UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CONSERVATIVE PARTY OF NEW YORK STATE, WORKING FAMILIES PARTY, and NEW YORK TAXPAYERS PARTY,

Plaintiffs,

-against-

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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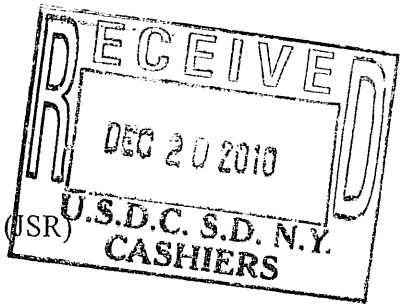

10 Civ. 6923 (JSR)

FIRST AMENDED COMPLAINT

Plaintiffs Conservative Party of New York State, Working Families Party, and New York Taxpayers 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 a declaration that New York Election Law § 9-112(4) and 9 N.Y.C.R.R. § 6210.13(a)(7) are unconstitutional and an order permanently enjoining Defendants from enforcing their policy and practice of discriminating against minor political parties and their supporters with respect to so-called "double-votes."

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) and 9 N.Y.C.R.R. § 6210.13(a)(7) address what to do when a voter votes for a single candidate on multiple party lines. These provisions require that a double-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 State simply ignores the 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, to facilitate their ability to strategize for future elections, and to advance the issues they care

about. It is equally critical for voters to be able to count on the fact that their expressed support of minor political parties will be credited. 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 without petitioning, and parties appear on the ballot in an order determined by the number of votes that their previous gubernatorial candidate received.

6. Although New York Election Law § 9-112(4) and Defendants' discriminatory practice of crediting all double-votes to the first party on the ballot have been in place for many years, they have 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 before 2010 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 voted on paper ballots, which were then fed into and counted by the new optical scanner machines. Accordingly, this previously minor issue has now taken on great significance.

9. Making matters worse, Defendants do not adequately warn voters that a double-vote will automatically be credited only to the first party on the ballot. Indeed, whereas State law expressly requires that paper ballots warn voters not to vote for more than one *candidate* for a single office and to explain that such "over-votes" will not count, State law does *not* require that paper ballots provide *any* warning about the State's treatment of *party* double-votes. Moreover, unlike with overvotes, when the optical scanner machines detect that a ballot contains a double-vote, the machines do not warn the voter that a double-vote has been detected, much less afford the voter an opportunity to correct her ballot. Instead, the machines simply accept the ballot and automatically credit the vote to the first party on the ballot, almost invariably the major party.

10. Defendants' treatment of double-votes is unconstitutional. When a voter has unambiguously expressed her intent to support *both* a major party *and* a minor party, Defendants 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.

THE PARTIES

11. 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. According to recently released election results, it received the third largest number of votes in the 2010 gubernatorial election.

12. 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. According to recently released election results, it received the fourth largest number of votes in the 2010 gubernatorial election.

13. The New York Taxpayers Party (the "Taxpayers Party") was founded in 2010. According to recently released election results, it received the ninth largest number of votes in the 2010 gubernatorial election.

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

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

16. Defendant Evelyn J. Aquila is a Commissioner of the New York State

Board of Elections. Commissioner Aquila is sued in her official capacity.

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

18. 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.

19. 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

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

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

22. 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

A. The State's Double-Vote Counting Rule Discriminates Against Minor Political Parties

23. 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.* (emphasis added).

24. Defendants have 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) (emphasis added). In other words, the more powerful party receives all of the credit, and the less powerful party receives none of the credit.

B. The State's Discriminatory Double-Vote Counting Rule Severely Burdens Minor Parties

25. The State's discriminatory double-vote counting rule imposes a variety of burdens that, both independently and collectively, severely restrict the ability of minor parties to compete with major parties in the political marketplace.

26. First, a fair and accurate count of the number of votes cast for each party in each election is critical to the ability of minor parties to influence elected officials on matters of public policy. The more votes a minor party wins in an election, the more responsive elected officials are to the minor party and its agenda, and the more likely they are to support the issues the minor party advocates.

27. Elected officials are well aware of the number of votes they received on

each party line in the last election. There is a strong correlation between the number of votes an official receives on a minor party line and that official's willingness to advocate for issues that are important to the minor party and its members.

