

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
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,

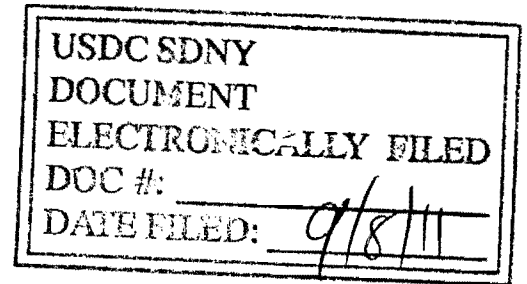
10 Civ. 6923 (JSR)

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.  
-----x



**CONSENT DECREE**

Plaintiffs, the Conservative Party, by Mike Long, its Chairman, and Paul Atanasio, its Treasurer; the Working Families Party, by Robert P. Master, its Chairperson, Daniel Cantor, its Executive Director, and Dorothy Siegel, its Treasurer; and the Taxpayers Party, by David Nezelek and Rus Thompson, brought this civil rights action pursuant to 42 U.S.C. § 1983, challenging the constitutionality of New York Election Law § 9-112(4) and its corresponding regulation, 9 N.Y.C.R.R. § 6210.13(A)(7). Together, these laws codify New York State's policy and practice with respect to so-called "double-voting," which occurs when a voter votes for the same

candidate on more than one party line. In this situation, while it is clear which candidate should be credited with the vote, it is not clear which *party*, if any, the voter intended to support. Under the State's current policy and practice, the double-vote is automatically credited to the candidate under the party selected by the voter which appears first on the ballot. Plaintiffs contend that this policy and practice discriminates against minor political parties and severely burdens the right to vote, in violation of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Defendants deny Plaintiffs' contentions and contend that the New York State Legislature's policy concerning double-votes does not discriminate against minor parties or burden any voter's right to cast a vote. According to Defendants, the procedure provides an administratively swift, efficient and appropriate way to record votes for a candidate.

The parties, desiring that this action be settled by an appropriate Consent Decree ("Decree") without the burden, expense and disruption of protracted litigation, and without any admission of wrongdoing, agree to the jurisdiction of this Court over the parties and the subject matter of this action. Subject to this Court's approval of this Decree, and subject to the continuing validity of this Decree if it or its terms are challenged in any other court, the parties agree to the entry of this Decree as final and binding among and between themselves as to the issues raised in the Plaintiffs' Second Amended Complaint. This Decree, being entered with the consent of the parties, shall in no way constitute an adjudication or finding on the merits in the above-captioned litigation.

In resolution of this action, the parties hereby AGREE to, and the Court expressly

APPROVES, ENTERS and ORDERS, the following:

**I. Parties Bound by this Decree**

This Decree shall be binding upon 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. This Decree shall also be binding upon those who succeed the named Defendants in their official capacities, as well as all other employees, agents, and representatives of the New York State Board of Elections. Hereinafter, the named Defendants and their successors are referred to as “Defendants.”

This Decree shall also be binding upon the Conservative Party, by Mike Long, its Chairman, and Paul Atanasio, its Treasurer; the Working Families Party, by Robert P. Master, its Chairperson, Daniel Cantor, its Executive Director, and Dorothy Siegel, its Treasurer; and the Taxpayers Party, by David Nezelek and Rus Thompson.

**II. Injunctive Relief**

(1) Unless and until such time as the Legislature amends New York Election Law §9-112(4) for crediting double-votes or upon the completion of the 2018 general election, whichever comes first, Defendants shall adhere to the following:

a) Defendants shall promptly provide for the State’s optical scan voting machines to be reprogrammed to alert voters when they have double-voted, to explain the consequences of double-voting, and to provide voters with a meaningful opportunity to change their ballots. Subject to paragraph (h) of this section, the voting machines shall display the screen messages attached as Appendix A to this Decree when a voter casts a double-vote.

