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

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TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO(s).

CASES

OTHER AUTHORITIES

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

PRELIMINARY STATEMENT

Defendants' motion to dismiss violates both basic rules of civil procedure and well-established constitutional principles. Defendants ignore the allegations in Plaintiffs' Complaint, and improperly seek to introduce purported "evidence" in support of their Rule 12 motion. They attempt to sidestep hornbook Eleventh Amendment doctrine that has been clearly established for over a century. They embrace that they are state actors, but claim entitlement to dismissal on the bizarre theory that they were not acting under color of state law. They assert that the policy at issue is "rational," but ignore controlling Second Circuit authority making clear that rational basis review does not apply.

Defendants' motion should be swiftly rejected. There is no question that Plaintiffs have stated a viable claim for relief, and that Defendants are not entitled to judgment as a matter of law at the pleading stage.

FACTS

New York Election Law § 1-104(b) defines a "party" as "any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor."

Whether a political party achieves full-fledged "party" status is particularly important because only full-fledged "parties" are guaranteed placement on the ballot. Parties that did not reach the 50,000 vote threshold in the most recent gubernatorial race are considered mere "independent bodies" that must go through the labor- and cost-intensive process of

submitting nominating petitions to place their candidates on the ballot. *See* N.Y. Election Law §§ 1-104(b), 6-138.

The number of votes that a party receives in a gubernatorial election is also important because it determines the order in which the parties will appear on the ballot for the next four years. *See* N.Y. Election Law § 7-116.

For these two reasons—ballot access and ballot order—it is imperative that the State fairly and accurately count and report the number of votes cast for each political party in a gubernatorial election. Cplt. ¶¶ 5, 28.

Moreover, even with respect to non-gubernatorial elections, it is imperative that the State fairly and accurately count and report the number votes cast for each political party. It is crucial for political parties—especially minor political parties such as the Plaintiffs—to obtain fair and accurate measures of the support that they receive in each election in order to facilitate their ability to attract new candidates and members, to raise money effectively, to advance their agendas with elected officials, and to plan and strategize for future elections. Cplt. ¶¶ 4, 29.

Additionally, the voters themselves have the fundamental right to have their intended votes counted and reported fairly and accurately. Those voters who have expressed their intent to support a minor political party, but for whatever reason have also checked the name of the same candidate on another party line, are entitled to be informed, when the optical scanner voting machines detect a double-vote, that they have cast an improper double-vote, and they are entitled to an opportunity to correct their mistake. Cplt. ¶ 30.

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

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

Cplt. ¶ 31.

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

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

9. N.Y.C.R.R. § 6210.13(a)(7). In other words, the more powerful party receives all of the credit, and the less powerful party receives none of the credit. Cplt. ¶ 32.

When the State's new optical scanner voting machines detect that a voter has voted for the same candidate on more than one party line, the machines do not provide the voter with any warning that, contrary to the voter's intent, her vote is going to be credited only to the "first" party (almost invariably the Democrats or the Republicans). Cplt. ¶ 33.

Indeed, the New York Election Law does not even require that the paper ballots themselves warn voters about the treatment of double-votes. Election Law § 7-106(5) spells out the "ballot instructions" that must be printed on each ballot "in heavy black type." Subsection (6) of this provision requires ballots to expressly warn voters not to *over-vote* (that is, to vote for

more than one candidate for a given office, as opposed to voting for a single candidate on multiple party lines), and to explain in detail that a vote will not be counted if the voter votes for "a greater number of *candidates* than there are vacancies to be filled." N.Y. Election Law § 7-106(5)(6) (emphasis added). However, no such warning is required to be provided with respect to *double-voting*.

Until recently, the Board's practice of automatically crediting double-votes to the "first" party had little or no practical significance because the vast majority of all votes were cast on lever voting machines, which did not physically allow a voter to vote for a single candidate on more than one party line. If a voter pulled the lever for Eliot Spitzer on the Democratic line, the machine physically prevented her from also pulling the lever for Eliot Spitzer on the Independence or Working Families Party lines. Cplt. ¶ 6-7, 35.

