

ORIGINAL

At a Term, Part _____, of the
Supreme Court of the State of New
York, held in and for the County of
Albany, at Albany, NY on the 9th
day of March, 2011.

Kimberly A. O'Connor
Present: Hon. Acting Supreme Court Justice, Justice

-----X
In the Matter of the Application of WARREN
REDLICH, candidate of the Libertarian Party of New
York for Governor of New York in the November
2010 Election, and MARK AXINN, as Chair of the
Libertarian Party of New York, an Independent Body,

Petitioners,

ORDER TO SHOW CAUSE

Index No. 1623-11

For a Judgment under Article 78 of the Civil Practice
Law and Rules that the Determination Made by the
New York State Board of Canvassers that WARREN
REDLICH Received Fewer than 50,000 Votes was
Affected by an Error of Law, was Arbitrary and
Capricious, and was an Abuse of Discretion,

- against -

NEW YORK STATE BOARD OF CANVASSERS,
NEW YORK STATE BOARD OF ELECTIONS and
JAMES A. WALSH, DOUGLAS A. KELLNER,
EVELYN J. AQUILA and GREGORY P. PETERSON,
in their official capacities as members of both the New
York State Board of Canvassers and the New York State
Board of Elections,

Respondents.

-----X
Upon the annexed petition of Warren Redlich, candidate of the Libertarian Party of New
York for Governor of New York in the November 2010 Election, and Mark Axinn, as Chair of
the Libertarian Party of New York, an Independent Body, verified on March 9, 2011, and the
annexed affidavit of Warren Redlich, sworn to on the 9th day of March 2011, and upon the
exhibits annexed thereto,

Let the respondents, New York State Board of Canvassers, New York State Board of Elections, and James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila and Gregory P. Peterson, in their official capacities as members of the New York State Board of Canvassers and the New York State Board of Elections, show cause at a Term, Part ____ (room ____) of this court to be held at the courthouse thereof, located at 16 Eagle St., Albany, Albany County, State of New York, on the 8th day of April ~~March~~ 2011, at 9:30 o'clock in the PM noon of that day, or as soon thereafter as counsel can be heard, (1) why an order pursuant to CPLR §408 should not be made to obtain for inspection and copying (i) all documents in any of the respondents' possession, custody or control, constituting or containing vote counts for the November 2, 2010 election, by county, of machine votes, absentee, military and affidavit ballots, for the office of Governor, and (ii) all documents in any of the respondents' possession, custody or control, reflecting or itemizing "overvotes" in the November 2, 2010 election, that may have been cast for both Warren Redlich and Charles Barron, or both Warren Redlich and Kristen Davis, and (2) why a judgment should not be entered for the relief demanded in the petition, and (3) why the petitioners should not have such other and further relief as might be just, proper and equitable.

Oral argument shall be required on the return date of this proceeding.

Sufficient reason appearing therefor, let personal service of a copy of this order together with the petition and supporting affidavit upon which it was granted, upon the respondents on or before the 15th day of March 2011 be deemed sufficient service.

Enter,

Kimberly A. O'Connor 3/9/11
J.S.C. Kimberly A. O'Connor
Acting Supreme Court Justice

FILE COPY
FILE COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
In the Matter of the Application of WARREN
REDLICH, candidate of the Libertarian Party of New
York for Governor of New York in the November
2010 Election, and MARK AXINN, as Chair of the
Libertarian Party of New York, an Independent Body,

VERIFIED PETITION

Index No.

Petitioners,

For a Judgment under Article 78 of the Civil Practice
Law and Rules that the Determination Made by the
New York State Board of Canvassers that WARREN
REDLICH Received Fewer than 50,000 Votes was
Affected by an Error of Law, was Arbitrary and
Capricious, and was an Abuse of Discretion,

- against -

NEW YORK STATE BOARD OF CANVASSERS,
NEW YORK STATE BOARD OF ELECTIONS and
JAMES A. WALSH, DOUGLAS A. KELLNER,
EVELYN J. AQUILA and GREGORY P. PETERSON,
in their official capacities as members of both the New
York State Board of Canvassers and the New York State
Board of Elections,

Respondents.

