

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED

NOV 26 2007

LAWRENCE K. BAERMAN, CLERK
ALBANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L SCHULZ (New York); BRIAN L.
ROBERTS (Alabama); JEAN C. ALLEN (Alabama);
CHARLES D. ROBERTS (Alabama); BRENT COLE
SR. (Alaska); DUANE F. ANDRESS (Alaska); HENRY Case No. 1:07-CV-0943 LEK/DRH
AYRE (Alaska); DAVID JOHNSON (Arizona); STUART
KEVIN COLE (Arizona); MARK J. YANNONE (Arizona);
TOM MAYFIELD (Arkansas); LYNNE BAKER (Arkansas);
GLENDA MIDDLEBROOK (Arkansas); SUSAN MARIE WEBER
(California); MATTHEW PITAGORA (California); MYCHAL
R. SCHILLACI (California); LORRAINE LUNNON (Colorado);
LOTUS (Colorado); BETTY WIES (Colorado); WALTER B.
REDDY III (Connecticut); CHARLES PRINCE (Connecticut);
HEATHER WILSON (Connecticut); STEVEN BACHMAN
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MONTGOMERY (Florida); JANINE L. DEAN WINTER
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JOHN HANSVICK (Minnesota); MARK G.
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Plaintiffs

-against-

STATE OF NEW YORK, Neil Kelleher, Douglas Kellner, Evelyn Aquila and Helena Moses Donahue, State Board of Elections; STATE OF ALABAMA, Beth Chapman, Secretary of State and Chief Election Official; STATE OF ALASKA, Sean Parnell, Lt. Governor and Chief Election Official; STATE OF ARIZONA, Jan Brewer, Secretary of State and Chief Election Official; STATE OF ARKANSAS, Charlie Daniels, Secretary of State and Chief Election Official; STATE OF CALIFORNIA, Debra Bowen, Secretary of State and Chief Election Official; STATE OF COLORADO, Mike Coffman, Secretary of State and Chief Election Official; STATE OF CONNECTICUT, Susan Bysiewicz, Secretary of State and Chief Election Official; STATE OF DELAWARE, Elaine Manlove, Commissioner of Elections; STATE OF FLORIDA, Kurt Browning, Secretary of State and Chief Election Official; STATE OF GEORGIA, Karen Handel, Secretary of State and Chief Election Official; STATE OF HAWAII, Rex M. Quidilla, Chief Election Officer; STATE OF IDAHO, Ben Ysursa, Secretary of State and Chief Election Official; STATE OF ILLINOIS, Albert Porter, Bryan Schneider, Jesse Smart, Wanda Rednour, Robert Walters, Patrick Brady, William McGuffage and John Keith, State Board of Elections; STATE OF INDIANA, Todd Rokita, Secretary of State and Chief Election Official; STATE OF IOWA, Michael Mauro, Secretary of State and Chief Election Official; STATE OF KANSAS, Ron Thornburgh, Secretary of State and Chief Election Official; STATE OF KENTUCKY, Trey Grayson, Secretary of State and Chief Election Official; STATE OF LOUISIANA, Jay Dardenne, Secretary of State and Chief Election Official; STATE OF MAINE, Matthew Dunlap, Secretary of State and Chief Election Official;

