UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

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| EILEEN JANIS and KIM COLHOFF,<br><br>Plaintiffs,<br><br>v.<br><br>CHRIS NELSON, in his individual and official capacity as Secretary of State of South Dakota, and as a Member of the State Board of Elections; MATT McCAULLEY, CINDY SCHULTZ, CHRISTOPHER W. MADSEN, RICHARD CASEY, KAREN M. LAYHER, and LINDA LEA M. VIKEN, in their individual and official capacities as Members of the State Board of Elections; SUE GANJE, in her official capacity and individual capacity as Auditor for Shannon County; LA FAWN CONROY, in her individual and official capacity as a poll worker for Shannon County,<br><br>Defendants. | Civ. 09-5019<br><br>BRIEF IN SUPPORT OF STATE DEFENDANTS' AMENDED MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON THE PLEADINGS AND TO TOLL DISCOVERY PENDING DISPOSITION OF STATE MOTIONS (Federal Rules Civil Procedure 8(a)(2), 12(b)(6) and 12(c)) |

COME NOW Defendants Chris Nelson, Matt McCaulley, Cindy Schultz, Christopher W. Madsen, Richard Casey, Karen M. Layher, and Linda Lea Viken, (hereinafter referred to as "State Defendants"), and submit this Brief in Support of State Defendants' Amended Motion to Dismiss, or in the Alternative, Motion for Judgment on the Pleadings and to Toll Discovery Pending Disposition of State Motions.

## Procedural History

On February 18, 2009, Plaintiffs filed their original Complaint. (Docket 1). On April 13, 2009, Defendants Nelson, McCaulley, Schultz, Madsen, Casey,

Layher, and Viken, (hereinafter "State Defendants"), filed a motion to dismiss all claims for monetary or nonprospective relief. (Docket 38). On May 4, 2009, Plaintiffs filed a Motion to Amend the Complaint. (Docket 49). On June 12, 2009, State Defendants filed a Motion to Dismiss or in the Alternative, Motion for Judgment on the Pleadings and to Toll Discovery Pending Disposition of State Motions and supporting brief. (Docket 55, 56). Plaintiffs' response and State Defendants' reply were subsequently filed. (Docket 60, 61). State Defendants also filed a Supplement to this motion and a supporting brief on July 31, 2009. (Docket 64, 66 ).

On July 16, 2009, Defendant Ganje filed a Motion to Dismiss on Mootness and Standing Grounds and supporting brief. (Docket 62, 63). Plaintiffs' response and Ganje's reply were subsequently filed. (Docket 67, 68). On September 11, 2009, Defendant Ganje filed a Rule12(b)(6) Motion to Dismiss and supporting brief. (Docket 74, 75). Plaintiffs' response was subsequently filed. (Docket 79).

On October 2, 2009, the Court issued its Order Granting Plaintiffs' Motion to Amend Complaint and Denying Defendants' Motion to Dismiss. (Docket 80). This Order denied Defendants' motion to dismiss all claims for monetary or nonprospective relief (Docket 38) as moot and without prejudice. The Order did not address the remaining motions to dismiss filed by State Defendants (Docket 38) and Defendant Ganje (Docket 62, 74).

On October 7, 2009, Plaintiffs filed the First Amended Complaint. (Docket 81). State Defendants filed their answer on October 21, 2009, (Docket 91), and

their amended answer on November 4, 2009. Defendant Ganje filed her answer to the First Amended Complaint on October 28, 2009. (Docket 94). The purpose of the States' amended motion is to reassert and supplement its arguments for dismissal and for tolling discovery in light of the filing of the First Amended Complaint and to join in motions to dismiss filed by Defendant Ganje.

**A. All counts of the First Amended Complaint should be dismissed against State Defendants, or in the alternative, judgment on the pleadings should be entered as to State Defendants, because Plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted.**

Nothing in Plaintiffs' First Amended Complaint changes the State Defendants' assertion that they should be dismissed from the action or judgment on the pleadings granted in their favor. A review of the original Complaint and the First Amended Complaint reveals some of the following substantive changes:

(1) Poll worker La Fawn Conroy has been added as a defendant (First Amended Complaint (Docket 81) at ¶ 10).[1]

[2] Plaintiffs previously alleged that Plaintiffs names were removed from the registration rolls in January of 2008 and now allege removal in February of 2008. (First Amended Complaint at ¶¶ 5, 6, 14, 29; Complaint (Docket 1) at p. ¶¶ 5, 6, 13).

