

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

ROBERT L. SCHULZ (New York, et al.),	)	Case No. 1:07-CV-0943 LEK/DRH
	)	
Plaintiffs,	)	MEMORANDUM IN SUPPORT
	)	OF DEFENDANTS STATE OF
v.	)	MINNESOTA AND MARK
	)	RITCHIE, SECRETARY OF
STATE OF NEW YORK, Neil Kelleher,	)	STATE'S MOTION TO DISMISS
Douglas Kellner, Evelyn Aquilaand Helena	)	
Moses Donahue, State Board of Elections, et al.,	)	
	)	
Defendants.	)	

Defendants, the State of Minnesota (hereinafter sometimes referred to as "the State"), and its Secretary of State Mark Ritchie (hereinafter sometimes referred to as "the Secretary"), submit this Memorandum in support of their motion to dismiss the Amended Complaint against them in the above-captioned matter.

**INTRODUCTION**

Plaintiffs, in their Amended Complaint, challenge the constitutionality of the election procedures, particularly those related to voting for the offices of United States President and Vice President in every state of the Union. Of the more than 145 individual Plaintiffs, only three allege any potential connection whatsoever with Minnesota's election system. Those three, John Marshall of Monticello, Minnesota; Shawn Wayne Junior Davis of Duluth, Minnesota, and John Hansvick of Henderson, Minnesota, merely allege that they are qualified and registered voters

who intend to vote for president “in the Minnesota State 2008 primary<sup>1</sup> and general election.” Amended Complaint (Hereinafter “AC”) ¶¶ 79-81.

None of the Plaintiffs allege any facts that would support a claim of personal jurisdiction by the courts in New York over the State of Minnesota or its Secretary of State. Indeed, the Plaintiffs make no specific allegations at all concerning particular actions of the State of Minnesota, or the Secretary. Rather, the Amended Complaint makes undifferentiated claims relating to use by the Defendants collectively of various machines and computers in the counting and tabulation of votes, and to failure of states in general to provide for the announcing of each candidate’s vote totals at every voting station. AC ¶¶ 245-251<sup>2</sup> Based upon those general allegations, the Amended Complaint purports to identify three causes of action against the Defendants as a group:

1. That some or all of the Defendants’ balloting and counting practices, to the extent that they are not “open, verifiable and machine and computer-free,” generally infringe upon and burden voting rights of Plaintiffs, and of unnamed “party insurgents.” AC ¶¶ 228, 246-251.

2. That some or all Defendants have, impaired their rights under “contracts” which are allegedly implied in Plaintiffs’ registrations to vote in their respective states. AC ¶¶ 257, 259, 261.

3. That the Constitution in some manner mandates that all states must use only those election procedures that are “open, verifiable and transparent” to the greatest possible as

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<sup>1</sup> Minnesota, in fact, holds no primary election to choose presidential and vice presidential candidates. Major party candidates for presidential electors are chosen at state conventions and their names are certified to the Secretary of State. *See* Minn. Stat. § 208.03 (2006) (copy attached). Other elector candidates are nominated by petition. *See* Minn. Stat. §§ 204B.07, subd. 2 (2006); 208.04 (2006) (copies attached)

<sup>2</sup> Minnesota law in fact provides for the public counting of ballots and the declaration of the totals at the precinct level. Minn. Stat. § 204C.19 (2006) (copy attached)

exemplified by a detailed paper-ballot election procedure contrived by Plaintiffs themselves. AC ¶ 262.

For relief, Plaintiffs ask the Court to enjoin all states' 2008 primary and general elections that are not determined to be completely "open, verifiable, transparent, machine-free, and computer-free" according to Plaintiffs' standards--in other words, all of them.

Nothing in the Amended Complaint discloses any alleged actions of the State, or Secretary Ritchie that have affected or will affect the State of New York or its residents in any fashion. Therefore, setting aside the self-evident flaws in the merits of Plaintiffs' constitutional assertions, their claims against the State and Secretary Ritchie must be dismissed because the Court lacks personal jurisdiction over them, and the State of Minnesota is immune from suit. In addition, since none of the individual Plaintiffs have alleged any actual or threatened individual harm fairly traceable to any specific action of the State or the Secretary, they lack the necessary standing to maintain this action. Thus, the Court also lacks subject-matter jurisdiction.

