IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ (New York), *et al.*, Plaintiffs v. STATE OF NEW YORK, *et al.*, Defendants	Case No. 07-CV-0943 LEK/DRH **STATE OF KENTUCKY'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Defendants Commonwealth of Kentucky ("State of Kentucky") and Kentucky Secretary of State Trey Grayson submit this memorandum of law in support of their motion to dismiss the Plaintiffs' Amended Verified Complaint.

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983 filed by *pro se* litigant Robert L. Schulz, a New York resident, and other plaintiffs from across the country recruited by Schulz by means of his webpage and other advertisements.[1] Plaintiffs' Amended Verified Complaint (Complaint) names as Defendants the Commonwealth of Kentucky, Kentucky's Secretary of State, Trey Grayson ("Kentucky Defendants"), and various other states and state election officials from all 50 states.

[1] Schulz operates a webpage under the name "We the People Foundation for Constitutional Education, Inc.," which Schulz purports to have founded for educational purposes. http://www.wethepeoplefoundation.org. Schulz and his supporters have named the present case the "National Clean Elections Lawsuit" ("NCEL").

The Plaintiffs contend "current election practices, including the widespread use of computerized voting machines, are unconstitutional because they are ripe for fraud and error and effectively hide the physical vote counting process from the public."[2] Their Complaint alleges the voting processes employed by the Defendants violate the United States Constitution because these processes are not sufficiently "open, verifiable, [or] transparent." Compl. ¶ 246. In particular, the Complaint alleges the Defendants' use of "machines and/or computers for vote casting and counting" in elections is unconstitutional. *Id.* ¶ ¶ 218, 228. The Complaint alleges Defendants violate the Constitution by failing to count ballots by hand, failing to keep ballots in public view at each voting station before the votes are counted, and failing to publicly announce the number of votes cast at each voting station. *Id.* ¶¶ 219-22.

The Complaint alleges three causes of action. The first cause of action alleges the complained of voting procedures infringe on Plaintiffs' right to vote. *Id.* ¶ 228. The second cause of action is based on contract, asserting that "[f]ormally registering with the State to vote . . . is a contract." *Id.* ¶ 252. What purports to be a third cause of action identifies voting procedures Plaintiffs allege Defendants are constitutionally required to follow during the 2008 primary and general elections. *Id.* ¶ 262. Among other relief, Plaintiffs ask the Court to permanently enjoin Defendants from conducting any elections that are not "machine free" and ask this Court to order Defendants to "rely exclusively on paper ballots, hand marked and hand counted." *Id.* ¶ 268.

Significantly, the Complaint does not allege any contacts between the Commonwealth of Kentucky or Kentucky Secretary of State Trey Grayson and the State

[2] Press release issued by Schulz on November 6, 2007.

of New York. The Complaint does not allege any acts by the Kentucky Defendants that occurred within the State of New York. The Complaint does not allege any acts by the Kentucky Defendants that allegedly violated the rights of any New York resident in any way. The Kentucky Secretary of State denies having any sufficient minimum contact with the State of New York to afford this Court with personal jurisdiction. Kentucky election law also does not make the Secretary of State the official in charge of selecting the type of election devices used in Kentucky elections.[3] Secretary Grayson was inappropriately named. Accordingly, the Kentucky Defendants, by and through the Office of the Attorney General for the Commonwealth of Kentucky, join numerous other states and their named election officials in moving to dismiss the Complaint for lack of personal jurisdiction, lack of Article III subject matter jurisdiction, lack of proper venue, and failure to state a claim upon which relief may be granted.[4]

ARGUMENT IN SUPPORT OF DISMISSAL

A. Plaintiffs lack personal jurisdiction to bring this action against the Kentucky Defendants in the State of New York.

Kentucky joins all other states, other than the State of New York, in moving to dismiss for lack of personal jurisdiction. The party seeking to invoke the court's jurisdiction bears the burden of establishing by competent proof that jurisdiction exists. See *Computer Associates Intern., Inc. v. Altai*, 126 F.3d 365, 370-71 (2nd Cir. 1997). "It has long been the rule that the standard to be applied in determining whether a federal

[3] See appended supporting affidavit of Kentucky Secretary of State Trey Grayson.

