Robert L. Schulz
2458 Ridge Road
Queensbury, NY 12804

September 11, 2008

Clerk, U.S. District Court
U.S. Courthouse
445 Broadway
Albany, NY 12207

Re: Schulz et al., v. State of New York, et al.
Case number 07-943

Dear Sir:

Attached for filing is Plaintiffs' Reply in support of their Motion for Summary Judgment, together with a Certificate of Service.

Respectfully submitted,

Robert L. Schulz, pro se
518-656-3578

Cc: Kimberly Galvin
Special Counsel
N.Y.S. Board of Elections
40 Steuben St.
Albany, NY 12207

JP Liggett, pro se
1040 1st Ave. #351
New York, NY 10022

Arthur Berg, pro se
1441 US Route 11
Tully, NY 13159

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, et al.,	)	
	)	**No. 07-cv-0943**
Plaintiffs,	)	**LEK-DRH**
v.	)	
	)	
	)	
STATE OF NEW YORK, et al.,	)	
	)	
Defendants,	)	

PLAINTIFFS' REPLY BRIEF

Plaintiffs reply herein to Defendants' ANSWER and Defendants' OPPOSITION TO SUMMARY JUDGMENT.

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.[1] 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."[2] These rules apply with equal force to suits for declaratory and injunctive relief under the Constitution of the United States of America.

A. THERE ARE NO MATERIAL FACTS AT ISSUE

Defendants have admitted that the facts material to the case are not in dispute, as follows:

[1] *Celotex Corp. v. Associated Wholesale Grocers*, 130 U.S. 317, 323 (1986).
[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)

1. Defendants admit most votes for President of the United States in 2008 and beyond will not be marked by hand on paper ballots and hand counted.

2. Defendants admit, in effect, by not supporting their denial with the documentary evidence or proof required by Fed. Rules of Civil Procedure Rule 56 that machines will be used in 2008 and beyond to count votes cast for President of the United States.[3]

3. Defendants admit, in effect, by not supporting their denial with the documentary evidence or proof required by Fed. Rules of Civil Procedure Rule 56, that in 2008 and beyond it will not be possible for the voter to physically observe that his vote was received or verify that his vote was accurately counted.

4. Defendants admit, in effect, by not supporting their denial with the documentary evidence or proof required by Fed. Rules of Civil Procedure Rule 56, that the vote counting machines to be used in 2008 and beyond are too unreliable and insecure to ensure the integrity of any election.

5. Defendants admit, in effect, by not supporting their denial with the documentary evidence or proof required by Fed. Rules of Civil Procedure Rule 56, there have been many reports of failures by vote counting machines, including the mechanical lever operated machines currently in use in New York State and the electronic optical scan machines scheduled for use in New York after 2008.[4]

6. Defendants deny the result of the vote count is not read aloud at each polling place. However, defendants admit the totals are not posted at each polling place. See defendants' response to Fact # 7.[5]

7. Defendants admit certified vote totals will not be posted at each polling place for public viewing.

8. Defendants admit certified vote totals from each polling place are not communicated to a government supervised central tabulation location in the State to be publicly tabulated, certified and announced, precinct-by-precinct or otherwise.

9. Defendants admit, in effect, by not supporting their denial with the documentary evidence or proof required by Fed. Rules of Civil Procedure Rule 56, uncertified voter returns from precincts and counties are turned over to representatives of the private, New York based National Election Pool, where the results are tabulated by machines, in secret and out of the public view, and then immediately publicly announced via the NEP cartel comprised of all five dominant television news networks, ABC, CBS, CNN, FOX and NBC, and via

---

[3] Defendants comment that votes cast with a Ballot Marking Device (to be on hand in each polling place to assist the handicapped) will be hand counted.

[4] Having already declared the Ballot Marking Device will not be used for vote counting (see Fact #2), Defendants now say there have been no reports of failure of the Ballot Marking Device as a vote counting machine

[5] However, it's not clear from Defendants' response if the vote total s from the Ballot Marking Device will be proclaimed at each precinct.

wire communicated to all dominant daily newspapers and other media entities throughout the United States of America.

10. Defendants admit, in effect, by not supporting their denial with the documentary evidence or proof required by Fed. Rules of Civil Procedure Rule 56, the election result made available to the public as a result of the vote tabulation by the National Election Pool does not include a precinct-by-precinct breakdown of the vote.

The machines, systems, practices and private consortium (NEP) embraced by Defendants are so practically and constitutionally deficient and open to attack that their use defies common sense. Again, we quickly review for the Court the most vulnerable, and intolerable aspects of the Defendants' practices for 2008 and beyond:

-- Vulnerable voting machines (proprietary software, non-auditable results, etc.)

