

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY, by MIKE LONG, its  
Chairman, and PAUL ATANASIO, its Treasurer;  
WORKING FAMILIES PARTY, by ROBERT P. MASTER,  
its Chairperson, DANIEL CANTOR, its Executive  
Director, and DOROTHY SIEGEL, its Treasurer; and  
TAXPAYERS PARTY, by DAVID NEZELEK and  
RUS THOMPSON,

Plaintiffs,

-against-

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

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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**DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW  
IN SUPPORT OF THE MOTION TO DISMISS**

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Defendants submit this supplemental brief in response to plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss.

Plaintiffs fail to understand the totality of the voting process. It is more than placing a voting mark in an oval and having the ballot scanned. The Election Law has mandated certain requirements and procedures to ensure that there is, in fact, a swift, efficient and cost-effective voting process. Plaintiffs' proposed "remedy" not only raises serious concerns over voter privacy but may also destroy the efficient voting process the State has established.

### **I. The Voting Process and Required Procedures Under the Election Law**

The State has established a comprehensive and well-designed voting process. When a voter appears at a polling place:

- Voters can only enter the "voting area" (*i.e.*, the table used by the inspectors in charge of the poll books) two at a time to appear before a clerk or an inspector of elections to ascertain whether he or she is entitled to vote. See Elec. Law §8-300.
- If the clerk or inspector determines that the voter is entitled to vote, the voter is handed a ballot, the inspector accounts for the paper ballot,<sup>1</sup> and the voter is directed to the privacy booth to mark his or her ballot. See Elec. Law §8-312(1).
- The voter is entitled remain in the privacy booth for a reasonable amount of time for the purposes of marking his or her ballot. See Elec. Law §8-300.
- After the voter marks the ballot, he leaves the privacy booth with the ballot and proceeds to the ballot scanner, inserts the ballot into the scanner and waits for the notice that the ballot has been successfully scanned. See Elec. Law §8-312(2).
- If the scanner informs the voter that the ballot was properly scanned, the voter is finished voting and the ballot has been cast. See Elec. Law §8-312(2).
- If, however, the notice does not appear, the voter must seek assistance of the election inspector. See Elec. Law §8-312(2).
- If the voter wrongly marks or defaces a ballot, the voter must return<sup>2</sup> the ballot to the clerk or inspector who must then mark the ballot as a "cancelled" or "spoiled", place the spoiled ballot in the secure box set aside for spoiled or mutilated ballots. Then, the voter shall receive another ballot, one ballot at a time and *not exceeding three ballots in all*, to mark his votes. See Elec. Law §8-312(1); §8-316.
- The voter then begins the process again by walking back to the privacy booth, marking his ballot again for all offices, questions and propositions, and then scanning it in the voting machine. See Elec. Law §8-312.

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<sup>1</sup> Each paper ballot is accompanied by a "stub" which contains a ballot number. See Elec. Law §7-106(3). The stubs have consecutive numbers of ballots beginning with "No. 1," and increasing in regular numerical order. Id. After the close of the polls, the inspectors and the clerks are required to account for each and every single paper ballot used (whether cast or marked spoiled). See Elec. Law §9-102(1).

<sup>2</sup> Whenever there is a need for a new ballot, the voter must either interrupt the line or return to the end of the line to return his marked ballot and obtain a new one, both causing delays for voters.

## II. Plaintiffs' Remedy Destroys Voter Privacy

Unlike an overvote where a voter's preference for a candidate in a particular contest is not discernable, with a double vote, the voter's preference for a candidate is clear. Plaintiffs' remedy would destroy voter privacy. For example, if, after the voter scanned his ballot, plaintiffs' proposed notice appeared on the screen informing him of a double vote in one or more contests, the voter would be required to seek inspector assistance pursuant to §8-312. When he did and his ballot was returned to him from the voting machine, his vote could be revealed to the inspector. Further, when the voter handed his ballot back to the clerk in the voting area to be marked as spoiled, the voter's choice would again be exposed thereby destroying voter privacy and compromising the secret ballot a voter is entitled to cast.

## III. Plaintiffs' Remedy Undercuts the State's Swift and Efficient Voting Process

It is well-settled that "[s]tates certainly have an interest in protecting the integrity, fairness and efficiency of their ballots and election processes as means for electing public officials." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997). The aforementioned voting process is not the simplistic process plaintiffs posit in their supplemental brief. Plaintiffs' proposed remedy can lead to voting delays, voter confusion, voter dissatisfaction and possibly voter disenfranchisement. Empirical evidence is not needed to appreciate the fact that should this process repeat itself several times during an election, as plaintiffs' assert, it would have an adverse impact on the administration of the election. Moreover, it would adversely affect voters who could become confused, frustrated and disenfranchised if, after plaintiffs' proposed notice appears on the voting machine, voters choose not to expose their vote to the inspectors, or repeat the process and complete an entirely new ballot for all offices, not just for the office that was double voted, or wait again to cast their vote. See Timmons, 520 U.S. at 364 ("[n]or do we require elaborate, empirical verification of the weightiness of the State's asserted justifications.").

Despite the disruption, the legislature determined that in the case of an *overvote*, it was appropriate to afford the voter the opportunity to clarify his intent so that his vote for a candidate could be counted. A double vote does not require clarification. As a result, double votes do not interfere with the primary purpose of elections – to elect candidates. Furthermore, plaintiffs' proposed remedy would cause a voter to utilize one of his "three strikes" when his preference for a candidate can already be discerned. The receipt of subsequent ballots can cause a voter to be disenfranchised if he uses all three of his allotted ballots. In sum, treating a double vote like an overvote would simply add a second layer of delay, disruption and confusion at the polling sites, which could lead to even greater voter dissatisfaction, frustration and possible disenfranchisement – all of which the state has an interest in preventing.

Dated: February 7, 2011  
Garden City, New York 11530

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I, **HALE YAZICIOGLU**, an attorney duly admitted to practice law in the Courts of the State of New York and before this Court, hereby certify, pursuant to 28 U.S.C. § 1746, that on the **7th day of February, 2011**, I served a copy of the **DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS, dated February 7, 2011**, by First Class Mail by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to the following attorneys at the addresses listed below, said addresses being designated for that purpose:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: Garden City, New York  
February 7, 2011

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