

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT SCHULZ, *et al*,
Plaintiffs

v.

STATE OF NEW YORK, *et al*,
Defendants

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CASE NO: 1:07-CV-0943 LEK/DRH

MEMORANDUM IN SUPPORT OF
INDIANA DEFENDANTS' MOTION TO DISMISS

NOW COME the State of Indiana and Todd Rokita, Indiana Secretary of State (hereinafter referred to as "Indiana Defendants"), by and through counsel, the Office of the Attorney General for the State of Indiana, and hereby submit their Motion to Dismiss and Memorandum in Support, and request the Court to dismiss Plaintiffs', Bob Schulz, *et al*, (hereinafter referred to as "Plaintiffs") Amended Complaint on the grounds that: (1) pursuant to Federal Rule of Civil Procedure 12(b)(2), this Court does not have personal jurisdiction over the Indiana Defendants; (2) pursuant to Fed. R. Civ. P. 12(b)(3), this Court constitutes improper venue as to the Indiana Defendants; (3) pursuant to Fed. R. Civ. P. 12(b)(1), this Court lacks jurisdiction over the subject matter of this case because the Secretary of State of Indiana has no authority to control the types of electronic voting systems that are used in Indiana, and therefore, the Plaintiffs lack standing; (4) pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiffs have failed to state a claim upon which relief may be granted because the individual Indiana counties independently determine whether they are going to use voting machines at their polling places for all local, state and federal

elections, thus a ruling in favor of the Plaintiffs would fail to redress the Plaintiffs' alleged injuries; and (5) pursuant to the Eleventh Amendment, the State of Indiana is immune from suit. In support of this motion, the Indiana Defendants state the following:

I. BRIEF FACTUAL BACKGROUND

Plaintiffs filed this amended complaint alleging three causes of action against all fifty states and their chief election officials, including the Indiana Defendants. The allegations against each of the Defendants relate to Plaintiffs' objections to the Defendants use of certain voting machines in elections held in the States of each of the named Defendants.

Plaintiffs request that this Court permanently enjoin the Defendants from conducting elections: (1) which are not "open, verifiable, transparent, machine-free, computer-free," (Amended Complaint at ¶ 268(a)); (2) which do not "rely exclusively on paper ballots, hand marked and hand-counted," (Amended Complaint at ¶ 268(b)); and (3) which do not keep paper ballots in "full public view until the results of the hand counting is publicly announced at that vote station." (Amended Complaint at ¶ 268(c)).

II. ARGUMENT IN SUPPORT OF DISMISSAL

A. This Court lacks personal jurisdiction over the Indiana Defendants.

"It has long been the rule that the standard to be applied in determining whether a federal district court has jurisdiction over the person in diversity cases is the law of the state where the court sits." *Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd.*, 869 F.2d 34, 40 (2d Cir.1989). The exercise of jurisdiction is proper if the defendant has sufficient contacts to satisfy both the state long arm statute and the Due Process Clause of the

Fourteenth Amendment. *See Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1025-26 (2d Cir.1997).

The Indiana Defendants hereby incorporate by reference and adopt the New Hampshire Defendants' arguments to dismiss for lack of personal jurisdiction. For the reasons set forth in the New Hampshire Defendants' Motion to Dismiss and accompanying memorandum, the Plaintiffs' Amended Complaint against the Indiana Defendants must be dismissed.

B. This Court is not the proper venue to bring this action against the Indiana Defendants.

This Court should grant the Indiana Defendants' motion to dismiss because this Court is not the proper venue for this action. Venue is determined by considering the connection between the acts or omissions in the filing forum and the asserted claims. *See Friedman v. Revenue Mgmt. of N.Y., Inc.*, 38 F.3d 668, 672 (2d Cir.1994). Title 28 U.S.C. § 1391(b) provides in relevant part:

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 (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

The Indiana Defendants hereby incorporate by reference and adopt the New Hampshire Defendants' arguments to dismiss for improper venue. For the reasons set forth in the New Hampshire Defendants' Motion to Dismiss and accompanying memorandum, the Plaintiffs' Amended Complaint against the Indiana Defendants must be dismissed.

