

**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. )

**FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF,  
INJUNCTIVE RELIEF, AND MONETARY DAMAGES**

**INTRODUCTION**

1. This is an action to enforce the voting rights of Plaintiffs Eileen Janis and Kim Colhoff who were unlawfully removed from state and county voter registration rolls and denied the right to vote in the June 3, 2008 primary elections and November 4, 2008 general elections based on their felony convictions for which they were sentenced only to probation. Under South Dakota law, a person convicted of a felony who is sentenced to imprisonment in the state penitentiary loses the right to vote during the term of imprisonment. S.D.C.L. § 23A-27-35. People not sentenced to the penitentiary retain the

right to vote. Because Plaintiffs were not sentenced to imprisonment, they retain the right to vote in all federal, state, and local elections. Nevertheless, Defendants unlawfully removed Plaintiffs from the state and county voter registration lists and denied them the right to vote in violation of their 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 seek declaratory relief, injunctive relief, and compensatory and nominal damages against Defendants.

#### **JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 42 U.S.C. § 1973j(f). This suit is authorized by 42 U.S.C. § 1983. This Court may exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) to hear claims under the constitution and laws of South Dakota. This Court has jurisdiction to grant both declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

3. Pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284, a three-judge district court is required to hear Plaintiffs’ Section 5 claim.

4. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b).

#### **THE PARTIES**

5. Plaintiff EILEEN JANIS is a Native American and resident of Pine Ridge, South Dakota, located in Shannon County. She registered to vote for the first time in or about September 1984, and remained on the voter registration rolls until January 2008.

On January 28, 2008, Plaintiff Janis was convicted of a felony offense and sentenced only to probation for five years. She was involuntarily removed from the voter registration rolls in February 2008. She attempted to vote on November 4, 2008, in the federal and state general elections, but was denied that right based on her felony conviction.

6. Plaintiff KIM COLHOFF is a Native American and resident of Pine Ridge, South Dakota, located in Shannon County. She registered to vote for the first time in 1974 and remained on the voter registration rolls until January 2008. On January 28, 2008, Plaintiff Colhoff was convicted of a felony offense and sentenced only to probation for five years. She was involuntarily removed from the voter registration rolls in February 2008. She attempted to vote in the June 3, 2008 primary elections, but was denied that right based on her felony conviction.

7. Defendant CHRIS NELSON is the Secretary of State of South Dakota. He is the chief state election official within the meaning of the Help America Vote Act of 2002 and the National Voter Registration Act of 1993, and is responsible for implementing voting rules and regulations as necessary to carry out the provisions of the election code, and for maintaining the statewide voter registration file. S.D.C.L. § 12-4-18. Defendant Nelson also serves as the chairman and secretariat for the State Board of Elections for South Dakota and assists the board in carrying out its responsibilities. S.D.C.L. § 12-1-7. Upon information and belief, it is also his duty to inform county auditors of who is ineligible to vote based on a felony conviction. He is sued individually and in his official capacity.

8. Defendants MATT McCAULLEY, CINDY SCHULTZ, CHRISTOPHER W. MADSEN, RICHARD CASEY, KAREN M. LAYHER, and LINDA LEA M.

VIKEN are members of the State Board of Elections for South Dakota. They are responsible for promulgating rules concerning voter registration, voter file maintenance, compliance with HAVA, implementation of the NVRA, and ensuring the uniformity of election procedures. S.D.C.L. §§ 12-1-9, 12-1-21, 12-4-35. They are sued individually and in their official capacities.

9. Defendant SUE GANJE is the Auditor for Shannon County, South Dakota. She is responsible for maintaining and safeguarding the voter registration records for the county. S.D.C.L. § 12-4-2. She is sued individually and in her official capacity.

10. Defendant LA FAWN CONROY served as a poll worker at Billy Mills Hall located in Shannon County for the November 4, 2008 general elections and was responsible for assisting voters during the election process. S.D.C.L. § 12-15-1.3. She is sued individually and in her official capacity.

#### **FACTUAL ALLEGATIONS**

11. On January 28, 2008, Plaintiff Janis was convicted of theft and sentenced to five years of probation.

12. Because Plaintiff Janis was sentenced only to probation for her felony offense, she never lost the right to vote under South Dakota law.

13. Plaintiff Janis was registered to vote prior to her felony conviction.

14. Plaintiff Janis' name was removed from the state and Shannon County voter registration rolls in February 2008 based on her felony conviction.

15. Plaintiff Janis never received notice from any local, state, or county government office informing her that she was being removed from the list(s) of eligible voters.

16. On November 4, 2008, Plaintiff Janis went to Billy Mills Hall, located in Shannon County, South Dakota on the Pine Ridge Reservation, to vote in local, state, and federal elections.

