

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L SCHULZ, *et al*

Plaintiffs,

**DECLARATION OF
TODD D. VALENTINE**

-against-

07-CV-0943

STATE OF NEW YORK, *et al.*,

LEK/RFT

Defendants.

Todd D.Valentine, an attorney admitted to practice in the State of New York, on the date noted below, pursuant to 28 U.S.C §1746, declares the following to be true and correct under penalty of perjury under the laws of the United States of America:

1. I am the Special Counsel for the New York State Board of Elections, attorney for defendants Neil Kelleher, Douglas Kellner, Evelyn Aquila and Helena Moses Donohue as Commissioners of the New York State Board of Elections and the New York State Board of Elections.

Complaint Against the New York State Board of Elections is barred by the 11th Amendment

2. I make this declaration in support of the motion by defendant New York State Board of Elections to dismiss the amended complaint on the ground that it is barred by the 11th Amendment.

3. The amended complaint is brought by in excess of 150 plaintiff, proceeding *pro se*, against all 50 States and Commonwealths of the United States, and their respective chief election officials.

4. In essence, the amended complaint seeks a permanent injunction directing that each State and Commonwealth conduct the Presidential primary and general elections using paper ballots which are publicly counted by hand.

5. The New York State Board of Elections is not a proper party to this action as it is not a person within the meaning of 42 U.S.C §1983 and, in any event, is protected from suit by sovereign immunity under the 11th Amendment.

6. As of the writing of this declaration, approximately 35 States and Commonwealths have filed motions to dismiss, all of which raise the 11th Amendment immunity defense.

7. Rather than file a duplicative motion, the New York State Board of Elections joins each of these motion as to the 11th Amendment sovereign immunity defense and specifically joins the State of Oregon's motion to dismiss (Dkt. No. 22) and adopts and incorporates by reference Point II of its memorandum of law, as Oregon was the first State to so move.

8. Accordingly, the New York State Board of Elections respectfully requests that it be dismissed from this action in its entirety with prejudice.

Failure to State a Cause of Action

9. I make this declaration in support of the motion by defendant Commissioners of the New York State Board of Elections, Kelleher, Kellner, Aquila and Donohue to dismiss the amended complaint on the ground that it fails to state a cause of action against the Commissioners of the State Board.

10. Plaintiffs seek to order the voting for the Presidential Primary election on paper ballots.

11. The Commissioners of the State Board of Elections are not responsible for determining the specific methods of voting in each of New York's 62 counties. Rather, under the New York State Election Laws that responsibility is the local or county boards of elections determination. *See*, NY Election Law sections 7-200 (1); 3-226.

12. Rather than file a duplicative motion, the Commissioners of the New York State Board of Elections joins each of those motions as to the failure to state a cause of action and specifically joins the State of Ohio's motion to dismiss (Dkt. No. 175) and adopts and incorporates by reference Point C of its memorandum of law.

13. The Commissioners of the State Board of Elections are without the authority to grant the relief sought by the plaintiffs, accordingly, the Commissioners respectfully requests that they be dismissed from this action in its entirety with prejudice.

Failure of Alleged Breach of Contract Claim

14. I make this declaration in support of the motion by defendant Commissioners of the New York State Board of Elections, Kelleher, Kellner, Aquila and Donohue to dismiss the amended complaint on the ground that it fails to state a cause of action against the Commissioners of the State Board for breach of contract.

15. The Commissioners of the New York State Board of Elections are not responsible for registering any voters. That authority lies with the county or local boards of elections. *See*, NY Election Law section 5-210.

16. The Commissioners of the New York State Board of Elections specifically joins the State of Ohio's motion to dismiss (Dkt. No. 175) with regards to the plaintiffs' alleged breach of contract claim.

17. Accordingly, the Commissioners respectfully requests that they be dismissed from this action in its entirety with prejudice.

Plaintiffs Residing Outside of New York State Lack Standing

18. I make this declaration in support of the motion by defendant Commissioners of the New York State Board of Elections, Kelleher, Kellner, Aquila and Donohue to dismiss the amended complaint on the ground that plaintiffs residing outside of New York lack standing as against the Commissioners of the State Board.

19. The only plaintiffs alleged to be New York State residents are; Robert Schulz, Arthur Berg and John Liggett. Amended Complaint at ¶¶ 13 (Schulz); 105 (Berg); 106 (Liggett).

20. Since none of the other plaintiffs has alleged that they are able and intend to vote in any election in New York, or that their votes might not be accurately tabulated in New York, they cannot actually be harmed by any conduct of the New York defendants in conducting elections in New York. Therefore, none of the plaintiffs except Robert Schulz, Arthur Berg and John Liggett has any standing to sue the New York defendants, and the claims of all the plaintiffs except Robert Schulz, Arthur Berg and John Liggett should be dismissed as to all the New York defendants.

21. Rather than file a duplicative motion, the Commissioners of the New York State Board of Elections joins each of those motions as to the lack of standing for out of state plaintiffs and specifically joins the State of Wisconsin's motion to dismiss (Dkt. No. 162) and adopts and incorporates by reference Point III of its memorandum of law.

22. Accordingly, the Commissioners respectfully requests that they be dismissed from this action in its entirety with prejudice.

Dated: Albany, New York
December 17, 2007

S/ Todd Valentine

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