11-4894

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Doug Bersaw, New Hampshire, Amanda Moore, South Carolina, Arthur Groveman, Florida, James Condit, Jr., Ohio, Fred Smart, Illinois, Pam Wagner, Iowa, Troy Reha, Iowa, Gregory Gorey, Texas, Susan Marie Weber, California, Mary D. Farrell, Oregon, Brian L. Roberts, Alabama, Jean C. Allen, Alabama, Charles D. Roberts, Alabama, Brent Cole, Sr., Alaska, Duane F. Andress, Alaska, Henry Ayre, Alaska, David Johnson, Arizona, Stuart Kevin Cole, Arizona, Mark J. Yannone, Arizona, Tom Mayfield, Arkansas, Lynne Baker, Arkansas, Glenda Middlebrook, Arkansas, Mychal R. Pitagora, California, Mychal R. Schillaci, California, Lorraine Lunnon, Colorado, Lotus, Colorado, Betty Wies, Colorado, Walter B. Reddy, III, Connecticut, Charles Price, Connecticut, Heather Wilson, Connecticut, Steven Bachman, Delaware, Jean Mateson, Delaware, Marcus Riego, Delaware, Nova A. Montgomery, Florida, Janine L. Dean Winter, Florida, John J. Felso, Georgia, Clay Dalton, Georgia, Roger Patrick, Georgia, Ka'imi Pelekai, Hawaii, Charles W. Abel, Hawaii, Michael Marsoun, Hawaii, Gary Conway,

(Parties Continued on Next Page)

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

BRIEF ON BEHALF OF PLAINTIFFS - APPELLANTS

February 10, 2012

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Queensbury, NY 12804

JOHN LIGGETT
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New York, NY 10022

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Owen Mulligan, Vermont, William Clark Delashmutt, Virginia, Carolyn Williams, Virginia, Judith Sharpe, Virginia, Ron Moss, Washington, Larry K. Burns, Washington, David Knight, Washington, William Sisemore, West Virginia, Dorris Ponstingl, West Virginia, Zabrina Sisemore, West Virginia, Francine Arnold, Wisconsin, Anita Zibton, Wisconsin, Lance Crain, Wyoming, Maurice W. Jones, Joe R. Slack, Jr., Wyoming, Kenneth Cooper, Michigan, State of Texas, Samuel Anthony Ettaro, Pennsylvania,

Plaintiffs,

Robert L. Schulz, New York, John Liggett, New York,

Plaintiffs- Appellants,

v.

State of New Hampshire, State of South Carolina, State of Florida, State of Ohio, State of Illinois, State of Iowa, State of California, State of Oregon, Neil Kelleher, New York State Board of Elections, State of Alabama, Beth Chapman, Alabama Secretary of State and Chief Election Official, in her individual and official capacity, State of Alaska, Sean Parnell, Alaska Lt. Governor and Chief Election Official, individually and in his or her official capacity, State of Arizona, Jan Brewer, Arizona Secretary of State and Chief Election Official, individually and in his or her official capacity, State of Arkansas, Charlie Daniels, Arkansas Secretary of State and Chief Election Official, individually and in his or her official capacity, Debra Bowen, California Secretary of State and Chief Election Official, indivudually and in her official capacity, State of Colorado, Mike Coffman, Colorado Secretary of State and Chief Election Official, individually and in his official capacity, State of Connecticut, Susan Bysiewicz, Connecticut Secretary of State and Chief Election Official, individually and in her official capacity, State of Delaware, Elaine Manlove, Delaware Commissioner of Elections, individually and in her official capacity, Kurt Browning, Florida Secretary of State and Chief Election Official, individually and in his official capacity, State of Georgia, Karen Handel, Georgia Secretary of State and Chief Election Official, individually and in her official capacity, State of Hawaii, Rex M. Quidilla, Hawaii

Chief Election Officer, individually and in his official capacity, State of Idaho, Ben Ysursa, Idaho Secretary of State and Chief Election Official, individually and in his official capacity, Albert Porter, individually and in his official capacity, Bryan Schnier, individually and in his official capacity, Jesse Smart, individually and in his official capacity, Wanda Rednour, individually and in her official capacity, Robert Walters, individually and in his official capacity, Patrick Brady, individually and in his official capacity, William McGuffage, individually and in his official capacity, John Keith, individually and in his official capacity, Illnois State Board of Elections, State of Indiana, Todd Rokita, Indiana Secretary of State and Chief Election Official, individually and in his official capacity, Michael Mauro, Iowa Secretary of State and Chief Election Official, individually and in his official capacity, State of Kansas, Ron Thornburgh, Kansas Secretary of State and Chief Election Official, individually and in his official capacity, State of Kentucky, Trey Grayson, Kentucky Secretary of State and Chief Election Official, individually and in his official capacity, State of Louisiana, Jay Dardenne, Louisiana Secretary of State and Chief Election Official, individually and in her official capacity, State of Maine, Matthew Dunlap, Maine Secretary of State and Chief Election Official, individually and in his official capacity, State of Maryland, Robert Walker, individually and in his official capacity, Bobbie Mack, individually and in his official capacity, Andrew Jezic, individually and in his official capacity, David McManus, individually and in his official capacity, Charles Thompson, individually and in his official capacity, Maryland State Board of Elections, State of Massachusetts, William Francis Galvin, Massachusetts Secretary of the Commonwealth and Chief Election Official, individually and in his official capacity, State of Michigan, Terri Lynn Land, Michigan Secretary of State and Chief Election Official, individually and in his or her official capacity, State of Minnesota, Mark Ritchie, Minnesota Secretary of State and Chief Election Official, individually and in his official capacity, State of Mississippi, Eric Clark, Mississippi Secretary of State and Chief Election Official, individually and in his official capacity, State of Missouri, Robin Carnahan, Missouri Secretary of State and Chief Election Official, individually and in his or her official capacity, State of Montana, Brad Johnson, Montana Secretary of State and Chief Election Official,

individually and in his official capacity, State of Nebraska, John Gale, Nebraska Secretary of State and Chief Election Official, individually and in his official capacity, State of Nevada, Ross Miller, Nevada Secretary of State and Chief Election Official, indivudually and in his official capacity, William Gardner, New Hampshire Secretary of State and Chief Election Official, individually and in his official capacity, State of New Jersey, Anne Milgram, New Jersey Attorney General and Chief Election Official, individually and in her official capacity, State of New Mexico, Mary Herrera, New Mexico Secretary of State and Chief Election Official, individually and in her official capacity, State of North Carolina, Larry Leake, individually and in his official capacity, Lorraine Shinn, individually and in her official capacity, Charles Winfree, individually and in his official capacity, Genevieve Sims, individually and in her official capacity, Robert Cordle, individually and in his official capacity, North Carolina State Board of Elections, State of North Dakota, Alvin Jaeger, North Dakota Secretary of State and Chief Election Official, individually and in his or her official capacity, Jennifer Brunner, Ohio Secretary of State and Chief Election Official, individually and in her official capacity, State of Oklahoma, Thomas Price, individually and in his official capacity, Susan Turpen, individually and in her official capacity, Ramon Watkins, individually and in his official capacity, Oklahoma State Election Board, Bill Bradbury, Oregon Secretary of State and Chief Election Official, individually and in his official capacity, State of Pennsylvania, Pedro Cortes, Pennsylvania Secretary of the Commonwealth and Chief Election Official, individually and in his official capacity, State of Rhode Island, A. Ralph Mollis, Rhode Island Secretary of State and Chief Election Official, individually and in his official capacity, John Hudgens, III, individually and in his official capacity, Cynthia Bensch, individually and in her official capacity, Tracey Green, individually and in his or her official capacity, Pamella Pinson, individually and in her official capacity, Edward Pritchard, Jr., individually and in his official capacity, South Carolina State Election Commission, State of South Dakota, Chris Nelson, South Dakota Secretary of State and Chief Election Official, individually and in his official capacity, State of Tennessee, Riley Darnell, Tennessee Secretary of State and Chief Election Official, individually and in his or her

official capacity, Phil Wilson, Texas Secretary of State and Chief Election Official, individually and in his official capacity, State of Utah, Gary Herbert, Utah Lt. Governor and Chief Election Official, individually and in his official capacity, State of Vermont, Deborah Markowitz, Vermont Secretary of State and Chief Election Official, individually and in her official capacity, State of Virginia, Jean Cunningham, individually and in his or her official capacity, Harold Pyon, individually and in his official capacity, Nancy Rodriques, individually and in her official capacity, Virginia State Board of Elections, State of Washington, Sam Reed, Washington Secretary of State and Chief Election Official, individually and in his or her official capacity, State of West Virginia, Betty Ireland, West Virginia Secretary of State and Chief Election Official, individually and in her official capacity, State of Wisconsin, John Schober, individually and in his official capacity, Shane Falk, individually and in his or her official capacity, David Anstaett, individually and in his official capacity, Kirby Brant, individually and in his or her official capacity, Donald Goldberg, individually and in his official capacity, Carl Holborn, individually and in his official capacity, Patrick Hodan, individually and in his official capacity, Robert Kasieta, individually and in his official capacity, Jon Savage, individually and in his official capacity, Wisconsin State Elections Board, State of Wyoming, Max Maxfield, Wyoming Secretary of State and Chief Election Official, individually and in his or her official capacity, Commonwealth of Massachusetts, William Francis Galvin, Whitney Brewster, State of New York,

Defendants,

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, Gregory P. Peterson, as Commissioner of the New York State Board of Elections, James A. Walsh, as Commissioner of the New York State Board of Elections, Helena Moses Donahue, individually,

Defendants - Appellees.