STATE OF MARYLAND, Robert Walker, Bobbie Mack, Andrew Jezic, David McManus and Charles Thomann, State Board of Elections; STATE OF MASSACHUSETTS, William Francis Galvin, Secretary of the Commonwealth and Chief Election Official; STATE OF MICHIGAN, Tern Lynn Land, Secretary of State and Chief Election Official; STATE OF MINNESOTA, Mark Ritchie, Secretary of State and Chief Election Official; STATE OF MISSISSIPPI, Eric Clark, Secretary of State and Chief Election Official; STATE OF MISSOURI, Robin Carnahan, Secretary of State and Chief Election Official; STATE OF MONTANA, Brad Johnson, Secretary of State and Chief Election Official; STATE OF NEBRASKA, John Gale, Secretary of State and Chief Election Official; STATE OF NEVADA, Ross Miller, Secretary of State and Chief Election Official; STATE OF NEW HAMPSHIRE, William Gardner, Secretary of State and Chief Election Official; STATE OF NEW JERSEY, Anne Milgram, Attorney General and Chief Election Official; STATE OF NEW MEXICO, Mary Herrera, Secretary of State and Chief Election Official; STATE OF NORTH CAROLINA, Larry Leake, Lorraine Shinn, Charles Winfree, Genevieve Sims and Robert Cordle, State Board of Elections; STATE OF NORTH DAKOTA, Alvin Jaeger, Secretary of State and Chief Election Official; STATE OF OHIO, Jennifer Brunner, Secretary of State and Chief Election Official; STATE OF OKLAHOMA, Thomas Prince, Susan Turpen and Ramon Watkins, State Election Board; STATE OF OREGON, Bill Bradbury, Secretary of State and Chief Election Official; STATE OF PENNSYLVANIA, Pedro Cortés, Secretary of the Commonwealth and Chief Election Official; STATE OF RHODE ISLAND, A. Ralph Mollis, Secretary of State and Chief Election Official; STATE OF SOUTH CAROLINA, John Hudgens III, Cynthia Bensch, Tracey Green, Pamela Pinson and Edward Pritchard, Jr., State Election Commission; STATE OF SOUTH DAKOTA, Chris Nelson, Secretary of State and Chief Election Official; STATE OF TENNESSEE, Riley Darnell, Secretary of State and Chief Election Official; STATE OF TEXAS, Phil Wilson, Secretary of State and Chief Election Official; STATE OF UTAH, Gary Herbert, Lt. Governor and Chief Election Official; STATE OF VERMONT, Deborah Markowitz, Secretary of State and Chief Election

Official; STATE OF VIRGINIA, Jean Cunningham, Harold Pyonand Nancy Rodriques, State Board of Elections; STATE OF WASHINGTON, Sam Reed, Secretary of State and Chief Election Official; STATE OF WEST VIRGINIA, Betty Ireland, Secretary of State and Chief Election Official; STATE OF WISCONSIN, John Schober, Shane Falk, David Anstaett, Kirby Brant, Donald Goldberg, Carl Holborn, Patrick Hodan, Robert Kasieta and Jon Savage, State Elections Board; STATE OF WYOMING, Max Maxfield, Secretary of State and Chief Election Official;

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MEMORANDUM OF LAW IN SUPPORT OF MICHIGAN DEFENDANTS'
MOTION TO DISMISS

TABLE OF CONTENTS

- I. Factual Background**
- II. Argument in Support of Dismissal**
 - A. Plaintiffs lack personal jurisdiction to bring this action against the Michigan Defendants because:**
 - 1. Plaintiffs' amended complaint fails to establish jurisdiction under New York's long-arm statute; and,**
 - 2. Plaintiffs' amended complaint fails to establish jurisdiction under the Due Process clause of the Fourteenth Amendment**
 - B. This Court is not the proper venue to bring this action against the Michigan Defendants.**

C. Defendant State of Michigan and Secretary of State Terri Lynn Land are immune from suit under the Eleventh Amendment

III. Conclusion

NOW COME the State of Michigan and Terri Lynn Land, Michigan Secretary of State and Chief election Official in her individual and official capacities, and hereby move to dismiss the Plaintiffs' amended Complaint on the grounds that: 1) under Fed R Civ Proc 12(b)(2) because this Court does not have personal jurisdiction over the Michigan Defendants; 2) under Fed R Civ Proc 12(b)(3) because this Court constitutes improper venue as to the Michigan Defendants; 3) pursuant to the Eleventh Amendment, the State of Michigan and Terry Lynn Land in her official capacity are immune from suit; and, 4) the Michigan Defendants are not "persons" under 42 U.S.C. § 1983.

I. FACTUAL BACKGROUND

Plaintiffs filed this Amended Complaint on November 1, 2007. They have alleged three causes of action against the State of Michigan and Terri Lynn Land, Secretary of State and Chief

Election Official in her individual and official capacity ("Michigan Defendants"). The crux of the allegations against these Michigan Defendants is that Plaintiffs object to Defendants' use of certain voting machines in elections held in the State of Michigan.

Plaintiffs request that this Court permanently enjoin the Michigan Defendants from conducting elections: 1) that are not "open, verifiable, transparent, machine-free, computer-free" (Pls' Amended Compl, ¶ 268(b)); that do not "rely exclusively on paper ballots, hand marked and hand counted" (Pls' Amended Compl, ¶ 268(b); and, that do not keep paper ballots in "full public view until the results of the hand counting is publicly announced at that vote station (Pls' Amended Compl, ¶ 268(b)).

