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## **Appellate Division, Third Department Matter, of Schulz v. Pataki**

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Appellate Division, Third Department Matter, of Schulz v. Pataki

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**SUPREME COURT, APPELLATE DIVISION  
THIRD, DEPARTMENT**

Matter of Schulz v. Pataki<sup>1</sup>  
(decided May 18, 2000)

Petitioner, Robert L. Schulz, appealed a judgment entered on February 24, 1999<sup>2</sup> dismissing his application, and sought a declaration that the actions of the respondent, Governor George E. Pataki, in the distribution of complimentary tickets to Whiteface Mountain and the New York State Fair were unconstitutional.<sup>3</sup> Schulz commenced a combined proceeding and declaratory judgment action<sup>4</sup> pursuant to CPLR article 78<sup>5</sup> and State Finance Law article 7A<sup>6</sup> against Governor George E. Pataki and the Friends of Pataki (hereinafter “Friends”).<sup>7</sup> Schulz alleged the following in his petition: 1) that the Governor’s actions in the matter at bar exceeded his authority and were ultra vires;<sup>8</sup> 2) that the Governor’s actions violated petitioner’s federal<sup>9</sup> and state constitutional right to a free election;<sup>10</sup> 3) that the complimentary tickets constituted “illegal gifts,”<sup>11</sup> in violation of the New York Constitution;<sup>12</sup> and

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<sup>1</sup> 708 N.Y.S.2d 177 (2000).

<sup>2</sup> *Schultz*, 708 N.Y.S.2d at 178.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* “Friends of Pataki” are a “private political campaign committee organized to assist the Governor in his 1998 bid for reelection.” *Id.*

<sup>8</sup> *Schultz*, 708 N.Y.S.2d at 178.

<sup>9</sup> U.S. CONST. amend. I states in pertinent part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” *Id.*

<sup>10</sup> N.Y. CONST. art. I, § 9 states in pertinent part: “No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof.” *Id.*

<sup>11</sup> *Schultz*, 708 N.Y.S.2d at 178.

<sup>12</sup> N.Y. CONST. art. VII, § 8 states in pertinent part:

The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking, but the foregoing provisions shall not apply to any fund or property

4) that the complimentary tickets and the mailing and the printing that followed constituted an “expenditure of State funds, without appropriation,” in violation of the New York Constitution, article VII, § 7.<sup>13</sup> Schulz requested an order directing the Governor and the Friends of Pataki to reimburse the State treasury for the value of the gifts.<sup>14</sup> Thereafter, respondents made a motion for summary judgment, which was granted by the lower court.<sup>15</sup> The plaintiff appealed and the Appellate Court affirmed the lower court’s decision.<sup>16</sup>

The facts that precipitated Schulz’s claims against the respondents stemmed from a devastating storm, which struck northern New York on January 7, 1998.<sup>17</sup> Soon after, a State Disaster Emergency was declared.<sup>18</sup> Thousands of volunteers<sup>19</sup> assisted the residents of that area with “debris removal, traffic control, road clearance, security patrol, food and water distribution.”<sup>20</sup> In the summer following the incapacitating storm and the relief effort, Governor Pataki sent letters to the volunteers offering his thanks and inviting the volunteers and their families to attend a picnic in their honor.<sup>21</sup> In addition to honoring the volunteers with a picnic, the Governor included two

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now held or which may hereafter be held by the state for educational, mental health or mental retardation purposes.

*Id.*

<sup>13</sup> N.Y. CONST. art. VII, § 7 states in pertinent part:

No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation or continuing or reviving an appropriation, shall distinctly sufficient for such law to refer to any other law to fix such sum.

*Id.*

<sup>14</sup> *Schultz*, 708 N.Y.S.2d at 178.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, at 180.

<sup>17</sup> *Id.* at 178.

<sup>18</sup> *Id.*

<sup>19</sup> *Schultz*, 708 N.Y.S. 2d at 178. Approximately 19,617 individuals volunteered in the relief efforts. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* The picnics were held in the City of Watertown, Jefferson County, and the City of Plattsburgh, Clinton County, on August 22, 1998. *Id.*

complimentary ski lift tickets to Whiteface Mountain Ski Center and two free admission tickets to the State Fair.<sup>22</sup> Thereafter, Schulz commenced this action for a declaration that the respondents' actions were unconstitutional. Schulz sought to hold the "Friends" financially responsible for the Governor's alleged actions.<sup>23</sup> The Appellate Court found that the Supreme Court properly dismissed the claim against "Friends."<sup>24</sup>