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JURISDICTION

The claims arise under the Constitution for the United States of America. Defendants-Appellees DOUGLAS KELLNER, EVELYN AQUILA, GREGORY PETESON, JAMES WALSH and HELENA MOSES, (hereinafter the "New York State Board of Elections" or "BOE") are violating the Voting Rights of Plaintiffs-Appellants, ROBERT SCHULZ and JOHN LIGGETT, who are resident-citizens and registered voters in New York State (hereinafter "Voters" or "Voters Schulz and Liggett").

The District Court has jurisdiction under Article III, Sect. 2 and the First Amendment, Cl. 5 of the Constitution, 28 U.S.C. Sections 1331 and 1343(3), and 42 U.S.C. Section 1983.

This Court's jurisdiction is provided by 28 USC Section 1291. This appeal is from a dispositive Order of the District Court entered October 13, 2011 that, together with its earlier, non-appealable orders, disposes of all parties' claims. The appeal was taken November 9, 2011.

STATEMENT OF THE ISSUES ON APPEAL

1) Whether Voters Have Constitutional and/or Prudential Standing to Sue.
2) Whether Voters Are Entitled To Full Relief From This Court.
3) Whether The Court Should Take Judicial Notice Of Foreign Law.
4) Whether Claims Are Moot.
5) Whether The Court Has Jurisdiction Over The Breach Of Contract Claim.

STATEMENT OF THE CASE

This case is about the on-going violation of the Voting Rights of Voters Schulz and Liggett, Rights guaranteed by the principle of the public nature of elections, which is an essential principle underlying the Constitution for the United States of America and the Constitution for the State of New York.

The principle of the public nature of elections requires every major step in the election process be conducted in public and subject to public examination – that is, "known by, or open to the knowledge of, all or most people." *Webster's New Twentieth Century Dictionary, Second Edition*.

The case was dismissed for lack of standing after surviving a similar motion at the outset and all but completing discovery. Voters seek a ruling by this Court:

a) To reverse the District Court's Order that dismissed this case for lack of standing, which Order, by definition means votes cast by Voters in the 2012 primary and general elections, and beyond, will continue to be recorded, counted and tabulated in secret, a violation of the principle of public elections and their Voting Rights that emerge from Article 1, Section 2, cl. 1, Article 1, Section 4, cl. 1 and the Seventeenth Amendment to the Constitution for the United States of America, and;

b) To permanently enjoin and prohibit the use of the Dominion and ES&S electronic voting systems, and all such similarly violative systems, by the

BOE in all federal primary, general and special elections in 2012 and beyond, and;

c) To reverse the District Court's Confidentiality Order of 6/4/10, and for Defendants to fully respond to all prior discovery requests, and;

d) To direct the BOE to provide Voters Schulz and Liggett with non-confidential voting systems, for all federal primary, general and special elections to be held in 2012 and beyond, that are fully open to public examination and transparent at all essential steps in the voting process following the private casting of their votes, including, but not necessarily limited to, the recording and counting of their votes at their polling stations, and the public posting, at their polling stations, of the locally certified results of that count, and;

e) To direct the BOE to require Voters' Polling Centers to publicly post the Centers' vote totals in hard copy and on their websites, immediately following the close of the voting period and tabulation of the vote - that is, before the Polling Centers forward those totals to any other centralized vote tabulation center, public or private, and;

f) To direct the BOE to require Voters' Counties to publicly post Voters' precinct vote totals on their websites, as part of a precinct-by-precinct list, immediately following the Counties' receipt of the vote totals from

the polling centers/precincts in the Counties, that is, before the Counties forward those totals to any other centralized vote tabulation center, public or private, and;

g) For such other and further relief as the Court deems just and proper.

Given the current voting systems, Voters Schulz and Liggett cannot know if *their* votes are being accurately recorded and counted. Yet this is what happens and will continue to happen in Voters' polling places where electronic or mechanical, lever-operated machines are used.

In 2007, Voters petitioned the District Court for an Order directing the BOE and the State of New York to eliminate these electronic and mechanical voting systems. Voters demonstrated to the Court via the form of relief requested that it **could** issue such an Order without concern that the Order would leave the BOE and Voters without a legally compliant, constitutionally sound voting system. Voters showed the Court and the BOE there was a **readily available voting system** that:

- Is compliant with the constitutional principle of public elections, having every essential step in the voting process (following the private casting of the vote), open, verifiable and transparent for public examination, and;
- Is compliant with the federal Help America Vote Act ("HAVA"), and;

- Is the system of choice worldwide, including half the precincts in the State of New Hampshire, all of Canada and nearly all of the developed, industrialized countries of the world, and;
- Takes full advantage and compliments the private process of vote casting on paper ballots already in use by the BOE in Voters' polling places.

Voters petitioned the District Court for an Order directing the BOE to eliminate that part of Voters' voting process that records and counts Voters' paper ballots in secret.

PROCEDURAL HISTORY

9/12/07 Complaint filed (Dkt. 1)

11/1/07 Amended Complaint filed. (Dkt. 21)

12/17/07 States'Motion to dismiss for lack of jurisdiction. (Dkt. 199)

12/20/07 Agreement to simplify service. (Dkt. 209)

12/28/07 Voters' Response and Cross-Motion for Summary Judgment. (Dkt. 223)

1/4/08 Order by Judge Kahn staying decision on Motion for Summary Judgment pending decision on Motion to Dismiss. (Dkt. 233)

4/28/08 Voters' Sur-Reply in opposition to Motion to Dismiss. (Dkt. 295)

5/8/08 Order by Judge Kahn rejecting Voters' Sur-Reply. (Dkt. 301)

6/4/08 Order by Judge Kahn granting States'Motions to Dismiss. (Dkt. 303)

8/4/08 Voter's Motion for Default Judgment against the BOE. (Dkt. 304)

8/18/08 Declaration by Schulz, filing NH Primary Recount Report. (Dkt. 314)

8/21/08 BOE Answer to Amended Complaint. (Dkts. 319 - 323)

8/27/08 BOE Response to Motion for Summary Judgment. (Dkt. 324,325)

9/12/08 Voters' Reply. (Dkt. 327)

9/22/08 Order by Judge Kahn denying Summary Judgment. (Dkt. 328)

10/20/08 Judgment by Judge Kahn, dismissing all remaining non-New York State Plaintiffs and remaining non-New York State Defendants. (Dkt. 329)

5/4/09 UNIFORM PRE-TRIAL SCHEDULING ORDER (Dkt. 335)

10/13/09 Magistrate's Order regarding status of party defendants. (Dkt. 342)

2/3/10 Voters' motion by Show Cause Order requesting Court restrain BOE from avoiding duty to respond to Voters' full production request.

2/8/10 Text Order by Magistrate Homer, converting Voters' proposed Order to Show Cause to a discovery motion.

2/16/10 Confidentiality Order by the Magistrate Judge Homer, ordering BOE to comply with Voters' discovery demands and ordering Voters to keep the information Confidential. (Dkt. 347)

2/22/10 Amended Scheduling Order (Dkt. 348)

2/26/10 Voters appeal Magistrate's Confidentiality Order to Judge Kahn. (Dkt.351, 353, 355)

3/30/10 Letter to Judge Kahn, requesting judicial notice of *Bloomberg* and *Fox* decisions by the Second Circuit. (Dkt. 355)

5/14/10 Order by Judge Homer ordering BOE to produce documents demanded by Voters and new scheduling order. (Dkt. 357)

6/4/10 Order by Judge Kahn affirming Confidentiality Order. (Dkt. 358)

7/6/10 Voters' motion requesting BOE be held in contempt for refusing to comply with Judge Homer's Order of May 14, 2010 directing BOE to provide Voters with discovery documents. (Dkt. 360)

9/3/10 Corrected Order by Second Circuit dismissing Voter's appeal from "non-final" Confidentiality Order Court of Appeals Case No. 10-2726-cv.

9/14/10 Order by Magistrate Judge Homer denying BOE request for a stay of proceedings and directing BOE to produce documents. (Dkt. 363)

10/14/10 Voters' Letter to the BOE. Having received documents from the BOE on 9/29/10, 10/7/10 and 10/8/10, **totaling 44,414 pages**, Voters asked BOE to justify its decision to label three sets of documents "confidential." Voters also informed BOE of Voters' intent to request an enlargement in time set for Discovery in order to analyze the material contained on the 44,414 pages. BOE did not answer.

