

U.S. DISTRICT COURT  
N.D. OF N.Y.  
FILED

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

DEC 28 2007

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**ROBERT L. SCHULZ, et al.,** )  
)  
**Plaintiffs,** )  
**v.** )  
)  
**STATE OF NEW YORK, et al.,** )  
)  
**Defendants,** )

**No. 07-cv-0943  
LEK-DRH**

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**PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS  
AND IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT**

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**December 27, 2007**

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<b>STATE OF NEW YORK, et al.,</b>	)	
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<b>Defendants,</b>	)	

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**PLAINTIFFS' BRIEF IN OPPOSITION TO MOTIONS TO DISMISS  
AND IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

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**STATEMENT OF THE CASE**

Plaintiffs seek to enjoin the State Defendants, from deliberately concealing material information in a setting of fiduciary obligation, that is, from committing acts designed to deprive individual Plaintiffs -- the People -- of their constitutionally guaranteed, unalienable and intangible Rights, specifically such Rights as having public officials perform their election duties transparently and honestly by counting each vote for President of the United States at each polling station, in the open in full view of the People, and the Right to have their public officials immediately post those individual polling station totals on County and State publicly accessible websites, precinct-by-precinct, thereby enabling the People who witnessed the public vote counting at individual polling stations, and noted such totals when they were publicly announced, to verify that the counts they witnessed matched the properly tabulated and recorded counts performed by the County and State, AND TO DO SO BEFORE PUBLIC OFFICIALS RELEASE THOSE COUNTY AND STATEWIDE TABULATIONS TO THE ASSOCIATED PRESS, THE NATIONAL ELECTION POOL OR ANY OTHER PRIVATE PARTY.

The evidence submitted herewith establishes that Defendants have been counting votes in secret, adding insult to injury by using machines with proven vulnerabilities to error and fraud.

The evidence also shows that when a Plaintiff votes in a precinct during a Caucus, Primary or general election, and hears a media announcement stating e.g., “the machine reports candidate A received 319 votes and candidate B 119 votes,” that Plaintiff has no way to determine if those totals (as unreliable as machine counted votes are), were included accurately in the tabulation of votes obtained from machines across his County and State. Most Counties and States do not certify the results, much less post them for days or weeks to come. If and when his County and State post the total votes on election night, as reported by all the machines in his County and State, they fail to do so precinct-by-precinct, thereby preventing the Plaintiff from determining if the votes “counted” and announced at his precinct were accurately counted in the subsequent tabulations performed by the county and the state.

Instead, on election night, machine totals from precincts across a county (towns and cities in the Northeast), or from counties across a State are handed by officials of the county or state to a private consortium (the National Election Pool), who immediately tabulate the voter returns, again by electronic means, and begin broadcasting the names of the winners and losers all across the nation on all five dominant T.V. networks, ABC, CBS, CNN, FOX and NBC. These results are **not** first certified and the results are **never** posted precinct-by-precinct.

This is a violation of the law, the unalienable Right of each Plaintiff to cast an effective, undiluted vote, that is, to have his and **all other** votes for President of the United States accurately counted by state officials.

See Figure 1 for an overview of the constitutionally deficient voting procedures now followed by every State Defendant.

“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”

*Reynolds v. Sims*, 377 U.S. 533, 556.

The State has a compelling interest in protecting the integrity of the political process. *Storer v. Brown*, 415 U.S. 724, 732 (1974).

States have a compelling interest, not just a legitimate interest, in structuring elections in a way that avoids confusion, deception and even frustration of the democratic process. *Larouche v. Kezer*, 990 F.2d at 442 (2d Cir. 1993).

The Supreme Court has clarified “the right to vote” to mean “the right to participate in an electoral process that is necessarily structured [by state regulations] to maintain the integrity of the democratic system.” *Burdick v. Takusi*, 112 S. Ct. 2059, 2063 (1992). “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” 112 S. Ct. at 2067.

Injunctions to stop violations of the law are typically permitted “because [they] merely require the enjoined party to obey the law.” *United States v Campbell*, 857 F.2d 1317, 1324 (5<sup>th</sup> Cir. 1990).

State Defendants have all filed motions to dismiss. While their arguments and case cites vary from state to state, collectively the States are asking the Court to dismiss for lack of subject matter jurisdiction, lack of personal jurisdiction, sovereign immunity, failure to state a claim for which relief can be granted, the State is not a “person,” wrong venue and lack of standing.

## ARGUMENT

### I. DEFENDANTS ARE NOT ENTITLED TO DISMISSAL

#### A. THE COURT HAS SUBJECT MATTER JURISDICTION

This case arises under the Constitution of the United States of America, and is a controversy between citizens from each State and all fifty States. The Court has general subject matter jurisdiction under Article III, Section 2 of the Constitution, which reads in relevant part:

“The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the Laws of the United States...to Controversies between two or more States...between a State and citizens of another State ... between citizens of different States....”

The Court’s subject matter jurisdiction has been questioned by some Defendants on the grounds that they have no control over the towns, cities and counties of the State regarding their voting procedures, including decisions regarding the use of machines to count the votes, whether ballots are kept in full public view until the votes are counted, decisions on how and when local officials announce and release voter returns, and so forth.

