

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUDGE RAKOFF
10 CIV 6923

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CONSERVATIVE PARTY OF NEW
YORK STATE and WORKING FAMILIES
PARTY,

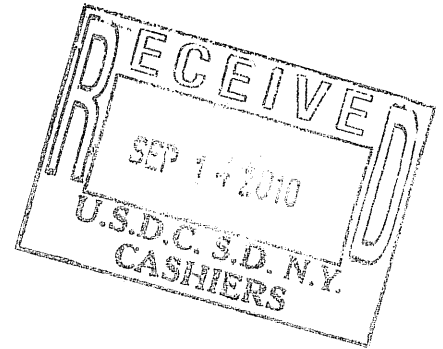
___ Civ. _____ ()

Plaintiffs,

COMPLAINT

-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 Conservative Party of New York State and Working Families
Party, by and through their attorneys, Emery Celli Brinckerhoff & Abady LLP and the
Brennan Center for Justice at New York University School of Law, for their Complaint
allege as follows:

INTRODUCTION

1. This action seeks to preliminarily and permanently enjoin a policy and
practice of the New York State Board of Elections that is so baldly unconstitutional that it
is difficult to believe that it actually takes place.

2. New York allows "fusion" voting, meaning that a single candidate can
accept the nomination of multiple political parties and thus appear on the ballot on

multiple lines for the same office. The issue is what to do when a voter improperly votes for the same candidate on more than one party line – commonly referred to as a “double-vote” – for example, in the 2006 gubernatorial election, by voting for Eliot Spitzer both on the Democratic and Independence lines. There is no question that Spitzer should be credited with such a vote, for the voter unambiguously signaled her intent to vote for him and nobody else. The question is which of the two *parties* should be credited with that vote.

3. New York Election Law § 9-112(4) addresses what to do when a voter votes for a single candidate on multiple party lines. The New York State Board of Elections has interpreted this provision to require that in such circumstances, the vote is automatically credited to the “first” party on the ballot – *i.e.*, to the party that received more votes in the prior gubernatorial election. In other words, if a 2006 voter voted for Spitzer on both the Democratic and Independence lines, the Democrats were credited with the vote, and if the voter voted for John Faso on both the Republican and Conservative lines, the Republicans were credited with the vote. The Board simply ignores fact that the voter has expressed her intent to support a minor party.

4. This is no small issue. Under any circumstances, political parties – and especially minor political parties such as the Plaintiffs – have a core constitutional right to have all votes cast in their favor counted and reported fairly and accurately. 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, and to facilitate their ability to strategize for future elections. It is equally critical for voters to be able to count on the fact that their intended support of minor political parties will be

credited. It is axiomatic that the State may not give preferential treatment to the two major political parties, at the expense of minor political parties such as the Plaintiffs, without a compelling justification.

5. 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. Only those parties whose previous gubernatorial candidate received at least 50,000 votes are entitled to a place on the ballot, and parties appear on the ballot in an order determined by the number of votes that their previous gubernatorial candidate received.

6. Notably, although the State's unabashedly discriminatory practice of crediting all double-votes to the first party on the ballot – and simply ignoring double-voters' manifest intent to support minor parties – has been in place for many years, it has had little practical significance until this year due to the State's recent migration from the old lever voting machines to the new optical scanner voting machines. The old lever voting machines did not physically allow a voter to pull two levers for any office, even two levers for the same candidate. It therefore was physically impossible for a voter to double-vote for a single candidate on more than one party line.

7. To be sure, it was possible for a voter who voted on a paper ballot (for example, a voter who was given a paper affidavit ballot because her name could not be found on the registration roles at her precinct on Election Day) to double-vote for a single candidate on two different party lines. But paper ballot voting comprised a tiny percentage of the 4.7 million votes that were cast in the 2006 gubernatorial election, and the issue therefore had little or no practical significance.

8. This year, in marked contrast, *all* voters will vote on paper ballots, which will then be fed into and counted by the new optical scanner machines. Accordingly, this previously minor issue has now taken on profound significance.

9. Although the paper ballots that the voters will fill out this year will instruct the voters to mark only one line per office, there is no question that many voters will vote for a single candidate on multiple party lines. And because there will be no lever machine physically preventing them from doing so, and no notice that a voter has marked more than one line per office, voters undoubtedly will double-vote for a single candidate on multiple party lines in record numbers.

10. Notably, although the new optical scanner voting machines have been programmed to attempt to warn voters when they have improperly voted for two candidates for a single office, the new voting machines give no warning at all when a voter votes for a single candidate on multiple party lines. Instead of returning a ballot containing an improper double-vote to the voter for correction – which the machines could easily be instructed to do – the new optical scanner voting machines simply accept the ballot containing the double-vote and, without informing the voter, count the vote for the “first” party (in the vast majority of cases, the Democrats or the Republicans).

11. This policy and practice is flatly unconstitutional. When a voter has unambiguously expressed her intent to support *both* a major party *and* a minor party, the State cannot simply ignore the minor party and, without informing the voter, blindly credit the vote to the major party. This is true under any circumstances, and it is especially true given the enormous ballot access and order consequences that the State has assigned to party success in gubernatorial elections.

12. Given the extremely high stakes for minor parties in gubernatorial elections, voters should be informed when the new machines detect a double-vote and allowed to correct their ballot. Short of that, a double-vote should be counted for both parties, at least for purposes of ballot access and ballot order. The State, which is largely run by representatives of the two major parties, cannot be permitted to stifle political competition by self-servingly ignoring the fact that a voter has expressed her desire to support a minor party.

