

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

EILEEN JANIS and KIM COLHOFF,

Plaintiffs,

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. MADSEN, 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,

Defendants.

Civ. 09-5019

STATE DEFENDANTS' REPLY TO  
PLAINTIFFS' RESPONSE IN  
OPPOSITION OF STATE DEFENDANTS'  
MOTION TO DISMISS OR IN THE  
ALTERNATIVE JUDGMENT ON THE  
PLEADINGS

INTRODUCTION

State Defendants file this reply to Plaintiffs' Response in Opposition to the State Defendants' Motion to Dismiss for failure to plead sufficient facts to show that State Defendants are liable for the misconduct alleged. First, Plaintiffs have failed to identify any facts suggesting State Defendants are liable for the wrongs alleged. Second, the inclusion of State Defendants in this suit so that Plaintiffs can demand substantial discovery and obtain broader relief is unwarranted. This is particularly so in light of Plaintiffs' failure to include as Defendants local election officials even when they claim local officials violated

their voting rights at the polling place.\* Plaintiffs' complaint against the State Defendants should be dismissed.

#### FACTS

Under state law the county auditor has "complete charge of maintaining the voter registration records in the county". SDCL 12-4-2. (Statute precleared by the Department of Justice on May 3, 2004. Nelson Affidavit ¶ 5 (Doc. 36).) The official voter registration file is maintained by the county auditor. SDCL 12-4-38. (Statute precleared on December 17, 2001, and May 3, 2004. Nelson Affidavit ¶ 13 (Doc. 36).)

Secretary of State Nelson has, pursuant to SDCL 12-4-37, established a "a computerized system for maintaining and utilizing the voter registration file and transmitting voter registration information from each county auditor to the Office of the Secretary of State." This statute was adopted in 2001 to comply with federal law and was precleared on December 17, 2001. Nelson Affidavit ¶ 9 thru 11 (Doc. 36). The statewide voter registration file maintained by the Secretary of State is a duplicate file of the official file of the voter registration records held in each county office. For federal elections, the statewide file is the official voter registration file. Only the county auditor is allowed to make changes to the statewide voter registration file and those changes must be transmitted to the statewide file on a daily basis. Nelson Affidavit ¶ 10 (Doc. 36).

---

\* Initial disclosure suggests that one of the Plaintiffs was a precinct worker at one of the polling sites where Plaintiffs allege violations occurred.

The chief state election officer in South Dakota is the Secretary of State. Nelson Affidavit ¶ 2 (Doc. 36). His responsibilities relating to voter registration are set forth in statute. Nelson Affidavit ¶ 3 (Doc. 36). The Secretary of State is not allowed to add, delete or modify any data in the statewide voter registration file. Nelson Affidavit ¶ 4 (Doc. 36).

42 U.S.C. 1973gg (6)(g)(1) states “On the conviction of a person of a felony in a district court in the United States, the United States attorney shall give written notice of the conviction to the chief state election official designated under Section 10 of the State of the person’s residence.” 42 U.S.C. 1973gg (6)(g)(5) requires the chief State election official to “notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.” 42 U.S.C. 1973gg-6-3 permits the chief State election official of the State or the state official with responsibility for determining the effect that a conviction may have on an offender’s qualifications to vote to request additional information from the U.S. attorney concerning the offender and the offense of which the offender was convicted. Because the Secretary of State is the chief state election official in South Dakota, the U.S. Attorney’s Office “routinely sends federal felony conviction notices from the U.S. Attorney’s office in South Dakota and from other states”. Nelson Affidavit ¶ 34 (Doc. 36).

SDCL 12-4-18 provides that is the county auditor’s responsibility to remove, from the master registration list, “names of those sentenced to imprisonment within the federal penitentiary system. . . .” This statute was

precleared on December 17, 2001, and August 30, 2004. Nelson Affidavit ¶ 30 (Doc. 36).

Pursuant to the above federal and state statutes, when the Secretary of State receives notice of a federal felony conviction from a U.S. Attorney's office, he determines the county of the felon's residence and forwards the federal felony notice received from the U.S. Attorney to the appropriate county auditor in the county of the felon's residence. Nelson Affidavit ¶ 37 (Doc. 36).

The State Board of Elections is given nine responsibilities relating to voter registration records. Nelson Affidavit ¶ 17 (Doc. 36). All those statutes and administrative rule provisions have been precleared. Nelson Affidavit ¶¶ 19-32 (Doc. 36). The State Board of Elections members are not allowed to add, delete or modify any of the data in the voter registration file. Nelson Affidavit ¶ 18 (Doc. 36).