b) Subject to paragraph (h) of this section, Defendants shall promptly also arrange for the State’s optical scan voting machines to be reprogrammed to capture and record the total number of double-votes cast on any machine properly configured by the County

Boards of Election (“BOE”). Defendants and their successors shall instruct each County BOE that it has an obligation to configure voting machines to capture and record the total number of double-votes cast. The recorded number of double-votes cast shall be available to the public in accordance with the State’s Freedom of Information Law.

c) Defendants shall provide each County BOE with the notice attached as Appendix B to this Decree, which warns voters against double-voting and explains the consequences of double-voting (hereinafter, the “Double-Vote Notice”). In order to minimize voter confusion, if a county’s actual ballots differ significantly in form and layout from what is shown in the Double-Vote Notice, the County BOE shall alter the Double-Vote Notice to incorporate images reflective of that county’s actual ballots. Defendants shall instruct each County BOE of the following:

- Each County BOE shall post this Double-Vote Notice, throughout all polling places in easily visible locations;
- Each County BOE shall post this Double-Vote Notice within or in close proximity to the voter privacy booths;
- Each County BOE shall make copies of this Double-Vote Notice, available for poll workers to provide to voters as discussed in paragraph (e) of this section.

d) Defendants shall include instructions concerning double-voting in all State-issued poll worker training material, in the form attached as Appendix C to this Decree (hereinafter, the “Training Instructions”). Defendants shall also instruct each County BOE that it has an obligation to distribute these Training Instructions, or substantially similar instructions, as part of their poll worker training material.

e) Defendants shall instruct each County BOE that it has an obligation to provide voters with a meaningful opportunity to change their ballots if they have double-voted. Defendants shall instruct each County BOE of the following procedure which should be followed when a voter receives a double-vote error message on his or her voting machine screen and presses “return” in order to change his or her ballot:

- The poll worker shall hand the voter the Double-Vote Notice for the voter to read.
- The poll worker shall offer the voter the opportunity to get a new ballot.
- The poll worker shall direct the voter to the next available privacy booth.
- After the voter has completed his or her new ballot, the poll worker shall direct the voter to the next available voting machine.
- All reasonable efforts shall be made so that the voters will not be required to wait in line again after requesting a replacement ballot.

- Poll workers shall be instructed to make all reasonable efforts to avoid looking at any voter's ballot selection(s) without an express request by that voter.
- f) Defendants shall instruct all employees, agents and representatives of the New York State Board of Elections and all County BOEs to abide by the terms of this Decree.
- g) Defendants shall instruct each County BOE that it has an obligation to inform voters on the proper way to avoid casting a double-vote.
- h) If programming limitations prevent the State's optical scan voting machines from:
  - a. displaying the screen messages described in paragraph (a) of this section and attached as Appendix A to this Decree (including the specific language, formatting, font size and colors); and/or
  - b. counting and recording double-votes as described in paragraph (b) of this section;

Defendants shall immediately notify Plaintiffs. The parties shall negotiate in good faith to amend the obligations set forth in paragraph (a) and/or paragraph (b). If the parties reach written agreement, Defendants shall be entitled to follow that written agreement. If the parties fail to reach a written agreement through direct negotiations, they shall seek mediation from this Court. In the event a written agreement cannot be reached after court mediation, Plaintiffs may, notwithstanding any other language in this Decree, re-file their Second Amended Complaint with this Court without prejudice.

(2) Notwithstanding any amendment to New York Election Law § 9-112(4) or the completion of the 2018 general election, Defendants shall notify Plaintiffs and their undersigned counsel of any decision by the State Board of Elections to modify its procedure for warning voters about double voting, and the consequences thereof, promptly after such decision is made. It is understood that it will not be a violation of this provision if the failure to provide such notice was in good faith or inadvertent or occurred despite the exercise of due diligence. Nothing herein shall limit Plaintiffs' right to bring an action challenging any amendment to New York Election Law §9-112(4) or Defendants' double vote procedures after the 2018 election.

