

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,

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

-against-

**ANSWER WITH AFFIRMATIVE
DEFENSES TO SECOND
AMENDED COMPLAINT**

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, 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, and Todd D. Valentine and Robert A. Brehm, in their official capacities as Co-Executive Directors of the New York State Board of Elections (collectively, “defendants”), by their attorneys, Jaspan Schlesinger LLP and Bee Ready Fishbein Hatter & Donovan, LLP, as and for their Answer with Affirmative Defenses to Second Amended Complaint, dated February 3, 2011 (the “Second Amended Complaint”) of plaintiffs, 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 (collectively, “plaintiffs”), state as follows:

INTRODUCTION

1. With respect to paragraph “1” of the Second Amended Complaint, defendants neither admit nor deny the truth of the matters contained therein as the allegations set forth plaintiffs’ theory of the case and to which no response is necessary.

2. Deny the truth of the matters contained in paragraph “2” of the Second Amended Complaint, except admit that under the New York State Election Law, a candidate can be nominated for election to public office by more than one political party and/or independent body.

3. Deny the truth of the matters contained in paragraph “3” of the Second Amended Complaint, and respectfully refer the Court to the statute and regulation referred to therein for a judicial determination as to their true content and meaning.

4. Deny the truth of the matters contained in paragraph “4” of the Second Amended Complaint.

5. Deny the truth of the matters contained in paragraph “5” of the Second Amended Complaint.

6. Deny the truth of the matters contained in paragraph “6” of the Second Amended Complaint, except admit that the “old lever” voting machines did not physically allow a voter to pull two levers for the same candidate for the same office on two different party lines.

7. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “7” of the Second Amended Complaint, except admit that a voter who voted on a paper ballot could mark the ballot for the same candidate on different party lines.

8. Deny the truth of the matters contained in paragraph “8” of the Second Amended Complaint, except admit that voters used paper ballots which were inserted into optical scanner voting machines.

9. Deny the truth of the matters contained in paragraph “9” of the Second Amended Complaint, except admit that the paper ballots do not contain a specific “warning” about double votes, and respectfully refer the Court to the state law referred to therein for its true content and meaning.

10. Deny the truth of the matters contained in paragraph “10” of the Second Amended Complaint.

THE PARTIES

11. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “11” of the Second Amended Complaint, except admit that the gubernatorial candidate for the Conservative Party polled 232,281 votes in the 2010 general election.

12. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “12” of the Second Amended Complaint, except admit, upon information and belief, that Michael Long is the State Chairman of the State Committee of the Conservative Party of New York State, and respectfully refer this Court to the Rules and Regulations of the Conservative Party of New York State for a judicial determination as to Mr. Long’s powers and responsibilities.

13. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “13” of the Second Amended Complaint, except admit, upon

information and belief, that Paul Atanasio is the Treasurer of the State Committee of the Conservative Party of New York State.

14. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “14” of the Second Amended Complaint, except admit that the gubernatorial candidate for the Working Families Party polled 154,853 votes in the 2010 general election.

15. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “15” of the Second Amended Complaint, except admit, upon information and belief, that Robert P. Master is an Executive Officer of the State Committee of the Working Families Party of New York State, and respectfully refer this Court to the Rules of the Working Families Party of New York State for a judicial determination as to Mr. Master’s powers and responsibilities.

16. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “16” of the Second Amended Complaint, except admit, upon information and belief, that Daniel Cantor is an Assistant Secretary of the State Committee of the Working Families Party of New York State.

17. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “17” of the Second Amended Complaint, except admit, upon information and belief, that Dorothy Siegel is the Treasurer of the State Committee of the Working Families Party of New York State.

18. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “18” of the Second Amended Complaint.

19. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “19” of the Second Amended Complaint, except admit that the Taxpayer Party is not a recognized “party” pursuant to the New York Election Law.

20. Deny the truth of the matters contained in paragraph “20” of the Second Amended Complaint, except admit that an independent body using the name “Taxpayer Party” failed to garner 50,000 votes for its gubernatorial candidate in the 2010 general election.

21. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “21” of the Second Amended Complaint.

22. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “22” of the Second Amended Complaint.

23. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “23” of the Second Amended Complaint.

