UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Defendant Commissioners of the New York State Board of Elections ("Commissioners") now move to dismiss the Amended Complaint on the ground that 1) Schulz and Liggett lack standing to sue because the injury to Schulz and Liggett from having their votes counted in secret and not knowing, reliably, if their votes are being accurately counted without a special expert knowledge, is no different from the injury to all other citizen-voters whose votes are also counted in secret; 2) the claims against the Lever and "any" voting system are moot; and 3) the Court lacks jurisdiction over the breach of contract claim.

ARGUMENT

I. SCHULZ AND LIGGETT HAVE STANDING TO SUE

A. The Order Of June 4, 2008 Is The Law Of The Case

On December 6, 2010, the Commissioners filed the instant motion to dismiss. (Dkt. 367).

At Docket 367, the Clerk of the Court entered the Docket Text, "First MOTION to Dismiss for Lack of Subject Matter Jurisdiction …"

In fact, the instant motion is the SECOND Motion to dismiss for lack of subject matter jurisdiction to be filed by the Commissioners, not the First.

On November 1, 2007, Schulz and Liggett filed their Amended Complaint. (Dkt. 21)

On December 17, 2007, the New York Defendants filed a Motion "for an order dismissing the Amended Complaint …." (Dkt. 199).

Annexed to the Commissioners' December 17, 2007 Motion to Dismiss was a Declaration by Todd Valentine, Attorney for the Defendant New York State Board of Elections and Defendant Commissioner of the New York State Board of Elections in their individual and official capacities. (Dkt 199).

Attorney Valentine made his Declaration:

a. " in support of the motion by defendant New York State Board of Elections to dismiss the amended complaint on the ground that it is barred by the 11th Amendment," (paragraphs 2-8); and

b. "in support of the motion by defendant Commissioners …. to dismiss the amended complaint on the ground that it fails to state a cause of action against the Commissioners of the State Board," (paragraphs 9-13); and

c. "in support of the motion by defendant Commissioners …. to dismiss the amended complaint on the ground that it fails to state a cause of action against the Commissioners of the State Board for breach of contract," (paragraphs 14-17); and

d. "in support of the motion by defendant Commissioners …. to dismiss the amended complaint [by non-New York plaintiffs] on the ground that plaintiffs residing outside of New York lack standing as against the Commissioners of the State Board." (paragraphs 18-22).

The Court's attention is invited to paragraph 20 of said Declaration by Attorney Valentine:

> "20. Since none of the other plaintiffs has alleged that they are able and intend to vote in any election in New York, or that their votes might not be **accurately tabulated** in New York, they cannot actually be **harmed** by any conduct of the New York defendants in conducting elections in New York.

> Therefore, none of the plaintiffs **except** Robert Schulz, Arthur Berg and John Liggett has any standing to sue the New York defendants, and the claims of all the plaintiffs **except** Robert Schulz, Arthur Berg and John Liggett should be dismissed as to all the New York defendants." (emphasis added by Plaintiffs)

Clearly, in their 2007 Motion to Dismiss the Amended Complaint, the Commissioners admitted Schulz and Liggett had standing to maintain this action due to their status as citizen-voters who claim the inability to *know* that their votes are being accurately counted.

On December 28, 2007, Schulz and Liggett filed their Memorandum in opposition to the motion to dismiss (Dkt 223), arguing *inter alia* general and personal subject matter jurisdiction and their standing to sue the Commissioners (Dkt 223, page 11-12).

By it MEMORANDUM-DECISION AND ORDER entered June 4, 2008 (Dkt. 303), the Court:

a. GRANTED the motion by defendant New York State Board of Elections to dismiss the amended complaint on the ground that it is barred by the 11th Amendment, and
b. DENIED the motion by defendant Commissioners …. to dismiss the amended complaint on the ground that it fails to state a cause of action against the Commissioners of the State Board, and
c. Was not able to reach a decision on the motion by defendant Commissioners …. to dismiss the amended complaint on the ground that it fails to state a cause of action against the Commissioners of the State Board for breach of contract, and
d. GRANTED the motion by defendant Commissioners …. to dismiss the amended complaint by ONLY those plaintiffs residing outside of New York for lack of standing.

