

THOM D. ROBERTS (#2773)
Assistant Attorney General
MARK L. SHURTLEFF (#4666)
Attorney General
160 East 300 South, 5th Floor
P.O. Box 140857
Salt Lake City, Utah 84114-0857
Telephone: (801) 366-0353
Attorney For Utah Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, et al.,

Plaintiffs,

vs.

STATE OF NEW YORK, et al.,

Defendants,

**MOTION TO DISMISS COMPLAINT
BY STATE OF UTAH AND UTAH
LIEUTENANT GOVERNOR
GARY R. HERBERT**

Civil No. 07-CV-0943
LEK/DRH

The State of Utah and Gary R. Herbert, Lieutenant Governor and chief election officer (Utah Defendants), by and through counsel, Thom D. Roberts, Assistant Utah Attorney General, and pursuant to the provisions of Rule 12(b), Federal Rules of Civil Procedure, hereby move the Court for an order dismissing the complaint as against the Utah Defendants upon the following grounds and reasons:

1. This Court does not have personal jurisdiction over the Utah Defendants and this action should be dismissed as against them;
2. This Court is not the proper venue to sue the Utah Defendants and this Court should dismiss this action against the Utah Defendants;

3. Pursuant to the Eleventh Amendment of the United States Constitution, the State of Utah is immune from suit and Plaintiffs' claim against the State of Utah must be dismissed;

4. That this action as against Gary R. Herbert, Lieutenant Governor of the State of Utah, in his individual and official capacity, is also barred by the provisions of the Eleventh Amendment, and this matter should be dismissed as against him;

5. The Utah Defendants are not "persons" under 42 U.S.C. § 1983 and Plaintiffs' claims against the Utah Defendants must be dismissed;

6. There is not a justiciable controversy as against the Utah Defendants as they are not persons under 42 U.S.C. § 1983 and that elections in the State of Utah are conducted by the county clerks, not the Lieutenant Governor.

As allowed by the Order of the Court, since the claims against and the Motions filed by the various state defendants are substantially the same, the Utah Defendants hereby join in the Motions and pleadings filed by the other State Defendants, specifically including New Hampshire Defendants, Michigan Defendants, and California Defendants, which are incorporated herein.

A memorandum of law in support of this Motion is filed concurrently herewith. Also, this is a dispositive motion and there is no requirement that concurrence be sought.

DATED this 17th day of December, 2007.

MARK L. SHURTLEFF
Attorney General

/s/ Thom D. Roberts
THOM D. ROBERTS
Assistant Attorney General

