Election Law § 7-116. For these two reasons—ballot access and ballot order—it is imperative that the State fairly and accurately count and report the number of votes cast for each political party in a gubernatorial election. Am. Cplt. ¶¶ 5, 32-33.

Even with respect to non-gubernatorial elections, it is imperative that the State fairly and accurately count and report the number votes cast for each political party. It is crucial for political parties—especially minor political parties such as the Plaintiffs—to obtain fair and accurate measures of the support that they receive in each election in order to facilitate their ability to attract new candidates and members, to raise money effectively, to advance their agendas, and to plan and strategize for future elections. *Id*. ¶¶ 4, 26-31.

Voters themselves, including Plaintiffs' members and supporters, also have a fundamental right to have their intended votes counted and reported fairly and accurately. Those voters who have expressed their intent to support a minor political party, but for whatever reason have also checked the name of the same candidate on another party line, are entitled to have their support for a minor party tallied and/or to be informed and provided an opportunity to correct an improper double-vote. *Id*. ¶ 34.

New York Election Law § 9-112(4) addresses what happens when a voter votes for a candidate on more than one party line for the same office:

> If, in the case of a candidate whose name appears on the ballot more than once for the same office, the voter shall make a cross X mark or a check V mark in each of two or more voting squares before the candidate's name . . . only the first vote shall be counted for such candidate. If such vote was cast for the office of governor, such vote shall not be recorded in the tally sheet or returns in a separate place on the tally sheet as a vote not for any particular party or independent body.

The Board of Elections has interpreted this provision to require that, in both gubernatorial and non-gubernatorial elections, when a voter votes for a single candidate on more than one party line, the "first" party on the ballot receives credit for the vote, and the party appearing lower on the ballot receives no credit whatsoever:

> If a ballot is marked in each of two or more target areas or sensitive areas for a candidate whose name appears on the ballot more than once for the same office, and the total number of votes cast for such race for different candidates does not exceed the number for which he or she is lawfully entitled to vote, only the first votes for such candidate with multiple markings shall be counted for such candidate.

9. N.Y.C.R.R. § 6210.13(a)(7) . In other words, the more powerful party receives all of the credit, and the less powerful party receives none of the credit. Am. Cplt. ¶ 24.

When the State's new optical scanner voting machines detect that a voter has voted for the same candidate on more than one party line, the machines do not provide the voter with any warning that, contrary to the voter's intent, her vote is going to be credited *only* to the "first" party (typically the Democrats or the Republicans). *Id*. ¶¶ 9, 48-53.

Indeed, the paper ballots themselves do not even warn voters about the treatment of double-votes. Election Law § 7-106(5) spells out the "ballot instructions" that must be printed on each ballot "in heavy black type." Subsection (6) requires ballots to expressly warn voters not to *over-vote* (that is, to vote for more than one candidate for a given office, as opposed to voting for a single candidate on multiple party lines), and to explain in detail that a vote will not be counted if the voter votes for "a greater number of *candidates* than there are vacancies to be filled." N.Y. Election Law § 7-106(5)(6) (emphasis added). However, no such warning is required to be provided with respect to *double-voting*, and none is provided.

Until 2010, the Board's practice of automatically crediting double-votes to the "first" party had little practical significance to Plaintiffs because the vast majority of all votes

were cast on lever voting machines, which did not physically allow a voter to vote for a single candidate on more than one party line. If a voter pulled the lever for Eliot Spitzer on the Democratic line, the machine physically prevented her from also pulling the lever for Eliot Spitzer on the Independence or Working Families Party lines. Am. Cplt. ¶¶ 6-7, 35.

Last year, however, the State introduced new optical scanner voting machines. Under this new voting system, a voter now casts her vote by filling out bubbles on a paper ballot, which are then run through and counted by an optical scanner. Because these new scannable paper ballots do not physically prevent a voter from double-voting for a single candidate on more than one party line (unlike the lever machines), there undoubtedly were more double-votes in the recent election than in any election in the State's history. Am. Cplt. ¶¶ 8-9, 36. This new voting system, coupled with the State's practice of crediting double-votes only to the "first" party without meaningfully warning voters, presents a grave threat to minor political parties such as Plaintiffs. Am. Cplt. ¶¶ 25-34, 41-43, 57.

The practice challenged here is particularly suspect because it is self-serving. Democrats and Republicans in the legislature enacted section 9-112(4), and those parties control the Board of Elections. These dominant parties have little incentive to protect the votes intended to be cast for minor parties. Their failure to provide double-voters with any notice or opportunity to correct their ballots, and their insistence that double-votes be credited entirely to the more powerful party, serves to stifle political competition and ensure a perpetual duopoly over the political process in New York. Am. Cplt. ¶¶ 10, 54, 59.

STANDARD OF REVIEW

On a motion to dismiss, the Court must assume that all of the facts alleged in the Amended Complaint are true, construe those facts in the light most favorable to Plaintiffs, and

draw all reasonable inferences in favor of Plaintiffs. *See Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 169 (2d Cir. 2009); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 115 (2d Cir. 2008); *U.S. Bank Nat. Ass'n v. Ables & Hall Builders*, 582 F. Supp. 2d 605, 606 (S.D.N.Y. 2008) (Chin, J.).

