UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EILEEN JANIS AND KIM COLHOFF, Plaintiff(s), v. 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 MCCAULLEY, CINDY SCHULTZ, CHRISTOPHER W. MADEN, RICHARD CASEY, KAREN M. LAYHER, AND LINDA LEA M. VIKEN, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES AS MEMBERS OF THE STATE BOARD OF ELECTIONS; AND SUE GANJE, IN HER OFFICIAL AND INDIVIDUAL CAPACITY AS AUDITOR FOR SHANNON COUNTY; AND LA FAWN CONROY, IN HER INDIVIDUAL AND OFFICIAL CAPACITY AS A POLL WORKER FOR SHANNON COUNTY, Defendant(s).	)	Case No.: 09-5019 **REPLY TO PLAINTIFFS' OPPOSITION TO GANJE AND CONROY'S MOTION TO DISMISS PLAINTIFFS' FOURTEENTH AMENDMENT CLAIMS**

Defendants, Sue Ganje and LaFawn Conroy, by and through their counsel of record Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, pursuant to Fed. R. Civ. P. 12(c), hereby submit their Reply to Plaintiffs' Opposition to Motion to Dismiss Plaintiffs' Fourteenth Amendment Claims.

A very recent decision handed down by the Second Circuit on January 28, 2010, falls in line precisely with Ganje and Conroy's previous arguments. In Hayden v. Paterson, 2010 WL 308897 (2nd Cir. 2010), a New York state statute prohibited convicted felons from voting.[1] The

[1] New York's disenfranchisement law is identical in substance to South Dakota's. Like South Dakota's law, New York prohibits convicted felons from voting while they are serving a prison sentence or while they are on parole following a prison sentence or their maximum sentence of imprisonment has yet to expire. Like South Dakota, the

plaintiffs sued, alleging a § 2 VRA claim and a violation of the Fourteenth and Fifteenth Amendment. Id. *1. The plaintiffs' complaint alleged that there was a history of racial discrimination in New York State's disenfranchisement laws, and also that there is disparate application of New York's felon disenfranchisement law, including that racial disparities exist in the disenfranchisement rates of minorities. Id. *4-7. Specifically, the Hayden plaintiffs alleged the plaintiff felons were removed from registration lists in a manner in which has a disparate impact on minorities. Id. Plaintiffs alleged minorities in New York are prosecuted, convicted, and sentenced at rates substantially disproportionate to whites. Id. The Hayden plaintiffs further alleged that although blacks in New York constitute 15.9% of the state population, they comprise 54.3% of the current prison population and 50% of the current parolee population in New York, etc. Id. The Hayden plaintiffs' alleged minorities are sentenced to incarceration at rates higher than whites, and whites are sentenced to probation at rates higher than minorities. Id. Citing such statistics, the Hayden plaintiffs alleged minorities comprise 87% of those currently denied the right to vote while making up only 31% of the overall state population. Id.

As the Hayden court stated, "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Id. *9, citing Washington v. Davis, 426 U.S. 229, 239 (1976). "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Id., citing Village of Arlington Heights v. Metro Hous. Div. Corp., 429 U.S. 252, 265 (1977). "Although disproportionate impact is not irrelevant, to violate the Fourteenth Amendment the disproportionate impact must be traced to a *purpose* to discriminate on the basis of race." Id. (emphasis in the original, internal citations and quotations omitted), citing Pers. Adm'r of Mass.

New York law allowed felons to vote if they had completed their prison sentences, received suspended sentences, or never had been sentenced to a term of imprisonment. Compare to S.D.C.L. §§ 12-4-18, 23A-27-35, and 24-5-2.

v. Feeney, 442 U.S. 256, 260 (1979). "Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Id. (internal quotations omitted), citing Feeney, 442 U.S. at 279.

The Hayden court held that the plaintiffs had alleged sufficient facts to establish disproportionate impact of New York's felon disenfranchisement laws on minorities, as compared with whites. Id. *10. "The question remains, however, as to whether the plaintiffs have sufficiently traced that impact to a *purpose* to discriminate on the basis of race, thereby stating a plausible claim of intentional discrimination." Id. (internal citation and quotations omitted).

There is no distinction between cases which determine the constitutionality of disenfranchisement *laws*, and cases determining the constitutionality of disenfranchisement *conduct*. In fact, the analysis is one in the same. Whether a plaintiff alleges that her name was removed from the voter registration list due to a statute or due to misapplication of a statute, the claim is the same—the plaintiffs are alleging in both instances that they were unconstitutionally removed from the voter registration list. Plaintiffs here, like plaintiffs in other voter disenfranchisement cases, allege they were unconstitutionally denied the right to vote by way of their names be unconstitutionally removed from the voter registration list. Therefore, the Plaintiffs' case at hand should be determined in the same manner as all other voter disenfranchisement cases.

