UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY OF NEW YORK STATE and WORKING FAMILIES PARTY,

10 Civ. 6923 (JSR)

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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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Andrew G. Celli, Jr. (AC 3598)
Eric Hecker (EH 0989)
Zoe Salzman (ZS 9816)
EMERY CELLI BRINCKERHOFF & ABADY LLP
75 Rockefeller Plaza
New York, NY 10019
(212) 763-5000

Attorneys for Plaintiff Conservative Party of New York State

Wendy Weiser (WW 8580)
Lawrence Norden (LN 7123)
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Ave. of the Americas
New York, NY 10013
(646) 292-8310

Attorneys for Plaintiffs Conservative Party of New York State and Working Families Party

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PRELIMINARY STATEMENT

This motion seeks to preliminarily enjoin Defendants' unabashedly discriminatory policy and practice of automatically crediting so-called "double-votes"—*i.e.*, votes cast for a single candidate on more than one party line—to the "first" party on the ballot, almost invariably the Democrats or the Republicans, to the detriment of minor political parties such as Plaintiffs.

New York allows "fusion" voting, meaning that a single candidate can accept the nomination of multiple political parties and thus appear on the ballot on multiple lines for the same office. New York Election Law § 9-112(4) addresses what to do when a voter votes for a single candidate on multiple party lines. Defendants have interpreted this provision to require that in such circumstances, the vote is automatically credited to the party that received more votes in the prior gubernatorial election. In other words, if a 2006 voter voted for Eliot Spitzer on both the Democratic and Working Families Party lines, the Democrats were credited with the vote, and if the voter voted for John Faso on both the Republican and Conservative lines, the Republicans were credited with the vote. Defendants simply ignore the fact that the voter has expressed her intent to support a minor party.

This is no small issue. Under any circumstances, political parties—and especially minor political parties such as Plaintiffs—have a core constitutional right to have all votes cast in their favor counted and reported fairly and accurately. It is critical for minor 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 with elected officials, and to facilitate their ability to strategize for future elections. It is equally critical for voters to be able to count on the fact that their intended support of minor political parties will be credited.

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. Parties that did not reach the 50,000 vote threshold in the most recent gubernatorial race are considered only "independent bodies," *see* N.Y. Election Law § 1-104, and are required to go through a costly and time-consuming process of submitting nominating petitions to place their candidates on the ballot. *See* N.Y. Election Law § 6-138. In addition, parties appear on the ballot in an order determined by the number of votes that their previous gubernatorial candidate received. *See* N.Y. Election Law § 7-116.

Although the State's policy and practice of crediting all double-votes to the first party on the ballot has been in place for many years, it has had little practical significance until this year due to the State's recent migration from the old lever voting machines to the new optical scanner voting machines. 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. It therefore was physically impossible for a voter to double-vote for a single candidate on more than one party line. This year, in marked contrast, all voters will vote on paper ballots, which will then be fed into and counted by the new optical scanner machines. Because it is likely that tens of thousands of voters will inadvertently double-vote, this previously minor issue has now taken on profound significance.

Notably, although the new ballots contain printed warnings urging voters not to vote for two *candidates* for a single office (commonly referred to as an "over-vote"), and although the new optical scanner voting machines have been programmed to warn voters when they have over-voted, the new ballots contain no warning at all about double-voting, and the new voting machines give no warning at all when a double-vote is detected. Instead of informing the voter that she has filled in more ovals than allowed and providing the voter with the option of correcting her error and filling out a new ballot —which the machines already do for over-votes, and which they could easily do for double-votes —the new optical scanner voting machines simply accept the ballot containing the double-vote and, without informing the voter, count the vote for the "first" party (in the vast majority of cases, the Democrats or the Republicans).

This policy and practice is flatly unconstitutional. When a voter has unambiguously expressed her intent to support both a major party and a minor party, the State cannot simply ignore the minor party and, without informing the voter, blindly credit the vote to the major party. This is true under any circumstances, and it is especially true given the enormous ballot access and order consequences that the State has assigned to party success in gubernatorial elections.

