

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ and JOHN P. LIGGETT,

Plaintiffs,

-against-

1:07-CV-0943 (LEK-DRH)

RETURNABLE: Sept 2, 2011

DOUGLAS KELLNER, Individually and as
Commissioner Of the New York State Board of Elections;
EVELYN AQUILA, Individually and as Commissioner
Of the New York State Board of Elections; HELENA
MOSES DONAHUE, Individually; JAMES A. WALSH,
As Commissioner of the New York State Board of
Elections; and GREGORY P. PETERSON, as
Commissioner of the New York State Board of Elections,

Defendants.

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS’
MOTION FOR RECONSIDERATION**

Shame on the State of New York.

Governments are instituted among Men to secure the Rights of the People. *Declaration of Independence*, 2nd paragraph.

Defendants (hereinafter “State”) demonstrate they are clearly more interested in denying Plaintiffs’ (hereinafter “Voters”) Rights than in safeguarding those Rights.

In their Motion for Reconsideration, Voters demonstrated the Court’s decision to dismiss this case for lack of constitutional standing and mootness was without reason, unsupported by substantial evidence and erroneous as a matter of law. Voters persuaded by argument and evidence.

The State was obligated to intelligently and rationally confront and refute Voters’ arguments and evidence, offering their own, or to stand down. Instead, the State ignored the

substance of Voters' arguments and evidence, choosing to manufacture a distracting claim, accusing Voters of not quoting case law accurately. The claim is false. The State's opposition paper is an apparent attempt to prevent the Court from focusing on the arguments and the evidence provided in support of the People's Voting Rights. See Part B, below.

A. IN EFFECT, VOTER'S ARGUMENTS AND EVIDENCE FOR RECONSIDERATION STAND UNOPPOSED BY THE STATE

The Court based its decision on an erroneous view of the law – i.e., the Constitution, itself.

Voters' case rests on the fundamental, and self-evident principle that the public nature of elections must be resolutely protected as it is the very cornerstone of the form of representative government mandated by We the People via the Constitution for the United States of America.

To avoid constitutional injury, Voters must be able to comprehend and verify the crucial, procedural steps in conducting their elections, reliably and without any special prior technical knowledge.

To avoid constitutional injury, the elections, particularly the counting of votes, must be implemented before Voters' eyes. Only then is it possible to guarantee the integrity of an election and ensure the trust of the sovereign Voters in the Congress and the Presidency being composed in a manner corresponding to the *bona fide* will of the voters.

An election procedure in which Voters cannot reliably comprehend whether their vote is accurately recorded and included in the tabulation of the election result, and how the total votes cast are assigned and counted, excludes central elements of the election procedure from public monitoring, and hence fails to comply with the principle of the public nature of elections arising and emerging, self-evidently, from the Constitution, including Article I, Sections 2 and 4 and the Seventeenth Amendment.

Frivolously, the State asserts Plaintiffs’ “assume the existence of a constitutional right known only to the Plaintiffs.” Opp. 2.

No, the Right is not known only to Plaintiffs. The specific Right of Voters to public monitoring of central elements of the election procedure has been thoroughly documented through Plaintiffs’ pleadings and is, therefore, known to the State and the Court. It is the duty of the Court to ascertain whether the State has remained within the limited boundaries of latitude granted to them by the Constitution, or whether they have violated a valid and fundamental constitutional election principle by overstepping these boundaries.¹

The State asserts, “Movants ...have simply not made an argument upon controlling precedent which this Court might have overlooked.” Opp. 2.

Not true. In fact, Plaintiffs have argued the Court overlooked the fact that the Right of Voters to public monitoring at central elements of the election procedure (such as the vote counting element) lies within the circumference of the principles of law laid down in the cases cited by Plaintiffs, including but limited to *United States v. Saylor*, 322 U.S. 385, 388 (1944); *United States v. Classic*, 313 U.S. 299, 315 (1941); *United States v. Mosley*, 238 U.S. 383 (1915), *Williams v. Rhodes*, 393 U.S. 23,

Alternatively, as pro-se Plaintiffs implicitly argued, the Court overlooked the fact that the Right lies within the ambit of the controlling “precedent” of the Ninth Amendment.