In fact, in addition to the chief election official in each State, the State itself is a defendant, including its three branches of government and its political subdivisions. In keeping with Fed. Rule of Civil Procedure, Rule 4 (j)(2), the chief executive officer of each State was served a copy of the Amended Summons and Amended Complaint. All towns, cities and counties are political subdivisions of the State, created and controlled by the State. The relief Plaintiffs are seeking can be obtained by order of the Court against the States and served on the chief executive officer of the state as well as on the chief election officials of the state.

“Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at [federal] elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough*, supra; *Wiley v. Sinkler*, supra; *Swafford v. Templeton*, supra; *United States v. Mosley*, supra; see *Ex parte Siebold*, supra; *In re Coy*, 127 U.S.



731, 8 S.Ct. 1263; *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617. And since the constitutional command is without restriction or limitation, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals **as well as of states**. *Ex parte Yarbrough*, supra; *Logan v. United States*, supra. ...” *U. S. v. Classic*, 313 U.S. 299, 314 (1941).

Rising to the level of frivolity is the argument by a few of the Defendants that the Court lacks subject matter jurisdiction because Plaintiffs have not named as defendants the (non-elected) election commissioners who manage elections at the precinct and County level on behalf of the states (and on behalf of the private political parties).

Any suggestion to the effect that an order served on these State Defendants, aimed at protecting the honesty and integrity of the vote for President of the United States, could not be enforced is absurd to say the least.

The State has a compelling interest in protecting the integrity of the political process. *Storer v. Brown*, 415 U.S. 724, 732 (1974).

Notwithstanding the recognition by the Supreme Court of the need for state regulations to protect the democratic (voting) process, the Supreme Court has held that a state cannot violate a right encompassed within the Equal Protection Clause of the Fourteenth Amendment. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

### **B. Jurisdiction Does Not Violate Defendants’ Due Process Rights**

Defendants’ incorrectly allege that jurisdiction by this Court would violate their due process rights due to a lack of “minimal contacts” between the States and New York State.

In fact, the Court has general jurisdiction based on the defendants' "continuous and systematic" contacts with the forum state. Every four years Defendants conduct primary and general elections for President of the United States of America. Fundamental, natural Rights of citizens in every judicial district in New York State, including New York Plaintiffs, are affected by the votes "counted" in each of the other States. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 415-16 (1984).

"[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 556.

In addition, all Defendants maintain continuous and systematic contact with the New York based consortium, the **National Election Pool** (NEP), which includes the New York City based Associated Press and the New York City based ABC, CBS, CNN, FOX and NBC television networks. See accompanying Affidavits by Lynn Landes, James Condit, John Liggett and Robert Schulz.

As the accompanying Affidavits show, continuous and systematic contact between all State Defendants and agents, employees and contractors of New York based NEP includes:

- 1) personal and electronic connections between NEP and all counties in the country (towns and cities in the North east) and complete reliance upon NEP for the tabulation of all voter returns on election night and the announcement of the winners and losers, and
- 2) completion by the States of extensive pre-election survey forms prepared by NEP, and
- 3) exit polls in the States using forms prepared by NEP and conducted by NEP contractor Edison/Mitofsky.

Thus, much more than "minimal contact" exists between each State Defendant and New York.

However, under the facts and circumstances of this controversy, the Court has jurisdiction regardless of the level of "contacts." "In judging the minimum contacts consistent

with due process under the Fourteenth Amendment for establishing personal jurisdiction over a defendant in a State, a court properly focuses on the relationship among the defendant, the forum, and the litigation; the Plaintiffs' lack of "contacts" [with the out-of-state Defendants] will not defeat otherwise proper jurisdiction." *Calder v Jones*, 465 U.S. 783 (1983).

The Court has personal jurisdiction over out-of-state Defendants. There is no constitutional tort without injury, and the state in which the victim of the constitutional tort suffers the injury may entertain a suit against the accused tortfeasor to answer for its deeds, even if the wrongdoer is out of state and the events were put in train outside its borders. Jurisdiction over all State Defendants in a constitutional tort suit is proper in any State based on the "effects" of their conduct in that state, even though the conduct occurs in another state. The fact that the actions causing the injurious effects in New York were performed outside the State does not prevent this Court from asserting jurisdiction over a cause of action arising out of those effects. *Calder v Jones*, 465 U.S. 783 (1983). See also *Janmark v. Reidy and Dreamkeeper*, 132 F.3d 1200, (7<sup>th</sup> Cir., 1997). "[T]he state in which the victim of a tort suffered the injury may entertain a suit against the tortfeasor [in another state]."

Defendants are the primary participants in a constitutional tort knowingly and intentionally directed at the People at large, including New Yorkers. This is certainly true given Defendants' knowledge and awareness of the secret (by machine) vote counting, the added uncertainty arising out of the well-documented lack of security and reliability associated with the machines being used to count the votes, and the fact that they, the Defendants, immediately after the polls close, turn over the raw, uncertified, uncertain "voter returns" to a private entity, the National Election Pool, to tabulate and inform the nation of the winners and losers. See accompanying Affidavits by Landes, Condit, Liggett and Schulz.