II. ARGUMENT IN SUPPORT OF DISMISSAL OF PLAINTIFFS' AMENDED COMPLAINT

A. Plaintiffs lack personal jurisdiction to bring this action against the Michigan Defendants.

The party seeking to invoke the court's jurisdiction has the burden of establishing by competent proof that jurisdiction exists. *Computer Assoc Intern, Inc v Altai*, 126 F 3d 365, 370-371 (CA 2, 1997). The law of the state where the court sits determines whether a federal district court has jurisdiction over the person in diversity cases. *Canterbury Belts Ltd v Lane Walker Rudkin, LTD*, 869 F2d 34, 40 (CA 2, 1989).

The exercise of jurisdiction is proper if there are sufficient contacts with a defendant to satisfy both the applicable state's long-arm statute and the Due Process clause of the Fourteenth Amendment. *Computer Assoc*, 126 F3d at 370 (citing *Chaiken v VV Publ'g Corp*, 119 F3d 1018, 1025-26 (CA 2, 1997)).

1. Plaintiffs have not established jurisdiction under New York's long-arm statute.

Section 301 of New York's long-arm statute provides that "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." N.Y. C.L.P.R. 301 (McKinney 2007). This section has been interpreted to include "the power to exercise personal jurisdiction over a non-domiciliary defendant based on the tradition notion of the defendant's presence within the state." *Twine v Levy*, 746 F Supp 1202, 1204 (ED NY, 1990). Moreover, "[a] non-domiciliary may be served outside New York and sued upon any cause of action, if it engages in a continuous and systematic course of doing business in New York." *Hoffritz for Cutlery, Inc v Amajac, Ltd*, 763 F2d 55, 58 (CA 2, 1985). "The test for 'doing business' is a 'simple [and] pragmatic one'. . . The court must be able to say from the facts that the corporation is 'present' in the State 'not occasionally or casually, but with a fair measure of permanence and continuity.'" *Landoil Resources Corp v Alexander & Alexander Servs, Inc*, 565 NE2d 488, 490 (NY, 1990) (internal citations omitted). In applying § 301, New York courts have considered factors including "the existence of an office in New York; the solicitation of business in the state; the presence of bank accounts and other property in the state; and, the presence of employees of the foreign defendant in the state." *Hoffritz*, 763 F2d at 58.

The Michigan Secretary of State is not "present" in New York under any of these constructs. The Michigan Defendants were not physically present when served in this case; neither are they domiciled in New York. The Secretary of State does not transact business in New York in a systematic and continuous manner, nor is the Secretary of State are present there with any permanence. Defendant Terri Lynn Land does not have an office in New York, does

not solicit business in New York, and does not have employees in New York. Therefore, personal jurisdiction over the Michigan Defendants is not proper under § 301.

Section 302 of New York's long-arm statute provides additional bases for personal jurisdiction over non-domiciliaries where the suit arises out of the defendants' actions in or related to New York. § 302 states in pertinent part:

- (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
 - 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
* * *
 - 4. owns, uses or possesses any real property situated within the state.
* * *
- (c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

N.Y. C.P.L.R. § 302(a) (McKinney 2007).

Plaintiffs' Amended Complaint fails to show that this federal court has jurisdiction over the Michigan Defendants under New York's long-arm statute. The Michigan Secretary of State does not transact business in New York, nor does the Secretary of State contract anywhere to supply goods or services in New York. Further, the Michigan Secretary of State does not own, use, or possess any real property in the State of New York.

2. Plaintiffs' Amended Complaint fails to establish jurisdiction under the Due Process Clause of the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment limits the exercise of personal jurisdiction to persons having certain "minimum contacts" with the forum state. *Burger King Corp v Rudzewicz*, 471 US 462, 474 (1985); *Int'l Shoe Co v Washington*, 326 US 310, 316 (1945). "A court may exercise personal jurisdiction only over a defendant whose 'conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Computer Assoc*, 126 F3d at 370-371 (quoting *Burger King Corp*, 471 US at 474 (quoting *WorldWide Volkswagen Corp v Woodson*, 444 US 286, 297 (1980))). Each exercise of personal jurisdiction must demonstrate "some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Computer Assoc*, 126 F3d at 380-371 (quoting *Burger King Corp*, 471 US at 475 (quoting *Hanson v Denckla*, 357 US 235, 253 (1958))).