Given the high stakes for minor parties, especially in gubernatorial elections, voters should be informed when the new machines detect a double-vote, and voters should be afforded the opportunity to correct their ballots. Short of that, a double-vote should be counted for both parties, at least for purposes of ballot access and ballot order. The State, which is largely run by representatives of the two major parties, cannot

be permitted to stifle political competition by self-servingly ignoring the fact that a voter has expressed her desire to support a minor party.

FACTS

Background on the Minor Party Plaintiffs

The Conservative Party is a political party organized under the laws of New York State since 1962. The party seeks to protect the traditional American values of individual freedom, individual responsibility, and individual effort. The party currently has approximately 155,000 members. There are currently thirty-one (31) State Senators and forty (40) Assembly Members designated by the Conservative Party in the New York State Legislature for 2009-2010. Declaration of Michael Long ("Long Decl"), ¶ 3.

Since its founding, the Conservative Party has cross-endorsed gubernatorial candidates from other political parties on the ballot and has consistently received over 50,000 votes for those candidates on its party line. For example, in 1994, the Conservative Party cross-endorsed Republican Party candidate George Pataki for governor; the party received 326,605 votes for Mr. Pataki, and as a result, secured a line on the ballot for the following four years. In 1998 and 2002, the Conservative Party again cross-endorsed George Pataki for governor and received 348,272 and 176,848 votes respectively, securing a place on the ballot for two more four-year periods. And in 2006, the Conservative Party cross-endorsed Republican Party gubernatorial candidate John Faso, receiving 168,654 votes and again securing a place on the ballot for another four years. *Id.* ¶ 5. The Conservative Party also frequently cross-endorses candidates

from other political parties in other state, federal, and local races. For example, in 1994, the Conservative Party cross-endorsed Republican candidate Dennis Vacco for State Attorney General, receiving 305,961 votes for Mr. Vacco on its ballot line. In 2008, the Conservative Party cross-endorsed Republican candidate John McCain for U.S. President, receiving 170,475 votes for Mr. McCain on its ballot line. *Id*. ¶ 6.

In the November 2010 election, the Conservative party is cross-endorsing Republican Party gubernatorial candidate Carl Paladino, as well as other parties' candidates for U.S Senate, U.S. Congress, and State Comptroller. *Id.* ¶ 7.

The Working Families Party is a political party organized under the laws of New York State since 1998. Among the party's main concerns are the right to organize, the creation of a sustainable economy, a democratic and fair banking system, public financing of elections, and the rights of equal education for all children. Declaration of Daniel Cantor ("Cantor Decl"), ¶ 3.

Since 1998, the Working Families Party has cross-endorsed gubernatorial candidates from other political parties on the ballot and has consistently received over 50,000 votes for those candidates on its party line. In 1998, the Working Families Party cross-endorsed Democratic Party candidate Peter Vallone for Governor; the party received 51,325 votes for Mr. Vallone and, as a result, secured a line on the ballot for the following four years. In 2002, the Working Families Party cross-endorsed Democratic Party gubernatorial candidate Carl McCall and received 90,533 votes for Mr. McCall, securing a place on the ballot for another four years. In 2006, the Working Families Party cross-endorsed Democratic Party gubernatorial candidate Elliot Spitzer, receiving

155,184 votes for Mr. Spitzer, and again securing a place on the ballot for four more years. In 2010, the Working Families Party is cross-endorsing Democratic Party gubernatorial candidate Andrew Cuomo. *Id.* ¶¶ 5-6.

