

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

ROBERT L. SCHULZ, et al.,)	
)	Civil Action No. 1:07-CV-0943 (LEK/DRH)
Plaintiffs,)	
)	
v.)	
STATE OF NEW YORK, et al.,)	
)	
Defendants.)	

**MEMORANDUM OF LAW IN SUPPORT OF VERMONT DEFENDANTS'
MOTION TO DISMISS**

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL OF THE
STATE OF VERMONT

By: /s/ Mark J. Di Stefano
Mark J. Di Stefano
Assistant Attorney General
New York Bar No. 106490
Attorney for Defendants State of Vermont
And Deborah Markowitz
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
Telephone: (802) 828-3171
Fax: (802) 828-2154
E-mail: mdistefano@atg.state.vt.us

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I. INTRODUCTION

Plaintiffs' amended complaint (Doc. 21) seeks to present a nationwide challenge to election procedures. Plaintiffs have filed suit against all fifty states and their respective elections officials. Plaintiffs' amended complaint includes two Vermont defendants – the State of Vermont and Vermont's Secretary of State, Deborah Markowitz ("the Vermont defendants").

The Vermont defendants move to dismiss on grounds of lack of personal jurisdiction. The amended complaint does not allege sufficient contacts between the Vermont defendants and the State of New York. It does not allege any acts by the Vermont defendants that occurred within the State of New York. It does not allege any acts by the Vermont defendant that violated the rights of any New York resident. Accordingly, the court lacks personal personal jurisdiction over the Vermont defendants. In addition, defendant State of Vermont moves to dismiss on the ground that plaintiffs' claims against it are barred by the Eleventh Amendment of the United States Constitution. Plaintiffs may not seek relief against the State in federal court. For these reasons, plaintiffs' amended complaint should be dismissed.

II. BACKGROUND

Plaintiffs allege in their amended complaint that the election procedures employed by all fifty states for counting votes are not sufficiently "open, verifiable, or transparent." *See* Amended Complaint, 11/1/07 (Doc. 21), ¶ 217. In particular, they allege that defendants' use of machines or computers for vote casting and counting is unconstitutional. *Id.* at ¶ 218. They further allege that the states will violate the Constitution by failing to count all votes by hand, *id.* ¶ 220, failing to keep all ballots "in public view or in the public custody before the votes are counted and publicly posted at each and every voting station," *id.* ¶ 219, and failing to publicly announce at each voting station the number of votes cast for each candidate "before the total

number of votes cast in that State for each candidate has been tabulated, totaled, and publicly announced,” *id.* ¶ 221.

Plaintiffs assert three claims for relief. Their first claim for relief alleges that the voting procedures in the fifty states “abridge the [constitutional] right to cast an effective vote.” *Id.* ¶ 246; *see also* ¶ 247 (procedures allegedly “impose an impermissible burden upon fundamental rights under the First and Fourteenth Amendment”). The second claim for relief alleges that various procedures violate plaintiffs’ contract rights based on a theory that registering to vote results in an enforceable contract between the State and the registrant. *See id.* ¶ 252. The third claim for relief sets forth a set of voting procedures that plaintiffs maintain the states are required to follow during the 2008 primary and general elections. *Id.* ¶ 262. Among other relief requested, plaintiffs ask the court to require defendants to “rely exclusively on paper ballots, hand marked and hand counted” and to require all ballots to “remain in full public view until the results of the hand counting is publicly announced.” *Id.* at ¶ 268.

III. ARGUMENT

A. This Court lacks personal jurisdiction over the Vermont defendants.

Plaintiffs bear the burden of establishing that the court has personal jurisdiction over each of the defendants. *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994). At the pleading stage, a plaintiff is required to make at least a *prima facie* showing that personal jurisdiction exists. *Id.*

“In a federal question case, where the defendant resides outside the forum state, federal courts apply the forum state’s personal jurisdiction rules if the applicable federal statute does not provide for national service of process.” *Sunward Electronics, Inc. v. McDonald*, 362 F.3d 17, 22 (2d Cir. 2004) (citing *PDK Labs., Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997)).

Moreover, if a court concludes that personal jurisdiction attaches under the forum state's long-arm jurisdiction statute, the court must then consider whether exercising personal jurisdiction would comport with the Due Process Clause of the Fourteenth Amendment. *See, e.g., Sunward Electronics*, 362 F.3d at 24 (“The exercise of long arm jurisdiction over Defendants by a New York court must also satisfy constitutional due process standards”).