The State asserts, “Plaintiffs have failed to cite any case, arising under the Constitution which supports their often repeated claim that voting procedures that are not *open, verifiable and transparent and machine and computer free, with paper ballots that are hand marked and hand*

¹ As Plaintiffs have argued, said Right is also now known throughout the nation of Germany, whose high Court, in 2009, banned the further use of all electronic vote counting systems in Germany, necessitating the return to hand counted paper ballots. See Plaintiffs’ Opposition to the State’s motion to dismiss.

counted, abridge the right to cast an effective vote. This argument is the lynch-pin of Plaintiffs' case and the only case offered in support of it is *Williams v. Rhodes*, 393 U.S. 23." Opp. 2.

Not true. In fact, the oft-repeated lynch-pin of Voters' case is the Principle of the Public Nature of Elections emerging from our Constitution that is inclusive of the Right to *know* their votes are being accurately counted, through voting systems that are open, verifiable and transparent. This constitutional requirement is currently being violated by the State's voting systems that utilize electronic and mechanical vote counting machines. However, the essential principle of public elections is a constitutional requirement that can be readily satisfied by an election process (i.e., "voting system") that utilizes hand-counted paper ballots.

Again, to clarify, **Plaintiffs have squarely argued that counting of votes, in secret, by machines, is a clear deprivation of a protected fundamental Right by the State.** The Court has so concurred in their Order to Dismiss. The cited procedure of publicly counting hand-marked paper ballots is a suggested SOLUTION, and specific form of RELIEF requested by Plaintiffs. That little or no judicial precedent may exist that specifically addresses this specific point may be accurate, the Court would be remiss in ignoring the natural and obvious implications if it fails to grant standing to Plaintiffs, and instead relies on a limited interpretation of the judicial doctrine of standing which not only directly thwarts both the intent of the Constitution and essence of valid public elections upon which the Republic stands, but flies in the face of the principle of law laid down in *Public Citizen, Akin* and *American Canoe*.

Indeed, a failure by this Court to recognize standing of the Voters in this case based on a dismissive theory that "equal injuries" are suffered by ALL voters, would be tantamount to establishing a judicial precedent likely barring any future election-related litigation against this State by its Citizens – no matter the specific facts, circumstances or Constitutional injuries.

The lengthy, intense discovery process in this case has provided ample proof of the constitutional harm induced by the current, electronic, in-secret, vote counting system, and the constitutional compliance of the available, manual, in-public, vote counting system. Voters requested and were granted a jury trial. Voters were well on their way to proving their claim as they prepared for the trial.

B. PLAINTIFFS CORRECTLY QUOTED CASE LAW

The State wrote, “Plaintiffs refer the court to page 30 of [*Williams v. Rhodes*, 393 U.S. 23]and a reading of that page reveals that the words, “open, verifiable, transparent and machine and computer free, with paper ballots that are hand marked and hand counted”, nowhere appear. Those words do not appear anywhere within the entire opinion of *Williams*. (Memorandum of Law in Support of Reconsideration, pp. 4-5).”

Voters have never said those words appear in *Williams*, as the State would induce the Court to believe. In their Amended Complaint, Voters simply wrote:

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). (Amended Complaint, paragraph 253)

There were no quote marks around any of the words, thereby placing the words. “open, verifiable, transparent and machine and computer free, with paper ballots that are hand marked and hand counted” in the category of Voters’ opinion of the meaning of the principle of law reinforced in *Williams* -- the individual Right to cast an effective vote.

On page 3-4 of Plaintiffs’ Memorandum of Law in Support of Motion for Reconsideration (not 4-5 as the State wrote), Plaintiffs wrote:

In fact, the Amended Complaint explicitly states: “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).” (emphasis added by Voters).

