

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

ROBERT L. SCHULZ, et al.,

Plaintiffs,

v.

Case No. 1:07-CV-0943 LEK/DRH

STATE OF NEW YORK, et al.,

Defendants.

BRIEF IN SUPPORT OF
MOTION OF WISCONSIN DEFENDANTS
TO DISMISS AMENDED COMPLAINT

J.B. VAN HOLLEN
Attorney General

THOMAS J. BALISTRERI
Assistant Attorney General
N.D. N.Y. Bar #106500
Wisconsin State Bar #1009785

Attorneys for Wisconsin Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT.....	2
I. THE ELEVENTH AMENDMENT PRECLUDES THE PLAINTIFFS FROM SUING THE STATE OF WISCONSIN AND THE WISCONSIN ELECTIONS BOARD IN FEDERAL COURT.....	2
II. THIS COURT HAS NO PERSONAL JURISDICTION OVER ANY OF THE REMAINING WISCONSIN DEFENDANTS BECAUSE NONE OF THEM HAS ANY SIGNIFICANT OFFICIAL CONTACT WITH THE STATE OF NEW YORK WHERE THIS COURT IS LOCATED.	5
III. NONE OF THE PLAINTIFFS EXCEPT FRANCINE ARNOLD AND ANITA ZIBTON HAS STANDING TO SUE THE WISCONSIN DEFENDANTS.....	6
IV. VENUE OF THE CASE OF ANY REMAINING PLAINTIFFS AGAINST ANY REMAINING WISCONSIN DEFENDANTS SHOULD BE TRANSFERRED TO THE WESTERN DISTRICT OF WISCONSIN.....	8
CONCLUSION.....	10

CASES CITED

Arizonans for Official English v. Arizona, 520 U.S. 43 (1997)	7
--	---

	Page
Bennett v. City of Atlantic City, 288 F. Supp. 2d 675 (D. N.J. 2003).....	5
Boldt v. State, 98 Wis. 2d 445, 297 N.W.2d 29 (Ct. App. 1980), modified on other grounds, 101 Wis. 2d 566, 305 N.W.2d 133 (1981).....	4
Deposit Ins. Agency v. Super. of Banks of State of N.Y., 482 F.3d 612 (2d Cir. 2007).....	3
Diamond v. Charles, 476 U.S. 54 (1986)	7
Fiala v. Voight, 93 Wis. 2d 337, 286 N.W.2d 824 (1980)	4
Fincher v. Fla. Dept. of Labor & Emp. Sec., 798 F.2d 1371 (11th Cir. 1986), cert. denied, 479 U.S. 1072 (1987).....	5
Friends of the Earth, Inc. v. Laidlaw Envntl. Serv., Inc., 528 U.S. 167 (2000)	7
German v. DOT, 223 Wis. 2d 525, 589 N.W.2d 651 (Ct. App. 1991).....	4
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	7
Mancuso v. N.Y. State Thruway Auth., 86 F.3d 289 (2d Cir. 1996).....	3
McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987), cert. denied, 486 U.S. 1006 (1988).....	4
McDonald v. Illinois, 557 F.2d 596 (7th Cir.), cert. denied, 434 U.S. 966 (1977).....	3

	Page
Owen v. Lash, 682 F.2d 648 (7th Cir. 1982)	3
Parents for Quality Educ. With Integration, Inc. v. Fort Wayne Cmty. Sch. Corp., 662 F. Supp. 1475 (N.D. Ind. 1987)	5
Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)	4
Perry v. Vill. of Arlington Hgts., 186 F.3d 826 (7th Cir. 1999)	7
Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990)	3
Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998)	6, 7
Quern v. Jordan, 440 U.S. 332 (1979)	4
Warth v. Seldin, 422 U.S. 490 (1975)	6
Weinberger v. Wisconsin, 906 F. Supp. 485 (W.D. Wis. 1995), aff'd, 105 F.3d 1182 (7th Cir.), cert. denied, 522 U.S. 932 (1997).....	4
Whitmore v. Arkansas, 495 U.S. 149 (1990)	6, 7
Williams v. Missouri, 973 F.2d 599 (8th Cir. 1992)	4