This year, however, the State introduced new optical scanner voting machines. Under this new and radically different voting system, a voter will now cast her vote by filling out bubbles on a paper ballot, which will then be run through and counted by an optical scanner. Because these new scannable paper ballots do not physically prevent a voter from double-voting for a single candidate on more than one party line (unlike the lever machines, which did), there likely were more such double-votes in the recent election than in any election in the State's history. Cplt. ¶¶ 8-9, 36.

This new voting system, coupled with the State's indefensible practice of crediting double-votes only to the "first" party without meaningfully warning voters, presents a grave threat to minor political parties such as the Plaintiffs herein. Cplt. ¶¶ 9, 38.

The practice of failing to inform a voter that she has double-voted, and of crediting the double-vote entirely to the "first" party, is particularly perverse because it is self-

serving. The Democrats and Republicans are responsible for the enactment of section 9-112(4), and they control the Board of Elections. These dominant parties have little incentive to protect the votes intended to be cast for minor parties. Their failure to provide double-voters with any notice or opportunity to correct their ballots, and their insistence that double-votes must be credited entirely to the more powerful party, serves to stifle political competition and ensure a perpetual duopoly over the political process in New York. Cplt. ¶¶ 11, 39.

STANDARD OF REVIEW

In considering a motion to dismiss, the Court must assume that all of the facts alleged in the Complaint are true, construe those facts in the light most favorable to Plaintiffs, and draw all reasonable inferences in favor of Plaintiffs. *See Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 169 (2d Cir. 2009); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 115 (2d Cir. 2008); *U.S. Bank Nat. Ass'n v. Ables & Hall Builders*, 582 F. Supp. 2d 605, 606 (S.D.N.Y. 2008) (Chin, J.).

ARGUMENT

I. THE ELEVENTH AMENDMENT DOES NOT BAR PLAINTIFFS' CLAIM

Defendants are correct that the Eleventh Amendment precludes Plaintiffs from suing the New York State Board of Elections directly. *See* Def. Br. at 3-5. Accordingly, Plaintiffs have voluntarily dismissed the Board pursuant to Fed. R. Civ. P. 41(a)(1), and that issue is now moot.

However, Defendants' argument that the Eleventh Amendment bars Plaintiffs' claim for injunctive relief against the individual Defendants is nothing short of frivolous. More than a century ago, the Supreme Court established the universally recognized rule that suits against state officials in their official capacity seeking to prospectively enjoin violations of

federal law are not barred by the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123 (1908). As the Court explained:

> The act enforced is alleged to be unconstitutional; and if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because it is unconstitutional. . . . The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. at 159-60.

Defendants suggest that the *Ex parte Young* doctrine was overruled in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Def. Br. at 5-6. That is nonsense. *Pennhurst* expressly reaffirmed that *Ex parte Young*'s "important exception" to the Eleventh Amendment remained good law, and merely held that the *Ex parte Young* doctrine is inapplicable "in a suit against state officials *on the basis of state law*." *Id.* at 102, 106 (emphasis added). As Defendants are well aware, Plaintiffs' claims in this case arise exclusively under *federal* law, not state law. *See* Cplt. ¶¶ 39-45. Accordingly, *Pennhurst* plainly does not apply. *See Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 439 (2004) (distinguishing *Pennhurst* because "[i]n that case we found the rationale of *Ex parte Young* inapplicable to suits brought against state officials *alleging violations of state law*") (emphasis added). The Supreme Court has recently reaffirmed the doctrine of *Ex parte Young*. *See id.* at 437 ("To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law."); *Verizon v. Maryland Pub. Svc. Comm'n*, 535 U.S. 635, 645-48 (2002).

Courts in this district have repeatedly rejected state officials' assertions of sovereign immunity against claims for prospective injunctive relief for violations of federal law.

Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (holding that *Ex Parte Young* applied and allowed claims for prospective injunctive relief against an individual state official under federal law); *Credico v. New York State Bd. of Elections*, 2010 WL 4340635, at *2 (E.D.N.Y. Oct. 25, 2010) (Dearie, C.J.) (finding that the Eleventh Amendment barred suit against the Board of Elections, but holding that "plaintiffs' request for prospective injunctive relief is available against the Commissioners acting in their official capacities under the *Ex Parte Young* doctrine"); *M.K.B. et al. v. Eggleston et al.*, 445 F. Supp. 2d 400, 437 (S.D.N.Y. 2006) (Rakoff, J.) (rejecting a similar argument because "the Eleventh Amendment . . . does not preclude suits against state officers in their official capacity for prospective injunctive relief to prevent a continuing violation of federal law") (internal quotation marks omitted).

Undeterred by this squarely controlling authority, Defendants nonetheless suggest that the *Ex parte Young* doctrine does not apply in this case because Plaintiffs seek prospective injunctive relief that might entail some expenditure of public funds. Def. Br. at 6. This argument similarly ignores long-settled case law. The Supreme Court has expressly held that some "ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). As the Court explained, "[t]he injunction issued in *Ex parte Young* was not totally without effect on the State's revenues . . . [and l]ater cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*." *Id*. at 667. Accordingly, the law is clear that, although a claim for *retroactive monetary relief* against a state actor is barred by the Eleventh Amendment, the mere fact "that an expenditure of public funds may be incidentally necessary" in order to comply with an injunction does not implicate the Eleventh Amendment. *Kostok v. Thomas*, 105 F.3d 65, 69 (2d Cir. 1997)

(holding that an injunction requiring a state actor to provide a wheelchair did not violate the Eleventh Amendment even though it plainly would require the State to expend funds).

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

A. Plaintiffs Have Adequately Pled that Defendants Acted Under Color of State Law

Notwithstanding Defendants' Eleventh Amendment argument—the premise of which is that they *are* state actors—Defendants nonetheless argue that Plaintiffs' Complaint should be dismissed at the pleading stage because, as a matter of law, they were not acting "under color of State law." Def. Br. at 7-8. This argument is also frivolous.

As a threshold matter, Plaintiffs' Complaint expressly and unambiguously pleads that Defendants *did* act under color of state law. Cplt. ¶ 44. This should be the beginning and end of the inquiry, at least for purposes of this motion. Defendants cite no case, nor could they possibly cite any case, holding that it is implausible for a plaintiff to allege that a Board of Elections official acts under color of state law when he or she administers a duly enacted state statute and/or a duly promulgated state regulation.

Ignoring the allegations of Plaintiffs' Complaint, Defendants argue that it is "well-settled" that one does not act under "color of law" within the meaning of 42 U.S.C. § 1983 unless one "*misuses*" his or her power. Def. Br. at 8 (emphasis in original). That is flatly false. Defendants conveniently collapse the two independent elements of a § 1983 claim into one. In order to prevail under § 1983, the "defendant must first *possess* power by virtue of state law, then *misuse* that power in a way that violates federal constitutional rights." *See Hayut v. State Univ. of New York*, 352 F.3d 733, 744 (2d Cir. 2003) (emphasis in original) (quoting *Christian v. Belcher*, 888 F.2d 410, 414 (6th Cir.1989)). Contrary to Defendants' spin, the Supreme Court

has explained that "[t]he traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49-50 (1988) (internal quotation marks omitted); *see also Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009). To be sure, Defendants will have ample opportunity in this litigation to marshal evidence sufficient to meet their burden of proving that their actions have not violated the Constitution. But Defendants have cited no case holding, and to Plaintiffs' knowledge no case has ever held, that a § 1983 claim is subject to dismissal at the pleading stage merely because the attorneys representing admitted state actors have averred, in a brief in support of a Rule 12 motion to dismiss, that their clients did nothing wrong.

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

On the merits, Defendants make the bold argument that Plaintiffs' Complaint should be dismissed at the pleading stage because, as a matter of law, their double-vote policy does not even *implicate* any constitutionally protected rights. They are mistaken.

