

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 OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
THE CALIFORNIA DEFENDANTS'  
MOTION TO DISMISS

**I. INTRODUCTION**

Defendants the State of California and the California Secretary of State, Debra Bowen, (collectively, the "California Defendants") move to dismiss Plaintiffs' Amended Complaint on two grounds: (1) pursuant to Federal Rule of Civil Procedure, Rule 12(b)(2) for lack of personal jurisdiction over both California Defendants; and (2) pursuant to Federal Rule of Civil Procedure, Rule 12(b)(1) because the Eleventh Amendment to the United States Constitution bars the claims against the State of California. The arguments in this motion to dismiss are similar to the arguments made by the Oregon and New Hampshire defendants and rely upon much of the same legal authority in support of dismissal. Because this Court lacks personal jurisdiction over the California Defendants and Plaintiffs' claims against the State of California are barred by the Eleventh Amendment, Plaintiffs' Amended Complaint should be dismissed.

## II. BACKGROUND

The Amended Complaint names all fifty states and certain elections officials from each of those states as defendants. Three of the pro se plaintiffs, Susan Marie Weber, Matthew Pitagora, and Mychal R. Schillach, allege that they are citizens and registered voters, who reside in California. Amended Complaint, ¶¶ 26-28. Plaintiffs' first cause of action alleges a violation of constitutional rights based on the alleged

[f]ailure to provide the People with a continuous public viewing – a “People’s Chain of Custody” – of all ballots as contained in the ballot box or boxes during the voting period, and a manual allocation and count of all ballots in full public view promptly as the voting period ends, at each voting station, before those ballots are ever removed from public view violates the voting rights of Plaintiffs.

Amended Complaint, ¶ 228. Plaintiffs' second cause of action alleges breach of contract based upon the same alleged failure to provide a “People’s Chain of Custody.” Amended Complaint, ¶¶ 252-261. Plaintiffs' third cause of action sets forth a twelve step voting procedure that Plaintiffs allege must be followed by the defendants during the 2008 primary and general elections. Amended Complaint, ¶ 262. Plaintiffs seek injunctive relief. Amended Complaint, ¶ 268.

As required by law, the California Secretary of State is a citizen of California, and her office is in Sacramento, California. *See* Cal. Gov. Code §§ 1020, 1060(b). Among other things, the California Secretary of State is the chief elections officer for California. Cal. Gov. Code § 12172.5.

### III. ARGUMENT

#### A. **This Court Does Not Have Personal Jurisdiction Over The California Defendants.**

Plaintiffs' Amended Complaint against the California Defendants must be dismissed pursuant to Federal Rule of Civil Procedure, Rule 12(b)(2) because this Court lacks personal jurisdiction over the California Defendants.

The personal jurisdiction inquiry has two components: a statutory one and a constitutional one. The first question is whether the assertion of jurisdiction is permitted under New York law. If jurisdiction is proper under New York law, the Court must determine whether asserting jurisdiction under the New York law would be compatible with the requirements of Due Process established under the Fourteenth Amendment to the United States Constitution. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d. Cir. 2007). If jurisdiction is statutorily foreclosed, then there is no need to reach the constitutional issue. *Best Van Lines*, 490 F.3d at 244. Plaintiffs have the burden of proof to show that the Court's exercise of jurisdiction is appropriate. *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1025 (2d Cir. 1997).

##### 1. **This Court Does Not Have Personal Jurisdiction Over The California 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.

C.P.L.R. § 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. C.P.L.R. § 302. *King v. Best Western Country Inn*, 138 F.R.D 39, 41 (S.D.N.Y. 1991). Here, Plaintiffs have not alleged facts sufficient to establish personal jurisdiction over the California Defendants under either test.

**a. This Court Does Not Have Personal Jurisdiction Over The California Defendants Under Section 301.**

Under section 301, an entity is subject to jurisdiction in New York if it is "doing business" in New York so as to establish its presence in the state. *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990). For purposes of establishing jurisdiction, a defendant who is "doing business" in New York must engage in a "continuous and systematic course of conduct in New York." (*Id.*).

In the present case, Plaintiffs do not allege that the California Defendants are doing business in New York. Indeed, the California Defendants are not doing business because they are not engaged in a continuous and systematic course of conduct in New York. Therefore, the Court lacks jurisdiction over the California Defendants pursuant to section 301. *See* N.Y. C.P.L.R. § 301.

**b. This Court Does Not Have Jurisdiction Over The California Defendants Under Section 302.**

Plaintiffs fail to allege any facts to establish that jurisdiction is proper under N.Y. C.P.L.R. § 302. *See* 35 N.Y. C.P.L.R. § 302(a). Section 302(a) 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. owns, uses or possesses any real property situated within the state.

35 N.Y. C.P.L.R. § 302(a). The reach of this long-arm statute does not coincide with the limits of the Due Process Clause. *Best Van Lines*, 490 F.3d at 244.

Here, none of these four statutory bases for asserting jurisdiction over the California Defendants exist. Plaintiffs do not allege that the California Defendants transact business within the state of New York or contract to supply goods or services in the state of New York. *See* 35 N.Y. C.P.L.R. § 302(a)(1). Plaintiffs do not allege that the California Defendants committed a tortious act in New York. *See* 35 N.Y. C.P.L.R.

§ 302(a)(2). Rather, any alleged constitutional deficiencies in the California election process must have occurred in California. Similarly, Plaintiffs do not allege that the California Defendants committed a tortious act outside of New York that caused injury in New York. *See* 35 N.Y. C.P.L.R. § 302(a)(3). Plaintiffs also do not allege that the California Defendants own, use or possess any real property in New York. *See* 35 N.Y. C.P.L.R. § 302(a)(4).