In addition, Schulz argued that the Governor's distribution of letters and complimentary tickets was politically motivated, in light of the upcoming election, and violated both his federal and state constitutional right to a free election.<sup>25</sup> The court disagreed with Schulz's arguments and failed to find any interference with the right to free election or any other improper purpose of promoting behind the letters.<sup>26</sup> On the contrary, the court found the letters demonstrative of the Governor's sincere thanks and appreciation for the assistance provided by the volunteers during an especially difficult time for the residents of the northern region of New York.<sup>27</sup> Moreover, the court disagreed with Schulz's contention that the complimentary tickets, free food, T-shirts, or entertainment provided at the picnics constituted unconstitutional gifts,<sup>28</sup> under Article VII, § 8(1)<sup>29</sup> of the New York Constitution. There was, in fact, no showing that any of the above mentioned articles were obtained with public funds. On the contrary, the complimentary lift tickets to Whiteface Mountain Ski Center were provided by the Olympic Regional Development Authority (hereinafter "ORDA").<sup>30</sup> The court noted that this was not the first

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* "Friends' deputy campaign manager averred that it had no involvement in the activities which are the subject of the petition/complaint." *Id.*

<sup>24</sup> *Schultz*, 708 N.Y.S.2d at 178. The court found that petitioner had "failed to adduce adequate evidence" proving that Friends were in some way involved in the allegedly improper activities complained of in the petition. *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 179.

<sup>28</sup> *Id.*

<sup>29</sup> N.Y. CONST. art.VII, § 8(1).

<sup>30</sup> *Schultz*; 708 N.Y.S.2d at 179. ORDA is "a public benefit corporation and independent entity which obtains its funding from the Legislature and not from the State treasury or State property." *Id.*

time ORDA had furnished complimentary tickets to the public.<sup>31</sup> In fact, the court noted that ORDA occasionally provided free tickets to promote tourism,<sup>32</sup> and that this occurred without any cost to the State.<sup>33</sup> Similarly, the court found the free food, T-shirts, free entertainment, and free admission to the State fair did not constitute unconstitutional gifts.<sup>34</sup>

Nor did the court find the expenses associated with the printing and mailing of the letters and tickets in any way violative of the New York Constitution.<sup>35</sup> The court noted that the complimentary tickets did not require any “expenditure of monies that derived”<sup>36</sup> from the State treasury.<sup>37</sup> The funds expended for the mailing and printing, as well, did not constitute “unconstitutional gifts.”<sup>38</sup> The court found that under the circumstances presented at the time, “this was a reasonable expenditure consistent with the goal of disaster preparedness.”<sup>39</sup>

The court found Schulz’s claims, that the Governor’s distribution of thank you letters was politically motivated and violative of his right to a free election under both the Federal and State Constitutions, unconvincing.<sup>40</sup> The court dealt with each cause of action separately. It first addressed Schulz’s cause of action alleging a violation of his right to a free election under the First Amendment of the Federal Constitution and New York State

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* The court found that “similarly, the entity which operates the State Fair, a part of the Department of Agriculture and Markets, has broad authority to regulate admission and has in the past provided free admission to certain patrons for the purpose of promoting attendance at the fair.” *Id.*

<sup>35</sup> *Schultz*, 708 N.Y.S.2d at 179. The court held that nor the furnishings of the complimentary tickets “nor the printing and mailing expenses associated therewith violated N.Y. Constitution, article VII, § 7.” *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* “The majority of the printing and mailing expenses were financed by the Department of Economic Development from appropriations by the Legislature for business development and the promotion of tourism.” *Id.*

<sup>38</sup> *Id.* The court held that “since the mailings fell within the broad purpose of such appropriation, the disbursement was authorized.” *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Schultz*, 708 N.Y.S.2d at 178.

Constitution, Article I, § 9.<sup>41</sup> The court concluded that petitioner's arguments were unpersuasive. Following the lead of *Schulz v. New York*,<sup>42</sup> *Schulz v. McCall*,<sup>43</sup> and *Phillips v. Maurer*,<sup>44</sup> the court adopted a test for establishing the constitutional deprivation. In order to show a constitutional deprivation of one's right to a free election, it must be shown that "government funds were expended for the purpose of promoting a particular political outcome or partisan cause in an election."<sup>45</sup> The court held that the letters revealed no such purpose or intent,<sup>46</sup> but instead evinced a genuine intent to thank the many volunteers who had provided their time and assistance during an emergency situation.<sup>47</sup>

In *Phillips v. Maurer*,<sup>48</sup> the Court of Appeals set forth the constitutional guidelines for permissibility of use of public funds for election activities and dissemination of election literature. The case involved use of public funds by a school district's board of education to advocate support of a budget and bond issue proposal. The Court held that public funds may be expended "[t]o educate, to inform, to advocate or to promote voting on any issue may be undertaken, provided it is not to persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a State agency of any issue, worthy as it may be."<sup>49</sup> Applying the foregoing standard, the Court found the publication went beyond what was "‘reasonably necessary’ to educate the public."<sup>50</sup>

Similarly, in *Schulz v. New York*,<sup>51</sup> the Court of Appeals, applying the same standard, held that the publication persuaded and conveyed favoritism, partisanship, partiality and disapproval by a State agency of an issue<sup>52</sup> and was, thus, unconstitutional. In this case, citizen-taxpayers brought suit alleging that various

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<sup>41</sup> *Id.*

<sup>42</sup> 86 N.Y.2d 225, 630 N.Y.S.2d 978, 654 N.E.2d 1226 (1995).

