

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

ROBERT L. SCHULZ, et al.,

*

Plaintiffs,

*

v.

*

Case No. 07-CV-0943 LEK/DRH

STATE OF NEW YORK, et al.,

*

Defendants.

*

* * * * *

**MEMORANDUM IN SUPPORT OF
MARYLAND DEFENDANTS' MOTION TO DISMISS**

Defendants State of Maryland, Robert S. Walker, Bobbie S. Mack, Andrew V. Jezic, David J. McManus, Jr., and Charles E. Thomann (the "Maryland Defendants"), through their undersigned counsel, submit this memorandum in support of their motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b).

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INTRODUCTION

Plaintiffs bring this action against each of the fifty states and their elections officials, including the Maryland Defendants, challenging the constitutionality of elections procedures in each state. The Maryland Defendants are the State of Maryland and five named individuals. Each of the individual Maryland Defendants resides in Maryland and is a member of the Maryland State Board of Elections, which oversees voter registration and elections practices in the State of Maryland.

Of the more than 145 individual Plaintiffs, only three allege any potential connection with Maryland's election system. Those three Plaintiffs – Harold Poole, Walter Augustine, and Cynthia Jones – allege only that they are qualified and registered voters in Maryland who intend to vote for President “in the Maryland State 2008 primary and general election.” Amended Compl. (“AC”) ¶¶ 70-72.

None of the Plaintiffs alleges any facts that would establish personal jurisdiction in New York over the State of Maryland or the members of the Maryland State Board of Elections. Plaintiffs make no specific allegations concerning particular actions of the Maryland Defendants. Rather, the Amended Complaint makes undifferentiated claims relating to the Defendants' alleged collective use of various machines and computers to count and tabulate votes in elections held in every state, and the states' alleged general failure to announce each candidate's vote totals at every voting station. AC ¶¶ 245-51. Based upon these general allegations, Plaintiffs seek as relief to permanently enjoin each state from conducting elections that (1) are not “open, verifiable, transparent, machine-free, and

computer-free,” (2) do not “rely exclusively on paper ballots, hand marked and hand counted,” and (3) do not keep such paper ballots “in full public view until the results of the hand counting is publicly announced at that vote station.” AC ¶ 268.

Plaintiffs’ claims against the Maryland Defendants should be dismissed on the face of the complaint. The State of Maryland is immune from this suit in federal court under the Eleventh Amendment to the United States Constitution. In addition, the Amended Complaint fails to allege any action on the part of the State of Maryland, or the members of the Maryland State Board of Elections, that has any nexus to the State of New York or its residents and supports an assertion of personal jurisdiction over the State of Maryland. Venue also is improper in this Court. Moreover, since none of the individual Plaintiffs has alleged any actual or threatened harm fairly traceable to any specific action of the Maryland Defendants, Plaintiffs lack the necessary standing to maintain this action. This Court thus lacks subject matter jurisdiction as well.

ARGUMENT

I. The State of Maryland Is Immune from Suit Under the Eleventh Amendment.

The Eleventh Amendment to the United States Constitution bars claims in federal court against consenting states and their agencies. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (“It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is

proscribed by the Eleventh Amendment.”). This jurisdictional bar applies regardless of the nature of the relief sought. *Id.*

Plaintiffs have named the State of Maryland itself as a defendant in this action. The State of Maryland has not consented to suit. The claims against the State of Maryland should thus be dismissed.

II. Plaintiffs Have Not Established Personal Jurisdiction over any of the Maryland Defendants.

To survive a motion to dismiss for lack of personal jurisdiction, the plaintiff must allege facts establishing a prima facie showing that personal jurisdiction exists over each defendant. *A.I. Trade Fin., Inc. v. Petra Bank*, 989 F.3d 76, 79-80 (2d Cir. 1993); *see also Arista Techs., Inc. v. Arthur D. Little Enters., Inc.*, 125 F. Supp. 2d 641, 649 (E.D.N.Y. 2000). To determine whether personal jurisdiction exists, courts look first to the law of the state in which the district court sits. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007); *Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir. 2006) (“The breadth of a federal court’s personal jurisdiction is determined by the law of the state in which the district court is located.”). If the relevant state’s law establishes personal jurisdiction, courts must then determine whether asserting jurisdiction under that law would be compatible with the Fourteenth Amendment’s requirement of due process. *Best Van Lines*, 490 F.3d at 242 (citing *International Shoe v. Washington*, 326 U.S. 310, 315 (1945)); *see also Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997) (“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.”), *cert. denied*, 523 U.S. 1106 (1998).

