

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION**

EILEEN JANIS and KIM COLHOFF, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
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 MCCAULEY, )  
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 and individual )  
capacity as Auditor for Shannon County; )  
LA FAWN CONROY, in her individual and )  
official capacity as a poll worker for )  
Shannon County )  
)  
Defendants. )

Civil Action No. 09-5019

**PLAINTIFFS' RESPONSE IN OPPOSITION TO  
THE STATE DEFENDANTS' MOTION TO DISMISS**

Plaintiffs, by and through counsel, submit this response in opposition to Defendants Nelson, Shultz, Madsen, Casey, Layer, and Viken's, (hereinafter "the state defendants") Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.

Plaintiffs filed this civil action on February 18, 2009 challenging the unlawful denial of their right to vote in the 2008 federal, state, and local elections. Plaintiffs sued the state defendants in their official capacities and sought declaratory relief, injunctive relief, and nominal monetary damages. On April 13, 2009, the state defendants filed a

motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction only as to Plaintiffs' request for nominal monetary damages. They do not assert any other ground for their motion.

“A motion to dismiss for lack of subject matter jurisdiction challenges the court's power to hear the case.” Garreaux v. United States, 544 F.Supp.2d 885, 889 (D.S.D. 2008). A defendant must challenge the complaint on its face or on the truthfulness of its factual allegations, and the plaintiff bears the burden of proof as to the existence of subject matter jurisdiction. Farmers Union Oil Co. v. Guggolz, 2008 WL 216321 \*2 (D.S.D. Jan. 24, 2008). When considering a Fed. R. Civ. P. 12(b)(1) motion, “no presumptive truthfulness attaches to the plaintiff's allegations” and, if the jurisdictional and substantive issues are connected, a court may render its decision after reviewing all of the evidence presented. Id. at \*3 (citing Osborn v. United States, 918 F.2d 724, 730 (8<sup>th</sup> Cir. 1990); Whalen v. United States, 29 F.Supp.2d 1093, 1095-96 (D.S.D.1998)). See also Crow Creek Sioux Tribe v. Bureau of Indian Affairs, 463 F.Supp.2d 964, 967 (D.S.D. 2006) (applying same standard); Locke v. U.S., 215 F.Supp.2d 1033, 1037 (D.S.D. 2002) (applying same standard).

Although the State of South Dakota generally enjoys sovereign immunity from suit, the state may waive such immunity. S.D. Const. art. III, § 27; Wilson v. Hogan, 473 N.W.2d 492, 494 (S.D. 1991). Section 21-32-16 of the South Dakota Code provides that “[t]o the extent such liability insurance is purchased pursuant to 21-32-15\* and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the

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\* “The State of South Dakota, through the commissioner of administration, may obtain and pay for public liability insurance to the extent and for the purposes considered expedient by the commissioner for the purpose of insuring the liability of the state, its officers, agents, or employees.” S.D.C.L. § 21-32-15.

common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued.” Courts have rejected the sovereign immunity defense based on evidence of liability insurance coverage for public officials. See Webb v. Lawrence County, 144 F.3d 1131, 1136-39 (8<sup>th</sup> Cir. 1998) (ruling that county defendants did not enjoy common law sovereign immunity because of county’s purchase of liability insurance); Bland v. Davison County, 566 N.W.2d 452, 461 n.9 (S.D. 1997) (“County waived this [sovereign immunity] defense by purchasing liability insurance and is deemed to have consented to suit in the same manner that any other party may be sued.”) (internal quotations omitted).

If the state defendants have liability insurance coverage or engage in a risk-sharing pool, they have waived their sovereign immunity. The issue of whether such coverage exists and, if so, the extent of such coverage, are areas in which Plaintiffs will seek discovery. At this time, the Court has no evidence upon which to make a proper determination on the issue of subject matter jurisdiction. Therefore, dismissing Plaintiffs’ claim for nominal monetary damages at this time is premature and unwarranted.

Furthermore, sovereign immunity does not apply to civil actions against public officials sued in their individual capacities. See Murphy v. Arkansas, 127 F.3d 750, 754 (8<sup>th</sup> Cir. 1997) (“The Eleventh Amendment does not bar damage claims against state officials acting in their personal capacities.”); Taylor v. Howe, 280 F.3d 1210 (8<sup>th</sup> Cir. 2000) (affirming lower court’s damages award ranging from \$500 and \$2,000 in voting rights suit against poll workers sued in their individual capacities). Plaintiffs note that, on May 4, 2009, they filed a motion to amend their complaint to sue all of the defendants in

their individual capacities. To the extent that the jurisdictional allegations in the complaint are insufficient, the Court may allow Plaintiffs to amend the complaint to avoid dismissal on jurisdictional grounds. See Jones v. Freeman, 400 F.2d 383, 387 (8<sup>th</sup> Cir. 1968) (“[E]ither this Court or the District Court . . . has power to permit amendment [of the complaint] to avoid dismissal under jurisdictional grounds.”). If the Court grants Plaintiffs’ motion to amend the complaint to sue the state defendants in their individual capacities, the state defendants’ motion to dismiss will be moot.

### CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court deny the state defendants’ Fed. R. Civ. P. 12(b)(1) motion to dismiss.

Respectfully submitted,

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