

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

EILEEN JANIS AND KIM COLHOFF, )  
 )  
 Plaintiff(s), )  
 )  
 v. )  
 )  
 CHRIS NELSON, IN HIS 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. MADEN, RICHARD )  
 CASEY, KAREN M. LAYHER, AND LINDA )  
 LEA M. VIKEN, IN THEIR OFFICIAL )  
 CAPACITIES AS MEMBERS OF THE STATE )  
 BOARD OF ELECTIONS; AND SUE GANJE, )  
 IN HER OFFICIAL CAPACITY AS AUDITOR )  
 FOR SHANNON COUNTY, )  
 )  
 Defendant(s). )

Case No.: 09-5019

**MEMORANDUM IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR  
TEMPORARY RESTRAINING  
ORDER OR PRELIMINARY  
INJUNCTION**

Defendant, Sue Ganje, by and through her counsel of record Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, LLC, hereby submits her response to Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction. The Court should dismiss Plaintiffs' Motion on the merits.

**A. Preclearance Obligations of Todd and Shannon Counties**

State Defendants submitted a thorough description of the preclearance obligations of Shannon County in its brief, p. 3-6 (Docket No. 37). Defendant Ganje joins in State Defendant's Brief, § A, and incorporates that section in her brief by this reference.

**B. The Facts Upon Which Congress Relied To Renew § 5 Are Constitutionally Insufficient**

State Defendants submitted a thorough description of the the facts upon which Congress relied to renew § 5 and why they are constitutionally insufficient in its brief, p.6-8 (Docket No. 37). Defendant Ganje joins in State Defendant’s Brief, section B, and incorporates that section in her brief by this reference.

**C. Plaintiffs’ Request For An Injunction Is Moot**

Plaintiffs have alleged in their Motion that Plaintiffs were wrongfully removed from the voter registration rolls based upon their felony convictions in federal court. Eileen R. Janis is currently registered to vote in Shannon County, South Dakota. See Exhibit A, Janis Voter Registry Information. Her voter registration is dated November 4, 2008. Id. Kim Colhoff is currently registered to vote in Shannon County, South Dakota. See Exhibit B, Colhoff Voter Registry Information. Her voter registration is dated April 8, 2009. Id.

Plaintiffs further allege in support of their motion that the Defendants failed to comply with § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, when the Plaintiffs’ names were removed from the voter registration list. To state a cause of action for injunctive relief, Plaintiffs are required to prove that

1. They will suffer irreparable harm unless the status quo is maintained;
2. They will have no adequate remedy at law;
3. They have a clear legal right to the relief granted; and
4. A temporary injunction will serve the public interest.

Plaintiffs must also establish a substantial likelihood of success on the merits. Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 530 F.3d 724, 732 (8th Cir. 2008).

Plaintiffs cannot prove that they will suffer irreparable harm, since both Plaintiffs are on the voter registration list and will not be removed absent a court order. See Affidavit of Sue Ganje (“Ganje Affidavit”), filed simultaneously herewith. Therefore, both Plaintiffs can vote in the next and subsequent elections, and cannot possibly suffer “irreparable harm.”

Nor can Plaintiffs prove the second requirement – that they will have no adequate remedy at law – since they presently have the remedy they seek. In fact, Plaintiff Janis filed suit even though she had her voting rights restored prior to her complaint being filed.

Because both Plaintiffs can vote, they neither have a clear legal right to the relief they seek. One cannot allege that she has a clear legal right to an injunction to place them back on the voter registration list when they are already on the voter registration list. For the same reasons, Plaintiffs cannot prove that an injunction serves the public interest. It is in no one’s interest to grant an injunction for relief that the Plaintiffs have already achieved.

Not only have Plaintiffs failed to prove each of the four factors listed above to obtain an injunction, the Court has no jurisdiction to hear Plaintiffs’ motion. “Federal Courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.” Schanou v. Lancaster County Sch. Dist., 62 F.3d 1040, 1042 (8th Cir. 1995) (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 354, 540 (1986)). Article III requires a “case or controversy” to exist at every stage in the litigation before the Court can reach the merits of a case. See Schanou, 62 F.3d at 1042. A “case or controversy” requires “a definite and concrete controversy involving legal interests at every state in the litigation.” McFarlin v. Newport Special Sch. Dist., 980 F.2d 1208, 1210 (8th Cir. 1992). “Occasionally, due to the passage of time or a change in circumstances, the issues presented in a case will no longer be ‘live’ or the parties will no longer

have a legally confinable interest in the outcome of the litigation.” Arkansas AFL-CIO v. Federal Communications Comm’n, 11 F.2d 1430, 1435 (8th Cir. 1993).