Here, plaintiffs seek to establish federal question jurisdiction under 28 U.S.C. § 1331 and they invoke 42 U.S.C. § 1983 to advance their constitutional claims. *See* Amended Complaint, ¶ 1. Section 1983 does not provide for nationwide service of process. *See Barclay v. Hughes*, 462 F.Supp.2d 314, 315 n.3 (D. Conn. 2006) (concluding that § 1983 does not provide for national service of process and therefore the court applies forum state's long-arm statute). Thus, this court must determine whether New York's long-arm statute allows for the exercise of personal jurisdiction over the Vermont defendants and, if so, whether the exercise of personal jurisdiction in this action would meet due process requirements.

This court lacks personal jurisdiction over the Vermont defendants for the following reasons:

1. Plaintiffs have not alleged sufficient facts to confer personal jurisdiction over the Vermont defendants under New York law.

Under New York, there are two ways in which a court may exercise 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, jurisdiction may be exercised if the defendant falls under New York's long-arm statute. *See* N.Y. CPLR § 302. Here, Plaintiff have not alleged sufficient facts to establish personal jurisdiction under either statute.

The Vermont defendants hereby incorporate, adopt by reference, and reiterate all of the legal analysis and arguments presented by the Oregon defendants in Argument Parts I(A)(1) and (2) of their Memorandum in Support of Oregon Defendants' Motion to Dismiss dated November 8, 2007 and filed in this action. *See* Doc. 22, at 4-6. The same analysis and arguments apply with equal force to the Vermont defendants.

2. Exercising personal jurisdiction over the Vermont defendants would not comport with Due Process.

Because there is no basis for personal jurisdiction over the Vermont defendants under New York law, it is not necessary for the court to determine whether the exercise of jurisdiction over the Vermont defendants would run afoul of due process requirements. But even if New York law did purport to extend personal jurisdiction over the Vermont defendants in this case, that exercise of personal jurisdiction would violate due process requirements. Under the Due Process Clause, plaintiffs have failed to allege sufficient facts to confer personal jurisdiction over the Vermont defendants.

The Vermont defendants hereby incorporate, adopt by reference, and reiterate all of the legal analysis and arguments presented by the Oregon defendants in Argument Part I(B) of their Memorandum in Support of Oregon Defendants' Motion to Dismiss dated November 8, 2007 that was filed in this action. *See* Doc. 22, at 6-7. The same analysis and arguments apply with equal force to the Vermont defendants.

The conclusion that no personal jurisdiction lies in this case with respect to the Vermont defendants is further supported by *Springer v. Balough*, 96 F.Supp.2d 1250 (N.D. Okla. 2000). In *Springer*, the plaintiff filed a § 1983 action in the Northern District of Oklahoma naming as defendants the elections officials of all fifty states and alleging that they unconstitutionally rejected or ignored his request to be placed on an election ballot in their states. The district court

dismissed for lack of personal jurisdiction over the non-resident state officials. *Id.* at 1255-56. The Tenth Circuit Court of Appeals affirmed the dismissal, concluding that the plaintiff had not made a *prima facie* showing of sufficient contacts between the non-resident election officials and Oklahoma under the Oklahoma long-arm statute, which it construed as permitting the exercise of jurisdiction consistent with due process principles. *See* 232 F.3d 902 (Table), 2000 WL 1616246 (10th Cir. 2000) (unpublished opinion). Likewise, plaintiffs in this action have failed to allege sufficient contacts between the Vermont defendants and New York to meet the requirements of due process. In sum, this court lacks personal jurisdiction over the Vermont defendants.

B. Defendant State of Vermont is immune from suit under the Eleventh Amendment.

Plaintiffs' claims against the defendant State of Vermont are barred by the Eleventh Amendment of the United States Constitution. The Vermont defendants hereby incorporate, adopt by reference, and reiterate all of the legal analysis and arguments presented by the Oregon defendants in Argument Part II of their Memorandum in Support of Oregon Defendants' Motion to Dismiss dated November 8, 2007 that was filed in this action. *See* Doc. 22, at 7. The same analysis and arguments apply with equal force to the Vermont defendants.

CONCLUSION

For all the foregoing reasons, the Vermont defendants respectfully request that their motion to dismiss be granted.

Dated: December 7, 2007

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL OF THE
STATE OF VERMONT

By: /s/ Mark J. Di Stefano
Mark J. Di Stefano
Assistant Attorney General
New York Bar No. 106490
Attorney for Defendants State of Vermont
And Deborah Markowitz
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
Telephone: (802) 828-3171
Fax: (802) 828-2154
E-mail: mdistefano@atg.state.vt.us