

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

EILEEN JANIS and KIM COLHOFF,)	
)	
Plaintiffs,)	
)	
vs.)	Civil Action No. 09-5019
)	
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.)	

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS
SUE GANJE AND LA FAWN CONROY'S MOTION TO DISMISS
PLAINTIFFS' FOURTEENTH AMENDMENT CLAIMS**

Plaintiffs, by and through counsel, file this response in opposition to Defendants Sue Ganje and La Fawn Conroy's Fed. R. Civ. P. 12 (c) motion to dismiss* Plaintiffs' claims under the Equal Protection and Due Process clauses of the Fourteenth Amendment (Counts 1 and 2 of the Amended Complaint, respectively). Defendants argue that Plaintiffs do not allege intentional racial discrimination on the part of Defendants and, therefore, they have failed to state a claim upon which relief can be granted. They also

* Defendants Ganje and Conroy have styled their motion as a "Motion to Dismiss," but Fed. R. Civ. P. 12 (c) applies to motions for judgment on the pleadings. For the sake of consistency, Plaintiffs will use the term "motion to dismiss."

contend that this Court lacks subject matter jurisdiction and that they should have raised their equal protection and due process claims in state court. Plaintiffs maintain they were not required to allege intentional racial discrimination in order to sustain their equal protection and due process claims. In addition, federal courts have jurisdiction over claims grounded in federal law which involve the denial of voting rights, especially when federal elections such as that for the U.S. President are involved. Therefore, this Court should deny Defendants' motion to dismiss.

STANDARD OF REVIEW

Courts review a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings under the same standard used for analyzing a Fed. R. Civ. P. 12(b)(6) motion to dismiss. Waldron v. Boeing Co., 388 F.3d 591, 593 (8th Cir. 2004). When ruling on a Fed. R. Civ. P. 12(c) motion, the court must assume that the complaint's factual allegations are true and should construe all inferences from them in the non-moving party's favor. Id. The court must not look at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). A court should only grant a motion for judgment on the pleadings when there is no material fact in dispute and the moving party is entitled to judgment as a matter of law. Wishnatsky v. Rovner, 433 F.3d 608, 610 (8th Cir. 2006); Syverson v. FirePond, Inc., 383 F.3d 745, 749 (8th Cir. 2004).

ARGUMENT AND CITATIONS OF AUTHORITY

Defendants contend that Plaintiffs must allege intentional or purposeful racial discrimination in order to sustain their Fourteenth Amendment claims. Ganje and Conroy Mot. Dismiss at 3. Plaintiffs' equal protection claim is based on the fact that they

were unlawfully denied the right to vote because of their felony convictions even though they retained the right to vote under South Dakota law. Amend. Compl. ¶¶ 12, 27-28, 44-47; S.D.C.L. § 23A-27-35. They maintain Defendants should have allowed them to vote like all other similarly situated qualified electors and Defendants' failure to do so resulted in unequal treatment in violation of the Fourteenth Amendment. Their due process claim is premised on the fact that Defendants failed to notify them regarding the removal of their names from the county voter registration list and denied Plaintiffs any meaningful opportunity to challenge such actions. Amend. Compl. ¶¶ 15, 30, 48-52. Therefore, Plaintiffs contend Defendants violated their procedural and substantive due process rights.

Given the context of Plaintiffs' Fourteenth Amendment claims, an allegation of intentional racial discrimination is unnecessary and not required. Instead, they are only required to show that they are qualified electors who faced arbitrary and disparate treatment for purposes of their equal protection claim, and that Defendants denied them a fundamental right without any due process. Because Plaintiffs have alleged sufficient facts to make out a prima facie case regarding violations of their rights under the Fourteenth Amendment, dismissal of those claims is unwarranted.

