

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

EILEEN JANIS AND KIM COLHOFF,)
))
Plaintiff(s),)
))
v.)
))
CHRIS NELSON, IN HIS 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 OFFICIAL)
CAPACITIES AS MEMBERS OF THE STATE)
BOARD OF ELECTIONS; AND SUE GANJE,)
IN HER OFFICIAL CAPACITY AS AUDITOR)
FOR SHANNON COUNTY,)
))
Defendant(s).)

Case No.: 09-5019

**DEFENDANT GANJE’S REPLY TO
PLAINTIFFS’ MEMORANDUM IN
OPPOSITION TO MOTION TO
DISMISS ON MOOTNESS AND
STANDING GROUNDS**

Defendant, Sue Ganje, by and through her counsel of record Sara Frankenstein of Gunderson, Palmer, Nelson & Ashmore, hereby submits her Reply to Plaintiffs’ Opposition to Motion to Dismiss on Mootness and Standing Grounds. Defendant Sue Ganje (“Ganje”) moved to dismiss all Counts of Plaintiffs’ Complaint (Docket No. 1) or proposed Amended Complaint (Docket No. 49, Exhibit 1) requesting injunctive and declaratory relief.

First, the Court should note that Ganje moved to dismiss Plaintiffs’ claims requesting injunctive and declaratory relief. Ganje did not move to dismiss claims requesting monetary damages. Therefore, the Court should determine only Plaintiffs’ claims for injunctive and declaratory relief, and analyze such claims pursuant to case law discussing injunctive and

declaratory relief. Viewing Ganje's motion properly, Plaintiffs have not stated a claim for which relief can be granted.

A. Standing

Plaintiffs did not address the six factors they must prove in the Voting Rights Act ("VRA") context to demonstrate standing. See Newman v. Voinovich, 789 F.Supp. 1410, 1415 (S.D. Ohio 1992), citing Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471-77 (1982). The VRA standing requirements include that the plaintiffs' injury must likely be redressed by the requested relief. Id. Plaintiffs must also establish they are asserting their own legal rights and interests, and not those of a third party. Id. Plaintiffs must further demonstrate their injury consists of more than a generalized grievance that is shared by many. Id. Plaintiffs made no attempt in their opposition brief to demonstrate that any of their requested injunctive relief can redress the alleged past denial of their right to vote. Nor could they, as injunctive relief is meant to deter future behavior, not punish past conduct. Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2942 (1995).

Moreover, Plaintiffs are only entitled to injunctive relief if there is no adequate legal remedy. Plaintiffs are requesting monetary damages. Monetary damages have long been established to provide adequate legal remedies.

1. Standing Under Section § 5 of the VRA

Plaintiffs cite a number of cases for the proposition that a private party has standing to obtain an injunction under § 5 of the VRA because courts have recognized a private cause of action under the VRA. These citations and the general proposition miss the point. It does not matter whether a statute provides a private cause of action, but rather whether these particular Plaintiffs have standing to *bring* the private cause of action. Whether a statute provides a private

cause of action is an entirely different legal issue than the issue of standing. Because a statute provides a private cause of action does not mean that every person has standing to sue under it.

Notably, all cases cited by Plaintiffs involve plaintiffs alleging an ongoing and current violation of their own personal voting rights. Plaintiffs in this case have not and cannot show they are currently and personally affected by any previous unprecleared voting change.

Plaintiffs cite the District Court opinion in Quick Bear Quiver v. Nelson, 387 F.Supp. 22, 1027, 1031 (D.S.D. 2005) for the proposition that any resident of a covered jurisdiction has standing to obtain an injunction in such a case. Again, it must be noted that in Quick Bear Quiver the plaintiffs alleged imminent harm, not a previous harm that has since been corrected. Moreover, since that decision, the U.S. Supreme Court has handed down a number of cases addressing this issue.

[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Hein v. Freedom from Religion Found., Inc., 127 S.Ct. 2553, 2563-64 (2007). A plaintiff may not merely allege the law has not been followed. Lance v. Coffman, 127 S.Ct. 1194, 1198 (2007) (per curiam). Alleging an injury that a law has not been followed “is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.” Id.

The plaintiffs in Lopez v. Merced County, 2008 WL 170696, made the same arguments Plaintiffs make here. In Lopez, the court cited U.S. Supreme Court decisions in finding that

While Allen v. State Board of Elections, 393 U.S. 544, 557 . . . (1969), establishes that it “is consistent with the broad purpose of the Act [Voting Rights Act] to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements,” a private litigant still must satisfy

the standing requirement that he suffered a “distinct and palpable injury to himself,” Warth, 422 U.S. at 501, and show that such injury is likely to be redressed if the requested relief is granted.

Id. citing Warth v. Seldin, 422 U.S. 490 (1975).

Defendant Ganje is obviously not enforcing any alleged policy of removing convicted felons from the voter registration list as it affects Plaintiffs, as Plaintiffs are currently registered. Plaintiffs have not shown the requisite injury that is anything more than a generalized grievance shared by other citizens of Shannon County.