ARGUMENT

I. PLAINTIFFS DO NOT LACK CAPACITY OR STANDING

A. Plaintiffs Have Capacity

Defendants argue that this suit could only be brought on behalf of the unincorporated political associations that actually appear on the ballot, and that the fact that Plaintiffs claimed to be non-for-profit corporations means they lack capacity to maintain this action. Def. Br. at 3-4. Defendants are wrong for a variety of reasons.

First, Defendants waived this argument by failing to raise it in their prior motion to dismiss the initial Complaint. Rule 9(a)(2) of the Federal Rules of Civil Procedure requires a defendant challenging a plaintiff's capacity to do so "by a specific denial," and Rules 12(g)(2) and (h)(1)(A) provide that certain defenses are waived if not raised in an initial Rule 12 motion to dismiss. Applying these rules, courts and commentators have concluded that the failure to raise a lack of capacity defense in an initial Rule 12 motion constitutes a waiver of that defense. *See*, *e.g*., *Pressman v. Steinvorth*, 860 F. Supp. 171, 176-77 (S.D.N.Y. 1994) (Carter, J.); *Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor*, *Inc.*, 929 F.2d 343, 345-466 (7th Cir. 1991); 5A Fed. Prac. & Proc., Civ. § 1295 (3d ed.) (the "better conclusion" is that "an objection to a party's capacity" is "treated as waived if not asserted by motion"); 2A Moore's Federal Practice ¶ 9.02 ("failure to raise the issue of capacity by a direct negative averment results in a waiver of the defense").

Second, even if this defense were not waived and had merit, Plaintiffs should at the very least be allowed to amend their pleading to assert their claims on behalf of the unincorporated associations that Defendants assert are the proper parties. Doing so would merely require that the words "unincorporated association" be substituted for "domestic not-for-profit corporation" in Paragraphs 11 and 12 of the Amended Complaint, and that the words "New York" and "of New York State" be deleted from Paragraphs 11 and 13 and from the caption. Given that Rule 15(a)(1)(B) would have afforded Plaintiffs the unqualified right to do so in response to Defendants' initial motion had Defendants raised the capacity issue, and given that Rule 15(a)(2) requires the Court to "freely give leave" to amend under any circumstances, Plaintiffs should be permitted to make this modest, technical change to their pleading in the event that the Court does not find that the issue has been waived. Defendants cannot contend that they would be prejudiced by such a minor, technical amendment at such an early stage of this litigation.

Third, there is no merit to Defendants' speculation that this lawsuit was not duly authorized by the "president or treasurer" of Plaintiff Taxpayers Party. Def. Br. at 4-5. As a threshold matter, the plain language of Rule 17(b)(3)(A) of the Federal Rules of Civil Procedure provides that an unincorporated association may maintain an action "to enforce a substantive right existing under the United States Constitution" *even if* it has "no such capacity" to do so under state law. Because this case plainly alleges the violation of federal constitutional rights, Plaintiffs may maintain this action regardless of whether they have capacity to do so under New York law.

In any event, the political parties that have brought this action have capacity to do so under New York law. To be sure, § 12 of the New York General Association Law contains

language suggesting that only the "president or treasurer" of an unincorporated association may bring suit on its behalf. That provision, however, "does not abridge the common law right of members of an association to bring a representative action in the name of all of its members on their behalf." *Locke Assocs., Inc. v. Fdn. for Support of United Nations*, 661 N.Y.S.2d 691, 693 (Sup. Ct. N.Y. Co. 1997). Because the constitutional claims raised in this action plainly "belong" to the members of the political parties at issue, Plaintiffs have capacity to proceed under New York common law.

Moreover, New York courts have made clear that where an association has no "president," a suit may be commenced by "an elected or *de facto* officer performing equivalent functions and responsibilities." *Id*. (citations omitted).[1] For the purposes of this motion, the Court must assume that this lawsuit has been duly authorized by the appropriate officers of the Plaintiff political parties. In due course, Defendants may engage in discovery about this issue. In the meantime, Defendants' capacity argument is at best premature. *See id.* at 693-94 (denying summary judgment and finding triable factual questions regarding whether plaintiff "was empowered to commence suit" on association's behalf).

[1] New York law is "settled" that a "*de facto* officer performing the equivalent functions and responsibilities" as a president has the capacity to sue on the association's behalf. *Chavis v. New York Temp. State Comm'n on Lobbying*, 787 N.Y.S.2d 821, 825 (Sup. Ct. Albany Co. 2004) (holding that association's "Administrative Coordinator" had capacity to sue); *see also Pelham Council of Governing Bds. v. City of Mount Vernon*, 720 N.Y.S.2d 768, 770 (Sup. Ct. Westchester Co. 2001) (rejecting lack of capacity defense where suit was instituted by association officer, albeit not the "president"); *Pasch v. Chemoleum Corp.*, 209 N.Y.S.2d 191 (Sup. Ct. N.Y. Co. 1960), *aff'd*, 214 N.Y.S.2d 644 (1st Dep't 1961) (holding that association's "Chairman, who exercises all the functions usually exercised by a president" was the "equivalent" of its "president" and had capacity to sue under § 12). The cases cited by Defendants, Def. Br. at 5, are not to the contrary. In *Arbor Hill Concerned Citizens Neighborhood Ass'n v. City of Albany*, 250 F. Supp. 2d 48, 62 (N.D.N.Y. 2003), the Court found that an association's suit may be authorized by "an officer who is the functional equivalent" to a president or treasurer, and held that the plaintiff was entitled to leave to amend. So too with *CA-POW! v. Town of Greece*, 2010 WL 3663409, at *3 (W.D.N.Y. 2010).