10/27/10 Voters Letter to Magistrate Judge Homer requesting a conference to obtain a resolution to the three questions regarding confidentiality and requesting an extension of Discovery deadline. (Dkt. 365)

11/3/10 Text Order by Judge Homer. Discovery Deadline extended to June 1, 2011. Order did not address Voters' request for discovery conference to resolve the unanswered questions.

12/6/10 BOE filed Motion to Dismiss for lack of standing. (Dkt. 367)

1/5/11 Voters response to BOE Motion to Dismiss. (Dkt. 374)

1/18/11 BOE reply. (Dkt. 377)

1/25/11 Order by Judge Kahn denying Voter's mot. to file sur-reply. (Dkt. 380)

7/7/11 Order and Judgment by Judge Kahn granting the State's Motion to Dismiss for lack of standing. (Dkt. 383,384)

7/22/11 Voters motion for reconsideration. (Dkt. 385)

8/15/11 BOE response. (Dkt. 386,387)

8/26/11 Order by Judge Kahn granting Voters' request to file reply. (Dkt. 389)

10/13/11 Order by Judge Kahn denying Motion for Reconsideration. (Dkt. 390)

11/9/11 Notice of Appeal filed

STATEMENT OF FACTS

1. Neither Voter Schulz nor Voter Liggett is physically or mentally handicapped.

2. Since October 12, 2007, Voter Liggett has been registered with the BOE, through its New York City Board of Elections, to vote in primary, general and special elections. Before that he was registered with the BOE, through its Putnam County Board of Elections, to vote in Putnam County, New York. He has voted in New York County in all presidential and congressional elections since 2007 and intends to vote in all future elections. (Dkt 374, Opposition to Motion to Dismiss, Appendix G). See A 179,180.

3. Since October 2, 1971, Voter Schulz has been registered with the BOE, through its Washington County Board of Elections, to vote in primary, general and special elections. (Dkt 374, Opposition to Motion to Dismiss, Appendix G). He has voted in Washington County in all presidential and congressional elections since 2007 and, on information and belief, since 1993, and intends to vote in all future elections. (Dkt 374, Opposition to Motion to Dismiss, Appendix G). See A 181,182,188.

4. Voters have asked for an Order permanently enjoining BOE from conducting any primary, special, general or any other public election in the 2008 election cycle **and beyond** in a manner which is not fully public – that is, open, verifiable and transparent. (Dkt 21, Am. Complaint, par. 268). See A 78

5. Until 2010, the BOE required Voters in Washington and New York Counties to use a mechanical voting system that hid the recording and counting of votes

from Voters Schulz and Liggett, respectively. (Dkt 367-8, Memo in Support of Defendants' Motion to Dismiss, page 14-15). See A 189, 190.

6. Since 2010, the BOE has required Voters to cast their votes on paper ballots, with votes to be recorded and counted by the Dominion and ES&S voting systems that BOE certified in December 2009. (Dkt 367-8, Memo in Support of Defendants' Motion to Dismiss, page 14-15). See A 189, 190

7. Since 2010, the "Highly Confidential" Dominion electronic voting system has secretly scanned, recorded and counted the votes that were cast on paper ballots by Voter Schulz. See A 158-177 and 189,190

8. Since 2010, the "Confidential" ES&S electronic voting system has secretly scanned, recorded and counted the votes that were cast on paper ballots by Voter Liggett. See A 158-177 and 189-190.

9. When Voters attempted to learn, during Discovery, how the Dominion and ES&S electronic voting systems operate and perform the vote recording and counting functions, **Voters were given 44,414 pages of highly technical information by the BOE, marked "Highly Confidential" or "Confidential."** (Dkt 365, Letter Schulz to Magistrate Judge Homer, pages 4-6, 16, 17 and pages 9-15, 17, 18). See A 158-177

10. The District Court granted the request from the BOE, on behalf of Dominion and ES&S, for "Confidentiality," to keep secret information as to how

Dominion and ES&S electronic voting systems scan, record and count votes. (Dkt 347, Magistrate Judge Homer's Confidentiality Order). (Dkt 358, Judge Kahn's Order affirming the Confidentiality Order). Note: The 2nd Circuit dismissed Voters' appeal of the Confidentiality Order as a non-final order. (CA2 case number 10-2726). See A 136-143, A 146-149 and A 154-155.

11. In 2011, the District Court declared, in effect, that the BOE, together with the manufacturers of the Dominion and ES&S electronic voting systems, can continue, in perpetuity, the hidden process of scanning, recording and counting of votes that have been cast on paper ballots by Voters Schulz and Liggett (and by extension, all New York voters), in all elections, including federal presidential and congressional elections. (Dkt 390, Order by Judge Kahn refusing Request to Reconsider) (Dkt 386 and 387, Order and Judgment by Judge Kahn dismissing the case for lack of jurisdiction and standing). See A-2, and A-7.

12. The Dominion and ES&S electronic voting systems are controlled by a confidential microprocessor and confidential software program that handles the hidden vote recording and counting processes. (Dkt 365, Letter Schulz to Magistrate Judge Homer, pages 2-20). See A 158-177.

13. Optical scan voting systems violate federal accuracy standards, experiencing an error rate approximately 163 times greater than the error rate allowed under

Federal Election Law. (Dkt 314, Declaration by Robert L. Schulz, Exhibit A, "*2008 NH Primary, Reliability of Vote Counting: Machine v. People*"). For first 14 pages of Exhibit A, see A 96-112.

14. However, this case is *not* focused on the questionable construction or operating characteristics and performance records of the mechanical and electronic vote counting systems the BOE is forcing Voters to use, the inadequacy of BOE's official monitoring of these machines, the deficient public nature of the testing and certification of the voting systems, or whether the public has been denied the ability to adequately examine the mechanics, software code, designs, documentation regarding the voting machines in question.

15. Voters' injury in fact **is BOE's violation of their constitutionally protected Right to public elections**: elections that are open, verifiable and transparent; elections that enable Voters' to publicly examine essential steps in the voting act; elections that enable Voters to know their votes have been accurately recorded and counted; elections that enable Voters' to obtain information critical to their peace of mind, confidence and trust that they are casting an effective vote; elections that enable Voters to know that the election process and the democracy they are participating in is not operating in contrast to the way it is designed to work by the Basic Law – the Constitution for the United

States of America; and elections that enable Voters to know that the BOE has done everything in its power to eliminate frustration, confusion, error and fraud.

16. The BOE allows Voters to cast their votes in private by marking paper ballots by hand (highly commendable), but then requires Voters insert their ballots into a machine where *their* votes are recorded and counted by systems that are hidden and not subject to public examination by Voters Schulz and Liggett.

17. Voters cannot see or hear their votes being recorded and counted by the Dominion and ES&S voting systems.

18. Voters lack the special expert knowledge required to KNOW how their votes are recorded and counted by the Dominion and ES&S systems, even when provided with the technical design and testing specifications of these systems. (Dkt 365, Ltr to Magistrate Judge Homer, pages 2-20). See A 158-177.

19. Voters could not know if their votes are accurately recorded and counted, even with that special expert knowledge, given the propensity for errors by electronic voting systems, both unintentional and malicious. (Dkt 21, Amended Complaint, paragraphs 224-227). See A-63. See also (Dkt 223, Declaration #1by Schulz, paragraphs 24 and 25 and Exhibits L and M.).

20. In addition to violating the constitutional principle of public elections, independent expert researchers have revealed all electronic voting systems to

be far too unreliable and insecure to ensure the integrity of any election. (Dkt. 223, Schulz Declaration #1, Exh. L).

21. In addition to violating the constitutional principle of public elections, there have been thousands of reports of failures involving tens of thousands of electronic voting systems. (Dkt. 223, Schulz Declaration #1, Exh. M).

22. The BOE has excluded central elements of the election procedure from public monitoring and has classified them as "Highly Confidential" and "Confidential." (Dkt 365, Letter Schulz to Magistrate Judge Homer, pages 2-20). See A 158-177.

23. Voters injury is concrete and particularized, actual in 2008, 2009, 2010 and 2011, **and imminent** in 2012 and beyond. They were and still are denied their Right to check and verify the essential steps in the election act, and in the ascertainment of the results.

24. Voters' votes were recorded and counted in secret by mechanical lever machines in 2008 and 2009, and by computer-controlled vote recording and counting machines in 2010 and 2011 (to be used again in 2012 and beyond).

25. BOE authorizes and sanctions the following practice: immediately following the end of the voting period, uncertified, secretly recorded and counted voter returns from Voters' precincts, and all other polling places in Voters' counties, are turned over to representatives of the private, New York based

National Election Pool ("NEP"), where the results are somehow electronically tabulated by NEP's computers, and then immediately publicly announced via NEP (comprised of all five dominant television news networks, ABC, CBS, CNN, FOX and NBC, and the Associated Press) to all dominant daily newspapers and other media entities throughout Voter's counties, the State of New York, the United States of America and the world. (Dkt. 223: Opposition to Motion to Dismiss and Support for Motion for Summary Judgment, Attachment #2, Schulz Declaration, Exh. M; Attachment #3 and #4, Landes Affidavit; Attachment #5, Liggett Affidavit; Attachment #6, Condit Affidavit).