It has long been settled law that the Constitution protects the rights of freedom of speech and association, including the "right of citizens to create and develop new political parties." *Norman v. Reed*, 502 U.S. 279, 288 (1992). Laws that place unequal burdens on minor political parties "impinge[], by [their] very nature, on associational choices" protected by the First and Fourteenth Amendments because they "limit[] the opportunities of independent-minded voters" and therefore "threaten to reduce diversity and competition in the marketplace of ideas." *Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and government policies is at the core of our electoral process and the First Amendment freedoms."). For this reason, the Constitution does not allow state law to

"grant[] 'established parties a decided advantage over any new parties.'" *Green Party of New York State v. New York State Bd. of Elections*, 389 F.3d 411, 419 (2d Cir. 2004) (quoting *Williams*, 393 U.S. at 31).

Laws that discriminate in favor of particular groups, including political parties, are intrinsically suspect and rarely, if ever, upheld. As the Supreme Court stated in *Anderson*, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint [or] associational preference," including those groups "whose political preferences lie outside the existing political parties." 460 U.S. at 791, 793-94 (striking down a scheme that allowed "[c]andidates and supporters within the major parties [to] have the political advantage of continued flexibility" beyond a March filing deadline, while "for independents, the inflexibility imposed by the March filing deadline is a correlative disadvantage"). Accordingly, the State may not implement elections rules that disadvantage minor political parties, relative to the two major political parties, without a "compelling state interest." *Green Party*, 389 F.3d at 419-20 ("Where the state's classification 'limit[s] the access of new parties and inhibits this development, the state must prove that its classification is necessary to serve a compelling state interest.") (quoting *Norman*, 502 U.S. at 288-89) (citing *Schulz v. Williams*, 44 F.3d 48, 60 (1994) (striking down New York law that required voter enrollment lists to be provided free of charge only to major parties because "[i]t is clear that the effect of these provisions . . . is to deny independent or minority parties . . . an equal opportunity to win the votes of the electorate")); *see also Williams*, 393 U.S. at 31. Even if the State has such a compelling interest, "it must show that the means it adopted to achieve that goal are the least restrictive means available." *Green Party*, 389 F.3d at 420 (quoting *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185

(1979)); *see also Norman*, 502 U.S. at 288-89; *Reform Party of Allegheny County v. Allegheny County Dep't of Elections*, 174 F.3d 305, 314 (3d Cir. 1999).

The protection against discriminatory treatment that the Constitution affords to minor political parties applies with equal force to their members and voters. *See Anderson*, 460 U.S. at 793-94 (noting the "particular importance" of protecting "those voters whose political preferences lie outside the existing political parties"); *Illinois State Bd.*, 440 U.S. at 184 (holding that the Constitution protects "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively") (quoting *Williams*, 393 U.S. at 30); *Price v. New York State Bd. of Elections*, 540 F.3d 101, 108 (2d Cir. 2008) (same).[1]

Moreover, the Supreme Court has repeatedly reaffirmed the common-sense principle that the electorate's fundamental right to vote includes the concomitant right "to have their votes *counted*." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (emphasis added); *see also Williams*, 393 U.S. at 30 (state law discriminating against minor parties "places burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."); *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *South v. Peters*, 339 U.S. 276, 279 (1950); *United States v. Classic*, 313 U.S. 299, 315 (1941); *United States v. Mosley*, 238 U.S. 383, 386 (1915). As one District Court put it more recently, "[t]he public interest is served when citizens can look with confidence at an election process that insures that all votes cast by qualified voters are counted." *Bay County*

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

Democratic Party v. Land, 347 F. Supp. 2d 404, 438 (E.D. Mich. 2004) (citing *Bush v. Gore*, 531 U.S. 98, 109 (2000)).