There was no appeal from the Court's June 4, 2008 Order.

On August 21, 2008, the individual Commissioners filed their Verified Answers (Dkts 319-323), offering two affirmative defenses, neither of which alleged lack of subject matter jurisdiction or standing.

On October 13, 2009, the Commissioners filed an Amended Answer (Dkt 343), adding only qualified immunity as a third Affirmative Defense.

The parties have been heavily engaged in Discovery, now scheduled to conclude on June 1, 2011. For instance, Schulz and Liggett have directed substantial resources toward the fulfillment of the case, including payment for expert witnesses, and produced 106 documents in response to the Commissioners' first demand for documents. In addition, in response to their First Notice to Produce, Schulz and Liggett have received numerous documents from the Commissioners, totaling 44,414 pages. See Dkt 365.

With regard to the Commissioners' instant (SECOND) Motion to Dismiss the Amended Complaint for lack of subject matter jurisdiction and standing, Schulz and Liggett argue the motion should be dismissed on the ground that the Court's June 4, 2008 Order is the law of this case.

B. Alternatively, Schulz and Liggett Have Suffered An Injury in Fact, There Is A Causal Connection Between The Injury And The Conduct Complained Of That Is Traceable To The Commissioners And The Injury Will Be Redressed By A Favorable Decision

Schulz and Liggett have suffered an injury in fact that is concrete and particularized, actual in 2008 and 2010 **and** imminent in 2012 and beyond. When they voted in 2008 and 2010, they were denied their sovereign Right, through an essential principle underlying the democratic, election provisions of the Constitution for the United States – the principle of the public nature of elections -- to check and verify the essential steps in the election act, and in the ascertainment of the results, reliably and without special expert knowledge. **Their votes were counted in secret**.

They were unable to know that their votes were accurately counted. Their injury will continue in 2012 and beyond, unless the Court grants the relief they are seeking.

Schulz and Liggett's injury was caused by the Commissioners who violated the fundamental principle of the public nature of elections emerging from Article 1, Section 2, cl. 1, Article 1, Section 2, cl. 1 and the Seventeenth Amendment to the Constitution for the United States of America, by **requiring** their votes be counted in secret. The Constitution requires that all essential steps in the election of their representatives be subject to public examination, reliably and without special expert knowledge.

For instance, Schulz and Liggett's votes were recorded and counted in secret by mechanical lever machines in 2008, and by computer-controlled vote counting machines in 2010 (to be used again in 2012 and beyond). Schulz and Liggett's *sovereign* Right to know, by examination that their votes were being accurately recorded and counted was and will continue to be violated unless they are granted the requested relief.

Schulz and Liggett's injury is clearly traceable to the conduct of the Commissioners. See the Court's Memorandum and Order of June 4, 2008 (Dkt. 303).

The Commissioners allege the injury is no fault of theirs, but is the result of a third party, Judge Sharpe, who "ordered the Defendants to implement a new HAVA compliant electronic voting system." Not so. The Commissioners are referring to *United States v. New York State Board of Elections*, Case No. 06-CV-0262, U.S. District Court, Northern District of New York. That lawsuit, filed on March 1, 2006, sought declaratory and injunctive relief for the Commissioners' failure to implement the voting system standards and statewide voter list provisions of HAVA ("Help America Vote Act" of 2002). With respect to HAVA's voting system standards, the complaint supported its allegation by noting that the State Board failed to

(1) approve **any** voting systems, (2) adopt **any** final rules or regulations related to voting systems, and (3) obtain **any** voting systems that comply with the requirements of HAVA.

Unfortunately, HAVA does not include language designed to ensure what should have been obvious to all concerned --- that any voting system had to be compliant with the constitutional **principle of the public nature of elections**.