[4] The arguments in this brief for the most part follow the arguments and case-law presented by the State of New Hampshire [D.E. 24]. The primary distinctions from New Hampshire's brief and this brief are found in arguments (C) and (D) below which focus on Kentucky election law statutes, instead of New Hampshire election law statutes, and arguments (E) and (F) which expand the discussion of Eleventh Amendment immunity and the *Will v. Michigan Dept. of State Police* doctrine.

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." *Computer Associates Intern., Inc.*, 126 F.3d at 370 (citing *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1025-26 (2d Cir. 1997). These principles apply in election cases as much as any other federal case. Personal jurisdiction may not be asserted against every state or their election officials in any single federal district in the absence of a federal statute establishing nationwide personal jurisdiction. See, *Springer v. Balough*, 96 F.Supp.2d 1250, 1255-56 (N.D.Okl. 2000), *aff'd*, 232 F.3d 902 (10th Cir. 2000) (dismissing suit by aspiring presidential candidate who attempted to sue every state; case was dismissed for lack of jurisdiction and failure to state a cognizable claim against the states).

(1) Plaintiffs' amended complaint fails to establish jurisdiction under New York's long-arm statute.

New York's long-arm statute provides in pertinent part:

> (a) Acts which are the basis of jurisdiction. 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:
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> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
> . . .
>
> 4. owns, uses or possesses any real property situated within the state.
> . . .

> (c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section.

N.Y. C.P.L.R. § 302(a).

New York courts define "transact[ing] business" as purposeful activity-"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." *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 -247 (2d Cir. 2007) (quoting, *McKee Elec. Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382, 229 N.E.2d 604, 607, 283 N.Y.S.2d 34, 37-38 (1967)). "If the defendant is transacting business in New York, the second half of the section 302(a)(1) inquiry asks whether the cause of action 'aris[es] from' that business transaction or transactions." *Best Van Lines*, at 249.

Here, Plaintiffs' Complaint fails to show that this federal court has jurisdiction over the Kentucky Defendants under New York's long-arm statute, N.Y. C.P.L.R. § 302(a). As stated in Secretary Grayson's attached affidavit, the Kentucky Defendants do not transact business or contract anywhere to supply goods or services in New York. Further, the Kentucky Defendants do not own, use or possess any real property in New York. Any cause action directed toward them, instead, arises from election activities conducted exclusively in Kentucky.

(2) Plaintiffs' amended complaint fails to establish jurisdiction under the Due Process Clause of the Fourteenth Amendment.

If there were a statutory basis for jurisdiction under the New York long-arm statute, this Court wold next determine whether the extension of personal jurisdiction in such a case would be permissible under the Due Process Clause of the Fourteenth

Amendment. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124 (2d. Cir. 2002). The Due Process Clause limits the exercise of personal jurisdiction to persons having certain "minimum contacts" with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "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.'" *Computer Associates Intern., Inc.*, 126 F.3d at 370-71 (quoting *Burger King Corp.*, 471 U.S. at 474, in turn 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 purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Id*. at 371 (quoting *Burger King Corp.*, 471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). When, as here, plaintiffs fail to make out a prima facie case of jurisdiction, a district court has discretion to dismiss without permitting plaintiffs to engage in discovery. See *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 186 (2d Cir. 1998).

In this case, the Kentucky Defendants do not reside in New York. Moreover, none of the allegations contained in the amended complaint relate to the Kentucky Defendants performing any action in New York. The Kentucky Defendants could not reasonably have anticipated litigation in New York as a result of the Plaintiffs' allegations. This Court clearly lacks personal jurisdiction over the Kentucky Defendants. Accordingly, the Plaintiffs' amended complaint against the Kentucky Defendants must be dismissed.

B. This Court is not the proper venue to bring this action against the Kentucky Defendants and Plaintiffs lack Article III standing to file suit against the Kentucky Defendants.

This Court should also grant the Kentucky Defendants' motion to dismiss because this Court is not the proper venue for this action. "The purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great Western United Corporation*, 443 U.S. 173, 184 (1979). "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy is to be given a liberal construction." *Olberding v. Illinois Central R. Co.*, 346 US 338, 340 (1953). Therefore, courts are required to strictly construe the venue statue. *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) (citing to *Olberding*, 346 U.S. at 340).