C. The Secretary of State of Indiana has no authority to control the types of electronic voting systems that are used in Indiana; thus the Court should grant Indiana's Motion to Dismiss because the Plaintiffs lack standing.

Under Article III of the United States Constitution, this Court lacks subject matter jurisdiction over this case because the Plaintiffs lack standing in that the injuries they assert are not fairly traceable to the conduct of the Defendants.

Standing turns on whether the plaintiffs have a personal stake in the controversy and “whether the dispute touches upon the ‘legal relations of the parties having adverse legal interests.’” *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). To have standing a plaintiff must demonstrate: 1) a personal injury; 2) fairly traceable to the defendant; 3) that is likely to be redressed in the event of a favorable ruling from the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The injury must be causally related to the defendant’s action and not the result of the independent action of some third party. *Id.* Also, it must be likely, not just speculative, that a favorable ruling from the court will redress the Plaintiffs’ injury. *Id.* at 561.

The second and third elements of standing require that “a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.” *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). In this case, only the parties that actually enforce the challenged statute, e.g. the Indiana Election Commission, will be able to redress the asserted injury. It is not enough that the government officials have the ability to give advice about a statute, and “[g]eneral

authority to enforce the laws of the state is not sufficient to make government officials the proper parties to litigation challenging the law.” *1st Westco Corp. v. School Dist. of Philadelphia*, 6 F.3d 108, 113-14 (3d Cir. 1993) (holding that the school district officials, not the Attorney General or state Secretary of Education, were the proper defendants in a challenge to a contractor residency requirement). In *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019 (9th Cir. 2002), the court lacked jurisdiction over a city ballot text dispute brought against the California Secretary of State because the city was not required to follow the Secretary’s directions when running its municipal elections.

The Indiana Secretary of State does not have the authority under Indiana law to approve or otherwise select what type of voting method or electronic voting system the individual Indiana county election boards use in counting and/or processing votes for local, state or federal elections. The decision to approve electronic voting systems lies with the Indiana Election Commission and the decision on whether or not to use electronic voting systems lies with the individual Indiana county election boards. *See* Ind. Code §3-11-7.5-1 and § 3-11-14-2.

The Indiana Election Commission consists of four (4) individuals appointed by the Governor. Ind. Code § 3-6-4.1-2. The Indiana Election Commission is responsible for, among other duties, the administration of Indiana election laws and the adoption and governing of rules regarding the fair, legal, and orderly conduct of elections. Ind. Code § 3-6-4.1-14. Notably, “the *commission* must approve any form of electronic voting system before it may be used at an election.” Ind. Code § 3-11-7.5-1. (Emphasis added). The individual Indiana county election boards consist of a circuit court clerk and two (2) persons appointed by the circuit court clerk, one (1) from each of the major political

parties of the county. Ind. Code § 3-6-5-2. The individual county election boards are given the authority to decide whether or not to use electronic voting systems in their respective counties. Ind. Code § 3-11-14-2. Indiana Code § 3-11-14-2 states that a county election board may use an approved electronic voting system in any election, in all or in some of the precincts, and instead of or in a combination with any other voting method. Nowhere within the relevant Indiana statutes is the Secretary of State given the authority to establish or choose a voting method for Indiana elections.

The Indiana Secretary of State, on the other hand, is denominated the state's "chief election official", which means that he is the designated state official for purposes of enforcing, for example, voting accessibility rights for the elderly and handicapped under 42 U.S.C. § 1973ee. The Secretary of State has other limited duties concerning state elections, which primarily deal with developing programs to assist in the implementation of the Help America Vote Act (HAVA). *See* Ind. Code § 3-6-3.7-2; Ind. Code § 3-6-4.2-2. Notably, the Secretary of State cannot act without the consent of the co-directors of the Indiana Election Division. Ind. Code § 3-6-3.7-2. The Indiana Secretary of State does not have the authority under Indiana law to approve or otherwise select what type of voting machines or voting method the counties in Indiana use in counting and/or processing votes for local, state or federal elections. Accordingly, this Court should dismiss Plaintiffs' amended complaint against the Indiana Secretary of State.