17. Upon request, she provided her name to Kyle Clifford, a poll worker. Mr. Clifford informed Plaintiff Janis that her name was not on the list of registered voters in the county.

18. Plaintiff Janis informed Mr. Clifford that her name should be in the book of registered voters and that she regularly voted in past elections.

19. Mr. Clifford called the Shannon County auditor's office to determine Plaintiff Janis' voter eligibility. After finishing his conversation with the auditor's office, Mr. Clifford told Plaintiff Janis that her name was taken off of the voter registration rolls based on her January 2008 felony conviction.

20. Mr. Clifford then advised Plaintiff Janis to complete a new voter registration form which she did.

21. Plaintiff Janis informed Mr. Clifford that she was sentenced only to probation and, therefore, was eligible to vote.

22. Defendant La Fawn Conroy also called the Shannon County auditor's office regarding Plaintiff Janis' voter registration status. Upon finishing her conversation with the auditor's office, Defendant Conroy told Plaintiff Janis she was ineligible to vote

due to her felony conviction. Defendant Conroy then refused to allow Plaintiff Janis to cast a regular ballot.

23. After being denied the right to cast a regular ballot, Plaintiff Janis asked county election officials for a provisional ballot, but that request was denied.

24. The county election officials' denial of Plaintiff Janis' right to vote occurred in front of over 200 voters which caused her a great deal of public humiliation and embarrassment.

25. Plaintiff Janis has not received any notice, either in the form of a voter registration card or other document, regarding her current voter registration status.

26. She wishes to vote in upcoming elections, but Defendants' actions prevent her from doing so without fear of prosecution.

27. On January 28, 2008, Plaintiff Colhoff was convicted of theft and sentenced to five years of probation.

28. Plaintiff Colhoff was registered to vote prior to her felony conviction.

29. Upon information and belief, Plaintiff Colhoff's name was removed from the state and Shannon County voter registration lists based on her felony conviction in or about February 2008.

30. Plaintiff Colhoff never received notice from any local, state, or county government office informing her that she was being removed from the list(s) of eligible voters.

31. In June 2008, Plaintiff Colhoff checked the voter registration roll book in Shannon County to confirm her eligibility to vote in the June 3, 2008 primary elections, but her name was not in the book.

32. Based on her understanding that the voter registration roll book contains the names of all registered voters in the county, and because her name was not in the book, Plaintiff Colhoff concluded that her name was removed from the voter registration rolls due to her January 2008 felony conviction.

33. County election officials never informed Plaintiff Colhoff of her right to cast a provisional ballot in the June 3, 2008 primary elections or the November 4, 2008 general elections. As a result, she did not cast a provisional ballot in either election.

34. Plaintiff Colhoff wishes to vote in upcoming elections, but Defendants' actions prevent her from doing so without fear of prosecution.

35. The right to vote is clearly established.

36. None of the Defendants could have reasonably believed that their conduct described herein was lawful.

37. Upon information and belief, Defendants are denying voting rights to other people convicted of felonies regardless of the sentence imposed. Consequently, people convicted of felonies who are not sentenced to imprisonment are being unlawfully denied the right to vote.

38. Native Americans are disproportionately represented in South Dakota's criminal justice system. Upon information and belief, Native Americans represent a disproportionate number of those who are sentenced to probation.

39. Defendants' actions of denying voting rights to people convicted of felonies regardless of their sentence has a disproportionate and negative impact on Native Americans including Plaintiff and results in the denial of their voting rights on account of race, color, or membership in a language minority group.

40. Shannon County in South Dakota is a jurisdiction subject to the preclearance requirement of Section 5 of the Voting Rights Act (42 U.S.C. § 1973c).

41. Upon information and belief, Defendants did not seek preclearance under Section 5 from the United States District Court for the District of Columbia or the Attorney General of the United States prior to implementing their policy and practice of denying voting rights to people with felony convictions who are on probation.

42. Plaintiffs are suffering irreparable harm as a result of Defendants' actions complained of herein, and that harm will continue unless declared unlawful and enjoined.

43. Plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief.

### **COUNT ONE**

#### **Violation of Equal Protection Under The Law**

44. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

45. Section 1 of the Fourteenth Amendment of the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

46. The South Dakota Constitution provides: "Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." S.D. CONST. ART. VII, § 1; S.D. CONST. ART. VI, § 19.

47. Because Plaintiffs retain the right to vote and were eligible to vote in the June 3, 2008 primary elections and the November 4, 2008 general elections, Defendants' unlawful removal of Plaintiffs from the state and county voter registration lists violates



their right to equal protection of the laws, the free exercise of the right of suffrage under the federal and state constitutions, and 42 U.S.C. § 1983.

