

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

ROBERT L. SCHULZ, et al.,

Plaintiffs,

v.

STATE OF NEW YORK, et al.,

Defendants.

Case No. 07-CV-0943 LEK/DRH

**MEMORANDUM IN SUPPORT OF NEBRASKA  
DEFENDANTS' MOTION TO DISMISS**

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## **PRELIMINARY STATEMENT**

Defendants State of Nebraska and Nebraska's Secretary of State, John A. Gale, have filed a motion to dismiss the amended complaint filed herein as to them and an affidavit in support of their motion to dismiss. The basis of these defendants' motion and the arguments in support of the motion are essentially the same as those advanced by the State of Oregon and its secretary of state in their motion to dismiss and memorandum of law submitted to the court as filing 22 on November 8, 2007 - *i.e.*, the court lacks jurisdiction over the persons of the State of Nebraska and Secretary of State Gale and plaintiffs' action against the State of Nebraska is barred by the states' Eleventh Amendment immunity from suit.

While Nebraska and its secretary of state do not seek to burden the court with unnecessary briefing and other paperwork, they are, nonetheless, submitting this present memorandum of law to reiterate and, to some limited degree, elaborate on the arguments for dismissal previously made by Oregon and others and to tie them into Nebraska's situation and the affidavit of John Gale which has been submitted in support of Nebraska's motion to dismiss.

## **INTRODUCTION**

Plaintiffs' amended complaint challenges the constitutionality of the election procedures in all fifty states, including Nebraska. Nowhere in the amended complaint, however, do plaintiffs allege any facts that could justify the exercise of personal jurisdiction over the State of Nebraska or its Secretary of State John Gale ("Nebraska defendants") in this matter. Plaintiffs do not allege that the Nebraska defendants committed any act within the state of New York or that the Nebraska defendants have

violated the rights of any New York resident. Indeed, plaintiffs fail to allege that the Nebraska defendants had *any* contacts with New York. Plaintiffs have thus failed to allege facts sufficient to confer jurisdiction over the Nebraska defendants under either New York law or the Due Process Clause; and, as established by the affidavit of John Gale submitted in support of the Motion to Dismiss, plaintiffs will be unable to meet their burden to show such personal jurisdiction over the Nebraska defendants. In addition, plaintiffs' claims with respect to defendant State of Nebraska are barred by the Eleventh Amendment to the United States Constitution. Because this court lacks jurisdiction over the Nebraska defendants, plaintiffs' amended complaint should be dismissed.

### **BACKGROUND**

Plaintiffs' amended complaint names more than 100 defendants; fifty states together with each state's respective chief election officials. There are two named Nebraska defendants, the State of Nebraska and Nebraska's Secretary of State, John Gale.

The amended complaint alleges that the voting processes employed by all of the defendants violate the United States Constitution because those processes are not sufficiently "open, verifiable or transparent." Amended Complaint, ¶ 217. In particular, plaintiffs allege that the defendants' use of "machines and/or computers" for vote casting and counting in elections is unconstitutional. *Id.* at ¶ 218. Plaintiffs also allege that defendants violate the Constitution by failing to count ballots by hand, failing to keep ballots "in public view or in the public custody before the votes are counted and publicly posted at each and every voting station," and failing to publicly announce the number of votes cast for candidates at each voting station. *Id.* at ¶¶ 219-20.

Plaintiffs' amended complaint ostensibly identifies three claims for relief. In the first claim, plaintiffs allege that the voting procedures used by defendants infringe on plaintiffs' right to vote as articulated by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428; 112 S. Ct. 2059; 119 L. Ed. 2d 245 (1992). In their second claim for relief, plaintiffs allege that the voting procedures area violation of plaintiffs' "contract rights," based on the assertion that "[f]ormally registering with the State of vote \* \* \* is a contract." Amended Complaint, ¶ 252. In what purports to be a "third cause of action," plaintiffs submit a set of voting procedures that, they allege, defendants are constitutionally required to follow during the 2008 primary and general elections, including the exclusive use of hand-counted paper ballots. Among other relief, plaintiffs ask the court to permanently enjoin defendants from conducting any elections in 2008 that are not "machine-free." *Id.* at ¶ 268.

The amended complaint does not allege any contacts, related to elections or otherwise, between the Nebraska defendants and the State of New York, and the Gale affidavit shows that no such contacts have occurred. The amended complaint does not allege any acts by the Nebraska defendants that occurred within the state of New York and, again, the Gale affidavit establishes that no such acts have taken place. The amended complaint does not allege any acts by the Nebraska defendants that violated the rights of any New York resident in any way.

## **ARGUMENT**

### **I.**

#### **THE COURT LACKS PERSONAL JURISDICTION OVER THE NEBRASKA DEFENDANTS.**

In the context of the pending motion to dismiss for lack of personal jurisdiction, plaintiffs have the burden of establishing that the court does, in fact, have such jurisdiction over each defendant. Plaintiffs must make at least a prima facie showing of jurisdiction in order to meet this burden.

