

**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.	)	

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

**I. INTRODUCTION**

Plaintiffs Eileen Janis and Kim Colhoff, who are South Dakota residents, filed this voting rights lawsuit because Defendants wrongfully removed their names from the state and Shannon County voter registration lists based on their felony convictions despite the fact that they retained the right to vote under S.D.C.L. § 23A-27-35. Plaintiffs also maintain they were never provided notice that their names would be removed from the state and county voter registration lists, and were denied the right to cast provisional ballots in the 2008 primary and general elections. Defendants' actions violated Plaintiffs

rights to equal protection and due process under the federal and state constitutions, the Help America Vote Act (“HAVA”) (42 U.S.C. §§ 15482 and 15483), the National Voter Registration Act (“NVRA”) (42 U.S.C. § 1973gg-6), and Sections 2 and 5 of the Voting Rights Act of 1965 (42 U.S.C. §§ 1973 and 1973c). Plaintiffs, as class representatives, seek injunctive and declaratory relief, as well as compensatory and nominal monetary damages.

Plaintiffs have filed this lawsuit against the lead defendants, but also seek the Court’s permission to sue on behalf of all South Dakota residents who were denied the right to vote based on their felony convictions despite the fact that they retained the right to vote under S.D.C.L. § 23A-27-35, and on behalf of a subclass of all Native American residents who have been negatively and disproportionately impacted by the Defendants’ unlawful actions in violation of Section 2 of the Voting Rights Act. Plaintiffs further request they be allowed to sue a class of all South Dakota county auditors to vindicate these rights. The claims on behalf of the proposed plaintiff class and subclass against the proposed defendant class satisfy each of the mandatory requirements for class certification under Fed. R. Civ. P. 23(a) as well as the conditions set out in Fed. R. Civ. P. 23(b)(2).

## II. ARGUMENT

Plaintiffs must establish that they can satisfy all four requirements set forth in Fed. R. Civ. P. 23(a) and at least one of the requirements in Fed. R. Civ. P. 23(b) before a court may certify a class. Blades v. Monsanto Co., 400 F.3d 562, 568-69 (8<sup>th</sup> Cir. 2005); Bird Hotel Corp. v. Super 8 Motels, Inc., 246 F.R.D. 603, 605 (D.S.D. 2007); Christina A. v. Bloomberg, 197 F.R.D. 664, 667 (D.S.D. 2000). This action satisfies all of the

requirements necessary for certification of a class and subclass of plaintiffs, and a class of defendants: (1) the classes are so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the classes; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the classes; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In addition to these four mandatory conditions, the proposed classes here meet the conditions set forth in Fed. R. Civ. P. 23(b)(2) because the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the classes as a whole.

When considering a motion for class certification, a court should construe the requirements for class certification liberally, especially in civil rights actions where the plaintiffs seek injunctive relief targeting conduct that has applied generally to the entire class. Coley v. Clinton, 635 F.2d 1364, 1378 (8<sup>th</sup> Cir. 1980); Christina A. v. Bloomberg, at 671. Also, if after examining the prescribed factors, the result the court should reach is not totally clear, all doubts should be resolved in favor of certification. See Fast v. Applebee's Intern., Inc., 2009 WL 2391921 \*2 (W.D. Mo. Aug. 3, 2009); Jones v. American Gen. Life & Accident Ins. Co., 213 F.R.D. 689, 693 (S.D. Ga. 2002).

**A. The Proposed Plaintiff Class and Subclass Should Be Certified.**

**1. Members of the class are so numerous as to make it impracticable to bring them all before this Court.**

Courts have not put a strict number of the amount of people who should comprise a putative class, and a plaintiff is not required to show the precise number of putative class members. Emanuel v. Marsh, 828 F.2d 438, 444 (8<sup>th</sup> Cir. 1987), vacated on other

grounds, 487 U.S. 1229 (1988). See also Telco Group, Inc. v. Ameritrade, Inc., 2007 WL 203949 \*4 (D. Neb. Jan. 23, 2007) (noting that “courts have relaxed the numerosity requirement when the plaintiffs seek certification pursuant to Rule 23(b)(2)); Bublitz v. E.I. du Pont de Nemours and Co., 202 F.R.D. 251, 256 (S.D. Iowa 2001) (recognizing that courts should focus on the injunctive and declaratory relief being sought when determining whether the numerosity requirement has been satisfied). Instead, courts have concentrated on the nature of the lawsuit, the difficulty of litigating individual suits, and “any other factor relevant to the practicability of joining all the putative class members.” Paxton v. Union National Bank, 688 F.2d 552, 559-60 (8<sup>th</sup> Cir. 1982).