An individual in New York need not go to another state to seek redress from persons who, though remaining in that state commit a constitutional tort that causes injury in New York.

In light of the facts, especially following the events in Florida in 2000 and in Ohio in 2004, the release of the studies by Princeton, Cal Tech, MIT, UCLA and others discrediting the reliability, integrity and security of voting machines in elections,<sup>1</sup> it is reasonable to conclude that all Defendants anticipated being sued in one fashion or another, in New York State or another state, in a class action or as a named Defendant. On this basis alone, the Court has personal jurisdiction over all Defendants. See *Calder v Jones*, 465 U.S. 783 (1983).

In addition, under the Federal Rules of Civil Procedure, Rule 20, Plaintiffs domiciled outside the boundaries of New York State may join in this action, and Defendants located outside the boundaries of New York State may be joined in this action.

“All persons may join in one action as plaintiffs if they assert any Right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as Defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all Defendants will arise in the action.” FRCP Rule 20.

Finally, with today’s inexpensive individual and group communication, conferencing and mass-transportation systems, coupled with the distinct probability that this case will be determined on submissions, the maintenance of this suit in New York State will not offend traditional notions of fair play and substantial justice. See *International Shoe v State of Washington*, 326 U.S. 310 (1945).

### **C. The Eleventh Amendment Does Not Bar Jurisdiction**

The Eleventh Amendment to the Constitution of the United States of America reads:

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<sup>1</sup> Including the recently released studies and determinations by Ohio and Colorado. See Declaration #1 by Schulz.

“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State ....”

Plaintiffs are suing all chief election officials acting in their official capacities. A plaintiff may seek prospective injunctive relief in federal court against a state official acting in his or her official capacity. *Ex Parte Young*, 209 U.S. 123 (1908)

In the instant suit, each citizen is suing his or her State and not *one* of the other States, but *each and every one* of the other States due to a series of similar acts and occurrences (i.e., constitutional torts) taking place from “sea to shining sea,” with each occurrence causing incremental injury to every Plaintiff, and the whole harm being greater than the sum of the parts. There is a constitutionally sufficient relationship between the forum chosen in New York State and the 49 other state defendants, whose constitutionally tortuous acts are calculated to cause injury to the plaintiffs in all states, including New York State plaintiffs.

“Absent consent, this means there must be authorization for service of summons on the defendant... Service of process in a federal action is covered generally by FRCP Rule 4.” *Omni Capital International v. Rudolf Wolff*, 484 U.S. 97

Fed. R. Civ. P. 4(f) describes where process may be served. It authorizes service in the state in which the action is brought, or anywhere else authorized by a federal statute or by the rules.

Under Fed. R. Civ. P. 4(j)2, service on the chief executive officer of a state is authorized where the state is a defendant. In this case, all States are Defendants and Plaintiffs have served the chief executive officer (the Governor) of all States.

In addition, under FRCP Rule 4(e), a federal court normally looks to either a federal statute **or** to the long-arm statute of the state in which it sits to determine whether a defendant is

amenable to service, a prerequisite to its exercise of personal jurisdiction. *Omni Capital International v. Rudolf Wolff*, 484 U.S. 97

Here, the Court need look no further than the federal law -- the Constitution of the United States of America -- and the nature of the litigation (voting procedures in Presidential caucus, primary and general elections) to determine the Defendants are amenable to suit and service.

Even if the federal law/Constitution itself did not provide amenability to suit under the Eleventh Amendment (which is not the case), New York's Long Arm Statute does. New York State's jurisdictional statute is as broad as the Federal Constitution permits. Under (NYCPLR Section 302), a state court may exercise "long-arm" jurisdiction over a non-domiciliary defendant in certain specified circumstances. NYCPLR Section 302 provides (Plaintiffs' emphasis added):

"Personal Jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the State or contracts anywhere to supply goods or services within the state; or
2. commits a tortuous act within the state, except as to a cause of action for defamation of character arising from the act; or
3. **commits a tortuous act without the state causing injury to person or property within the state**, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) Expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state."

As argued herein, all non-domiciliary Defendants have made the decision to commit the **constitutionally tortuous act** of counting IN SECRET the votes for President of the United States of America in their upcoming caucuses and primaries and in the general election, and to pass the secretly counted vote totals from each precinct or County to a private, corporately

controlled cartel for statewide and national tabulation and reporting of winners and losers, causing injury to the individual Liberty and Property Rights of New York Plaintiffs, and others.

Alternatively, and on the equity side of the Court, due to a “bizarre hiatus in the Rules” jurisdiction over out-of-state defendants is justifiable, for the alternative is at a *minimum*, fifty separate suits in fifty federal courts all arising from the same series of occurrences and resting on the same facts and law.

#### **D. VENUE IS PROPER**

Venue is determined in accordance with 28 USC Section 1391(b) which provides:

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.”

New York defendants are residents of this judicial district and there is no judicial district in which this action may otherwise be brought.

