UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSERVATIVE PARTY OF NEW YORK STATE
And WORKING FAMILIES PARTY,

                           Plaintiffs,

    -against-

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

                           Defendants.

**AFFIDAVIT OF
ROBERT A. BREHM IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR PRELIMINARY
<u>INJUNCTION</u>**

Civil Action No. **10-CV-6923**
(JSR)

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

      ROBERT A. BREHM being duly sworn, deposes and states as follows:

      1.   I am a Co-Executive Director for defendant New York State Board of Elections (the "State Board"). I have held the position of Co-Executive Director since October 1, 2009, and in such capacity I am fully familiar with the facts and circumstances of this proceeding. I make this affidavit on behalf of the State Board in opposition to plaintiffs' motion for a preliminary injunction for an order enjoining the State Board's practice, in accordance with Election Law §9-112(4) of crediting a "double vote" for a single candidate to the candidate's party line which appears first on the ballot. For the reasons set forth herein as well as in the accompanying affidavit of Robert Warren and defendants' memorandum of law, plaintiffs' motion should be denied in all respects.

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2.   First it is important to understand what a "double vote" is. A "double vote"

occurs when a candidate's name appears on more than one ballot line for a particular office and

the voter casts his vote for the candidate by checking off the candidate's name on two or more

ballot lines.[1] In other words, the voter has cast two votes for the same candidate. New York

Election Law §9-112(4) requires that when that happens, a single vote is cast for the candidate

and it is credited to the first voted ballot line on which the candidate's name appears.

3.   I am advised by counsel that plaintiffs object to this procedure and want a double

vote to be treated in essentially the same manner as an "overvote" is treated with a warning and

an opportunity to "correct" the ballot.[2] An "overvote" occurs when a voter votes for more

candidates than the number of persons to be elected to a position.[3] For example, the voter votes

for two different candidates running for governor when only one candidate is to be elected.

Currently when an overvote is detected by the optical scanning voting machines currently being

used, a warning notice appears on the video screen advising the voter that he has overvoted. He

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[1]   The State Board's regulations which relate to double voting appear at 9 NYCRR §6210.13(7). The regulation provides as follows: "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 vote for such candidate with multiple markings shall be counted for such candidate.*" (emphasis added)

[2]   In the alternative, plaintiffs are requesting that all of the ballots be segregated and preserved. Currently, all ballots are preserved for two years after an election. Segregating the ballots would be an undue and unnecessary burden since based on the actual election results the number of "double votes" may be of no consequence whatsoever.

[3]   The State Board's regulations which relate to over voting appear at 9 NYCRR §6210.13(5). The regulation provides as follows: "Overvote. If a contest is marked with a greater number of choices of different candidates or ballot questions than the number for which he or she is lawfully entitled to vote, the vote shall not be counted for that contest, but shall be counted in all other contests in which there are no overvotes and the voter's choice can be clearly determined.

is then given the option on the screen to either have the ballot returned to him so that he can correct it or to cast the ballot as is. In accordance with Election Law § 9-112(6), if he chooses the second option - - to cast the ballot as is - - his vote for that particular office is not counted because there is no way to determine which candidate the voter really intended to vote for.

4.   The situation is different with a double vote because the voter's intent with respect to which candidate he wanted to cast his vote for is clear. It would, therefore, be inappropriate to apply the current functionality of the voting machines for overvoting to a double voting situation. If that were to be done, two things would happen. The person who double voted would be given the same warning and the same options given to a person who overvoted. The result would be, if he chose to have his ballot returned to him to "correct", that he would be required to select a particular political party before he would be able to cast his vote for the candidate, even if he did not want to select a party to get credit for his vote. On the other hand, if he chose the second option, to cast the ballot as is, the voting machine as currently programmed would disregard the vote all together and the candidate would not be credited with the vote even though the voter's intent to cast a vote for that candidate was absolutely clear.

5.   To change the way that the voting machine would treat a double vote as opposed to an overvote after issuing the warning would require a change in the software/firmware currently being used for the voting machines.   Making such a change at this eleventh hour is impossible. Maintaining the integrity and the accuracy of the vote is critically important. As a result, any changes to the software/firmware currently being used would have to be carefully developed and tested before it could be put into use. This is a long, complex and labor intensive process. The Court is respectfully referred to the accompanying affidavit of Robert Warren, the State Board's certification project manager for a more detailed description of the process that

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would have to be followed if changes were made to the current software/firmware program to provide for a different method of counting double votes.

