

1 TERRY GODDARD
ATTORNEY GENERAL
2
3 Bruce L. Skolnik (106483)
Assistant Attorney General
177 North Church Avenue, Suite 1105
4 Tucson, Arizona 85701-1114
(520) 388-7124 Fax (520) 628-6050
5 bruce.skolnik@azag.gov

6 Attorneys for Arizona Defendant

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

9 ROBERT L. SCHULZ, et al.,
10 Plaintiffs,
11 v.
12 STATE OF NEW YORK, et al.,
13 Defendants.
14

No. 07-CV-943 (LEK/DRH)

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

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I. INTRODUCTION

Plaintiffs’ Amended Verified Complaint was filed by pro per litigants in each of the fifty states. While not entirely clear if the action is directed against the states themselves, it is, at a minimum, directed against the purported chief election official of each state. Among other things, the Complaint seeks to enjoin the states from using any sort of mechanical means for vote casting or counting in 2008 in favor of hand-casted and counted ballots. Because Plaintiffs do not allege that there is any lawful basis under which a New York court can assert jurisdiction over the State of Arizona,¹ Plaintiffs’ Complaint against the State of Arizona must be dismissed as a matter of law pursuant to Fed. R.Civ.P. 12(b)(2). In addition, the Eleventh Amendment precludes Plaintiffs’ suit in federal court against the State of Arizona.

II. BACKGROUND

While it is unclear whether Plaintiffs’ Amended verified Complaint names the State of Arizona as a defendant, it is clearly directed against Arizona Secretary of State Jan Brewer. The Complaint generally claims that the election procedures presently used by the states are unconstitutional. More specifically, it challenges the lawfulness of any vote-casting or counting mechanism that employs “machines and/or computers” (*id* at ¶ 218), and it seeks to enjoin all upcoming elections that are not slated to be conducted in a “machine-free” manner (*id.* at ¶ 268).

Plaintiffs’ Complaint does not allege any lawful basis upon which a New York court can asset jurisdiction over the State of Arizona. The Amended Complaint must, therefore, be dismissed as a matter of law.

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¹ For convenience, if Plaintiffs’ Complaint is directed against the State of Arizona as an entity, as well as its Secretary of State, they are referred to collectively as the “State of Arizona.”

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III. ARGUMENT

A. This Court Lacks Personal Jurisdiction Over the State of Arizona

(1) Plaintiffs Bear the Burden of Establishing Personal Jurisdiction Over the State of Arizona.

“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 Gonzales & Rodriguez*, 305 F.3d 120, 124 (2d Cir. 2002). At the pleading state, a plaintiff must at least make a prima facie showing that such jurisdiction exists. *Id.* Plaintiffs cannot satisfy this burden as to the State of Arizona.

In “exercising its diversity jurisdiction, [this Court is] obliged to apply the substantive law of the state to which the forum state, New York, would have turned had the suit been filed in state court.” *Factors Etc., Inc. v. Pro Arts*, 652 F.2d 278, 280 (2d Cir. 1981). Examination of New York Law reveals that this Court may not assert jurisdiction over the State of Arizona.

(2) Plaintiffs Cannot Assert Jurisdiction Over the State of Arizona in New York.

New York’s long arm statute provides in relevant part as follows:

(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.

...

1 (c) Effect of appearance. Where personal jurisdiction is based
2 solely upon this section, an appearance does not confer such
3 jurisdiction with respect to causes of action not arising from
4 an act enumerated in this section.

4 N.Y.C.P.L.R. § 302(a).

5 Plaintiffs' Amended Complaint does not allege that the State of Arizona has
6 transacted any business within the State of New York or that it contracted to supply goods
7 or services within New York. Similarly, Plaintiffs do not allege that Arizona owns, uses
8 or possesses any real property in New York. The State of Arizona, therefore, lacks the
9 "minimum contacts" needed with New York out of which New York's courts could assert
10 jurisdiction over it. *See Burger King Crop. v. Rudzewicz*, 471 U.S. 462, 474-75, 105 S.Ct.
11 2174 (1985)(the crucial question is whether a defendant has "purposefully avail[ed] itself
12 of the privilege of conducting activities with the forum state, thus invoking the benefits
13 and protection of its laws," so that it "should reasonably anticipate being hailed into court
14 [in that state]." Because the State of Arizona had no contracts out of which it could have
15 reasonably anticipated having to defend itself against a lawsuit filed against it in New
16 York, Plaintiff's Complaint against it must be dismissed as a matter of law.

17 **B. The State of Arizona Must be Dismissed Because It is Not Amenable to**
18 **Suit Under 42 U.S.C. § 1983 and It is Immune From Being Sued in**
19 **Federal Court Under the Eleventh Amendment**

19 The Eleventh Amendment to the United States Constitution bars suits in federal
20 court against the states and their agencies. *Pennhurst State School & Hospital v.*
21 *Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984). Under *Ex Parte Young*, 209 U.S. 123, 28
22 S.Ct. 441 (1908), "a plaintiff may sue a state official acting in his official capacity –
23 notwithstanding the Eleventh Amendment — for prospective, injunctive relief from
24 violations of federal law." *In re Deposit Ins. Agency*, 482 F. 3d 612, 617 (2d Cir.
25 2007)(internal quotation marks omitted). Importantly, however, the *Ex Parte Young*
26

1 exception does not permit injunctive relief to be granted against a state itself, as opposed
2 to its officials. *Ex Parte Young*, 209 U.S. at 159-60. Therefore, to the extent that
3 Plaintiffs' intended to direct their Complaint against the State of Arizona as an entity, it,
4 must be dismissed as a matter of law.

5 In addition, the State of Arizona is not a "person" as that term is used in 42 U.S.C.
6 § 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 109 S.Ct. 2304 (1989).
7 On this basis as well, the State of Arizona must be dismissed from the lawsuit.

8 **IV. CONCLUSION**

9 For all the foregoing reasons, Plaintiffs' Amended Verified Complaint against the
10 State of Arizona should be dismissed with prejudice as a matter of Law.

11 RESPECTFULLY SUBMITTED this 6th day of December, 2007.

12 **TERRY GODDARD**
13 **ATTORNEY GENERAL**

14
15 /s/ Bruce L. Skolnik
16 Bruce L. Skolnik
17 Assistant Attorney General
18 Attorney for State of Arizona Defendants
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CERTIFICATE OF SERVICE

I hereby certify that on December 6th, 2007, I served the foregoing MEMORNADUM IN SUPPORT OF STATE OF ARIZONA DEFENDANTS' MOTION TO DISMISS upon the parties hereto by the method indicated below, and addressed to the following:

MAIL DELIVERY TO:

Robert L. Schulz
2458 Ridge Road
Queensbury, NY 12804

**TERRY GODDARD
ATTORNEY GENERAL**

/s/ Bruce L. Skolnik
Bruce L. Skolnik
Assistant Attorney General
Attorneys for Defendants