Whether the two Plaintiffs’ names should be placed back on the voter registration list is no longer before the Court. The Court must now determine whether an actual ongoing case or controversy to which Plaintiffs have a legally cognizable interest still exists. Schanou, 62 F.3d at 1043. As Wright and Miller have noted:

Since an injunction is regarded as an extraordinary remedy, it is not granted routinely; [footnote omitted] indeed, the court usually will refuse to exercise its equity jurisdiction unless the right to relief is clear... [H]istorically, and even today, the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy.

Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2942 (1995). Moreover, under circumstances where the conduct which may require injunctive relief has abated, it has long been recognized that injunctive relief will be denied.

Because injunctive relief looks to the future, and is designed to deter rather than punish, relief will be denied if the conduct has been discontinued on the ground that the dispute has become moot and does not require the court’s intervention.

In McFarlin v. Newport Special School District, 980 F.2d 1208 (8th Cir. 1992), the court refused to grant injunctive relief to parents on behalf of their daughter under circumstances where the daughter had been excluded from the high school basketball team. Id. at 1210-1211. The court concluded that the issue was moot because the student had graduated from high school, and the court could not place her back on the basketball team. Id. at 1210.

In Grandson v. University of Minnesota, 272 F.3d 568 (8th Cir. 2001), the Eighth Circuit affirmed a district court’s denial of injunctive relief under circumstances where female students brought claims alleging unequal treatment of female student athletes. The court found that one

student's claims were moot because, among other things, she sought to compel the university to create a women's varsity ice hockey team, but the school already had done so. Id. at 574.

Plaintiffs request an injunction to place their names back on the voter registration rolls. Both Plaintiffs are currently on the voter registration rolls. Moreover, Defendant Ganje has testified that she will not be removing either Plaintiff's name without a court order instructing her to do so. See Ganje Affidavit. As the Eighth Circuit has found, this conduct renders Plaintiffs' request for an injunction moot, and Plaintiffs' Motion should be dismissed as moot.

#### **D. Plaintiffs' § 5 Claim Is Without Merit**

Any alleged mistakes made by a county auditor do not require § 5 preclearance. Alleged mistakes are mistakes – not changes in policy or procedure that require § 5 preclearance. Courts have taken up this issue many times in the past. Perhaps most analogous is Montgomery v. Leflore County Republican Executive Committee, 776 F.Supp. 1142 (N.D.Miss. 1991). In Montgomery, the issue before the court was whether violations of Mississippi election law were changes covered by § 5 of the VRA, thus requiring preclearance. The court found that violations of Mississippi law were not changes within the meaning of § 5 and did not require preclearance.

The Court held that

[t]he only allegations in the complaint relevant to the convening of a three-judge court are those that implicate § 5 of the Voting Rights Act. . . . Plaintiff contends that the violations of Mississippi law which she cites in her complaint, involve changes covered by § 5, and that those changes have not been precleared pursuant to the statutory procedures. The issue for a three-judge court, then, is whether the acts of defendants . . . are changes within the meaning of § 5.

Id. at 1144 (internal citations omitted).

First, however, the court determined whether a three-judge panel was proper to hear the § 5 issue. The Montgomery court noted that § 5 of the Voting Rights Act provides in pertinent part as follows:

... [W]henever a State or political subdivision ... [covered by § 4] shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1968, ... such State or subdivision may institute an action in the [U.S.] District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, ... and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if ... [it] has been submitted ... to the Attorney General and the Attorney General has not interposed an objection within sixty days ...

42 U.S.C. § 1973c.

The statute provides that “[a]ny action under this section shall be heard and determined by a court of three judges in accordance with the provisions of 28 U.S.C. § 2284 ...” 42 U.S.C. § 1973c. The three-judge court may adjudicate only what has become known as the “coverage” issue—that is, whether the political subdivision has adopted a change covered by § 5 without obtaining preclearance of that change. . . . If no such change occurred, or if the change was precleared, then the suit is dismissed; if a change occurred and was not precleared, then it is unlawful and may not be enforced.

Id. at 1144(internal citation omitted).

While the statute allows for a three-judge panel to convene, most duties are properly performed by the single-judge court. “Although § 5 provides that claims arising under it are to be heard by a three-judge court, it also incorporates the provision of 28 U.S.C. § 2284.” Id. at 1144. That statute states that a single judge may conduct all proceedings except the trial, as well as enter all orders permitted by the rules of civil procedure. 28 U.S.C. § 2284.

This provision stands for the proposition that the single-judge district court to whom the request for a three-judge court is made has the authority to determine if a three-judge court is required. . . . Because of the significant time and expense involved with impaneling a three-judge court, courts confronted with § 5 claims have consistently held that the single judge to whom the case is assigned may properly dismiss § 5 claims that are wholly insubstantial and completely without merit. . . . Regardless of the nature of the relief sought, a single judge has the authority to review a complaint seeking the convening of a three-judge court in order to determine whether it states a substantial claim and one over which the

court would have jurisdiction; the single judge has the authority and responsibility to ascertain whether the claim is substantial and one over which the court has jurisdiction.