-----X
Petitioners Warren Redlich, candidate of the Libertarian Party of New York for Governor
of New York in the November 2010 Election ("Warren Redlich"), and Mark Axinn, as Chair of
the Libertarian Party of New York, an Independent Body ("Axinn") (collectively "Petitioners"),
by and through their undersigned attorneys, for their petition against respondents New York
State Board of Canvassers ("Board of Canvassers"), New York State Board of Elections ("Board
of Elections"), and James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila and Gregory P.
Peterson, in their official capacities as members of the New York State Board of Canvassers and
the New York State Board of Elections (collectively "Respondents"), allege as follows:

Albany County Clerk
Document Number 10842661
Rcvd 03/09/2011 11:02:44 AM



PRELIMINARY STATEMENT

1. Petitioners bring this proceeding pursuant to Article 78 of the CPLR to request a ruling (i) annulling and setting aside the certification of the result of the November 2, 2010 election for New York Governor made by the Board of Canvassers on December 13, 2010 (the "Board's Certification"), and (ii) directing the Board of Canvassers to certify a result of the November 2, 2010 election for New York Governor that reflects that the number of votes cast for Warren Redlich exceeded 50,000.

2. More specifically, Petitioners seek relief pursuant to CPLR §7803(3) on the grounds that the Board's Certification was affected by an error of law, was arbitrary and capricious, and was an abuse of discretion.

BRIEF RECITATION OF THE MOST RELEVANT FACTS

3. On October 29, 2002, the United States Congress enacted the Help America Vote Act of 2002 ("HAVA"). Among the provisions of that act, codified within Title 42, Chapter 146 of the United States Code, are the following:

§15302. Replacement of punch card or lever voting machines

(a) Establishment of program

...

(2) Use of funds

A State shall use the funds provided under a payment under this section ... to replace punch card voting systems or lever voting systems (as the case may be) in qualifying precincts within that State with a voting system ... that –

(A) does not use punch cards or levers;

(B) is not inconsistent with the requirements of the laws described in section 15545 of this title ["No effect on other laws"]; and

(C) meets the requirements of section 15481 of this title.

...

§15481. Voting systems standards

(a) Requirements

Each voting systems used in an election for Federal office shall meet the following requirements:

(1) In general

(A) Except as provided in subparagraph (B), the voting system ... shall –

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office –

(I) notify the voter that the voter has selected more than one candidate for a single office on the ballot;

(II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and

(III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

...

§15484. Minimum requirements

The requirements established by this subchapter [Subchapter III. Uniform and Nondiscriminatory Election Technology and Administration Requirements] are minimum requirements and nothing in this subchapter shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this subchapter so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law described in section 15545 of this title.

§15485. Methods of implementation left to discretion of State

The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State.

4. In 2009, the Board of Elections issued its Amended State Implementation Plan, Version 5-20, which addressed the issue, among others, of how the State of New York “will adopt voting system guidelines and processes which are consistent with the requirements of” HAVA. As a “goal,” the Board of Elections’ plan indicated (at p. 17) that:

New York intends to replace all lever voting machines used in the state, which numbered 19,843 at the 2000 Presidential Election, with voting systems which are HAVA-compliant.

Under “present status,” the Board of Elections’ plan indicated (at p. 18) that:

The performance of logic and accuracy tests is required before each election, and is conducted at the county level, pursuant to formulas and procedures developed and distributed by the State Board, thus ensuring accurate ballot configuration and consistent correct vote counts for all offices, and uniformity throughout the state. Draft procedures have been developed to ensure tasks match the new voting technologies to be used in New York.