THE PARTIES

13. The Conservative Party of New York State (the “Conservative Party”) is a domestic not-for-profit corporation that was founded in 1962. It received the fourth largest number of votes in the 2006 gubernatorial election.

14. The Working Families Party is a domestic not-for-profit corporation that was founded in 1998. It received the fifth largest number of votes in the 2006 gubernatorial election.

15. The New York State Board of Elections (the “Board of Elections”) was established on June 1, 1974 as a bipartisan agency vested with the responsibility for administration and enforcement of all laws relating to elections in New York State. Pursuant to N.Y. Elec. Law § 3-102, the Board of Elections has the power and duty to “issue instructions and promulgate rules and regulations relating to the administration of the election process” N.Y. Elec. Law § 7-200(1) empowers the Board of Elections to exercise control over the selection and configuration of voting machines used throughout the State.

16. Defendant James A. Walsh is the Co-Chair of the New York State Board of Elections. Chairman Walsh is sued in his official capacity.

17. Defendant Douglas A. Kellner is the Co-Chair of the New York State Board of Elections. Chairman Kellner is sued in his official capacity.

18. Defendant Evelyn J. Aquila is a Commissioner of the New York State Board of Elections. Commissioner Aquila is sued in her official capacity.

19. Defendant Gregory P. Peterson is a Commissioner of the New York State Board of Elections. Commissioner Peterson is sued in his official capacity.

20. Defendant Todd D. Valentine is a Co-Executive Director of the New York State Board of Elections. Mr. Valentine is sued in his official capacity.

21. Defendant Robert A. Brehm is a Co-Executive Director of the New York State Board of Elections. Mr. Brehm is sued in his official capacity.

JURISDICTION AND VENUE

22. This action arises under the First and Fourteenth Amendments to the United States Constitution, and under 42 U.S.C. §§ 1983 and 1988.

23. The jurisdiction of this Court is predicated upon 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

24. The acts complained of occurred in the Southern District of New York, and venue is lodged in this Court pursuant to 28 U.S.C. § 1391(b).

FACTUAL ALLEGATIONS

25. 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.”

26. 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 § 6-138.

27. 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.

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

29. 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, and to plan and strategize for future elections.

30. 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 same 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.

31. 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.

32. 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. In other words, the more powerful party receives all of the credit, and the less powerful party receives none of the credit.

33. 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). Indeed, under the State’s new scheme, the voter is not provided with any notice that she has double-voted at all.

34. There is no legitimate reason for this failure to inform and provide an opportunity to correct. On information and belief, the State’s new optical scanner voting machines come pre-programmed with a setting that, if enabled, would automatically return to the voter a ballot containing a double-vote. Because no software would need to be modified, this setting could be enabled instantaneously, and testing the change would be simple. However, the Board of Elections has not enabled this pre-programmed setting. Instead, the Board of Elections is content to provide no notice to the voter that the voter has double-voted, let alone notice that the voter’s double-vote will automatically be credited to the “first” party on the ballot.

35. 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.

36. Beginning this year, however, the State is introducing 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 will be dramatically more such double-votes in the upcoming election than in any election in the State's history.

37. This new voting system, coupled with the State's indefensible practice of crediting double-votes only to the "first" party, presents a grave threat to minor political parties such as the Plaintiffs herein. Although both Plaintiffs received well more than the requisite 50,000 votes in the 2006 gubernatorial election, there is no guarantee that they will replicate that success this year.

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.

FIRST CAUSE OF ACTION

(42 U.S.C. § 1983 – First and Fourteenth Amendments)

39. Plaintiffs repeat and reallege the foregoing paragraphs as if the same were fully set forth at length herein.

40. The freedom of association, right to due process, and right to equal protection protected by the First and Fourteenth Amendments include the fundamental rights to engage in partisan political organization, to vote for the candidates and parties of one's choice, and to have one's votes counted.

41. The State's policy of crediting a double-vote for a single candidate on more than one party line entirely to the "first" party appearing on the ballot, without any notification to the voter or any opportunity to correct her ballot, places severe burdens on voters and on minor political parties such as the Plaintiffs herein.

42. This State policy cannot be justified by any compelling or even important government interest.

43. This State policy is blatantly discriminatory, and stifles political competition from minor political parties such as the Plaintiffs herein.

44. Acting under color of State law, Defendants have deprived Plaintiffs of their rights, remedies, privileges, and immunities guaranteed to every citizen of the United States in violation of 42 U.S.C. § 1983, including, but not limited to, rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

45. As a direct and proximate result of Defendants' unconstitutional conduct, Plaintiffs have been threatened with imminent irreparable harm and have no adequate remedy at law.

WHEREFORE, Plaintiffs respectfully request that judgment be entered against Defendants as follows:

a. Preliminarily enjoining Defendants, in advance of the 2010 general election, to ensure that the State's optical scanner voting machines notify voters, when they submit ballots containing double-votes, that they can only vote for a candidate on one party line and return the double-voted ballots to voters for correction; or, in the alternative, ordering Defendants to credit all double-votes in the 2010 general election to each party receiving a double-vote, at least for the purposes of ballot access and ballot order;


b. Permanently enjoining Defendants to ensure that the State's optical scanner voting machines adequately inform voters, when they submit ballots containing double-votes, that they can only vote for a candidate on one party line and return double-voted ballots to voters for correction;

c. Awarding reasonable attorneys' fees and costs under 42 U.S.C. § 1988; and

d. Awarding such other and further relief as this Court may deem just and proper.

Dated: New York, New York
September 14, 2010

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