Id. at 1145 (internal citations omitted).

In the very case in which it authorized three-judge courts in § 5 suits, Allen v. Board of Elections, 393 U.S. at 561-62, 89 S.Ct. at 829-30, the Supreme Court explained why such panels should be sparingly invoked:

We have long held that congressional enactments providing for the convening of three-judge courts must be strictly construed ... Convening a three-judge court places a burden on our federal court system, and may often result in a delay in a matter needing swift adjudication ... Also, a direct appeal may be taken from a three-judge court to [the Supreme] Court, thus depriving us of the wise and often crucial adjudications of the courts of appeal. Thus we have been reluctant to extend the range of cases necessitating the convening of three-judge courts.”

Montgomery at 1145.

The Montgomery court reiterated the rare nature of such claims requiring a three-judge panel and courts’ obligation to determine whether a three-judge panel is truly necessary.

“Individuals must not be allowed to obtain a three-judge court, with its concomitant burdens, simply by intoning the catchwords of § 5. This court has an obligation to examine the complaint to determine whether it states a substantial claim.” Montgomery at 1145.

The Montgomery court found that its present situation was one whereby the defendants purportedly acted in violation of precleared Mississippi election laws that remained in full force. The Montgomery court held that the alleged misconduct of the defendant represented “an ordinary, garden-variety election dispute; plaintiff’s attempt to convert it into a voting rights claim under § 5 is ‘completely without merit.’ . . . Thus, convening a three-judge court on such a claim would patently amount to a misuse of limited judicial resources.” Id. at 1145.

After the Montgomery court held that a three-judge panel was not properly convened in the case, it went on to find that the § 5 issue was without merit. The court referred to the VRA

text and held that § 5 refers to changed practices that a subdivision ‘enacts’ or ‘seeks to administer.’ Id. at 1145. “The approval or preclearance requirements of § 5 are triggered only when ‘a state or political subdivision shall enact or seek to administer’ a change in its voting procedures. . . . In other words, some volitional action on the part of the state or a subdivision thereof is required.” Id. at 1145 (internal citations omitted). The Montgomery court found no enactment of a “change” occurred because neither the Leflore County Democratic Executive Committee nor the Leflore County Republican Executive Committee were governmental subdivisions. “The complaint merely alleges that these committees have violated Mississippi election laws. With that in mind, it is the opinion of the court that *it was not Congress’ intent for litigants to utilize § 5 of the Voting Rights Act for purposes of enforcing precleared state election laws.*” Id. at 1144 (internal citations omitted, emphasis added).

The court emphasized that its ruling did not deny plaintiffs relief otherwise available through proper avenues. “The state court has jurisdiction to hear complaints that election officials have violated state election laws. Such claims may be raised in challenges to particular election results. Therefore, while plaintiff may have valid grievances under Mississippi law, her complaint lacks a legitimate claim under § 5 of the Voting Rights Act.” Id. at 1145, (internal citations omitted).

Similarly, the Fifth Circuit case U.S. v. Saint Landry Parish School Board, 601 F.2d 859, affirmed dismissal of a § 5 claim by a district court judge without assembling two other judges. The Fifth Circuit rejected the argument that the misconduct of local election officials amounted to a § 5 voting procedure. Id. at 863.

[O]ne would not normally conclude that a state “enacts or administers” a new voting procedure every time a state official deviates from the state’s required procedures. The commonsense meaning of “shall enact” indicates that action of a state, as a body, is envisioned, and we think “shall seek to ... administer” was

added to cover situations when an enactment was not actually passed, but when a procedure was nonetheless widely administered with at least the implicit approval of the state governing authority ... But we can find no case which even hints that actions of a state official which are in conflict with the state's required procedures should be considered a change in voting procedures enacted or administered by the state within the meaning of § 5 ...

Id. at 864.

The Montgomery court found wide support for its decision, not only in the Fifth Circuit Saint Landry decision, but numerous others. “Litigants with garden-variety election challenges such as ballot counting or election administration have been redirected from federal court to the state tribunals. In so doing, the court has recognized that the Constitution leaves to the states broad power to regulate the conduct of federal and state elections.” Montgomery at 1146, citing Duncan v. Poythress, 657 F.2d 691, 702 (5th Cir.1981); Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir.1972) (federal courts should “not intervene in state election contests for the purpose of deciding issues of state law”), cert. denied, 410 U.S. 910 (1973); Powell v. Power, 436 F.2d 84, 86 (2d Cir.1970) (federal courts are neither equipped, nor empowered, to rectify every alleged election irregularity”). In Duncan v. Poythress, 657 F.2d 691, the Fifth Circuit held that administration of elections is generally a matter of state concern, and that more than an ordinary dispute over the counting and marking of ballots is required for federal intervention to be appropriate. See Griffin v. Burns, 570 F.2d 1065, 1078 (1st Cir.1978).

