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.

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

DEFENDANTS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

JASPAN SCHLESINGER LLP
Attorneys for New York State Board of Elections, Douglas A. Kellner, Evelyn J. Aquila, & Robert A. Brehm
300 Garden City Plaza
Garden City, New York 11530
(516) 746-8000

BEE READY FISHBEIN HATTER & DONOVAN, LLP
Attorneys for the New York State Board of Elections, James A. Walsh, Gregory P. Peterson, & Todd D. Valentine
170 Old Country Road, Suite 200
Mineola, New York 11501
(516) 746-5599

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Federal Cases

State Cases

Federal Rules

State Statutes

State Regulations

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of Defendants,[1] in opposition to the motion filed by Plaintiffs, Conservative Party of New York State (the "Conservative Party") and Working Families Party (the "Working Families Party") for a preliminary injunction (the "Motion").

In the Motion, Plaintiffs request that this Court enter an order "enjoining Defendants to ensure that 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 an opportunity to correct their ballots; or in the alternative, to segregate and preserve all ballots containing double-votes in the 2010 general election; and for such other relief that the Court may deem just and proper." See Motion [Docket # 19-24, 26].

As fully set forth below, Plaintiffs' motion must be denied in its entirety as they have failed to meet their burden in establishing irreparable harm as well as a clear or substantial likelihood of success on the merits of their claim which challenges the application of a provision of the New York Election Law. The constitutional rights which Plaintiffs allege are violated do not exist and are not protected rights under the First or Fourteenth Amendment. In fact, Plaintiffs' evidence paradoxically supports a denial of their motion, and the doctrine of laches precludes the relief they seek because they unreasonably and inexcusably delayed asserting their claim thereby prejudicing the Defendants.

The Court is respectfully referred to the accompanying Affidavit of Robert A. Brehm,

[1] The Defendants are the New York State Board of Elections (the "Board"), 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 (collectively, the "Commissioners"), Todd D. Valentine ("Valentine") and Robert A. Brehm ("Brehm"), in their official capacities as Co-Executive Directors of the New York State Board of Elections.

duly sworn to on October 8, 2010 ("Brehm Aff."); Affidavit of Todd D. Valentine, duly sworn to on October 8, 2010 ("Valentine Aff."); Affidavit of Robert Warren, duly sworn to on October 8, 2010 ("Warren Aff."); Declaration of Kenneth Carbullido, dated October 7, 2010 ("Carbullido Decl."); and Declaration of John Poulos, dated October 7, 2010 ("Poulos Decl.").

PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural History

Plaintiffs commenced this action on or about September 14, 2010, the same day as the 2010 Primary Election [Docket # 1]. Thereafter, following a hearing on September 30, 2010, with respect to their contemplated motion for a preliminary injunction, Plaintiffs' filed their Motion seeking injunctive relief relating to the application of Election Law § 9-112(4) and the Board's practice and policy with respect to "double votes" [Docket # 19-24, 26].

In accordance with this Court's directive at the September 30, 2010 hearing, Defendants submit this opposition to Plaintiffs' Motion and request that the Motion be denied in its entirety.

B. Relevant Factual Background

The Conservative Party and the Working Families Party are each considered a "party" within the meaning of Election Law § 1-104(3). In accordance with the Election Law, both Plaintiffs attained this status by polling at least 50,000 votes for its candidate for governor in the 2006 gubernatorial election. See Elec. Law § 1-104(3). In the upcoming 2010 gubernatorial election, both Plaintiffs will similarly need to poll at least 50,000 votes for their candidate for governor in order to maintain their "party" status. If they do not, they will become an independent body which can still nominate candidates for office in elections as long as they comply with the nomination process for independent bodies set forth in Article 6 of the Election Law. See Elec. Law §§ 1-104(3) & (12), §§ 6-138 to 6-142. In their Motion, Plaintiffs raise

certain challenges with respect to the manner in which votes will be canvassed in the upcoming gubernatorial election based upon their fear and speculation that they will not be able to maintain their "party" status if they are not credited with certain votes cast by voters.

As required by the enactment of the Help America Vote Act of 2002, 42 U.S.C. § 15301 *et seq.* ("HAVA") in 2002, New York enacted the Election Reform and Modernization Act of 2005 pursuant to which votes in the upcoming general election to be held on November 2, 2010 will be cast on new optical scanning voting machines. Section 9-112 of the Election Law, along with the rules of regulations of the Board set forth at 9 N.Y.C.R.R. §6200 *et seq.* (the "Rules"), set forth the legal standards as well as the Board's practice and policy with respect to the canvassing of votes for elections to be held in the State of New York.

In their Motion, Plaintiffs challenge the application of the Election Law and the Board's Rules concerning "double votes". Under the long standing statutory scheme and in accordance with the Rules, 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. The statutory scheme and Board's Rules require that when a voter casts a double vote the vote is credited to the first voted ballot line on which the candidate's name appears. See Elec. Law § 9-112(4); 9 N.Y.C.R.R. § 6210.13(7).

Plaintiffs' challenge the application of the Election Law and Board's Rules to double votes and request that this Court grant their application for injunctive relief in order to alleviate their speculative fears of losing their "party" status. The Motion must be denied.

LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

In the Motion, Plaintiffs' apply the incorrect legal standard for a preliminary injunction. See Memorandum of Law in Support of Motion for Preliminary Injunction, dated October 1,

2010 (the "Pls.' Mem. of Law"), at 17. They recite the incorrect standard despite relying on a Second Circuit case articulating the correct standard. See id., citing Green Party of New York State v. New York State Bd. of Elections, 389 F.3d 411 (2d Cir. 2004).

