

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

EILEEN JANIS and KIM COLHOFF,)
)
 Plaintiffs,)
)
 v.) CIVIL ACTION NO. 09-5019
)
 CHRIS NELSON, et al.,)
)
 Defendants.)
_____)

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR
MOTION FOR A TEMPORARY RESTRAINING ORDER
OR PRELIMINARY INJUNCTION**

The plaintiffs respectfully submit this brief in support of their motion for a temporary restraining order or preliminary injunction. The plaintiffs seek an order enjoining the defendants from failing to restore the plaintiffs to the voter rolls in time for the next election in Shannon County (currently scheduled for June 9, 2009), enjoining the defendants from removing the plaintiffs from the voter rolls until this action is resolved on the merits, and granting any further relief which the Court deems necessary and appropriate to ensure that the defendants comply with their obligations under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c.

I. BACKGROUND

Plaintiffs Eileen Janis and Kim Colhoff are Native American residents of Pine Ridge, South Dakota. In January 2008, both of them were convicted of a felony offense and sentenced only to probation. A short time thereafter, both of them were removed from the voter rolls as part of the defendants' regular practice of disfranchising those convicted of felony offenses.

The defendants' practice stands in stark contrast to state law, which disfranchises only those sentenced to an adult penitentiary system for a felony offense. *See* S.D.C.L. § 23A-27-35.

II. DISCUSSION

The Eighth Circuit Court of Appeals has identified four factors for a district court to consider when determining whether a temporary restraining order or preliminary injunction should issue: (1) the likelihood that the moving party will succeed on the merits; (2) the threat of irreparable harm to the movant in the absence of the requested injunction; (3) the balance between the harm to the moving party if the injunction is denied and any harm to other parties if the injunction is granted; and (4) the public interest. *See United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1178-79 (8th Cir. 1998); *Dataphase Sys. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). *See also S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project*, 877 F.2d 707, 708 (8th Cir. 1989) (approving the application of the *Dataphase* factors to analyze a request for a temporary restraining order). When applying the *Dataphase* factors, “a court should flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene.” *Clorox*, 140 F.3d at 1179. As explained below, the balance weighs heavily in the plaintiffs' favor on each of the four factors.

A. LIKELIHOOD OF SUCCESS

Section 5 of the Voting Rights Act of 1965 requires designated states and political subdivisions to obtain federal approval, known as preclearance, before giving effect to changes in “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.” 42 U.S.C. § 1973c. *See generally Lopez v. Monterey County*, 525 U.S. 266 (1999). Without preclearance, a voting change will not be effective as law, *Connor v. Waller*, 421 U.S. 656, 656 (1975) (per curiam), and is unenforceable, *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982). *Accord Clark v. Roemer*, 500 U.S. 646, 652 (1991).

Section 5 provides two ways for a designated, or "covered," jurisdiction to seek preclearance. For administrative preclearance, the jurisdiction may submit the proposed voting change to the United States Attorney General for review. 42 U.S.C. § 1973c. If the Attorney General affirmatively approves the submitted change or fails to object to it within sixty days, the change is precleared and may then take effect. *Id.* Alternatively, or following an objection from the Attorney General, the jurisdiction may seek judicial preclearance by filing a declaratory judgment action in the United States District Court for the District of Columbia. *Id.* Both methods place the burden on the covered jurisdiction to prove that its proposed change “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 [or membership in a language minority].” *Id.*

In 1976, the United States Attorney General designated two counties in South Dakota, Shannon and Todd, as covered jurisdictions under Section 5 as a result of the 1975 amendments to the Voting Rights Act. *See* 28 C.F.R. pt. 51 app. (list of covered jurisdictions); 41 Fed. Reg. 784 (Jan. 5, 1976). The counties must therefore obtain preclearance before giving effect to any voting qualifications, prerequisites, standards, practices or procedures different from those “in force or effect on November 1, 1972.” 42 U.S.C. § 1973c.

The voting practice at issue here is clearly a voting change within the meaning of Section 5. *See* 28 C.F.R. 51.13(a) (providing that changes affecting voting include “[a]ny change in qualifications or eligibility for voting”). The defendants have been engaged in the practice of purging all individuals convicted of felony offenses - at least those convicted in federal court. That practice is different from anything that has previously been precleared. The defendants have neither sought nor obtained preclearance for this practice, nor would preclearance likely be

forthcoming if they did seek it. This unlawful practice has a discriminatory effect on Native American voters and should not continue.

The Supreme Court has consistently held that covered voting changes “will not be effective as laws until and unless precleared.” *Connor v. Waller*, 421 U.S. at 656. Failure to obtain preclearance “renders the change unenforceable.” *Hathorn v. Lovorn*, 457 U.S. at 269. If covered changes have not been precleared, “§ 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.” *Clark v. Roemer*, 500 U.S. at 652-53.

Accordingly, the plaintiffs are very likely to succeed on the merits of their Section 5 claim.

B. IRREPARABLE HARM

The harm in this case is clear. The plaintiffs will be unable to vote until they are restored to the rolls. The next election in Shannon County, where they live, is scheduled for June 9, 2009, and it is unlikely that they will be restored to the rolls before then in the absence of an injunction. Even if the defendants restored the plaintiffs to the rolls voluntarily, the plaintiffs would remain under the continuing threat of being disfranchised prior to the resolution of this action.

In the context of the Voting Rights Act, moreover, harm is presumed when a jurisdiction tries to enforce an unprecleared voting change: “If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change.” *Lopez v. Monterey County*, 519 U.S. at 20 (citations omitted); accord *Clark v. Roemer*, 500 U.S. at 652-53; *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969).

Accordingly, the plaintiffs are suffering, and will continue to suffer, irreparable harm in the absence of injunctive relief.

C. THE BALANCE OF HARMS

As discussed above, the plaintiffs will suffer irreparable harm if they continue to be unlawfully disfranchised. The defendants, however, can claim no harm in having to comply with Section 5. Any minor inconvenience to the defendants is clearly outweighed by the harm to the plaintiffs.

D. THE PUBLIC INTEREST

In a democracy, there can hardly be a matter of greater importance to the public interest than the right to vote, for the franchise is the foundation upon which all other freedoms are built. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The public therefore has a strong interest in the enforcement of Section 5. It cannot be in the public interest for the State to disfranchise its citizens and avoid its legal obligations.

III. CONCLUSION

This Court should grant the plaintiffs' motion for a temporary restraining order or preliminary injunction.

Respectfully submitted,



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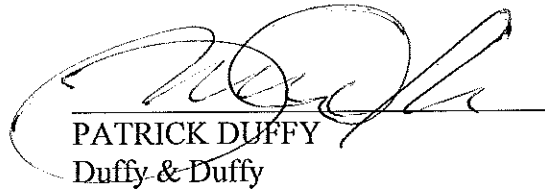
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served on the following counsel of record via electronic case filing on this 25th day of March, 2009.

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A handwritten signature in black ink, appearing to read 'Patrick Duffy', is written over a horizontal line. The signature is fluid and cursive.

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