After examining the wealth of case law on the topic, the Montgomery court summarized its holding as follows:

It would appear then, that misconduct of election officials does not constitute a § 5 claim. The court could not simultaneously embrace plaintiff's theory and avoid thrusting itself into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.

In conclusion, the court is of the opinion that this case appears to be a local election dispute which should be resolved by the Mississippi state court. What plaintiff has conclusively labelled as § 5 changes, are no more than alleged violations of valid state laws, precleared and still adhered to by Mississippi. Thus, these allegations are meritless under § 5 and do not justify convening a three-judge court. Those portions of the complaint alleging violation of § 5 of the Voting Rights Act are dismissed with prejudice.

Montgomery at 1146 (internal citations omitted).

Many other courts have agreed that misconduct of election officials does not constitute a § 5 change. See e.g. Beatty v. Esposito, 439 F.Supp. at 832; Gordon v. Executive Committee, 335 F.Supp. 166, 169-70 (D.S.C.1971) (three-judge court) (per curiam); Webber v. White, 422 F.Supp. at 425-28, Eccles v. Gargiulo, 497 F.Supp. at 422; Gremillion v. Rinaudo, 325 F.Supp. 375, 378 (E.D.La.1971). In Powell v. Power, 436 F.2d 84 (2d Cir. 1970), an unsuccessful candidate and voters in a Democratic congressional primary alleged that election officials had permitted non-party members to vote in the primary, in violation of the Voting Rights Act and § 1983. The district court denied relief, and the Court of Appeals affirmed. Regarding the plaintiffs' Voting Rights Act claims, the Second Circuit stated:

Were we to embrace plaintiffs' theory, this court would henceforth be thrust into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law.... (W)e are not inclined to undertake such a wholesale expansion of our jurisdiction into an area which, with certain narrow and well defined exceptions, has been in the exclusive cognizance of the state courts.

Id. at 86.

As set forth in Secretary of State Nelson's Affidavit, all applicable statutory and administrative rule provisions at issue have been precleared by Department of Justice. Nelson Affidavit para. 74. Any deviations from those precleared provisions by local election workers or officials are not a basis for entering a preliminary injunction or convening a three-judge district

court panel under the provisions of § 5. Accordingly, Plaintiffs' Section 5 VRA claims should be dismissed, and the Court should dismiss Plaintiffs' motion for an injunction on its merits.

### CONCLUSION

Plaintiffs have not and cannot meet each of the four factors required before the Court may grant a preliminary injunction. Moreover, the Court has no jurisdiction of this matter, as the Plaintiffs' claim and request is moot. Finally, this case is not properly before the Court under § 5 of the VRA and should be dismissed on its merits by a single-judge court without further delay.

Dated: April 13, 2009.

GUNDERSON, PALMER, NELSON  
& ASHMORE, LLP

By: *s/Sara Frankenstein*

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**CERTIFICATE OF SERVICE**

I hereby certify on April 13, 2009, a true and correct copy of **MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION** was served electronically through the CM/ECF system upon the following individuals:

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By: ./s/Sara Frankenstein  
Sara Frankenstein

Shannon County

Voter Display

Voter's Id: J0465 060500000

Voter's Name: JANIS, EILEEN R

Address: PO BOX 525  
PINE RIDGE SD  
57770

Sex:

Date Registered: 11/04/08 Party: DEMOCRAT

Twp/City: 98 NOT IN FIRE DIS Ward: PIN

School: 01 SHANNON 65-1 Precinct: 3

Phone Number:

Date of Birth: 1/12/61

Old SS#/DrL#: 000000000

DriversLic: 00474069

DriversLicState: SD

Last 4 of SS#:

Water Dist:

Special District: 00

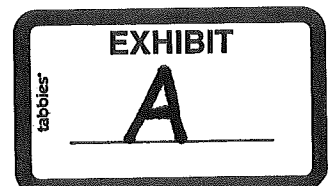
Commissioner District: 04

Election History:

Date Last Voted:

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Shannon County

Voter Display

Voter's Id: C1810 060500000

Voter's Name: COLHOFF, KIM A

Address: GENERAL DELIVERY

PINE RIDGE SD

57770

Date Registered: 4/08/09

Party: DEMOCRAT

Twp/City: 98 NOT IN FIRE DIS Ward: PIN

School: 01 SHANNON 65-1 Precinct: 1

Phone Number:

Date of Birth: 10/30/56

Old SS#/DrL#: 000000000

DriversLic:

DriversLicState: SN

Last 4 of SS#:

Water Dist:

Special District: 00

Commissioner District: 03

Election History:

Date Last Voted:

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