STATUTES CITED

28 U.S.C.A. § 1391.....	2, 9
-------------------------	------

	Page
28 U.S.C.A. § 1391(b)	9
28 U.S.C.A. § 1404(a)	2, 9
42 U.S.C.A. § 1983.....	4
42 U.S.C.A. § 1985.....	4, 5
Wis. Stat. § 5.05(1).....	3
Wis. Stat. § 15.61.....	3
Wis. Stat. § 165.25(6).....	4

OTHER AUTHORITIES CITED

Fed. R. Civ. P. 12(b)(1)	2
Fed. R. Civ. P. 12(b)(2)	2
Fed. R. Civ. P. 12(b)(3)	2
U.S. Const. art. III, § 2.....	6
U.S. Const. amend. XI.....	2, 3

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

ROBERT L. SCHULZ, et al.,

Plaintiffs,

v.

Case No. 1:07-CV-0943 LEK/DRH

STATE OF NEW YORK, et al.,

Defendants.

BRIEF IN SUPPORT OF
MOTION OF WISCONSIN DEFENDANTS
TO DISMISS AMENDED COMPLAINT

INTRODUCTION

Over one hundred plaintiffs from all over the country, each appearing pro se, have sued all fifty states and/or their election officials seeking to force the states to abandon voting machines in favor of hand printed and hand counted paper ballots.

Only two of the numerous plaintiffs, Francine Arnold and Anita Zibton, allege that they reside in Wisconsin, and that they intend to vote for president in primary and general elections to be held in Wisconsin. None of the other plaintiffs has alleged any connection with Wisconsin or any elections in Wisconsin.

The State of Wisconsin, Wisconsin State Elections Board, John Schober, Shane Falk, David Anstaett, Kirby Brant, Donald Goldberg, Carl Holborn, Patrick Hodan, Robert Kasieta, and Jon Savage (collectively Wisconsin defendants), have moved to

dismiss the amended complaint of all plaintiffs against defendants State of Wisconsin and Wisconsin State Elections Board under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction over the subject matter under U.S. Const. amend. XI, and to dismiss the amended complaint of all plaintiffs against all remaining Wisconsin defendants under Fed. R. Civ. P. 12(b)(2) for lack of jurisdiction over the person, or in the alternative to dismiss the amended complaint of all plaintiffs except Francine Arnold and Anita Zibton (collectively Wisconsin plaintiffs) against all Wisconsin defendants under Fed. R. Civ. P. 12(b)(1) for lack of standing to sue the Wisconsin defendants, to dismiss the amended complaint of the Wisconsin plaintiffs against all other defendants under Fed. R. Civ. P. 12(b)(1) for lack of standing to sue the other defendants, and under Fed. R. Civ. P. 12(b)(3), to transfer venue of any claims of any remaining Wisconsin plaintiffs against any remaining Wisconsin defendants under 28 U.S.C.A. §§ 1391 and 1404(a), to the United States District Court for the Western District of Wisconsin.

ARGUMENT

I. THE ELEVENTH AMENDMENT PRECLUDES THE PLAINTIFFS FROM SUING THE STATE OF WISCONSIN AND THE WISCONSIN ELECTIONS BOARD IN FEDERAL COURT.

To begin with, the amended complaint should be dismissed against the State of Wisconsin and the Wisconsin State Elections Board because the Eleventh Amendment precludes any and all of the plaintiffs from suing a state or state agency in federal court.¹

¹The State of Michigan has also moved to dismiss under the Eleventh Amendment and Wisconsin adopts and joins in Michigan's arguments. Brief for Michigan at 20-22.

The Constitution of the United States provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State” U.S. Const. amend. XI.