B. Plaintiffs Have Standing

Contrary to Defendants' claim, Def. Br. at 6, Plaintiffs have already suffered an actual injury sufficient to establish standing. Defendants do not deny that in the 2010 general election, all double-votes cast for the major parties and for Plaintiffs were credited solely to the major parties, pursuant to section 9-112(4) and 9. N.Y.C.R.R. § 6210.13(a)(7), nor do they contest that Plaintiffs will continue to lose credit for all double-votes cast for them in future elections unless these provisions are struck down. Plaintiffs have pled, and the Court must accept as true at this stage of the proceedings, that they have lost thousands of votes, Am. Cplt. ¶¶ 35-47, and that the loss of these votes harms their ability to influence elected officials on matters of public policy, because elected officials are more responsive to parties that garner more votes, *id.* at ¶¶ 26-29; to raise money and attract new members and candidates, *id.* at ¶¶ 30-31; and to secure the ballot placement and order they are entitled to on the basis of the votes cast for them, *id.* at ¶¶ 32-33.[2] These allegations suffice to show that Plaintiffs have suffered an injury in fact for standing purposes, particularly on a motion to dismiss, where "all facts averred by the plaintiffs must be taken as true for purposes of the standing inquiry – as they must be for any other issue presented." *Lerman v. Bd. of Elections*, 232 F.3d 135, 142 (2d Cir. 2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that the general allegations embrace those specific facts that are necessary to support the claim.") (internal quotation marks omitted)). Where, as here, Plaintiffs themselves

[2] Defendants' claim that the Taxpayers Party "cannot legitimately allege that the statute and regulation have denied it ballot access since it was on the ballot," Def. Br. at 11, misses the point. Clearly, the Taxpayers Party was on the ballot in 2010. Plaintiffs pled that the loss of double-votes cast in the 2010 election prevented the Taxpayers Party from reaching the 50,000 vote threshold, which would have secured it official party status and a guaranteed line on the ballot in future elections. *See* Am. Cplt. ¶¶ 43-46.

are the "object of the action at issue . . . there is ordinarily little question that the action . . . has caused [them] injury, and that a judgment preventing or requiring the action will redress it." *Lujan*, 504 U.S. at 561-62; *see also Lerman*, 232 F.3d at 142-43. Defendants have taken votes away from Plaintiffs. Plaintiffs plainly have standing.

Defendants mistakenly argue that because the *extent* of the harm is not yet known, *i.e.* because the precise number of double-votes cast in the 2010 election has not yet been determined (because the State does not record double-votes and instead credits them solely to the major party), no injury in fact has been alleged for standing purposes. But, as the Second Circuit reasoned in *Rockefeller v. Powers*, an equal protection challenge to signature-gathering requirements, "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." 74 F.3d 1367, 1375-76 (2d Cir. 1995) (quoting *Ne. Fla. Chapter of Assoc. Gen'l Contractors v. City of Jacksonville,* 508 U.S. 656, 113 S.Ct. 2297, 2303 (1993)). Similarly, in *Fulani v. League of Women Voters Education Fund*, the Court of Appeals found that the plaintiff had standing, reasoning that "infringements of these [First Amendment] rights can occur regardless of the success or failure of a particular candidate at the polls." 882 F.2d 621, 627 (2d Cir. 1989) (quoting *Common Cause v. Bolger*, 512 F. Supp. 26, 32 (D.D.C. 1980)); *see also Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003) (holding that plaintiff Libertarian Party had standing and did not have to "show that the [challenged] primary system affected the outcome of any contested races.").[3] Likewise, here, Plaintiffs have standing.

[3] Defendants' footnoted argument, Def. Br. at 7, n. 5, that any harm suffered by Plaintiffs cannot be traced to Defendants is equally misplaced. Plaintiffs' injury-in-fact is the loss of double-votes that were cast for them but credited solely to the major parties.

Finally, Plaintiffs have standing to assert the rights of their members and supporters whose votes were not properly counted. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, Inc., 528 U.S. 167, 181 (1992). Under the facts as alleged in the Amended Complaint, there are at least some individual members and supporters of Plaintiffs who intended to support Plaintiffs but whose votes were improperly credited to a major party. Those individuals were clearly injured. The counting of those votes is central to Plaintiffs' missions. Accordingly, Plaintiffs have standing to assert those rights. *See, e.g.*, *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 564, 573-74) (6th Cir. 2004) (political party had standing to assert voting rights of members in challenge to provisional ballot counting rules); *Ostrom v. O'Hare*, 160 F. Supp. 2d 486, 491 (E.D.N.Y. 2001) (political party had standing to assert speech and associational rights of members in challenge to campaign finance law).