Finally, Plaintiffs have not shown that the injunction they request will redress their injury. U.S. v. Hays, 515 U.S. 737, 742 (1995) (holding an irreducible constitutional minimum of standing includes that the plaintiffs’ injury will likely be redressed by a favorable decision, and such factor may not be met by simply pointing to allegedly illegal government conduct.) Id. at 743. While Plaintiffs may allege ongoing violations of § 5 of the VRA, such allegations are not sufficient to demonstrate standing. As indicated above, case law is clear that Plaintiffs must show their injury will likely be redressed by the requested relief. Plaintiffs’ case revolves around their claimed injury of being wrongfully removed from the voter registration list. They are currently on that list¹, and no manner of injunctive relief is necessary to accomplish what has already been accomplished.

If the Court is persuaded that Plaintiffs have established standing for their §5 claim, then Plaintiffs are limited to standing under their § 5 claim. Plaintiffs must prove that they have standing under each claim brought, and that each claim has injunctive remedies available which will redress their current injury.

2. Standing Under § 2 of the VRA

¹ Plaintiff Janis was on the registration list even at the time she filed her Complaint.

Plaintiffs argue at length that they have previously suffered an injury under § 2, yet ask for injunctive relief under § 2. This argument again is off-point—requests for injunctive relief are not to punish past behavior, but rather deter future behavior. In order to sustain a claim for injunctive relief, Plaintiffs' injury must be ongoing, with no adequate remedy at law available. Damages are not allowed under VRA claims. Olagues v. Russoniello, 770 F.2d 791 (9th Cir.1985) (finding no authority within the VRA to allow for damages, no legislative history suggesting damages are allowed, finding no case in which damages were ever recovered, declining to imply any action for damages under VRA); B.C. Foreman v. Dallas County, Texas, 990 F.Supp. 505 (N.D.Tex.1998) (finding no cases in which a VRA § 5 court has awarded any form of monetary relief, finding no authority within the VRA for money damages, and declining to imply a right to damages under the VRA); Windy Boy v. County of Big Horn, 647 F.Supp. 1002 (D.Mon.1986) (finding no precedent in recent voting cases for awarding damages under VRA and stating injunctive relief is the universal remedy when plaintiffs prevail in VRA actions.) Clearly, the VRA and its § 2 remedies are meant to address current injuries by precluding them in the future through injunctive remedies.

Plaintiffs go on to cite a number of cases in which courts found that plaintiffs who were registered to vote within the affected region had standing to bring suit in redistricting cases. Again, such citations are off point, as each such case included plaintiffs who alleged *current* injuries regarding the voting district in which they lived. The only helpful case citations for Plaintiffs would be cases in which a minority voter was previously denied voting rights, the voting rights were restored, yet plaintiff continued to seek injunctive relief to restore rights which had already been restored. Plaintiffs have cited no such case.

Again, the Court should carefully review Plaintiffs' prayer for relief found in their Complaint (or the proposed Amended Complaint). Each injunctive remedy Plaintiffs seek explicitly requests a remedy affecting persons other than Plaintiffs. See Defendant Ganje's Memorandum in Support of Motion to Dismiss on Mootness and Standing Grounds, pp. 2-3. To prove standing, Plaintiffs must assert their own legal rights and interests. Newman, 789 F.Supp. at 1415.

B. Mootness / Damages

It is important to note that Plaintiffs did not argue their injunctive and declaratory judgment requests under Claims 1, 2, 3, 4, 5, and 8, are not moot. Notably, Plaintiffs only argued that their VRA claims and monetary damages claims are not moot. Therefore, Plaintiffs have conceded that Claims 1, 2, 3, 4, 5, and 8, inasmuch as they request injunctive relief and a declaratory judgment, are moot. Those claims are therefore properly dismissed.

Plaintiffs argue that their case is not moot because they have requested monetary damages. In fact, two pages of Plaintiffs' Opposition Brief (pp. 12-13) argue that Plaintiffs' monetary claims must not be dismissed as moot. Ganje never argued or moved for dismissal of Plaintiffs' monetary damages claims. The Court need not consider Plaintiffs' Opposition Brief pp. 12-13.

Plaintiffs argue that they get around the mootness problem because their past injury is capable of repetition yet evading review. Plaintiffs cite Moore v. Ogilvie, 394 U.S. 814, 816 (1969) for the proposition that an election practice is not mooted if it remains and controls future elections. Ganje's alleged practice does not remain, as both Plaintiffs are currently registered to vote. See Affidavit of Sue Ganje. Nor can Ganje's alleged conduct be said to control future

elections for Plaintiffs, since both Plaintiffs can vote in future elections and Ganje will not remove their names from the registration list without court order. Id.

Plaintiffs' cite Morris v. Republican Party of Virginia, 517 U.S. 186, 235 n. 48 (1996) for the same proposition. In that case, the Defendant had not disallowed the electoral practice in question. Ganje has returned both Plaintiffs to the registration rolls and has testified she will not remove them absent a court order. See Ganje Affidavit. Therefore, the Morris case is also off point.