**COUNT TWO**

**Violations of Due Process of Law**

48. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

49. Section 1 of the Fourteenth Amendment of the United States Constitution provides: “No State shall . . . deprive any person of life, liberty, or property without due process of law.”

50. The South Dakota Constitution provides: “No person shall be deprived of life, liberty or property without due process of law.” S.D. CONST. ART. VI, § 2.

51. Plaintiffs neither received notice from Defendants prior to November 4, 2008, informing them that their names were removed from the state and county voter registration rolls, nor did they have an adequate or meaningful opportunity to challenge their removal from the voter registration lists.

52. The actions of Defendants in removing Plaintiffs from the state and county voter registration lists violates Plaintiffs’ rights to due process of law under the federal and state constitutions, and 42 U.S.C. § 1983.

**COUNT THREE**

**Violations of the Help America Vote Act (“HAVA”)  
(42 U.S.C. § 15483)**

53. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

54. HAVA requires Defendant Nelson to implement a statewide computerized voter registration list that contains the name and registration information of every legally registered voter in the State for use as the official voter registration list in federal elections. 42 U.S.C. § 15483(a)(1)(A).

55. HAVA also requires Defendants Nelson and Ganje to perform list maintenance in a manner that ensures that only voters who are not registered or who are not eligible to vote are removed from the computerized list. *Id.* at § 15483(2)(B)(ii).

56. Members of the South Dakota Board of Elections are responsible for promulgating rules concerning voter registration, voter file maintenance, compliance with HAVA, and ensuring the uniformity of election procedures. *Id.* at § 15483; S.D.C.L. §§ 12-1-9, 12-1-21, 12-4-35.

57. Defendants have failed to implement adequate procedures to ensure that Plaintiffs and similarly situated eligible voters are not removed from voter registration lists.

58. Defendants' removal of Plaintiffs from the state and county voter registration lists was in violation of HAVA, as enforced by 42 U.S.C. § 1983.

59. As a result of this violation, Plaintiffs were denied the right to vote and suffered other damages as described above.

#### **COUNT FOUR**

##### **Violations of the Help America Vote Act ("HAVA") (42 U.S.C. § 15482) and State Law**

60. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

61. HAVA entitles any person whose name does not appear on the official list of eligible voters for the polling place, or whom an election official asserts is not eligible to vote, to cast a provisional ballot. 42 U.S.C. § 15482(a)(1).

62. State law similarly provides that any person whose name does not appear on the official list of eligible voters or whom an election official asserts is not eligible to vote may cast a provisional ballot. S.D.C.L. § 12-18-39.

63. HAVA and state law further require election officials at the polling place to notify such persons of their right to cast a provisional ballot. *Id.*; 42 U.S.C. § 15482(a)(1).

64. Defendants' failure to notify Plaintiffs of their right to cast a provisional ballot and their failure to allow Plaintiffs to cast a provisional ballot violated HAVA, S.D.C.L. § 12-18-39, and 42 U.S.C. § 1983.

65. As a result of this violation, Plaintiffs were denied the right to vote and suffered other damages as described above.

#### **COUNT FIVE**

##### **Violation of the National Voter Registration Act ("NVRA")** **(42 U.S.C. § 1973gg-6)**

66. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

67. South Dakota is required by the NVRA to maintain "an accurate and current voter registration roll for elections for Federal office" through the use of uniform and non-discriminatory programs and activities in compliance with the Voting Rights Act of 1965, 42 U.S.C. § 1973gg-6(b)(1).

68. The NVRA provides that the name of a registrant may not be removed from the official list of eligible voters except at the request of the registrant, the death of the registrant, a change in the residence of the registrant, or “as provided by state law, by reason of criminal conviction or mental incapacity.” *Id.* at § 1973gg-6(a)(3)(B).

69. The NVRA also states that when a person is convicted of a felony in federal court, the United States attorney “shall give written notice of the conviction to the chief State election official,” and the notice must include the sentence imposed by the court. *Id.* at § 1973gg-6(g).

70. The NVRA provides a private right of action for citizens adversely affected by a state’s violation of the Act. *Id.* at § 1973gg-9(b).

71. The NVRA further states that “[a] person who is aggrieved by a violation . . . may provide written notice of the violation to the chief election official of the State involved.” *Id.* at § 1973gg-9(b)(1). However, if the violation occurred within thirty (30) days before the date of a federal election, the aggrieved person “need not provide notice to the chief election official of the State before bringing a civil action.” *Id.* at § 1973gg-9(b)(3).