6.   Aside from the technical challenges outlined in the Mr. Warren's affidavit, there are a number of other challenges that must be addressed as well. For example, any changes to the voting procedures that impact the counties of Kings, Queens and Bronx are subject to "preclearance" by the United States Department of Justice (DOJ) pursuant to the Civil Rights Act. The current method of dealing with double votes and the notices to voters in connection with overvotes have been specifically pre-cleared by the Department of Justice. It is my understanding that altering the manner in which voters interact with the voting system would be a change requiring preclearance. Based on our experience in obtaining such preclearances, it is routine for the DOJ to take an average of six weeks to approve such requests, even when there is a request to expedite its review process. Clearly, DOJ preclearance would not be possible with just a few weeks remaining before the election is scheduled to take place. It is my understanding that even an order of this Court cannot supersede the requirement of preclearance in the counties of New York, Kings and Bronx. It is, therefore, clear that it would be impossible for the State Board to do what plaintiffs are asking this Court to order.

7.   There are a number of other reasons why plaintiffs are not entitled to a preliminary injunction. I am advised by counsel that a preliminary injunction is an extraordinary remedy and that the party moving for a preliminary injunction must demonstrate 1) that absent the relief requested, it will suffer irreparable harm, and either (a) that it will likely succeed on the merits or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation *and* that the balance of the hardships tips decidedly in favor of the moving party. *See* Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70,72 (2d Cir. 1979). Where

the injunctive relief is sought to enjoin a State's executive functions, the Court must act with caution and restraint. *See* <u>Reynolds v. Giuliani</u>, 506 F.3d 183,198 (2d Cir. 2007). Moreover, where "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." <u>Bery v. City of New York</u>, 97 F.3d 689, 694 (2d Cir. 1996), <u>cert</u>. <u>denied</u> 520 U.S. 1251 (1997). As discussed in the accompanying memorandum of law, plaintiffs have not satisfied their burden under any test.

8.   First, plaintiffs have not demonstrated that that they will suffer irreparable harm if the injunction is not granted. The harm they claim is that unless voters who double vote are forced to select a particular ballot line before casting their vote, plaintiffs may not reach the 50,000 vote threshold needed for designation as a political party pursuant to the Election Law. In addition, plaintiffs allege that it might also effect their ballot placement in the future.

9.   Their arguments are speculative and unfounded. The Conservative Party received 168,654 votes in the last gubernatorial election and the Working Families Party received 155,184 votes, both well above the fifty thousand votes needed for party designation. Plaintiffs have not come forward with any evidence that they are unlikely to receive at least the threshold number of votes in the upcoming election if they are not credited with double votes. Even applying their analysis of extrapolating from *overvotes* cast on paper ballots in New York City in the 2008 presidential election the percentage of *double votes* which might be expected in the general statewide election, it is clear that the number of double vote would be so small as to be inconsequential to them.[4] As a result, there is no likelihood that plaintiffs will suffer the harm

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[4]   If the .718% derived from plaintiffs' analysis was accurate and was applied to the results of the 2006 gubernatorial election, it would not have had any effect on either plaintiff reaching

that they fear, even if there was some validity to their analysis, which there is not.

10.   In addition, as discussed in defendants' Memorandum of Law, plaintiffs do not have a viable claim for violation of their constitutional rights. See Defendants' Memorandum of Law, pp. 16-23. As a result, plaintiffs do not have a likelihood of ultimate success on the merits, nor are there sufficiently serious questions going to the merits to make them a fair ground for litigation.

11.   Finally, the equities clearly tip decidedly in defendants' favor. The process that plaintiffs are complaining about with respect to how double votes are treated has been in place since at least 1976. It is well known to all political parties in the State. Despite that, plaintiffs waited to virtually the eve of the election to bring this lawsuit. Moreover, the change that plaintiffs want is costly, confusing to the voters and, possibly detrimental to the entire election process. Forcing the State Board to rush through a change to the software/firmware without the time needed to properly test and implement the safeguards necessary to protect the integrity of the voting system has the potential of disrupting the entire election and causing challenges to the validity of the results.

12.   The current ballot scanner counts votes consistent with the provisions of NYS Election Law §9-112 and rules, regulations and procedures that have been in place for over thirty years. As evidenced from the affidavit of Robert Warren, there is no simple fix without altering the existing voting system ballot coding to allow a double vote to be detected and, if the ballot is cast as-is by the voter, allow a vote to be recorded by the ballot scanner for such individual.