However, neither is there language in HAVA that required the Commissioners to adopt the electronic, computer-controlled vote counting machines (Dominion and ES&S) that Schulz and Liggett were forced to use in 2010 and will be forced to use in 2012 and beyond - voting systems that record and count votes **in secret.** The Commissioners do not identify any such language in their motion to dismiss. Appendix E annexed hereto is a copy of HAVA. Any such language or intent would render HAVA unconstitutional on its face.

The Commissioners had the choice, but rejected the "hand counted paper ballot" voting system Schulz and Liggett called for in their Amended Complaint, a voting system that is fully compliant with both HAVA and the constitutional principle of the public nature of elections.

On April 10, 2006, the Commissioners filed a HAVA Plan with Judge Sharpe. DOJ agreed to the Plan. The Plan did not include the final selection of a specific voting system. Instead, it addressed HAVA's voting standards, and steps to be taken, which would lead to the selection of a specific voting system that would be compliant with HAVA's principal requirement that voting systems provide access for people with disabilities. On June 2, 2006, Judge Sharpe ruled that the Commissioners' Plan was expected to bring the state, over time, into full compliance. He set a series of deadlines for implementation and reporting.

The Court's attention is invited to the fact that on Dec. 20, 2007, the Commissioners attended a hearing in *United States v. New York State Board of Elections,* Case No. 06-CV-0262,

before Judge Sharpe. The date of that hearing was long after Schulz and Liggett filed their Complaint in Sept. 2007, after Schulz and Liggett filed their Amended Complaint on Nov. 1, 2007 and three days after the Commissioners filed their FIRST motion to dismiss Schulz and Liggett's Amended Complaint on Dec. 17, 2007. According to the transcript of that hearing (see Exhibit E to the Declaration by Collins in support of the instant motion to dismiss), Judge Sharpe repeatedly expressed his frustration over the Commissioners' on-going failure to select a specific voting system that would be compliant with HAVA's requirement that it provide access for people with disabilities and that would replace the existing lever machines. For instance, see Transcript page 52, line 11-12, where Judge Sharpe is quoted saying, "And here we are, in December of '07, and we don't have a plan." See also, Transcript page 91, line 7-8, where Judge Sharpe is quoted saying, "The obligation is to get [voting systems] in place that will accommodate the disabled."

The point is, the Commissioners were well aware of Schulz and Liggett's constitutional challenge to secret vote counting by mechanical and computer-controlled machines long before the Commissioners adopted a final HAVA Plan, much less selected, certified and authorized the expenditure of public funds on the Dominion and ES&S electronic voting systems that Schulz and Liggett were forced to use in 2010 and beyond.

In January of 2008, following said Dec. 20, 2007 hearing, Judge Sharpe ordered the Commissioners to file a HAVA compliant implementation plan.

Not remembering the constitutional principle of the public nature of elections and the requirement that all essential steps in the election act and in the ascertainment of the results of the election be open to the sovereign, citizen-voters such as Schulz and Liggett, reliably and without special expert knowledge, the **Commissioners' submitted a Plan to Judge Sharpe that**

included a timetable for the deployment of an electronic, **secret vote counting system** for citizen-voters without disabilities, such as Schulz and Liggett, coupled with a special voting system for those with disabilities.

Not remembering the constitutional principle of the public nature of elections and the requirement that all essential steps in the election act and in the ascertainment of the results of the election be open to the sovereign, citizen-voters such as Schulz and Liggett, reliably and without special expert knowledge, **DOJ agreed with the Commissioners' Plan**.

Not remembering the constitutional principle of the public nature of elections and the requirement that all essential steps in the election act and in the ascertainment of the results of the election be open to the sovereign, citizen-voters such as Schulz and Liggett, reliably and without special expert knowledge, but with a Plan in hand that originated with the Defendants in the case before him, and that the Department of Justice was in agreement with, Judge Sharp ordered the Commissioners to implement **the Commissioners' Plan**.