### **III. Implementation**

Defendants will in good faith endeavor to have all optical scan voting machine programming changes required to implement the agreed-upon procedures made, certified, and fully implemented in time for the November 2012 General Election. All other agreed-upon provisions shall be implemented as soon as possible, and no later than the November 2011 General Election.

Before the next statewide General Election, Defendants and their successors shall advise each County BOE that it must comply with the injunctive relief described above.

### **IV. Attorney's Fees**

Counsel for plaintiffs and State defendants having advised the Court that they have conferred on the issue of reasonable attorney's fees and expenses and reviewed applicable record evidence and documentation in support thereof, and desiring to resolve the matters raised without the further expense, delay, inconvenience and uncertainty of protracted litigation, the parties have agreed as follows;

Within one hundred and twenty (120) days after entry of this Decree, and receipt by counsel for defendants of a copy of this fully executed Decree bearing the signature of the Court, Defendants shall pay to counsel for Plaintiffs a total of \$199,000.00 for attorneys' fees and costs. This amount shall be allocated as follows: \$77,701.53 to Emery Celli Brinckerhoff & Abady LLP; \$19,948.39 to Cuti Hecker Wang LLP; and \$101,350.08 to the Brennan Center for Justice at NYU School of Law.

The payment to be made pursuant to this paragraph is in full satisfaction of all claims on behalf of plaintiffs for attorney's fees and expenses in this action through and including the date of this Decree, and in consideration of such payment, plaintiffs and



executed Decree.

Nothing in this Decree, including the payment provided for in this paragraph, shall limit Plaintiffs' right to seek reasonable attorneys' fees and expenses in any subsequent action or proceeding brought to enforce the terms of this Decree or to challenge any change in procedures for counting or crediting double votes, or for Defendants to seek reasonable attorneys' fees and expenses in the event that they are the prevailing parties in any such action, proceeding or challenge.

**V. Enforcement and Modification**

This Court shall have continuing jurisdiction to enforce the terms of this Decree.

Any of the parties may file a motion with the Court to modify, extend or terminate this Decree for good cause shown.


Nothing herein shall limit or restrict the Legislature from modifying, amending or repealing Election Law §9-112(4), or from otherwise implementing an alternative manner for crediting double-votes.

**Judgment is hereby entered in accordance with the foregoing Consent Decree this**

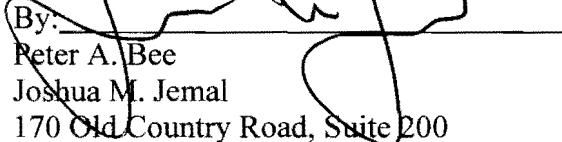
 **8<sup>th</sup> day of ~~August~~ <sup>September</sup> 2011.**

  
UNITED STATES DISTRICT JUDGE

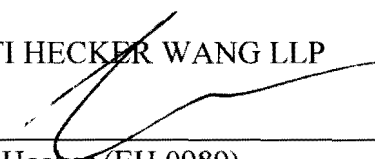
EMERY CELLI BRINCKERHOFF  
& ABADY LLP

By:   
Andrew G. Celli, Jr. (AC 3598)  
Zoe Salzman (ZS 9816)  
75 Rockefeller Plaza, 20th Floor  
New York, New York 10019  
(212) 763-5000  
*Attorneys for Plaintiffs Conservative Party  
and Taxpayers Party*

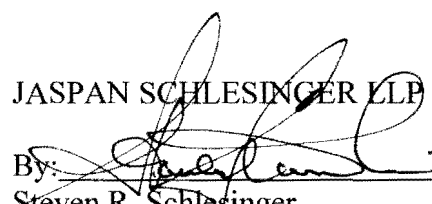
BEE READY FISHBEIN HATTER &  
DONOVAN, LLP

By:   
Peter A. Bee  
Joshua M. Jemal  
170 Old Country Road, Suite 200  
Mineola, New York 11501  
(516) 746-5599  
*Attorneys for James A. Walsh, Gregory  
P. Peterson, & Todd D. Valentine*


