UNITED STATES DISTRICT COURT **Index No. 07-CV-0943**
NORTHERN DISTRICT OF NEW YORK

ROBERT L.SCHULZ, *et al,*

-Plaintiffs,

-against-

STATE OF NEW YORK, *et al,* **-Defendants.**

Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment

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Kimberly A. Galvin (505011)
Special Counsel
New York State Board of Elections
40 Steuben Street, Albany, New York 12207
Tel: (518) 474-6367, Fax: (518) 486-4546

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Statement of the Case

Although all appear to be inextricably intertwined, the Plaintiff's Motion for Summary Judgment could possibly be read to set forth three separate claims for relief. The first, that there are no material facts to the case in dispute, the second, which appears to state that transnational corporations and not sworn election officials are controlling the election procedures and running the elections and the third, a claim sounding as if there is a Constitutional and Voting Rights deprivation.

Argument

I.

PLAINTIFF HAS FAILED TO SHOW THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT WHICH ENTITLES THEM TO SUMMARY JUDGMENT

I. Standard of Review

Fed. R. Civ. P. 56 (c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." the burden is initially on the moving party to demonstrate that there is no genuine dispute respecting any material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v Catrett*, 477 U.S. 317, 323 (1986).

Thereafter, to successfully oppose a motion for summary judgment, the responding party "must set forth facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Although the Court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inference in its favor," *Allen v. Coughlin*, 64 F. 3d 77, 79 (2d Cir. 1995), a summary judgment motion cannot be defeated through mere speculation or conjecture. *Western World Ins. Co. v. Stack Oil, Inc.*, 922 F. 2d 118, 121 (2d Cir. 1990).

Any motion for summary judgment shall contain a Statement of Material Facts. The Statement of Material Facts shall set forth, in numbered paragraphs, each material fact about which the moving party contends there exists no genuine issue. Each fact listed shall set forth a specific citation to the record where the fact is established. Failure of the moving party to submit an accurate and complete Statement of Material Facts shall result in a denial of the motion. NDNY L.R. 7.1 (a) (3).

It is the Defendant's position that the Plaintiffs Statement of Material Fact does not comply with the requirements set forth in L.R. 7.1 (a) (3) in that it does not set forth a specific citation to the record where the fact is established. Specifically facts 1-3 inclusive cite "common knowledge, " with no additional citing reference provided. Also, fact 4, relies on "credible researchers" to establish the fact that there is no genuine issue with regard to the assertion of fact that all voting machines have been revealed to be unreliable.

Not only is the form of the Statement deficient, but it is the Defendant's assertion that the facts and arguments set forth are clearly in dispute.

While it is often unclear in the moving papers whether or not the Plaintiff is referring to electronic voting machines or any voting machine whatsoever, which presumably would include the lever voting machine type. For this election season, New York will continue to use the lever voting machines. These lever machines will be supplemented by one electronic Ballot Marking Device in each of the State's polling places, to assist in the facilitation of allowing New York's disabled voting community to vote privately and independently by marking a ballot for them. These ballots will then be hand counted.

To the extent that the Amended Complaint and/or Motion for Summary Judgment alleges that there is any problem with these types of voting systems or these concepts, Defendant would direct this Court to the Supplemental Remedial Order of Judge Sharpe issues January 16, 2008 in the case *US v. New York State Board of Elections et al* (06-cv-0263), which not only authorizes said machine types to be used, but mandates it. Additionally, there are three counties within New York State for whom prior Justice Department approval for any change in voting methods must be obtained under Section 5 of the Voting Rights Act, a requirement not referenced or mentioned at all by the Plaintiff in either the underlying Amended Complaint or Motion for Summary Judgment. In fact, the Department of Justice is in constant contact with the Board of Elections staff to ensure that compliance with this order is being carried out in an expeditious and efficient manner.

The fact that New York State is implementing Judge Sharpe's order with constant discussion, direction and guidance from the Department of Justice, supports Defendant's argument that not only does the Plaintiff's argument for summary judgment fail, but also that they have failed to state a cause of action for which any relief whatsoever should be granted.

II.

PLAINTIFF'S CONFUSING CLAIM THAT NEW YORK'S VOTING PROCEDURES VIOLATE VARIOUS PROVISIONS OF THE CONSTITUTION AND FEDERAL VOTING RIGHTS ACT IS ERRONEOUS

I. The New York Election Law is Presumed to be Constitutional

It is well-settled that a statute is entitled to a strong presumption of constitutionality. *Schweiker v. Wilson*, 450 U.S. 221, 238 (1981); *Matthews v. DeCastro*, 429 U.S. 181, 185 (1976); *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 808-09 (1969); *Butts v. City of New York*, 779 F.2d 141, 147 (2d Circ. 1985). Federal courts "should be 'reluctant to attribute unconstitutional motives to the state.'" *Butts*, *id*., *quoting, Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Neither does the court "sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *Brock v. Sands*, 924 F. Supp. 409, 414 (E.D.N.Y. 1996), *quoting, Heller v. Doe*, 509 U.S. 312, 319 (1993).

Since a statute is presumed to be constitutional, "[o]ne who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Natural Carbolic Gas Co.*, 220 U.S. 61, 78-79 (1911). If there is any reasonable justification to support the classification, the statute will be upheld. *McDonald*, 394 U.S. at 809.

Moreover, the legitimate objective which the Court finds to support the classification need not have been articulated by the Legislature in the statute or the legislative history. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980); *McDonald*, 394 U.S. at 809. As courts have held time and again, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Western v. Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648, 671-72 (1981). This is true even though neither the statute nor the legislative history specifically mentions this objective. *Schweiker*, 449 U.S. at 179; *McDonald*, 394 U.S. at 809; *McGowan*, 366 U.S. at 426; *United States Railroad Retirement Board*, 449 U.S. at 179.