The Working Families Party also frequently cross-endorses on its ballot line candidates from other political parties in other statewide, federal, and local races. For example, in 2000 and 2006, the Working Families Party cross-endorsed Democratic Party candidate Hillary Clinton for the U.S. Senate race, receiving 102,094 and 148,792 votes respectively. In 2004, the party cross-endorsed Democratic Party candidate Chuck Schumer for U.S. Senate, receiving 168,719 votes. The party is again endorsing Senator Schumer on its ballot line in 2010. In 2006, the party cross-endorsed Democratic Party candidate Andrew Cuomo for New York Attorney General, receiving 152,502 votes. The Working Families Party has also cross-endorsed Republican Party candidates for state office, including, for example George Maziarz for the 62nd State Senate district in 2000, 2002, 2004, and 2008, and Joseph Saldino for the 12th State Assembly district in 2006 and 2008. At times, the Working Families Party has cross-endorsed candidates that were also endorsed by other minor political parties. For example, in 2002, both the Working Families Party and the Green Party cross-endorsed several Democratic Party candidates for State Assembly. *Id.* ¶ 7.

Even when Plaintiffs cross-endorse the candidate of another political party, Plaintiff still compete with that party for votes for that candidate. The Conservative and Working Families Parties have their own political agendas that differ

from the political agendas of other parties, including the Republicans and Democrats. Long Decl. ¶ 8; Cantor Decl. ¶ 8.

It is critical to Plaintiffs that all votes cast for them be counted and reported fairly and accurately. The more votes these minor political parties obtain, the better they are able to attract new members, to raise money for their campaigns, and to organize for future elections. In addition, their ability to advance the issues they care about with elected officials is directly related to the strength they are able to show at the ballot box. The more votes they are able to show they obtained, the more likely elected officials are to support their agendas. Long Decl. ¶¶ 9-10; Cantor Decl. ¶¶ 9-10.

The Special Importance to Minor Parties of Fair and Accurate Vote Counting in Gubernatorial Elections

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 particularly 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 mere "independent bodies" that must go through the labor- and cost-intensive process of submitting nominating petitions to place their candidates on the ballot. *See* 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 especially imperative that the State fairly and accurately count and report the number votes cast for each political party in a gubernatorial election.

Defendants' Policy of Counting All Double-Votes, Including In Gubernatorial Elections, For the "First" Party on the Ballot

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

> 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, or fill in such voting squares or punch out the hole in two or more voting squares of a ballot intended to be counted by machine, 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.

During the September 30, 2010 conference, the Court asked whether this provision constitutes a "prohibition" of double-voting. It certainly does not constitute a "prohibition" in the sense of rendering it illegal or a crime to cast a double-vote. But § 9-112(4), while not a model of clarity, appears to prohibit the State from crediting a single vote to multiple political parties, much the same way that Election Law § 9-112(6)

prohibits the State from counting a vote cast for multiple candidates running for a single office. In this sense, § 9-112(4) does constitute a "prohibition," in that it prohibits two parties from sharing credit for a vote cast for a candidate whom they have both cross-endorsed.

Defendants have interpreted § 9-112(4) 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 all of the credit for the vote, and the party appearing lower on the ballot receives no credit whatsoever. In other words, Defendants *pretend* that the voter expressed unequivocal intent to support the more powerful party, and simply ignore the fact that the voter also expressed intent to support the less powerful party.

Defendants' Failure to Warn Voters When the Optical Scanner Voting Machines Detect a Double-Vote

Until recently, Defendants' policy and practice of automatically crediting double-votes to the "first" party on the ballot had little or no practical significance 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.

Beginning this year, however, the State is introducing new optical scanner voting machines. Under this new voting system, a voter will now cast her vote by filling

out bubbles on a paper ballot, which will then be 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, which did), there likely will be dramatically more such double-votes in the upcoming election than in any election in the State's history.

Defendants have suggested that voters are provided with ample notice about the consequence of double-voting, both because of the language of the New York Election Law and the instructions that are printed on the ballots themselves. Both claims are false.

With respect to the "notice" allegedly provided by the Election Law, even if it is fair to assume that voters know what the statute says (which is dubious at best), Election Law § 9-112(4) is beyond clumsily worded. Indeed, the second sentence of this provision, which purports to explain what to do with a double-vote in a gubernatorial election, contains an inscrutable double negative that renders it grammatically nonsensical:

> 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.

Most experienced election lawyers could not explain what that sentence means. Surely Defendants cannot defend the constitutionality of their policy by arguing that voters should simply read that sentence and make sure they adhere to it.