CUTI HECKER WANG LLP

By:   
Eric Hecker (EH 0989)  
154 Grand Street  
New York, New York 10013  
(646) 205-3642  
*Attorneys for Plaintiffs Conservative Party and  
Taxpayers Party*

JASPAN SCHLESINGER LLP

By:   
Steven R. Schlesinger  
Stanley A. Camhi  
Hale Yazicioglu  
300 Garden City Plaza  
Garden City, New York 11530  
(516) 746-8000  
*Attorneys for Douglas A. Kellner, Evelyn J.  
Aquila, & Robert A. Brehm*

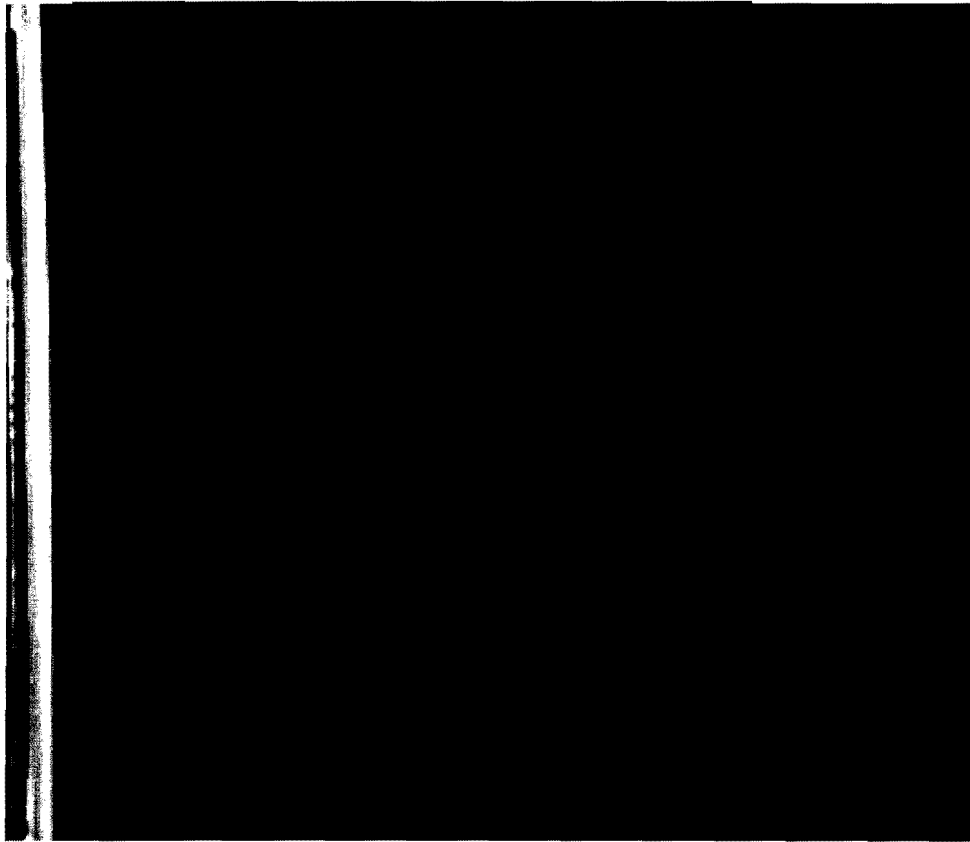
BRENNAN CENTER FOR JUSTICE AT  
NYU SCHOOL OF LAW

By:   
Wendy Weiser (WW 8580)  
Lawrence Norden (LN 7123)  
Mimi Marziani (MM 1135)  
161 Avenue of the Americas, 12th Floor  
New York, NY 10013  
(646) 292-8310  
*Attorneys for Plaintiffs Conservative Party  
and Working Families Party*



## APPENDIX A

**ImageCast: Settlement Agreement 5/6/2011**



## ES&S: Settlement Agreement 5/6/2011

03/26/2011 10:00:00am

**You filled in more than one oval for a candidate in at least one contest.  
While your candidate preference is clear, it is not clear which party you prefer.**

**You have filled in more than one oval for a candidate in the following contests:**

- **Governor**
- **Comptroller**

If you do not change your ballot, your vote will count for the candidate, but only under the party you selected listed first on the ballot.

