

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

CHIS BROOKS, FRANCIS RENCOUNTRE,  
GLORIA RED EAGLE, SHARON CONDEN,  
JACQUELINE GARNIER, JENNIFER RED OWL,  
EDWINA WESTON, MICHELLE WESTON,  
MONETTE TWO EAGLE, MARK A. MESTETH,  
STACY TWO LANCE, HARRY BROWN,  
ELEANOR WESTON, DAWN BLACK BULL,  
CLARICE MESTETH, DONOVAN L. STEELE,  
EILEEN JANIS, LEONA LITTLE HAWK, EVAN  
RENCOUNTRE, CECIL LITTLE HAWK, SR.,  
LINDA RED CLOUD, LORETTA LITTLE HAWK,  
FAITH TWO EAGLE, EDMOND MESTETH; and  
ELMER KILLS BACK, JR.

Plaintiffs,

v.

JASON GANT, in his official capacity as SOUTH  
DAKOTA SECRETARY OF STATE, SHANNON  
COUNTY, SOUTH DAKOTA, FALL RIVER  
COUNTY, SOUTH DAKOTA, SHANNON  
COUNTY BOARD OF COMMISSIONERS, FALL  
RIVER BOARD OF COMMISSIONERS, JOE  
FALKENBUEG, ANNE CASSENS, MICHAEL P.  
ORTNER, DEB RUSSELL, and JOE ALLEN, in  
their official capacity as members of the County  
Board of Commissioners for Fall River County,  
South Dakota, BRYAN J. KEHN, DELORIS  
HAGMAN, EUGENIO B. WHITE HAWK,  
WENDELL YELLOW BULL, and LYLA  
HUTCHISON in their official capacity as  
members of the County Board of  
Commissioners for Shannon County,  
South Dakota, SUE GANJE, in her official  
capacity as the County Auditor for Shannon  
and Fall River Counties, and JAMES SWORD,  
in his official capacity as Attorney for  
Shannon County and Fall River Counties,

Defendants.

Civ. No. 12-5003

DEFENDANT GANT'S  
REPLY TO PLAINTIFFS'  
RESPONSE TO GANT'S  
MOTION TO DISMISS

Defendant Jason Gant (“Gant”), in his official capacity as Secretary of State, submits this Reply to Plaintiffs’ Response to Gant’s Motion to Dismiss (Doc. 45). In addition to and in conjunction with the below, Defendant Gant hereby reincorporates the arguments and authorities as found in his Memorandum in Support of Motion to Dismiss and Opposing Entry of Preliminary or Permanent Injunction (Doc. 44).

*I. Plaintiffs’ Citations to Unrelated Election Statutes Do Not Support Plaintiffs Claims for Relief*

As noted in Gant’s initial Memorandum (Doc. 44) each of Plaintiffs’ Claims for Relief allege that Gant “fail[ed] to establish early voting polling places within Shannon County.” As Gant then pointed out, the Secretary of State has no authority to “establish early voting polling places within Shannon County.” See Gant’s Memorandum Doc. 44 at pp. 4-9. Plaintiffs attempt to salvage their claims for relief by citing to several unrelated and unsupportive election statutes. See Plaintiffs’ Response Doc. 47 at pp. 6-8. The cited statutes do not allow the Secretary of State to act as alleged by Plaintiffs.

Plaintiffs begin by citing to SDCL § 12-3-6. SDCL § 12-3-6 to § 12-3-13 implement Public Law 94-73. See *Generally* § 12-3-6 through § 12-3-13 inclusive; PL 94-73, August 6, 89 Stat 400. South Dakota currently has no jurisdictions covered by PL 94-73’s Section 203’s requirements. On October 13, 2011 the Federal Register published the determinations found by the Director of the Census that identified jurisdictions subject to Section 203. See letter from T. Christen Herren, Jr. Chief, Voting Section, U.S. Department of

Justice (Attached Exhibit 4); Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63602 (Attached Exhibit 5). The remaining language obligations of 42 U.S.C. § 1973(4)(f) are those of the covered jurisdictions-Shannon and Todd Counties- and not the State. See Herren Letter (“We have notified Shannon and Todd Counties of their continuing obligations under Section 4(f)(4)”); 28 C.F.R § 55.5 (coverage of political subdivision); 28 C.F.R § 55.1 (defining “political subdivision” in most instances as a “county or parish” unless a lesser unit of government is covered).

South Dakota’s implementation of the above provisions is found in SDCL Chapter 12-3. SDCL § 12-3-6 merely requires the Secretary of State to notify affected counties that they will be governed by SDCL § 12-3-6 to § 12-3-13 which implement the bilingual election requirements of PL 94-73. Contrary to placing authority for these sections with the Secretary of State, SDCL § 12-3-8 specifically requires the “person in charge of such elections” – the County Auditor in our case - to implement the provisions. The expenses for implementing these provisions are also specifically placed on the county. “All expenses shall be paid out of the county general fund or other appropriate political subdivision fund.” SDCL § 12-3-11. None of these provisions allow the Secretary of State to establish early voting polling places in Shannon County.

Plaintiffs' then cite to SDCL 12-3-13 which allows the Board of Elections to promulgate rules pursuant to chapter 1-26 to implement the above rules. See SDCL § 12-3-13. Plaintiffs' however, have not sued the Board of Elections and Gant as Secretary of State and Chairman of the Board of Elections has no authority to unilaterally implement such rules. *See generally* Complaint (Doc. 1); SDCL chapter 1-26. Moreover, the rules could not provide any power greater than conferred by statute. *In Re Solid Waste Disposal Permit Application By the City of Sioux Falls*, 268 N.W.2d 599, 601 (S.D. 1978) ("it is axiomatic that an administrative agency can only exercise the jurisdiction which has been granted to it by the Legislature." (citations omitted)). Accordingly, the statutes do not provide the Board of Elections the authority to promulgate rules requiring the Secretary of State to establish early voting polling places in Shannon County. Furthermore, because he cannot unilaterally act on behalf of the Board of Elections, Defendant Gant, as Secretary of State, would be without authority to enact or implement them.