With respect to the "notice" that allegedly is provided to voters on the ballots themselves, the fact of the matter is that the ballots contain no such notice. Indeed, the New York Election Law does not require ballots to contain *any* warning about double-voting. Election Law § 7-106(5) spells out the "ballot instructions" that must be printed on each ballot "in heavy black type." It provides that ballots must expressly warn voters as follows:

> (1) Mark only with a writing instrument provided by the board of elections.
>
> (2) To vote for a candidate whose name is printed on this ballot fill in the (insert oval or square, as applicable) above or next to the name of the candidate.
>
> (3) To vote for a person whose name is not printed on this ballot write or stamp his or her name in the space labeled "write-in" that appears (insert at the bottom of the column, the end of the row or at the bottom of the candidate names, as applicable) for such office (and, if required by the voting system in use at such election, the instructions shall also include "and fill in the (insert oval or square, as applicable) corresponding with the write-in space in which you have written in a name").
>
> (4) To vote yes or no on a proposal, if any, that appears on the (indicate where on the ballot the proposal may appear) fill in the (insert oval or square, as applicable) that corresponds to your vote.
>
> (5) Any other mark or writing, or any erasure made on this ballot outside the voting squares or blank spaces pro-vided for voting will void this entire ballot.
>
> (6) Do not overvote. If 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) If you tear, or deface, or wrongly mark this ballot, return it and obtain another. Do not attempt to correct mistakes on the ballot by making erasures or cross outs. Erasures or cross outs may invalidate all or part of your ballot. Prior to submitting your ballot, if you make a mistake in completing the ballot or wish to change your ballot choices, you may obtain and complete a new ballot. You have a right to a replacement ballot upon return of the original ballot.
>
> (8) After completing your ballot, insert it into the ballot scanner and wait for the notice that your ballot has been successfully scanned. If no such notice appears, seek the assistance of an election inspector.

Id. Thus, whereas 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), explaining 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" (emphasis added), no such warning is required to be provided with respect to *double-voting*. If anything, the express warning that is printed on ballots about the impropriety of over-voting, coupled with the absence of any information about the impropriety of double-voting, may well make it even *more* likely that voters will mistakenly believe that they may vote for a single candidate on multiple party lines. In any event, the ballots certainly do not warn voters that if they do double-vote, the major party will get all of the credit, and the voter's support for the minor party will be totally ignored.

Notably, when the new optical scanner voting machines detect an over-vote (*i.e.*, a vote for more than one candidate for a given office), Defendants' practice is

to provide the voter with an express warning that she has over-voted—on top of the warning that is printed on the ballot—and to provide the voter with an opportunity to correct her ballot. Indeed, Defendants are statutorily required to do so. *See* New York Election Law § 7-202(1)(d) (providing that when a voter "votes for more than one candidate for a single office," the voting machine must "notify the voter that the voter has selected more than one candidate for a single office on the ballot, notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office, and provide the voter with the opportunity to correct the ballot before the ballot is cast and counted"). No such notification is provided when a voter votes for a single candidate on more than one party line. The voting machine simply accepts such a ballot and, without providing any warning that the voter's desire to support a minor party will be ignored, automatically credits the vote to the major party only.

There is no legitimate reason for this failure to inform the voter of how double-votes are treated or to provide the voter with an opportunity to correct her ballot. The State's new optical scanner voting machines could easily be set to automatically warn a voter that a double-vote has been detected and return the ballot to the voter with an opportunity for correction. Declaration of Daniel Wallach (Wallach Decl.), ¶ 15. Because no software would need to be modified, testing this change would be simple and would take very little time. *Id*.

The Harm Caused By Defendants' Failure to Warn
Voters About Its Double-Vote Policy Is Not "De Minimis"

At the September 30, 2010 conference, Defendants suggested that the number of double-votes in the November 2010 election is likely to be "de minimis." That is false. Although it is impossible to predict with certainty how many double-votes will be cast in the upcoming election, official data regarding the number of over-votes (votes for more than one candidate for a single office) that were cast on paper ballots (primarily absentee and affidavit ballots) in New York City in the 2008 election suggests that there will be, at the least, *tens of thousands* of double-votes cast across New York State in the upcoming election.

