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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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Pursuant to the Court's instructions at the September 30 and October 12 conferences, the limited purpose of this brief is not to prove Plaintiffs' entitlement to preliminary injunctive relief – which Plaintiffs will do at the October 20 evidentiary hearing – but rather to submit legal argument in opposition to Defendants' assertion that, even affording Plaintiffs the benefit of all disputed factual inferences, Plaintiffs are not entitled to preliminary injunctive relief as a matter of law.

As will be demonstrated below, Defendants' strained argument that their double-vote policy does not even *implicate* any constitutional rights, and their only slightly less strained argument that rational basis review applies, are belied by numerous controlling cases that Defendants simply ignore. Moreover, under any standard of review, Defendants' assertion that Plaintiffs' motion should be denied as a matter of law is untenable because Defendants have not offered *any* justification for their double vote policy – much less a rational one, and much less the compelling one that the case law requires. Defendants' remaining arguments – that the harm caused by their policy is only "de minimis," and that they have a meritorious laches defense – beg disputed factual questions that cannot be resolved by this Court as a matter of law prior to the hearing.

ARGUMENT

A. Defendants' Double-Vote Policy Implicates Fundamental Constitutional Rights

Defendants concede, as they must, that the First and Fourteenth Amendments "protect[] the right of citizens to associate and to form political parties for the advancement of common political goals and ideas." Opp. Br. at 6 (quoting *Timmons v. Twin Cities Area New*

Party, 520 U.S. 351, 357 (1997)). Defendants nonetheless insist that, as a matter of law, the Constitution does not require a fair and accurate tally of the votes cast for major and minor parties in an election. They are mistaken.

In arguing that Plaintiffs' claims fail to implicate the Constitution as a matter of law, Defendants barely acknowledge, and make no attempt to distinguish, the many cases cited in Plaintiffs' opening brief establishing that the Constitution affords robust protection to the ability of minor political parties to compete fairly and evenhandedly with the major political parties. *See* Opening Brief at 17-19. Indeed, Defendants fail to discuss either the Supreme Court's seminal case on minor party rights, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), or the statement of applicable law in the Second Circuit's decision in *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411 (2d Cir. 2004).

Instead of confronting the applicable case law, Defendants assert that Plaintiffs "have no constitutional right to appear on the ballot." Opp. Br. at 8. That may be true (to the extent that Plaintiffs fail to meet appropriate state law requirements), but the claim in this case is *not* that Plaintiffs have a constitutional right to appear on the ballot, but rather that the Constitution prohibits the major political parties from *crediting to themselves votes that were not actually cast in their favor*. Thus, for example, although Carl Paladino may have no affirmative constitutional right to appear on the ballot, the Constitution obviously would be implicated if the State were to enact a law providing that all over-votes cast both for Carl Paladino and Andrew Cuomo must automatically be credited to Andrew Cuomo. Defendants' discriminatory treatment of votes for parties is no more immune from constitutional scrutiny than this hypothetical discriminatory treatment of votes for candidates.

Defendants' heavy reliance on *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282 (S.D.N.Y. 1994) (Ward, J.) – which they claim is "identical" to this case, Opp. Br. at 20 – is entirely misplaced. *New Alliance* involved a challenge to New York's practice of listing non-recognized parties who petitioned to place their candidates on the ballot in an order determined by a random lottery. The New Alliance Party had received more votes in the prior gubernatorial election than any of the other petitioning parties, and it asserted the right to be listed first among the non-full-fledged parties. Notably, the only "harm" that the New Alliance Party alleged was the deprivation of its ability to capture the so-called "windfall" vote – *i.e.*, votes cast by "uninformed or uninterested" voters who pick the minor party that is listed first solely because it is listed first on the ballot. 861 F. Supp. at 287. The Court held that "access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern." *Id*. at 295-96. The instant case, in contrast, has nothing to do with any claimed right to capture a "windfall." Indeed, far from seeking a "windfall" for themselves, Plaintiffs actually seek to prevent the major political parties from grabbing a windfall in the form of usurping credit for *votes that were not actually cast for them*.[1]

[1] Defendants distort the case law by selectively quoting from cases out of context. For example, in *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970) (three-judge court), the Court upheld various ballot access restrictions that were challenged as unduly burdensome. Defendants cite this case for the proposition that the Constitution does not require an accurate count of "minority and dissident political views" expressed at the ballot box because those views "can be aired in the public forum." Opp. Br. at 7. That is not what the Court said at all. To the contrary, the Court held that "the right of all qualified voters, regardless of political persuasion, to cast their votes effectively" is "firmly established among our precious freedoms," and that this right must be "held inviolate" *precisely in order to ensure* that dissenting political views may be "aired in the public forum." 314 F. Supp. at 989.

B. Rational Basis Review Does Not Apply

Defendants next claim that rational basis review applies in this case. Opp. Br. at 18-19. Once again, they are mistaken.