[1] To date, Conroy has not been served.

[3] Allegations regarding details of Plaintiff Janis' attempt to vote on November 4, 2008, have been added. (First Amended Complaint at ¶¶ 16-24; Complaint at ¶¶ 15-17).

[4] Allegations regarding Plaintiff Colhoff have changed. Plaintiffs previously alleged that Colhoff was informed on November 4, 2008, by "county election officials" that her name was removed from the voter registration lists, that she never received notice from Defendants prior to that date that her name had been removed, and that she was never informed of the right to cast a provisional ballot in the November 4, 2008, election. (Complaint at ¶¶ 21-23). Plaintiffs now allege that Colhoff checked the registration book herself in June of 2008 and concluded she had been removed from the voter registration rolls. (First Amended Complaint at ¶ 31). Plaintiffs also now allege that county election officials never informed Colhoff of the right to a provisional ballot in either the primary or general elections. (First Amended Complaint at ¶ 33).

[5] Plaintiffs previously alleged that denial of both Plaintiffs' voting rights occurred in front of several other voters. (Complaint at ¶ 24). Now that allegation is made only in regard to Janis. (First Amended Complaint at ¶ 24).

[6] Allegations have been added that Janis has received no notice regarding her current election status and that Defendants' actions allegedly prevent Plaintiffs from voting in upcoming elections because of "fear of prosecution." (First Amended Complaint at ¶¶ 25-26, 34).

[7] Plaintiffs have modified their allegations against the State Defendants and Defendant Ganje in regard to the Help America Vote Act ("HAVA"). (First Amended Complaint at ¶¶ 54-56, 58-59; Complaint at ¶ 42).

[8] Allegations have been added regarding the National Voting Registration Act ("NVRA"). (First Amended Complaint at ¶¶ 69-72). These additions reference the U.S. Attorney giving notice to the chief State election official and allegations as to why Plaintiffs failed to give the required notice under that Act.

There are no allegations in the First Amended Complaint that Plaintiff Colhoff ever presented herself to cast a regular ballot in either the primary or general election. There are also no allegations that Plaintiff Colhoff either requested or was denied a provisional ballot.

None of the new allegations in the First Amended Complaint help state a valid claim against State Defendants. All of Plaintiffs' new factual allegations go to the alleged wrongdoing of *local and county election officials*, not the State Defendants. (First Amended Complaint at ¶¶ 5, 6, 14, 16-24, 29, 31, 33). Moreover, the allegations regarding the Plaintiffs being prevented from voting "for fear of prosecution" are devoid of any factual support. (First Amended Complaint at ¶¶ 25-26, 34).

There are no allegations that the state Board of Elections failed to comply with their responsibilities. (First Amended Complaint at ¶ 56). Moreover, the new allegations regarding Defendant Nelson's obligations under HAVA state erroneous legal conclusions, not facts. (First Amended Complaint at ¶¶ 54-55).

As previously argued, nothing in state or federal law requires or authorizes Defendant Nelson to independently add, modify, or remove voters from the computerized list. HAVA requires that the appropriate "State or local election official shall perform list maintenance ... in a manner that ensures that ... only voters who are not registered or who are not eligible to vote are removed from the computerized list." 42 U.S.C. § 15483(a)(2) (emphasis added). South Dakota has imposed this obligation exclusively on the local election official. SDCL 12-4-2. Defendant Nelson simply forwarded the judgments of conviction from the US Attorney to the county auditors.

Resultantly, all arguments previously made by the State to dismiss the original Complaint also support dismissal of the First Amended Complaint. Therefore, State Defendants hereby resubmit all arguments previously made in their original Motion to Dismiss, or in the Alternative, Motion for Judgment on the Pleadings and supporting briefs (Docket 55, 56, 61) and their supplement to the Motion and Supporting Brief. (Docket 64, 66).