In order to obtain a preliminary injunction the moving party must *normally* show irreparable injury, and, either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships decidedly tipped in the movant's favor. See Green Party, 389 F.3d at 418; see also 1-800 Contacts, Inc. v. Whenu.com Inc., 414 F.3d 400, 406 (2d Cir. 2005); Moore v. Consol. Edison Co. of N.Y., 409 F.3d 506, 510 (2d Cir. 2005).

However, in a case like this one 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." Bery v. City of New York, 97 F.3d 689, 694 (2d Cir. 1996), cert. denied 520 U.S. 1251 (1997). In considering a plaintiff's likelihood of success in an action taken to enjoin government action, "regulations developed through reasoned democratic processes" are entitled to some deference. Bronx Household of Faith v. Board of Educ., 331 F.3d 342, 348 (2d Cir. 2003). Further, when the injunction sought would alter the *status quo* as in the instant action, a plaintiff must satisfy an even higher standard and show a "clear" or "substantial" likelihood of success. See Green Party, 389 F.3d at 418; Rodriguez ex rel. Rodriguez v. DeBuono, 175 F.3d 227, 233 (2d Cir. 1999). Since the Motion seeks to enjoin the operation of State statutes and alter the *status quo*, the "clear" or "substantial" likelihood of success on the merits standard applies. As discussed below, regardless of which standard the Court applies, Plaintiffs have failed to meet their burden for granting the extraordinary remedy of a preliminary injunction.

POINT I

PLAINTIFFS' APPLICATION FOR A PRELIMINARY INJUNCTION MUST BE DENIED IN ITS ENTIRETY

The Motion must be denied in its entirety as Plaintiffs have failed to meet their burden in establishing both irreparable harm as well as a "clear" or "substantial" likelihood of success on the merits of their claim. E.g., Bery, 97 F.3d at 694; 1-800 Contacts, Inc., 414 F.3d at 406. Preliminary injunctive relief is a drastic remedy that should not be routinely granted unless the party requesting such relief demonstrates his entitlement to it by a clear showing. See Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Patton v. Dole, 806 F.2d 24, 28 (2d Cir. 1986).

A. Plaintiffs Have Failed To Meet Their Burden In Establishing Irreparable Harm

In order to be awarded a preliminary injunction, Plaintiffs must sufficiently establish that they will suffer irreparable harm absent the relief sought. Plaintiffs have failed to do so.

1. Plaintiffs Have No Constitutional Rights Under the First and Fourteenth Amendments Sufficient to Establish Irreparable Harm

Plaintiffs' entire lawsuit and their motion for a preliminary injunction are premised on what they believe are violations of their "core" constitutional rights under the First and Fourteenth Amendments of the United States Constitution.

Although it is well-settled that "violations of First Amendment rights are commonly considered irreparable injuries," satisfying the first prong of the test for a preliminary injunction, see e.g., Dillon v. New York State Bd. of Elections, No. 05-CV-4966, 2005 WL 2847465, at *3 (E.D.N.Y. Oct. 31, 2005), quoting Green Party, 389 F.3d at 418), "in circumstances in which a plaintiff does not allege injury from a rule or regulation that directly limits speech, irreparable harm is not presumed and must still be shown," Doninger v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008). Irreparable harm cannot be presumed in this action as Plaintiffs, in fact, have no First or

Fourteenth Amendment constitutional rights as they claim.

Plaintiffs attempt to appeal to the sympathy of this Court in order to be granted injunctive relief, but fail to provide any legal supports for their proposed constitutional rights. In furtherance of their Motion, Plaintiffs claim that they have a "core constitutional right to have all votes cast in their favor counted and reported fairly and accurately." See Pls.' Mem. of Law at 1. Plaintiffs then reason that "[i]t 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." See Pls.' Mem. of Law at 2.

The gravamen of Plaintiff's constitutional challenge is that the tallying of the votes pursuant to Election Law § 9-112(4) with respect to double votes violates *their* "core" constitutional rights. It is undisputed that "[t]he First Amendment protects the rights of citizens to associate and to form political parties for the advancement of common political goals and ideas." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997); see also Socialist Workers Party v. Rockefeller, 314 F. Supp. 984, 989 (S.D.N.Y. 1970) ("The right of individuals to organize and associate for the advancement of their political beliefs and the right of all qualified voters, regardless of political persuasion, to cast their votes effectively for candidates of their choice have been firmly established among our precious freedoms."). However, it is well-settled that while all election laws "necessarily implicate the First and Fourteenth Amendments . . . 'it does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute.'" Dillon, 2005 WL 2847465, at *3 (internal citations omitted), citing, Burdick v. Takushi, 504 U.S. 428 (1992). Plaintiffs' claimed "core" constitutional rights – to have all votes purportedly cast in their favor counted and reported fairly

and accurately – is not a constitutionally protected right under the First Amendment. In fact, the Election Law presumes the double vote is in favor of a candidate, not a political party.

Section 9-112(4) of the Election Law and the Board's practice and policy with respect to double votes does not infringe on Plaintiffs' political rights to advance their political beliefs or on the individual voter's rights to cast his or her vote for the candidate that they choose. Plaintiffs are merely dissatisfied with the long-standing principle under the Election Law that where a voter has cast his or her vote for a specific *candidate* whose name appears on a ballot more than once, only the *first* vote for that candidate should count.