In this case, Plaintiffs have failed to plead facts to make a prima facie showing that personal jurisdiction over the Maryland Defendants exists under either New York law or the Fourteenth Amendment. Plaintiffs, therefore, cannot meet their burden of establishing personal jurisdiction. *See Thomas*, 470 F.3d at 495; *Arista Techs.*, 125 F. Supp. 2d 641, 652, 654.

A. Plaintiffs Have Not Pled Facts Indicating that Jurisdiction Exist Under New York’s Long-Arm Statute.

New York’s “long-arm” statute provides the terms under which courts in this State can exercise personal jurisdiction. It states the following:

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 . . . or
4. owns, uses or possesses any real property situated within the state.

N.Y. C.P.L.R. § 302(a).

Plaintiffs state no facts demonstrating that any of the Maryland Defendants meets any of these criteria for personal jurisdiction under New York law. Plaintiffs have not alleged that any of the Maryland Defendants transacts business in New York or contracts to supply goods or services in New York. They have not alleged that any of the Maryland Defendants has committed a tortious act within or without New York that affects New York residents or property. And they have not alleged that any of the Maryland Defendants owns, uses, or possesses any real property situated within New York. Although filed in New York, the Amended Complaint's allegations against the Maryland Defendants concern only voting in Maryland.

Plaintiffs, therefore, have failed to allege facts sufficient under New York's long-arm statute to impose personal jurisdiction over any of the Maryland Defendants.

B. Plaintiffs Have Not Pled Facts Indicating that Jurisdiction Exists Under the Due Process Clause of the Fourteenth Amendment.

Even if Plaintiffs had made a prima facie showing that New York's long-arm statute establishes jurisdiction over the Maryland Defendants, which they have not, Plaintiffs have not pled facts demonstrating that personal jurisdiction over the Maryland Defendants could be asserted consistent with the Due Process Clause of the Fourteenth Amendment.

A court determining whether, under the Due Process Clause, it has jurisdiction over an out-of-state defendant must evaluate the "quality and nature" of the defendant's contacts with the forum state under a totality of circumstances test. *Best Van Lines*, 490 F.3d at 242

(citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 485-86 (1985)). A court may exercise personal jurisdiction only over a defendant whose “conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” *Burger King Corp.*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Essential to the exercise of personal jurisdiction in each case is “some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Id.* at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

Plaintiffs have not alleged that the Maryland Defendants engaged in any act by which they purposefully availed themselves of the privilege of conducting activities within the State of New York, thus invoking the benefits and protections of the State’s laws. None of Plaintiffs’ allegations connect the Maryland Defendants to the State of New York in any way. Moreover, as discussed above, Plaintiffs have not alleged that any of the Maryland Defendants resides in New York or transacts business in New York.

Plaintiffs, therefore, have also failed to state facts sufficient under the Due Process Clause to confer personal jurisdiction over any of the Defendants. Accordingly, pursuant to Rule 12(b)(2), Plaintiffs’ claims against the Maryland Defendants must be dismissed. *See Thomas*, 470 F.3d at 495; *Arista Techs.*, 125 F. Supp. 2d 641, 652, 654.

III. Venue Is Improper for the Maryland Defendants.

As an independent basis for dismissal of the claims against the Maryland Defendants, this Court is not the proper venue for this action against them.

The applicable civil venue statute provides, in pertinent 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 a substantial part of the 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.

28 U.S.C. § 1391(b). Courts must construe this statute strictly. *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) (citing *Olberding v. Illinois Central R.R.*, 346 U.S. 338, 340 (1953)). “That means for venue to be proper, *significant* events or omissions *material* to the plaintiff’s claim must have occurred in the district in question, even if other material events occurred elsewhere.” *Id.* (emphasis in original).