Because the Plaintiffs' claim apparently "arises under" federal law, venue must be determined under 28 U.S.C. §1391(b), which provides in pertinent part:

> (b) 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 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)

The Plaintiffs have failed to show that they meet the requirements under 28 U.S.C. §1391(b). Subsection (1) does not apply because all of the named Defendants reside in different states. Under subsection (2), with respect to the Plaintiffs' claim

against the Kentucky Defendants, no part of the underlying events will take place in New York, and there is no Kentucky property alleged to be subject to the action that is situated in New York. See *Gulf Ins.Co.*, 417 F.3d at 357 ("district courts to take seriously the adjective 'substantial'").

Finally, the Plaintiffs have failed to show that subsection (3) provides them with proper venue. Although one of the Defendants, i.e., the New York State Board of Elections, see Pls' Amended Complt. at ¶160, can "be found" in New York, New York is not the proper venue for the Kentucky Defendants because the Plaintiffs have failed to show that there "is no district in which the action may otherwise be brought." See 28 U.S.C. §1391(b)(3); H.R. Rep. No. 101-734 at 23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6875; see generally, *McDonald v. General Accident Insurance Co.*, 1996 WL 590722 (N.D.N.Y. 1996).

Here, because three named Plaintiffs and the Kentucky Defendants reside or do business in Kentucky, and because the alleged events giving rise to the Plaintiffs' claim against the Kentucky Defendants allegedly occurred in Kentucky, to the extent that venue is proper in any federal court for adjudicating Plaintiffs' claims against the Kentucky Defendants, it must be in the United States District Courts of Kentucky.[5] Therefore, pursuant to 28 U.S.C. §1391(b), Plaintiffs' claim against the Kentucky Defendants

[5] The only plaintiffs with potential Article III standing to file suit against Kentucky are the three named Kentucky residents. However, they lack standing to file suit against the Kentucky Secretary of State for the reasons articulated in this memorandum of law. See Amended Compl. ¶¶ 61-63. The Kentucky Defendants adopt and incorporate by reference the standing arguments raised by the Wisconsin Defendants [D.E. 162-2, pp. 6-8] and the Minnesota Defendants [D.E. 128-2, pp. 7-8]. This action has not been and could not be brought as a class action since the parties are individual *pro se* plaintiffs acting without counsel and, therefore, cannot act as counsel for a class. The plaintiffs have also not complied with the requirements for obtaining designation as multi-district litigation under 28 USC § 1407. See *Frank v. Aaronson*, 120 F.3d 10 (2d Cir. 1997); see also *Phillips v. Tobin*, 548 F.2d 408, 412 (2d Cir. 1976). Other defenses would likely apply to defeat any claims that the three Kentucky Plaintiffs could bring in a Kentucky court. It is unnecessary to expound on them at this time.

cannot be brought in this Court. Accordingly, this Court should grant the Kentucky Defendants' motion to dismiss based on lack of venue.

C. The Secretary of State of Kentucky has no authority to control what type of voting machines are used in Kentucky.

Plaintiffs request injunctive relief against the Kentucky Secretary of State. See Pls' Amended Compl. at ¶¶ 268 (a), (b), and (c). This request is misplaced.

The Kentucky Secretary of State does not have the authority under Kentucky law to approve or otherwise select what types of voting machines Kentucky counties use in counting or processing votes for local, state or federal elections. See Ky. Rev. Stat. ("KRS") §§ 117.377-117.379. KRS 117.377 provides that the fiscal court of any Kentucky county or urban-county government may acquire by purchase or lease any voting system approved by the Kentucky State Board of Elections. KRS 117.379 provides that any person or corporation owning, manufacturing or selling any electronic voting system may request the State Board of Elections to examine the system if they submit a test from an independent testing authority approved by the State Board of Elections verifying that the system meets all Federal Election Commission standards as well as other standards set forth under Kentucky law. See KRS 117.381.

