

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

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| ROBERT SCHULZ, <i>et al.</i> , |) | |
| |) | Case No. 1:07-cv-0943 LEK/DRH |
| Plaintiffs, |) | |
| |) | MEMORANDUM IN SUPPORT OF |
| vs. |) | IDAHO DEFENDANTS’ MOTION TO |
| |) | DISMISS |
| STATE OF NEW YORK, <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |

Defendants State of Idaho and Ben Ysursa, Secretary of State of the State of Idaho (hereinafter “Idaho Defendants”), by and through their counsel of record, the Office of the Attorney General of the State of Idaho, hereby submit this Memorandum in Support of Idaho Defendants’ Motion to Dismiss. Idaho Defendants respectfully request that this Court dismiss Plaintiffs’ claims against them as a matter of law, based upon the following grounds:

- 1) This Court lacks personal jurisdiction over Idaho Defendants;
- 2) The Eleventh Amendment bars Plaintiffs’ claims against the State of Idaho; and
- 3) This Court is not the proper venue for Plaintiffs’ claims against Idaho Defendants.

BACKGROUND

Plaintiffs in this matter are individual voters who have raised claims under 42 U.S.C. § 1983, against all fifty states, as well as individual election officials from each

state. (Amended Verified Complaint (“Complaint”), ¶¶ 1, 13-209.) Among the Defendants are the State of Idaho and its Secretary of State, Ben Ysursa (“Idaho Defendants”). (Id. at ¶ 172.)

In their Complaint, Plaintiffs assert that:

[f]ailure to provide the People with a continuous public viewing . . . of all ballots as contained in the ballot box or boxes during the voting period, and a manual allocation and count of all ballots in full public view promptly as the voting period ends, at each voting station, before those ballots are ever removed from public view violates the voting rights of Plaintiffs.

(Id. at ¶ 228.) Specifically, Plaintiffs allege that utilization of computers to tally votes during elections violates their rights. (Id. at ¶¶ 217-27.) Plaintiffs additionally claim that this use of computers in elections constitutes a violation of their “contract rights,” asserting that voter registration represents a contractual agreement between the State and the registering voter, with the State allegedly agreeing “that the votes will be counted accurately.” (Id. at ¶ 252.)

The Amended Complaint does not allege any contacts, related to elections or otherwise, between Idaho Defendants and the State of New York. Nor does the Amended Complaint allege any acts by Idaho Defendants that occurred within the State of New York or that violated the rights of any New York resident in any way.

ARGUMENT AND JOINDER IN ARGUMENTS OF OTHER STATES

Idaho Defendants hereby join in the arguments raised by their co-defendants in the Motions to Dismiss that have already been submitted to this Court. In order to fully preserve their arguments, Idaho Defendants briefly set forth the grounds for their Motion

to Dismiss below. However, Idaho Defendants incorporate the arguments already advanced by other states in their Motions to Dismiss, as specifically cited below.

A. This Court Lacks Personal Jurisdiction Over Idaho Defendants

“When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant.” Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez, 171 F.3d 779, 784 (2d Cir. 1999). “In a federal question case where a defendant resides outside the forum state, a federal court applies the forum state’s personal jurisdiction rules if the federal statute does not specifically provide for national service of process.” PDK Labs, Inc. v. Friedlander, 103 F.3d 1105, 1108 (2d Cir. 1997). The personal jurisdiction rules of the forum state of New York therefore govern this matter as to this Court’s jurisdiction over Idaho Defendants. Id.

New York’s jurisdictional rules provide that a non-domiciliary defendant must commit an act in the State of New York that gives rise to the Court’s jurisdiction. NY CPLR § 302(a). Additionally, due process prevents the exercise of personal jurisdiction over any non-resident defendant unless “there exist ‘minimum contacts’ between the defendant and the forum State.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980). Plaintiffs have failed to allege any facts sufficient to confer personal jurisdiction over Idaho Defendants under either New York law or the Due Process Clause.