C. Relief For Nonparties

Plaintiffs' case citations actually prove Defendant Ganje's point—Plaintiffs may not seek injunctive relief which does not directly address their own injury. In Professional Ass'n of Coll. Educators v. El Paso County Cmty. Coll. Dist., 730 F.2d 258, 275 (5th Cir. 1948), the court held that “[i]ntrusion of federal courts into state agencies should extend no further than necessary to protect federal rights *of the parties*.” (emphasis added). “An injunction, however, is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit—even if it is not a class action—*if such breadth is necessary to give prevailing parties the relief to which they are entitled*.” (emphasis added). Id. at 273-74. The Professional Ass'n court vacated the district court's injunctions as it applied to persons other than the plaintiff injured. The district court could not infer why protecting nonparties was necessary to relieve the injured plaintiff. Id. The Fifth Circuit found the district court “could not have concluded that protecting [nonparties] was necessary to grant it full relief as a prevailing party.” Id.

Plaintiffs cite Williams v. Owens, 937 F.2d 609 (6th Cir. 1991). The Sixth Circuit held that the district court,

abused its discretion in fashioning its injunctive relief to run in favor of nonparties despite the fact that plaintiff did not bring suit as a class representative. All three of the injunctions...benefit not only plaintiff but all other inmates who suffer [from the same injury]. *An injunction should be narrowly tailored to give only the relief to which the plaintiff is entitled.*

(emphasis added) *Id.* at 3. “An injunction may not be overbroad because it protects nonparties if such breadth is necessary to give the prevailing parties the relief to which they are entitled.” *Id.* The court found no basis for an injunction benefiting nonparties where the only evidence in the case related to an incident involving the plaintiff. *Id.*

Plaintiffs’ Complaint and proposed Amended Complaint explicitly request relief on behalf of other persons. Plaintiffs disingenuously state they “seek this relief on their own behalf so that they will not again be subject to disfranchisement.” Plaintiffs’ Opposition Brief, p. 14. It is disingenuous to explicitly request an injunction to place other convicted felons back on the voter registry, public education about felon voting rights, etc., yet claim Plaintiffs seek these injunctions on their own behalf, or that these remedies are necessary to relieve Plaintiffs’ injuries.

D. Conclusion

Plaintiffs do not contest that their non-VRA injunctive claims and non-monetary claims are moot. In other words, Plaintiffs at most argue that only their VRA claims and monetary claims survive. Therefore, the Court must, at a minimum, dismiss Plaintiffs’ injunctive and declaratory judgment claims under each claim of their Complaint.

Plaintiffs have not made out each factor required under general standing principles, as well as VRA standing principles. Moreover, Plaintiffs’ claims are not justiciable, as there is no longer a live case or controversy with regard to whether Plaintiffs’ names must appear on the

voter registration list. Injunctive relief looks to the future rather than to punish past conduct, and Plaintiffs concede that any voting rights violation occurred in the past for these Plaintiffs.

Accordingly, the Court should grant Defendant Sue Ganje's Motion to Dismiss all counts of Plaintiffs' Complaint or proposed Amended Complaint requesting injunctive and declaratory relief.

Dated: August 21, 2009.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: *s/Sara Frankenstein*

Sara Frankenstein
Attorneys for defendant,
Sue Ganje
440 Mt. Rushmore Road, 3rd floor
P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 719-3471
E-mail: sfrankenstein@gpnlaw.com

CERTIFICATE OF SERVICE

I hereby certify on August 21, 2009, a true and correct copy of **DEFENDANT GANJE'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS ON MOOTNESS AND STANDING GROUNDS** was served electronically through the CM/ECF system upon the following individuals:

Bryan L. Sells
American Civil Liberties Union
230 Peachtree Street, N.W., Suite 1440
Atlanta, GA 30303-1513
E-mail: bsells@aclu.org
*Attorneys for plaintiffs,
Eileen Janis and Kim Colhoff*

Sherri Wald
Attorney General's Office
1302 E. Highway 14, #1
Pierre, SD 57501
E-mail: Sherri.Wald@state.sd.us
*Attorneys for defendants,
Chris Nelson, Matt McCaulley, Cindy Schultz,
Christopher Maden, Richard Casey, Karen Layher,
and Linda Lea Viken*

Patrick K. Duffy
Patrick K. Duffy, LLC
P.O. Box 8027
Rapid City, SD 57709-8027
E-mail: pduffy@rushmore.com
*Attorneys for plaintiffs,
Eileen Janis and Kim Colhoff*

Robert Doody
American Civil Liberties Union
401 East 8th Street, Suite 200P
Sioux Falls, SD 57103
E-mail: rdoody@aclu.org
*Attorneys for,
Eileen Janis and Kim Colhoff*

Nancy Abudu
American Civil Liberties Union
230 Peachtree Street, N.W., Suite 1440
Atlanta, GA 30303-1513
E-mail: nabudu@aclu.org
*Attorneys for plaintiff,
Eileen Janis and Kim Colhoff*

By: :/s/Sara Frankenstein
Sara Frankenstein