In this case, class membership is constantly growing as new individuals are convicted of felonies and sentenced to probation. The National Institute of Corrections, an agency within the U.S. Department of Justice’s Bureau of Prisons, reports that there were 972 people in South Dakota who were convicted of federal felonies and sentenced to probation in 2007.<sup>1</sup> Court Services, which is responsible for monitoring all probation-related activities in South Dakota, estimates that that there are about 1,100 adults currently under probation supervision.<sup>2</sup> In addition, based on information supplied by the Unified Judicial System regarding in-state felony convictions, there were a total of 1,361 people sentenced to probation in South Dakota between 2002 and January 28, 2010, and 172 of those individuals are Native Americans. See Ex. A.

Overall, the proposed plaintiff class and subclass are so large that the joinder of so many plaintiffs is undoubtedly impracticable. Furthermore, the fluidity of the plaintiff class and subclass emphasizes the impracticality of joining all class members. It is

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<sup>1</sup> <http://www.nicic.org/features/statestats/?State=SD#4>

<sup>2</sup> <http://www.sdjudicial.com/cc/FirstCircuit/Probation.aspx>

impossible to predict the identity of these future individuals and such uncertainty of specific identity shows that joinder is not a realistic option. See Christina A. v. Bloomberg, 197 F.R.D. at 667 (ruling that the fluid nature of the population at the juvenile facility at issue in the case made joinder impracticable).

**2. There are questions of law and fact common to the plaintiff class and subclass.**

Plaintiffs satisfy Fed. R. Civ. P. 23(a)(2) for class treatment because there are questions of law and fact common to the class and subclass. “While there must be questions of law or fact common to the class, these questions do not have to be common to every member.” Id. (citing Paxton, 688 F.2d at 561). Moreover, commonality is readily established where the plaintiff’s claims, as here, focus on standard practices rather than facts specific to each class member. Id. at 667-68.

Relevant facts common to all members of the class and subclass are that each member was: (1) convicted of a felony and sentenced to probation; and (2) considered by Defendants ineligible to vote based on that felony conviction. These common facts give rise to the plaintiff classes’ claims for legal relief. The remedy sought is uniform declaratory and injunctive relief to address the systematic violations challenged in this lawsuit, and such relief would be the same for the entire class notwithstanding any potential factual variations in the way the violations occurred with respect to individual class members.

**3. The claims of the lead plaintiffs are typical of the plaintiff class and subclass.**

The typicality requirement of Fed. R. Civ. P. 23(a)(3) is met when the representatives’ claims arise from the same event or course of conduct, and are based on

the same legal theories as the class' legal claims, even if factual differences exist regarding individual class members. See Alpern v. UtiliCorp. United, Inc., 84 F.3d 1525, 1540 (8<sup>th</sup> Cir. 1996) (Typicality means that there are "other members of the class who have the same or similar grievances as the plaintiff."); Christina A. v. Bloomberg, 197 F.R.D. at 668 ("Factual variations in the claims of the Plaintiffs will not preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.") (internal quotations and citations omitted).

Lead plaintiffs Janis and Colhoff and the proposed plaintiff class and subclass they seek to represent all have felony convictions and remained eligible to vote. Nevertheless, Defendants have been disfranchising people with felony convictions regardless of the sentence imposed. Plaintiffs maintain that these actions violate their rights under federal and state law. Members of the proposed plaintiff class and subclass have suffered from the same underlying policies, practices, and procedures that are the subject of this lawsuit. Therefore, they would all be able to assert the same legal claims that already are raised in this suit.