In opposing a motion to dismiss for lack of personal jurisdiction, “the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant.” . . . “Where a court [has chosen] not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials.”

*Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 165 (2d Cir. 2005), *cert. denied sub nom. King v. Grand River Enterprises Six Nations, Ltd.*, \_\_U.S.\_\_, 127 S. Ct. 379 (2006), (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999)). In this case, plaintiffs will be unable to meet that burden with respect to the Nebraska defendants.

A district court resolving issues of personal jurisdiction is to engage in a two-part analysis. First, the district court must determine if, under the laws of the forum state (in this case, New York), there is jurisdiction over the defendant. Second, if the laws of the forum state do provide a basis for such jurisdiction, the court must decide whether the exercise of personal jurisdiction over the defendant under those laws comports with federal constitutional due process requirements. *Grand River Enterprises Six Nations, Ltd.*, 425 F.3d at 165.

Plaintiffs have failed to allege facts that, if true, would be sufficient to confer jurisdiction over the Nebraska defendants under either New York law or the Due



Process Clause, nor could they. As shown by the Gale affidavit, the Nebraska defendants have not engaged in the required minimum contacts with New York that would permit the court to exercise personal jurisdiction over them in this matter.

**A. Plaintiffs Have Not Alleged And Cannot Establish Facts Sufficient To Confer Personal Jurisdiction Over The Nebraska Defendants Under New York Law.**

Under New York law, there are two ways in which a court may exercise personal jurisdiction over a non-domiciliary defendant. First, if the defendant “does business” in New York, the court may exercise its general jurisdiction pursuant to N.Y. CPLR §301. Second, even if the defendant does not “do business” in New York, specific jurisdiction may be exercised if the defendant falls under New York’s long-arm statute, N.Y. CPLR §302. *King v. Best Western Country Inn*, 138 F.R.D. 39, 41 (S.D.N.Y. 1991). In this case, plaintiffs have not alleged and cannot show facts sufficient to establish personal jurisdiction over the Nebraska defendants under either test.

**1. The Nebraska Defendants Are Not “Doing Business” In New York.**

Under New York law, a court has “general jurisdiction” over defendants who are “engaged in such a continuous and systematic course of “doing business” here as to warrant a finding of its ‘presence’ in this jurisdiction.” See *Aerotel, Ltd. V. Sprint Corp.*, 100 F. Supp. 2d 189, 191 (S.D.N.Y. 2000) (internal quotation marks omitted) (citing N.Y. C.P.L.R. § 301). For purposes of establishing jurisdiction, a defendant who is “doing business” in New York engages in a “continuous and systematic course of conduct in New York.” *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990).

In this case, there are no allegations that the Nebraska defendants engaged in *any* course of conduct in New York, much less a course of conduct that was “continuous

and systematic.” In fact, as established by the Gale affidavit, (¶¶ 4, 5 & 6) the Nebraska defendants have not engaged in such contacts. The court therefore lacks general jurisdiction over the Nebraska defendants under New York law.

**2. The Nebraska Defendants Are Not Within The Scope Of New York’s Long-Arm Statute.**

New York’s long-arm statute is N.Y. C.P.L.R. § 302(a). It provides:

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
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
- (4) own, uses or possesses any real property situated within the state.

Plaintiffs have failed to allege and will be unable to prove any facts to support the exercise of jurisdiction over the Nebraska defendants under any of the four prongs of N.Y. C.P.L.R. § 302(a).

First, plaintiffs have failed to provide any factual allegations to support jurisdiction over the Nebraska defendants under section 302(a)(1). To determine the

existence of jurisdiction under section 302(a)(1), a court must decide (1) whether the defendant “transacts any business” in New York and, if so, (2) whether this cause of action “aris[es] from” such a business transaction. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007). A suit “arises from” a party’s activities in New York if there is “an articulable nexus, or a substantial relationship, between the claim asserted and the actions that occurred in New York.” *Id.* In this case, plaintiffs do not allege that the Nebraska defendants have done anything at all within New York. Nor do they identify any connection between any actions that took place in New York and the Nebraska defendants. With respect to the Nebraska defendants, plaintiffs challenge only the manner in which votes are counted in Nebraska. Plaintiffs do not identify any way in which this is connected to New York. Again, the Gale affidavit shows clearly that the Nebraska Secretary of State transacts no election “business” in New York. Gale Affidavit, ¶¶ 4 & 5.