Plaintiffs claim that § 9-112(4) and the Board's practice and policy as applied to the new voting machines will somehow "impair[] in its ability to compete, advance its agenda, build the party and associate with its members and supporters" is without basis.

The Board's practice and policy with respect to double votes does not inhibit or prohibit any of Plaintiffs' constitutional rights under the First and Fourteenth Amendments. Regardless of the method used to count the votes cast in the upcoming general election, Plaintiffs' "minority and dissident political views can be aired in the public forum to serve as alternate solutions to contemporary problems and checks on the representation provided by the established or traditional political parties." See e.g., Socialist Workers Party, 314 F. Supp. at 989. Indeed, "[b]allots serve primarily to elect candidates, not as fora for political expression." Timmons, 520 U.S. at 363 (emphasis added). Plaintiffs' assertion that the Board's policy with respect to the double votes somehow will infringe upon their ability "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" does not rise to the level of constitutional violation.

Plaintiffs' real complaint is that the Board's practice and policy with respect to double votes does not help guarantee that they will reach the minimum 50,000 votes for party designation or their ballot position for the next four years. See e.g., Complaint at ¶¶ 27-28. Contrary to Plaintiffs' assertions, "[P]olitical parties have no constitutional right to appear on the ballot." Person v. New York State Bd. of Elections, 467 F.3d 141, 144 (2d Cir. 2006). It is well-settled that "states may limit ballot access in order to prevent 'the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.'" Person, 467 F.3d at 144, quoting Bullock v. Carter, 405 U.S. 134 (1972).

Furthermore, the remedy suggested by Plaintiffs would actually burden the voter. "[V]oting is of the most fundamental significance under our constitutional structure," Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). If the voting machines were to reject double votes and cause voters to remove their ballots from the machines, return to the line by the inspectors, obtain and fill in a new ballot, re-enter the line to the machine and attempt to recast their vote, such a burden would likely disenfranchise voters by lengthening lines and creating overall confusion. Plaintiffs' intended result would therefore violate the *voter's* fundamental right to vote.

Plaintiffs and their members have not been denied access to the ballot, nor denied the right to associate for political purposes or to have their candidates appear on the ballot – all of which are protected by the First Amendment. Therefore, Plaintiffs have failed to establish irreparable harm based on a violation of the First Amendment.

2. Plaintiffs Will Not Suffer Irreparable Harm in the Traditional Sense

Plaintiffs have additionally failed to establish irreparable harm in the traditional sense.

Irreparable harm "must be shown by the moving party to be imminent, not remote or speculative." E.g., Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990) (emphasis added). Mere possibility of irreparable harm is insufficient as Plaintiffs are required to demonstrate that they are "likely to suffer irreparable harm if equitable relief is denied." Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990). Plaintiffs have not met their burden as the harm Plaintiffs have alleged is nothing more than mere speculation and their fear that they will be unable to maintain their "party" status if double votes are canvassed in accordance with, and as required by, the Election Law.

The harm Plaintiffs perceive is that unless ballots with double votes for the same candidate are rejected and the voter is required to select a party line on which to cast their vote, they may not receive the 50,000 votes needed in the upcoming gubernatorial election to be considered a political party. See Complaint at ¶ 37. Their concern is that if they do not reach that threshold, they will be reduced to "independent bodies," although that status does not prevent them from nominating candidates. See Elec. Law § 6-138.

In support of their Motion, Plaintiffs submitted four declarations. None of the declarations provide any basis to support an injunction. For example, the declaration submitted by Plaintiffs' purported "expert", Daniel Wallach, fails to provide any factual basis to support the irreparable harm Plaintiffs will suffer if a preliminary injunction is not granted.[2] See Declaration

[2] Wallach's "expert" declaration should be rejected and not considered by the Court. District courts have a "gatekeeping" role under Fed. R. Evid. 702 and are charged with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." Amorgianos v. National R.R. Passenger Corp., 303 F.3d 256, 265 (2d Cir. 2002) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993); see also Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). The Court must determine "whether the proffered testimony has a sufficiently reliable foundation to permit it to be considered." Amorgianos, 303 F.3d at 265 (internal quotation omitted). Wallach never identifies what information within the "statements" he relies upon to form his "expert" opinion and acknowledges that he is not familiar

of Daniel Wallach, dated September 29, 2010 ("Wallach Decl."). Wallach articulates no theory as to why or how electronic voting machines and software that he has never seen before can easily be modified as he opines. He merely relies on information from other sources having no factual connection to the modifications he proposes. Beyond that he relies upon his knowledge and experience which, according to his declaration, completely exclude any experience with "double voting" or the particular voting machines being used in New York State. Wallach's statements are, therefore, so lacking in a reliable foundation that they should be rejected.

In addition, the declaration submitted by Plaintiffs' counsel, Eric Hecker, Esq., also fails to demonstrate that Plaintiffs' will suffer irreparable harm. See Declaration of Eric Hecker, Esq., dated October 1, 2010 (the "Hecker Decl."). Hecker asserts that "although it would be impossible to predict with any degree of certainty how many double votes will be cast in the upcoming election" he, nevertheless, predicts "that there will be at the least, tens of thousands of double votes cast across New York State in the upcoming election." Hecker Decl. at ¶ 1. Hecker also fails to explain with any quantum of proof as to how or why any measure of "overvoting" correlates to an accurate, predictive measure of "double voting." Furthermore, the statistical analysis contained in his declaration is wholly improper and should, therefore, be disregarded by this Court. See id. Hecker does not claim to have a background in statistics or the experience needed to make the analysis and reach the assumptions which he does.[3]

The declarations and "expert" affidavit submitted by Plaintiffs demonstrates that the alleged harm is nothing more than speculation based upon their fear that they will not be able to

---

with the voting systems' software, rendering his opinions speculative and depriving the Court of the ability to evaluate whether this purported evidence is a reliable.