1. State Defendants are entitled to be dismissed from this suit.

Plaintiffs' claims against State Defendants ignore applicable federal and state law requirements placed on various election officials. Plaintiffs simply allege, with nothing more than speculation and conjecture, that State Defendants violated their voting rights but applicable federal and state law requirements show otherwise. The County Auditor has "complete charge of maintaining the voter registration records in the county." SDCL 12-4-2; 12-4-38. Furthermore, it is the responsibility of the county auditor "to remove from the master registration list the . . . names of those sentenced to imprisonment in the federal penitentiary system . . ." Neither the Secretary of

State nor the members of the State Board of Elections have any authority to remove, add or delete a voter from the master registration file. Plaintiffs simply ignore these provisions of state law and allege that each of the “Defendants failed to implement an accurate and current statewide voter registration list.” Defendants’ Brief p 3. No facts were pleaded to support this broad allegation and Plaintiffs have failed to allege any facts against State Defendants to show that relief against them is plausible on its face. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). Plaintiffs simply ignore state and federal voter registrations requirements and broadly and assert that all of the named Defendants unlawfully harmed them. Fed. R. Civ. P. 8(a)(2) requires a more factual showing of harm by the State Defendants than that advanced by Plaintiffs. Conclusions unsupported by factual allegations are insufficient and subject to dismissal.

State Defendants acknowledge that the Secretary of State has the responsibility, pursuant to SDCL 12-4-37 to “establish a computerized system for maintaining and utilizing the voter registration file in transmitting voter registration information from each county auditor to the Office of Secretary of State.” This responsibility does not, however, involve the addition or removal of names to the master registration file. Nelson Affidavit ¶ 4 (Doc. 36). That responsibility falls squarely on the shoulders of the county auditor. SDCL 12-4-2; 12-4-38.

Moreover, 42 U.S.C.S. 1973gg (6)(g)(5) requires the chief state election official, which in South Dakota is the Secretary of State to, “notify the voter

registration officials of the local jurisdiction in which a person convicted of a felony resides”, which in South Dakota is the county auditor, that the U.S. Attorney’s office gave written notice of a felony conviction to the Secretary of State. The Secretary of State’s adherence to federal law by providing local election officials with notice of the federal felony conviction does not provide a sufficient basis to bring suit against him. If that were the case, it would appear that the U.S. Attorney’s office is also subject to suit for complying with federal law when *it* sent a copy Plaintiffs’ judgments of conviction to the Secretary of State. Pursuant to SDCL 12-4-18, once the county auditor receives the notice of a judgment of conviction, it is the responsibility of the county auditor to determine whether the federal felony conviction should result in the removal of a voter from the master voter registration list.

Nor have Plaintiffs alleged any facts to suggest that members of the Board of Elections failed to act, or acted in violation of any federal or state law. The State Board of Elections has nine responsibilities relative to voter registration. Nelson Affidavit ¶ 17 (Doc. 36). The Board and its members have no authority to add, delete or modify any of the data in the statewide voter registration file. *Id.* at 18. That authority lists exclusively the county auditor. SDCL 12-4-18. Allegations that one county auditor failed to follow a particular statute should not be sufficient to subject members of the State Board of Elections to suit by Plaintiffs.

Nor should State Defendants be enjoined for an alleged violation of Section 5 by Shannon County officials. The State of South Dakota is not a

covered jurisdiction under Section 5. *Only* Todd and Shannon County are subject to Section 5 requirements. See 28 C.F.R. 51 app. All applicable state laws at issue have been precleared. Moreover, the alleged failure of local election officials to follow precleared state law requirements is not a change requiring preclearance. At best, Plaintiffs may be able to show mistakes by local election officials occurred when they failed to follow precleared state provisions. If such a mistake did in fact occur, it does not constitute a change for purposes of Section 5. See Miller v. Daniels, 509 F. Supp. 400, 406 (S.D.N.Y. 1981); Moore v. Caledonia Natural Gas Dist., 890 F. Supp. 547 (N.D.Miss. 1995); Montgomery v. Leflore County Republican Executive Committee, 776 F. Supp. 1142 (N.D.Miss. 1991); Gold v. Feinberg, 1996 WL 743354 (S.D.N.Y. December 24, 1996); Landry v. City of Kenner, 2004 WL 97704 (S.D.La. January 20, 2004).

[O]ne would not normally conclude that a state “enacts or administers” a new voting procedure every time a state official deviates from the state’s required procedures . . . [W]e can find no case which even hints at actions of the state official which are in conflict with the state’s required procedures should be considered a change of voting procedures enacted or administered by the state within the meaning of § 5.

Miller 509 F. Supp. 407.

Plaintiffs’ attempt to convert alleged mistakes by local election officials into a Section 5 claim is completely without merit and must be dismissed. As the court noted in Montgomery, “it was not Congress’ intent for litigants to utilize Section 5 of the Voting Rights Act for the purposes of enforcing precleared state election laws.” 776 F. Supp. 1145.