D. The individual Indiana counties independently determine whether they are going to use voting machines at their polling places for all local, state and federal elections, thus a ruling in favor of the Plaintiffs would fail to redress the Plaintiffs' alleged injuries.

Indiana is comprised of ninety-two (92) counties. Pursuant to Indiana Code § 3-11-14-2, the county election boards may authorize the use of an approved electronic voting system in any election, in all or in some of the precincts and instead of or in combination with any other voting method. While the Indiana Election Commission, *supra*, is charged with determining what type of voting machines may be used in Indiana, the individual counties in Indiana are authorized to determine whether they will use such voting machines in conducting elections, or whether they will engage in hand-counting ballots. Furthermore, a county could not choose to provide traditional hand-paper ballots only, to do so would violate HAVA's requirement to have an accessible voting system in each polling place that would permit a blind or visually impaired person to vote privately and independently in an election with federal candidates on the ballot. Ind. Code § 3-11-15-13.3. Under HAVA, a county could use traditional hand-counted ballots with an otherwise accessible machine but they could not opt to use traditional hand-counted ballots as the sole means of voting in each polling place without violating HAVA.

Because the Indiana Secretary of State does not regulate or otherwise control which voting method is permitted for use in Indiana, and does not regulate or control whether an Indiana county opts to use or not use a voting machine in conducting local, state and federal elections, Plaintiffs have inappropriately named the Indiana Secretary of State as a Defendant. This lack of connection between the Secretary of State and the

Plaintiffs' asserted injuries also means that not even a favorable ruling from this Court will redress those injuries. *Lujan*, 504 U.S. at 560-61.

If the Court were to enjoin the Defendants from using electronic voting systems the Defendants would have no power to carry out that injunction. The county election boards have the power to enforce the statute at issue; they are not subject to the Defendants' control or personnel decisions. A lawsuit is justiciable under Article III, if a redress is "likely" to follow from a favorable decision and not be merely "speculative." *Lujan*, 504 U.S. at 561. Accordingly, Plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. *Chapman v. New York State Div. for Youth*, 2005 WL 2407548, *4 (N.D.N.Y. 2005).

E. Defendant State of Indiana's Motion to Dismiss must be granted because it is immune from suit under the Eleventh Amendment.

Plaintiffs' claim against the State of Indiana is barred by the Eleventh Amendment. The Eleventh Amendment deprives federal courts of subject matter jurisdiction over suits against states. *Atascadero v. Scanlon*, 473 U.S. 234, 238 (1985); *Moore v. State of Indiana*, 999 F.2d 1125, 1128 (7th Cir. 1993); *see also Seminole Tribe of Florida v. Florida*, 116 S. Ct. 114, 1122 n.7 (1996) (listing 24 Supreme Court cases reaffirming that the Constitution did not establish "federal jurisdiction over suits against unconsenting states")

The Indiana Defendants hereby incorporate by reference and adopt the New Hampshire Defendants' arguments to dismiss because the State of Indiana is immune from suit under the Eleventh Amendment. For the reasons set forth in the New Hampshire Defendants' Motion to Dismiss and accompanying memorandum, the Plaintiffs' Amended Complaint against the Indiana Defendants must be dismissed.

III. CONCLUSION

The Indiana Defendants respectfully request that this Honorable Court:

- (1) Dismiss the Plaintiffs' amended complaint as against the Indiana Defendants; and
- (2) Grant such further relief as it may deem just and equitable.

Dated: December 12, 2007

Respectfully submitted,

THE STATE OF INDIANA
and
TODD ROKITA, Indiana Secretary of State
By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2007, a copy of the foregoing Memorandum in Support of Indiana Defendants Motion to Dismiss was sent to the following by U.S. Mail:

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