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

Plaintiffs' Complaint expressly alleges—and, at least for purposes of this motion, the Court is obligated to assume—that Defendants' policy and practice with respect to double-votes has a direct and significant adverse impact on minor political parties and the members and voters seeking to support them. Under any circumstances, political parties, and especially minor political parties such as Plaintiffs, have a core constitutional right to have all votes cast in their favor counted and reported fairly and accurately because it is critical for political parties to be able to measure the support that they receive at the ballot box in order to attract new candidates and members, to raise money effectively, to advance the issues they care about, and to facilitate their ability to strategize for future elections. Cplt. ¶¶ 4, 29, 41; *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 590 (6th Cir. 2006) (noting that one of "the most fundamental of political activities" of a minor party is "recruiting supporters"); *Patriot Party of Allegheny County v. Allegheny County Dep't of Elections*, 95 F.3d 253, 261 (3d Cir. 1996) (observing that it is critical for a minor party to "demonstrat[e] its electoral appeal" through the number of votes

cast for it in order to "win . . . increased support from the electorate" and "enhance its standing with candidates and with voters").

Moreover, in a New York gubernatorial election, it is particularly imperative that all votes for a given party be counted fairly and accurately because those vote tallies are used to determine ballot access and order for the next four years. Cplt. ¶¶ 5, 25-27. Only those parties whose previous gubernatorial candidate received at least 50,000 votes are entitled to a place on the ballot, N.Y. Election Law § 6-138, and parties appear on the ballot in an order determined by the number of votes that their previous gubernatorial candidate received, N.Y. Election Law § 7-116. The ability of minor political parties to maintain their rightful place on the ballot is therefore critical to their ability to compete, if not survive altogether. Cplt. ¶¶ 5, 9, 12, 28, 37.

Defendants' policy and practice of failing to inform a voter that she has double-voted, and of crediting the double-vote entirely to the "first" party on the ballot, is particularly perverse because it is so self-serving. The Democrats and Republicans are responsible for the enactment of section 9-112(4), and they control the Board of Elections. Cplt. ¶¶ 12, 38. These dominant parties therefore have little incentive to protect votes that are intended to be cast for minor parties. *See Anderson*, 460 U.S. at 793 n.16 (emphasizing that "careful judicial scrutiny" is warranted where "the interests of minor parties and independent candidates are not well represented in state legislatures" due to "the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking"). Defendants' failure to provide double-voters with any notice or opportunity to correct their ballots, and their insistence that double-votes must be credited entirely to the more powerful party, unconstitutionally stifles political competition and ensures a perpetual duopoly over the political process in New York. *Id*. at 794 ("In short, the primary values protected by the First Amendment . . . are served when election campaigns

are not monopolized by the existing political parties."); *Williams*, 393 U.S. at 32 ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them.").

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

First, Defendants assert that "[p]olitical parties have no constitutional right to appear on the ballot." Def. Br. at 9. That may be true (to the extent that Plaintiffs fail to meet appropriate state law requirements), but the claim in this case is *not* that Plaintiffs have a constitutional right to appear on the ballot, but rather that the Constitution prohibits the major political parties from *discriminating* against minor parties by crediting to themselves votes that were not actually cast in their favor. Thus, for example, although Carl Paladino may have no affirmative constitutional right to appear on the ballot, the Constitution obviously would be implicated if the State were to enact a law providing that all over-votes cast both for Carl Paladino and Andrew Cuomo must automatically be credited to Andrew Cuomo. Defendants' *discriminatory treatment* of votes for parties is no more immune from constitutional scrutiny than this hypothetical discriminatory treatment of votes for candidates.[2]

Defendants next argue that political parties have no constitutional right "to receive a particular placement on the ballot." Def. Br. at 13. Once again, Defendants miss the basic point. Plaintiffs do not assert a freestanding right to receive any particular placement on

[2] Defendants conflate the range of injuries Plaintiffs suffer as a result of the violation of their constitutional rights with their constitutional rights. Plaintiffs claim constitutional rights to association and speech, not to ballot access, ballot placement, or to using the ballot for political organizing. The violation of their rights to free speech and association harms Plaintiffs in a variety of ways, including in their ballot access, ballot placement, and ability to use the electoral process for political organizing.