[3] In addition, there is no explanation as to where Hecker obtained the New York counties voting totals for the 2008 presidential race so as to properly authenticate them for reliability. Authentication of evidence is a pre-condition of admissibility. See Fed. R. Evid. 901.

maintain their "party" status if the Election Law is applied to double votes. Paradoxically, the party enrollment data and the statistical calculations Plaintiffs use actually support Defendants' position that Plaintiffs will not suffer imminent irreparable harm if the Motion is not granted.

The Conservative Party: According to the party enrollment records maintained by the Board, as of April 1, 2010, there were 146,221 people enrolled as members of the Conservative Party.[4] In the last gubernatorial election which took place on November 7, 2006, the Conservative Party had 154,201 enrolled members and its candidate received a total of 168,654 votes, far in excess of the 50,000 votes needed to qualify as a "political party". Presumably, the vast majority of the voters who voted for the candidate on the Conservative Party line were members of the Conservative Party and voted on that line because of their party affiliation and not because they were locked out of also voting for the same candidate on the Republican line.

With a party enrollment this year similar in number to 2006, there is no reason to believe that the number of people voting for the Conservative Party candidate on the Conservative Party line will not meet the 50,000 vote threshold needed for party designation. Its fear that it will not do so is entirely speculative. As a result, and assuming *arguendo* that not reaching the 50,000 vote threshold could constitute irreparable harm, the Conservative Party cannot demonstrate that it will, in fact, suffer irreparable harm in the absence of injunctive relief.

Moreover, if the Conservative Party is truly concerned that voters who vote on the Conservative Party line will also vote for the same candidate on the Republican line and thereby have their vote counted only as a vote for the Republican Party candidate, the simple solution is for the Conservative Party to notify its members prior to the election that they should vote only one time for governor and to do so only on the Conservative Party line because otherwise their

[4] Statistical information regarding the election results and party enrollment can be found on the Board's website, http://www.elections.state.ny.us/EnrollmentCounty.html.

vote will not be counted as a Conservative Party vote. In other words, the Conservative Party has the means and ability to avoid the harm that it perceives with respect to the manner in which the Board handles double votes.

The other harm the Conservative Party perceives has to do with future ballot placement which is based on the number of votes a party receives in the gubernatorial election. See Elec. Law § 7-116. It cannot be legitimately argued that the order in which a political party's name appears on a ballot rises to the level of a constitutional violation, since, as discussed above, political parties have no constitutional right to appear on a ballot. See e.g., Person, 467 F.3d at 144. At a minimum, plaintiff would have to demonstrate that ballot placement deprives it of the ability to have voters cast their votes for their candidate on their line. Without empirical data that a minor party's ballot placement has a significant negative impact on the number of voters who cast their vote on the party's line, or the voter's ability to vote for the minor party's candidate, the party's ballot placement cannot possibly constitute irreparable harm sufficient for the granting of a preliminary injunction. No such data has been offered by Plaintiffs in support of their Motion. Even if there was some "disadvantage" to be placed, for example, fifth instead of fourth on the ballot, the harm would be so *de minimis* that it would not warrant the disruption an injunction would cause at this late date in the election process.

The Working Families Party: Although the Working Families Party is in somewhat of a different position than the Conservative Party, it, too, cannot demonstrate that it will suffer irreparable harm absent the granting of a preliminary injunction. As of April 1, 2010, there were 40,878 people enrolled statewide as members of the Working Families Party. In November 2006, prior to the last gubernatorial election, the Working Families Party had 34,289 members. Despite the fact that its membership was short of 50,000 registered members, 155,184 people

voted for its candidate for governor on the Working Families Party line – more than four times its enrollment. Assuming that the majority of its registered members voted for its candidate on the Working Families Party line, well more than 100,000 other voters searched out the party's line on the ballot, even though its placement on the ballot was the fifth line.[5]

Again, there is no factual basis for Plaintiffs to believe that these 100,000 plus voters only voted on the Working Families Party's line because they were "locked out" of voting twice for the same candidate on either the Democratic or the Independence Party line.[6] While the Working Families Party with its 40,878 members does not have the same easy solution as the Conservative Party, which can notify its 146,221 members to vote for governor only on the Conservative Party line thereby virtually assuring that it will satisfy the 50,000 vote threshold, there is no reason to believe that the Working Families Party will not be able to attract the few additional voters it will need to reach the 50,000 vote threshold. Its fear that it will not reach the threshold is speculative and unwarranted in light of its prior history and ability to attract to its line more than 100,000 voters who were not affiliated with its party. As a result, the Working Families Party, too, cannot demonstrate that it will not be able to reach the 50,000 vote threshold needed to be considered a political party if the Board follows its current practice regarding double votes. Thus, it has failed to show it will suffer irreparable harm.