Focusing on the 2008 presidential election alone—and ignoring, for the moment, all of the over-votes that were cast in races for *other* offices—there were a total of 1,410 over-votes in the presidential race in New York City in 2008 out of a total of 196,497 paper ballots cast, or a 0.718% over-vote rate. *See* Declaration of Eric Hecker, ¶¶ 3-8 & Exh. A. Given that there were 7,722,019 votes cast in New York State in the 2008 presidential election, *id*. ¶ 9 & Exh. B, this 0.718% over-vote rate for New York City paper ballots, extrapolated on a statewide basis, would suggest that if all New York voters had been voting on papers ballots (as opposed to lever machines) in 2008, there would have been approximately 55,444 over-votes across New York State in the presidential election. Similarly, given that there were a total of 4,697,867 votes cast in New York State in the 2006 gubernatorial election, *id*. ¶ 10 & Exh. C, this 0.718% over-vote rate would suggest, assuming similar turnout numbers this year, that there will be

around 33,730 over-votes in the upcoming 2010 gubernatorial election—hardly a "de minimis" number of over-votes.

Moreover, this statistical extrapolation is, if anything, artificially *low* for two independent reasons.

First, there were far more than 1,410 over-votes in New York City in 2008. That is only the number of over-votes that were cast in the *presidential* race. Counting *all* races, there were at least 5,480 over-votes in New York City in 2008 out of a total of 196,497 paper ballots cast, suggesting an over-vote rate of as much as 2.79% (assuming that each over-vote was cast by a different voter). Indeed, even this rate may be low, because the data appended to the Hecker Declaration is missing one page out of six total pages devoted to Queens County, meaning that there were considerably more than 5,480 over-votes on paper ballots in New York City in 2008. Using the 2.79% figure, and multiplying by the 4,697,867 total votes cast in the 2006 gubernatorial election, it would be reasonable to expect as many as 131,070 over-votes in the 2010 gubernatorial election.

Second, it is reasonable to expect the rate of double-votes (votes cast for a single candidate on more than one party line) to be even *higher* than the rate of over-votes (votes cast for multiple candidates for a single office). After all, virtually everybody knows that it is improper to vote for more than one candidate for a single office. Virtually nobody believes that it is proper to vote *both* for Andrew Cuomo *and* Carl Paladino. The same is not true, however, when it comes to double-voting. Many people may well not understand that it is improper, in New York's fusion voting system,

to register support for multiple parties when voting for a single candidate. Indeed, this is especially true given that the new paper ballots expressly warn voters about the impropriety of over voting, but provide no warning at all about the impropriety of double-voting. *See* New York Election Law § 7-106(5).

For these two reasons, the above analysis, which suggests that there will be somewhere between 33,730 and 131,070 over-votes in the upcoming gubernatorial election, likely *undercounts* the number of double-votes that can be expected.

To be sure, in a perfect world, one would be able to extrapolate directly from data evidencing the prevalence of double-voting in past elections. Unfortunately, no such data exists. Ironically, the *reason* that the Board of Elections does not compile data on double-votes stems directly from the unconstitutional policy at issue in this case: Defendants simply to not consider double-votes to be "spoiled" ballots worthy of disaggregating and tracking. To the contrary, Defendants' view is that when a voter double-votes, the appropriate course is to blindly credit the vote to the major political party, to ignore the fact that the voter has also signaled her intent to support a minor political party, and to toss the ballot aside without any further thought about the issue. But for the State's policy of blatantly discriminating against minor political parties, there would be actual double-voting data from which to extrapolate. In any event, for present purposes, it suffices to observe that the harm Plaintiffs have identified cannot possibly be characterized as so "de minimis" as to be unworthy of preliminary injunctive relief.