## ARGUMENT

### I. THE STATE OF MINNESOTA IS IMMUNE FROM SUIT IN FEDERAL COURT.

A plaintiff may seek prospective injunctive relief in federal court against a state official acting in his or her official capacity. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908) However, the Eleventh Amendment to the United States Constitution generally precludes suits in federal courts against states, *per se*. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900 (1984); *National Ass'n for the Advancement of Colored People v. State of California*, 511 F.Supp. 1244, 1250, (D.C. Cal 1981), *Aff'd* 711 F.2d 121 (9th Cir. 1983). Consequently, the Amended Complaint should be dismissed as against the State of Minnesota, *per se*.

## **II. THE COURT LACKS PERSONAL JURISDICTION OVER THE STATE OF MINNESOTA AND SECRETARY OF STATE RITCHIE.**

To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff is required to allege facts sufficient to constitute at least a *prima facie* showing that the Court has personal jurisdiction over each Defendant. *See, e.g., A.I. Trade Finance, Inc., Petra Bank*, 989 F. 2d 76, 79 (2d Cir. 1993). Plainly the Plaintiffs have not done so as to either Secretary Ritchie or the State.

Under Fed. R. Civ. P. 4(k)(1)(A) a district court may exercise personal jurisdiction equivalent to that of a court of general jurisdiction in the state where the district court is located.

Under New York law, a state court may exercise “long-arm” jurisdiction over a non-domiciliary defendant only in certain specified circumstances. NYCPLR § 302 provides:

§ 302. Personal jurisdiction by acts of non-domiciliaries. (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
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. owns, uses or possesses any real property situated within the state.

As noted above, the Amended Complaint contains no claim that the Secretary is a New York domiciliary, nor any specific factual allegations identifying any of his actions that affect any person or property within the State of New York in any fashion, let alone any that would

bring him within any of the above jurisdictional categories. Therefore, even taking all the facts alleged in the Amended Complaint as true, they do not support jurisdiction over Secretary Ritchie by the courts of the State of New York, or, by operation of Rule 4k, by this Court. Consequently, the complaint should be dismissed as against Minnesota Secretary of State Ritchie.

Even if New York law could be interpreted to extend jurisdiction over Secretary Ritchie, however to do so in this case would contravene the Due Process guarantees of the U.S. Constitution. Federal courts have consistently concluded that for a state's courts to exercise personal jurisdiction over persons without its territorial limits, those persons must have certain minimum contacts with the state. In other words there must be 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. 462, 475, 105 S. Ct. 2174, 2184 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)). To establish personal jurisdiction, plaintiffs must demonstrate either specific jurisdiction, when 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 defendant's forum contacts—based on the defendant's "continuous and systematic" contacts with the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415-16, 104 S. Ct. 1868 (1984). In this case, as has already been noted, Plaintiffs have failed to allege that any Minnesota official has had *any* contacts, general or specific, with New York, much less any that would be sufficient to justify the exercise of personal jurisdiction in this case. *C.f. Springer v. Balough*, 96 F. Supp. 2d 1250 (N.D. Okla. 2000), *aff'd* 232 F3d 902 (10th Cir. 2000). But, in that case, a plaintiff sued election officials from every state in a federal court, raising

various allegations regarding the process for electing the President of the United States. *Id.* at 1254. The court concluded that the plaintiff had failed to establish personal jurisdiction over the nonresident defendants under the Constitutional due process standard because he had not “shown that Defendants purposefully directed their activities to the forum state.” *Id.* at 1255. Therefore, Plaintiffs have also failed to allege facts sufficient under the Due Process Clause to confer personal jurisdiction over any Minnesota Defendant.

**III. THIS COURT IS NOT THE PROPER VENUE FOR SUIT AGAINST THE STATE OR SECRETARY RITCHIE.**

For the same reasons as those noted under part II above, the Amended Complaint does not allege facts that would justify the choice of the Northern District of New York as a permissible venue for an action against the State or Secretary Ritchie. Since the Plaintiffs’ claims purportedly arise under Article 3, section 2 of the U.S. Constitution, 28 USC §§ 1331, 1343 and 42 USC § 1983, venue must be determined in accordance with 28 USC § 1391(b) which provides as follows:

(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.