Defendants also argue that this Court lacks subject matter jurisdiction over their claims and that Plaintiffs should have filed their lawsuit in state court. Ganje and Conroy Mot. Dismiss at 6. Federal jurisdiction exists in this case because Plaintiffs seek to vindicate their fundamental right to vote – a right protected by the Fourteenth Amendment – and the denial of that right prohibited them from participating in federal

and state elections, including the most important election of all – that for the U.S. President. Therefore, this Court also has jurisdiction over Plaintiffs’ claims.

A. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” and requires that all similarly-situated persons be treated alike. U.S. Const. amend. XIV, § 1; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985). See also Johnson v. City of Minneapolis, 152 F.3d 859, 862 (8th Cir. 1998) (“To state an equal protection claim, [a plaintiff] must have established that he was treated differently from others similarly situated to him.”) (citing Klinger v. Dep’t of Corrections, 31 F.3d 727, 731 (8th Cir. 1994)).

The Supreme Court has repeatedly found violations of the equal protection clause in the voting rights context even when the plaintiffs did not allege intentional or racial discrimination. In Gray v. Sanders, 372 U.S. 368, 381 (1963), for example, which coined the phrase “one person, one vote,” the Court struck down Georgia’s county unit system, not on grounds of racial discrimination, but because it accorded greater weight to the smaller and more rural counties than those counties which had larger population sizes. The unit system was unconstitutional because it denied “equality of voting power.” *Id.* at 381. In Wesberry v. Sanders, 376 U.S. 1 (1964) and Reynolds v. Sims, 377 U.S. 533 (1964), the Court applied the principle of “one person, one vote” to congressional and legislative redistricting and required states to value, respect, and protect every individual’s right to vote. See also Moore v. Ogilvie, 394 U.S. 814 (1969) (invalidating

an Illinois statute regarding candidate nominating petitions, finding that the law discriminated against residents in more populous counties).

Rather than applying a rigid test which focuses solely on intentional racial discrimination, the Court instead adopted an equal protection analysis that centers on whether a state election law or policy results in discriminatory treatment of a class of qualified voters. Consequently, whenever South Dakota adopts a process for determining who is qualified to vote, the Equal Protection Clause protects an individual's right to participate in elections on an equal basis as other qualified electors. Lubin v. Parish, 415 U.S. 709, 713 (1974). See also Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction”). In Bush v. Gore, 531 U.S. 98, 104-05 (2000), a voting rights case which implicated the Equal Protection Clause but did not involve allegations of racial discrimination, the Court held that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.”

The Eighth Circuit also has found violations of the Equal Protection Clause in voting rights cases brought on behalf of Native Americans, but which did not include claims of racial discrimination. Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975), involved a challenge to an election scheme which prohibited residents living in unorganized counties, who were predominately Native American, from voting in the elections of neighboring organized counties. The plaintiffs argued the law was unconstitutional because the organized counties exercised substantial political power over the unorganized counties. Id. at 1254. The court ruled that the scheme violated the Equal

Protection Clause, specifically stating: “Such unequal application of fundamental rights we find repugnant to the basic concept of representative government.” 518 F.2d at 1258. See also United States v. South Dakota, 636 F.2d 241 (1980) (relying on decision in Little Thunder to strike down law which prohibited residents in unorganized counties from running for office in adjacent counties which had authority over unorganized counties).

More recently, courts have followed this line of reasoning when applying the Equal Protection Clause in the voting rights context to non-raced based claims. In Day v. Robinwood West Community Improvement Dist., 2009 WL 1161655 *2 (E.D. Mo. 2009), for example, the court issued a preliminary injunction against the defendants from enforcing a local election policy which allowed some voters to cast more than one ballot if they were registered to vote and owned property. The court held that “the ‘one person, one vote’ rule [] guarantees that every individual’s vote is weighed equally.” 2009 WL 1161655 *2. In ACLU of New Mexico v. Santillanes, 546 F.3d 1313, 1319 (10th Cir. 2008), the court ruled that the plaintiffs had standing to raise an equal protection challenge against a state law that required voters to present photo identification at the polls. The court determined that Plaintiffs had presented sufficient evidence at the outset to support their claim of unequal treatment under the Equal Protection Clause with respect to in-person voting versus those voting via an absentee ballot. 546 F.3d at 1319. See also Coalition for Equal Rights, Inc. v. Ritter, 517 F.3d 1195, 1199 (10th Cir. 2008) (“The Equal Protection Clause . . . keeps governmental decision makers from treating differently persons who are in all relevant respects alike.”) (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