### **Return Your Ballot**

To change your ballot to reflect your party preference, press RETURN and ask for a new ballot.

**RETURN**

### **Ignore Message. Cast Ballot.**

To ignore this message and cast your ballot as is, press CAST.

**CAST**

## APPENDIX B

# Do not vote more than once for the same candidate

In some contests, a candidate may be listed under more than one party. If you fill in more than one oval for a candidate in a contest, your vote will count for that candidate, but only under the party you selected listed first on the ballot.

United States Senator	
Vote for one	
Party A A ♦	Party A John Smith <input type="radio"/>
Party B B ⚙	Party B Jane Doe <input type="radio"/>
Party C C ⚙	Party C John Smith <input checked="" type="radio"/>

**Correct number of ovals filled in.**  
This vote will count for John Smith under Party C.


United States Senator	
Vote for one	
Party A A ♦	Party A John Smith <input checked="" type="radio"/>
Party B B ⚙	Party B Jane Doe <input type="radio"/>
Party C C ⚙	Party C John Smith <input checked="" type="radio"/>

**Too many ovals filled in.**  
Your vote will count for John Smith, under Party A, not under Party C.

## Do not vote more than once for the same candidate

In some contests, a candidate may be listed under more than one party. If you fill in more than one oval for a candidate in a contest, your vote will count for that candidate, but only under the party you selected listed first on the ballot.


United States Senator	
Vote for one	
Party A A ♦	Party A John Smith <input type="radio"/>
Party B B ⚙	Party B Jane Doe <input type="radio"/>
Party C C ⌘	Party C John Smith <input checked="" type="radio"/>



### Correct number of ovals filled in.

This vote will count for John Smith under Party C.

United States Senator	
Vote for one	
Party A A ♦	Party A John Smith <input checked="" type="radio"/>
Party B B ⚙	Party B Jane Doe <input type="radio"/>
Party C C ⌘	Party C John Smith <input checked="" type="radio"/>



### Too many ovals filled in.

Your vote will count for John Smith, under Party A, not under Party C.

**Do not vote more than once for the same candidate**

In some contests, a candidate may be listed under more than one party. If you fill in more than one oval for a candidate in a contest, your vote will count for that candidate, but only under the party you selected listed first on the ballot.

United States Senator Senador de los Estados Unidos	A	B	C
	Party A Partido A	Party B Partido B	Party C Partido C
	John Smith	Jane Doe	John Smith
Vote for one Vote por uno	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

**Correct number of ovals filled in.**

This vote will count for John Smith under Party C.

United States Senator Senador de los Estados Unidos	A	B	C
	Party A Partido A	Party B Partido B	Party C Partido C
	John Smith	Jane Doe	John Smith
Vote for one Vote por uno	<input checked="" type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

**Too many ovals filled in.**

Your vote will count for John Smith, under Party A, not under Party C.



**Do not vote more than once for the same candidate**

In some contests, a candidate may be listed under more than one party. If you fill in more than one oval for a candidate in a contest, your vote will count for that candidate, but only under the party you selected listed first on the ballot.

United States Senator Senador de los Estados Unidos	A ♦ Party A Partido A	B ⚙ Party B Partido B	C ⌘ Party C Partido C
	John Smith	Jane Doe	John Smith
Vote for one Vote por uno	♦ Party A <input type="radio"/>	⚙ Party B <input type="radio"/>	⌘ Party C <input checked="" type="radio"/>



**Correct number of ovals filled in.**

This vote will count for John Smith under Party C.