In sum, it was the Commissioners and the United States Justice Department, without the necessary **constitutional conscience** who made the decision to deploy the computer-controlled vote counting machines, not Judge Sharpe as alleged. Judge Sharpe merely agreed with the stipulation of the parties in the action before him. There were no constitutional questions presented for him to decide. The Commissioners failed to bring Schulz and Liggett's constitutional claims to the attention of Judge Sharpe, not before, during or after the December 20, 2007 hearing.

The Landes Cases Are Not Dispositive

On July 24, 2004, Lynn Landes filed two cases in the U.S. District Court For the Eastern District of Pennsylvania. The defendants in each case were the Chairman of the City

Commissioners of Philadelphia (Margaret Tartaglione), Secretary of the Commonwealth of Pennsylvania (Peter Cortes) and Attorney General of the U.S. (John Ashcroft):

1. Landes v. Tartaglione, et al., 04-3164, a case challenging absentee voting, and
2. Landes v. Tartaglione, et al., 04-3163, a case challenging voting machines.

The cases were dismissed by the District Court for "lack of standing." The Third Circuit affirmed. The Supreme Court of the United States denied certiorari.

The Landes cases are neither binding nor dispositive of the instant case, where the facts, legal arguments and requested relief differ. For instance, unlike the instant case, in 04-3164, "[Landes] seeks a declaration that the local, state and federal laws permitting absentee voting are unconstitutional….,"and "she does not allege that her right to vote has been adversely affected by absentee voting." See Appendix F annexed hereto, Case 04- 3164, MEMORANDUM AND ORDER, pages 2 and 5 respectively. In addition, unlike Schulz and Liggett, in 04-3163, "[Landes] does not specifically allege that she intends to vote in future elections in Philadelphia or that she has voted in previous elections in the city." Appendix F, Case 04-3163, MEMORANDUM, page 2 and 4. Appendix F contains the Memorandum decisions by the Third Circuit in 04-3164 and 04-3163.

In filing this suit in 2007, Schulz and Liggett have alleged they are registered voters, that they intended to vote in the upcoming election(s), and that they expected to suffer the identified injury in 2008 and beyond unless the requested relief was granted. The Commissioners were provided with Schulz and Liggett's voter registration forms and related information. Copies are included at Appendix G annexed hereto.

C. FOREIGN LAW, A BASIS FOR PRECEDENT IN THIS CASE REGARDING INJURY AND STANDING

ON POINT:
The Constitutional Court Of Germany Recently Granted Standing To Two Of Its Citizens And Banned All Computer-Controlled Vote Counting Machines

In historical context, electronic voting machines are relatively new to the election arena, worldwide. Many countries, some with and some without a "constitutional conscience," have sought to address a host of legal issues presented by the use of the machines to record and count the votes. A spirited and divisive debate currently exists throughout the legal and academic communities and the Judiciary generally as to the legitimacy of citation of foreign law as a basis for precedent,[1] (and Schulz and Liggett would in most circumstances be among the first to quickly join those who favor prohibition against citation of foreign judicial rulings as precedent).

Given the critical constitutional decision which is now before this Court, Schulz and Liggett cannot ignore an absolutely on-point and relevant foreign case involving citizen standing and the issue of computer-controlled vote counting which was put before the Constitutional Court of Germany. The March 3, 2009 decision by the German Court not only addresses the issues presented and raised in this case before the bar, but is directly relevant and instructional to the core questions raised by this specific action pertaining to **Schulz and Liggett's standing under Article III and the First Amendment's Petition Clause, as well as** the constitutionality

[1] Reference materials re citation of foreign law/court decisions: A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer Washington College of Law, January 13, 2005 http://www.wcl.american.edu/secle/founders/2005/050113.cfm; The Use and Misuse of Foreign Law in U.S. Courts, Ilya Shapiro, Cato Institute http://www.cato-at-liberty.org/the-use-and-misuse-of-foreign-law-in-u-s-courts/; Austen L. Parrish. "Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law" *Univ. of Illinois Law Review* 2007.2 (2007): 637-680; No Thanks, We Already Have Our Own Laws (2004) Richard Posner, Judge 7th Circuit Court of Appeals and Sr. Lecturer U. of Chicago Law School http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp ; ASSESSING THE THREAT TO SECOND AMENDMENT RIGHTS POSED BY THE U.S. SUPREME COURT'S USE OF FOREIGN LAW IN CONSTITUTIONAL INTERPRETATION By HERBERT W. TITUS & WILLIAM J. OLSON, JULY 2006, http://gunowners.org/fs0603.htm

of the use of computer-controlled vote-counting systems within the framework of Article I and the 17th Amendment.