the ballot. To the contrary, Plaintiffs assert the right to be free from *unabashed discrimination* in the process of determining ballot order. The State may not have had the affirmative constitutional duty to determine ballot order based on the number of votes cast for a particular party in the prior gubernatorial election. However, having chosen to impose that regime, the State cannot then stack the deck in favor of the major political parties, to the disadvantage of the minor political parties, by assigning votes to the major parties that they did not actually receive. This case is not about affording Plaintiffs "a marginally better chance of having their names appear slightly higher up on the ballot," Def. Br. at 13, but rather about treating all political parties *equally*.[3]

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

[3] In their brief, Defendants cite to a November 4, 2010 *Newsday* blurb containing unofficial speculation about the number of votes that each minor party may have received in the recent general election. This reference is improper and should be ignored for two reasons: (1) because it is not based on official data and does not even purport to be accurate (indeed, as Defendants have represented to the Court, they will not be releasing the official party vote counts for several more weeks); and (2) because Defendants obviously cannot obtain dismissal as a matter of law under Rule 12(b)(6) by presenting alleged "facts" that go beyond the allegations in the Complaint. In any event, it is telling that the press speculation that Defendants cite seems to indicate that the results of the 2010 general election may well have a very significant impact on ballot position going forward, with the Conservative, Working Families, and Independence Parties all changing positions. Def. Br. Exh. A.

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 intended to be cast for them*.

Defendants also dismiss Plaintiffs' well-pled allegations that the State's discriminatory double-vote policy burdens their ability to attract new members, raise money, further their policy agendas, and organize for future elections, arguing that these "are not constitutionally protected interests." Def. Br. at 14. The cases Defendants cite, however, do not support their argument. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), the Court merely held that the Constitution does not affirmatively require states to allow fusion candidacies. In so holding, the Court took pains to reaffirm that the right "to form political parties for the advancement of common political goals and ideas" is constitutionally protected and that the "independent expression of a political party's views is 'core' First Amendment activity." *Id*. at 357-58 (quotations omitted). Although the Court observed that political parties have no right to use the *ballot* to send messages to candidates—by endorsing candidates that also accepted the nominations of other parties, *id*. at 362-63—that certainly does not mean that political parties have no right to use election *results* to convey their strength to candidates, voters, and funders through a fair and accurate tally of the votes that were and were not cast in their favor. And in *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court merely held that the

Constitution does not affirmatively require states to allow write-in voting. In so holding, the Court expressly reaffirmed that it is "beyond cavil that voting is of the most fundamental significance under our constitutional structure." *Id*. at 433. Although the Court suggested that the "expressive function" of elections must yield to "the ability of States to operate elections fairly and efficiently" in appropriate cases, the Court expressly admonished that it would only uphold "*politically neutral* rules that have the effect of channeling expressive activity at the polls." *Id*. at 438 (emphasis added). The double-vote policy at issue in this case cannot in any way be characterized as a "politically neutral" rule.[4]

Defendants also rely on *Dillon v. New York State Board of Elections*, 2005 WL 2847465 (E.D.N.Y. Oct. 31, 2005), for the proposition that the Constitution is not even implicated by its policy of crediting double-votes to the "first" party on the ballot. Def. Br. at 15-17. Contrary to Defendants' spin, the issue here is not at all "the same" (*id*. at 17) as the one in *Dillon*. That case involved a claim that a so-called "independent body"—*not* a full-fledged political party that had received the requisite 50,000 votes in the prior gubernatorial election—had the affirmative constitutional right to its own ballot line even though it had failed to meet the 50,000 vote requirement. Notably, as the Court recognized, the rules that the independent body challenged—which provide that the independent body does not get its own ballot line when its nominee has already been nominated by multiple full-fledged political parties—*do not apply in*

[4] Defendants distort the holding in *Socialist Workers Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y. 1970) (three-judge court), in which the Court upheld various ballot access restrictions that were challenged as unduly burdensome. Defendants cite this case for the proposition that the Constitution does not require an accurate count of "minority and dissident political views" expressed at the ballot box because those views "can be aired in the public forum." Def. Br. at 15. 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.