#### **E. PLAINTIFFS HAVE STANDING**

Defendants have made the decisions: to count the votes for President of the United States IN SECRET and to use unreliable and insecure machines to count the votes in secret, and/or not to publicly announce the results of the vote at each precinct immediately following the end of the voting period, and/or not to post voter returns publicly on their county and state websites on election night, precinct-by-precinct, before passing the results to NEP for tabulation and announcement of the winners and losers. This means Plaintiffs’ Right to have every vote accurately counted will be violated by Defendants and every one of them, a concrete injury directly traceable, and attributable, to Defendants’ flawed voting practices and procedures.

Defendants' actions will result in confusion, frustration, error and/or fraud. Plaintiffs are, therefore, threatened with injury – i.e., the loss of Liberty and Property Rights.

The Right to cast an effective vote and to have every vote accurately counted is a property Right and a measure of Plaintiffs' Liberty (see argument below).

Injury caused by Defendants is actual and imminent, not conjectural or hypothetical.

Plaintiffs' injury is redressable by the granting of the requested relief.

### **F. UNDER 42 U.S.C 1983, THE COURT HAS JURISDICTION OVER NON-DOMICILIARY ELECTION OFFICIALS IN THEIR INDIVIDUAL CAPACITIES**

Section 1983 creates a cause of action against any person who, acting under color of State law, abridges rights guaranteed by the Constitution and laws of the United States.

Specifically, the text of 42 USC 1983 reads:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity or other proper proceeding for redress ....”

Defendants, who have general supervisory responsibility over Presidential elections, both primary and general, have engaged in the injurious acts enumerated above -- including the decision to count the votes for President of the United States IN SECRET -- a violation of Plaintiffs' civil Rights.

The Court has jurisdiction over Defendant state election officials who have been sued in their individual as well as their official capacities.

### **II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT**

Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The party



moving for summary judgment bears the burden of persuasion on the relevant issues.<sup>2</sup> The non-moving party may survive a motion for summary judgment only by producing “evidence from which a [fact finder] might return a verdict in his favor.”<sup>3</sup> These rules apply with equal force to suits for declaratory and injunctive relief under the Constitution of the United States of America.

### **A. FACTS MATERIAL TO THE CASE ARE NOT IN DISPUTE**

As the accompanying STATEMENT OF MATERIAL FACTS demonstrates, Plaintiffs contend there is no genuine issue as to any material fact.

Many votes in the upcoming caucuses, primaries and general election **will not be** marked by hand on paper ballots. Nor will all ballots be hand counted.

The result of the count at each precinct **will not be** read aloud for public consumption immediately following the count.

A copy of certified tally sheets **will not be** posted on a wall at each precinct for public viewing immediately following the count.

Certified vote totals **will not be** immediately communicated from each precinct to a government supervised central tabulation location at their County where the totals from each precinct in the County are to be publicly tabulated and announced as they are received.

Certified vote totals **will not be** immediately communicated from each County to a government supervised central tabulation location in their State where the totals from each precinct and County are to be publicly tabulated and announced as they are received.

Instead, uncertified voter returns **will be** turned over by Defendants to representatives of the private, New York based National Election Pool immediately following the end of the voting period in each county, where the results will be tabulated **in secret** along with the results of other

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<sup>2</sup> *Celotex Corp. v. Associated Wholesale Grocers*, 130 U.S. 317, 323 (1986).

<sup>3</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)

counties, to be immediately announced via the NEP cartel comprised of all five dominant television news networks, ABC, CBS, CNN, FOX and NBC, and immediately wired to all dominant daily newspapers and media entities throughout the United States of America.

The announcement of the results of the tabulation by representatives of the National Election Pool **will not** include a precinct-by-precinct breakdown of the vote, whether counted by hand or by machine at the precincts.

### **B. PRIVATE CORPORATIONS CONTROL NATIONAL VOTE TOTALING AND REPORTING OF ELECTION RESULTS TO THE PUBLIC**

Without the urgent intervention of this Court, not only will corporate programmed voting machines "count" the votes cast using proprietary "black box" software for the coming year's primaries and general election, the non-certified, but *de facto* results of those state-managed elections, remain under the control and dominion of corporate media entities. These corporate entities not only communicate the election results to the public with the consent, participation and sanction of the State Defendants, they disturbingly also perform critical, non-official, but *de facto*, vote totaling and vote aggregation functions which become manifest, and publicly acknowledged as the *de facto* results of the election.

Although the states may certify and release their "official" election results much later (possibly many, many weeks later) it is the national corporate media entities that effectively total the election results *ad hoc* and communicate the results of every election to the general public.

The *de facto* function played by these, private, corporate, *non-official* entities in totaling the votes and publicly pronouncing to the public the *de facto* election results is not only a dereliction of the legal duty of state Defendants, it needlessly exposes the entire election to error, chicanery and sabotage. In other words, corporations are not merely *reporting* the official

determinations and official vote counts and certifications of our local election officials, they have in fact, effectively **replaced** the constitutional functions that election officials that have been charged, by law, with controlling and protecting. In short, it is now trans-national corporations, not sworn, accountable election officials, who count our votes and announce who our "elected" representatives shall be.