Emphasis added. Under “proposed plan,” the Board of Elections’ plan indicated (at p. 19) that:

The State Board will continue to work with county election officials, to ensure that fully-compliant lever replacement voting systems are purchased, acceptance tested and deployed throughout the State, once such replacement voting systems have been certified.

5. Thus, the Board of Elections had and has responsibility for developing, distributing and implementing “formulas and procedures” to ensure accurate ballot configuration, and uniformity of the ballots throughout the state.

6. New York Election Law §7-104 provides, in relevant part:

§7-104. Ballots; form of, voting machine

...

3. ...

(c) Each office shall occupy as many columns or rows on the machine as the number of candidates to be elected to that office.

...

8. With respect to candidates for the offices of governor and lieutenant governor of a party or independent body, ballots shall be printed so that the names of such candidates for both offices shall appear in the same row or column, with the name of the candidate for governor appearing first and the ballot shall be so adjusted that both offices are voted for jointly and have but one designating letter or number.

7. Although Election Law §7-104(3)(c) had been in effect for many years prior to the enactment of HAVA, the Board of Elections during those many years had consistently declined to design, develop or implement forms of ballots for statewide elections, including elections for Governor, that complied with §7-104(3)(c).

8. Although Election Law §7-104(3)(c) had been in effect for many years prior to the enactment of HAVA, the Board of Elections during those many years had consistently designed, developed and implemented forms of ballots for statewide elections, including elections for Governor, that provided for more than one column or row, as the case may be, for offices, to which one candidate was (or, in the case of Governor and Lieutenant Governor, two candidates running jointly were) to be elected.

9. Prior to the enactment of HAVA, the Board of Elections, in judicial proceedings and otherwise, had defended its design, development and implementation of such forms of ballots on the ground that the lever machines then in use across the state did not provide sufficient space to permit compliance with Election Law §7-104(3)(c).

10. At the time of and subsequent to the enactment of HAVA, and as a result of its enactment, the Board of Elections was responsible for redesigning the voting system to be used

across the state for every statewide election, including the elections for Governor and Lieutenant Governor.

11. The Board of Elections designed, developed and implemented a form of ballot for the November 2, 2010 election that did not comply with Election Law §7-104(3)(c), in that it provided for more than one column or row, as the case may be, for candidates for the office of Governor.

12. The voting systems available for implementation by the Board of Elections subsequent to the enactment of HAVA included systems which provide for no more than one column or row, as the case may be, for each statewide office on the ballot, in compliance with Election Law §7-104(3)(c).

13. As a result of the failure of the Board of Elections to comply with Election Law §7-104(3)(c), the name of a different candidate for Governor appeared on the same column or row, as the case may be, of the name of petitioner Warren Redlich, candidate for Governor of the independent body known as the Libertarian Party, on the form of all of the ballots used in the election held on November 2, 2010. In particular, on all ballots used outside the City of New York, the name of Charles Barron, candidate for Governor of the independent body known as the Freedom Party, appeared on the same column or row as the name of Warren Redlich, and on all ballots used within the City of New York, the name of Kristin Davis, candidate for Governor of the independent body known as the Anti-Prohibition Party, appeared on the same column or row as the name of Warren Redlich.

14. One purpose of Election Law §7-104(3)(c) is to ensure that all candidates for any given statewide office are treated equally, in recognition of their rights under the equal protection clauses of the state and federal constitutions.

15. Another purpose of Election Law §7-104(3)(c) is to minimize voter confusion based on the form of the ballot, such that voters may reasonably assume that each column or row on the ballot, as the case may be, corresponds to one, and only one, candidate for office, and overvotes, or multiple votes for a single office, are thereby avoided.

16. As a result of the failure of the Board of Elections to comply with Election Law §7-104(3)(c), at least 1,700 voters who intended to vote for Warren Redlich at the November 2, 2010 election, instead voted mistakenly for both Warren Redlich and Charles Barron or both Warren Redlich and Kristin Davis, as the case may be.