-- Vulnerable electronic networks (used to collect machine level totals)

-- No public counting of votes (at any level).

-- No immediate certification of vote totals.

-- State transmittal of totals to private, transnational corporations

-- ***de facto*** State sanctioning of vote totaling by private corporations

-- Announcement of ***de facto*** election results by transnational corporations

-- Delayed official certifications of vote totals

-- "Accidental" destructions and losses of original ballots (if any existed).

-- Practical prohibition of recounts due to evidentiary & cost burdens on requestor.

B. PLAINTIFFS' STATEMENT OF MATERIAL FACTS COMPLIES WITH NDNY L.R. 7.1

Contrary to Defendants' assertion, Plaintiffs' Statement of Material Facts complies with NDNY Local Rule 7.1 (a) (3). While Facts 1-3 do indeed cite common knowledge, Defendants have admitted Facts 1-3 are not in dispute. Contrary to Defendants' assertion, Plaintiffs did

support Fact 4 -- with a reference to Schulz Declaration Exhibit L, "Annotated Bibliography of Expert Reports on Voting Systems."

C. SUMMARY JUDGMENT WOULD NOT BE AT ODDS WITH *US v. NYS Board of Elections, et al*

Contrary to Defendants' allegations, elections in 2008 and beyond that relied on paper ballots that were hand marked and hand counted and that otherwise incorporated the relief being requested by Plaintiffs, coupled with a Ballot Marking Device for the disabled, would not be at odds with the Help America Voting Act or Judge Sharp's Order in *US v NYS Board of Elections*,

D. 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 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) 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 by 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 Freedom of Speech… or the Right of the People … to Petition the Government for Redress of Grievances."

To deny Plaintiffs their Right to cast an effective vote and to know that their votes have been accurately counted is to deny Plaintiffs their Freedom of Speech and their Freedom to Petition the Government for Redress of Grievances.

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…."

Plaintiffs' Right to have all votes that are cast 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 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 procedures in New York State that result in error and fraud, even confusion and frustration, infringe upon Plaintiffs' individual, unalienable Right to Liberty and Property.

Under the Supremacy Clause of the Constitution (Article VI, clause 2), New York State 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.

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 challenge the decision by New York State to count the votes for President of the United States of America IN SECRET (causing confusion, frustration, error and/or fraud).

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, 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. 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 effecting 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 50th 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 his State is not counting votes for President of the United States IN SECRET **or doing anything that would result in a vote not being counted accurately.**

The Supreme Court and the Founder's opinions are clear, no department of the Government can violate Fundamental Rights possessed by the People, not Congress and not the State Legislature.

> "And the Constitution itself is in every real sense a law-the lawmakers being the people themselves, in whom under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the People of the United States,' it says, 'do ordain and establish this Constitution.' Ordain and establish! These are definite words of enactment, and without more would stamp what follows with the dignity and character of law. The framers of the Constitution, however, were not content to let the matter rest here, but provided explicitly-'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land.' (Const. art. 6, cl. 2.) The supremacy of the Constitution as law is thus declared without qualification. That supremacy is absolute; the supremacy of a statute enacted by Congress is not absolute but conditioned upon its being made in pursuance of the Constitution. And a judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for adjudication, must apply the supreme law and reject the inferior stat- [298 U.S. 238, 297] ute whenever the two conflict. In the discharge of that duty, the opinion of the lawmakers that a statute passed by them is valid must be given great weight, *Adkins v. Children's Hospital*, 261 U.S. 525, 544 , 43 S.Ct. 394, 24 A.L.R. 1238; but their opinion, or the court's opinion, that the statute will prove greatly or generally beneficial is wholly irrelevant to the inquiry. *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549 , 550 S., 55 S.Ct. 837, 97 A.L.R. 947." *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

"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)

And, from Hamilton, *Federalist No. 78*

> "There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be

> valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.
>
> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
>
> "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental." Hamilton, *Federalist No. 78*

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 as 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 has 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, fraud and even frustration** of the democratic process. *Larouche v. Kezer*, 990 F.2d at 442 (2d Cir. 1993).

"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. Takusi*, 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). (Plaintiffs' emphasis).

"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.

"We regard it as equally unquestionable that the right to have one's vote **counted** is as open to protection by Congress as the right to put a ballot in a box." *U. S. v. Mosl*ey, 238 U.S. 383, 386 (1915). (Plaintiffs' emphasis).