26. Voters' injury is traceable to the conduct of the BOE. (Dkt. 303, Order by Judge Kahn, dated June 4, 2008, pages 10-12). See A 88-90.

27. Voters' injury will be Redressed by a favorable decision. (Dkt 21, Amended Complaint, paragraph 262-268). See A 74-78.

28. On March 3, 2009, the German Constitutional Court (i.e., their Supreme Court) declared the use of computer controlled voting systems to be unconstitutional in public elections because the non-public nature of recording and counting votes violated Fundamental Rights. (Dkt 374, Voters' opposition to BOE Motion to Dismiss, Appendix C). See A 216-256.

29. 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 a simple system based on hand marked paper ballots, publicly at each polling location, beginning with the 2009 elections of representatives to the European Parliament and the German Parliament. (Dkt 374, Voters' opposition to BOE Motion to Dismiss, Appendix C). See A 216-256.

30. The two Head Notes in said decision read (see Dkt 374, Voters' opposition to BOE Motion to Dismiss, Appendix C). See A 217:

> 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.

31. On March 3, 2009, the German Constitutional Court issued a public Statement that accompanied the Court's decision. The following paragraphs are excerpted from the Statement (see Dkt 374. Voters' opposition to BOE Motion to Dismiss, Appendix D, pages 1, 2). See A 258,259:

> "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."

"[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."

32. The German Court's decision was not based on voting machine security or construction characteristics. 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 fifty-four (54) times in its decision. (Dkt 374, Voters' opposition to BOE Motion to Dismiss, Appendix C). See A 216-256.

33. On information and belief, the paperless, lever-operated, mechanical voting systems used by the BOE in 2008 and 2009 to count, also in secret, the votes cast by Voters in Washington and New York Counties, have not been destroyed and continue to be used in special village and school district elections.

SUMMARY OF THE ARGUMENT

I. Voters Have Standing To Sue.

Voters are claiming personal injury to a particular Right of their own, as distinguished from the public's interest in the administration of the law.

Voters' harm, though also widespread, is sufficiently concrete and particularized to establish standing. Voters harm is caused by the BOE and can be redressed by Order of the Court.

Given the constitutional principle of the public nature of elections, and Voters' Voting Rights, that emerge from Article I, Section 2, cl. 1, in conjunction with Article I, Section 4, cl. 1 and the Seventeenth Amendment of the Constitution for the United States of America, Voters have a constitutionally protected interest in having all essential steps in the voting process subject to public, open, verifiable and transparent examination, unless other constitutional interests justify an exception.

Voters have a Right to be heard: under Article III, the Judicial Branch is invested with appellate jurisdiction in all cases, such as this, arising under the Constitution and laws of the United States; and, under the First Amendment, the Judicial Branch is obligated to respond to Petitions, such as this, to Remedy Grievances arising from violations of the Constitution. "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).*

II. Voters Are Entitled To Full Relief

The Confidentiality Order is dispositive of this controversy. See A 136-143 and 146-149. The Confidentiality Order amounts to a dispositive, *de facto*

admission by the BOE and the District Court, that BOE's Dominion and ES&S electronic voting systems require a special, expert, proprietary and secretive knowledge (intellectual and not part of the public record), regarding how votes cast by Voters' on paper ballots are recorded and counted by those voting systems.

Not only is the Confidentiality Order dispositive, it is detrimental to Voters' ability to prosecute their case. Voters' Expert Witnesses have indicated their inability to agree to the Confidentiality Order because to do so would most assuredly limit their ability to freely practice their trade by opening them to charges they violated the Order, given their existing and extensive degree of expertise on the subject matter.

III. Nothing Can Be Confidential In The Context Of Voting Systems

The Second Circuit has strongly reiterated the principles of public disclosure of government records. *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, 2nd Circ. USCOA, Docket No. 09-4083-cv; and *Fox News Network, LLC v. Board of Governors of the Federal Reserve System*, 2nd Circ. USCOA, 09-3795-cv.

It follows then, that this Court should reverse the lower court's blanket Confidentiality Order, and give Voters full unrestricted access to the requested documents and data possessed by the BOE, and wherever such records may reside

within BOE's vast top to bottom, statewide, elections structure, to which Voters are entitled -- by common law, the rules of Civil Procedure, and not inconsequentially, the Freedom of Information Act.

IV. The Court Is Asked To Take Judicial Notice Of Foreign Court Decision

In a totally on-point case, involving a constitutional challenge to the further use of electronic voting systems, the Constitutional Court of Germany not only granted standing to two of its citizens based on their status as injured voters, the Court granted them full relief, banning the further use of electronic voting systems and requiring each of Germany's sixteen states to eliminate all electronic voting systems that had been installed. See A 192-261.

As with this case, the German decision was not based on voting machine security or accuracy, which could also be argued. It was based squarely on the principle of the **public nature of elections**, a principle guaranteed by the German Constitution, a principle repeated by the Court fifty-four (54) times in its decision.

V. Claims Are Not Moot

Voters' claims have been 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." In addition, Voters made clear from the beginning, through the Complaint, Amended Complaint, Discovery Requests,

Confidentiality Order, motions and so on, the violation of their Voting Rights and the public nature of elections caused by voting systems both in use and proposed. The Complaint was filed by Plaintiffs from all 50 states against Defendants in all 50 States. New York State and its BOE were unique in 2008, having mechanical voting systems in use but on their way to certifying electronic voting systems for use in **2010 and beyond**. See A 189.

Voters' injuries in 2008, resulting from the violation of the principle of the public nature of elections were, without relief, certain to recur each year thereafter, and such injuries have recurred each year, and are likely to continue to recurr each year, absent relief from the Court.

To dismiss this four year old case involving vital, Fundamental Rights on the ground of mootness would be manifestly unjust.

VI. The Court Has Jurisdiction Over The Breach Of Contract Claim

Voters fully executed BOE's New York State Voter Registration Forms, which 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 A 185.

Voters' breach of contract claim was brought as a constitutional challenge under Article I, Section 10 of the Constitution for the United States.

The execution of Voter Registration Cards by Voters Schulz and Liggett is the execution of a contract between Voters and the BOE: Voters agree to be listed as a registered voter and a member of a political party with eligibility to vote in that political party's primary, public elections and in all general, public elections administered by BOE; the BOE agrees Voters not only have the Right to cast a vote, but the corollary Right to have all essential steps in the election act open and transparent and subject to public examination by Voters Schulz and Liggett.

ARGUMENT

I. VOTERS SCHULZ AND LIGGETT HAVE STANDING TO SUE.

Standard of Review

"A district court abuses its discretion if it bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact." *Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001)*.

"Under the arbitrary and capricious standard of review, we may overturn a decision … if it was without reason, unsupported by substantial evidence or erroneous as a matter of law." *See generally Pagan v. NYNEX Pension Plan, 52 F.3d 438, 442 (2d Cir. 1995)*

An appeal from a prior decision is filed to meet "the need to correct clear error of law or prevent manifest injustice." See *North River Ins. Co. v. Cigna Reinsurance Co*., 52 F.3d 1194, 1218 (3d Cir. 1995).

"In order to meet the 'irreducible constitutional minimum of standing' under Article III, a plaintiff must satisfy three elements: first, that he has suffered 'an injury in fact'; second, that there is a 'causal connection between the injury and the conduct complained of; and third, that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" (Internal citations and quotations omitted). (Dkt 383, Order by Judge Kahn, pg 9). See A 15.

"To establish an injury in fact, a plaintiff must show (1) an invasion of a legally protected interest that is (2) concrete and particularized and (3) actual and imminent rather than conjectural or hypothetical. 'The bare existence of an abstract injury is not enough to confer standing.' Rather, the party asserting the interest or injury must 'have a direct and personal stake in the controversy,' lest the judicial process 'be converted into a vehicle for the vindication of the value interests of concerned bystanders.'" (Internal citations and quotations omitted). (Dkt 383, Order by Judge Kahn, page 9). See A 15.

Voters Have Constitutional Standing

This case is about the on-going violation of the Voting Rights of Voters Schulz and Liggett, Rights guaranteed by the principle of the public nature of elections, an essential principle underlying the Constitution.

The principle of public elections requires every major step in the election process be conducted in public and subject to public examination – that is, "known by,

or open to the knowledge of, all or most people." *Webster's New Twentieth Century Dictionary, Second Edition*.

Since 2008, Voters have voted in all federal elections.

In 2008 and 2009, the BOE **forced** Voters to cast their votes by pulling levers on a mechanical machine that allegedly both recorded and counted their votes, i.e., by means and/or mechanisms that were both, 1) hidden and 2) not subject to public examination.

Since 2010, Voters have cast their votes by hand-marking paper ballots. However, Voters were then **forced** to insert their paper ballots into an electronic device; Voter Schulz into a Dominion electronic device; Voter Liggett into an ES&S electronic device. See for instance, A 158-177.