This is especially true in light of the fact that Plaintiffs allege that local election officials, not the State, denied them the right to vote in this case. Plaintiffs claim that Plaintiff Janis was denied the right to vote on November 4, 2008, at Billy Mills Hall. (First Amended Complaint at pp. 5-6, ¶¶ 16-24; Docket 81). Plaintiffs allege that after conversations with the Shannon County Auditor's office, poll worker Kyle Clifford[2] informed Janis that her name was not on the list of registered voters and that poll worker La Fawn Conroy refused

[2] Kyle Clifford is not named as a defendant in this action.

to allow Janis to cast a regular ballot. (First Amended Complaint at pp. 5-6, ¶¶ 17-22). Plaintiffs further allege that "county election officials" denied Janis a provisional ballot, and that the "county election officials' denial of Plaintiff Janis' right to vote occurred in front of over 200 voters..." (First Amended Complaint at p. 6, ¶¶ 23-24).

In regard to Plaintiff Colhoff, the allegations are that she checked the voter registration roll book and found her name was not in the book. (First Amended Complaint at p. 6, ¶ 31). Colhoff allegedly concluded that her name was removed from the voter registration rolls due to her January 2008 felony conviction, and she claims that "[c]ounty election officials" never informed her of the right to cast a provisional ballot in the 2008 primary and general elections." (First Amended Complaint at p. 6, ¶¶ 32-33).

These allegations demonstrate that the heart of Plaintiffs claims of wrongdoing lie with local election officials, not state officials. This is yet another illustration of why the State Defendants should not be part of this lawsuit. All State Defendants should be dismissed from the First Amended Complaint, or in the alternative, judgment on the pleadings should be rendered for State Defendants.

**B. The State Defendants join in the Motions of Defendant Ganje to Dismiss.**

If the Court denies the State Defendants' motion to dismiss them from all counts of the First Amended Complaint or obtain judgment on the pleadings, then the State Defendants join the motion and supporting briefs to dismiss of Defendant Sue Ganje. (Docket 62, 63, 68, 74, 75).

In addition, a recent case from the Eleventh Circuit Court of Appeals supports Ganje's motion to dismiss on mootness grounds. See Beta Upsilon Chi Upsil Chapter at the University of Florida v. Machen, __ F.3d __, 2009 WL 3429591. In Machen, the Plaintiff was a Christian fraternity originally denied official recognition by the University of Florida because of its refusal to adhere to the University's nondiscrimination policy. Id. at 1. The fraternity brought an action for declaratory and injunctive relief, claiming that the University had infringed its First and Fourteenth Amendment rights of association, freedom of speech, and free exercise of religion. Id. While the case was on appeal to the Eleventh Circuit Court of Appeals, the University amended its nondiscrimination policy and allowed the fraternity to register. Id.

The University moved to dismiss on mootness grounds. In regard to the Fraternity's "voluntary cessation doctrine" argument, the Court stated as follows:

> In cases where government policies have been challenged, the Supreme Court has held almost uniformly that voluntary cessation of the challenged behavior moots the claim. Accordingly, an assertion of mootness will be rejected "only when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated."

Id. at 7 (citations omitted). The court ruled that because the fraternity had essentially received the remedy requested, that being an injunction enjoining the University from denying official recognition, the appeal was moot and therefore would be dismissed. Id. at 8-9.

Like the Plaintiffs in Machen, Plaintiffs Janis and Colhoff have received the remedy sought in the First Amended Complaint. They have already had

their names restored to the voter registration rolls. As a result, all claims for declaratory judgment and injunctive relief are moot and must be dismissed.

**C. Discovery against state officials should be tolled pending disposition of the state defendants' motion to dismiss and motion for judgment on the pleadings.**

The arguments previously made by the State Defendants to toll discovery until the determination of the State's motions remain valid. Therefore, the State reasserts all arguments to toll discovery made in its previous motion and supplement and supporting briefs. (Docket 55, 56, 61, 64, 66).

Dated this 4th day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2009, a true and correct copy of Brief in Support of State Defendants' Amended Motion to Dismiss, or in the Alternative, Motion for Judgment on the Pleadings and to Toll Discovery Pending Disposition of State Motions was served electronically through the CM/ECF system upon the following persons:

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