17. The Board of Canvassers certified a result for the November 2, 2010 election for Governor that included 3,001 “void” votes statewide. At least 1,700 of those purportedly void votes were intended to and should have been counted by the Board of Canvassers as valid votes for Warren Redlich.

18. The Board of Canvassers certified a result for the November 2, 2010 election for Governor that included 95,092 “blank” votes statewide. A significant proportion of those purportedly blank votes were in fact overvotes which should ordinarily have been counted as “void,” as demonstrated by the anomalous result that many counties across the state – including all five counties within New York City – indicated a “0” result in the “void” category. As a result, at least 1,700 of those purportedly blank votes were intended to and should have been counted by the Board of Canvassers as valid votes for Warren Redlich.

19. The Board of Canvassers is made up of the same individuals who make up the Board of Elections.

20. Each county board of elections across New York State, and the New York City Board of Elections (collectively, the "county boards of elections"), is under the general jurisdiction of the New York State Board of Elections.

21. Based on information and belief, after the concession of loss by Carl Paladino, candidate for Governor of the Republican Party, and the common recognition of victory by Andrew Cuomo, candidate for Governor of the Democratic Party, in the November 2, 2010 election, each of the county boards of elections failed and neglected to canvass the votes from each and every absentee, military and provisional ballot that was required to be included in their tabulation of votes for that election for Governor.

22. Based on information and belief, as a result of the county boards' said failure and neglect to fully and completely canvass the votes for the November 2, 2010 election for Governor, at least 1,700 votes for Warren Redlich, candidate for Governor of the Libertarian Party, that should have been included in the Board's Certification, were not included.

23. Based on information and belief, upon a recount of a statistically relevant number of ballots actually counted by the county boards of election for the November 2, 2010 election, an anomaly would be found that, when extrapolated to the entire statewide vote for Governor, would indicate that Warren Redlich actually received in excess of 50,000 votes for Governor.

24. Based on information and belief, the members of the Board of Canvassers were aware or should have been aware of said statistical anomaly, and as a result were aware or should have been aware that Warren Redlich actually received in excess of 50,000 votes for Governor.

25. Due to the Board of Canvassers' erroneous certification of the vote for Governor for the November 2, 2010 election, in particular its determination that Warren Redlich received fewer than 50,000 votes, the Libertarian Party of New York has not been recognized pursuant to

New York law as a “party” (see Election Law §1-104(3)), and has been injured as a result, due to the several advantages provided to recognized “parties” under New York law.

26. In addition to the standing of Warren Redlich to bring this petition as an aggrieved candidate whose nominating body has erroneously not been recognized as a party under New York law, Mark Axinn has standing to bring this petition as the chair of the independent body that has erroneously not been recognized as a party under New York law, on the ground, among others, that the form of the ballot used for the November 2, 2010 election was illegal and improper. See Election Law §16-104(1).

JURISDICTION AND VENUE

27. This proceeding is brought pursuant to Article 78 of the CPLR to challenge the Board’s Certification to the extent it concluded that Redlich obtained fewer than 50,000 votes in the election for Governor held on November 2, 2010.

28. This action is timely because it is brought within four months of the date on which the challenged action occurred.

29. Venue is proper in this court because Albany County is where the material events took place.

CAUSE OF ACTION

30. Petitioners repeat and reallege paragraphs 1 through 29, above.

31. The decision to certify a result of the November 2, 2010 election for New York Governor that reflects that the number of votes cast for Warren Redlich did not exceed 50,000 was affected by an error of law, was arbitrary and capricious, and was an abuse of discretion.

WHEREFORE, Petitioners demand judgment (i) annulling and setting aside the certification of the result of the November 2, 2010 election for New York Governor made by the New York State Board of Canvassers on December 13, 2010, (ii) directing the New York State Board of Canvassers to certify a result of the November 2, 2010 election for New York Governor that reflects that the number of votes cast for Warren Redlich exceeded 50,000, (iii) granting petitioners their costs and disbursements in this proceeding, (iv) together with such other and further relief as this court deems just and fair.