The Eleventh Amendment has been authoritatively construed to establish that a nonconsenting state is immune from suits brought in federal court by its own citizens as well as by citizens of another state. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990); *McDonald v. Illinois*, 557 F.2d 596, 600 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977).

The immunity granted to the states under the Eleventh Amendment also extends to agencies of the state. *Deposit Ins. Agency v. Super. of Banks of State of N.Y.*, 482 F.3d 612, 617 (2d Cir. 2007); *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 292 (2d Cir. 1996). The Wisconsin State Elections Board is a state agency, created by statute, Wis. Stat. § 15.61 (2005-06), with members appointed by the Governor, *id.*, and having responsibility to administer state laws relating to elections and election campaigns. Wis. Stat. § 5.05(1) (2005-06).

The Eleventh Amendment is a limitation on federal judicial power which presents a jurisdictional bar to a suit against a state in a federal court. *Owen v. Lash*, 682 F.2d 648, 655 (7th Cir. 1982). Thus, a state cannot be sued in federal court and must be dismissed from the litigation unless the state has consented to be sued or Congress has abrogated its

immunity from suit. *Williams v. Missouri*, 973 F.2d 599, 600 (8th Cir. 1992); *McConnell v. Adams*, 829 F.2d 1319, 1328-29 (4th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988); *Weinberger v. Wisconsin*, 906 F. Supp. 485, 491 (W.D. Wis. 1995), *aff'd*, 105 F.3d 1182 (7th Cir.), *cert. denied*, 522 U.S. 932 (1997) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)).

The State of Wisconsin has consented to be sued only in those specific instances where the Legislature has clearly and expressly given its consent. *German v. DOT*, 223 Wis. 2d 525, 530-31, 589 N.W.2d 651, 654 (Ct. App. 1991); *Fiala v. Voight*, 93 Wis. 2d 337, 342-43, 286 N.W.2d 824, 827 (1980). *See* Wis. Stat. § 165.25(6) (2005-06) (statute authorizing Attorney General to defend lawsuits brought against state may not be construed as consent to sue state).

The State of Wisconsin has not consented to be sued in federal court, *Weinberger*, 906 F. Supp. at 491, and has not consented to be sued under 42 U.S.C.A. § 1983 in any court. *Boldt v. State*, 98 Wis. 2d 445, 453, 297 N.W.2d 29, 35 (Ct. App. 1980), *modified on other grounds*, 101 Wis. 2d 566, 305 N.W.2d 133 (1981). Nor is there any Wisconsin legislation clearly and expressly consenting to suits against the state under 42 U.S.C.A. § 1985.

Congress has not abrogated the states' Eleventh Amendment immunity from suit in civil rights actions under 42 U.S.C.A. § 1983. *Quern v. Jordan*, 440 U.S. 332, 341-45 (1979); *Williams*, 973 F.2d at 600; *McConnell*, 829 F.2d at 1328; *Weinberger*, 906 F. Supp. at 491. Nor has Congress abrogated the states' Eleventh Amendment

immunity from suit in civil rights actions under 42 U.S.C.A. § 1985. *Fincher v. Fla. Dept. of Labor & Emp. Sec.*, 798 F.2d 1371, 1372 (11th Cir. 1986), *cert. denied*, 479 U.S. 1072 (1987); *Bennett v. City of Atlantic City*, 288 F. Supp. 2d 675, 684 (D. N.J. 2003); *Parents for Quality Educ. With Integration, Inc. v. Fort Wayne Cmty. Sch. Corp.*, 662 F. Supp. 1475, 1480 (N.D. Ind. 1987).

Therefore, the State of Wisconsin and the Wisconsin State Elections Board are immune from being sued in any civil rights action in any federal court, and should be dismissed as defendants in this case.