In 2007, a constitutional challenge was filed in the German courts by Joachim Wiesner and his son, Dr. Ulrich Wiesner, who holds a Ph.D. in Physics and works as a consultant for a U.S.-American Software Company, seeking to prevent the German government from committing acts designed to deprive them of their constitutionally guaranteed, unalienable, individual natural Right to *know* without special expert knowledge that their votes cast for Members of the federal Legislature were being accurately recorded and counted. The Court is invited to visit Appendix A for a factual synopsis of the German Republic and its system of governance, which will reveal relevant similarities to our own. The Court is also invited to take note that interestingly and without knowledge of this action in Germany, Schulz and Liggett filed in the American Courts with the same concerns in the same year.

On March 3, 2009, the German Constitutional Court ruled in favor of the Wiesners, declaring the use of computer-controlled voting machines to be unconstitutional in public elections. Appendix C annexed hereto is a copy of the Court's Decision. The two HEADNOTES of the decision read as follows:

1. **The principle of the public nature of elections emerging from Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law (Grundgesetz – GG) requires that all essential steps in the elections are subject to public examinability unless other constitutional interests justify an exception.**

2. **When electronic voting machines are deployed, it must be possible for the citizen to check the essential steps in the election act and in the ascertainment of the results reliably and without special expert knowledge.**

Appendix D annexed hereto is a Statement, issued by the German Constitutional Court that accompanied that Court's March 3, 2009 decision in the Wiesner case. The following paragraphs are excerpted from the Statement.

> **"The [Constitutional Court's] Second Senate decided that the use of electronic voting machines requires that the essential steps of the voting and of the determination of the result can be examined by the citizen reliably and without any specialist knowledge of the subject. This requirement results from the principle of the public nature of elections (Article 38 in conjunction with Article 20.1 and 20.2 of the Basic Law (*Grundgesetz* – GG)), which prescribes that all essential steps of an election are subject to the possibility of public scrutiny unless other constitutional interests justify an exception."** Appendix D, page 1.

> **"[T]he Federal Voting Machines Ordinance is unconstitutional because it does not ensure that only such voting machines are permitted and used which meet the constitutional requirements of the principle of the public nature of elections. According to the decision of the Federal Constitutional Court, the computer-controlled voting machines used in the election of the 16th German *Bundestag* did not meet the requirements which the constitution places on the use of electronic voting machines."** Appendix D, page 2.

The German Court's decision was not based on voting machine security. It was based on the principle of the **public nature** of elections, a principle guaranteed by the German Constitution, a principle repeated by the Court 54 times in its decision. (See Appendix C.)

The German Court's decision resulted in the removal of ALL voting machines that had been certified and deployed before 2005 for the use of millions of people throughout Germany, to be replaced by hand counted, paper ballots beginning with the 2009 elections of representatives to the European Parliament and the German Parliament.

Consideration of the German Court's decision is not imposing or burdensome on the instant case, but thoroughly supporting: It addresses only the essentials of the physical process of voting in a democratic, constitutional Republic. There are no controversies of jurisprudence, but brings essential, practical insights into the origin, nature and constitutional requirements of our

own American democratic process. Other than the desire to protect the cornerstone of their democracy, (i.e., the physical election process), the German decision does not impose subjective questions involving foreign culture, foreign values, foreign political questions or perspectives of foreign law or rights which would complicate its citation by this American Court.