Furthermore, courts have applied heightened scrutiny in cases involving unequal treatment within the class of qualified voters. See Burdick v. Takushi, 504 U.S. 428, 434 (1992) (holding that when a state election law subjects equal protection rights to “severe” restrictions, the state law must be “narrowly drawn to advance a state interest of compelling importance.”); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (“We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, a classification which might invade or restrain them must be closely scrutinized and carefully confined.”); Little Thunder, 518 F.2d at 1255 (ruling that district court employed the wrong test and should have determined whether a compelling state interest justified the denial of the plaintiffs’ right to vote). In Plaintiffs’ case, the asserted injury involves the denial of their fundamental right to vote, and Defendants have not offered any justification – let alone a compelling governmental interest - for their systematic removal of eligible voters from the voter rolls.

Given that Plaintiffs may properly assert a violation of their equal protection rights based on their unequal treatment within the class of qualified voters, Defendants’ reliance on cases such as Welch v. McKenzie, 765 F.2d 1311 (5th Cir. 1985), and Ramaratan v. New York City Board of Elections, 2006 WL 2583742 (E.D.N.Y. Sept. 7, 2006), is misplaced. In Welch, the African-American plaintiffs alleged that irregularities, fraud, and other errors in the handling of absentee ballots were racially motivated. 765 F.2d at 1312. The court ruled against the plaintiffs because it found no evidence in the record to support that contention. Id. at 1315. In the instant case, Plaintiffs allege they were qualified voters and yet were denied the right to vote due to Defendants’

enforcement of an unlawful policy that strips voting rights away from anyone with a felony conviction regardless of the sentence imposed. Assuming that these allegations are true, which this Court must do, Plaintiffs have stated a claim under the equal protection clause based on the arbitrary and disparate way they have been treated vis-à-vis other qualified voters.

Ramaratan involved candidates who wanted to run for office in the New York state assembly, but had been removed from the ballot pursuant to a state court order which found that the candidate's designating petitions were wrought with fraudulent misrepresentations. 2006 WL 2583742 at *1. The plaintiffs sought a preliminary injunction placing the candidates' names back on the ballot, arguing that the decisions of state court judges were "tainted," but they did not specify in what ways. Id. at *5. The district court ruled that a blanket assertion that the state court's decision was "tainted" without more was insufficient to establish an equal protection violation. Id. The court's reference to intentional or purposeful discrimination derived from the fact that the plaintiffs had framed their equal protection claim as a violation emanating from some alleged bias on the part of the state court. However, the court also found that the "[p]laintiffs cannot show that the New York State court's decision resulted in arbitrary and disparate treatment," thus recognizing an alternative way of pleading an equal protection claim. Id.

Defendants' refusal to allow Plaintiffs and other similarly situated individuals to register, remain registered, and vote violates the Equal Protection Clause because they cannot exercise their fundamental right to vote in the same manner as other qualified voters. Although Plaintiffs are Native Americans and allege a claim under Section 2 of

the Voting Rights Act, their equal protection claim involves all people – not just racial minorities. Through Count 1, they seek to vindicate the rights of all qualified voters on probation, regardless of their race, who have been treated in an unfair and arbitrary manner. This is the heart of their equal protection claim, and the law recognizes such a violation. Therefore, they have stated a claim under the Equal Protection Clause.