In 2008, the outcomes of the presidential Caucuses, Primaries and General Elections will be managed and released to the public by a little-known corporate media consortium known as the "National Election Pool", or "NEP". See the accompanying affidavits by Landes, Condit, Liggett and Schulz. The consortium's website ([www.exit-poll.net](http://www.exit-poll.net)) provides details:

“The National Election Pool is a consortium of **ABC News**, **Associated Press**, **CBS News**, **CNN**, **Fox News** and **NBC News**. It was formed in 2003 in order to provide information on Election Night about the vote count, election analysis and election projections. NEP contracted with Edison Media Research and Mitofsky International (Edison/Mitofsky) to make projections and provide Exit Poll analysis. In addition, the NEP retained the Associated Press to conduct a tabulation of the vote throughout the country.

“The AP collects voter returns from all counties in the United States and from cities/towns in the New England states. They provide tabulations for each state for Senate and Governor, and congressional district tabulations for U.S. House of Representatives. They also provide tabulations for selected state referenda and initiatives. Regular AP clients are offered a more comprehensive vote count for many additional political contests.

“Edison/Mitofsky conducts statewide Exit Polls throughout the country as well as a National survey. In addition, Edison/Mitofsky collects the vote count in a sample of precincts in each state. Edison/Mitofsky provides Exit Poll analysis and projections for President, U.S. Senate, Governor as well as selected U.S. House, and state referenda and initiatives.

From the accompanying affidavits we learn several important things. First, the five dominant transnational corporate television news networks (CBS, NBC, ABC, FOX and CNN) and the Associated Press are the primary vested participants of the NEP consortium. The Associated Press is itself another corporate consortium ostensibly "owned" by 1500+ newspapers (many of which are also owned by the same transnational media parent companies controlling the broadcast networks). Next we learn that the Associated Press functions as the sole *de facto*

vote "totaler"/aggregator in the nation by collecting the "voter returns". Next, we know that (privately held) Mitofsky International controls the "exit polling" sampling process and creates statistical analyses for NEP (using its own undisclosed, proprietary methodologies) utilizing exit poll interviews and actual vote counts from selected precincts. In short, it is from this corporate consortium, the "NEP" -- not election officials -- that America's voters learn the *de facto* results of their federal elections.

Disturbingly, the State Defendants have instructed their election officials to cooperate in this contrived, but inherently flawed system. Instead of hand-counting and certifying the votes of each voting station and precinct, and having election officials publicly announce election results incrementally as votes are *officially* totaled, public officials instead transmit local vote totals via personal contact and computer connections to the Associated Press in New York, who in turn, totals the votes and distributes the running totals throughout election night to the consortium's cartel of television news networks. The statistical "projections", vote "totals" and final "results" are then announced on live national television by the corporate news correspondents and subsequently parroted and analyzed without end by the nation's and world's newspapers, magazines, television shows and websites.

Unfortunately, long after election night is over, and long after the losing candidates publicly concede their defeat at the polls, and long after state officials eventually get around to officially "certifying" the election results, the **de facto** winners have already assumed their thrones of power and any practical basis for mounting a legal challenge for a recount has vanished. With virtually every news media outlet relying directly on the vote totals aggregated and reported by the NEP consortium on the evening of each national election, it is no wonder

that there is scant attention paid to officially certified election results made by election officials or to examining the ballots actually cast by the People.

In fact, the danger posed by relying upon the broadcast **assertions** of transnational corporate entities having significant vested, and likely *very* selfish interests in the decisions and policies of the national government is so grave, that the Court is obligated to stop this affront upon the People. **There is no reasonable argument that can possibly justify putting the entire democratic process of this Republic at risk by allowing anything but hand-marked and hand-counted paper ballots at the precinct level, and by entrusting corporate entities with the totaling of the votes and the power of announcing the winners and losers on election night.**

The current machines, systems, practices now embraced by the NEP consortium and State Defendants are so constitutionally deficient and open to attack that their use defies common sense. Given the overall design of the Defendants' election "machinery", it is not unreasonable to conclude, disturbingly, that it has been designed *specifically* to facilitate election corruption.

### **C. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF EQUITY AND LAW**

On the Court's equity side, this case arises from Defendants' decision to count Plaintiffs' votes and the votes of other citizens for President of the United States IN SECRET, using insecure and unreliable machines, and to turn uncertified voter returns over to a private party for early (as soon as the polls close in each state) tabulation and immediate announcement of winners and losers, all in violation of the spirit and habit of fairness, justice and right dealing which would regulate the intercourse of men with men.

On the Court's law side, this case arises because said decisions and acts of Defendants violate certain provisions of the Constitution of the United States of America.

The Constitution must be construed in its entirety. “The provisions of the Federal Constitution granting Congress of the states specific power to legislate in certain areas are subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.”

*Williams v Rhodes*, 393 U.S. 23 (1968)

The **First Amendment** to the Constitution of the United States of America reads in part:

*“Congress shall make no law...abridging ... the Right of the People peaceably to Assemble and to Petition the Government for Redress of Grievances.”*

This lawsuit is a Petition for Redress (remedy) of a Constitutional tort being committed in individual Plaintiffs’ own States and in States geographically removed from individual Plaintiffs, but with harm felt by *all* Plaintiffs in *all* States. No act of Congress can, in equity or in law, bar this Court from determining the merits of Plaintiffs’ complaint and granting the requested relief.