For the same reasons discussed above with regard to the Conservative Party, future ballot placement does not rise to the level of a constitutional violation. In 2006, the Working Families

---

[5] See http://www.elections.state.ny.us/EnrollmentCounty.html. The Working Families Party's vote totals have consistently trended upward in gubernatorial races, Plaintiffs themselves report the vote totals in the following years: 1998 (51,325), 2002 (90,553), 2006 (155,184). See Declaration of Daniel Cantor, dated September 23, 2010 (the "Cantor Decl.") at ¶¶ 5.

[6] In the 2006 gubernatorial election, Eliot Spitzer, in addition to appearing on the Working Families Party line, was also a candidate of the Democratic Party and the Independence Party. Both the Democratic Party and the Independence Party had higher placement on the ballot.

Party was able to attract 155,184 votes to its line for its gubernatorial candidate despite the fact that it had the fifth line on the ballot. Over 155,000 voters were able to find its line and vote. Without empirical data that a minor party's ballot placement has a significant impact on a voter's ability to cast a vote on its line for its candidate, ballot placement cannot constitute the irreparable harm needed for granting the extraordinary remedy of a preliminary injunction. Again, Plaintiffs have not presented such data in support of their motion.

a. Plaintiffs' Analysis of Prior Voting Patterns Confirms That They Will Not Suffer Irreparable Harm

Plaintiffs' affidavits actually support Defendants' position that they will not suffer irreparable harm if the Motion is denied. Plaintiffs acknowledge that they have no evidence regarding the number of double votes in the 2006 gubernatorial election. As a result, they look to the number of overvotes cast by New York City voters in the 2008 presidential election to support their position. According to Plaintiffs' the overvotes represented .718% of the paper ballots cast. They then use the .718% figure derived from that election and apply and extrapolate it to the number of statewide votes cast in 2006 election for governor to attempt to establish what the number of *double votes* were in that election.

There is no legitimate basis for Plaintiffs' analysis. First, Plaintiffs have not shown that there is any correlation between overvotes and double votes to justify utilizing the percentage of overvotes to determine what would be the percentage of double votes cast in a future election. Second, Plaintiffs have not shown that the percentage of overvotes cast in New York City during the 2008 presidential election is reflective of the percentage of overvotes statewide. As a result, Plaintiffs' analysis is so fatally flawed and deficient that it should be rejected by the Court.

Even assuming *arguendo* that the Court was to give weight to Plaintiffs' analysis, the analysis supports Defendants' position that Plaintiffs are not likely to suffer irreparable harm if

the Motion is denied. For example, in 2006, John Faso was the gubernatorial candidate of both the Republican Party and the Conservative Party. According to election results from the 2006 election, 1,105,681 votes were attributed to John Faso on the Republican line and 168,654 votes were attributed to him on the Conservative Party line. Utilizing Plaintiffs' analysis and assuming *arguendo* that all double votes cast by the voters for Mr. Faso were intended to be votes on the Conservative Party Line, the Conservative Party would be credited with an additional 7,938 votes (1,105,681 x .00718) – a number which has no significance with respect to the alleged harm claimed by the Conservative Party regarding its need for 50,000 votes to qualify for party status. Moreover, the additional votes would have had no impact on its ballot placement in the future. Of course, there is no reason to assume that all the voters who "double voted" would, if given the option, elect to have their votes attributed to the Conservative Party, as opposed to the Republican Party, and, therefore, the ultimate figure would in all likelihood be considerably less.

Parenthetically, the Conservative Party may actually benefit from the application of § 9-112(4). The Conservative Party and the Taxpayers Party both have Carl Paladino as their gubernatorial candidate. If there are instances where a double vote occurs on the Conservative Party line and the Taxpayers line, but not on the Republican Party line, the vote would be credited to the Conservative Party.

The same holds true with regard to the Working Families Party. In 2006, Elliot Spitzer was the gubernatorial candidate for the Democratic, Independence and Working Families Party. Spitzer received a total 2,740,864 votes on the Democratic line, 190,661 votes on the Independence Party line and 155,184 votes on the Working Families Party line. Applying the same analysis, the number of double votes would be 19,678 (2,740,864 x .00718). Since both the Independence Party and the Working Families Party had Spitzer as their candidate, one

cannot assume that all of the double votes would be attributed to the Working Families Party if the voter was given the option to choose a single ballot line.

Assuming *arguendo* that none of the voters that double voted would choose the Democratic Party line and that all the votes would be attributed to one of the two minor parties running Mr. Spitzer as its candidate, a reasonable approach would be to attribute the votes to them on a *pro rata* basis. Utilizing that approach, 55% of the 19,678 double votes or a total of 10,823 votes would be attributed to the Independence Party and 45% of the 19,678 votes or 8,855 votes would be attributed to the Working Families Party. Adding 8,855 votes to the 155,184 votes the Working Families Party actually received would have had no impact on it reaching the 50,000 vote threshold and no impact on its ballot placement.[7]

Plaintiffs' final argument is that it is important that voters be *required* to select a party line when they cast their vote and not have all double votes attributed to one of the two major parties because the number of votes they receive helps them attract new members, raise more money and organize for future elections. None of the cases cited by Plaintiffs stand for the proposition that the Board is required to facilitate a minor party's ability to attract new members or raise more money, or organize for future elections. Therefore, Plaintiffs have failed to establish irreparable harm.