B. The Due Process Clause

Similarly, Defendants’ arguments regarding Plaintiffs’ due process claim fail. Section 1 of the Fourteenth Amendment of the United States Constitution provides: “No State shall . . . deprive any person of life, liberty, or property without due process of law.” In order to prove a violation of their procedural and substantive due process rights, Plaintiffs first must show that they have a protected liberty or property interest. Hammer v. Osage Beach, Mo., 318 F.3d 832, 840 n.11 (8th Cir. 2003); Merritt v. Reed, 120 F.3d 124, 126 (8th Cir. 1997). The due process clause protects individuals from unjustified deprivations of fundamental rights. Walker v. Kansas City, Mo., 911 F.2d 80, 93 (8th Cir. 1990). See also Duncan v. Poythress, 657 F.2d 691, 693 (5th Cir. 1981) (holding “that the due process clause of the fourteenth amendment ... protects against the disenfranchisement of a state electorate in violation of state election law”); Bonas v. Town of N. Smithfield, 265 F.3d 69 (1st Cir. 2001) (ruling that town officials violated voters’ due process rights by refusing to hold elections as required by town charter and state law).

Because “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,” the Supreme Court has consistently characterized the right to vote as a “fundamental political right.” Reynolds v. Sims, 377

U.S. at 562 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)). See also Wesberry v. Sanders, 376 U.S. at 17 (ruling that the right to vote is fundamental in nature). In general, under South Dakota law, Defendants are required to provide written notice prior to canceling a person's voter registration or rejecting a voter registration application. S.D.C.L. §§ 12-4-5.3; 12-4-19.1, 12-4-19.4. Plaintiffs allege they never received any notice that their names were being removed from the county voter registration list. Amend. Compl. ¶¶ 15, 30. In fact, Plaintiff Janis actually arrived at the polls on election day believing that she was entitled to vote and debated with election officials regarding her voting rights, thus further showing that she had no idea her name had been removed from the voter rolls. Amend. Compl. ¶¶ 16-22. Because Plaintiffs' due process claim is based on lack of notice, they have alleged sufficient facts support that claim.

C. Subject Matter Jurisdiction

The Eighth Circuit has held that, “[i]n order for a court to have subject matter jurisdiction, the pleading must on its face state a cognizable claim for relief, and in a section 1983 action the plaintiff must be able to point to specific articulable constitutional rights that have been transgressed.” Armstrong v. Adams, 869 F.2d 410, 413 (8th Cir. 1989) (citing Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278-79 (1977)). The Fourteenth Amendment secures Plaintiffs' fundamental right to vote in federal and state elections absent a clear and valid abridgment of that right by the State, and it is that federal law which serves as the foundation for their equal protection and due process claims. Reynolds v Sims, 377 U.S. at 554 (“Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.”).

Defendants' reliance upon the decision in Snowden v. Hughes, 321 U.S. 1 (1944), is misplaced because Snowden involved the denial of a state-created right, not a federal-created right which is at issue in the instant case. In Snowden, a Republican candidate who garnered the second highest number of votes in a primary election for a state office challenged the election officials' refusal to place his name on the ballot even though a state law required the officials to do so. 321 U.S. at 2. The Court dismissed the case on jurisdictional grounds, reasoning that "[t]he right to become a candidate for state office . . . is a right or privilege of state citizenship, not of national citizenship". Id. at 7. In this case, the Fourteenth Amendment protects Plaintiffs' fundamental right to vote, and the denial of that right prohibited them from participating not only in state elections, but federal elections as well; most notably, the presidential election. Because this Court has original jurisdiction over Plaintiffs' Fourteenth Amendment claims, subject matter jurisdiction exists.

CONCLUSION

For the reasons articulated above, Plaintiffs have stated claims under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and this Court has subject matter jurisdiction over those claims. Therefore, this Court should deny Defendants' motion to dismiss.

DATED this 26th day of January, 2010.

Respectfully submitted,

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