In this case, New York State's efforts to comply with a federal court order with regard to what machines must be deployed and utilized in this fall's elections satisfies the above stated legal standard. In addition, the Plaintiff again fails to state specific allegations of how this procedure has, or will, infringe upon or burden his right to vote.

A. The Standard to Apply in Assessing Election Law Restrictions

In assessing the constitutionality of a state election law, the court must balance the regulation's burden on the First and Fourteenth Amendment rights against the states interests advanced by the regulation, taking into consideration the extent to which the burden is necessary to the advancement of those interests. *Lerman v. Board of Elections in the City of New York*, 232 F. 3d 135, 145-146 (2d Circ. 2000) *cert denied*, 533 U.S. 915; *Prestia v. O'Conner*, 178 F. 2d 86, 88 (2d Circ. 1999), *cert. denied*, 528 U.S. 1025, (1999); *Buckley v. American Constitutional Law Found., Inc.,* 525 U.S. 182 (1999); *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358-359 (1997); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992).

If the regulation severely restricts the relevant rights, it must be narrowly drawn to advance a compelling state interest, but where the regulation imposes only reasonable, nondiscriminatory restrictions on those rights, "the State's important regulatory interests are generally sufficient to justify the restrictions."*Lerman*, 232 F. 3d at 145, *citing, Burdick*, 504 U.S. at 434.

The standards for review have become clear. "If the plaintiffs' rights are severely burdened, the statute is subject to strict scrutiny. *Burdick,* 504 U.S. at 435. If the burden is minor, but non-trivial, *Burdick's* balancing test is applied. Under this balancing test, the State's reasonable and nondiscriminatory restrictions will generally be sufficient to uphold the statute if they serve important state interests. *Id.* Review in such circumstances will be quite deferential, and we will not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons,* 520 U.S. at 364." *Price v. Albany County*, 2008 U.S. App. LEXIS 18015 at 16-17 (2d Circ 2008). The balancing test has become a three-tiered approach in which only severely burdensome restrictions receive strict scrutiny, less problematic laws serving legitimate state objectives are balanced against the party's or voter's interests, and rational basis review is used for other more benign restrictions. *See*, 82 Cornell L. Rev. 109,126 (1996).

Plaintiff has failed to allege any New York State election practice or procedure that infringes upon his right to cast his vote. All of his concerns allege conspiratorial theories

surrounding the voting machines and their tabulation of votes cast or the lack of transparency exercised by the voting officials in compiling the election record. The electronic voting systems to be used this fall in New York State will not be tabulating any votes. They have, however, been extensively tested to ensure vote security and accuracy. All of which is being done in pursuant to a federal court order with direct supervision of the Department of Justice.

It is the Defendant's assertions that if any burdens do exist on the Plaintiff's First and Fourteenth Amendment rights, that they are not severe and that the regulations have been narrowly tailored by the State to ensure that the compelling state interest of running secure, accurate and orderly elections is met.

B. Ability of the State to Regulate Elections

It is, of course, well established that a state may regulate elections in order to assure that they are fair and honest and that order, rather than chaos, is to accompany the democratic process. *Storer v. Brown*, 415 U.S. 724 , 729-30 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). It is also clear that the *First Amendment*, applied to the states through the 14th Amendment, prohibits state governments from enacting a "law . . . abridging the freedom of speech." *Prete v. Bradbury,* 438 F.3d 949, 961 (9th Cir. 2006) *citing*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 (1995).

The Court in *Prete* went on to say that "The *First Amendment* does not, however, prohibit all restrictions upon election processes: "States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."" *Id*. *quoting, Timmons,* at 358.

Plaintiffs, who are attacking the constitutionality of a duly enacted state statute, bear the burden of establishing its unconstitutionality. *McGee v. Board of Elections of City of New York*, 669 F. Supp. 73, 76 (S.D.N.Y. 1987) (Weinfeld, J.) (*citing*, *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 584-86 (1935)). Here, as discussed below, the plaintiff has not shown "invidious discrimination based upon wealth or race classifications or a preclusion of the right to vote, heightened scrutiny is not required." *McGee*, at 77 (*citing McDonald* at 807); *Unity Party v. Wallace*, 707 F.2d 59, 63 (2d Cir. 1983). Instead, "the challenged restriction is subject only to a rational basis analysis." *Unity Party,* at 63.

It is well recognized that "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1982) (*quoting Storer* at 730 (1974)). The Court has further stated that:

> "to achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends. Nevertheless, the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."

Anderson, supra, at 788 (footnote omitted).

It is Defendant's position that the New York State regulations governing elections have been narrowly tailored and comply with the standards set forth above. Plaintiff has failed to allege any New York State election practice or procedure that infringes in any way upon his right to cast his vote. Defendant also feels that it is not an insignificant point to mention again that the elections this fall are being run and supervised by the Department of Justice, which the Plaintiff has failed to recognize, acknowledge or dispute.

Conclusion

Based upon the foregoing reasons, plaintiff's motion for summary judgment clearly has not established that there are no genuine issues of material fact in dispute and should be denied and the claim should be dismissed in its entirety.

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Kimberly A. Galvin (Bar Roll No. 505011)
Special Counsel, New York State Board of Elections
Attorney for Defendant State Board of Elections
40 Steuben Street, Albany, New York 12207
Tel: (518) 474-6367, Fax: (518) 486-4546