Second, plaintiffs have failed to provide any factual allegations to support jurisdiction over the Nebraska defendants under section 302(a)(2) or (3). Plaintiffs do not allege that any of the defendants committed a tort of any kind. See *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 125 (2d Cir. 2002), (to satisfy section 302(a)(2) or (3), plaintiff must “aver facts constituting a tort under the law of the pertinent jurisdiction.” (internal quotation marks omitted)). They claim only that the defendants’ use of electronic vote counting machines is an infringement of their voting and contract rights. Further, plaintiffs do not allege that the Nebraska defendants committed *any* conduct, much less tortious conduct, within New York. Nor do they

allege any way in which that any conduct of the Nebraska defendants caused injury to a person or property within New York.

Finally, plaintiffs do not allege facts sufficient to support jurisdiction over the Nebraska defendants under section 302(a)(4). Nowhere in the amended complaint do plaintiffs allege that any of the defendants, including the Nebraska defendants, “own[], use[], or possess[] any real property” within the State of New York. Indeed, the Gale affidavit, ¶ 6, establishes that the Nebraska defendants do not have any such connection to real property in New York.

In sum, even assuming that all the facts alleged in the amended complaint were true, New York’s long-arm statute, CPLR § 302, does not confer upon its courts the jurisdiction to reach the Nebraska defendants in this matter. Because New York law does not confer to its courts personal jurisdiction to reach the Nebraska defendants, this court lack personal jurisdiction over the Nebraska defendants. Plaintiffs’ amended complaint should be dismissed on that ground.

**B. Extending Jurisdiction Over The Nebraska Defendants Is Also Impermissible Under The Due Process Clause Of The United States Constitution.**

Because there is no basis for jurisdiction under New York law, it is not necessary for the court to determine whether the exercise of jurisdiction over the Nebraska defendants would comport with federal due process. But even if New York law did purport to extend personal jurisdiction over the Nebraska defendants in this case, to do to would violate the Due Process Clause.

The Due Process Clause limits the exercise of personal jurisdiction to persons having certain “minimum contacts” with the forum state so that maintenance of the action does not offend notions of fair play and substantial justice. *Int'l Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *Best Van Lines v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007). Essential to the exercise of personal jurisdiction in each case is “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.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 162, 475, 105 S. Ct. 2174, 2183, 85 L. Ed 2d 528 (1985) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228 (1958)). To establish personal jurisdiction, plaintiffs must demonstrate either specific jurisdiction, if the suit arises from the defendant’s contacts with the forum, or general jurisdiction – that is, jurisdiction irrespective of whether the claim arises from or relates to the defendant’s forum contacts – based on the defendant’s “continuous and systematic” contacts with the forum state. *Helicopteros Nacionales do Columbia, S.A. v. Hall*, 466 U.S. 408, 415-16, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984).

In this case, as has already been noted, plaintiffs have failed to allege that the Nebraska defendants had *any* contacts with New York, much less “minimum” ones sufficient to justify the exercise of personal jurisdiction. The Gale affidavit shows that no such “minimum contacts” exist. Under the Due Process Clause, therefore, plaintiffs have failed to allege and cannot prove facts sufficient to confer personal jurisdiction of the Nebraska defendants.

**II.**

**DEFENDANT STATE OF NEBRASKA IS 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. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98-99, 104 S. Ct. 900, 907, 79 L. Ed. 2d 67 (1984).

While this immunity from suit is not absolute, there are only two circumstances in which an individual may sue a state. First, Congress may abrogate the Eleventh Amendment immunity and authorize such a suit when acting under its power to enforce the Fourteenth Amendment. Second, a state may waive its immunity by consenting to the suit. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 670, 119 S. Ct. 2219, 2223, 144 L. Ed. 2d 605 (1999).

In the present case plaintiffs have named the State of Nebraska as a defendant but have not cited any federal law enacted under the Fourteenth Amendment which purports to waive the states' Eleventh Amendment immunity from this type of suit or any Nebraska law under which Nebraska could be deemed to have consented to this suit. Indeed, no such statutes, either federal or state, exist. Accordingly, the State of Nebraska has retained its Eleventh Amendment immunity from this action and plaintiffs' claims against the State of Nebraska should be dismissed.

**CONCLUSION**

Plaintiffs do not allege facts sufficient to support a finding of personal jurisdiction over the Nebraska defendants in this matter, nor is there any basis to conclude the court has such jurisdiction. In addition, the claims against defendant State of Nebraska

are barred by the Eleventh Amendment. For these reasons, the Nebraska defendants' motion to dismiss should be granted.

DATED this 6<sup>th</sup> day of December, 2007.

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**CERTIFICATE OF SERVICE**

I, DALE A. COMER, do hereby declare that I electronically filed the foregoing Memorandum In Support of Nebraska Defendants' Motion to Dismiss with the Clerk of the District Court using the CM/ECF system, and that I caused a true and correct copy to be served by First-Class mail, upon Robert L. Schulz, 2458 Ridge Road, Queensbury, NY 12804.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on December 6, 2007.

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05-561-21