B. Plaintiffs Have Failed to Meet Their Burden In Establishing A "Clear" Or "Substantial" Likelihood of Success on the Merits of Their Claim

In the Complaint, Plaintiffs allege a single cause of action: a claim under 42 U.S.C. § 1983 – First and Fourteenth Amendments. In order to establish a claim under Section 1983, the

[7] Hecker, without any legitimate basis for doing so, assumes that the rate of overvotes could actually be as high as 2.79% statewide. Even assuming, *arguendo*, Hecker's worst case scenario was correct, it would not have made any difference in the 2006 gubernatorial election if that rate was used across the board and the double votes were distributed as discussed above. As a result there is no reason to believe to would make any difference in the 2010 gubernatorial election.

Plaintiffs must sufficiently allege: (1) that the defendant acted under color of state law; and (2) that as a result of the defendant's actions, the plaintiff suffered a denial of his federal statutory rights, or his constitutional rights or privileges. See Quinn v. Nassau County Police Dep't, 53 F. Supp. 2d 347, 353 (E.D.N.Y. 1999), citing Eagleston v. Guido, 41 F.3d 865, 872 (2d Cir. 1994). Plaintiffs have failed to meet their burden to sufficiently establish a clear or substantial likelihood of success on the merits of their sole cause of action, whether as a First Amendment Claim or as an Equal Protection Claim. Therefore, the Motion must be denied in its entirety.

1. Plaintiffs Have No Claim Under the First or Fourteenth Amendment

Plaintiffs' sole cause of action in the Complaint is premised upon purported violations of their alleged "core" constitutional rights. However, in support of the Motion, Plaintiffs have cited to no case supporting their position that the Board's practice and policy with respect to double votes is unconstitutional. Such an allegation without any credible support in law or fact mandates denial of Plaintiffs' Motion as they have failed to establish a clear or substantial likelihood of success on the merits of their claim.

a. The Proper Standard of Review to Apply to the Election Law and Board's Practice and Policy With Respect to Double Votes

Assuming, *arguendo*, Plaintiffs' claimed constitutional rights do exist, Plaintiffs want this Court to apply a strict scrutiny test to the alleged violation of their "core constitutional rights". This is the wrong standard to apply.

When reviewing challenges to state election laws, the court must consider "'the character and magnitude of the asserted injury to the rights protected by the *First* and *Fourteenth Amendments* that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by the rule.'" Burdick, 504 U.S. at 434, quoting Tashijan v. Republican Party of Connecticut, 479 U.S. 208, 213-214 (1986). When First and

Fourteenth Amendment rights are severely restricted, the law must be "'narrowly drawn to advance a state interest of compelling importance.'" Id., quoting Norman, 502 U.S. 279, 289 (1992). However, when First and Fourteenth Amendment rights are only burdened by "'reasonable, nondiscriminatory restrictions,'" the interests of the State will generally suffice to justify the law. Id., quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

All election laws, to some extent, burden the rights of individual voters. Price v. New York State Bd. of Elections, 540 F.3d 101, 107 (2d Cir. 2008). Laws that have been examined under heightened scrutiny "typically involved restrictions on voters' access to the polls, candidates' access to the ballot and the internal workings of political parties." Fletcher v. Marino, 882 F.2d 605, 611 (2d Cir. 1989); see also Unity Party v. Wallace, 707 F.2d 59, 60-62 (2d Cir. 1983) (finding constitutional provision of Election Law requiring timely filing of acknowledged acceptance and not warranting strict scrutiny review because "any encumbrance on [the voters'] rights to vote and politically associate is at best *de minimis* and New York may justify the restriction by advancing a rational basis for it"). However, where voters are not inhibited from associating with the political organization of their choice or barred from voting in an election, the court will not find a "weighty burden" placed on the rights of the voter. Unity, 707 F.2d at 62. As the Supreme Court has stated, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." Burdick, 504 U.S. at 433.

In the instant case, if Plaintiffs are correct in stating that a constitutional violation will occur in the general election (which Defendants dispute), the Board's practice and policy with respect to double votes should be upheld since the proper standard of review is rational basis and

not heightened scrutiny. Election Law § 9-112(4) does not severely restrict the rights of individual voters, as it neither inhibits access to the polls nor restricts candidates' ability to appear on the ballot. See Fletcher, supra. Moreover, unlike cases where strict scrutiny has been applied, Election Law § 9-112(4) does not infringe on voters' right to associate with the political organization of their choice. See Unity, supra. In fact, Plaintiffs have failed to allege any restrictions severe or otherwise. Because any burden imposed by the law is de minimis, the Board need only demonstrate a rational basis for the law. Clearly, the remedy sought by Plaintiffs, rejecting voters' ballots and causing additional lines and confusion at the polling places, is the antithesis of an equitable and efficient voting procedure.

b. Plaintiffs' Claim Under the First Amendment Fails

The Board's practice and policy is based upon the recognition that the first vote the voter makes on the ballot reflects the true vote that the voter intended. This recognition is embodied in § 9-112(4) of the Election Law, which states,

> 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 . . . 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.

Elec. Law § 9-112(4) (emphasis added). The Election Law recognizes that the voter clearly evidenced an intent to vote for a particular candidate in the case of a double or even triple vote for that candidate and merely directs that the vote be counted for the candidate on the canvass as a vote for that candidate on the first ballot line on which the ballot is marked to insure that the vote for the candidate intended by that voter is properly canvassed for that candidate.