Because the Kentucky Secretary of State does not have authority to approve voting machines in Kentucky, Plaintiffs have inappropriately named him as a defendant. Therefore, Plaintiffs cannot prove any set of facts in support of their claim that would entitle them to relief. See *Chapman v. New York State Div. for Youth*, 2005 WL 2407548 (N.D.N.Y. 2005). As this Court said in *Chapman*, "In deciding a Rule 12(b)(6) motion, a court "must accept the allegations contained in the complaint as true, and draw all

reasonable inferences in favor of the non-movant. However, conclusory allegations that merely state the general legal conclusions necessary to prevail on the merits and are unsupported by factual averments will not be accepted as true." *Chapman,* at *4 (quoting and citing, *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir.1994); and *Kaluczky v. City of White Plains*, 57 F.3d 202, 206 (2d Cir.1995) (internal quotes omitted)). "Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002) (brackets and internal citation omitted). "To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Comms., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98, (2d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, ___U.S ___, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)). In view of a plain reading of the Kentucky statutes cited above, Plaintiffs' claims against the Kentucky Defendants fail as a matter of law. Accordingly, this Court should dismiss Plaintiffs' amended complaint against Kentucky Secretary of State Trey Grayson.[6]

D. Individual Kentucky counties and urban-county governments independently determine whether they are going to use voting machines at their polling places for all local, state and federal elections.

Kentucky has 119 counties and one urban-county merged government. Pursuant to KRS 117.377, the fiscal courts of these counties and council members of the Fayette Urban County government determine what types of voting device to use. "Voting device" is defined in KRS 117.375 to include paper ballots or ballot cards or "an

[6] Even if Plaintiffs named the members of the Kentucky Board of Elections as defendants in this case, Plaintiffs' claim would fail under the jurisdictional and venue arguments set forth above.

apparatus by which such votes are registered electronically, so that in either case the votes so registered may be computed and tabulated by means of automatic tabulating equipment." While the Kentucky Board of Elections is charged with determining what type of voting machines may be used in Kentucky, the individual county fiscal courts in Kentucky are authorized to determine whether they will use such voting machines in conducting elections, or whether they will use paper ballots.

Because Kentucky Secretary of State Trey Grayson does not regulate or otherwise control which voting machines are permitted for use in Kentucky and does not regulate or control whether any Kentucky counties use voting machines in conducting local, state and federal elections, Plaintiffs have inappropriately named him as a Defendant. Accordingly, Plaintiffs cannot prove any set of facts in support of their claim that would entitle them to the relief they demand in their amended complaint. See *Chapman*, *supra*.

E. Defendant Commonwealth of Kentucky is not a "person" that can be sued under 42 U.S.C. § 1983.

The Plaintiffs rely on the federal civil rights act, 42 U.S.C. § 1983 to file suit against the Commonwealth of Kentucky. In *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1985), the Supreme Court determined that states and state agencies are not subject to suit under that statute. Since section 1983 does not authorize suits against states (states not being "persons" within the statute's meaning), See *Komlosi v. New York State Office of Mental Retardation and Developmental Disabilities*, 64 F.3d 810, 814-15 (2d Cir. 1995), Plaintiffs' claims against the Commonwealth of Kentucky fail as a matter of law; there is no need to reach the Eleventh Amendment immunity question. See *Power v. Summers*, 226 F.3d 815, 818 (7th Cir. 2000). However, in the interest of completeness,

it is noted that Plaintiffs' claims against all the named states including the Commonwealth of Kentucky are also barred by the Eleventh Amendment for the reasons argued below.

F. Defendants Commonwealth of Kentucky and its Secretary of State are immune from suit under the Eleventh Amendment and principles of sovereign immunity.