Here, the Michigan Defendants do not reside in New York and none of the allegations contained in the amended complaint relate to the Michigan Defendants performing any action in the State of New York. The Michigan Defendants could not reasonably have anticipated litigation in New York as a result of Plaintiffs' allegations. Therefore, this Court lacks personal jurisdiction over the Michigan Defendants. Accordingly, Plaintiffs' Amended Complaint against the Michigan Defendants should be dismissed for lack of jurisdiction.

B. This Court is not the proper venue to bring this action against the Michigan Defendants.

This Court should grant the Michigan Defendants' Motion to Dismiss because this Court is not the proper venue for this action. The purpose of statutorily specified venue is to protect a

defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial. *Leroy v Great Western United Corp*, 443 US 173, 184 (1979)). "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy is to be given a liberal construction." *Olberding v Illinois Central R Co*, 346 US 338, 340 (1953). Courts are therefore required to strictly construe the venue statute. *Gulf Ins Co v Glasbrenner*, 417 F3d 353, 357 (CA 2, 2005) (citing *Olberding*, 346 US at 340).

Plaintiffs' claims "arise under" federal law; therefore, venue must be determined under 28 U.S.C. § 1391(b), which provides in pertinent part:

(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 which the action may otherwise be brought.

28 U.S.C. § 1391(b).

Plaintiffs have not demonstrated that they meet the requirements under 28 U.S.C. § 1391(b). Subsection (1) does not apply because all of the named Defendants reside in different states. Under subsection (2), with respect to Plaintiffs' claims against the Michigan Defendants, no part of the underlying events took place in New York and no part of any Michigan property subject to the action is situated in New York. See *Gulf Ins Co*, 417 F3d at 357 (district courts take seriously the adjective "substantial"). Under subsection (3), New York is not the proper venue for the Michigan Defendants because Plaintiffs have failed to show that there is "no district in which the action may otherwise be brought." See 28 U.S.C. § 1391(b)(3); see also *McDonald v Gen'l Accident Ins Co*, 1996 WL 590722 (NDNY, 1996).

Here, because three named Plaintiffs and Michigan Defendants reside in Michigan, and because the alleged events that have given rise to Plaintiffs' claims against the Michigan Defendants allegedly occurred or will occur in the State of Michigan, to the extent that venue is proper in any federal court for purposes of adjudicating Plaintiffs' claims against the Michigan Defendants, this action must be brought in the United States District Court in Michigan. Therefore, under 28 U.S.C. § 1391(b), Plaintiffs' claims against the Michigan Defendants cannot be brought in this Court and should be dismissed.

C. Michigan Defendants and Secretary of State Terri Lynn Land are immune from suit under the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution generally bars claims in federal court against the states and their agencies. See *Pennhurst State Sch & Hosp v Halderman*, 465 US 89; 104 S Ct 900; 79 L Ed 2d 67 (1984). Although *Ex Parte Young*, 209 US 123; 28 S Ct 441; 52 L Ed 714 (1908) provides a possible exception to Eleventh Amendment immunity where a plaintiff sues a state official acting in his official capacity for prospective, injunctive relief from violations of federal law (*In re Deposit Ins Agency*, 482 F3d 612, 617 CA 2, 2007), *Ex Parte Young* does not allow injunctive relief against the State itself.

Plaintiffs have named the State of Michigan as a Defendant. The State of Michigan is immune from suit under the Eleventh Amendment and the claims against the State of Michigan should be dismissed.

As to Defendant Terri Lynn Land, Michigan Secretary of State and Chief Election Officer, the Supreme Court has made clear that *Ex parte Young* is no longer an automatic waiver of this constitutional bar. *Idaho v Coeur d'Alene Tribe*, 521 US 261; 117 S Ct 2028; 138 L Ed 2d 438 (1997). "[A]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an

obvious fiction," and must be interpreted consistently with the "real interests served by the Eleventh Amendment." *Coeur d'Alene*, 521 US at 270. Thus, *Coeur d'Alene* requires a case-by-case balancing of the State's interests. *Coeur d'Alene*, 521 US at 271-72.