In the *KU KLUX CASES*, 110 U.S. 651 (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** [110 U.S. 651, 667] **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 *United States v. Saylor*, 322 U.S. 385 (1944), the Supreme Court said, "In *United States v. Mosley*, 238 U.S. 383 , 35 S.Ct. 904, 905, this court reversed a judgment sustaining a demurrer to an indictment which charged a conspiracy of election officers to render false returns by

disregarding certain precinct returns and thus falsifying the count of the vote cast. After stating that 19 is constitutional and validly extends 'some protection, at least, to the right to vote for Members of Congress,' the court added: 'We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.' The court then traced the history of 19 from its origin as one section of the Enforcement Act of May 31, 1870,3 which contained other sections more specifically aimed at election frauds, and the survival of 19 as a statute of the United States notwithstanding the repeal of those other sections. The conclusion was that 19 protected personal rights of a citizen including the right to cast his ballot, and held **that to re-fuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from the polling place. The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted**." (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. Trebucq*, 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).

The federal Constitution condemns state restrictions such as those to be implemented by Defendants "that, without justification [no compelling state interest], significantly encroach upon the rights to vote [**and have the vote counted**] and to associate for political purposes." *Unity Party v. Wallace*, 707 F. 2d 59, 62 (2d Cir. 1983), or that enhance rather than prevent voter confusion, deception, frustration and fraud. *Storer v. Brown*, 415 U.S. 724, 732 (1974).

Voting procedures that are not open, verifiable, transparent and machine and computer free, with paper ballots that are hand marked and hand counted, **abridge the right to cast an effective vote.** *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Defendants' voting procedures impose an impermissible burden upon fundamental rights under the First and Fourteenth Amendments. See *Burdick v. Takusi*, 112 S. Ct. at 2063.

Defendants' voting procedures violate a right encompassed within the Equal Protection Clause of the Fourteenth Amendment. See *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

Defendants' voting procedures heavily burden the right to vote; due to the inevitability of machine error (intentional and unintentional) and human fraud, they will result in votes being cast only for party favorites at a time when party insurgents are clamoring for a place on the ballot. See *Williams v. Rhodes*, 393 U.S. 23, 41 (1968).

Due to the enhanced probability and inevitability of machine error and human fraud, Defendants' voting procedures will deprive each plaintiff of the right to have his voice heard and his views considered. *Williams v. Rhodes*, 393 U.S. 23, 41 (1968).

Due to the enhanced probability and inevitability of machine error and human fraud during the presidential primaries and general elections in 2008 and beyond, Defendants' voting procedures will restrict real as opposed to theoretical votes, ballot access and voter choice. *American Party v. White*, 415 U.S. 767, 783 (1974).

E. THE CONSTITUTION REQUIRES STATES CONDUCTING FEDERAL ELECTIONS TO DO EVERYTHING THEY CAN DO TO ELIMINATE CONFUSION, DECEIT, FRAUD AND FRUSTRATION

If the constitution requires everything possible be done to assure all votes are effective, and that all steps have been taken to eliminate confusion, deception, fraud and frustration, then the Constitution requires utilization of any available voting procedure that is open, verifiable and transparent, i.e., no machine or computerized vote counting

The following eleven step voting procedure is practical and available for adoption by the State of New York for the 2008 and beyond; a comparable system is now used in 45% the jurisdictions in the state of New Hampshire. If the Constitution requires everything possible to done to assure all votes are counted and effective, and there is no compelling state interest that

would argue against the adoption of the following voting procedure, the procedure must be adopted and followed by each Defendant beginning with the 2008 general election.

1. All votes (except by the handicapped) are to be marked by hand on paper ballots.

2. From the time the voter votes to the time the results of the vote are publicly announced, all paper ballots or the ballot box they are deposited in by the voters shall never be out of the view of the public.

3. Each completed paper ballot is to be deposited into a numbered, transparent container that is in clear public view throughout the voting period. The numbers are to be at least 4 inches high, black on white.

4. Each candidate on the ballot shall have the Right to have a representative present for an inspection of each container ten minutes before the voting period begins.

5. A rope shall surround each vote station at a distance of 6-10 feet from the numbered transparent container, beyond which any person can quietly stand to quietly observe and record by video recording device the transparent containers and the number of voters.

6. As the voting period ends, each ballot box is to be set on one of several 6-8 foot long cafeteria-style tables that have been set up at each of the voting stations. There, the ballots are to be hand-counted.