II. PLAINTIFFS HAVE PLED A VIABLE CLAIM THAT DEFENDANTS' DOUBLE-VOTE POLICY VIOLATES THE CONSTITUTION

A. Plaintiffs Have Adequately Pled that Defendants' Double-Vote Policy Is Unconstitutional

Defendants argue that Plaintiffs' Amended Complaint should be dismissed at the pleading stage because, as a matter of law, their double-vote policy does not even implicate any constitutionally protected rights. They are wrong.

It has long been settled law that the Constitution protects the rights of freedom of speech and association, including the "right of citizens to create and develop new political parties." *Norman v. Reed*, 502 U.S. 279, 288 (1992). Laws that place unequal burdens on minor

political parties "impinge[], by [their] very nature, on associational choices" protected by the First and Fourteenth Amendments because they "limit[] the opportunities of independent-minded voters" and therefore "threaten to reduce diversity and competition in the marketplace of ideas." *Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and government policies is at the core of our electoral process and the First Amendment freedoms."). For this reason, the Constitution does not allow state law to "grant[] 'established parties a decided advantage over any new parties.'" *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411, 419 (2d Cir. 2004) (quoting *Williams*, 393 U.S. at 31).

Laws that discriminate in favor of particular groups, including political parties, are intrinsically suspect and rarely, if ever, upheld. As the Supreme Court stated in *Anderson*, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference," including those groups "whose political preferences lie outside the existing political parties." 460 U.S. at 791, 793-94 (striking down a scheme that allowed "[c]andidates and supporters within the major parties [to] have the political advantage of continued flexibility" beyond a March filing deadline, while "for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage"). Accordingly, the State may not implement elections rules that disadvantage minor political parties, relative to the two major political parties, without a "compelling state interest." *Green Party*, 389 F.3d at 419-20 ("Where the state's classification 'limit[s] the access of new parties and inhibits this development, the state must prove that its classification is necessary to serve a compelling state interest.") (quoting *Norman*, 502 U.S. at 288-89) (citing *Schulz v. Williams*, 44 F.3d 48, 60 (1994) (striking down

New York law that required voter enrollment lists to be provided free of charge only to major parties because "[i]t is clear that the effect of these provisions . . . is to deny independent or minority parties . . . an equal opportunity to win the votes of the electorate")); *see also Williams*, 393 U.S. at 31. Even if the State has such a compelling interest, "it must show that the means it adopted to achieve that goal are the least restrictive means available." *Green Party*, 389 F.3d at 420 (quoting *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979)); *see Norman*, 502 U.S. at 288-89; *Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 314 (3d Cir. 1999).

The protection against discriminatory treatment that the Constitution affords to minor political parties applies with equal force to their members and voters. *See Anderson*, 460 U.S. at 793-94 (noting the "particular importance" of protecting "those voters whose political preferences lie outside the existing political parties"); *Illinois State Bd.*, 440 U.S. at 184 (holding that the Constitution protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively") (quoting *Williams*, 393 U.S. at 30); *Price v. New York State Bd. of Elections*, 540 F.3d 101, 108 (2d Cir. 2008) (same).[4]

Moreover, the Supreme Court has repeatedly reaffirmed the common-sense principle that the electorate's fundamental right to vote includes the concomitant right "to have their votes *counted*." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (emphasis added); *see also Williams*, 393 U.S. at 30 (state law discriminating against minor parties "places burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political

[4] Because this case presents a facial challenge to Defendants' double-vote policy, the harm that this policy causes to other political parties is relevant as well. *See Long Island R.R. Co. v. Int'l Ass'n of Machinists*, 874 F.2d 901, 910-11 (2d Cir 1989).

persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *South v. Peters*, 339 U.S. 276, 279 (1950); *United States v. Classic*, 313 U.S. 299, 315 (1941); *United States v. Mosley*, 238 U.S. 383, 386 (1915). As one District Court put it more recently, "[t]he public interest is served when citizens can look with confidence at an election process that insures that all votes cast by qualified voters are counted." *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 438 (E.D. Mich. 2004) (citing *Bush v. Gore*, 531 U.S. 98, 109 (2000)).

Defendants' policy and practice of automatically crediting double-votes to the "first" party on the ballot—almost invariably the Democrats or the Republicans—cannot survive the searching scrutiny that the case law requires. Contrary to Defendants' policy, the double-votes at issue are *not* cast only for the "first" party on the ballot. They are cast *both* for the "first" party *and* for a minor party. The State has no legitimate interest, let alone a sufficiently compelling interest, in ignoring the fact that the voter signaled her intent to support a minor political party and pretending that she gave her full and unequivocal support to the Democrats or the Republicans. It may not give the major parties an unwarranted advantage.

The Amended Complaint expressly alleges—and, for purposes of this motion, the Court is obligated to assume—that Defendants' policy and practice with respect to double-votes has a direct and significant adverse impact on minor political parties and the members and voters seeking to support them. Political parties, and especially minor parties such as Plaintiffs, have a core constitutional right to have all votes cast in their favor counted and reported fairly and accurately because it is critical for political parties to be able to measure the support that they receive at the ballot box in order to attract new candidates and members, to raise money

effectively, to advance the issues they care about, and to facilitate their ability to prepare for future elections. Am. Cplt. ¶¶ 4, 25-31, 41; *see Green Party*, 389 F.3d at 420-21 (finding that parties use voter enrollment lists "for a number of different activities essential to their exercise of First Amendment rights," including informing, organizing, mobilizing, and raising money from supporters); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 590 (6th Cir. 2006) (noting that one of "the most fundamental of political activities" of a minor party is "recruiting supporters"); *Patriot Party of Allegheny County v. Allegheny County Dep't of Elections*, 95 F.3d 253, 261 (3d Cir. 1996) (observing that it is critical for a minor party to "demonstrat[e] its electoral appeal" through the number of votes cast for it in order to "win . . . increased support from the electorate" and "enhance its standing with candidates and with voters").