In *Idaho v Coeur d'Alene*, the Supreme Court recognized the need to examine and determine on a case-by-case basis whether vital state interests are at issue and implicated even where the claim is asserted against an individual official. *Coeur d'Alene*, 521 US at 270-72. In cases where such interests are involved, *Young* is not applicable and does not afford the federal courts jurisdiction to grant relief that would otherwise be barred by the Eleventh Amendment. *Coeur d'Alene*, 521 US at 270.

The *Young* exception may serve an important purpose in two instances: 1) where there is no available state forum; and, 2) where the case calls for the interpretation of federal law. *Coeur d'Alene*, 521 US at 270. With regard to the second instance, the United States Supreme Court cautioned that it often leads to an improper "expansive application of the *Young* exception." *Coeur d'Alene*, 521 US at 270.

Here, Plaintiffs have sued Terri Lynn Land, Michigan's Secretary of State, in both her individual and official capacities. As to the suit against Defendant Land in her official capacity, Plaintiffs' claims against her are barred by the Eleventh Amendment. This case does not present either of the two instances in which the *Young* exception may serve an important purpose. First, there is an available State forum for litigants who are dissatisfied with a decision made in connection with election procedures to be employed in Michigan during the 2008 primary and general elections and beyond. Secondly, while this case presents federal constitutional questions, they are within the capability of the State courts to resolve. Michigan State courts regularly interpret and apply federal law, and any constitutional issues decided in a Michigan

state court would ultimately be subject to *certiorari* review by the United States Supreme Court.

28 U.S.C. § 1257.

The Supreme Court has noted the states' right and duty to interpret and follow the Constitution:

Interpretation of federal law is the proprietary concern of state, as well as federal, courts. It is the right and duty of the States, within their own judiciaries, to interpret and follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case . . .

It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case.

Coeur d'Alene, 521 US at 275. .

The State of Michigan has a compelling and sovereign interest in preserving the purity of elections, pursuant to the Michigan Constitution. 1963 Const, art 2, § 4. This sovereign interest also underscores that it is the State of Michigan's interests at issue here, not the specific conduct of a state official. The exercise of jurisdiction by the federal courts would substantially impact this sovereign interest. This Court therefore lacks jurisdiction on the basis of the Eleventh Amendment and should also dismiss this Complaint against Defendant Terri Lynn Land in her official capacity.

As to the claims against Defendant Land in her individual capacity, Defendant Land has taken no action in her individual capacity that would subject her to suit by Plaintiffs, nor have Plaintiffs alleged any such actions. Therefore, the claims against Defendant Land in her individual capacity should be dismissed as well.

D. The Michigan Defendants are not persons for purposes of § 1983.

Section 1983 creates a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution and laws of the United States. Specifically, the text of this statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. . .

42 U.S.C. § 1983.

The State of Michigan and its officials acting in their official capacities are not considered "persons" under § 1983. *Gaby v Bd of Trs*, 348 F3d 62, 63 (CA 2, 2003) (citing *Will v Michigan Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 2d 45, (1989)). However, to the extent that Defendant Terri Lynn Land is sued in her official capacity for injunctive relief, she is a person under § 1983. "[A] state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Gaby*, 348 F3d at 63 (quoting *Will*, 491 US at 71 n.10) (quoting *Kentucky v Graham*, 473 US 159, 167 n14; 105 S Ct 3099; 87 L Ed 2d 114 (1985)).

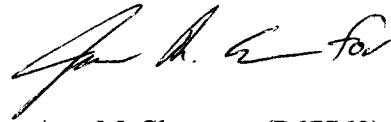
Thus, Plaintiffs' § 1983 claim against the State of Michigan should be dismissed because the State is not a person under § 1983. To the extent Defendant Land is sued in any capacity other than her official capacity for injunctive relief, Plaintiffs' claims against her should be dismissed, as well.

III. CONCLUSION

For the reasons set forth in this brief, the State of Michigan and Terri Lynn Land, Michigan Secretary of State and Chief Election Officer in her official and individual capacity, request that this Honorable Court dismiss with prejudice Plaintiffs' Amended Complaint against the Michigan Defendants and grant such further relief as it may deem just and equitable.

Respectfully submitted

Michigan Defendants
By their attorneys,

A handwritten signature in black ink, appearing to read "Ann M. Sherman". The signature is fluid and cursive, with a large initial "A" and a long, sweeping underline.

Ann M. Sherman (P67762)
Admitted *Pro Hac Vice*

Dated: November 20, 2007