gubernatorial elections (or state senate or assembly elections, for that matter) and therefore have no impact whatsoever on the ability of an independent body to achieve full-fledged party status. 2005 WL 2847465 at *2 (citing N.Y. Election Law § 7-104.6); *see also id.* at *6 ("If and when the Integrity Party cross-nominates a candidate for the office of governor, it will get its own ballot line no matter how many Parties or other independent bodies nominate the same candidate."). Moreover, the independent body at issue in *Dillon* simply was not similarly situated to the full-fledged parties it claimed were treated more favorably. In this case, in contrast, Plaintiffs have received the 50,000 votes necessary to qualify for full-fledged party status, and there is no reason, rational or otherwise, why double-votes should automatically be credited to the major parties at Plaintiffs' expense.

Finally, Defendants attack the remedy that Plaintiffs ultimately seek—namely, that the optical scanner voting machines be programmed to warn voters when they detect a double-vote and to return the ballot to voters for correction. Def. Br. at 17-18. However, questions about the propriety of the remedy Plaintiffs seek have no bearing on whether Plaintiffs have adequately pled that Election Law § 9-112(4) and 9 N.Y.C.R.R. § 6210.13 are unconstitutional. If and when this Court strikes those provisions down, Defendants will be afforded ample opportunity to weigh in on the appropriate remedy. Indeed, Plaintiffs seek other relief in addition to that challenged by Defendants—including a declaration that Defendants' policy is unconstitutional and any other relief this Court finds just and proper. At this preliminary juncture, any questions about the appropriateness of particular remedies are premature. *See Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 898 (2d Cir. 1976); *Island Oasis Frozen Cocktail Co., Inc. v. Coffee King, Inc.*, 2010 WL 3749402, at *3 (D. Mass. Sep. 24,

2010); *Devon Robotics v. DeViedma*, 2010 WL 300347, at *6 (E.D. Pa. Jan. 25, 2010).[5]

It is notable that, in their entire brief, Defendants only cite *two cases* in which an election law challenge was dismissed at the pleading stage under Rule 12(b)(6): *New Alliance Party*, which is distinguished above (*see supra* at 15-16), and *Strong v. Suffolk County Bd. of Elections*, 872 F. Supp. 1160 (E.D.N.Y. 1994), a case in which a *pro se* plaintiff running as a candidate of the "Fed Up Party" claimed a constitutional right to be notified of the Board's procedure for determining minor party ballot placement. Every single other case cited by Defendants either granted relief or denied relief only after plaintiffs were afforded the opportunity to build an evidentiary record. The dearth of case law dismissing minor party discrimination claims at the pleading stage is telling. Plaintiffs plainly have stated a viable claim for relief and are entitled to discovery.

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

Defendants argue that Plaintiffs' Complaint should be dismissed because, as a matter of law, their double-vote policy is "a rational and proper exercise of the legislative

[5] In the event the Court is inclined to address the remedy issue before Defendants have even answered, it bears repeating that the Court is obligated to accept as true Plaintiffs' well-pled allegation that voters are provided "no warning at all" when they double-vote. Cplt. ¶¶ 4, 33. Ignoring this allegation, Defendants attached to their brief what their lawyers assert (without an authenticating declaration) is the ballot that was used in Nassau County in the recent general election. Def Br. at 17 n.7 & Exh. B. Leaving aside that the single and inconspicuous use of the word "once" on this ballot hardly suffices to meaningfully warn a voter that a double-vote will automatically be credited to the major party, Defendants have proffered no evidence—and of course are not entitled to proffer evidence at this stage—about the extent to which any of the ballots used *in any of the other 61 counties* contained double-vote warnings. Notably, Election Law § 7-106(5) spells out the precise "ballot instructions" that must be printed on each ballot "in heavy black type" and does *not* require ballots to contain any warning about double-voting. Whereas subsection (6) of that provision requires ballots to expressly warn voters not to *over-vote* (that is, to vote for more than one candidate for a given office, as opposed to voting for a single candidate on multiple party lines), no such warning is required to be provided with respect to *double-voting*.

function." Def. Br. at 18-23. The law is clear, however, that rational basis review does not apply.