7. With representatives of the State Defendants doing the allocating and counting, chosen from the neighborhood polling place where the ballots were cast, each candidate on the ballot may have a representative observe the vote counting process at a reasonably close range without disrupting the process. All State Vote Counters must agree on the candidate allocation of each vote and the count. Once the Vote Counters are in agreement on the allocation and the count of the votes, the result of the count is to be read aloud for public consumption. After tallying the ballots for each candidate, the appropriate State Vote Counters will then each certify, under penalty of perjury, the vote totals for each candidate cast at their vote station. If after three counts of the ballots, all do not agree, then the written objection of those disagreeing must be noted and included with the ballots, as well as a copy given to the designated state representatives and the objectors.

8. The paper ballots at each vote station are to be returned to the numbered, transparent containers immediately after the votes are counted. The containers are to be sealed pursuant to State law and transported to a central warehouse according to State law, along with the certifications of the vote station's totals. A copy of the certified tally sheets shall be posted on a wall at the vote station for public viewing. A copy of the certified tally sheets will kept at the local precinct, ward, or polling station for a period of twenty (22 months) following the election.

9. The certified vote totals are to be immediately communicated from each vote station to a central tabulation location where the totals from each vote station are to be publicly announced and tabulated as they are received. The central location shall be open to the public during the entire process.

10. As each certified vote total arrives at the central warehouse, the identification number of the voting station, the ballot container number and the results of the hand-counted vote will be read aloud by the State and manually entered into a paper spreadsheet by one person, then entered into a computer spreadsheet by another person for live video projection onto public viewing screens within the room. Both manual and computer spreadsheets will consist of one (1) column for each candidate or item, one (1) row for each voting station, and the signatures and addresses of the persons making entries. The manual spreadsheet rows and columns shall be totaled manually. The computer spreadsheet will contain automated total fields for each row and column that will update automatically as vote data is entered. Immediately after the entry of computer data from each voting station, a separate, individually and sequentially named copy of the master spreadsheet file will be saved to the computer's hard drive and to a separate CD-ROM disc. Additionally, a hard-copy of the computer spreadsheet will be printed out following the entry of each vote station's data, compared to the manual spreadsheet and both the manual and computer generated spreadsheets shall be signed by a State Auditor with the time/date noted after all discrepancies, if any, are lawfully recorded and resolved. Both the manual and computer spreadsheets will be preserved as part of the official election record.

11. After the results of the vote from each of the vote stations are received, entered and read aloud, and the cumulative (grand) totals from the hand-counts are agreed to by the State and candidate representatives, the final totals will then be immediately certified by the State, publicly read aloud and pronounced as the final election result. Copies of the final vote spreadsheet in both manual and electronic format and hard copy will then be made immediately available to Candidate representatives and those interested members of the public and/or media within the room. The manual and computer spreadsheets shall be published by the State in the newspaper with the most numerous subscription at the State capitol. Following the election, the ballots, certifications, totals and manual and computer spreadsheet will be turned over to the custody of the State for secure storage, pursuant to State law for General Elections. The State will make copies of the vote certifications and spreadsheet(s) available to the public for a nominal copying fee. The State will post the manual and computer generated vote spreadsheets and appropriate certifications of the totals on its websites as soon as is practicable.

CONCLUSION

Base on the above and all prior pleadings, Plaintiffs respectfully request an order granting Summary Judgment.

Respectfully submitted,

September 11, 2008

ROBERT L. SCHULZ
2458 Ridge Road
Queensbury, NY 12804
518-656-3578

ARTHUR BERG
1441 US Route 11
Tully, NY 13159
315-696-5425

JOHN LIGGETT
1040 1st Ave #351
New York, NY 10022
646-335-6088

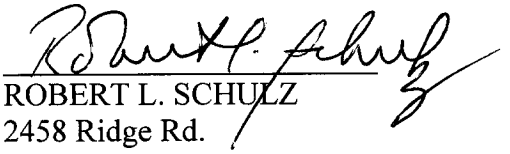
CERTIFICATE OF SERVICE

I am a Plaintiff in the matter *Robert L. Schulz, et al., v. State of New York, et al.*, Case No 07-CV-943.

On September 11, 2008, I served the annexed PLAINTIFFS' REPLY BRIEF and the CERTIFICATE OF SERVICE as follows:

I deposited a true copy thereof, properly enclosed in a sealed, postpaid Priority Mail wrapper, at the Queensbury, NY Post Office, a depository under the exclusive care and custody of the United States Post Office Department, directed to the following:

Kimberly Galvin
Special Counsel
N.Y.S. Board of Elections
40 Steuben St.
Albany, NY 12207



ROBERT L. SCHULZ
2458 Ridge Rd.
Queensbury, NY 12804
518-656-3578