"From birth, the States and the Federal Government have possessed certain immunities from suit in state and federal courts." *Ernst v. Rising*, 427 F.3d 351, 358 (6th Cir. 2005) (*en banc*) (citing, *inter alia*, *Alden v. Maine*, 527 U.S. 706 (1999)). For Kentucky and other states, "that immunity flows from the nature of sovereignty itself as well as the Tenth and Eleventh Amendments to the United States Constitution." *Ernst*, 427 F.3d at 758; see also *Alden*, 527 U.S. at 713 (stating that "[t]he sovereign immunity of the states neither derives from, nor is limited by, the terms of the Eleventh Amendment" but is rather "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today"). The Kentucky Constitution states that "The General Assembly may, by law, direct in what manner and in which courts suits may be brought against the Commonwealth." Ky. Const. § 231. Kentucky courts have interpreted this provision to protect sovereign immunity broadly. See *Bd. of Trs. of the Univ. of Kentucky v. Hayse*, 782 S.W.2d 609, 616 (Ky.1990) (overruled on other grounds by *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2002)) (noting § 231 "does not differentiate between suits for money damages and suits for injunctive relief"). The Kentucky Supreme Court has held that "the state cannot be sued except upon a specific and explicit waiver of sovereign immunity." *Commonwealth v. Whitworth*, 74 S.W.3d 695, 699 (Ky. 2002). Federal courts have repeatedly held

Kentucky has not waived its immunity from suit in federal court. See, e.g., *Hutsell v. Sayre*, 5 F.3d 996, 1001 (6th Cir. 1993) (No legislative waiver of immunity by virtue of statute allowing University of Kentucky to purchase liability insurance); *Lanier v. Kentucky Com'n on Human Rights*, 2007 WL 2407274, *3 (W.D. Ky. 2007) (No legislative waiver of immunity by enacting state civil rights laws).

Therefore, sovereign immunity and the Eleventh Amendment to the United States Constitution generally bar claims in federal court against Kentucky and her agencies. See *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). This immunity also bars claims against state officers, such as the Secretary of State, sued in their official capacities. See *Mitchell v. Chapman*, 343 F.3d 811, 822 (6th Cir. 2003) ("[A] suit against a public employee in his or her official capacity is a suit against the agency itself."). The Eleventh Amendment bars a suit against a state or one of its agencies in federal court unless the state has waived its immunity or unless Congress has exercised its power under § 5 of the Fourteenth Amendment to override that immunity. *Will v. Michigan Dep't of State Police et al.*, *supra*, 491 U.S. at 66. Eleventh Amendment immunity constitutes a jurisdictional bar, and neither supplemental jurisdiction nor any other basis for jurisdiction overrides Eleventh Amendment immunity. *Pennhurst State Sch. & Hosp. v. Halderman*, supra, 465 U.S. at 100. Congress has not abrogated the states' immunity from suit by the enactment of 42 U.S.C. § 1983. *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

Under the legal fiction of *Ex parte Young*, 209 U.S. 123 (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). Importantly, however, the ruling in *Ex parte Young* does not allow injunctive action against a state, as opposed to state officers. *Ashe v. Board of Elections of City of New York*, 1988 WL 95427, *2 (E.D.N.Y. 1988); see also *NAACP v. California*, 511 F.Supp. 1244, 1250 (E.D. Cal. 1981), *aff'd*. 711 F.2d 121 (9th Cir. 1982). Moreover, *Ex parte Young* does not allow a plaintiff to name just any state official. State officials are not "fungible." *David B. v. McDonald*, 156 F.3d 780, 783 (7th Cir. 1998). "To take advantage of *Young* the plaintiffs must sue the particular public official whose actions allegedly violate federal law." *Id*. If the state officer has no connection with the enforcement of the challenged state law, naming him is the same as impermissibly attempting to make the state a party. *In re Dairy Mart Convenience Stores, Inc*., 411 F.3d 367, 372-373 (2d Cir. 2005). Thus, when a state secretary of state does not have any connection to a challenged statute, he may not be sued under the fiction of *Young*. *Ashe, supra*. Plaintiffs' conclusory allegations notwithstanding, Kentucky law does not make Kentucky Secretary of State Trey Grayson responsible for choosing between voting machines, computerized election devices, or old fashioned paper ballots.

Plaintiffs have impermissibly named the Commonwealth of Kentucky as a defendant, and they have impermissibly named the Kentucky Secretary of State, who does not regulate the use of voting machines in Kentucky. Because the Commonwealth of Kentucky and Kentucky Secretary of State are both immune from suit under the Eleventh Amendment, they both must be dismissed.

CONCLUSION

For all the reasons argued above, and those argued by Kentucky's sister states and election officials, all of the Plaintiffs' claims against the Kentucky Defendants must be dismissed.

Respectfully submitted,

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