This action against the Maryland Defendants fails to meet any of the requirements under the statute establishing venue. Subsection (1) does not apply here because all of the Defendants do not reside in the same state. Subsection (2) does not provide venue because Plaintiffs have not alleged that any part of the underlying events or omissions giving rise to their claims against the Maryland Defendants occurred in New York, or that any property at issue related to the Maryland Defendants is situated in New York. Likewise, Plaintiffs have not suggested or shown that there is no district, other than the Northern District of New York,

in which an action against the Maryland Defendants could be brought. Subsection (3) thus does not supply a basis for venue in this Court.

Pursuant to Rule 12(b)(3), therefore, the claims against the Maryland Defendants should be dismissed.

IV. Plaintiffs Lack Standing to Maintain this Action.

None of the individual Plaintiffs has alleged that he or she has suffered any actual or threatened harm fairly traceable to any specific action of the Maryland Defendants. Plaintiffs thus lack the necessary standing to maintain this action.

A federal court has jurisdiction over a particular matter only when the plaintiff's allegations present a "case or controversy" within the court's authority under Article III of the United States Constitution. *See Hein v. Freedom From Religion, Inc.*, 127 S. Ct. 2553, 2562 (2007); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff satisfies that requirement by asserting that he or she has suffered some threatened or actual injury resulting from the alleged illegal actions of the defendant. *Warth*, 422 U.S. at 499. The alleged injury must be actual or imminent, not conjectural or hypothetical. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 560 (1992). It must be distinct and palpable, as opposed to a generalized grievance shared by all or a large class of citizens. *Warth*, 422 U.S. at 499. In addition, the alleged injury must be "fairly traceable" to the specific wrongful actions of the defendant and must be redressable by the relief requested. *Hein*, 127 S. Ct. at 2562.

Plaintiffs' claims do not meet these standards. The injury that Plaintiffs allege appears to be a general concern that all balloting systems that employ machines and computers are more susceptible to errors and manipulation than balloting systems involving hand-counting of paper ballots. Even assuming that Plaintiffs could prove such a claim, it would not follow that such general characteristics of voting systems would personally affect any particular state's elections, or the votes of any of these Plaintiffs. That leap of logic is entirely conjectural.

The three Plaintiffs who claim to be potential Maryland voters do not identify any specific action of the State of Maryland or the members of the Maryland State Board of Elections that directly affects their personal voting rights. Moreover, other than the three Maryland Plaintiffs, no Plaintiff alleges any connection with elections in Maryland. In fact, the other Plaintiffs all expressly assert their intention to vote in another state. AC ¶¶ 13-69, 73-159. No action of the State of Maryland or the members of the Maryland State Board of Elections can possibly affect the voting rights of these Plaintiffs. Plaintiffs have thus failed to allege any actual or threatened harm fairly traceable to any specific action of the Maryland Defendants

Finally, the relief Plaintiffs seek – the Court's enjoinder, or otherwise directing the conduct, of elections in Maryland and the other states – would not provide redress for Plaintiffs' alleged injury. Such action would most likely prevent some elections from being held at all, and, at the least, would inject confusion and uncertainty into several upcoming

elections, resulting in greater potential for error than under the status quo that Plaintiffs seek to change.

Plaintiffs thus lack standing to maintain this action against the State of Maryland and members of the Maryland State Board of Elections, and this Court lacks subject matter jurisdiction over their claims for this additional reason as well.

CONCLUSION

For the reasons stated above, the Maryland Defendants request that the Court dismiss with prejudice all claims against them.

Respectfully submitted,

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/s/

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CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of December, 2007, a true and correct copy of the foregoing Memorandum in Support of Maryland Defendants' Motion to Dismiss Plaintiffs' Amended Complaint was mailed first class to:

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2458 Ridge Road
Queensbury, New York 12804

Service on appearing Defendants is made through the Court's electronic filing system.

/s/
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Assistant Attorney General