The Dominion and ES&S electronic voting systems are somehow controlled via a highly confidential, proprietary microprocessor and software program. The paper ballots are somehow electronically scanned, and somehow the votes are recorded and stored on a confidential electronic storage medium, there to be somehow counted at the end of the voting period, in secret, out of public view, by a confidential, electronic voting system. After the machine determines the total vote counts, the voting results are somehow printed by a printer that is somehow integrated into the confidential voting system. See for instance, A 158-177.

The highly confidential, proprietary software program that controls the hidden recording and counting of the votes is to be found on confidential electronic storage modules. The scanned votes–including the linkages (first vote and connected second vote)–are somehow (allegedly) stored on a removable storage device. The data on the paper ballots, the attribution of the individual votes, as well as the date of the election and the polling station, are somehow stored on a confidential storage module. (Dkt 365, Letter Schulz to Magistrate Judge Homer, pages 2-20). See A 158-177.

Because the totality of the recording, counting and conveyance of vote information is conducted in secret by a machine using hidden, non-public means and mechanisms, there is absolutely no way Voters Schulz and Liggett can **know** that their votes are being accurately recorded and counted, without special expert knowledge. However, they have a Right to know. This Right is a Voting Right guaranteed and protected by an essential principle underlying the Constitution for the United States of America – *the principle of the public nature of elections*.

Under the principle of Public Elections, Voters are to enjoy the Right of knowing every essential step in the voting process (including the private casting of their votes) is subject to public examination **by them**. This includes Voters' Right to witness and know *their* votes were recorded at *their* polling places, *their* Right to witness and know their votes were included in the count at *their* polling places,

their Right to have the result of that count publically announced and posted at *their* polling places before *their* ballots are moved from *their* polling places, and *their* Right to *know, without expert, special knowledge,* and with a high degree of confidence, that *their* votes have been accurately recorded and counted, and that the BOE has done all in its power to eliminate frustration, confusion, error and fraud.

Voters have suffered a personal, sufficiently concrete, cognizable injury within the zone of interest to be protected by the constitutional principle of the public nature of elections and voting Rights, injury that is traceable to the BOE's action, and will continue to suffer the injury absent relief from the Court.

The District Court correctly held, "Plaintiffs [argue] that they have suffered an injury because '[t]hey were unable to know that their votes were accurately counted,' and that this injury will persist in future elections absent relief from the Court. PML at 4-5." (Internal citations and quotations omitted). (Dkt 383, Order by Judge Kahn, page 10). See A 16.

The Court was also correct in saying, "Plaintiffs correctly point out that they have a legally protected interest in having their votes counted accurately. Am. Compl. ¶¶ 238, 241, 243-44 (citing *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))." (Dkt 383, Order by Judge Kahn, pg 10). See A 16.

However, in error, the District Court said, "Plaintiffs are alleging a legally protected interest in having their votes counted in a very particular way – namely, in having their votes counted manually and in full public viewing at **every** polling station in the state of New York." (Emphasis added by Voters). (Dkt 383, Order by Judge Kahn, page 10). See A 16. In fact, Voters have claimed a protected interest in having their votes counted in a constitutionally valid manner at *their* polling stations, not "every" polling station.

In addition, Judge Kahn misquoted Voters, saying, "The Amended Complaint explicitly states: 'Voting procedures that are not . . . machine and computer free, with paper ballots that are hand marked and hand counted, abridge the right to cast an effective vote.' Am. Compl. ¶ 246 (citing *Williams v. Rhodes*, 393 U.S. 23, 30 (1968))." (Dkt 383, Order by Judge Kahn, pg 10-11). See A 16,17. In fact, the full quote reads, "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)." (Voters' Emphasis). (Dkt 21, Amended Complaint, paragraph 246). See A 70.

According to the *Williams* Court, all 50 states shall recognize "the right of qualified voters, regardless of their political persuasion, to cast their votes **effectively**." (Internal citations and quotations omitted). (Voters' emphasis).

In other words, Voters have a right to **know** that their votes, when cast, will produce a definite and desired result – that is, that they will be honestly and accurately counted.

Williams goes on to recognize that this right "of course, rank[s] among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States (internal citations and quotations omitted). Similarly we have said with reference to the right to vote: '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. Other rights, even the most basic, are illusory if the right to vote is undermined.'" (Internal citations and quotations omitted).

Judge Kahn then erred by misapplying the law, saying, "First, the Court notes that Plaintiffs' reliance on *Williams* in support of the above assertion is misplaced. The Supreme Court held in *Williams* only that voters have the right 'to cast their votes effectively'; it did not hold that manual counting of votes is required to protect that right… In order to find that Plaintiffs have established a legally protected interest here, then, the Court would be required to conclude that they have a legally protected interest in having their votes counted manually and in

full public viewing. **The Court is unable to reach such a conclusion here.**" (Dkt 383, Order by Judge Kahn, page 10-11). See A 16,17.

This is the crux of this case. The Court reached the merits, disagreeing with Voters' construction of the Constitution and an element of their suggested form of relief.[1]

Voters Schulz and Liggett believe, and argued in their opposition to the motion to dismiss and for reconsideration that the full contours of the Constitution's voting provisions include the principle of public elections, which requires all essential steps of the voting process, and of the determination of the result, be subject to examination by them, reliably and without any special expert knowledge of the subject, and that this requirement results from the principle of the public nature of elections, which prescribes that all essential steps of an election are subject to public scrutiny unless other constitutional interests justify an exception. (Dkt. 374, Voters response to BOE Motion to Dismiss). (Dkt. 385, Voters motion for reconsideration).

Only a voting process that fully complies with the constitutional principle of public elections can fully protect Voters' Rights:

[1] Yet the Court dismissed the case for lack of standing. This appears to be manifestly unjust.

- To the "integrity" of the political process, mandated by the Supreme Court in *Storer v. Brown*, 415 U.S. 724, 732 (1974) (Argued Dkt 21, Am. Complaint, par. 231). See A 65.
- 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. 2063. (Arg'd Dkt 21, Am. Compl't, par. 236). See A 65.
- To a state that structures elections in a way that avoids confusion, deception and even frustration of the democratic process, mandated by the Supreme Court in *Larouche v. Kezer*, 990 F.2d at 442 (2d Cir. 1993) (Argued Dkt 21, Am. Complaint, par. 232). See A 65.
- To have their votes [accurately and honestly] counted, as mandated by the Supreme Court in *United States v. Mosley*, 238 U.S. 383 . (Argued Dkt 21, Am. Complaint, par. 238). See A 66.
- To have their votes "honestly counted" as mandated by the Supreme Court in *United States v. Saylor*, 322 U.S. 385. (Argued in Dkt 21, Am. Complaint, par. 243). See A 67-68.
- To "cast their ballots **and have them counted** . . . ." (internal citations omitted) *Reynolds v. Sims,* 377 U.S. 533, 555 (1964). (Argued in Dkt 21, Am. Complaint, par. 238). See A 66.

- To cast an **effective** vote. *Williams v. Rhodes*, 393 U.S. at 30. See A 70.

However, without directly addressing the front and center issue of the constitutional principle of the (protected) public nature of elections, and without citing a judicial or scholarly authority, Judge Kahn simply disagreed with Voters' construction and demand for protection of the Constitution, and instead opines on the specific form of relief requested saying he is "unable to reach such a conclusion here." (Dkt 383, Order by Judge Kahn, page 11). See A 17.

The fact that the implicit constitutional principle of the public nature of elections has never been explicitly addressed by the Judicial Branch, and that this case might be considered first impression, notwithstanding the cases cited above, would appear to be no rightful justification for throwing Voters out of Court, telling them they have no standing and the Court can't hear their constitutional challenge. The Court failed in its duty to explain to Voters why they should be denied a determination regarding what is required to conduct a constitutionally valid, public election in America.

The Court had a duty to respond to Voters by declaring what it means to have public elections in America, constitutionally speaking.

This case arose as Voters turned to the independent Judicial branch, empowered to bind the other two branches with the chains of the Constitution,

regardless of the level of practical difficulty, political consequence or embarrassment.

In addition, this case arose because of Voters' claim and reliance upon the historical context and purpose of Article III, as well as the Framer's intent behind the last ten words of the *First Amendment – the Petition Clause*.

The Framer's intended Petition for Redress to serve a vital balancing role in a new political culture of **reciprocal obligation** and a carefully crafted balance of power between the People and the Government.

Surely, any branch is petitionable and obligated to respond to Voters' petitions relating to violations of the letter or spirit of the Constitution.

According to a principle of law laid down by the Supreme Court, an Article III Court abdicates its duty and commits "treason to the Constitution," when it fails to hear a constitutional challenge such as this.

> "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, **with whatever difficulties**, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be **treason to the constitution**. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one." (Voters' emphasis). *Cohens v.Virginia*, 6 Wheat. 264, 404 (1821).

Voters Schulz and Liggett are asking the Judiciary to compare the voting systems the BOE is forcing *them* to use with the requirements of the Constitution and determine if those voting systems violate Fundamental Rights of these Voters. Nothing is more important to Free Plaintiff-Appellants than their Voting Rights, the Constitution, and their ability to defend them, knowing these Rights are all that stand between them and total tyranny and despotism.