The **Fifth Amendment** to the Constitution of the United States of America reads in part:

*“No person shall be deprived of ...liberty, or property, without due process of law....”*

An individual American’s Right to have all votes that are cast in all States for President of the United States accurately counted is essential for the preservation of each Plaintiff’s individual Liberty, and essential for the protection of the first of the Grand Rights -- Government based upon the consent of the People.

The Right to have all votes cast in every State for President of the United States accurately counted is as much an unalienable Property Right of each Plaintiff as is his Right to worship freely and his Right to real and personal property.

Voting practices and procedures in any State that result in error and fraud, even confusion and frustration, infringe upon every Plaintiff’s individual, unalienable Right to Liberty and Property.

Under the Supremacy Clause of the Constitution (Article VI, clause 2), each and every one of the fifty States is prohibited from engaging in any act that would diminish the value of those Rights.

The Liberty and Property of each individual Plaintiff depends upon his or her vigilance and ability to defend against any act or threat by any Defendant to diminish the value of his or her Right to have all votes that are cast for President of the United States accurately counted, no matter the geographical distance between the State where the constitutional tort occurs and the Plaintiff's voting booth.

The **Ninth Amendment** reads: "*The enumeration in the Constitution of certain Rights shall not be construed to deny or disparage others retained by the People.*"

Each individual Plaintiff claims and is exercising the natural Right to join with all other Plaintiffs in a constitutional challenge to the collective decision by all States to count the votes for President of the United States of America IN SECRET (causing confusion, frustration, error and/or fraud), and to do so in any one of the federal District Courts.

The **Tenth Amendment** to the Constitution of the United States of America reads:

*"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."*

The power to control the decision over whether the votes for President of the United States are to be counted by hand in full public view (as is done in Richmond, Vermont), or in secret (as is always the case with mechanical or electrical machines), is clearly reserved to the People, who have not and would never transfer that power to the State(s). Each secret count of votes by a State or one of its subdivisions is a usurpation of the power of the People.

The **Fourteenth Amendment** to the Constitution of the United States of America reads:

*"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."*

Neither the State of New York nor any other State of the Union can count the votes for President of the United States of America IN SECRET without affecting the Rights of the Plaintiffs in the other States.

The other 49 states cannot count the votes for President of the United States of America IN SECRET without affecting the Rights of the Plaintiffs in the 50<sup>th</sup> State (New York).

No State shall act to abridge the Right of any Plaintiff to cast an effective vote and to have all votes for President accurately counted, by hand in full public view.

Each Plaintiff, as a citizen of the United States, is to enjoy the privilege and Right of knowing that no State is counting votes for President of the United States IN SECRET or doing anything that would result in a vote not being counted accurately.

“Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them”. *Miranda v. Arizona*, 384 U.S. 436 (1966)

Failure to provide the People with a continuous public viewing – a People’s “Chain of Custody”— of all ballots as contained in the ballot box or boxes during the voting period, and a manual allocation and count of all ballots in full public view promptly after the voting period ends, at each voting station, before those ballots are ever removed from public view, violates the voting rights of Plaintiffs.

The federal Constitution assigns to the states the initial responsibility for setting the rules and governing elections. The power given to the states in the federal Constitution to regulate elections is necessary as a way to insure orderly operation of the voting (democratic) process. State regulations of elections have been derived (*Burdick v Takushi*, 112 S. Ct. at 2603) from Article I, Section 4, cl. 1 of the federal Constitution which reads:

*“The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof.”*



State regulation of elections has also been derived (*Storer v Brown*, 415 U.S. at 729-30, 1974), from Article I, Section 2, cl. 1 of the Federal Constitution, which reads:

*“The House of Representatives shall be composed of members chosen every second year by the People of the several states, and the Electors in each state shall have qualifications requisite for Electors of the most numerous branch of the State Legislature.”*

The State has a compelling interest in protecting the integrity of the political process. *Storer v. Brown*, 415 U.S. 724, 732 (1974).

States have a compelling interest, not just a legitimate interest, in structuring elections in a way that avoids confusion, deception and even frustration of the democratic process. *Larouche v. Kezer*, 990 F.2d at 442 (2d Cir. 1993).

To prevail on the constitutional transgressions alleged in this complaint, Plaintiffs know that they need show beyond a reasonable doubt that the administration, by the State and County Boards of Elections will severely burden or prevent the exercise of a substantial constitutional voting right.

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Burdick v. Takushi*, 112 S. Ct. 2059, 2067 (1992).

The Supreme Court has derived a number of constitutional voting rights from the First and Fourteenth Amendments, including: the right to associate for the advancement of political purposes, *NAACP v Alabama*, 357 U.S. 449, 460 (1958); the right to cast an effective vote, *Williams v Rhodes*, 393 U.S. 23, 30 (1968); and the right to create and develop new political parties, *Norman v. Reed*, 112 S. Ct. 698, 705 (1992).