New York courts have consistently held that voter intent is paramount in election law cases, emphasizing the importance of "the right of the voter to be safeguarded against

disenfranchisement and to have his intent implemented wherever reasonably possible." In re Weinberger v. Jackson, 280 N.Y.S.2d 235, 236 (App. Div. 2d Dep't 1967); accord In re Muldoon v. Magnotta, 195 N.Y.S.2d 849, 850-851 (App. Div. 2d Dep't 1959) (noting that "the intent of voters is to be sought"); In re Pauly v. Mahoney, 374 N.Y.S.2d 844, 845 (App. Div. 2d Dep't 1975) (examining voter intent in a dispute regarding "write-in" ballots). The intention of voters to select the candidate of their choice should be given "full effect." In re Sullivan v. Power, 262 N.Y.S.2d 794, 795 (App. Div. 1st Dep't 1965). Thus, the Board's procedure to effectuate voter intent is a rational justification that passes constitutional muster, as it is sufficiently related to the law at issue.

Plaintiffs' claim with respect to the Board's practice and policy regarding double votes also fails because it is identical to the arguments raised and rejected by this Court in New Alliance Party v. New York State Bd. of Elections, 861 F. Supp. 282 (S.D.N.Y. 1994). In that case, the New Alliance Party ("NAP") raised a constitutional challenge to Election Law § 7-116 with respect to the listing and ordering of candidates for political office on the electoral ballot. See id. at 286. Specifically, NAP claimed that the statutory scheme which placed political parties and independent nominating bodies on a ballot "abridged its First and Fourteenth Amendment rights to cast an effective vote, to associate for the advancement of political ideas and to create and develop a new political party." Id. at 286. NAP further contended that "its constitutional rights have been significantly impaired under New York's ballot placement methods because it has been denied access to the preferred positions on the ballot." Id. at 295. NAP claimed that because it was not listed first on the ballot, it could not capture extra votes of uninformed voters or "anti-party" voters in the gubernatorial election. See id. at 295.

In dismissing NAP's claims, this Court found that while a political party's right to have

access to the ballot is a right subsumed within fundamental voting rights, "the Constitution protects real and not mere theoretical access to the ballot." Id. at 293-94. This Court recognized that "[t]he states' constitutional power to regulate elections is justified as a way to ensure orderly, rather than chaotic, operation of the democratic process." Id. at 294. "States may enact complex and comprehensive election codes, and while an election law might affect an individual's rights to vote and to associate for political ends, state interests are generally sufficient to justify the restrictions." Id. Moreover, in concluding that NAP had suffered no injury to its constitutional rights, this Court stated:

> All that plaintiff really alleges is that its opportunity to capture the windfall vote has been impeded. While access to ballot may, at times, be afforded constitutional protection, 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. Indeed, it should not be. The Constitution does not protect a plaintiff from the inadequacies or the irrationality of the voting public; it only affords protection from state deprivation of a constitutional right.

Id. at 295 (emphasis added). Plaintiffs' claims in this action must similarly be dismissed.

All that Plaintiffs have alleged in their Motion is that § 9-112(4) and the Board's practice and policy with respect to double votes impedes their ability to capture the votes of anti-party voters or multi-party voters who clearly voted for a *candidate*. Just as in New Alliance Party, the statute and the policy at issue in this case should not be changed just to allow Plaintiffs a marginally better chance of attracting voters who did not intend to support their party but intended to support a candidate.

Similar to the claims raised in this action, the New Alliance Party Court rejected NAP's argument that they would not be able to reach the required 50,000 votes for a "party" designation if the relief requested was not granted:

> To attribute their inability to gather 50,000 votes – less than one percent of

> registered voters in New York State – to the State's regulation of elections is akin to a professional football team blaming its loss in a playoff game and its elimination from Super Bowl contention on its opponent's home-field advantage. . . . Likewise, NAP itself, its candidates and its policies are the most important factors in determining the extent to which it upgrades its status from an independent body to a party. The independent body can improve its performance in elections and become a party by informing voters of its policies and by publicizing its candidates for office. To this extent, the State's interest in managing the ballot does not burden NAP's rights to vote, associate politically and develop itself as a party any more than the NFL's rule granting home-field advantage burdens the visiting team's ability to play, practice and develop into a championship contender.

New Alliance Party, 861 F. Supp. at 298 (emphasis added). Similar to New Alliance Party, the State's interest here should prevail. Accordingly, Plaintiffs' rights are not infringed by Election Law § 9-112(4)and the Board's practice and policy. As such, Plaintiffs have failed to establish a clear or substantial likelihood of success on the merits.

2. Plaintiffs Have No Equal Protection Claim

Alternatively, Plaintiffs appear to allege in the Complaint that aside from their freedom of association claim, their right to equal protection is being violated. See Complaint at ¶ 40. Again, Plaintiffs have no clear and substantial likelihood of success on the merits.

It is well-settled that "a State need not, and indeed probably should not, treat minor parties and independents the same as major parties." New Alliance Party of Alabama v. Hand, 933 F.2d 1568, 1574-1575 (11th Cir. 1991), citing Williams v. Rhodes, 393 U.S. 23 (1968). Access to the ballot is protected under the Equal Protection Clause of the Constitution. See e.g. Strong v. Suffolk County Bd. of Elections, 872 F. Supp. 1160, 1164 (E.D.N.Y. 1994). However, there is no constitutional right under the Equal Protection Clause to a favorable ballot position. New Alliance Party, 861 F. Supp. at 299. "Indeed, different treatment of minority parties in ballot placement 'that does not exclude them from the ballot, prevent them from attaining major

party status if they achieve widespread support, or prevent any voter from voting for the candidate of his or her choice, and that is necessary to further an important government interest does not result in a denial of equal protection.'" Strong, 872 F. Supp. at 1164 (citations omitted). Here, the mere fact that § 9-112(4) and the Board's practice and policy allows the vote to be credited to the first line voted does not mean that an equal protection violation has occurred.