German Plaintiffs, as two concerned citizens, exercised their Standing to sue – the natural, unalienable, INDIVIDUAL Right to Petition the Government for Redress of Grievances. The resulting ban on secret vote counting in Germany, was a mandatory fulfillment of **popular sovereignty** and **constitutional conscience, the essence of a democratic, constitutional Republic.** As the facts show in Appendix A and B, any German citizen may file a complaint when his constitutional Rights have been violated by the state; elections do indeed have a public nature; no "special expert knowledge" is to be required by citizen-voters in order to know if their vote is being accurately counted; and all counts and other essential steps in the election act and the ascertainment of the election results are to be open to public examination.

Consideration of the German Case will show that the Spirit of the German Constitution Redressed the injury of the People by rendering secret vote counting on computers impossible **as the primary means of counting**. **Nor will a paper trail suffice**, said the German Constitutional Court.

The Former Nazi Germany Knows the Value of
"Private Votes, PUBLIC Counts"[2]

[2] Interestingly, the American History Channel ran a documentary on the Rise and Fall of the Third Reich at the same time Schulz and Liggett were preparing this opposition to the Motion to Dismiss – two hours one night on the Rise of what was to become the horror of Nazi Germany, and two hours the next night on the Fall. A lesson from the documentary was the significant influence secrecy and the steady erosion of fundamental Human and Constitutional Rights had on the Rise. Schulz and Liggett see no difference between the Commissioners' attack on their standing to sue and the behavior of the German government during the rise of Nazi Germany.

At this time in America's own struggle to define its future path, the principle of law laid down in the German decision is a precedent that surely should be considered in deciding the instant motion and this case. The German decision documents an official, well-reasoned, legal process that nullified an inappropriate voting system that failed to uphold the liberties of its People within the framework of their constitutional Republic, notwithstanding the tremendous ramifications of the decision, in terms of dismantling a massive voting infrastructure with numerous direct and indirect manpower, intellectual, physical, mechanical and economic costs.

By listening and responding to the Petition for Redress from two of its citizens, the German Court's decision marks one of Germany's most earnest efforts to remediate itself and protect its future, following its climatic moral and spiritual meltdowns suffered during the 20th century. Indeed, Germany's lesson must be held out for the full consideration of this Court and the American People even as our own Republic wavers, in terms of constitutional governance carried out in decency and good order.

The German equivalent to the Supreme Court of the United States fulfilled the mandate of its own, and by extension, OUR OWN Constitution: To secure Freedom, we must have publicly observed vote counts, or we lose the guaranteed right to vote with the correlative right to have that vote counted properly.

As will be evident from review of the German Case, we here are given an opportunity to stand back and view the "forest for the trees," i.e., seeing the full application of America's Constitutional principles applied in a Land not so far off, which has paid the price in its own struggles to define and protect Individual Liberty. The German decision specifically addresses the key controversy of this case by Schulz and Liggett. It protects the institution of democracy and voting Rights by insuring the integrity of the election process through the "examinability" of

all essential steps in the election act and in the ascertainment of the election results. The decision thoroughly and point by point, provides a comprehensive and cohesive analysis of the virtually identical arguments and issues presented and raised by Schulz and Liggett, regarding the significant threats to democracy posed by use of vote-counting machines in general and specifically the lever, Dominion and ES&S voting systems used in their polling precincts in New York State and thereby challenged here.

In Appendix A, Schulz and Liggett present the key holdings of the comprehensive, wise and well-reasoned, historic (2009) decision by the Constitutional Court of Germany (juxtaposed with the virtually identical arguments put forth by Schulz and Liggett), that recognizes the Wiesners Standing to sue and bans the use of electronic voting machines as violative of the principle of the public nature of public elections.[3]

Both the German case and this case were filed in 2007, and both are constitutional challenges to secret vote counting, based on the individual Plaintiffs' Right to know, reliably, without special expert knowledge, that their votes are being accurately counted.

We hold that the German decision is directly reflective of the core human and constitutional principles inherent in our own Constitution as it relates to elections, especially the Right of individual citizen-voters to be heard in defense of his voting Rights, including the constitutional principle of the public nature of elections. The German court provides through its own contemporary experience nothing less than an "originalist" perspective of the protective mandates embedded within our own American Constitution.