Here, the quote marks were added due to the fact that, as stated, Plaintiffs were quoting what they wrote in their Amended Complaint.

The State also wrote, “Similarly, in their Memorandum of Law, Plaintiffs purport to quote, on page 8 of their Memorandum of Law, from the Supreme Court’s decision in *Fed. Election Comm’n v. Akins*, 524 US 11 but inserted language within such quote which does not appear in the Decision, to wit: ‘including the constitutional principle of the public nature of elections’, without advising this Court that such language is an editorial comment of Plaintiffs.” Opp. 3.

Not true. In fact, here is what Plaintiffs wrote:

In point of fact, the *Akins* Court held, “Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found ‘injury in fact.’ See [Public Citizen, 491 U.S. at 449-450](#) ... Thus the fact that a political forum may be more readily available where an injury is widely shared ... does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an ‘injury in fact.’ This conclusion seems particularly obvious where (to use a hypothetical example) ... large numbers of voters suffer interference with voting rights conferred by law [including the constitutional principle of the public nature of elections] (internal citations and quotations omitted). We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.” *Cf. Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24-25 (1998).

Said language was bracketed by pro-se Plaintiffs, thereby demonstrating Plaintiffs’ intent to show the Court that it was not part of the original decision.

The State has unfairly and insincerely attempted to lead the Court into believing Plaintiffs have deliberately or otherwise misquoted the Supreme Court.

CONCLUSION

Justice demands this case be allowed to go forward.

Plaintiffs petitioned the Court for a remedy of a Grievance. In sum they had three claims:

1) the electronic voting systems they were being forced to use in 2008 and beyond violated the self-evident, fundamental principles of public elections emerging from the Constitution for the United States of America and the Right to *know* their votes were being accurately counted; 2) there was a voting system that was readily available, successfully vetted and utilized for many years by all people in Canada in all federal elections, used by the people in half of the voting precincts in New Hampshire, and all the people in most of the countries in the western hemisphere, that would synchronize and protect the fundamental, Constitutional Principle of the Public Nature of Elections and their essential Voting Right to know their votes were being cast effectively; and 3) the electronic vote counting machines violate the contract Plaintiffs entered into when they registered to vote.

Having survived an earlier Motion to Dismiss for Lack of Standing, Discovery got underway by Order of this Court. After a lengthy, intense and costly exchange of documents, it was likely very clear to the State that Plaintiffs have obtained enough evidence to readily prove points 1 and 2 above to a jury of New York citizens. Suddenly, the State filed a second motion to dismiss, which the Court granted, in error.

As Plaintiffs argued in their Motion for Reconsideration, the Court:

- deleted/refused to recognize Plaintiffs claim that the constitutional principle of the public elections that emerges from our Constitution requires all essential steps of voting systems be “open, verifiable and transparent,” and

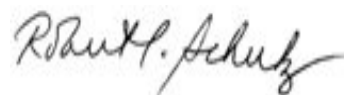
- overlooked the essential, on-point principle of law laid down in *Public Citizen*, 491 U.S. 449-450, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998), and *American Canoe Association v City of Louisa*, 389 F.3d 536-546.

Rather than respond to Plaintiff's compelling arguments, the State instead chose to concentrate its efforts in misleading the Court into believing Plaintiffs misquoted Supreme Court decisions.

Under the facts and circumstances of this case, it would be erroneous and manifestly unjust, not only to the Plaintiff Voters, but all the People of New York, if this Court dismissed this case for lack of constitutional standing or mootness.

"I consider it completely unimportant who in the party will vote, or how; but what is extraordinarily important is this—who will count the votes, and how." Attributed to Joseph Stalin, circa 1923, as quoted in *The Memoirs of Stalin's Former Secretary* (reprinted 1992) by Boris Bazhanov [Saint Petersburg]

Dated: August 25, 2011



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