First, it is apparent from the case caption that the Defendants do not all “reside” in one state, and neither the State of Minnesota nor Secretary Ritchie “resides” in New York.

Second, the Amended Complaint does not allege any actions, events or omissions attributable to the State or the Secretary that occurred, or will occur, anywhere in the State of New York. There is no allegation that any property is subject to the action.

Finally, there is no claim that either the State or the Secretary may be “found” within the District. In any event, there is a judicial district in which an action relating to the conduct of Minnesota elections could be brought against the Secretary; *i.e.*, the District of Minnesota.

Consequently, the Plaintiffs’ action against the State and the Secretary should be dismissed on the basis of improper venue.

#### **IV. THE PLAINTIFFS LACK STANDING TO MAINTAIN THE ACTION.**

A critical factor in determining whether a federal court has jurisdiction over a particular matter is whether the plaintiff’s assertions present a “case or controversy” within the authority of the federal judiciary under U.S. Const. Art. III. *See, e.g., Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007); *Allen v. Wright*, 468 U.S. 737, 749, 104 S. Ct. 3315, 3324 (1984); *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197 (1975). That condition is satisfied only when the plaintiff asserts that he or she has suffered some threatened or actual injury resulting from the allegedly illegal actions of the defendant. *Id.* 442 U.S. at 499, 95 S. Ct. at 2205. Furthermore, the alleged injury must be actual or imminent and not merely conjectural or hypothetical. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992). The harm alleged be distinct and palpable rather than a generalized grievance shared by all or a large class of citizens. *Warth*, 422 U.S. at 499, 95 S. Ct. at 2205. In addition, a plaintiff’s alleged injuries must be “fairly traceable” to the specific alleged wrongful actions of the defendant. *See, e.g., Hein*, 127 S. Ct. 2562 Finally, the alleged injury must be redressable by the granting of the requested relief. *Id.*; *Allen*, 468 U.S. 751, 104 S. Ct. 3109. The Plaintiff’s claims here fall far short of these standards.

First, the harm alleged by the Plaintiffs here consists, in essence, of the general concern that balloting all systems employing machines and computers are more likely to be subject to

errors and manipulation than would the hand-counting of paper ballots. Even assuming that claim is provable, the degree to which such a general tendency may affect any particular state's elections, or the votes of any of these Plaintiffs personally is completely conjectural.

Second, aside from the three Minnesota Plaintiffs, none allege any connection with Minnesota elections. To the contrary, all expressly assert their intention to vote in other states. AC ¶¶ 13-78, 82-159. Thus, no actions of the State of Minnesota or the Secretary can possibly affect their voting rights. Even the three potential Minnesota voters do not identify any specific actions of the Secretary that can be shown have any direct affect upon their personal voting rights.

Finally, there is no reason to believe that action of the Court to enjoin or otherwise direct conduct elections in Minnesota and other states would redress Plaintiffs' proclaimed grievances. It is just as likely that such action could prevent some elections from being held at all, and would at least potentially inject confusion and uncertainty into many upcoming elections, resulting in an equal or greater potential for error than that that alluded to by Plaintiffs under the states' present systems.<sup>3</sup>

For these reasons it is clear that Plaintiffs lack standing to maintain this action against the State of Minnesota and Secretary Ritchie, and the Court therefore lacks jurisdiction over the subject matter of their complaints.

### CONCLUSION

Accordingly, the Plaintiffs' claims against the State of Minnesota, and its Secretary of State, Mark Ritchie, should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(2)

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<sup>3</sup> Such difficulty is particularly likely in light of the requirements of the federal Help America Vote Act, which calls, *inter alia*, for voting systems that assure access for persons with disabilities. See 42 U.S.C. §§ 15421, et seq.



because the facts as alleged by the Plaintiffs are not sufficient to support a determination that the court has jurisdiction over them, that the venue is proper or that Plaintiffs have standing; and because action against the State is barred by the Eleventh Amendment.