Because Plaintiffs are alleging that the same unlawful conduct was directed at the class representatives and both the class and subclass itself, typicality is satisfied. Furthermore, in a case like this one – where the lead plaintiffs and class members all seek declaratory and injunctive relief – typicality is easily established because there is no risk of the lead plaintiffs pursuing goals at the expense of other class members.

- 4. The lead plaintiffs and class counsel will fairly and adequately protect the interests of the plaintiff class and subclass.**

Plaintiffs satisfy Fed. R. Civ. P. 23(a)(4) for class treatment because the lead plaintiffs and class counsel will fairly and adequately represent the interests of the class and subclass. The adequacy requirement has two aspects: (1) whether “the class representatives have common interests with the members of the class and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.” Bird Hotel Corp. v. Super 8 Motels, Inc., 246 F.R.D. at 607.

Plaintiffs’ interests are identical to those of the proposed class and subclass members: securing their right to vote under federal and state laws, and ensuring Defendants no longer violate those rights. They present no probability of a conflict because all class members have a common interest in obtaining the same declaratory and injunctive relief permitting them to register to vote. That equitable relief is not contrary to any interest of the proposed plaintiff class members.

Moreover, class counsel have many years of experience in civil rights and class action litigation. Plaintiffs’ attorneys, the American Civil Liberties Union and the law firm of Patrick K. Duffy, LLC, have the requisite expertise and knowledge and have adequate financial resources to litigate this matter. Class counsel have demonstrated a commitment to securing the voting rights of all people and a willingness to vigorously litigate voting rights cases through the hundreds of cases they have filed around the country, several of them in South Dakota.

**5. Class-wide injunctive and declaratory relief is appropriate because Defendants have acted or refused to act on grounds generally applicable to the class.**

In addition to satisfying the four requirements of Fed. R. Civ. P. 23(a), Plaintiffs also have met the conditions of Fed. R. Civ. P. 23(b)(2) because Defendants have

“refused to act on grounds that apply generally to the class [and subclass as a whole], so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Plaintiffs repeatedly have asserted that the Defendants have adopted and implemented an unprecleared policy, practice, and procedure which systematically denies voting rights to anyone convicted of a felony, not just those sentenced to imprisonment, in contravention of federal and state laws. Because of the widespread nature of Defendants’ actions, the voting rights of the entire proposed plaintiff class and subclass have been unlawfully abridged, and the only way to remedy such gross violations is for the Court to order declaratory and injunctive relief which will protect the fundamental right to vote of Plaintiffs and similarly-situated individuals which is exactly what the class and subclass represent.

An order from this Court forcing Defendants to comply with their statutory and constitutional mandates would constitute relief generally applicable to the entire plaintiff class and subclass. Thus, Fed. R. Civ. P. 23(b)(2) is satisfied and certification of the proposed plaintiff class and subclass is warranted.

**B. The Proposed Defendant Class Should Be Certified.**

Plaintiffs seek certification of a proposed defendant class consisting of all county auditors in South Dakota. When determining whether to certify a defendant class, a court must look at whether the requirements of Fed. R. Civ. P. 23 have been met, not whether the plaintiffs will ultimately prevail on the merits of their claims. Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478, 480 (D.S.D. 1979). In addition to the reasons set forth in Sections A1-5 above, Plaintiffs note that there are sixty-six (66) counties in South Dakota. Based on numbers alone, the proposed defendant class meets the numerosity



standard of Fed. R. Civ. P. 23(a)(1). For purposes of Fed. R. Civ. P. 23(a)(2), the relevant facts are whether county auditors either have been rejecting voter registration applications based on an individual's felony conviction regardless of the sentence imposed, and/or have been purging eligible voters from county voter registration lists based on felony criminal sentences for which the person should not have been disfranchised. Such actions unlawfully impinge upon the rights of the proposed plaintiff case and subclass to vote in the same manner as otherwise qualified voters, and it is these common facts which give rise to the claims for legal relief which the proposed plaintiff class and subclass raise.