Moreover, in a New York gubernatorial election, it is particularly imperative that all votes for a given party be counted fairly and accurately because those vote tallies are used to determine ballot access and order for the next four years. Am. Cplt. ¶¶ 5, 32-33. Only those parties whose previous gubernatorial candidate received at least 50,000 votes are entitled to a place on the ballot, N.Y. Election Law § 6-138, and parties appear on the ballot in an order determined by the number of votes that their previous gubernatorial candidate received, N.Y. Election Law § 7-116. The ability of minor political parties to maintain their rightful place on the ballot is therefore critical to their ability to compete. Am. Cplt. ¶¶ 5, 25-47, 57, 59.

Defendants' policy and practice of failing to inform a voter that she has double-voted, and of crediting the double-vote entirely to the "first" party on the ballot, is particularly perverse because it is self-serving. Democrats and Republicans enacted section 9-112(4), and they control the Board of Elections. Am. Cplt. ¶ 54. These dominant parties have little incentive to protect votes that are intended to be cast for minor parties. *See Anderson*, 460 U.S. at 793

n.16 (emphasizing that "careful judicial scrutiny" is warranted where "the interests of minor parties and independent candidates are not well represented in state legislatures" due to "the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking"). Defendants' failure to provide double-voters with any notice and opportunity to correct their ballots, and their insistence that double-votes must be credited entirely to the more powerful party, unconstitutionally stifles political competition and ensures a perpetual duopoly over the political process in New York. *Id*. at 794 ("In short, the primary values protected by the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties."); *Williams*, 393 U.S. at 32 ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them.").

Instead of confronting the applicable case law, Defendants offer several reasons why Plaintiffs' Amended Complaint should be dismissed as a matter of law at the pleading stage, none of which has merit.

First, Defendants suggest that political parties have no constitutional right to appear on the ballot. Def. Br. at 12-13. That may be true (to the extent that Plaintiffs fail to meet appropriate state law requirements), but the claim in this case is *not* that Plaintiffs have a constitutional right to appear on the ballot, but rather that the Constitution prohibits the major political parties from *discriminating* against minor parties by crediting to themselves votes that were not actually cast in their favor. Thus, for example, although Carl Paladino may have no affirmative constitutional right to appear on the ballot, the Constitution obviously would be implicated if the State were to enact a law providing that all over-votes cast both for Carl Paladino and Andrew Cuomo must automatically be credited to Andrew Cuomo. Defendants' *discriminatory treatment* of votes for parties is no more immune from constitutional scrutiny

than this hypothetical discriminatory treatment of votes for candidates. Defendants' speculation that the petitioning process is no more burdensome than the primary process, Def. Br. at 12, belies common sense, is not entitled to any weight on a motion to dismiss and, in any event, misses the point: having chosen to condition ballot access on a 50,000 vote threshold, the State cannot diminish minor parties' chances of satisfying that threshold by taking votes away from the minor parties and crediting them instead to the major parties.

Defendants next argue that political parties have no constitutional right "to receive a particular ballot placement." Def. Br. at 15. Once again, Defendants miss the basic point. Plaintiffs do not assert a freestanding right to receive any particular placement on the ballot. To the contrary, Plaintiffs assert the right to be free from unabashed *discrimination* in the process of determining ballot order. The State may not have had the affirmative constitutional duty to determine ballot order based on the number of votes cast for a particular party in the prior gubernatorial election. However, having chosen to impose that regime, the State cannot then stack the deck in favor of the major political parties, to the disadvantage of the minor political parties, by assigning votes to the major parties that they did not actually receive. This case is not about affording Plaintiffs "a marginally better chance of having their names appear slightly higher up on the ballot," Def. Br. at 15, but rather about treating all political parties *equally*.

Defendants do not cite any cases involving the markedly different treatment of major and minor parties that is at issue in this case. Instead, they rely heavily on *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282 (S.D.N.Y. 1994) (Ward, J.) , which involved a challenge to New York's practice of listing non-recognized parties who petitioned to place their candidates on the ballot in an order determined by a random lottery. The New Alliance Party had received more votes in the prior gubernatorial election than any of the other

petitioning parties, and it asserted the right to be listed first among the non-full-fledged parties. The only "harm" that the New Alliance Party alleged was the deprivation of its ability to capture the so-called "windfall" vote—*i.e*., votes cast by "uninformed or uninterested" voters who pick the first minor party solely because it is listed first on the ballot. 861 F. Supp. at 287. The Court held that "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern." *Id*. at 295-96. The instant case, in contrast, has nothing to do with any claimed right to capture a "windfall." Indeed, far from seeking a "windfall" for themselves, Plaintiffs actually seek to prevent the major political parties from grabbing a windfall in the form of *usurping credit for votes* cast also for minor parties.