In sum, Plaintiffs' Amended Complaint does not contain any allegations that would support the assertion of personal jurisdiction over the California Defendants. Where jurisdiction is foreclosed by New York law it is unnecessary to consider whether jurisdiction is proper under the Due Process Clause. *Best Van Lines*, 490 F.3d at 244. Accordingly, the Amended Complaint must be dismissed on this basis alone.

**2. This Court Does Not Have Personal Jurisdiction Over The California Defendants Under The Due Process Clause.**

Plaintiffs' Amended Complaint also fails to allege any facts to support that the assertion of jurisdiction over the California Defendants is consistent with the Due Process Clause of the Fourteenth Amendment. Modern principles of personal jurisdiction arise from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. The Due Process requirement "protects a person without meaningful ties to the forum state from being subjected to binding judgments within its jurisdiction." *Metropolitan Life Ins. Co. v. Roberson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996). There must be established

a sufficient nexus to the forum in order for the court to exercise personal jurisdiction over the defendants so that maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” *International Shoe*, 326 U.S. at 316.

The Due Process test for personal jurisdiction has two related components: the “minimum contacts” inquiry and the “reasonableness inquiry.” *Metropolitan Life Ins. Co.*, 84 F.3d at 567. The Court must first determine whether the defendant has sufficient contacts with the forum state to justify the court’s exercise of personal jurisdiction. *Id.*

A state may exercise either general or specific jurisdiction over a defendant. If a defendant’s activities are “continuous and systematic” or “substantial,” the state has sufficient relationship with the defendant to assert general jurisdiction. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 445-46 (1952). Plaintiffs have not and cannot allege any facts that would establish that the California Defendants have “continuous and systematic” or “substantial” contacts with the State of New York.

Plaintiffs also have failed to allege any facts that would establish specific jurisdiction. To establish specific jurisdiction, Plaintiffs must show that their claim arises out of or relates to the California Defendants’ contacts with New York. *See Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1028 (2d Cir. 1997) (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Plaintiffs must also show that the California Defendants “purposefully availed” themselves of the privilege of doing business in New York and that they could foresee being “haled into court” there. *Id.* (citing *World-*

*Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).). To evaluate “purposeful availment,” courts look to “some act by which the defendant purposefully avails itself to the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Plaintiffs have not alleged any facts which suggest that this Court has personal jurisdiction over the California Defendants. Here, Plaintiffs do not allege any facts suggesting that this Court has either general or specific jurisdiction over the California Defendants. Plaintiffs’ Amended Complaint does not allege or suggest that the California Defendants have continuous and systematic contacts with New York, or that the California Defendants have purposefully directed any activities related to this lawsuit towards New York.

Plaintiffs’ allegations are patently insufficient to support a finding of “minimum contacts” between New York and the California Defendants. As discussed above, Plaintiffs’ Amended Complaint contains no allegations that the California Secretary of State has conducted business in New York or taken any action related to this lawsuit that was intended to have an effect in New York. This is not surprising given that the California Secretary of State’s election duties are solely related to elections in California and she is the chief elections officer for California, not New York. *See* Cal. Gov. Code § 12172.5. Plaintiffs’ claims against the California Secretary of State arise from her



governmental acts in California. Indeed, the Amended Complaint is devoid of any allegation that the California Secretary of State “purposefully availed” herself to the benefits and protections of New York law. *See Hanson*, 357 U.S. at 253.

In sum, this is a case where there is absolutely no nexus between the allegations against the California Defendants and the forum. Accordingly, the assertion of jurisdiction not only violates New York law, but also violates Due Process.

**B. The Claims Against The State Of California Are Barred By 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 School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984). Under *Ex parte Young*, 209 U.S. 123, 159-60 (1908), “a plaintiff may sue a state official acting in his official capacity – notwithstanding the Eleventh Amendment – for prospective, injunctive relief from violations of federal law.” *In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007) (internal quotation marks omitted). However, *Ex parte Young* does not allow injunctive action against the state itself. *Ashe v. Board of Elections*, 1988 WL 95427 (E.D.N.Y. 1988).

Plaintiffs allege that they are bringing this action pursuant to 42 U.S.C. § 1983. Amended Complaint, ¶ 1. By its terms, section 1983 applies to “[e]very person who, under color of any statute ” violates the rights secured by the Constitution and laws of

the United States. 42 U.S.C. § 1983. It is well established that States are not “ persons ” for purposes of section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65-66 (1989); *United States v. City of Yonkers*, 96 F.3d 600, 619 (2d Cir. 1996).

In the present case, Plaintiffs have named the State of California as a defendant. Because the State of California is immune from suit under the Eleventh Amendment, the claims against the State of California should be dismissed.

#### IV. CONCLUSION

For all the foregoing reasons, the claims against the California Defendants must be dismissed.

Dated: December 10, 2007

Respectfully submitted,

EDMUND G. BROWN JR.  
Attorney General of the State of California

CHRISTOPHER E. KRUEGER  
Senior Assistant Attorney General

CONSTANCE L. LELOUIS  
Supervising Deputy Attorney General

/s/ Margaret Carew Toledo

MARGARET CAREW TOLEDO  
Deputy Attorney General  
Office of the Attorney General  
1300 I Street, Suite 125  
PO Box 944255  
Sacramento, CA 94244-2550