C. The Balance of the Equities Weights in Defendants' Favor

Assuming that the Court were to consider the third prong of the test for the issuance of a preliminary injunction despite the more stringent test applicable to preliminary injunction motions against the State, the Motion would still need to be denied because the equities weigh decidedly in Defendants' favor.

Plaintiffs filed the instant action on September 14, 2010 seeking an injunction concerning the general election scheduled for a mere six weeks later. Among Plaintiffs' many requests in their Motion, Plaintiffs request that that this Court "enjoin[] Defendants to ensure that 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." See Plaintiffs' Notice of Motion. In support of their Motion, Plaintiffs assert without any evidence to support their claim that "setting the voting system to display the same 'Over Voted Ballot' message for double votes would be a trivial change to the configuration files and would not require any change to the voting system software." Wallach Decl. at ¶ 12. Wallach, who admits that he has not examined the voting machines that will be used in the upcoming election, is wrong. As discussed in the Warren and Brehm Affidavits and the Poulos and Carbullido Declarations, the software would have to be rewritten to accomplish Plaintiff's proposed remedy. This would require an extensive and labor intensive process

including independent testing and certification to assure that the system maintains its integrity and accurately records notes. That process in the natural course takes months. Moreover, any changes in the election system would require pre-clearance from the Department of Justice ("DOJ") with respect to the counties of New York, Kings and Bronx. Obtaining clearance from the DOJ typically takes approximately six months.

Plaintiffs' inexcusable and prejudicial delay in bringing the instant action requires that their Motion be denied. Laches "is an equitable defense that 'bars a plaintiff's equitable claim where he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant.'" Ikelionwu v. United States, 150 F.3d 233, 237 (2d Cir. 1998) (internal citations omitted); see also Veltri v. Building Serv. 32b-J Pension Fund, 393 F.3d 318, 326 (2d Cir. 2004); Brennan v. Nassau County, 352 F.3d 60, 64 (2d Cir. 2003). Clearly, Defendants are prejudiced by Plaintiffs' inexcusable and unreasonable delay.

It was widely known for almost five years that the old lever machines would no longer be used in the upcoming general election. In fact, HAVA was passed in 2002 and New York enacted the Election Reform and Modernization Act of 2005 amending certain provisions of its Election Law to be HAVA compliant. See Election Reform and Modernization Act of 2005, Laws of New York, ch. 181 (2005). Moreover, the Board Regulation pertaining to additional requirements for voting systems was added on June 7, 2006 and provides that "[i]n the case of candidates who appear on one or more party lines, the system shall be capable of correctly counting the vote according to the provisions of Election Law Section 9-112." See 9 N.Y.C.R.R. § 6209.3. Section 9-112 of the Election Law was enacted decades ago. Additionally, this exact provision of the Election Law has been used for counting absentee, emergency, military, special federal and affidavit ballots for decades. There was, therefore, no reason for Plaintiffs to have

waited virtually until the eleventh hour before bringing this action.

Indeed, the Working Families Party is a plaintiff in a different action, NAACP New York State Conference v. New York State Bd. of Elections, 10-CV-2950, which was commenced in the Eastern District of New York on or about June 28, 2010. In that action, plaintiffs are seeking, inter alia, "a preliminary and permanent state-wide injunction . . . restraining and enjoining Defendants individually and in their official capacities from enforcing or applying the practice and procedure regarding overvotes." See Complaint, Docket # 1, E.D.N.Y. Case No. 10-2950. The Working Families Party was certainly well-versed in the operation of § 9-112 months before the instant action was commenced.

Based on the foregoing, it is clear that the equities tip decidedly in Defendants' favor.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a preliminary injunction should be denied in its entirety.

Dated: Garden City, New York
October 8, 2010

JASPAN SCHLESINGER LLP
Attorneys for New York State Board of Elections, Douglas A. Kellner, Evelyn J. Aquila, & Robert A. Brehm

By: /s/ Steven R. Schlesinger
STEVEN R. SCHLESINGER
STANLEY A. CAMHI
HALE YAZICIOGLU
300 Garden City Plaza
Garden City, New York 11530
(516) 746-8000

Dated: Mineola, New York
October 8, 2010

BEE READY FISHBEIN HATTER & DONOVAN, LLP
Attorneys for the New York State Board of Elections, James A. Walsh, Gregory P. Peterson, & Todd D. Valentine

By: /s/ Joshua M. Jemal
PETER A. BEE
JOSHUA M. JEMAL
170 Old Country Road, Suite 200
Mineola, New York 11501
(516) 746-5599

/D726279v2/M056970/C0152520

TO: **Andrew G. Celli**
Eric Hecker
Zoe Antonia Salzman
Emery Celli Brinckerhoff & Abady, LLP
Attorneys for Plaintiffs
75 Rockefeller Plaza
20th Flr.
New York, NY 10019
(212) 763-5000

Laurence D. Norden
Wendy R. Weiser
Brennan Center for Justice at NY University School of Law
Attorneys for Plaintiffs
161 Avenue of the Americas
12th floor
New York, NY 10013
(212) 292-8310

Harry Kresky
Law Office of Harry Kresky
Attorneys for Amicus Curiae
City Organizations of the New York Independence Party
250 W. 57 St. (# 2017)
New York, NY 10107
(212) 581-1516