Plaintiffs' citations to SDCL § 12-19-2.3 (implementing the Uniformed and Overseas Citizens Absentee Voting Act) and Exhibit 25 (Doc. 48-25) (SB 58, 2012 Session) likewise provide no authority for Gant to establish early voting polling places in Shannon County. Suggestions to the contrary run afoul of the express language of the statutes and South Dakota's grant of this authority to county officials. *See generally* SDCL Title 12 *Elections*; Gant Memorandum (Doc. 44). Also as cited by Plaintiffs, Gant's *personal* web page indicates his

desire to work diligently to establish best practices for elections in South Dakota. Plaintiffs Response (Doc. 47) at 8. While Gant certainly supports this important goal, aspirations in this regard do not establish Plaintiffs' claim for relief.

Plaintiffs paint with too broad a brush in announcing that Gant as Secretary of State is "ultimately responsible for *any* violation of election rules, regulations, or statutes that infringes upon an individual's right to vote." Plaintiffs Response (Doc. 47) at p. 8 (emphasis added). This fundamental flaw in reasoning runs afoul of South Dakota's statutory mechanism and current case law. *See generally* Gant Memorandum (Doc. 44). This very Court has recognized that the Secretary of State is not "ultimately responsible for *any* violation..." Were the statutes fail to place a requirement on the Secretary of State and the facts fail to allow "a reasonable inference that defendant is liable for the misconduct alleged" the claim must be dismissed. *Janis v. Nelson*, 2009 DSD 5019, Doc. 112 (*citing Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)). Gant simply has no ability to establish early voting polling places in Shannon County as alleged by Plaintiffs. The failure to establish a viable nexus between Gant and the alleged wrong allows the assertion of each of the defenses as seen in Gant's opening Memorandum (Doc. 44). As such, Gant respectfully requests the claims against him be dismissed.

*II. Gant Cannot Be Required to Fund Shannon County's Election Responsibilities*

As argued in Gant's previous Memorandum (Doc. 44) Plaintiffs cannot obtain a remedy when no claim for relief exists. Plaintiffs do not state a claim through which the Secretary of State would be required to fund Shannon County's election. Nonetheless, Plaintiffs assert the State is responsible for such expenditure.

Plaintiffs have acquiesced to the fact that county election expenses are not expenses of the State. Plaintiffs' Response (Doc. 47) at p. 20. Instead, Plaintiffs appear to be asking the Court order disbursement of funds in a manner inconsistent with the State's HAVA plan. Plaintiffs seem to request HAVA funds be directly paid to Shannon County without first requiring Shannon County to expend the funds. As Plaintiffs note, the plan currently is one of reimbursement. Plaintiffs' Response (Doc. 47) at 13. This policy is applied equally to all counties. Because not all election expenses are reimbursable under HAVA, by examining receipts for actual expenditures, the reimbursement requirement helps Gant fulfill his responsibility to ensure that only the expenses allowed under HAVA are being covered by HAVA funds. See 42 U.S.C. §§ 1503 and 1504.

Regardless of whether Plaintiffs are satisfied with the State's HAVA plan, they have no authority to challenge it. Plaintiffs do not allege Gant violated HAVA. Nor do Plaintiffs challenge the State's assertion that no private right of action exists under Section 2 of HAVA which governs the grant of HAVA funds

to the State and the State's distribution of those funds. See Gant's Memorandum (Doc. 44) at pp. 17-20. Plaintiffs may not plead around this lack of Article III standing by use of other mechanisms. *Rose v. Bank of America*, 200 Cal.App.4<sup>th</sup> 1441, 1448-1449 (Cal.Ct.App. 2011)(if no private right of enforcement is established, plaintiffs may not maintain a claim under other statute); *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9<sup>th</sup> Cir. 2001)(plaintiff cannot plead around bars to relief found in other causes of action); *Monroe v. Missouri Pacific Railroad Company*, 115 F.3d 514, 519-520 (5<sup>th</sup> Cir. 1997)(plaintiff cannot "artfully plead" around preemptive effect of other statute). Here, no private right of action exists to challenge the State's distribution of HAVA funds. Additionally, Congress specifically granted the States immunity from suit for implementation of a HAVA plan. 42 U.S.C. § 15404(c) specifically provides:

Protection against actions based on information in plan.

(1) In general

No action may be brought under this Act against a State or other jurisdiction on the basis of any information contained in the State plan filed under this subpart.

Plaintiffs attack on the State HAVA plan must fail.

### Conclusion

Based on the arguments and authorities above and the arguments and authorities seen in Gant's Memorandum in Support of Motion to Dismiss (Doc. 44) Gant respectfully requests that the Court dismiss all claims against him

with prejudice. Alternatively, Gant requests the Court deny Plaintiffs' motion for preliminary and permanent injunction.

Dated this 27<sup>th</sup> day of February, 2012.

MARTY J. JACKLEY  
ATTORNEY GENERAL

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies on February 27, 2012, a copy of DEFENDANT GANT'S REPLY TO PLAINTIFFS' RESPONSE TO GANT'S MOTION TO DISMISS was served through CM/ECF system upon the following:

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