Dated: Albany, New York
March __, 2011

I hereby verify (CPLR § 3021) and affirm under penalty of perjury (CPLR § 2106) that the statements in this Petition are true to the best of my knowledge, based on my personal knowledge and my discussions with all involved, such that this document should be considered admissible as my own affirmation.

THE LAW OFFICE OF WARREN REDLICH

By: Warren Redlich
Petitioner and Attorney for Petitioners

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
In the Matter of the Application of WARREN
REDLICH, candidate of the Libertarian Party of New
York for Governor of New York in the November
2010 Election, and MARK AXINN, as Chair of the
Libertarian Party of New York, an Independent Body,

AFFIDAVIT IN SUPPORT
OF MOTION

Index No. 623-11

Petitioners,

For a Judgment under Article 78 of the Civil Practice
Law and Rules that the Determination Made by the
New York State Board of Canvassers that WARREN
REDLICH Received Fewer than 50,000 Votes was
Affected by an Error of Law, was Arbitrary and
Capricious, and was an Abuse of Discretion,

- against -

NEW YORK STATE BOARD OF CANVASSERS,
NEW YORK STATE BOARD OF ELECTIONS and
JAMES A. WALSH, DOUGLAS A. KELLNER,
EVELYN J. AQUILA and GREGORY P. PETERSON,
in their official capacities as members of both the New
York State Board of Canvassers and the New York State
Board of Elections,

Respondents.

-----X
Warren Redlich, an attorney duly admitted to practice in the courts of the State of New
York, affirms the truth of the following statements under the penalties of perjury:

1. I am a petitioner, and the attorney for the petitioners, in the above-entitled proceeding and am familiar with all the facts and circumstances heretofore had herein.
2. This proceeding is being brought against the respondents for a judgment directing a recertification of the results of the November 2, 2010 election for Governor to reflect that I in fact received a number of votes in excess of 50,000.

3. Petitioners hereby request the issuance of an order to show cause pursuant to CPLR §403(d) to bring this proceeding on for hearing, and including a motion made pursuant to CPLR Rule 406 and §408 for disclosure, in particular to obtain for inspection and copying (i) all documents in any of the respondents' possession, custody or control, constituting or containing vote counts for the November 2, 2010 election, by county, of machine votes, absentee, military and affidavit ballots, for the office of Governor, and (ii) all documents in any of the respondents' possession, custody or control, reflecting or itemizing "overvotes" in the November 2, 2010 election, that may have been cast for both Charles Barron and myself, or both Kristin Davis and myself.

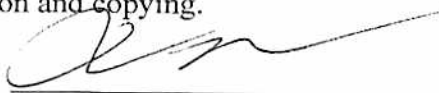
4. The documents sought are material and necessary to the prosecution of this proceeding because they will probably support petitioners' claims that (1) votes other than those cast at polling places across the state were not fully counted, after the "winner" of the Governor race was known, and (2) numerous "overvotes" were caused by the respondents' faulty ballot design, and many additionally were erroneously tabulated as "blank" votes, in the November 2, 2010 election for Governor.

5. Petitioners have a good and meritorious cause for bringing this proceeding.

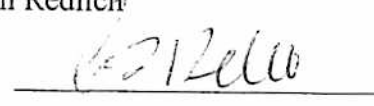
6. It is intended in good faith to use the documents herein prayed for upon the hearing of this proceeding.

7. No previous application for the relief herein prayed for has been made.

WHEREFORE, your deponent respectfully asks for an order directing production by respondents of the specified documents for inspection and copying.


Warren Redlich

Sworn to before me this 9th day of March, 2011


STACEY L. DELOACH
Notary Public, State of New York
Qualified in Albany County *Saratoga County*
No. 02DE6086281
Commission Expires 3/31/15