Defendants also dismiss Plaintiffs' well-pled allegations that the State's discriminatory double-vote policy burdens their ability to attract new members, raise money, further their policy agendas, and organize for future elections, arguing, contrary to the caselaw cited above, that these are not "constitutionally protected interest[s]." Def. Br. at 16. The cases Defendants cite, however, do not support their argument. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Court merely held that the Constitution does not affirmatively require states to allow fusion candidacies. In so holding, the Court took pains to reaffirm that the right "to form political parties for the advancement of common political goals and ideas" is constitutionally protected and that the "independent expression of a political party's views is 'core' First Amendment activity." *Id*. at 357-58 (quotations omitted). Although the Court observed that political parties have no right to use the *ballot* to send messages to candidates—by endorsing candidates that also accepted the nominations of other parties, *id*. at 362-63—that certainly does not mean that political parties have no right to use election *results* to convey their strength to candidates, voters, and funders through a fair and accurate tally of the votes cast in

their favor. And in *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court merely held that the Constitution does not affirmatively require states to allow write-in voting. In so holding, the Court expressly reaffirmed that it is "beyond cavil that voting is of the most fundamental significance under our constitutional structure." *Id*. at 433. Although the Court suggested that the "expressive function" of elections must yield to "the ability of States to operate elections fairly and efficiently" in appropriate cases, the Court expressly admonished that it would only uphold "*politically neutral* rules that have the effect of channeling expressive activity at the polls." *Id*. at 438 (emphasis added). The double-vote policy at issue in this case cannot in any way be characterized as a "politically neutral" rule.[5]

Defendants also rely on *Dillon v. New York State Board of Elections*, 2005 WL 2847465 (E.D.N.Y. Oct. 31, 2005), for the proposition that the Constitution is not even implicated by its policy of crediting double-votes to the "first" party on the ballot. Def. Br. at 17-18. But the issue here is not at all "the same" (*id*. at 18) as the one in *Dillon*. That case involved a claim that an "independent body"—not a full-fledged political party that had received the requisite 50,000 votes in the prior gubernatorial election—had the affirmative constitutional right to its own ballot line even though it had failed to meet a neutral state law requirement. Notably, as the Court recognized, the rules that the independent body challenged—which provide that the independent body does not get its own ballot line when its nominee has already

[5] Defendants distort the holding in *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970) (three-judge court), in which the Court upheld various ballot access restrictions that were challenged as unduly burdensome. Defendants cite this case for the proposition that the Constitution does not require an accurate count of "minority and dissident political views" expressed at the ballot box because those views "can be aired in the public forum." Def. Br. at 17. That is not what the Court said at all. To the contrary, the Court held that "the right of all qualified voters, regardless of political persuasion, to cast their votes effectively" is "firmly established among our precious freedoms," and that this right must be "held inviolate" *precisely in order to ensure* that dissenting political views may be "aired in the public forum." 314 F. Supp. at 989.

been nominated by multiple full-fledged political parties—*do not apply in gubernatorial elections* (or state senate or assembly elections, for that matter) and therefore have no impact whatsoever on the ability of an independent body to achieve full-fledged party status. 2005 WL 2847465 at *2 (citing N.Y. Election Law § 7-104.6); *see also id*. at *6 ("If and when the Integrity Party cross-nominates a candidate for the office of governor, it will get its own ballot line no matter how many Parties or other independent bodies nominate the same candidate."). Moreover, the independent body at issue in *Dillon* simply was not similarly situated to the full-fledged parties it claimed were treated more favorably. In this case, in contrast, at least two of the three Plaintiffs have received the 50,000 votes necessary to qualify for full-fledged party status, and there is no reason, rational or otherwise, why double-votes should automatically be credited to the major parties at Plaintiffs' expense. Finally, Defendants' are wrong that the *Dillon* court found that the First Amendment was not even implicated in that case. To the contrary, applying the *Burdick* balancing test, the *Dillon* court found that the State's strong interest in avoiding voter confusion outweighed the minimal burden the law placed on the plaintiffs. *Id.* at * 3-*4, *8. Here, in contrast, Defendants' policy engenders greater voter confusion. *Cf. Credico v. New York State Bd. of Elections*, __ F. Supp. 2d __, 2010 WL 4622133, at *4-*5 (E.D.N.Y. 2010) (preliminarily enjoining application of same law challenged in *Dillon* where application of law did not prevent voter confusion).

Finally, Defendants attack the remedy that Plaintiffs ultimately seek—namely, that the optical scanner voting machines be programmed to warn voters when they detect a double-vote and to return the ballot to voters for correction. Def. Br. at 18-19. However, questions about the propriety of the remedy Plaintiffs seek have no bearing on whether Plaintiffs have adequately pled that Election Law § 9-112(4) and 9 N.Y.C.R.R. § 6210.13 are

unconstitutional. If and when this Court strikes those provisions down, Defendants will be afforded ample opportunity to weigh in on the appropriate remedy. At this preliminary juncture, any questions about the appropriateness of particular remedies are premature. *See Lipsky v. Commonwealth United Corp*., 551 F.2d 887, 898 (2d Cir. 1976); *Island Oasis Frozen Cocktail Co., Inc. v. Coffee King, Inc*., 2010 WL 3749402, at *3 (D. Mass. Sep. 24, 2010); *Devon Robotics v. DeViedma*, 2010 WL 300347, at *6 (E.D. Pa. Jan. 25, 2010).