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must demonstrate (1) irreparable harm; (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation; and (3) a balance of hardships tipping in Plaintiffs' favor. *See Green Party of New York State v. New York State Bd. of Election*s, 389 F.3d 411, 418 (2d Cir. 2004); *Polymer Tech. Corp. v. Mimran*, 37 F.3d 74, 77-78 (2d Cir. 1994).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM

It has long been settled law that the Constitution protects 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).

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. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (holding that the Constitution protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively"); *Williams*, 393 U.S. at 30 (same); *Price v. New York State Bd. of Elections*, 540 F.3d 101, 108 (2d Cir. 2008) (same).

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 793-94. 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.") (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." *Id*. at 420 (quoting *Illinois State Bd.*, 440 U.S. at 185); *see also Norman v. Reed*, 502 U.S. 279, 288-289 (1992); *Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 314 (3rd Cir. 1999).

Anderson, a ballot access case like the instant one, involved a challenge to an Ohio statute that provided "for the automatic inclusion of the Presidential nominees of the major parties on the general election ballot," but required independent candidates to file a statement of candidacy by mid-March in order to qualify for a position on the ballot. 460 U.S. at 791 n.11. The Supreme Court struck down the statute because it allowed "[c]andidates and supporters within the major parties [to] have the political advantage of continued flexibility" beyond the filing deadline, while "for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage because of the competitive nature of the electoral process." *Id.* at 791.

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' treatment of them, 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 as well. The State has no legitimate interest, let alone a sufficiently compelling interest, in simply ignoring the fact that a voter has signaled her intent to support a minor political party, and

pretending that the voter gave her full and unequivocal support to the Democrats or the Republicans.

There is no doubt that Defendants' policy and practice with respect to double-votes has a direct adverse impact on minor political parties and the members and voters seeking to support them. Under any circumstances, political parties—and especially minor political parties such as Plaintiffs—have a core constitutional right to have all votes cast in their favor counted and reported fairly and accurately. 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 strategize for future elections. Long Decl. ¶¶ 8-10; Cantor Decl. ¶¶ 8-10.

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. 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, if not survive altogether.

Nor can the harm caused by Defendants' policy be characterized as "de minimis." As discussed in greater detail above, basic mathematical extrapolation from

the number of over-votes cast on paper ballots in New York City in the 2008 general election confirms that there likely will be, at the very least, *tens of thousands* of double-votes cast across New York State in the 2010 general election. *See supra* at 14-16.

In order to remedy this obvious constitutional violation, Defendants should be required to ensure that the voting machines inform voters when they detect double-votes, notify voters about the consequence of voting for a candidate on more than one party line, and provide voters with the opportunity to correct their ballots. Notably, state and federal law already require Defendants to do exactly that with respect to over-votes (*i.e.*, votes for multiple candidates for a single office). *See* N.Y. Election Law § 7-202(1)(d) (providing that when a voter "votes for more than one candidate for a single office," the voting machine must "notify the voter that the voter has selected more than one candidate for a single office on the ballot, notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office, and provide the voter with the opportunity to correct the ballot before the ballot is cast and counted"); 42 U.S.C. § 15481(a)(1)(iii) (requiring that all optical scanner voting machines must "notify the voter that the voter has selected more than one candidate for a single office on the ballot," "notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office," and "provide the voter with the opportunity to correct the ballot before the ballot is cast and counted").[1]

[1] During the September 30, 2010 conference, counsel for Defendants suggested that Plaintiffs are seeking relief that would "force" or "compel" voters not to double-vote. That is totally false. To the contrary, Plaintiffs merely seek an order compelling Defendants to provide would-be double-voters with the same *warning* and *opportunity* to

Given the gravity of the constitutional rights at stake, there is no persuasive reason why Defendants should not be ordered to effect this change prior to the November 2, 2010 general election. *See* Wallach Decl. ¶ 15.

