

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

ROBERT L. SCHULZ, et al.,)

Plaintiffs,)

v.)

07-943-LEK/DRH

STATE OF NEW YORK,)

Neil Kelleher, Douglas Kellner,)

Evelyn Aquilaand, Helena Moses)

Donahue, State Board of Elections,)

et al.,)

Defendants.)

STATE OF GEORGA AND KAREN HANDEL'S
BRIEF IN SUPPORT OF THEIR
MOTION TO DISMISS AMENDED COMPLAINT
BY SPECIAL APPEARANCE

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07-943-LEK/DRH

**STATE OF GEORGIA
AND KAREN HANDEL’S
NOTICE OF MOTION**

**STATE OF GEORGA AND KAREN HANDEL’S
BRIEF IN SUPPORT OF THEIR
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BY SPECIAL APPEARANCE**

COME NOW the State of Georgia and Karen Handel, Secretary of State (hereinafter the “Georgia Defendants”), by and through counsel, the Office of the Attorney General for the State of Georgia, and hereby move to dismiss Plaintiff’s Amended Complaint on the grounds that (1) pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, this Court does not have personal jurisdiction over the Georgia Defendants; (2) pursuant to Rule 12(b)(3), this Court constitutes improper venue as to the Georgia Defendants; (3) pursuant to the Eleventh Amendment of the Constitution of the United States, the State of Georgia is immune from suit; and, (4) pursuant to Rule 12(b)(6) of the Federal Rules of Civil

Procedure, Plaintiffs fail to state a claim upon which relief may be granted, as the State Defendants do not have the statutory authority to require the use of voting machines. In further support of their Motion, the Georgia Defendants show the Court as follows:

I. FACTUAL BACKGROUND

Plaintiffs filed their Amended Complaint alleging three causes of action against all Defendants, including the Georgia Defendants. The allegations against each of the Defendants relate to Plaintiff's objection to each State's use of voting machines in elections held in the States.

Plaintiffs request this Court permanently enjoin the Defendants from conducting elections (1) which are not "open, verifiable, transparent, machine-free, computer-free" (Plaintiff's Amended Complaint at ¶ 268(a), Doc. No. 21); which do not "rely exclusively on paper ballots, hand marked and hand-counted" (*Id.* at ¶ 268(b)); and, (3) which do not keep paper ballots in "full public view until the results of the hand counting is publicly announced at that vote station." (*Id.* at ¶ 268(c)).

II. ARGUMENT

A. Plaintiff Fails to State a Claim Upon Which Relief May Be Granted Against the Georgia Defendants, as the Georgia Defendants do not have statutory to require the use of voting machines by municipalities in the State of Georgia.

By operation of statute, each municipality may authorize and direct the use of voting machines, either by the majority vote of the governing authority of the municipality or based upon a referendum submitted to the electors of the municipality. (O.C.G.A. §§ 21-2-320 and 21-2-321 (2007)). Because the Georgia Defendants do not have the statutory authority to require the use of voting machines or paper ballots, Plaintiffs have inappropriately named the State of Georgia and Karen Handel, the Secretary of State, as Defendants. Accordingly, Plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. See Chapman v. New York State Div. for Youth, 2005 WL 2407548 at *4 (2nd Cir. 2005) (citing Conley v. Gibson, 355 U.S. at 45-46 (1957)).

B. This Court Lacks Personal Jurisdiction Over the Georgia Defendants (adopting and incorporating by reference those arguments presented in the Motions to Dismiss submitted by the State of Oregon (Doc. No. 22) and South Carolina (Doc. No. 23).

The Georgia Defendants adopt and incorporate by reference those arguments presented in the Motions to Dismiss submitted by the State of Oregon (Doc. No. 22) and South Carolina (Doc. No. 23). In addition, the Georgia Defendants would further show the Court that the Plaintiffs fail to allege any facts specifically

relating to the activities of the Georgia Defendants in New York State. (See, *generally*, Doc. 21). As this Court lacks personal jurisdiction over the Georgia Defendants, Plaintiffs' Amended Complaint should be dismissed.

C. This Court is the Improper Venue for Plaintiff's Claims Against the Georgia Defendants (adopting and incorporating by reference those arguments presented in the Motions to Dismiss submitted by the State of South Carolina (Doc. No. 23)).

The Georgia Defendants adopt and incorporate by reference those arguments presented in the Motion to Dismiss submitted by the State of South Carolina (Doc. No. 23). In addition, the Georgia Defendants would further show the Court that the Plaintiffs fail to allege any facts specifically relating to the activities of the Georgia Defendants, or any of the Defendants, in the Northern District of New York State. (See, *generally*, Doc. 21). As this Court is the improper venue for this action, Plaintiffs' Amended Complaint should be dismissed.

D. The State of Georgia is Immune from this Action by Plaintiffs by Operation of the Eleventh Amendment (adopting and incorporating by reference those arguments presented in the Motion to Dismiss submitted by the States of Oregon (Doc. No. 22) and South Carolina (Doc. No. 23)).

In this case, Plaintiffs have named the State of Georgia as a Defendant. Because the State of Georgia is immune from suit under the Eleventh Amendment

of the Constitution of the United States, the claims against the State of Georgia should be dismissed.

Defendants adopt and incorporate by reference those arguments presented in the Motion to Dismiss submitted by the States of Oregon (Doc. No. 22) and South Carolina (Doc. No. 23). As the State of Georgia is immune from suit, Plaintiffs' Amended Complaint and the allegations against the State of Georgia should be dismissed.

III. CONCLUSION

For the foregoing reasons, the Georgia Defendants respectfully request this Honorable Court:

- (1) dismiss the Plaintiffs' Amended Complaint against them;
- (2) tax all costs against Plaintiffs;
- (3) require nothing further from the Georgia Defendants; and,
- (4) grant such further relief as this Court deems appropriate.

Respectfully submitted this 17th day of December, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2007, I have filed a true and correct copy of the foregoing **DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS BY SPECIAL APPEARANCE** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the Defendants, and I hereby certify that on December 17, 2007, I mailed by United States Postal Service, the document to the following non-registered participant per the Court's October 30, 2007 Order:

Robert L. Schulz
2458 Ridge Road
Queensburg, New York 12804
(Lead Plaintiff)

This 17th day of December, 2007.

\s\ Holly Loy Smith
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