28. For example, in 2004, Albany County District Attorney candidate David Soares defeated an incumbent in significant part due to votes he received on the Working Families Party line, which endorsed Soares and campaigned on his behalf on a platform of reforming the Rockefeller Drug Laws. This victory significantly helped the Working Families Party's effort to push for reform of the Rockefeller Drug Laws.

29. Elected officials are also more responsive to a minor party and its issues when the party garners a significant number of votes for another candidate in the same district.

30. Second, a fair and accurate count of the number of votes cast for each party in each election is critical to the ability of minor parties to raise money and attract new members. Minor parties regularly broadcast their most recent vote totals in their fundraising and recruitment drives, and there is a strong correlation between the number of votes a minor party receives and its ability to raise money and attract new members.

31. Third, a fair and accurate count of the number of votes cast for each party in each election is critical to the ability of minor parties to recruit candidates. Candidates want to be associated with successful parties, and they do not want to be associated with marginal or fringe parties. There is a strong correlation between the number of votes a minor party receives and its ability to recruit candidates for future elections.

32. Fourth, with respect to gubernatorial elections, a fair and accurate count of the number of votes cast for each party in each election is critical to the ability of minor

parties to secure a place on the ballot. 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 § 6-138.

33. Fifth, 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. A fair and accurate accounting of the votes is critical to ensure fair allocation of favorable ballot placements.

34. Sixth, above and beyond the harms caused to minor parties, the State's discriminatory double-vote counting rule imposes severe burdens on the voters themselves, who have the fundamental right to have their intended votes counted and reported fairly and accurately. When Defendants do not count votes for parties fairly and accurately, they severely burden not only voters' association rights but also their expressive rights; many voters cast votes for a minor party to signal their support for the party and its agenda to candidates and the public. Plaintiffs' members are harmed when they signal their intent to support a minor party but the State credits their vote as if it had been cast exclusively for a major party.

C. The Number of Double-Votes Cast In the 2010 General Election Was Very Substantial

35. Until recently, Defendants' practice of automatically crediting double-votes to the "first" party had little practical significance to Plaintiffs 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 introduced new optical scanner voting machines. Under this new and radically different voting system, a voter now casts her vote by filling out bubbles on a paper ballot, which are then 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 have been dramatically more double-votes in the recent election than in any election in the State's history.

37. On information and belief, the State does not track double-votes and has never attempted to identify the number of double-votes cast in any election. However, other available data indicates that there likely were *tens of thousands* of double-votes in the 2010 general election in New York.

38. First, data released by the New York City Board of Elections confirms that the over-vote rate – *i.e.*, the frequency with which voters improperly vote for more than one candidate for a single office – in New York City in the 2008 general election was at least 0.718%. There were 4,756,679 votes cast in New York State in the 2010 general

election. A double-vote rate of 0.718% would yield 34,153 double-votes statewide.

39. Second, a recent mock election using ballots similar to the ones that New York used this year yielded a double-vote rate of 2.68%, suggesting that there may well have been over 125,000 ballots with double-votes in the 2010 general election. The double-vote rate on the gubernatorial line of the mock election was 0.83%, suggesting that there may have been over 39,000 double-votes for governor. Tellingly, when these voters had the opportunity to vote for a candidate on three different party lines, they usually cast their votes on only two party lines, thus suggesting that the voters actually intended to support a particular minor party and were not simply checking every box containing the candidate's name.

40. Third, double-voting data from both the 2009 and 2010 elections in Connecticut suggests that Connecticut voters double-vote with substantially greater frequency than they vote exclusively for minor parties. According to the Connecticut figures, *more than half* of the votes that included a vote for a minor party were double-votes. In Bridgeport in 2010, for example, an independent tally conducted by the *Connecticut Post* found that Democratic and Working Families Party gubernatorial candidate Dan Malloy received 300 votes on the Working Families Party line and 1006 double-votes on both the Democratic and Working Families Party lines. The overall double-vote rate for the gubernatorial election in Bridgeport was 4.35%. If New Yorkers double-voted at a similar rate, there may have been as many 206,915 double-votes statewide in the 2010 elections.