Voters do have an individual, unalienable Right to defend their Rights in an Article III court.

"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.

"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).*

Voters, as citizens of the United States, are to enjoy the privilege and Right of knowing that the BOE's voting system is open, verifiable and transparent, (i.e., constitutionally valid) and that the BOE has done everything in its power to

eliminate confusion, frustration, error and fraud. *Larouche v. Kezer*, 990 F.2d at 442 (2d Cir. 1993)

The laws and regulations adopted by the federal government of the United States and the government of New York State, to govern the BOE (regarding such matters as the selection and use of voting systems in Voters' polling centers), do not mandate the use of any electronic voting systems, such as the Dominion and ES&S systems. (Dkt 374, Opposition to Motion to Dismiss, Appendix E containing: 1) a copy of the principal federal law, Public Law 107-252, passed by the 107th Congress of the United States on October 29, 2002, titled Help America Vote Act ("HAVA"); and 2), a copy of the principal New York State Law, Chapter 181 of the Laws of New York, which became law on July 12, 2005, titled Election Reform and Modernization Act of 2005 ("ERMA"), and its 2007 amendment).

HAVA and ERMA implicitly require all voting systems comply with the Constitution for the United States of America, including the constitutional principle of the public nature of elections, which requires *all essential steps* in the voting process must be subject to public examination – that is, it must be possible for Voters to check the essential steps in the election act and in the ascertainment of the results, reliably and without special expert knowledge, unless other constitutional interests justify an exception, and there are none.

It is not sufficient if Voters must rely on the hidden functionality of the system without the possibility of personal inspection. It is hence inadequate if they are initially informed by an electronic display or computer generated "receipt" asserting that their ballot has been accurately registered. This does not facilitate sufficient monitoring by Voters.

Whether there are any technical possibilities which create trust on the part of the Voters in the correctness of the proceedings in ascertaining the election result based on verifiability, and which, otherwise comply with the principle of the public nature of elections, need not be decided here.

A comprehensive set of technical and organizational security measures (e.g. monitoring and safekeeping of the voting machines, comparability of the devices used with an officially checked sample at any time, criminal liability in respect of election falsifications and locally organized elections) is not suited by itself to compensate for a lack of monitoring and controllability of the essential steps in the election procedure by the citizen.

Accordingly, neither participation by Voters in procedures of the examination or approval of the voting machines nor a publication of examination reports or construction characteristics (including the source code of the software with computer-controlled voting machines) makes a major contribution towards ensuring the constitutionally required level of controllability and verifiability of the

election events. Technical examinations and official "certification" procedures, which in any case can only be expertly evaluated by interested (and possibly conflicted or biased) government employees, specialists or technicians, relate to a stage in the proceedings which is **far in advance of the balloting and vote counting.** The participation of the public in order to achieve the required reliable monitoring of the election events requires other precautions in addition to those – i.e., all essential steps in the process must be subject to public examination.

Finally, the interest in rapidly clarifying the composition of the Congress or the Presidency is not a constitutional interest that justifies the imposition of restrictions on the constitutional principle of the public nature of the election event.

Voters Have "Prudential" Standing

Judge Kahn based his ruling on a mistaken application of the law, saying, "Furthermore, the Court finds that Plaintiffs have not alleged a sufficiently concrete and particularized harm to establish standing. The Second Circuit has joined other circuits in holding that 'a voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared.' (Internal citations and quotations omitted). Not only is the alleged injury of which Plaintiffs complain widely shared by all voters in the state of New York, it is an abstract one and as such cannot constitute an injury in fact. Plaintiffs' argument that '[t]hey were unable to know that their votes were accurately counted' is not the kind of 'informational injury'

that has previously been found to establish standing, for instance, when voters are unable to obtain information that would help them evaluate candidates for office. *Cf. Fed. Election Comm'n v.Akins*, 524 U.S. 11, 21 (1998). (Dkt 383, Order by Judge Kahn, page 12). See A 18.

Judge Kahn erred by failing to consider the relevant principle of law laid down in *Akins.*

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 (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." (Emphasis added by Voters). *Cf. Fed. Election Comm'n v.Akins*, 524 U.S. 11, 24-25 (1998).

"To the extent that *Akins* requires some additional 'plus' -- some reason that plaintiffs need the information … **that requirement is liberally construed** … **it is difficult to imagine what information would not make a citizen a better-informed voter,** or would not affect her ability to participate in some workings of government. *See* *Akins*, 524 U.S. at 21; *Pub. Citizen*, 491 U.S. at 449 … In determining whether an informational injury is sufficiently concrete, the universe of interests that will create a 'plus' is larger than those that would support standing on their own (as evidenced by *Akins*'s reliance on voting, which is an interest shared by every citizen in America)." (Emphasis added by Voters). *American Canoe Assoc. v City of Louisa,* 389 F.3d 536, 546.

Voters argue the District Court erred and should not be permitted to establish, via its Order to Dismiss, that the secret recording and secret counting of votes is not a type of "informational injury" that would otherwise give rise to standing in an election litigation context as he asserts in his Order. (Dkt 383, Order by Judge Kahn, page 12). See A 18.

Judge Kahn further, and incorrectly asserts Voters' basis for standing is nothing more than a generalized claim that their votes "will not be counted accurately." (Ibid, pg 13). See A 18.

Arguing by analogy, what (if any) is the difference between: a) a computerized machine both recording and counting the hand-marked paper ballots, in secret using hidden, electronic devices and software algorithms; and b) a group of people employed by the "state" moving all the hand-marked paper ballots to a hidden location to be recorded and counted in secret, without any public observation?

Voters' personal injury-in-fact establishing standing **IS the violation of Voters' individual Right to public elections by BOE**:

- Elections that are open, verifiable and transparent;
- Elections that enable Voters' to publicly examine essential steps in the voting act;
- Elections that enable Voters to know their votes have been accurately counted;
- Elections that enable Voters' to obtain information critical to their peace of mind, confidence and trust that they are casting an effective vote;
- Elections that enable Voters to know that the election process and the democracy they are participating in is not operating in contrast to the way it is designed to work by the Basic Law – the Constitution for the United States of America; and

- Elections that enable Voters to know that the BOE has done everything in its power to eliminate frustration, confusion, error and fraud.

Voters are unable to find anything in any Act of Congress intending to exclude Voters from the concrete, particularized benefits of the constitutional principle of the public nature of elections, nor should they.

Voters have suffered a **sufficiently concrete**, genuine injury in fact, clearly traceable to BOE, and will continue to do so absent relief from the Court.

Voters are claiming personal injury to a particular Right of their own, as distinguished from the public's interest in the administration of the law.

II. VOTERS REQUEST FULL RELIEF

By definition, BOE's certified electronic voting systems do not comply with the constitutional requirement for public elections, i.e., the essential steps are not subject to public examination by Voters Schulz and Liggett. Making matters worse for Voters Schulz and Liggett, the BOE placed a "Highly Confidential" or "Confidential" label on most of what Voters requested and received during discovery. (Dkt 365, Ltr to Magistrate Homer, with attachment). See A 158-177.

The Confidentiality Order condones BOE's on-going violation of the constitutional requirement for public elections, allowing the BOE to keep the essential steps hidden from Voters' view. The Order declares the design and

operating features of the systems' internal, out-of-view, vote recording and counting components can remain hidden and out of the public record. (Dkts 347 and 358, Confidentiality Orders by Judge Homer and Judge Kahn). See A 136-143 and A 146-149).

The Confidentiality Order adversely impacts Voters' ability to prosecute their case. Voters' Expert Witnesses declined to agree to the Order because to do so would most assuredly limit their ability to practice their trade by opening them up to charges they violated the Order, given their existing and extensive degree of expertise on the subject matter.

Rather than reply to Voters' initial challenge regarding the confidentiality of some of the documents, the BOE filed the Motion to Dismiss which is the subject of this appeal. (Dkt 367).

III. NOTHING CAN BE CONFIDENTIAL IN THE CONTEXT OF PUBLIC ELECTIONS – PUBLIC VOTING SYSTEMS

Voters are entitled to the technical information requested under the rules of discovery, without having to agree to keep the information confidential.

Nothing can be confidential in the context of Voters' public elections and Voters' public voting systems, not schematics, diagrams, firmware, software or written descriptions of how a machine works, whether in mechanical, electrical or electronic engineering language or otherwise, nor reports on operation,

performance and repair. Nor can the state, counties or BOE make such a claim with regard to their records regarding the certification, approval, maintenance and use of such voting systems.

Two recent holdings of the Second Circuit support the general principles of public access/disclosure and Voters' Opposition to the Confidentiality Order which restricts access and/or disclosure of BOE's discovery evidence. *Bloomberg L.P. v. Board of Governors of the Federal Reserve System*, March 19, 2010, Docket No. 09-4083-cv; and *Fox News Network, LLC v. Board of Governors of the Federal Reserve System*, Docket No. 09-3795-cv.