In the event that the Court is inclined to address the remedy issue before Defendants have even answered, it bears repeating that the Court is obligated to accept as true Plaintiffs' allegation that voters are provided no warning at all when they double-vote. Am. Cplt. ¶¶ 9, 49. Ignoring this well-pled allegation, Defendants assert that "[v]oters are specifically instructed *on the ballot* how to cast an effective vote." Def. Br. at 18-19 (emphasis in original). Leaving aside the obvious procedural impropriety of relying on a factual assertion in a motion to dismiss that contravenes the allegations in the operative pleading, Defendants' assertion is notable for what it does not say: that voters are warned not to *double-vote*. Evidently, they are not. Election Law § 7-106(5) spells out the precise "ballot instructions" that must be printed on each ballot "in heavy black type" and does not require ballots to contain any warning about double-voting. Whereas subsection (6) of that provision requires ballots to expressly warn voters not to *over-vote* (that is, to vote for more than one candidate for a given office, as opposed to voting for a single candidate on multiple party lines), no such warning is required to be provided with respect to *double-voting*, and none is provided.

It is telling that in their entire brief, Defendants only cite *two cases* in which an election law challenge was dismissed at the pleading stage under Rule 12(b)(6): *New Alliance Party*, which is distinguished above (*see supra* at 15-16), and *Strong v. Suffolk County Bd. of*

Elections, 872 F. Supp. 1160 (E.D.N.Y. 1994), a case in which a *pro se* plaintiff running as a candidate of the "Fed Up Party" claimed a constitutional right to be notified of the Board's procedure for determining minor party ballot placement. Every single other case cited by Defendants either granted relief or denied relief only after plaintiffs were afforded the opportunity to build an evidentiary record. The dearth of case law dismissing minor party discrimination claims at the pleading stage is telling. Plaintiffs plainly have stated a viable claim for relief and are entitled to discovery.

B. Defendants' Attempt to Justify Their Double-Vote Policy Does Not Entitle Them to Dismissal at the Pleading Stage

Defendants argue that Plaintiffs' Amended Complaint should be dismissed because, as a matter of law, there is a "rational basis" for their double-vote policy. Def. Br. at 19-24. The law is clear, however, that rational basis review does not apply.

To be sure, voting rights cases such as this one do not automatically trigger strict scrutiny, and are governed by the balancing test set forth in *Anderson*, *Burdick*, and their progeny. But the Second Circuit has held that rational basis review is not appropriate where an election regulation imposes any non-trivial burden on voters or parties. *See Price*, 540 F.3d at 108-09. Accordingly, some form of heightened scrutiny applies in this case.

Moreover, the Second Circuit has also held, following established Supreme Court precedent, that strict scrutiny applies where a law affords a major political party a significant advantage over a minor party:

> The Supreme Court has said that if state law grants "established parties a decided advantage over new parties struggling for existence and thus place[s] substantially unequal burdens on both the right to vote and the right to associate" the Constitution has been violated, absent a showing of a compelling state interest.

Green Party, 389 F.3d at 419-20 (quoting *Williams*, 393 U.S. at 31). Reiterating this holding,

the Circuit also stated in *Green Party* that:

> Where the state's classification "limit[s] the access of new parties" and inhibits this development, the state must prove that its classification is necessary to serve a compelling government interest [and that] the means it adopted to achieve that goal are the least restrictive means available."

Id. at 420 (quoting *Norman*, 502 U.S. at 288-89); *see also Anderson*, 460 U.S. at 793 n.16 (emphasizing that "careful judicial scrutiny" is warranted in cases involving discrimination against minor parties).[6]

Finally, as Defendants have previously acknowledged, it is well established that rational basis review only applies, if at all, to "*nondiscriminatory* restrictions." *Anderson*, 460 U.S. at 788 (emphasis added). Here, the restriction at issue is anything but "nondiscriminatory." Defendants' policy is not to credit a double-vote to neither party, or to split a double-vote between the parties, or even to allocate credit based on a coin flip—all of which would at least be *neutral*. Instead, Defendants automatically credit all double-votes to the "first" or major political party, and completely ignore the fact that the voter has signaled her intent to support the minor party as well. No case supports the remarkable proposition that an unabashedly discriminatory

[6] Defendants' attempt to distinguish *Price* and *Green Party* is unpersuasive. Def. Br. at 20 n.13. Although the *facts* in those cases are not identical to the facts presented here, Defendants have offered no reason why the *analytical framework* set forth in those cases does not apply. *Price* expressly held that it is "clear" that "*Burdick*'s 'flexible standard'" is *not* the same as garden-variety rational basis review. 540 F.3d at 108-09. And *Green Party* expressly held that rational basis review does not apply when state law "limit[s] the access of new parties" or grants "established parties a decided advantage over new parties." 389 F.3d at 419-20. Nor is this well-established analytical regime in any way altered by *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), *see* Def. Br. at 20, which long predates *Anderson*, *Burdick*, *Price*, *Green Party*, and all of the other modern cases speaking to the standard of review that applies in election law challenges such as this one.