Through this "mirror application" from abroad, Plaintiffs Schulz and Liggett invite deep reflection of America's Charters of Freedom and Her political and governmental institutions,

[3] In paragraphs 35-89 of its decision, the Constitutional Court provides a comprehensive review of the positions taken by both sides. While not included in Appendix A they are noteworthy for they mirror the positions of the parties in the instant case. They are included in Appendix C.

and the fundamental Right of Her individual citizens to sue in defense of the principle of the public nature of elections.

In 2007, Schulz and Liggett initiated the instant constitutional challenge, seeking to enjoin the Commissioners from deliberately concealing material information in a setting of fiduciary obligation, that is, from committing acts designed to deprive Schulz and Liggett of their constitutionally guaranteed, unalienable, individual Right to *know* without special expert knowledge that their votes cast for President of the United States and Members of Congress are being accurately recorded and counted – that is, their Right not to have their votes counted in secret by a process that requires a special or extraordinary knowledge which cannot be obtained or expected of ordinary voters Schulz and Liggett.

Schulz and Liggett argue that the **principle of the public nature** of elections emerging from Article I, Section 2, cl. 1, in conjunction with Article I, Section 4, cl. 1 and the Seventeenth Amendment of the Basic Law (Constitution for the United States of America) requires that all essential steps in the elections of federal representatives are subject to public examination unless other constitutional interests justify an exception.

As was the case with the Wiesners in Germany, Schulz and Liggett seek a final Court order directing the Commissioners to honor an essential principle underlying the Constitution for the United States of America, the **public nature** of federal elections, by:

(a) requiring the individual ballots cast by Schulz and Liggett to remain in full public view in their individual polling stations until manually recorded and counted, there, by public officials, in the open, in full public view; and

(b) requiring public officials to immediately announce, publicly, there, at the individual polling stations, the results of the count; and

(c) requiring public officials to immediately post the individual polling station totals on the wall and outside, on the door of their individual polling stations; and

(d) requiring public officials to immediately post the individual polling station totals on the County and State publicly accessible websites, precinct-by-precinct, enabling Schulz and Liggett, who may have witnessed and heard the public vote count at their individual polling stations, and noted such totals when they were publicly announced, to verify that the counts they witnessed at their polling stations matched the counts on the County and State, precinct-by-precinct, tabulations; and

(e) requiring public officials to satisfy the requirements listed above, before they release the results any such County or State tabulations to the Associated Press, the National Election Pool or any other private party.

Unlike the German Government, here in the United States of America, the Commissioners of the Board of Elections for the "Empire State" of New York have responded to Plaintiffs' claim of injury by moving the Court for an Order dismissing the Complaint on the ground that Schulz and Liggett lack standing to maintain their constitutional challenge because their injuries are no different in kind and degree from those of everyone else in the State, **even though those injuries are in zones of interests to be protected by the U.S. Constitution under Article I, Sections 2 and 4, the Seventeenth Amendment, Article III, Section 2, and the "accountability clause" of the First Amendment, and even though those injuries are caused by the act of counting their votes in secret by the Commissioners and those responsible to them**.

II. THE CLAIMS ARE NOT MOOT

A. The Lever Machines

The Commissioners allege the claims against the lever machines are moot because lever machines have been abandoned in New York State as of the 2010 elections.

Unless the Commissioners are willing to stipulate that they will never reintroduce the lever machines should the Court ban the electronic computer-controlled vote counting machines that are also under challenge in this case, Schulz and Liggett oppose the dismissal of the claims against the lever machines for mootness.

B. The Computer-Controlled Dominion and ES&S Machines

The Commissioners allege the claims against "any voting system" are moot because Schulz and Liggett claims were merely directed at the 2008 elections, and Schulz and Liggett claimed they were only registered and intended to vote in the 2008 elections.