The Supreme Court has clarified “the right to vote” to mean “the right to participate in an electoral process that is necessarily structured [by state regulations] to maintain the integrity of the democratic system.” *Burdick v. Takasi*, 112 S. Ct. at 2063.

Notwithstanding this recognition by the Supreme Court of the need for state regulations to protect the democratic (voting) process, the Supreme Court has held that a state cannot violate a right encompassed within the Equal Protection Clause of the Fourteenth Amendment. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, *Ex parte Yarbrough*, 110 U.S. 651, and to have their votes counted, *United States v. Mosley*, 238 U.S. 383. In *Mosley* the Court stated that it is ‘**as equally unquestionable that the right to have one's vote counted is as open to protection . . . as the right to put a ballot in a box.**’ 238 U.S. at 386. The right to vote can neither be denied outright, *Guinn v. United States*, 238 U.S. 347, *Lane v. Wilson*, 307 U.S. 268, nor destroyed by alteration of ballots, see *United States v. Classic*, 313 U.S. 299, 315, nor diluted by ballot-box stuffing, *Ex parte Siebold*, 100 U.S. 371, *United States v. Saylor*, 322 U.S. 385. As the Court stated in *Classic*, ‘Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots **and have them counted . . .**’ (313 U.S. at 315).” *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

“And history has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a

democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” 377 U.S. 533, 556.

“Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 356, the Court referred to “the political franchise of voting’ as ‘a fundamental political right, because it is preservative of all rights.’ 118 U.S., at 370.” 377 U.S. 533, 562.

In the *KU KLUX CASES*, 110 U.S. 651, 667 (1884), the Supreme Court said:

“It is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people, as that the original form of it should be so. In absolute governments, where the monarch is the source of all power, it is still held to be important that the exercise of that power shall be free from the influence of extraneous violence and internal corruption. **In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger. Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources.**” (Plaintiffs’ emphasis).

In *U. S. v. Classic*, 313 U.S. 299 (1941), the Supreme Court said,

“Pursuant to the authority given by 2 of Article I of the Constitution, and subject to the legislative power of Congress under 4 of Article I, and other pertinent provisions of the Constitution, the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress. In common with many other states Louisiana has exercised that discretion by setting up machinery for the effective choice of party candidates for representative in Congress by primary elections and by its laws it eliminates or seriously restricts the candidacy at the general election of all those who are defeated at the primary. All political parties, which are defined as those that have cast at least 5 per cent of the total vote at specified preceding elections, are required to nominate their candidates for representative by direct primary elections. Louisiana Act No. 46, Regular Session, 1940, 1 and 3.

“The primary is conducted by the state at public expense. Act No. 46, supra, 35. The primary, as is the general election, is subject to numerous statutory regulations as to the time, place and manner of conducting the election, **including provisions to insure that the ballots cast at the primary are correctly counted**, and the results of the count correctly recorded and certified to the Secretary of State, whose duty it is to place the names of the successful candidates of each party on the official [313 U.S. 299, 312] ballot. The Secretary of State is prohibited from placing on the official ballot the name of any person as a candidate for any political party not nominated in accordance with the provisions of the Act. Act 46, 1...

“The right to vote for a representative in Congress at the general election is, as a matter of law, thus restricted to the successful party candidate at the primary, to those not candidates at the primary who file nomination papers, and those whose names may be lawfully written into the ballot by the electors. Even if, as appellees argue, contrary to the decision in *Serpas v. Trebuca*, supra, voters may lawfully write into their ballots, cast at the general election, the name of a candidate rejected at the primary and have their ballots counted, the practical operation of the primary law in otherwise excluding from the ballot on the general election the names of candidates rejected at the primary is such as to impose serious restrictions upon the choice of candidates by the voters save by voting at the primary election. In fact, as alleged in the indictment, the practical operation of the primary in Louisiana, is and has been since the primary election was established in 1900 to secure the election of the Democratic primary [313 U.S. 299, 314] nominee for the Second Congressional District of Louisiana.

“Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus as a matter of law and in fact an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district. The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the Congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice. ...

“Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots **and have them counted** at Congressional elections. **This Court has consistently held that this is a right secured by the Constitution.** *Ex parte Yarbrough*, supra; *Wiley v. Sinkler*, supra; *Swafford v. Templeton*, supra; *United States v. Mosley*, supra; see *Ex parte Siebold*, supra; *In re Coy*, 127 U.S. 731, 8 S.Ct. 1263; *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617. And since **the constitutional command is without restriction or limitation**, the right unlike those guaranteed by the Fourteenth and Fifteenth Amendments, **is secured against the action of individuals** as well as of states. *Ex parte Yarbrough*, supra; *Logan v. United States*, supra. ...

“...Moreover, we cannot close our eyes to the fact already mentioned that **the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary and may thus operate to deprive the voter of his constitutional right of choice.** This was noted and extensively commented upon by the concurring Justices in *Newberry v. United States*, supra, 256 U.S. 263 -269, 285, 287, 41 S.Ct. 476-478, 484.