13.   Moreover, the State Board has already taken reasonable precautions to address the

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the threshold number of votes needed for party designation or its placement on future ballots. See Defendants' Memorandum of Law, pp. 14-16.

issues raised. Consistent with Chapter 164 of the Laws of 2010, the State Board provided the form of notice that is required to be conspicuously posted in a prominent place near the ballot scanner and in the privacy booth instructing the voter on how to properly mark a ballot in order to have his or her vote counted. An example of the notice is attached as Exhibit A. At each poll site, instructions are provided to voters on how to mark a ballot correctly, including cautions for overvoting and the consequences of doing so, how to correct a ballot, how to scan a ballot, including an invitation to ask for assistance if it is needed. In addition to the instructions that appear on the ballot scanner, instructions appear on the ballot itself, in postings inside privacy booths, in the Voter's Bill of Rights, and on postings located near the ballot scanner.

14.   The State Board has taken steps to ensure that voters encounter a private and confidential voting experience. The immediate rejection of an double voted ballot, as has been proposed, will create voter confusion in poll sites and compromise voter confidentiality, as voters will have to step away from the scanner, ballot in hand and must then try to discern what they did wrong.

WHEREFORE, plaintiffs' motion for a preliminary injunction should be denied in its entirety.

Dated: October XXX, 2010
         Albany, New York

                                                    /s/ Robert A. Brehm
                                                    ROBERT A. BREHM

Sworn to before me this
8th day of October, 2010.

/s/ ANNA E. SVIZZERO
Notary Public, State of New York
Qualified in Rensselaer County
No. 01SV4894387
Commission Expires June 1, 2011

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EXHIBIT A

MAKE SURE YOUR VOTE COUNTS (ES & S – insert artwork showing properly marked voting position)

1. Use only the writing instrument provided by the election inspectors in your poll site.

2. To vote for a candidate whose name is printed on this ballot, fill in the oval above or next to (CBOE to personalize here) the name of the candidate you want to vote for.

   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 at the bottom of the column or the end of the row (personalize here) for such office and fill in the oval corresponding with the write-in space in which you have written in a name.

3. To vote on any proposal which is located on the reverse side of this ballot, fill in the oval that corresponds to your "YES" or "NO" vote.

4. Do not overvote. You may vote only for the maximum number of candidates allowed for each contest. The maximum number of candidates you may vote for in each contest appears at the top of the column or beginning of the row (personalize here) for that office. Casting more votes than the maximum numbered allowed in any contest will void your votes for that contest only.

5. Any other mark or writing, or any erasure made on this ballot outside the ovals or blank spaces provided for voting will void this entire ballot.

6. If you tear, deface or wrongly mark this ballot, return it to an election inspector to obtain another ballot. Do not try to correct mistakes on your ballot by making erasures or cross outs. Erasures or cross outs may invalidate all or part of your ballot. Before you scan your ballot, if you have made 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 the return of your original ballot.

7. After completing your ballot, be sure to review it carefully, to confirm that you have cast your votes as you intended, and that you have not exceeded the number of votes permitted per contest. Then, insert it into the ballot scanner and wait for the message that tells you your ballot has been successfully scanned. If you do not see that message, ask an election inspector for assistance.

MAKE SURE YOUR VOTE COUNTS   (Dominion – insert artwork showing marked voting position)

1. Use only the writing instrument provided by the election inspectors in your poll site.

2. To vote for a candidate whose name is printed on this ballot, fill in the oval (or square – CBOE to insert what they use here) above or next to (CBOE to personalize here) the name of the candidate you want to vote for.

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 at the bottom of the column or the end of the row (CBOE to personalize here) for that office.

4. To vote on any proposal which is located on the reverse side of this ballot, fill in the oval or square (personalize here) that corresponds to your "YES" or "NO" vote.

5. Do not overvote. You may vote only for the maximum number of candidates allowed for each contest. The maximum number of candidates you may vote for in each contest appears at the top of the column or the beginning of the row (personalize here) for that office. Casting more votes than the maximum numbered allowed in any contest will void your votes for that contest only.

6. Any other mark or writing, or any erasure made on this ballot outside the ovals or squares (personalize) or blank spaces provided for voting will void this entire ballot.

7. If you tear, deface or wrongly mark this ballot, return it to an election inspector to obtain another ballot. Do not try to correct mistakes on your ballot by making erasures or cross outs. Erasures or cross outs may invalidate all or part of your ballot. Before you scan your ballot, if you have made 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 the return of your original ballot.

8. After completing your ballot, be sure to review it carefully, to confirm that you have cast your votes as you intended, and that you have not exceeded the number of votes permitted per contest. Then, insert it into the ballot scanner and wait for the message that tells you your ballot has been successfully scanned. If you do not see that message, ask an election inspector for assistance.