To be sure, voting rights cases such as this one do not automatically trigger strict scrutiny, and are governed by the balancing test set forth in *Anderson*, *Burdick v. Takashi*, 504 U.S. 428 (1992), and their progeny. But the Second Circuit has squarely held that rational basis review is *never* appropriate where an election regulation imposes any non-trivial burden on voters or parties. *See Price v. New York State Bd. of Elections*, 540 F.3d 101, 108-09 (2d Cir. 2008). Accordingly, it is beyond dispute that some form of heightened scrutiny applies in this case.

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

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

Green Party, 389 F.3d at 419-20 (quoting *Williams*, 393 U.S. at 31). Reiterating this holding, the Circuit also stated in *Green Party* that:

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

Id. at 420 (quoting *Norman*, 502 U.S. at 288-89). Defendants simply ignore this holding. *See also Anderson*, 460 U.S. at 793 n.16 (emphasizing that "careful judicial scrutiny" is warranted in cases involving minor party rights).

Finally, as Defendants acknowledge, it is well established that rational basis review only applies, if at all, to "*nondiscriminatory* restrictions." Opp. Br. at 18 (quoting *Anderson*, 460 U.S. at 788) (emphasis added). Here, the restriction at issue is anything but "nondiscriminatory." Defendants' policy is not to credit a double-vote to neither party, or to split a double-vote between the parties, or even to allocate credit based on a coin flip – all of which would at least be *neutral*. Instead, Defendants automatically credit all double-votes to the major political party, and completely ignore the fact that the voter has signaled her intent to support the minor party as well. No case supports the remarkable proposition that such an unabashedly discriminatory election regulation triggers mere rational basis review.[2]

C. Under Any Standard of Review, Defendants' Policy Is Unconstitutional

Regardless of the standard of review that applies, Defendants' argument that Plaintiffs' motion should be denied as a matter of law must be rejected. As a threshold matter, Defendants have not offered *any* justification, whether compelling or even rational, for their discriminatory treatment of double-votes. It is axiomatic that a claim that a government policy is unconstitutional cannot be rejected out of hand where the government *has not even attempted to articulate* the ostensible purpose of the policy. *See, e.g.*, *Price*, 540 F.3d at 108-09.

[2] Neither of the cases upon which Defendants rely supports the application of rational basis review. In *Fletcher v. Marino*, 882 F.2d 605 (2d Cir. 1989), the Second Circuit upheld a law that prohibited certain municipal employees and elected officials from serving as community school board members. In applying less than strict scrutiny, the Court emphasized that strict scrutiny is warranted where, as here, an election regulation subjects a political party to discriminatory treatment. *Id*. at 611-12. And in *Unity Party v. Wallace*, 707 F.2d 59 (2d Cir. 1983), the Second Circuit upheld a law that required independent candidates to formally accept their parties' nomination before a deadline. The Court found that rational basis review was appropriate because the law was neutral, non-discriminatory, and imposed no undue time-consumption, financial, or other hardships. *Id*. at 62.

The only statement in Defendants' brief that even arguably attempts to explain the purpose of their double-vote policy is their statement that the "policy is based upon the recognition that the first vote the voter makes on the ballot reflects the true vote that the voter intended." Opp. Br. at 19. To the extent that Defendants are referring to the intent of the voter with respect to which *candidate* to support, that is entirely irrelevant to this case, for everyone agrees that a double-vote should be credited to the chosen candidate (because the voter clearly and unambiguously signaled her intent to support that candidate). To the extent that Defendants are referring to the intent of the voter with respect to which *party* to support – the only issue in this case – this purported justification is utter nonsense. Surely Defendants understand than when a voter has voted for a given candidate on more than one party line, blindly crediting that vote to the major party, and completely ignoring the equal support that the voter expressed for the minor party, does not reflect "the true vote that the voter intended." To the contrary, Defendants' policy plainly *undermines* to that worthy goal.

Nor is there any merit, under any standard of review, to defense counsel's statement at the October 12 conference that their double-vote policy is necessary in order to ensure an "orderly" and "smooth" process on Election Day. Their double-vote policy does not in any way implicate the voter's experience in the polling place, for it only governs how double-votes are counted *after the voter has gone home*. Even to the extent that the warning that Plaintiffs seek implicates the voter's experience in the polling place, Defendants have not attempted to explain why that warning would threaten the "orderly" and "smooth" administration

of the voting process, let alone why it would be so obviously and extremely disruptive that Plaintiffs' motion should be denied as a matter of law.[3]

To the extent that Defendants may argue that the State must choose *some* party-counting rule in order to effectuate the reasonable policy of crediting the vote to the voter's candidate of choice, Plaintiffs do not disagree. But Defendants have not explained why, among at least four potential choices—crediting the vote to the first party, to the second party, to both parties, or to neither party—they chose the rule that knowingly disadvantages minor parties. No possible state interest could justify this discrimination under any standard of review. *See*, *e.g.*, *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (state must independently justify discriminatory classification and identify the "precise interests" demonstrating that discrimination is "necessary").