Although the *Bloomberg* and *Fox News* controversies are Freedom of Information Act (FOIA) lawsuits not directly involving discovery precedent re FRCP per se, the larger ends of Justice and government accountability are common to the legislative intent of both FOIA and the FRCP, even if executed in separate, but similar and complementary legal processes. The principles of public interest and "reach" of the arm of disclosure are instructive and well reiterated in these two decisions, and as such, are of direct relevance in the instant controversy. In short, the Second Circuit has reiterated the principles of public disclosure of government records.

The Court is respectfully asked to reverse the lower court's blanket Confidentiality Order, order Defendants to fully respond to Voters' prior

Disclosure requests, and permit Voters full unrestricted access to the documents and data possessed by the BOE, wherever such records may reside within their vast top to bottom, statewide, elections operation they control and administer under New York Law. Voters believe they are entitled -- by Common Law, by the rules of Civil Procedure and the Freedom of Information Act to these records, unrestricted, non-redacted.

Rejecting the claims of the Federal Reserve arguing for document confidentiality in *Bloomberg*, (which included foretelling of grave potential harms and risks to the national banking system) the Court of Appeals stated, (citing):

> The "basic purpose [of FOIA] reflected a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-361 (1976).
>
> *(cite continued…)*
>
> To implement this presumption for disclosure, FOIA exemptions "have been consistently given a narrow compass." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989); see also *Inner City Press/Cmty. on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006). "[A]ll doubts [are] resolved in favor of disclosure." *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988). And "the burden [is] on the agency to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). The agency's decision that the information is exempt from disclosure receives no deference; accordingly, the district court decides *de novo* whether the agency has sustained its burden. 5 U.S.C. § 552(a)(4)(B); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 20 U.S. 749, 755 (1989).

The *Bloomberg* Court also addresses the practical dangers of permitting an agency [i.e., applicable to BOE in the instant case] to infringe disclosure by invoking its own perceived subjective judgment regarding vague subjective factors

it believes justify confidentiality (e.g., "program effectiveness", etc.). Various subjective factors (e.g., applied to the instant case as vague potential for commercial/trade harms to state vendors, the potential dissemination of certain vaguely proprietary material regarding vendor voting systems, etc.) are implicated. Citing from *Bloomberg*, pg. 17:

> The "program effectiveness" test, if applied as the Board invokes it, would give impermissible deference to the agency, and would be analogous to the "public interest" standard rejected by the Supreme Court in the context of Exemption Five. See Fed. *Open Market Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 354 (1979) . . . The Supreme Court rejected that argument in terms that are instructive:
>
> [T]he [agency's] argument proves too much. Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda . . .whenever the agency concluded that disclosure *would not promote the "efficiency" of its operations or otherwise would not be in the "public interest."* This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard. Id. at 354 (emphasis added).
>
> … But a test that permits an agency to deny disclosure because the agency thinks it best to do so (or convinces a court to think so, by logic or deference) would undermine "the basic policy that disclosure, not secrecy, is the dominant objective of FOIA]." See *Rose*, 425 U.S. at 361.

Records of the County-level Boards of Elections Are Rightfully Subject to Discovery

On February 3, 2010, Voters moved the District Court for an order "Restraining Defendants from avoiding their duty to respond to Plaintiffs' **full production request** in an orderly, organized and expeditious manner ….,"

including the request for documents that may be in the possession or control of each County Board of Elections and which may patently otherwise exist as public records. (emphasis added). On February 8, 2010,Magistrate Judge Homer converted the Motion by Show Cause Order to a discovery motion.

In addition to Voters' other objections filed with the District Judge, Voters specifically objected to the fact that the Magistrate's Orders of February 16 and 18, 2010 did not address the "county" records issue.

In the *Fox News* FOIA lawsuit, the 2nd Circuit held that despite the efforts of the Federal Reserve Board of Governors to divorce itself from its member banks, because of its administrative function, the records of those "member banks" were *de facto* records of the Federal Reserve [agency] and were subject to disclosure. By analogy in the instant case, the records of the local county Board of Elections are also clearly subject to search and discovery (as well as FOIA), as the state Board of Elections is, by statute, legally responsible for the administration and agency enforcement of New York election laws. Citing from *Fox News (*page 8*)*:

> By regulation, records of the Federal Reserve Banks become records of the Board when they are created pursuant to the "performance of functions for or on behalf of the Board" or when they "are maintained for administrative reasons in the regular course of business in official files in any division or office of the Board or any Federal Reserve Bank in connection with the transaction of any official business." 12 C.F.R. § 261.2(i)(1)(i-ii). Again, citing *Fox News*, page 11:

> As the district court held in *Bloomberg*--without appeal from the Board on that point--this regulation provides that certain records of the twelve Federal Reserve Banks are records of the Board and those records must be searched. *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys*., 649 F. Supp. 2d 262, 274 (S.D.N.Y. 2009). To fully comply with the Fox News FOIA requests, the Board must search records of the twelve Federal Reserve Banks that are maintained for administrative reasons, in the regular course of business, in the Board's official files or by any Federal Reserve Bank, and in connection with the transaction of any official business. And responsive documents identified in that search must be produced unless shielded by some FOIA exemption.

By its holding in *Fox News*, the 2nd Circuit is clearly reiterating the well established and logically sound principle that a government agency **cannot evade** its production obligations under FOIA [or discovery] which arise directly from its primary agency administrative functions.

In Voters' First Notice to Produce, Voters demanded at least 26 items the BOE had the legal and constitutional authority to obtain from the counties (if they needed to because they were not already in possession of the items).

The BOE refused to provide **any** of the items, stating it had **no authority** to order the counties to produce the documents. In their refusal to turn over any documents without a Confidentiality agreement, BOE directly implied that, despite the general statutory record keeping requirements of New York law, and the fact BOE administers and enforces (by lawful authority) the entire New York electoral process, they are NOT in possession of a single relevant document, *public record*

or otherwise, involving the day-to-day administration of the NY election laws or systems **that is not in some way confidential.**

IV. THE COURT IS ASKED TO TAKE JUDICIAL NOTICE OF FOREIGN LAW – AN ON-POINT CASE

Given the critical constitutional decision which is now before this Court, Voters request judicial notice of an on-point foreign case involving citizen standing and the issue of computer-controlled, electronic vote counting, decided in 2009. There, the (Supreme) Court not only granted standing to two of that country's citizens, it gave full relief.

The two citizens, one of whom was a software programmer for a German-American company, sought to prevent the German government from denying their Voting Right to publicly examine each essential step in the voting process and to know, without special expert knowledge, that their votes for members of the federal Legislature were being accurately recorded and counted.

The High Court issued a highly focused order deeply examining its constitutional requirements mandating fully public elections. The Order banned the further use of electronic voting systems in Germany, requiring each of its states to eliminate all electronic voting systems that had been installed. See A 217-256.

In brief, ALL voting machines that had been certified and deployed before 2005 for the use of millions of people throughout Germany, were removed and

replaced by hand marked, publicly counted, paper ballots beginning with the 2009 elections of representatives to the German Parliament.

In historical context, electronic voting machines are new to the election arena, worldwide. Many countries, some with and some without a "constitutional conscience," have been forced to redress a host of legal issues presented by the use of machines to record and count votes.

In America, a spirited debate currently exists throughout the legal and academic communities and the Judiciary generally as to the propriety of citation of foreign law as a basis for precedent,[2] (Voters Schulz and Liggett would normally be the first to join those who favor prohibition against citation of foreign judicial rulings as precedent).

The decision by the German Court addresses the specific issues presented and raised in the instant case and is directly relevant and instructional to the core legal questions raised by this action pertaining to **Voters standing under Article**

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[2] A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication with 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, Shapiro, Cato Institute http://www.cato-at-liberty.org/the-use-and-misuse-of-foreign-law-in-u-s-courts/; "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

III and the First Amendment's Petition Clause, as well as the constitutionality of the use of computer-controlled vote-counting systems within the framework of Article I and the 17th Amendment.

The attention of the Court is invited to the record of the instant case for a factual synopsis of the German Republic and its system of governance, which will reveal relevant similarities to our own. (Dkt 374-1, Voters' Brief In Opposition To Motion To Dismiss, Appendix A). See A 192-215.

The attention of the Court is invited to the record for a copy of the Constitution for the Republic of Germany. (Dkt 374-1, Voters' Brief In Opposition To Motion To Dismiss, Appendix B).

The German high Court declared the use of computer-controlled, electronic voting systems to be unconstitutional in public elections. The attention of the Court is invited to the record for a copy of the decision. (Dkt 374-1, Voters' Brief In Opposition To Motion To Dismiss, Appendix C). See A 217-256.

The attention of the Court is invited to the record of this case for a copy of a Statement, issued by the German Constitutional Court that accompanied that Court's decision in the Wiesner case. (Dkt 374-1, Voters' Brief In Opposition To Motion To Dismiss, Appendix D). See A 258-261.