<sup>43</sup> 632 N.Y.S.2d 883 (1995).

<sup>44</sup> 67 N.Y.2d 672, 499 N.Y.S.2d 675, 490 N.E.2d 542 (1986).

<sup>45</sup> *Schulz*, 708 N.Y.S.2d at 178.

<sup>46</sup> *Id.* at 179.

<sup>47</sup> *Id.*

<sup>48</sup> *Phillips*, 67 N.Y.2d at 672.

<sup>49</sup> *Id.* at 673.

<sup>50</sup> *Id.*

<sup>51</sup> *Schultz*, 86 N.Y.2d at 225.

<sup>52</sup> *Id.*

actions by State and local governmental officials “constituted the use of public funds for private purposes in violation of Article VII, § 8(1) and Article VIII, § 1 of the New York Constitution.”<sup>53</sup> Plaintiffs alleged that in 1992, at the direction of then Governor Mario Cuomo and Commissioner Tese, the State Office of Economic Development printed and distributed by mail at the expense of the State a newsletter “to serve the individual and private purposes of Governor Cuomo, the New York Democratic State Committee and Mario Cuomo’s campaign committee known as Friends of Mario M. Cuomo Committee, Inc.”<sup>54</sup>

Applying the same standard and with a similar set of facts, the Court of Appeals in *Schulz v. McCall*<sup>55</sup> held that in the absence of an expenditure of public funds “a State official’s private expression of his or her partisan position on a public issue does not violate New York Constitution, Article VII, § 8.”<sup>56</sup> Once public funds are expended for private use, the Court held, “the mere existence of some factual information, ‘that, standing alone, would be considered a proper attempt to educate the public’ will not rectify the constitutional violation.”<sup>57</sup>

The court in the instant case next addressed Schulz’s second allegation that the tickets, free food, T-shirts, and entertainment constituted free gifts. The court, pursuant to Article VII, § 8(1) of the New York Constitution, again found petitioner’s arguments unpersuasive. The court concluded that Schulz failed to prove that the tickets, free food, T-shirts, and entertainment were obtained with public funds.<sup>58</sup> The court then confronted the issue of whether there had been a violation of Article VII, § 7 of the New York Constitution,<sup>59</sup> with the printing and mailing expenses associated with sending the letters and whether such constituted “an expenditure of State funds without appropriation.”<sup>60</sup> The court found that, under the circumstances, the expenditures made were

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<sup>53</sup> *Id.* at 229.

<sup>54</sup> *Id.* at 233.

<sup>55</sup> *Schultz*, 632 N.Y.S.2d at 883.

<sup>56</sup> *Id.* at 884.

<sup>57</sup> *Id.* at 885.

<sup>58</sup> *Schulz*, 708 N.Y.S.2d at 179.

<sup>59</sup> *Id.* This provision “requires that there be a specific legislative appropriation each time that moneys in the State Treasury are spent.” *Id.*

<sup>60</sup> *Id.* at 178.



reasonable and “consistent with the goal of disaster preparedness,”<sup>61</sup> and that there had been no unconstitutional appropriation of public funds. It concluded by holding that Schulz’s constitutional rights had not been violated. The Governor’s actions, therefore, passed both federal and state constitutional muster.

Although Schulz’s contentions were impressive and well articulated, the court was not convinced and found his arguments faulty and unpersuasive.<sup>62</sup> Both federal and state constitutional claims were rejected. The court did not see much of a difference between the federal and the state constitutional claims and did not feel the need to elaborate on the matter. A look at the pertinent provisions of each Constitution shows that these provisions mirror one another. New York adopted the First Amendment of the Federal Constitution when granting its citizens the right to a free election. New York also grants its citizens the right to peaceably “assemble”<sup>63</sup> and “petition the government, or any department thereof.”<sup>64</sup> Similarly, the Federal Constitution provides all citizens of the United States with the right to peaceably “assemble and to petition the Government for redress.”<sup>65</sup> Although States are not required to adopt the Federal Constitution, they may choose to do so. New York has chosen to give its citizens the same rights bestowed by the founding fathers upon the citizens of the United States.

*Daniela Licata*

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<sup>61</sup> *Id.* at 179.

<sup>62</sup> *Id.* at 180.

<sup>63</sup> N.Y. CONST. art. I, § 9.

<sup>64</sup> *Id.*

<sup>65</sup> U.S. CONST. amend. I.

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