D. The Harm Caused By Defendants' Unconstitutional Policy Is Not "De Minimis"

Defendants attempt to prove, ostensibly as a matter of law, that it is unthinkable that Plaintiffs will suffer any harm in the 2010 election because it is certain that Plaintiffs will reach the 50,000 vote ballot access threshold. Opp. Br. at 10-14. Leaving aside that Plaintiffs have asserted significant harms to their associational rights that transcend the 50,000 vote issue, Defendants' argument is flawed in several respects.

[3] Shortly after the October 12 conference, Plaintiffs informed Defendants that they will be seeking an order requiring the following warning to be posted: "Do not vote for a candidate more than once. If you wish to vote for a candidate who appears on more than one party line, then you should vote for the candidate on the party line that you wish to support. If you vote for a candidate on more than one party line, then the candidate will receive credit for the vote, but the vote will automatically be credited to the first party listed on the ballot, and no other party will receive any credit for the vote."

First, surely we can all agree that nobody knows what is going to happen in the 2010 election. Although both Plaintiffs did well in the 2006 election, and although both Plaintiffs are confident about their prospects in the 2010 election, the future is uncertain.[4] Indeed, the fundamental issue in this case is that the State's recent transition from lever voting machines (which *did not physically allow* the overwhelming majority of voters to double-vote) to paper ballots that are optically scanned (which *do not even warn* voters about how double-votes are treated, let alone physically prevent them from double-voting) means that we are venturing into entirely uncharted waters. There is no evidentiary support for Defendants' insistence that, as a matter of law, Plaintiffs' past performance guarantees their future success, especially given the State's new, radically different, and entirely untested voting system.

Moreover, even assuming that a hypothetical crystal ball were to guarantee us that both Plaintiffs will surpass the 50,000 vote hurdle this year, Defendants cannot offer any such guarantee to other minor political parties. Indeed, in 2006, the Green Party received 42,166 votes, and in 2002 the Green Party and the Right to Life Party received 41, 797 votes and 44,195 votes, respectively – just a few thousand votes shy of the 50,000 vote threshold. It requires no great stretch of the imagination to suppose that one of these parties, or a different minor party, may get just under 50,000 votes on Election Day. Because this is a *facial* challenge to Defendants' double-vote policy, the harm that other political parties face cannot be ignored. *See Long Island R. Co. v. Int'l Ass'n of Machinists*, 874 F.2d 901, 910 -911 (2d Cir 1989).

[4] For example, in 2002, after garnering more than 50,000 votes in 13 consecutive elections dating back to 1946, the Liberal Party failed to reach that threshold and is no longer guaranteed a place on the ballot.

In any event, Defendants' claim that Plaintiffs will lose only a "de minimis" number of votes due to double-voting is, at best, a sharply disputed question of fact that cannot be resolved prior to the hearing. In addition to the basic mathematical calculations performed in the Hecker Declaration with respect to New York City over-voting in 2008 (which will be confirmed at the hearing by an expert statistician), Plaintiffs will also offer (a) evidence of double-voting from a mock election that was recently performed using ballots similar to the ones that New York will use this year; and (b) evidence of actual double-voting rates in 2008 in Norwalk, Connecticut (which allows "fusion" voting and had already transitioned to optical scanners). In the mock election, the double-vote rate was 2.68%, suggesting that there likely will be well over 100,000 double-votes in the upcoming election. And the Norwalk data demonstrates that actual voters double-voted *with as much frequency as they voted for minor parties* (*i.e.*, that *half* of the votes that included a vote for a minor party were double-votes). For present purposes, it suffices to observe that this Court cannot reject Plaintiffs' motion as a matter of law without hearing this evidence.[5]

E. Defendants' Laches Defense Has No Merit

Defendants are not entitled to a finding of laches as a matter of law. As discussed more fully in the accompanying Declaration of Daniel Cantor, Plaintiffs did not learn about Defendants' double-vote policy until July 2010, and during the ensuing month, two State officials (including Defendant Kellner) expressly assured Mr. Cantor that double-votes were *not*

[5] During the October 12 conference, the Court stated that Plaintiffs need not submit additional declarations regarding disputed factual issues. Instead, the Court directed Plaintiffs to submit a good faith proffer in this reply brief regarding the nature of the factual evidence it will present at the hearing.

automatically credited to the major party. Promptly after Mr. Cantor was informed that these officials were wrong, Plaintiffs made diligent efforts to retain counsel willing to commence this action on their behalf. The doctrine of laches is inapplicable where, as here, any delay in commencing litigation resulted from good faith efforts to investigate the claim. *See Tom Doherty Assoc., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 39 (2d Cir. 1995); *Computer Associates Intern., Inc. v. Bryan*, 784 F. Supp. 982, 987 (E.D.N.Y. 1992). Moreover, the doctrine of laches applies with considerably less force in cases involving fundamental constitutional rights. *See Hershcopf v. Lomenzo*, 350 F. Supp. 156, 159 (S.D.N.Y. 1972); *Bishop v. Lomenzo*, 350 F. Supp. 576, 581 (E.D.N.Y. 1972).

CONCLUSION

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

Dated: New York, New York
October 14, 2010

Respectfully submitted,

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