To be sure, voting rights cases such as this one do not automatically trigger strict scrutiny, and are governed by the balancing test set forth in *Anderson*, *Burdick*, and their progeny. But the Second Circuit has squarely held that rational basis review is *never* appropriate where an election regulation imposes any non-trivial burden on voters or parties. *See Price*, 540 F.3d at 108-09. 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 discrimination against minor parties).

Finally, as Defendants have previously acknowledged, it is well established that rational basis review only applies, if at all, to "*nondiscriminatory* restrictions." *Anderson*, 460

U.S. at 788 (emphasis added). Here, the restriction at issue is anything but "nondiscriminatory." Defendants' policy is not to credit a double-vote to neither party, or to split a double-vote between the parties, or even to allocate credit based on a coin flip—all of which would at least be *neutral*. Instead, Defendants automatically credit all double-votes to the 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. *See Credico*, 2010 WL 4340635, at *4 (holding that "*Price* directs me to conduct more than just a rational basis review").

Incredibly, Defendants' brief does not even cite—let alone meaningfully distinguish—the Second Circuit's opinions in *Green Party* or *Price*. These are the Circuit's two most significant pronouncements on the standard of review that applies in an election law case such as this one. Plaintiffs discussed these cases extensively in their preliminary injunction papers, and yet Defendants' brief studiously ignores them. The fact that Defendants have buried their heads in the sand with respect to the standard of review is reason enough to deny their motion.

In any event, regardless of the standard of review that applies, Defendants' attempt to justify their double-vote policy is well wide of the mark. Defendants devote several pages of their brief to the argument that their double-vote policy is necessary in order to credit the vote to the *candidate* who received it. Def. Br. at 18-20. But this case does not in any way implicate whether the candidate should receive credit for the double-vote. Of course he or she should (because the voter clearly and unambiguously signaled his or her intent to support that candidate). The only question is which *party*, if any, should receive credit. Defendants simply assume, for example, that treating a double-vote as a "nullity" (*i.e.*, crediting the vote to neither

party) would require the candidate to be deprived of the vote. Def. Br. at 20. But that plainly is not so. There is no legal or logical reason why a double-vote could not be credited to the candidate but to neither party—or, more fairly, split among both parties or credited to the minor party. *Cf. Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992) (state must independently justify discriminatory classification and identify the "precise interests" demonstrating that discrimination is "necessary"). Defendants' focus on "fairness" to candidates therefore is nothing but a red herring.

Nor is there any merit to Defendants' argument that their double-vote policy is "the most rational and the fairest" because it "treats all minor parties the same." Def. Br. at 21. Once again, Defendants miss the point. The claim in this case is not that Defendants are treating certain minor parties better or worse than others.[6] The claim is that Defendants are arbitrarily *favoring the major political parties*, at the expense of the minor parties, by giving the major parties exclusive credit for votes that actually were cast for both.[7]

Finally, it bears emphasis that Defendants have not offered any *evidence*—such as an affidavit from a government official—regarding the purpose of their double-vote policy. Instead, they rely exclusively on the unsworn musings of their attorneys. This is insufficient. *See Price*, 540 F.3d at 110-11 (rejecting the State's "contrived argument" and "flimsy proffered justification"); *Lerman v. Bd. of Elections of the City of New York*, 232 F.3d 135, 149-50 (2d Cir.

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

[7] Defendants' reliance on *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568 (11th Cir. 1991), Def. Br. at 22, is puzzling. Far from holding that the State may discriminate against minor parties, the Eleventh Circuit actually granted the minor party the injunction it sought and struck down the challenged provision, finding that "the interests put forth by the defendant" were "not persuasive" and did "not adequately justify the restriction imposed." *Id*. at 1576.

2000) (holding that defendants must "do more than simply posit the existence of the disease sought to be cured") (quotation omitted); *see also Libertarian Party*, 462 F.3d at 593-94 (rejecting the government's reliance "on suppositions and speculative interests").

CONCLUSION

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

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Respectfully submitted,

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