41. On information and belief, there were most likely tens of thousands of double-votes in New York in the 2010 general election.

42. The number of double-votes in the 2010 general election is material to and severely burdens Plaintiffs' ability to influence elected officials on matters of public policy, to raise money, to attract new members, and to recruit candidates.

43. The number of double-votes in the 2010 general election is material to and affects the order in which parties are entitled to appear on the ballot for the next four years.

44. The number of double-votes in the 2010 election was material to Plaintiff Taxpayers Party's ability to reach the 50,000 vote threshold for political party status, and in future elections will likely be material to and affect all Plaintiffs' ability to reach the 50,000 vote threshold for political party status and Plaintiffs' ballot placement in New York.

45. Plaintiff Taxpayers Party nominated Carl Paladino for Governor and received a total of 25,820 votes in the 2010 general election. Mr. Paladino received a total of 1,548,101 votes, of which 1,290,017 were credited to the Republican Party. The Taxpayers Party would have reached the 50,000 vote threshold if 1.874% of the votes that Mr. Paladino received on the Republican line were credited to the Taxpayers Party.

46. On information and belief, the Taxpayers Party would have reached the 50,000 vote threshold but for Defendants' unconstitutional double-vote counting rule and Defendants' failure to warn voters about the manner in which double-votes are counted.

47. Plaintiffs Conservative Party's and Workings Families Party's satisfaction of the vote threshold in the 2010 elections does not guarantee similar success in future elections. 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, as a result, lost its guaranteed place on the ballot.

D. The State's Failure to Warn Voters Regarding Its Discriminatory Double-Vote Counting Rule

48. The harms caused by the State's discriminatory double-vote counting rule are exacerbated by the State's failure to provide voters with any meaningful warning that they have double-voted and that double-votes are automatically credited entirely to the first party on the ballot.

49. State law does not require that the paper ballots themselves warn voters about double-votes or their treatment. 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.

50. On information and belief, few if any of the County Boards of Elections provide ballots that clearly warn voters not to vote for a candidate on more than one party line, much less that a double-vote will automatically be credited to the first party on the ballot.

51. 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. Indeed, under the State's new scheme, the voter is

not provided with any notice that she has double-voted at all.

52. There is no legitimate reason for this failure to inform and provide an opportunity to correct.

53. On information and belief, the State's new optical scanner voting machines could easily be programmed to detect double-votes, warn the voter that she has double-voted, and provide the voter with an opportunity to correct her ballot

54. 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 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 help ensure a perpetual duopoly over the political process in New York.

FIRST CAUSE OF ACTION
(42 U.S.C. § 1983 – First and Fourteenth Amendments)

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

56. 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.

57. New York Election Law § 9-112(4), 9 N.Y.C.R.R. § 6210.13(a)(7), and Defendants' 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, place severe burdens on voters and on minor political parties such as the Plaintiffs herein.

58. New York Election Law § 9-112(4), 9 N.Y.C.R.R. § 6210.13(a)(7), and Defendants' policy cannot be justified by any compelling or even important government interest.

59. New York Election Law § 9-112(4), 9 N.Y.C.R.R. § 6210.13(a)(7), and Defendants' policy are blatantly discriminatory, and stifle political competition from minor political parties such as the Plaintiffs herein.

60. Acting under color of State law, Defendants have misused their power by enforcing an unconstitutional statute and enacting and implementing an unconstitutional regulation. In so doing, 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.

61. As a direct and proximate result of Defendants' unconstitutional conduct, Plaintiffs have been injured by having votes that were cast for them credited solely to the major parties and have suffered damages as a result.

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

a. Declaring that New York Election Law § 9-112(4) and 9 N.Y.C.R.R. § 6210.13(a)(7) are unconstitutional;

b. Permanently enjoining Defendants from enforcing their policy and practice of crediting double-votes exclusively to the first party on the ballot;

c. Ordering Defendants' to implement a double-vote counting rule that does not discriminate against minor parties;

d. Ordering Defendants to ensure that the State's optical scanner voting machines notify voters when they detect ballots containing double-votes and provide voters with a meaningful opportunity to correct their ballots;

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

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

Dated: New York, New York
December 20, 2010

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