24. With respect to paragraph “24” of the Second Amended Complaint, admit that James A. Walsh is a Co-Chair of the New York State Board of Elections, and respectfully refer the Court to the statutes cited therein for a judicial determination as to their true content and meaning.

25. Admit the truth of the matters contained in paragraph “25” of the Second Amended Complaint.

26. Admit the truth of the matters contained in paragraph “26” of the Second Amended Complaint.

27. Admit the truth of the matters contained in paragraph “27” of the Second Amended Complaint

28. Admit the truth of the matters contained in paragraph “28” of the Second Amended Complaint.

29. Admit the truth of the matters contained in paragraph “29” of the Second Amended Complaint.

JURISDICTION AND VENUE

30. With respect to paragraph “30” of the Second Amended Complaint, defendants neither admit nor deny the truth of the matters contained therein, as the allegations call for a legal conclusion to which no response is necessary, however, to the extent a response is deemed necessary, it is denied.

31. With respect to paragraph “31” of the Second Amended Complaint, defendants neither admit nor deny the truth of the matters contained therein, as the allegations call for a legal conclusion to which no response is necessary, however, to the extent a response is deemed necessary, it is denied.

32. With respect to paragraph “32” of the Second Amended Complaint, defendants neither admit nor deny the truth of the matters contained therein, as the allegations call for a legal conclusion to which no response is necessary, however, to the extent a response is deemed necessary, it is denied.

FACTUAL ALLEGATIONS

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

33. Deny the truth of the matters contained in paragraph “33” of the Second Amended Complaint, except admit that the statute addresses the situation where a voter votes more than once for a candidate and respectfully refer the Court to the statute cited therein for a judicial determination as to its true content and meaning.

34. Deny the truth of the matters contained in paragraph “34” of the Second Amended Complaint and respectfully refer the Court to the regulation referred to therein for a judicial determination as to its true content and meaning.

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

35. Deny the truth of the matters contained in paragraph “35” of the Second Amended Complaint.

36. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “36” of the Second Amended Complaint.

37. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “37” of the Second Amended Complaint.

38. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “38” of the Second Amended Complaint.

39. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “39” of the Second Amended Complaint.

40. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “40” of the Second Amended Complaint.

41. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “41” of the Second Amended Complaint.

42. Deny the truth of the matters contained in paragraph “42” of the Second Amended Complaint, and respectfully refer the Court to the statutes cited therein for a judicial determination as to its true content and meaning.

43. Deny the truth of the matters contained in paragraph “43” of the Second Amended Complaint, and respectfully refer the Court to the statute cited therein for a judicial determination as to its true content and meaning.

44. Deny the truth of the matters contained in paragraph “44” of the Second Amended Complaint.

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

45. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “45” of the Second Amended Complaint, except admit that the lever voting machines did not allow a voter to vote for a single candidate on more than one party line.

46. Deny the truth of the matters contained in paragraph “46” of the Second Amended Complaint, except admit that a voter now casts votes by marking a paper ballot which is then inserted into an optical scanning voting machine.

47. Deny the truth of the matters contained in paragraph “47” of the Second Amended Complaint, except admit, upon information and belief, that the State does not track double votes cast.

48. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “48” of the Second Amended Complaint.

49. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “49” of the Second Amended Complaint.

50. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “50” of the Second Amended Complaint.

51. Deny the truth of the matters contained in paragraph “51” of the Second Amended Complaint.

52. Deny the truth of the matters contained in paragraph “52” of the Second Amended Complaint.

53. Deny the truth of the matters contained in paragraph “53” of the Second Amended Complaint.

54. Deny the truth of the matters contained in paragraph “54” of the Second Amended Complaint.

55. Deny the truth of the matters contained in paragraph “55” of the Second Amended Complaint, except admit that an independent body using the name “Taxpayers Party” nominated Carl Paladino for governor in the 2010 general election and respectfully refer the Court to the 2010 general election results.

56. Deny the truth of the matters contained in paragraph “56” of the Second Amended Complaint.

57. Deny knowledge or information sufficient to form a belief as to the truth of the matters contained in paragraph “57” of the Second Amended Complaint, except admit that the Liberal Party is no longer a “party” within the meaning of the Election Law.