II. THIS COURT HAS NO PERSONAL JURISDICTION OVER ANY OF THE REMAINING WISCONSIN DEFENDANTS BECAUSE NONE OF THEM HAS ANY SIGNIFICANT OFFICIAL CONTACT WITH THE STATE OF NEW YORK WHERE THIS COURT IS LOCATED.

The states of Michigan, New Hampshire, North Dakota, Oregon, South Carolina, and Texas have previously filed motions to dismiss raising, among other defenses, a claim that this Court lacks personal jurisdiction over the defendants in those states because the amended complaint fails to allege that any of those defendants has any significant contact with the State of New York where this Court is located.

Rather than unnecessarily repeating the arguments already made in the briefs of the other states, the Wisconsin defendants hereby adopt, join in, and incorporate by reference the arguments made by those states regarding lack of personal jurisdiction, i.e. Brief for Michigan at 15-18, Brief for New Hampshire at 2-4, Brief for North Dakota at 2-8, Brief for Oregon at 2-7, Brief for South Carolina at 3-6, and Brief for Texas at 3-7.

As with the defendants in those states, the amended complaint fails to allege any facts showing that any of the Wisconsin defendants has any significant contact with the State of New York. Moreover, the attached affidavit of Kevin Kennedy affirmatively shows that neither the Wisconsin State Elections Board nor any of its individual members has any significant contact with the State of New York.

Therefore, the United States District Court for the Northern District of New York lacks personal jurisdiction over any and all the Wisconsin defendants.

III. NONE OF THE PLAINTIFFS EXCEPT FRANCINE ARNOLD AND ANITA ZIBTON HAS STANDING TO SUE THE WISCONSIN DEFENDANTS.

Alternatively, none of the numerous plaintiffs except the two Wisconsin plaintiffs, Francine Arnold and Anita Zibton, has standing to sue any of the Wisconsin defendants.

The jurisdiction of federal courts is limited to “cases or controversies.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998); U.S. Const. art. III, § 2.

To qualify as a case or controversy within this jurisdictional limitation, a dispute must be amenable to resolution by the judicial process. *Steel Co.*, 523 U.S. at 102. The requirement of standing serves to identify those disputes that may properly be resolved by this process, *id.*, so as to warrant the invocation of federal jurisdiction and justify the exercise of federal judicial power. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975).

For there to be standing, first and foremost there must be injury in fact. *Steel Co.*, 523 U.S. at 103; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). It is not enough that there might be a disagreement, no matter how sharp or acrimonious, which, if resolved in

the plaintiffs' favor, might make them happier. *Compare Steel Co.*, 523 U.S. at 107, with *Diamond v. Charles*, 476 U.S. 54, 62 (1986). There must be an invasion of a legally protected interest that is both qualitatively and chronologically concrete. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *Whitmore*, 495 U.S. at 155. The injury must be palpable rather than abstract, and the harm must be actual instead of conjectural. *Id.* (and cases cited).

Moreover, the injury must be caused by the conduct about which the plaintiff complains. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Perry v. Vill. of Arlington Hgts.*, 186 F.3d 826, 829 (7th Cir. 1999). And it must be likely that the alleged injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561; *Perry*, 186 F.3d at 829. All three requirements are indispensable elements of a plaintiff's case. *Id.*

Thus, the party invoking the jurisdiction of a federal court has the burden to establish standing to sue. *Steel Co.*, 523 U.S. at 107; *Whitmore*, 495 U.S. at 154-56. To establish standing, the plaintiff must prove that a real injury is present or threatened at the time the complaint is filed, and will likely continue or occur if the defendant's conduct is not checked by the court. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 189-91 (2000); *Whitmore*, 495 U.S. at 158.

In this case, only two of the scores of pro se plaintiffs have alleged that they will suffer any actual injury as a result of the conduct of any of the Wisconsin defendants. Only Francine Arnold and Anita Zibton have alleged that they are citizens of Wisconsin, that they are registered to vote in Wisconsin, and that they intend to vote for president in

elections to be held in Wisconsin. Amended Complaint, ¶¶ 155-56. Only Francine Arnold and Anita Zibton have alleged that their votes might not be accurately tabulated if Wisconsin uses machines to count them.

