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FROM: Lauren Pardee
Law Clerk to Hon. Jed S. Rakoff

DATE: October 15, 2010

RE: Conservative Party of New York State v. New York State Board of Elections, 10 Civ. 6923

MESSAGE: Please see attached Order.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CONSERVATIVE PARTY OF NEW YORK STATE and WORKING FAMILIES PARTY,

Plaintiffs,

-v-

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-Directors of the New York State Board of Elections

Defendants.

10 Civ. 6923 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

On September 14, 2010, plaintiffs the Conservative Party of New York State and the Working Families Party filed a complaint challenging Section 9-112(4) of the New York Election Law and the policy thereunder regarding so-called "double-votes."[1] A "double-vote" is cast when a candidate accepts the nomination of more than one political party and the voter improperly votes for that candidate on

[1] See N.Y. Elec. Law § 9-112(4) ("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.")

multiple party lines. While it is clear which candidate the voter intended to support, it is not clear which party should be credited with the vote. In this situation, New York Election Law § 9-112(4) provides that the vote is counted towards the first party on the ballot, almost invariably one of the major parties. Plaintiffs, which are minor political parties hoping to garner as many votes as possible, allege that this practice violates the First and Fourteenth Amendments of the United States Constitution.

On October 1, 2010, plaintiffs filed a motion for preliminary injunction based on their belief that the harms allegedly associated with this purportedly unconstitutional practice would be magnified in the upcoming election because of the transition to electronic voting machines and the corresponding programming.[2] Plaintiffs therefore sought injunctive relief that, among other things, would have required reprogramming of the machines. Although the Court set an evidentiary hearing for October 20, 2010, defendants filed papers seeking to have the Court first deny the request for preliminary injunction, without a hearing, on numerous grounds, including, inter alia, the indication that reprogramming the machines at this late date would present very

[2] In prior elections, the lever voting machines used in most places did not physically allow a voter to pull two levers for any office, and it was therefore impossible for a voter to double-vote for a single candidate on more than one party line. The new electronic voting machines, however, do not similarly prevent voters from casting double-votes.

considerable practical difficulties. At the second in-court conference held on this matter on October 12, 2010, plaintiffs, without admitting that such difficulties were insurmountable, then reduced their request for preliminary relief to the more modest remedy of posting warning signs against double-voting at each election booth.

In response to this reduced proposal, defendants argued that finding appropriate wording for such a sign would be difficult,[3] and that, even then, obtaining the Justice Department-approval required in certain districts, determining how such signs should be placed, and training poll watchers to deal with the questions such signs would inevitably engender would present serious practical difficulties. Defendants also argued, both orally and in their papers, that plaintiffs were on notice of the allegedly improper practice arising from counting a double-vote for the first party listed because it is set forth in the first sentence of the statute, see New York Election Law § 9-112(4), and plaintiffs thus had no legitimate reason for delaying their motion for injunctive relief until the eve of the election.

The question now before the Court, therefore, is whether the plaintiffs have provided sufficient basis for moving forward with the evidentiary hearing scheduled for October 20, 2010, or whether their request for preliminary relief should be denied as a matter of law.

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[3] The Court has not yet received a copy of plaintiffs' proposed language.

Having carefully reviewed all the arguments of counsel, the Court finds that while plaintiffs have set forth substantial arguments in favor of their underlying complaint, the Court cannot conclude at this stage that they have established by the requisite evidence either that they in fact have a likelihood of prevailing on the merits or that the harm that would follow if the injunction were not granted would be other than de minimis. Moreover, because they seek not just to preserve the status quo but rather to require a government agency to alter it in the face of a contrary statute, their burden is particularly high. See, e.g., Bery v. City of New York, 97 F.3d 689, 694 (2d Cir. 1996), cert. denied 520 U.S. 1251 (1997); Bronx Household of Faith v. Board of Educ., 331 F.3d 342, 348-49 (2d Cir. 2003); Green Party of New York State v. New York State Bd. of Elections, 389 F.3d 411, 418 (2d Cir. 2004).

But the Court need not reach the merits at this time because it agrees with defendants that plaintiffs have slept on their rights and cannot at this late date seek the kind of onerous and potentially confusing relief envisioned by even their more restricted proposal, absent a showing greater than any they would be able to present even with the benefit of an evidentiary hearing. The manner in which the State handles double-voting is, as mentioned, a matter of statute, and a political party as assiduous as the Conservative Party with long experience in New York elections is surely on notice of this

provision.[4] There is no good reason, therefore, for plaintiffs to bring this request for injunctive relief now when, because of the imminence of election, all the potential harms postulated by the defendants are at their maximum.

Under these circumstances, and taking account of the speculative nature of the harm that plaintiffs claim they could prove at an evidentiary hearing, the obvious potential for confusion created by a change that would have to be made on such short notice and without adequate training of personnel, and the simple fact that plaintiffs waited until six weeks before the election to file their complaint, the Court will not invoke the extraordinary remedy of a preliminary injunction at this time. Mazurek v. Armstrong, 520 U.S. 968, 972 (1997). Consequently, the motion for a preliminary injunction is denied so far as the instant election is concerned, without prejudice to this case going forward in all other respects, including with respect to injunctive relief in future elections.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
October 15, 2010

[4] The suggestion in the Declaration of Daniel Cantor that he received conflicting advice about this matter when he first inquired about it last July is irrelevant. The first sentence of the statute is clear and unambiguous.