Like the instant case, the German Court's decision did not address machine security. It was analyzed and decided entirely on the principle of the **public nature**

of elections, a principle guaranteed by the German Constitution and repeated by the Court fifty-four (54) times in its decision. (Dkt 374-1, Voters' Brief In Opposition To Motion To Dismiss, Appendix C). See A 217-256.

Unknowingly, Voters Schulz and Liggett and the citizens of Germany filed their cases at the same time in 2007. Consideration of the German Court's decision would not be imposing or burdensome on the Court, but thoroughly helpful and supportive: it addresses only the essentials of the physical process of voting in a democratic, constitutional Republic and how that process implicates Fundamental Rights of Voters. Voters note there are no controversies of jurisprudence to seek or borrow from the decision, but rather an extensive analysis offering a High Court's judicial insight regarding the essential, practical aspects of public elections, and their nature with regard to constitutional requirements such as those which parallel, and are the foundation of our American democratic process. A study and review of the German decision would not impose subjective and inappropriate questions or judicial consideration 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 exercised their (rightful) 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 (Dkt 374-1, Voters' Brief In Opposition To Motion To Dismiss, Appendix A and B):

- Any German citizen may file a complaint and enjoy standing when his constitutional Rights have been violated by the state; and,
- Elections do indeed have a public nature; and,
- 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 and subject to public examination.

Consideration of the German Case will show that the Spirit of the German Constitution redressed the injury of the People, rendering secret vote counting by computer controlled, electronic voting systems impossible **as the primary means of counting**. **Nor will a paper trail suffice**, held the German Constitutional Court.

At this time in America's own struggle to define its future path in the digital age, the principle of law laid down in the German decision is a precedent that surely should be considered in deciding the instant 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, this 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 German Republic's most earnest efforts to remediate itself and protect its future, following its climatic moral and spiritual failures suffered during the 20th century. Indeed, Germany's hard-learned 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 its commitment to constitutional governance carried out in decency and good order.

The German equivalent to the Supreme Court of the United States fulfilled the mandate of the German Constitution: to secure the Freedom of its voters, voters must have true Public Elections, including publicly observed vote counts, or voters lose the guaranteed Right to vote with the correlative Right to know their votes are counted honestly and accurately.

As will be evident from review of the German Case, the Court is given an opportunity to see the full application of America's Constitutional principles applied in another Constitutional Republic, 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 Voters 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 Voters Schulz and Liggett, regarding the significant threats to democracy posed by use of the mechanical lever and electronic Dominion and ES&S voting systems used in Voters' polling centers and challenged here.

Voters 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 Voters), 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] (Dkt 374-1, Voters' Opposition To Motion To Dismiss, Appendix A). See A 192-215.

V. CLAIMS ARE NOT MOOT

Judge Kahn held, "Upon reviewing the Amended Complaint, the Court agrees with Defendants that Plaintiffs failed to allege that they intended to vote in future elections; indeed, there is no mention of future elections beyond 2008 until

[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 Dkt 374-1, Plaintiffs' Brief In Opposition To Motion To Dismiss, Appendix C).

the final paragraph requesting injunctive relief relating to the 2008 elections 'and beyond.' See Am. Compl. ¶ 268. The Court does not consider this final paragraph sufficient to establish a direct relationship between Plaintiffs and all future elections that occurred and will occur after 2008, and which are not referenced anywhere but the final paragraph of the Amended Complaint." (Internal citations and quotations omitted). (Dkt 383, Order by Judge Kahn, page 16). See A 22.

Voters' claims were clearly directed at the 2008 election cycle **and beyond**, not only as evidenced by the relief requested in their Amended Complaint, where Voters' request was for "the 2008 election cycle and beyond," but also by the very content of their Complaint, Amended Complaint, Discovery Requests, Confidentiality Order, motions and so forth, from the very beginning of the case. All was clearly directed to redress the (continuing) violations of the public nature of elections and voting Rights as caused by voting systems, (both mechanical and electronic) in use by Voters and proposed to be put into use for future elections by BOE in Voters' State. The Court is asked to note the Complaint was filed by plaintiffs in all 50 states against defendants in all 50 states. The BOE was unique in 2008, having mechanical voting systems in use but actively intent on certifying electronic voting systems, which it finally completed in Dec. 2009. See A 189-190.

Voters' injuries in 2008, has recurred each year thereafter and will continue so without relief from the Court.

Voter registration in New York State is not an annual affair and has no fixed registration period. Voters Schulz and Liggett have been registered to vote in the 2008 elections **and beyond**. They have decades of life to live. Requesting relief for 2008 **and beyond** is another way of saying they intended to vote in 2008 and in all elections thereafter and have the Right to know their votes will be accurately counted in the open, without requiring special expert knowledge at any BOE governed public election in 2008 and beyond. The constitutional violations and harm Voters expected and experienced in 2008 were expected to be repeated in 2009, 2010 and 2011 and now in 2012 and beyond. Those violations and that harm will recur for Voters in **every future election** unless the requested relief is granted.

To dismiss this four and one-half year old case regarding a vital constitutional question on the ground of mootness would be manifestly unjust.

Judge Kahn also held, "The Court finds Plaintiffs' claims relating to the lever voting machines are not sufficiently capable of repetition to constitute a live case or controversy at this point." (Dkt 383, Order by J. Kahn, pg16). See A 22.

In fact, unless prohibited from doing so, the BOE would likely attempt to reintroduce the lever voting machines in the wake of a Court Order to eliminate the electronic voting systems, resulting in the same constitutional injuries. In addition, on information and belief, the mechanical lever machines continue in use in Voters' precincts in such special elections as Village, School and Library elections.

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

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

On August 12th and 17th 2009, the BOE received copies of fully executed New York State Voter Registration Forms for Voters Liggett and Schulz, respectively. The BOE 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." (Dkt 374-1, Voters' Brief In Opposition To Motion To Dismiss, Appendix G). See A 185.

Voters' breach of contract claim was brought as a constitutional challenge under Article I, Section 10 of the Constitution for the United States. (Dkt 21, Am. Complaint, second cause of action, page 44). See A 72-74.

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

Formally registering with the BOE to vote, by signing BOE's Voter Registration Forms, signifies a contract between BOE and Voters. Voters agreed to be listed as a registered voter and a member of a political party with eligibility to

vote in that political party's primary elections and in all general elections administered by BOE. The BOE (and the political party, including the BOE Commissioners who are all chosen by their respective parties), implicitly agreed:

- Voters have the Right to vote in all federal elections; and
- Such elections will be administered in strict compliance with the Letter and Spirit of the Rule of Law, from the U.S. Constitution on down; and
- Voters have the Right to cast a vote and the Right to have their votes counted honestly and accurately.

In law, an agreement is 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.

A contract is based upon an agreement. An agreement arose when the BOE, made an offer to Voters Schulz and Liggett and Voters Schulz and Liggett accepted.

Article 1, Section 10 of the U.S. Constitution reads, "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 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).

The execution of the Voter Registration Cards by Voters was the execution of contracts between Voters and the BOE.

The BOE has breached Voters' contract rights by forcing Voters to use an electronic voting system whose essential steps are not open and subject to public monitoring and examination, thereby depriving Voters of their Right to know, without special expert knowledge, that their votes are being honestly and accurately counted.

CONCLUSION

Voters seek a ruling by this Court:

a) To reverse the District Court's Order that dismissed this case for lack of standing, which Order, by definition means votes cast by Voters in the 2012 primary and general elections, and beyond, will continue to be recorded, counted and tabulated in secret, a violation of the principle of public elections and their Voting Rights that emerge from Article 1, Section 2, cl. 1, Article 1,

Section 4, cl. 1 and the Seventeenth Amendment to the Constitution for the United States of America, and;

b) To permanently enjoin and prohibit the use of the Dominion and ES&S electronic voting systems, and all such similarly violative systems by the BOE in all federal primary, general and special elections in 2012 and beyond, and;

c) To reverse the District Court's Confidentiality Order of 6/4/10, and;

d) To direct the BOE to provide Voters Schulz and Liggett with non-confidential voting systems, for all federal primary, general and special elections to be held in 2012 and beyond, that are fully open to public examination and transparent at all essential steps in the voting process following the private casting of their votes, including, but not necessarily limited to, the recording and counting of their votes at their polling stations, and the public posting, at their polling stations, of the results of that count, and;

e) To Direct the BOE to require Voters' Polling Centers to publicly post the Centers' vote totals in hard copy and on their websites, immediately following the close of the voting period and tabulation of the vote - that is, before the Polling Centers forward those totals to any other centralized vote tabulation center, public or private, and;

f) To direct the BOE to require Voters' Counties to publicly post Voters' precinct vote totals on their websites, as part of a precinct-by-precinct list, immediately

following the Counties' receipt of the vote totals from the polling centers/precincts in the Counties, that is, before the Counties forward those totals to any other centralized vote tabulation center, public or private, and;

g) For such other and further relief as the Court deems just and proper.

February 10, 2012

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CERTIFICATE OF COMPLIANCE

This Brief contains 13,829 words. Therefore, this Brief complies with the type-volume limitation of Rule 32(a)(7)(B).

APPENDIX A

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Documents: in date order