With regard to personal jurisdiction, rather than duplicating arguments proffered by other states, Idaho Defendants hereby join in and incorporate by reference the arguments advanced in the following memoranda:

- Memorandum in Support of **Oregon** Defendants' Motion to Dismiss (Dkt. No. 22-2), pp. 2-7;
- State of **South Carolina**'s Memorandum in Support of Motion to Dismiss (Dkt. No. 23-2), pp. 3-6;
- **Texas** Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(2) With Order (Dkt. No. 36), pp. 2-7;
- State of **North Dakota**'s Memorandum in Support of Motion to Dismiss (Dkt. No. 39-2), pp. 2-8;
- Memorandum in Support of **Wyoming** Defendants' Motion to Dismiss Amended Verified Complaint (Dkt. No. 95-2), pp. 3-8; and
- Memorandum of Points and Authorities in Support of the **California** Defendants' Motion to Dismiss (Dkt. No. 140-2), pp. 3-9.

B. Plaintiffs' Claims Against the State of Idaho are Barred by the Eleventh Amendment

The Eleventh Amendment to the United States Constitution bars claims against states in federal court, including claims for injunctive relief, such as those at issue in this litigation. See Pennhurst State Sch. & Hosp. v. Halderman, 456 U.S. 89, 100 (1984).

The United States Supreme Court has additionally held “that a State is not a ‘person’ within the meaning of § 1983.” Will v. Michigan Dep’t of State Police, 491 U.S. 58, 65-66, 71 (1989). “Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties.” Id. at 66 (emphasis added). Accordingly, Plaintiffs cannot raise their Section 1983 claims against

Defendant the State of Idaho, and such claims must be dismissed as a matter of law. See id. at 71; Jones v. New York Div. of Military & Naval Affairs, 166 F.3d 45, 49 (2d Cir. 1999).

Idaho Defendants hereby join in and incorporate by reference the arguments regarding Eleventh Amendment immunity advanced in the following memoranda:

- Memorandum of Law submitted by **Michigan** Defendants (Dkt. No. 70-2), pp. 20-22) and
- Brief in Support of Motion of **Wisconsin** Defendants to Dismiss Amended Complaint (Dkt. No. 162-2), pp. 2-5

C. This Court is Not the Proper Venue for Suit Against Idaho Defendants

In addition to the above, this Court is not the proper venue for Plaintiffs' suit against Idaho Defendants. Plaintiffs have failed to demonstrate that they meet the requirements for venue set forth under 28 U.S.C. § 1391(b):

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in

- (1) a judicial district where any defendant resides, if all defendants reside in the same State,
- (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
- (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

Subsection (1) does not apply because the individual defendants reside in all fifty states and the States, if they are defendants, do not "reside" anywhere. Subsection (2)

also does not apply to Idaho Defendants, as no part of the underlying events allegedly giving rise to Plaintiffs' claims against Idaho Defendants occurred or will occur in New York, and there is no Idaho property subject to the action that is situated in New York. Finally, New York is not the proper venue under Subsection (3) because Plaintiffs cannot demonstrate that "there is no district in which the action may otherwise be brought."¹
Id.

Idaho Defendants hereby join in and incorporate by reference the arguments regarding improper venue set forth in the following memoranda:

- Memorandum in Support of **New Hampshire** Defendants' Motion to Dismiss (Dkt. No. 24-2), pp. 4-6;
- State of **North Dakota**'s Memorandum in Support of Motion to Dismiss (Dkt. No. 39-2), pp. 8-9;
- Memorandum in Support of **Wyoming** Defendants' Motion to Dismiss Amended Verified Complaint (Dkt. No. 95-2), pp. 9-11; and
- Memorandum of Law submitted by **Michigan** Defendants (Dkt. No. 70-2), pp. 18-20.

CONCLUSION

For the foregoing reasons, as well as the arguments incorporated by reference to the memoranda cited above, Idaho Defendants respectfully request that this Court dismiss Plaintiffs' claims against them as a matter of law, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

¹ The suit against the Idaho Defendants could be brought in Idaho.

DATED this 17th day of December, 2007.

/s/ Michael S. Gilmore

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 2007, I electronically filed the foregoing MEMORANDUM IN SUPPORT OF IDAHO DEFENDANTS' MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system. I also hereby certify that I have mailed by United States Postal Service the foregoing document(s) to the following non-CM/ECF Registered Participant(s).

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