At a minimum, Defendants should be required to segregate and preserve all ballots containing double-votes in the 2010 general election. Double-votes for gubernatorial candidates may well be material to ballot access and/or order issues—if, for example, the Conservative Party receives 48,000 votes and there are more than 2,000 double-votes. Under such circumstances, the Constitution would require Defendants to credit these double-votes to the relevant minor party, at least for purposes of the 50,000 vote ballot access threshold. Defendants may not be able to do that unless they to take steps, prior to Election Day, to ensure that all double-votes are segregated and preserved.[2]

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correct their ballots that federal and state law already require Defendants to provide to would-be over-voters: a "notif[ication]" that the machine has detected a double-vote; an explanation of "the effect of casting" a double-vote; and "the *opportunity* to correct the ballot before the ballot is cast and counted." New York Election Law § 7-202(1)(d) (emphasis added). In the unlikely event that there is any validity to Defendants' speculation that a significant number of double-voters actually intend to do so—even after it is explained to them that the effect of double-voting is to unequivocally support the major political party, and to give no support whatsoever to the minor political party —double-voters will be just as free to insist upon casting ballots containing double-votes as over-voters already are free to insist upon casting ballots containing over-votes.

[2] During the September 30, 2010 conference, counsel for Defendants suggested that the Democratic and Republican Parties may be "indispensable" parties to this action. Rule 19 of the Federal Rules of Civil Procedure provides for the joinder of parties where "disposition of the action" in their absence may "as a practical matter impair or impede" their ability to protect their interests. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). But it is not "enough for a third party to be adversely affected by the outcome of the litigation. Rather, necessary parties under Rule 19(a)(2)(i) are only those parties whose ability to protect their interests would be impaired *because* of that party's absence from the litigation." *Mastercard Int'l Inc. v. Visa Int'l Serv. Assoc., Inc.*, 471 F.3d 377, 387 (2d Cir. 2006)

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 so self-serving. The Democrats and Republicans are responsible for the enactment of section 9-112(4), and they control the Board of Elections. These dominant parties therefore 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 or 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

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(emphasis in original); *see also Fulani v. Mackay*, No. 06 Civ. 3747 (GBD), 2007 WL 959308, at *3 (S.D.N.Y. Mar. 29, 2007) ("That the other political parties might be affected – even negatively affected – by a holding invalidating [this statute], does not make them necessary parties."); *Lopez Torres v. New York State Bd. of Elections*, 411 F. Supp. 2d 212, 242 (E.D.N.Y. 2006) (rejecting joinder of the Democratic Party because "[t]he defendants point to no colorable constitutional ground upon which the State Democratic Party might lawfully disregard the State Board [of Elections'] authority to enforce all forms of relief the plaintiffs seek."), *aff'd*, *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), *rev'd on other grounds*, *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008).

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.").

II. PLAINTIFFS WILL BE IRREPARABLY HARMED ABSENT PRELIMINARY INJUNCTIVE RELIEF AND THE BALANCE OF HARDSHIPS WEIGHS IN FAVOR OF RELIEF

The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Accordingly, it is firmly established that "where a First Amendment right has been violated, the irreparable harm requirement for the issuance of a preliminary injunction has been satisfied." *Green Party*, 389 F.3d at 418; *see also Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("[V]iolations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction."); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) (same). The injury to Plaintiffs, absent relief, is of great magnitude, whereas the only hardship to Defendants from rectifying their unconstitutional policy is minor administrative inconvenience. Accordingly, the balance of hardships tips decidedly in Plaintiffs' favor.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

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Respectfully submitted,

EMERY CELLI BRINCKERHOFF
& ABADY LLP

By:_____/s/_____
Andrew G. Celli, Jr. (AC 3598)
Eric Hecker (EH 0989)
Zoe Salzman (ZS 9816)

75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

Attorneys for Plaintiff Conservative Party of New York State

BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY SCHOOL
OF LAW

By:_____/s/_____
Wendy Weiser (WW 8580)
Lawrence Norden (LN 7123)

161 Avenue of the Americas, 12th Floor
New York, NY 10013
(646) 292-8310

Attorneys for Plaintiffs Conservative Party of New York State and Working Families Party