In fact, Schulz and Liggett's claims were obviously directed at the 2008 election cycle and beyond, as evidenced by the relief requested in their Amended Complaint, where each request was for "the 2008 election cycle and beyond." Voter registrations in New York State are not an annual affair and have no fixed registration period. Schulz and Liggett were registered to vote in the 2008 elections and beyond. Schulz and Liggett have decades of life to live. Requesting relief for 2008 **and beyond** is another way of saying they intended to vote in 2008 and beyond and wanted to know their votes would be accurately counted without requiring special expert knowledge. In any event, the violations and harm Plaintiffs experienced in 2008 were repeated in 2010 and there is every reasonable indication that those violations and harm will recur in every future election unless the requested relief is granted.

III. THE COURT HAS JURISDICTION OVER THE BREACH OF CONTRACT CLAIM

On August 12th and 17th 2009, the Commissioners received copies of fully executed New York State Voter Registration Forms for Liggett and Schulz, respectively. The Form clearly states, "to vote in an election, you must mail or deliver this form to your county board no later than 25 days before the election in which you want to vote." See Appendix G.

Schulz and Liggett's breach of contract claim was brought as a constitutional challenge under Article I, Section 10 of the Constitution for the United States. See Plaintiffs' second cause of action in the Amended Complaint (Exhibit A attached to Collins Declaration in support of the instant motion to dismiss).

For this constitutional challenge, the Court has jurisdiction under Article III, Section 2 of the Constitution and, of course, under the last ten words of the First Amendment – i.e., the Petition Clause.

Formally registering with the State to vote, and registering as a member of a political party, is a contract. On the one hand the registrant agrees to be listed as a voter and a member of that party with eligibility to vote in that political party's primary election and in the general election. On the other hand the State and the political party (including the Commissioners who are all chosen by their respective parties) agree that the registrant has the Right to vote in all public elections and the Right to have his votes counted accurately.

Offer and Acceptance: A contract is based upon an agreement. An agreement arises when one person, the offeror, makes an offer and the person to whom the offer is made, the offeree, accepts. An offer may be made to a particular person or it may be made to the public at large.

Agreement: In law, a concord of understanding and intention between two or more parties with respect to the effect upon their relative rights and duties, of certain past or future facts or performances.

Article 1, Section 10 of the Constitution reads as follows:

> **Section 10 - Powers prohibited of States**
> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, **or Law impairing the Obligation of Contracts**, or grant any Title of Nobility."

All contracts must contain mutual assent. *Anderson*, 540 N.W.2d at 285. This assent is usually given through an offer and acceptance. An offer is a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Id. (quoting Restatement (Second) of Contracts § 24). An offer also must be certain as to its terms and requirements. See Audus v. Sabre Communications Corp., 554 N.W.2d 868, 871 (Iowa 1996); 17A Am. Jur.2d Contracts § 192, at 202.

The execution of the Voter Registration Cards by Schulz and Liggett was the execution of contracts between them and Defendant Commissioners.

The Voter Registration contract contains not only the Right to cast a vote, but the corollary Right to know, reliably, by examination of all essential steps in the election act and in the ascertainment of the election results, and without special expert knowledge that the votes will be counted accurately.

The Commissioners have breached Schulz and Liggett's contract rights by denying their Right to know, reliably, by examination of all essential steps in the election act and in the

ascertainment of the election results, and without special expert knowledge that their votes will be counted accurately.

CONCLUSION

The only JUST ruling on the Commissioners' Motion to Dismiss is to command and proceed in favor of a trial on fully public, visible, transparent vote counts, because they are an absolute necessity for the unalienable Right expressed by the Declaration of Independence to "alter" the government, and the Right to public vote counts given the constitutional principle of the public nature of public elections.

WHEREFORE, based on the above and the prior pleadings, Plaintiffs Schulz and Liggett respectfully request an order denying the Defendant Commissioners motion to dismiss the Amended Complaint.

Dated: January 5, 2011

ROBERT L. SCHULZ
2458 Ridge Road
Queensbury, NY 12804

JOHN LIGGETT
1040 1st Ave #351
New York, NY 10022