Since none of the other plaintiffs has alleged that they are able and intend to vote in any election in Wisconsin, or that their votes might not be accurately tabulated in Wisconsin, they cannot actually be harmed by any conduct of the Wisconsin defendants in conducting elections in Wisconsin.

Therefore, none of the plaintiffs except Francine Arnold and Anita Zibton has any standing to sue the Wisconsin defendants, and the claims of all the plaintiffs except Francine Arnold and Anita Zibton should be dismissed as to all the Wisconsin defendants.

IV. VENUE OF THE CASE OF ANY REMAINING PLAINTIFFS AGAINST ANY REMAINING WISCONSIN DEFENDANTS SHOULD BE TRANSFERRED TO THE WESTERN DISTRICT OF WISCONSIN.

For the same reasons discussed above, the claims of Francine Arnold and Anita Zibton should be dismissed as to all defendants except the Wisconsin defendants because these Wisconsin plaintiffs, who have not alleged any intent to vote in elections in any other states, have no standing to sue any other states or their election officials.

So if the amended complaint is not dismissed as to all Wisconsin defendants for lack of jurisdiction, the only live claims left as far as the Wisconsin plaintiffs and defendants are concerned would be the claims of Francine Arnold and Anita Zibton

against the State of Wisconsin, the Wisconsin State Elections Board, and the individual members of the Board.

The proper venue with respect to those claims is plainly not the Northern District of New York since none of the Wisconsin plaintiffs or defendants reside in that district, and none of the acts giving rise to the cause of action alleged by the Wisconsin plaintiffs against any Wisconsin defendants have taken place in that district. *See* 28 U.S.C.A. § 1391(b) (West 2006).²

Rather, since the office of the Wisconsin State Elections Board is in Madison in the Western District of Wisconsin, since all the individual defendants identified as members of the Board reside in Wisconsin, and since Evansville and La Farge where Francine Arnold and Anita Zibton reside and vote are in the Western District of Wisconsin, as shown by the attached affidavit of Kevin Kennedy, the appropriate venue for any remaining claims by the Wisconsin plaintiffs against any remaining Wisconsin defendants is the Western District of Wisconsin. *See id.*

So if any claims of any Wisconsin plaintiffs remain against any Wisconsin defendants, venue regarding those remaining claims should be transferred to the Western District of Wisconsin under 28 U.S.C.A. §§ 1391 and 1404(a) (West 2006).

²The State of Michigan has also complained that venue is not proper in this district and Wisconsin adopts and joins in Michigan's arguments. Brief for Michigan at 18-20.

CONCLUSION

It is therefore respectfully submitted that the amended complaint filed by all plaintiffs should be dismissed as to the State of Wisconsin and the Wisconsin State Elections Board because they have absolute immunity from suit, and that the amended complaint filed by all plaintiffs should be dismissed as to all remaining Wisconsin defendants for lack of jurisdiction over the person.

In the alternative, the claims of all plaintiffs except the Wisconsin plaintiffs should be dismissed as to all Wisconsin defendants for lack of standing to sue the Wisconsin defendants, the claims of the Wisconsin plaintiffs should be dismissed as to all other defendants for lack of standing to sue any non-Wisconsin defendants, and venue regarding any claims of any remaining Wisconsin plaintiffs against any remaining Wisconsin defendants should be transferred to the Western District of Wisconsin.

Dated this 12th day of December, 2007.

J.B. VAN HOLLEN
Attorney General

s/Thomas J. Balistreri
THOMAS J. BALISTRERI
Assistant Attorney General
N.D. N.Y. Bar #106500
Wisconsin Bar #1009785

Attorneys for Wisconsin Defendants

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1523

balistreritj\schulz, robert\brief re motion to dismiss.doc