

ROBERT L SCHULZ, *et al*

*Plaintiffs,*

**Index No. 07-0CV-0943**

-against-

STATE OF NEW YORK, *et al.*,

*Defendants.*

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**STATEMENT IN OPPOSITION TO MATERIAL  
FACTS TO WHICH THE PLAINTIFFS CONTEND  
THERE IS NO GENUINE ISSUE FOR TRIAL**

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All of the below statements in opposition to material facts as set forth by the Defendant relate only to the State of New York. The Plaintiff's facts are set forth in italics and bolded.

1. ***Many Votes for President of the United States of America in the upcoming caucuses, primaries and general election will not be marked by hand on paper ballots and hand counted.***

Defendant denies the allegations set forth by Plaintiff.

It is unclear what the phrase "many" means in this context, and therefore this statement cannot be deemed irrefutable. Defendants would agree that most of the votes for President of the United States in the general election in New York State will not be marked by hand on paper ballots and hand counted.

**2. *All State Defendants will utilize machines to count some or all votes cast for President of the United States in the 2008 Presidential cycle.***

Defendant denies the allegations set forth by Plaintiff.

It is unclear what the Plaintiff means by "utilize machines" to count some or all votes cast for President on the United States in the 2008 Presidential cycle. Does Plaintiff mean electronic voting machines that will tabulate and count the results of the votes cast thereon? Or does Plaintiff mean to include the lever voting machines and the final tally sheets produced thereon? Regardless of the true intent, New York State is currently operating under a federal court order which is requiring each polling place in New York State to have an electronic Ballot Marking Device to, among other things, specifically assist in the facilitation of votes by the disabled community. These Ballot Marking devices will not be tabulating the votes or doing a vote tabulation of any kind in any polling place in the upcoming Presidential election.

**3. *When machines count votes they do so in secret; that is when machines count votes it is not possible for the voter (or state officials) to physically observe that his vote was received or verify that his vote was accurately counted.***

Defendant denies the allegation set forth by Plaintiff.

The canvass of votes is a public process under Election Law section 9-102.

**4. *All vote counting machines have been revealed by credible researchers to be far too unreliable and insecure to ensure the integrity of any election.***

Defendant denies the allegation set forth by Plaintiff.

It is Defendant's position that summary judgment cannot be granted based upon a statement of material fact which relies on various opinion papers that relate specifically to another states voting procedures or voting machines.

**5. *During the last five years there have been thousands of reports of vote counting machine failures, involving tens of thousands of machines.***

Defendant denies the allegation set forth by Plaintiff that there have been tens of thousands of reports of machine failures in New York.

While Defendant agrees that there have been many studies relating to vote counting machine failures, involving many machines, Defendants would submit that none of these studies could refer to the ballot marking devices that have been interim certified by New York State for use in this upcoming election. It is Defendant's position that these particular machines have not yet been utilized in an election.

**6. *The result of the vote count at each precinct, whether counted by hand or by machine, is not read aloud for public consumption at each precinct immediately following the count.***

Defendant denies the allegation set forth by Plaintiff.

New York State Election law § 9-122 specifically requires a public oral proclamation of the election tallies for all candidates for each office.

**7. *A copy of certified vote tally sheets are not posted on a wall at each precinct for***

***public viewing immediately following the count.***

Defendant would agree that there is no requirement in New York State to post vote tally sheets on the wall at each precinct for public viewing immediately following the count.

**8. *In no State are the precinct vote totals immediately communicated to a government supervised central tabulation location in the State to be publicly tabulated, certified and announced, precinct-by-precinct or otherwise.***

Defendant denies the allegation set forth by Plaintiff .

In New York State the precinct vote totals are not immediately communicated to a government supervised central tabulation location. Under Election Law section 9-126 the vote totals are, however, communicated to each county board of elections who in turns certifies the results at that level.

**9. *Instead, immediately following the end of the voting period in each county uncertified voter returns from precincts and counties are turned over by Defendants to representatives of the private, Ne York based National Election Pool, where the results are tabulated by their 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 wire communicated to all dominant daily newspapers and other media entities throughout the United States of America.***

Defendant denies the allegation set forth by Plaintiff.

Results reported by the media are unofficial and not a function of the State or the counties

and have no bearing on the certification of election in New York State.

**10. *The election data made available to the public as a result of vote tabulation by the National Election Pool does not include any precinct-by-precinct breakdown of the vote, whether counted by hand or by machine at the precincts.***

Defendant denies the allegation set forth by Plaintiff.

Results reported by the media are unofficial and not a function of the State or the counties and have no bearing on the certification of elections in New York State.

Dated: August 27, 2008  
Albany, New York

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