United States Senator Senador de los Estados Unidos	A ♦ Party A Partido A	B ⚙ Party B Partido B	C ⌘ Party C Partido C
	John Smith	Jane Doe	John Smith
Vote for one Vote por uno	♦ Party A <input checked="" type="radio"/>	⚙ Party B <input type="radio"/>	⌘ Party C <input checked="" type="radio"/>



**Too many ovals filled in.**

Your vote will count for John Smith, under Party A, not under Party C.

## APPENDIX C

## Voters should not vote more than once for the same candidate

In some contests, a candidate may be listed under more than one party. If a voter fills in more than one oval for a candidate in a contest, his or her vote will count for that candidate, but only under the party he or she selected listed first on the ballot.

United States Senator	
Vote for one	
Party A A ❖	Party A John Smith <input type="radio"/>
Party B B ⚙	Party B Jane Doe <input type="radio"/>
Party C C ⌘	Party C John Smith <input checked="" type="radio"/>

### Correct number of ovals filled in.

This vote will count for John Smith under Party C.

United States Senator	
Vote for one	
Party A A ❖	Party A John Smith <input checked="" type="radio"/>
Party B B ⚙	Party B Jane Doe <input type="radio"/>
Party C C ⌘	Party C John Smith <input checked="" type="radio"/>

### Too many ovals filled in.

This vote will count for John Smith, under Party A, not under Party C.

When a voter receives a double-vote error message on his or her voting machine screen and presses "return" in order to change his or her ballot, you should follow these steps:

- Hand the voter the Double-Vote Notice provided by the State Board of Elections.
- Offer the voter the opportunity to get a new ballot.
- Direct the voter to the next available privacy booth.
- After the voter has completed his or her new ballot, direct the voter to the next available voting machine.
- All reasonable efforts shall be made so that the voters will not be required to wait in line again after requesting a replacement ballot.
- All reasonable efforts shall be made to avoid looking at any voter's ballot selection(s) without an express request by that voter.

## Voters should not vote more than once for the same candidate

In some contests, a candidate may be listed under more than one party. If a voter fills in more than one oval for a candidate in a contest, his or her vote will count for that candidate, but only under the party he or she selected listed first on the ballot.

<b>United States Senator</b> Senador de los Estados Unidos Vote for one Vote por uno	<b>A</b> ♦ <b>Party A</b> Partido A	<b>B</b> ☼ <b>Party B</b> Partido B	<b>C</b> ☼ <b>Party C</b> Partido C
	<b>John Smith</b> ♦ <input type="radio"/>	<b>Jane Doe</b> ☼ <input type="radio"/>	<b>John Smith</b> ☼ <input checked="" type="radio"/>



### Correct number of ovals filled in.

This vote will count for John Smith under Party C.

<b>United States Senator</b> Senador de los Estados Unidos Vote for one Vote por uno	<b>A</b> ♦ <b>Party A</b> Partido A	<b>B</b> ☼ <b>Party B</b> Partido B	<b>C</b> ☼ <b>Party C</b> Partido C
	<b>John Smith</b> ♦ <input checked="" type="radio"/>	<b>Jane Doe</b> ☼ <input type="radio"/>	<b>John Smith</b> ☼ <input checked="" type="radio"/>



### Too many ovals filled in.

This vote will count for John Smith, under Party A, not under Party C.

When a voter receives a double-vote error message on his or her voting machine screen and presses "return" in order to change his or her ballot, you should follow these steps:

- Hand the voter the Double-Vote Notice provided by the State Board of Elections.
- Offer the voter the opportunity to get a new ballot.
- Direct the voter to the next available privacy booth.
- After the voter has completed his or her new ballot, direct the voter to the next available voting machine.
- All reasonable efforts shall be made so that the voters will not be required to wait in line again after requesting a replacement ballot.
- All reasonable efforts shall be made to avoid looking at any voter's ballot selection(s) without an express request by that voter.