72. Plaintiffs were unaware that their names were removed from the state and county voter registration lists, in violation of the NVRA, until the day of the June 3, 2008 primary election in the case of Plaintiff Colhoff, and until the day of the November 4, 2008 general elections in the case of Plaintiff Janis.

73. Because Plaintiffs retain the right to vote under state law despite their felony convictions, Defendants’ removal of their names from the official list of eligible voters and the denial of their right to vote violated the NVRA.

74. As a result of this violation, Plaintiffs were denied the right to vote and suffered other damages as described above.

**COUNT SIX**

**Violation of the Voting Rights Act of 1965**  
**(42 U.S.C. § 1973)**

75. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

76. Section 2 of the Voting Rights Act provides: “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color,” or membership in a language minority group. 42 U.S.C. § 1973(a).

77. Defendants’ unlawful removal of Native Americans convicted of felonies who retain the right to vote has resulted in Native Americans, including Plaintiffs, having less opportunity than other members of the electorate to participate in the political process in violation of Section 2 of the Voting Rights Act.

**COUNT SEVEN**

**Violation of the Voting Rights Act of 1965**  
**(42 U.S.C. § 1973c)**

78. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

79. Defendants’ failure to preclear their policy and practice of denying voting rights to people with felony convictions who are on probation deprives Plaintiffs of rights

guaranteed to them by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c.

**COUNT EIGHT**

**Violation of the Civil Rights Act of 1964**  
**(42 U.S.C. § 1971) and State Law**

80. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein.

81. Pursuant to 42 U.S.C. § 1971(a)(2)(A), no state official acting under color of law shall “in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote.”

82. Article 6, § 18 of the South Dakota Constitution provides that “no law shall be passed granting to any citizen, class of citizens or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens.”

83. Defendants, in determining that Plaintiffs were not qualified to vote despite their eligibility under state law, applied a standard, practice, or procedure different from those applied to other individuals who have been found qualified to vote in violation of 42 U.S.C. §§ 1971 and 1983, and the state constitution.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully asks this Court to:

(1) Exercise supplemental jurisdiction over Plaintiff’s claims brought under the Constitution and laws of South Dakota;

(2) As a single-judge court, declare that the removal of Plaintiffs' names from the list of eligible voters, the denial of their right to vote, and the failure to allow them to vote by provisional ballot violates:

(a) their rights to equal protection under § 1 of the Fourteenth Amendment of the United States Constitution, and Article VI, § 19 and Article VII, § 1 of the South Dakota Constitution;

(b) their rights to due process under § 1 of the Fourteenth Amendment of the United States Constitution and Article VI, § 2 of the South Dakota Constitution;

(c) the Help America Vote Act, 42 U.S.C. §§ 15482, 15483(a)(1)(A), (2)(B)(ii), and (a)(4), and S.D.C.L. § 12-18-39;

(d) the National Voter Registration Act, 42 U.S.C. § 1973gg-6;

(e) Section 2 of the Voting Rights Act, 42 U.S.C. § 1973;

(f) the Civil Rights Act of 1964, 42 U.S.C. § 1971, and Article VI, § 18 of the South Dakota Constitution; and

(g) 42 U.S.C. § 1983.

(3) As a three-judge court, enter an injunction prohibiting defendants from denying voting rights to people with felony convictions who are on probation until they have complied with Section 5 of the Voting Rights Act;

(4) Enjoin Defendants and their agents, employees, and representatives from denying Plaintiffs the right to vote, and direct Defendants to place Plaintiffs' names back on the state and county voter registration lists;

(5) As a single-judge court, direct Defendants to adopt procedures to prevent future disfranchisement of individuals convicted of felonies who are on probation;

(6) Authorize the appointment of federal observers pursuant to 42 U.S.C. § 1973a(a) to enforce the voting rights of people with felony convictions who retain the right to vote;

(7) Exercise and retain jurisdiction under 42 U.S.C. § 1973a(c) for such period as the court deems appropriate to enforce the voting rights of people with felony convictions who retain the right to vote;

(8) Direct Defendants to prepare and distribute across the state public service announcements and education materials regarding the voting rights of people with felony convictions;

(9) Award Plaintiffs compensatory and nominal damages for each denial of their right to vote;

(10) Award Plaintiffs the expenses, costs, fees, and other disbursements associated with the filing and maintenance of this action, including reasonable attorneys' fees pursuant to 42 U.S.C. §§ 1988 and 1973f(e);

(11) Exercise continuing jurisdiction over this action during the enforcement of its judgment; and

(12) Award any other and further relief this Court deems proper and just.

DATED this 7<sup>th</sup> day of October, 2009.

Respectfully submitted,

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