Dated: December 7, 2007

Respectfully submitted,

LORI SWANSON  
Attorney General  
State of Minnesota

s/ Kenneth E. Raschke, Jr.  
Assistant Attorney General  
Minn. Atty. Reg. No. 89643

ATTORNEYS FOR DEFENDANT  
STATE OF MINNESOTA AND  
MARK RITCHIE, SECRETARY OF STATE

445 Minnesota Street, Suite 1800  
St. Paul, Minnesota 55101-2134  
(651) 297-1141 (Voice)  
(651) 297-1235 (Facsimile)  
(651) 282-2525 (TTY)  
[ken.raschke@state.mn.us](mailto:ken.raschke@state.mn.us) (email)

AG: #1904018-v1

**APPENDIX OF  
MINNESOTA STATUTES**



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### 204C.19, Minnesota Statutes 2007

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#### 204C.19 COUNTING VOTES; PENALTY.

Subdivision 1. **Procedure.** When the hours for voting have ended and all voting has concluded, the election judges shall immediately count the votes cast at the election. The count shall be held at the polling place and shall be public. It shall be continued without intermission until it is completed and the results are declared, except that the election judges may recess for meals or other necessary purposes. During the count no one except the election judges shall handle the ballots. Any other individual who touches or interferes with ballots during the counting or any election judge who permits such touching or interference is guilty of a misdemeanor.

Subd. 2. **Ballots; order of counting.** Except as otherwise provided in this subdivision, the ballot boxes shall be opened, the votes counted, and the total declared one box at a time in the following order: the white box, the pink box, the canary box, the light green box, the blue box, the buff box, the goldenrod box, the gray box, and then the other kinds of ballots voted at the election. If enough election judges are available to provide counting teams of four or more election judges for each box, more than one box may be opened and counted at the same time. The election judges on each counting team shall be evenly divided between the major political parties. The numbers entered on the summary sheet shall not be considered final until the ballots in all the boxes have been counted and corrections have been made if ballots have been deposited in the wrong boxes.

Subd. 3. **Premature disclosure of count results.** No count results from any precinct shall be disclosed by any election judge or other individual until all count results from that precinct are available, nor shall the public media disclose any count results from any precinct before the time when voting is scheduled to end in the state.

**History:** 1981 c 29 art 5 s 19; 1987 c 266 art 1 s 38; 1991 c 227 s 17

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### 208.03, Minnesota Statutes 2007

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**208.03 MS 1957** [Repealed, 1959 c 675 art 13 s 1]

#### **208.03 NOMINATION OF PRESIDENTIAL ELECTORS.**

Presidential electors for the major political parties of this state shall be nominated by delegate conventions called and held under the supervision of the respective state central committees of the parties of this state. On or before primary election day the chair of the major political party shall certify to the secretary of state the names of the persons nominated as presidential electors, the names of eight alternate presidential electors, and the names of the party candidates for president and vice president.

**History:** 1959 c 675 art 9 s 3; 1979 c 251 s 2; 1981 c 29 art 7 s 38; 1981 c 217 s 1; 1986 c 444; 1986 c 475 s 20; 2005 c 156 art 6 s 57

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### 208.04, Minnesota Statutes 2007

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208.04 MS 1957 [Repealed, 1959 c 675 art 13 s 1]

#### 208.04 PREPARATION OF BALLOTS.

Subdivision 1. **Form of presidential ballots.** When presidential electors and alternates are to be voted for, a vote cast for the party candidates for president and vice president shall be deemed a vote for that party's electors and alternates as filed with the secretary of state. The secretary of state shall certify the names of all duly nominated presidential and vice presidential candidates to the county auditors of the counties of the state. Each county auditor, subject to the rules of the secretary of state, shall cause the names of the candidates of each major political party and the candidates nominated by petition to be printed in capital letters, set in type of the same size and style as for candidates on the state white ballot, before the party designation. To the left of, and on the same line with the names of the candidates for president and vice president, near the margin, shall be placed a square or box, in which the voters may indicate their choice by marking an "X." The form for the presidential ballot and the relative position of the several candidates shall be determined by the rules applicable to other state officers. The state ballot, with the required heading, shall be printed on the same piece of paper and shall be below the presidential ballot with a blank space between one inch in width.

Subd. 2. **Applicable rules.** The rules for preparation, state contribution to the cost of printing, and delivery of presidential ballots are the same as the rules for white ballots under section [204D.11, subdivision 1](#).

**History:** 1959 c 675 art 9 s 4; 1961 c 606 s 2; 1976 c 224 s 7; 1979 c 251 s 3; 1981 c 29 art 7 s 23,24; 1984 c 560 s 25; 1999 c 132 s 39; 2005 c 156 art 6 s 58

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