“**Unless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection** save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries. 3 Such an expedient would end that state autonomy with respect to elections which the Constitution contemplated that Congress should be free to leave undisturbed, subject only to such minimum regulation as it should find necessary to insure the freedom [313 U.S. 299, 320] and integrity of the choice. **Words, especially those of a constitution, are not to be read with such stultifying narrowness.** The words of 2 and 4 of Article I, read in the sense which is plainly

permissible and in the light of the constitutional purpose, require us to hold that a primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it. ...

“Conspiracy to prevent the official count of a citizen's ballot, held in *United States v. Mosley*, supra, to be a violation of 19 in the case of a congressional election, is equally a conspiracy to injure and oppress the citizen when the ballots are cast in a primary election prerequisite to the choice of party candidates for a congressional election. **In both cases the right infringed is one secured by the Constitution.** The injury suffered by the citizen in the exercise of the right is an injury which the statute describes and to which it applies in the one case as in the other...”The right of the voters **at the primary** to have their votes counted is, as we have stated, a right or privilege secured by the Constitution...” (Plaintiffs’ emphasis).

## CONCLUSION

Defendants’ actions have caused, and are causing substantial harm to their citizens, including Plaintiffs. The Court should permanently enjoin defendants to prevent further harm, and deny Defendants’ motions to dismiss.

Respectfully submitted.

Dated: December 26, 2007

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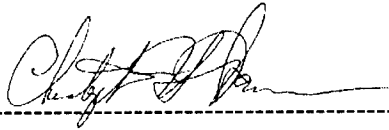
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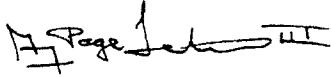
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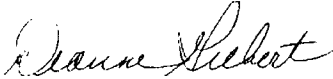
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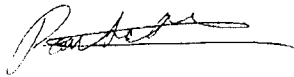
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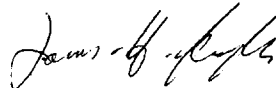
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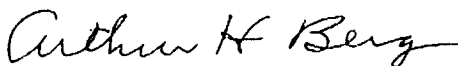
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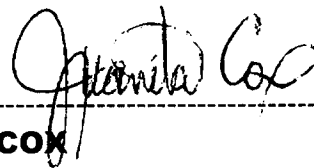
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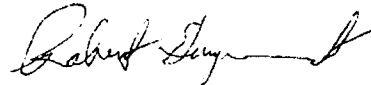
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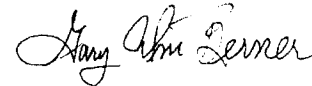
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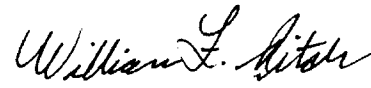
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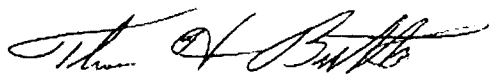
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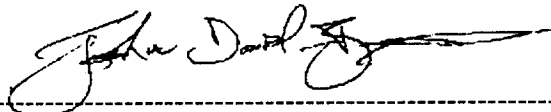
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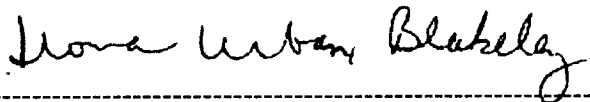
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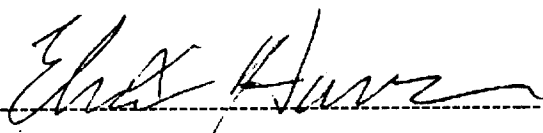
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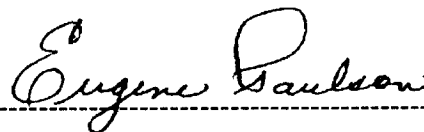
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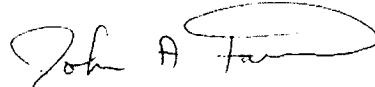
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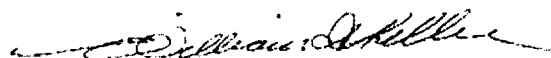
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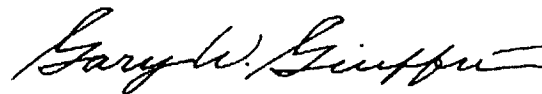
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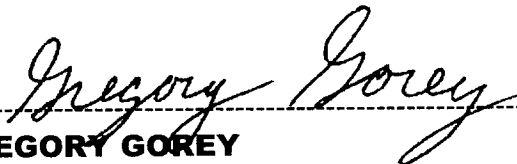


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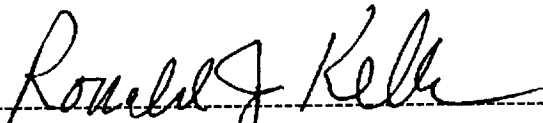
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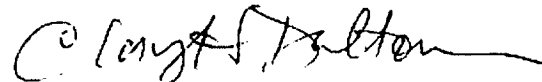
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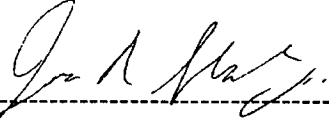
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