It is illogical to have one standard for a plaintiff alleging that her name was unconstitutionally removed despite a statute and a different standard for a plaintiff alleging her

name was unconstitutionally removed because of a statute. No case in the nation indicates a differing standard or analysis. Disenfranchisement claims are disenfranchisement claims, following the same analysis under the Fourteenth Amendment.

Plaintiffs cite Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981) for the proposition that the Due Process Clause protects against the disenfranchisement of a state electorate in violation of state election law. In Duncan, state officials refused to hold a special election to fill a position on the Georgia Supreme Court, disenfranchising the entire electorate of Georgia. Id. at 693. The Fifth Circuit repeatedly stated that it was a close question whether the actions of Georgia officials amounted to a constitutional violation entitled to a § 1983 remedy in federal court. Id. at 700-01. The Court stated that "[t]he functional structure embodied in the Constitution, the nature of the federal court system and the limitations inherent in the concepts both of limited federal jurisdiction and of the remedy afforded by § 1983 must all be fully attended." Id. at 701. The Fifth Circuit set forth the following guide for determining whether a particular challenge to a state election practice rises to a level deserving of federal protection:

> . . . the determination that particular conduct constitutes a constitutional deprivation rather than a lesser legal wrong depends on the nature of the injury, *whether it was inflicted intentionally or accidentally*, whether it is part of a pattern that erodes the democratic process *or whether it is more akin to a negligent failure properly to carry out the state ordained electoral process* and whether state officials have succumbed to "temptations to control . . . elections by violence and corruption . . . ."

Id. at 701 (emphasis added), citing Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir.1980). The Fifth Circuit reviewed the numerous cases in which federal courts refused to adjudicate cases in which unintentional error was alleged in the voting process. Id. at 701-702. "Of course, most cases of federal court intervention have been brought under the Fourteenth Amendment's Equal Protection Clause and concerned the *purposeful* denial, or dilution, of the voting rights of a

segment of the electorate." Id. at 702 (emphasis added). The Duncan court repeatedly referred to federal intervention as being appropriate only in the "extraordinary case," to be used only "[i]f the election process itself reaches the point of patent and fundamental unfairness." Id. at 703. "Such a situation must go well beyond the ordinary dispute over the counting and marking of ballots . . . ." Id. The Duncan court reiterated that federal intervention is only appropriate if the allegations implicate the very integrity of the electoral process, such as cases in which the entire state electorate is wrongfully disenfranchised. Id. The Duncan court stated that it was willing to adjudicate the case at hand because the plaintiffs were not asking the federal courts to count ballots or otherwise enter into the details of the administration of an election. Id. The Duncan court distinguished the case from others, indicating that the Duncan case did not include inadvertent election errors but rather a deliberate, intentional decision to dispense with a special election. Id. The court found it could assert federal intervention because of the fundamental unfairness of Georgia state officials to disenfranchise voters in violation of state law so that they could fill governmental seats through the power of appointment. Id. at 704. The Duncan court reiterated once again after stating their holding that the Duncan case was distinguishable from those which did not allege purposeful conduct. Id. at 704.

Plaintiffs cite a number of cases discussing the one-person-one-vote rule recognized under the Equal Protection Clause. This is not a one-person-one-vote case. Plaintiffs' Fourteenth Amendment claims do not involve determinations of whether persons' votes are weighted equally absent vote dilution. Rather, this case involves the allegation that Defendants *un*intentionally removed Plaintiffs' names from the voter registration list and an unnamed poll worker (not named as a defendant) *un*intentionally denied one Plaintiff (Janis) a provisional ballot.

Plaintiffs cite numerous cases that include vague statements regarding equality of voting power under the Fourteenth Amendment. None of Plaintiffs' cited cases are helpful or relevant here, as none of those cases included a discussion of whether intentional conduct must be alleged in order to make out a Fourteenth Amendment claim. Plaintiffs state that 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. For this proposition, Plaintiffs cite cases in which it is not discussed whether the plaintiffs in those cases alleged intentional conduct. Whether intentional conduct is a required allegation was likely not discussed in those cases because intentional conduct *was* alleged in those plaintiffs' complaints. Because a case does not *discuss* whether intentional conduct is necessary does not mean intentional conduct is *not* necessary. Rather, absence of such a discussion means the topic was not at issue in the case. The Court should not determine that intentional conduct need not be alleged simply because some Fourteenth Amendment cases do not discuss the topic.

The Court should grant Defendant Ganje and Conroy's motion to dismiss for failing to allege intent as required for Fourteenth Amendment claims.

Dated this 17th day of February, 2010.

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CERTIFICATE OF SERVICE

I hereby certify on February 17, 2010, a true and correct copy of **GANJE AND CONROY'S MOTION TO DISMISS PLAINTIFFS' FOURTEENTH AMENDMENT CLAIMS** was served electronically through the CM/ECF system upon the following individuals:

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