election regulation triggers mere rational basis review. *See Credico*, 2010 WL 4340635, at *4 (holding that "*Price* directs me to conduct more than just a rational basis review").[7]

In any event, regardless of the standard of review that applies, Defendants' attempt to justify their double-vote policy is well wide of the mark. Defendants devote several pages of their brief to the argument that their double-vote policy is necessary in order to credit the vote to the *candidate* who received it. Def. Br. at 20-23. But this case does not in any way implicate whether the candidate should receive credit for the double-vote. Of course he or she should (because the voter clearly and unambiguously signaled his or her intent to support that candidate). The only question is which *parties*, if any, should receive credit. Defendants simply assume, for example, that treating a double-vote as a "nullity" (*i.e.*, crediting the vote to neither party) would require the candidate to be deprived of the vote. Def. Br. at 22. But that plainly is not so. There is no legal or logical reason why a double-vote could not be credited to the candidate but to neither party—or, more fairly, split among both parties or credited to the minor party. *Cf. Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (state must independently justify discriminatory classification and identify the "precise interests" demonstrating that discrimination is "necessary"). Defendants' focus on fairness to candidates is a red herring.

Nor is there any merit to Defendants' argument that their double-vote policy is rational because it "treats all minor parties the same." Def. Br. at 22, 24-25. Once again, Defendants miss the point. The claim in this case is not that Defendants are treating certain

[7] Defendants assert that their policy is "nondiscriminatory" because it supposedly makes no "distinction between 'major' and 'minor' parties." Def. Br. at 24. That is absurd. Even assuming the policy is not purposely nondiscriminatory – which remains to be seen – it is beyond dispute that the overwhelming effect of the policy is to credit double-votes to the major parties at the expense of the minor parties. At a minimum, that is what the Amended Complaint alleges. Am. Cplt. ¶¶ 4, 9, 25, 61.

minor parties better or worse than others.[8] The claim is that Defendants are arbitrarily *favoring the major political parties*, at the expense of the minor parties, by giving the major parties exclusive credit for votes that actually were cast for both.[9]

Finally, it bears emphasis that Defendants have not offered any *evidence*—such as an affidavit from a government official—regarding the purpose of their double-vote policy. Instead, they rely exclusively on the unsworn musings of their attorneys. This is insufficient. *See Price*, 540 F.3d at 110-11 (rejecting the State's "contrived argument" and "flimsy proffered justification"); *Lerman*, 232 F.3d at149-50 (holding that defendants must "do more than simply posit the existence of the disease sought to be cured") (quotation omitted); *see also Libertarian Party*, 462 F.3d at 593-94 (rejecting government's reliance "on suppositions and speculative interests").

C. Plaintiffs' Claims Are Plausible

Defendants also contend that Plaintiffs' allegations fail to meet their pleading burden under *Bell Atl. Corp v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937 (2009). Def. Br. at 8-10. Once again, Defendants are wrong.

The Second Circuit has expressly rejected the notion that *Twombly* or *Iqbal* impose a heightened pleading standard:

> [T]he notion that *Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those

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[8] In any event, Defendants are incorrect that their policy treats all minor parties the same. Minor parties who appear earlier on the ballot are given an advantage over minor parties later on the ballot with respect to double votes cast for two minor parties.

[9] Defendants' reliance on *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991), Def. Br. at 25, is puzzling. Far from holding that the State may discriminate against minor parties, the Eleventh Circuit actually granted the minor party the injunction it sought and struck down the challenged provision, finding that "the interests put forth by the defendant" were "not persuasive" and did "not adequately justify the restriction imposed." *Id*. at 1576.

> required by Rule 8, and declarations from the persons who collected the evidence is belied by the *Twombly* opinion itself.

Arista Records LLC v. Doe, 604 F.3d 110, 119 (2d Cir. 2010). The Circuit explained that it would be "impermissible" to require a plaintiff to plead any "specific evidence or extra facts beyond what is needed to make the claim plausible." *Id*. at 120-21.

The gravamen of Plaintiffs' Amended Complaint is that there likely were thousands if not tens of thousands of double-votes in the recent gubernatorial election, and that the vast majority of these votes were improperly credited to the two major political parties at the expense of the minor parties. Am. Cplt. ¶¶ 35-47. Given that there were 4.75 million votes cast in the election, that the State rolled out new electronic voting machines that voters were not accustomed to, that the old machines did not physically permit double-voting, and that voters were not warned about double-voting, the claim that thousands of minor party votes were lost is hardly implausible. The plausibility of this claim is strengthened by Plaintiffs' mock election results showing a significant double-vote rate in New York in 2010; the fact that there were thousands of over-votes in New York in 2008; and the fact that under similar circumstances in Bridgeport, Connecticut, there were thousands of double-votes in 2010. *Id*. ¶¶ 38-41. Plaintiffs further claim that this deprivation has harmed them in a variety of concrete ways. *Id*. ¶¶ 26-69. These allegations of concrete harm are more than plausible and afford Defendants ample notice of "the grounds showing entitlement to relief." *Arista Records*, 604 F.3d at 120.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Defendants' motion to dismiss should be denied.

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Respectfully submitted,

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