The typicality requirement of Fed. R. Civ. P. 23(a)(3) also is met because any defenses available to the lead defendants are available to the proposed defendant class of county auditors. There is no reason to believe the lead defendants have any interests that would be contrary to that of the other defendant class members. Moreover, as Fed. R. Civ. P. 23(a)(4) mandates, the lead defendants can fairly and adequately protect the interests of the defendant class. The central issue in this case involves the defendants' systematic disfranchisement of individuals with felony convictions even if such individuals retained the right to vote. Even if later events suggest that the lead defendants are not adequately protecting the interests of the defendant class, the Court may always take whatever steps it thinks are necessary under Fed. R. Civ. P. 23(c) or (d) to address that issue.<sup>3</sup> Lynch Corp. v. MII Liquidating Co., 82 F.R.D. 478, 482 (D.S.D. 1979).

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<sup>3</sup> Federal Rule of Civil Procedure 23(c)(1)(C) states: "An order that grants or denies class certification may be altered or amended before final judgment." Rule 23(d)(1)(B)(iii) provides: "In conducting an action under this rule, the court may issue orders . . . giving appropriate notice to some or all class members of the members' opportunity to signify whether they consider the representation fair and adequate . . . ." Rule 23(c)(2)(B)(iv)

Finally, the requirements of Fed. R. Civ. P. 23(b)(2) have been met. Again, Plaintiffs contend that Defendants' practices, policies, and procedures of disfranchising individuals with felony convictions regardless of the sentenced imposed affects the entire proposed plaintiff class and subclass. In addition to compensatory and nominal monetary damages, Plaintiffs seek injunctive and declaratory relief, and such injunctive and declaratory relief is the primary way to resolve the harm to the plaintiff class and subclass as a whole. Therefore, certification of the defendant class is appropriate.

### III. CONCLUSION

For the foregoing reasons, Plaintiffs move this Court to certify a plaintiff class, a plaintiff subclass, and a defendant class of county auditors pursuant to Fed. R. Civ. P. 23(a) and (b).

Respectfully submitted,

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also allows any class member to enter an appearance through an attorney if the member so desires.

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Re: *Janis & Colhoff v. Nelson*  
Supplemental Information from the UJS regarding In-State Convictions

Dear Counsel:

As stated in the State Defendants' First Supplemental Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents, the information on state conviction information is not in the possession, custody or control of the State Defendants. However, as a courtesy, I requested information from the Unified Judicial System (UJS) regarding Interrogatories 17, 18, 19, and 20 as well as Request for Production of Documents No. 8.

Given the Court's limitation in its Order (Document 113) to sentences for probation only, Interrogatories 17 and 18 and Interrogatories 19 and 20 are duplicative. In response to these interrogatories, the UJS provided the following numbers regarding in-state felony convictions for offenses resulting in a sentence of probation only:

Year	Total Probation Only	Total Native American
2002	205	9
2003	189	12
2004	197	17
2005	183	21
2006	158	21
2007	140	32
2008	148	35
2009	138	25
2010*	3	0

\* As of January 28, 2010.

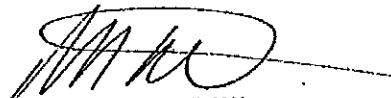
It is my understanding that "probation only" in this context includes all felonies resulting in a probation only sentence and/or a suspended imposition of sentence.

The UJS could not provide information responsive to Request for Production No. 8 because it was overly broad and unduly burdensome. It is my understanding from UJS that the requested information is not stored in a central location. Each county courthouse maintains the documents related to convictions within that county. In order to comply with this request, an exorbitant number of documents would have to be gathered from each of the sixty-six counties at great expense. The information is equally available to Plaintiffs by requesting the information from or viewing the documents at the respective county courthouses.

As stated above, this information was not in the possession, custody, or control of the State Defendants and was instead supplied by the UJS and simply passed through attorneys for the State Defendants. As such, the State Defendants cannot verify and swear to the accuracy of this information. Because of this limitation, this information is being provided by letter outside the State Defendants' First Supplemental Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents.

If you have any questions, please feel free to e-mail or call me.

Sincerely,



Richard M. Williams  
Assistant Attorney General

RMW/dh  
By E-mail