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STATE OF MONTANA AND
MONTANA SECRETARY OF STATE BRAD JOHNSON

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ, et al.,)	Cause No. 07 CV-0943
)	
Plaintiffs)	MEMORANDUM IN
-against -)	SUPPORT OF MONTANA
)	DEFENDANTS’ MOTION TO
STATE OF NEW YORK, et al.,)	DISMISS
)	
Defendants.)	

Pursuant to the Court’s December 12, 2007 scheduling order, and by separate motion and notice, Defendants the State of Montana and Brad Johnson, Montana Secretary of State (“Montana Defendants”), have moved this Court to dismiss the Plaintiffs’ amended complaint against the Montana Defendants on pursuant to Fed. R. Civ. P. 12(b). First, pursuant to Rule 12(b)(1), this Court does not have subject matter jurisdiction because Plaintiffs lack standing. Second, pursuant to Rule 12(b)(2), this Court does not have personal jurisdiction over the Montana Defendants. Third, pursuant

to Rule 12(b)(3), this Court is not the proper venue to sue the Montana Defendants.

Fourth, the Montana Secretary of State does not have the statutory authority to control what, if any, type of voting machine is used in local, state and federal elections held in Montana. Therefore, pursuant to FRCP 12(b)(6), Plaintiffs have failed to state a claim upon which relief may be granted and this action must be dismissed. Fifth, the State of Montana is immune from suit under the 11th Amendment of the United States Constitution.

BACKGROUND

Plaintiffs filed this amended complaint alleging three causes of action against State Defendants, including the Montana Defendants. The allegations against each of the Defendants relate to Plaintiffs' objection to the Defendants' use of certain voting machines in elections held in the States of each of the named Defendants.

Plaintiffs request that this Court permanently enjoin the Defendants from conducting elections: (1) which are not "open, verifiable, transparent, machine-free, computer-free," Pls' Amended Compl. at ¶ 268(a); (2) which do not "rely exclusively on paper ballots, hand marked and hand-counted," *id.* at ¶ 268(b); and (3) which do not keep paper ballots in "full public view until the results of the hand counting is publicly announced at that vote station." *Id.* at ¶ 268(c).

ARGUMENT

In order to avoid undue duplication, the Montana Defendants incorporate by reference the subject matter jurisdiction, personal jurisdiction, venue, and Eleventh Amendment immunity arguments made by the other states, including but not limited to the arguments presented by the Minnesota Defendants, the New Hampshire Defendants, and the North Dakota Defendants. The remaining argument concerning the Montana Defendants' lack of control over the voting machines used by counties is similar to that raised by New Hampshire and other State Defendants.

I. COUNTIES CHOOSE VOTING SYSTEMS IN MONTANA.

In Montana, the Secretary of State is “the chief election officer of the state.” Mont. Code Ann. § 13-1-201. However, the county clerk and recorder of each county is the election administrator, “responsible for the administration of all procedures relating to registration of electors and conduct of elections.” Mont. Code Ann. § 13-1-301(2). Counties choose, purchase, and implement the voting system used in that county, either through their governing bodies or by countywide referendum. Mont. Code Ann. § 13-17-104. The voting system must be approved by the Secretary of State. Mont. Code Ann. § 13-17-101. However, that approval is based on a detailed list of criteria that includes, notably for purposes of this case, a requirement that any voting system must “use[] a paper ballot that allows votes to be manually counted.” Mont. Code Ann. § 13-17-103(k). These provisions do not allow the Secretary of State to overrule or otherwise direct a county's choice of an otherwise approved voting system, or to

withdraw approval for a voting system based on Plaintiffs' concerns. The counties, or their voters, make the final decision as to the voting systems they will use. Therefore, the Amended Complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

CONCLUSION

Montana Defendants respectfully request that this Honorable Court: (1) Dismiss the Plaintiffs' amended complaint as against the Montana Defendants; and (2) Grant such further relief as it may deem just and equitable.

Respectfully submitted this 17th day of December, 2007.

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By: /s/ Anthony Johnstone
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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2007, an accurate copy of the foregoing Memorandum In Support Of Montana Defendants' Motion To Dismiss was filed electronically with the Clerk of Court through ECF, and the ECF will send a Notice of Electronic Filing (NEF) on Defendants.

I further certify that a copy of the foregoing document was served upon the following by mailing a true and correct copy thereof to the following non-ECF participant:

Mr. Robert L. Schulz
2458 Ridge Road
Queensbury, NY 12804

with postage prepaid in the United States mail at Helena, Montana this 17th day of December, 2007.

/s/ Anthony Johnstone
Anthony Johnstone
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