2. Section 5 is unconstitutional as applied to Todd and Shannon Counties.

The Constitutionality of Section 5 has been previously challenged by both the State Defendants and the County Official named in this suit. State Defendants renew their constitutional challenge to Section 5 and incorporate by references those arguments previously set forth in its Brief in Opposition to Plaintiffs Request for a Temporary Restraining Order or Preliminary Injunction previously filed with the Court (Doc. 37.) In addition, Northwest Austin Mun. Utility District No. One v. Holder, 2009 WL 1738645 (U.S. June 22, 2009) makes it clear that, in a proper case, such as this, Section 5 should be struck as unconstitutional.

3. State Defendants' should not be subject to suit simply because Plaintiffs seek massive discovery and broad relief that the alleged wrongdoers are unable to provide.

It is readily apparent State Defendants have been named in this suit so that Plaintiffs can demand extensive discovery and obtain broader relief than what they are entitled to based on the wrongs alleged. The Supreme Court has, however, established that State Defendants should not be subjected to a lawsuit simply so Plaintiffs can engage in a discovery fishing expedition and obtain greater remedies - this is exactly the type of disruptive and abusive discovery the Court cautioned against in Ashcroft v. Iqbal, 129 S.Ct. 1937, 1953 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 545, 555 (2007).

Plaintiffs have failed to alleged in any of their pleadings that they are entitled to any relief against State Defendants. There is nothing in Plaintiffs' pleadings that allow this Court to draw the reasonable inference that State



Defendants are liable for the misconduct alleged. The sheer possibility that the State Defendants may have acted unlawfully is clearly insufficient.

The case law establishes that Plaintiffs' allegations of a "pattern or practice in the state of South Dakota whereby election officials automatically remove from voter registration the names of individuals convicted of felony regardless of the criminal sentence imposed" assumes state election officials routinely and regularly violate state and federal voter registration requirements. No facts were, or could be, pleaded to support this broad allegation. The only facts pleaded allege violations in Shannon County. Plaintiffs failed to identify any facts on which their belief of a systematic removal of felons, regardless of the criminal sentence, is founded. Iqbal and Trombly establish that Plaintiffs should not be able to file a complaint against State Defendants based on nothing more than speculation and conjecture and then demand extensive discovery in the hope that they may find mistakes by other county election officials to justify their assertions. Nor, on the basis of the case law, should Plaintiffs' claims against State Defendants be subject to suit simply because "State Defendants are best suited to remedy" problems Plaintiffs allege occurred in one county.

In summary, Plaintiffs have failed to state a claim to relief that is plausible on its face against State Defendants. Trombly, 550 U.S. 570. Nothing in Plaintiffs Complaint or Brief in Opposition allows this Court to draw the reasonable inference that State Defendants are liable for the misconduct alleged. At most, Plaintiffs have alleged that local election officials in one

county violated voter registration statutes when they removed Plaintiffs' names from the voter list, regardless of the criminal sentence imposed. State Defendants should be dismissed.

Dated this 13th day of July, 2009.

/s/Sherri Sundem Wald  
Sherri Sundem Wald  
Deputy Attorney General  
sherri.wald@state.sd.us

John P. Guhin  
Deputy Attorney General

Scott R. Swier  
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify on 13th day of July, 2009, a true and correct copy of the **State Defendants' Reply to Plaintiffs' Response in Opposition of State Defendants' Motion to Dismiss or in the Alternative Judgment on the Pleadings** thereof was served electronically through the CM/ECF system upon the following individuals:

Bryan L. Sells  
Nancy Abudu  
American Civil Liberties Union Foundation  
230 Peachtree Street, N.W., Suite 1440  
Atlanta, GA 30303-1513  
E-mail: [bsells@aclu.org](mailto:bsells@aclu.org)  
*Attorneys for Plaintiffs,  
Eileen Janis and Kim Colhoff*

Patrick K. Duffy  
Patrick K. Duffy, LLC  
629 Quincy Street, Suite 105  
Rapid City, SD 57701  
E-mail: [pduffy@rushmore.com](mailto:pduffy@rushmore.com)  
*Attorney for Plaintiffs,  
Eileen Janis and Kim Colhoff*

Robert Doody  
American Civil Liberties Union,  
South Dakota Chapter  
401 East 8th Street, Suite 200P  
Sioux Falls, SD 57103  
E-mail: [rdoody@aclu.org](mailto:rdoody@aclu.org)  
*Attorney for Plaintiffs,  
Eileen Janis and Kim Colhoff*

Jeffrey R. Connolly  
Donald P. Knudsen  
Sara M. Frankenstein  
Gunderson, Palmer, Goodsell & Nelson  
P.O. Box 8045  
Rapid City, SD 57709  
E-mail: [sfrankenstein@gpgnlaw.com](mailto:sfrankenstein@gpgnlaw.com)  
*Attorney for Defendant,  
Sue Ganje*

By: /s/ Sherri Sundem Wald  
Sherri Sundem Wald