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

58. Deny the truth of the matters contained in paragraph “58” of the Second Amended Complaint.

59. Deny the truth of the matters contained in paragraph “59” of the Second Amended Complaint, except admit that the paper ballots do not contain a specific warning about double

votes and their treatment and respectfully refer the Court to the statutes cited therein for a judicial determination as to their true content and meaning.

60. Deny the truth of the matters contained in paragraph “60” of the Second Amended Complaint.

61. Deny the truth of the matters contained in paragraph “61” of the Second Amended Complaint, except admit that in accordance with the New York Election Law and Election Reform Modernization Act of 2005, the new optical scanning voting machines do not notify the voter of the existence of a “double vote” on the ballot or how a double vote will be treated.

62. Deny the truth of the matters contained in paragraph “62” of the Second Amended Complaint.

63. Deny the truth of the matters contained in paragraph “63” of the Second Amended Complaint.

64. Deny the truth of the matters contained in paragraph “64” of the Second Amended Complaint.

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

65. With respect to paragraph “65” of the Second Amended Complaint, defendants reiterate each and every response to paragraphs “1” to “64” heretofore made in answer to allegations contained therein, with the same force and effect as if more fully set forth at length herein.

66. With respect to paragraph “66” of the Second Amended Complaint, defendants neither admit nor deny the truth of the matters contained therein, as the allegations call for a legal conclusion to which no response is necessary.

67. Deny the truth of the truth of the matters contained in paragraph “67” of the Second Amended Complaint and respectfully refer the Court to the statutes and regulation cited therein for a judicial determination as to its true content and meaning.

68. Deny the truth of the matters contained in paragraph “68” of the Second Amended Complaint.

69. Deny the truth of the matters contained in paragraph “69” of the Second Amended Complaint.

70. Deny the truth of the matters contained in paragraph “70” of the Second Amended Complaint.

71. Deny the truth of the matters contained in paragraph “71” of the Second Amended Complaint.

FIRST DEFENSE

72. The Second Amended Complaint fails to state a claim against the defendants upon which relief may be granted.

SECOND DEFENSE

73. Plaintiffs lack capacity to bring this action.

THIRD DEFENSE

74. Plaintiffs lacking standing to bring this action.

FOURTH DEFENSE

75. The alleged harms sustained by plaintiffs, if any, are the result of their own acts and/or omissions.

FIFTH DEFENSE

76. The defendants at all times acted within the scope of their authority in the lawful performance of their duties.

SIXTH DEFENSE

77. The defendants acted in good faith without malice and all actions taken served a valid public purpose and interest and were not applied in a discriminatory manner.

SEVENTH DEFENSE

78. Election Law § 9-112(4) is a remedial statute that does not restrict plaintiffs' ability to associate with others or engage in partisan political organization or limit a voter's right to vote for candidates and parties of his choice or have his vote counted.

EIGHTH DEFENSE

79. Plaintiffs' theoretical injuries do not give rise to a claim under 42 U.S.C. § 1983.

NINTH DEFENSE

80. Plaintiffs are not deprived of a constitutional right by Election Law § 9-112(4) and Regulation 6210.13(a)(7).

TENTH DEFENSE

81. Plaintiffs do not have a constitutional right to receive a particular placement on the ballot.

ELEVENTH DEFENSE

82. Plaintiffs have no constitutionally protected interest in using a ballot or election results to facilitate their goals of attracting new members, raising more money or organizing for future elections.

TWELFTH DEFENSE

83. There is a rational basis, legitimate and compelling state interest for the manner in which double votes are counted and Election Law § 9-112(4) and Regulation 6210.13(a)(7) serve a compelling state interest in making certain that a candidate with a most voter support is actually elected.

THIRTEENTH DEFENSE

84. State has compelling interest in ensuring that candidates with the most votes win the election and that elections run smoothly and efficiently.

85. Election Law § 9-112(4) and Regulation 6210.13(a)(7) provide an administratively efficient and swift way to credit a vote for a candidate who is the clear choice of the voter and also makes certain a vote is only counted once despite a voter having voted for a candidate multiple times.

WHEREFORE, defendants demand that the Second Amended Complaint be dismissed in its entirety together with such other and further relief as the Court deems just and proper.

Dated: Garden City, New York
February 18, 2011

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