

May 4, 2012

Mr. T. Christian Herren
Chief, Voting Section
Civil Rights Division
Room 7254-NWB
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: Comment Under Section 5 of the Voting Rights Act on
Submission No. 2012-1747 - South Dakota House Bill
1247

Dear Mr. Herren:

The ACLU Voting Rights Project and the ACLU of South Dakota submit this comment letter in strong opposition to House Bill 1247 which amends SDCL § 12-18-10 and expands the denial of voting rights to include those with felony convictions while they are on probation. The South Dakota legislature approved House Bill 1247 and Governor Dennis Daugaard signed the bill into law on March 12, 2012.

In its Section 5 submission, the State failed to disclose the statistically significant racial disparities within the State's criminal justice system which result in Native Americans being disproportionately arrested, convicted, and sentenced to probation as compared to their white counterparts. Therefore, a change to the State's felon disfranchisement law to increase the number of ineligible voters will have a discriminatory impact on Native Americans in violation of Section 5. The legislature's failure to address this discriminatory impact during any of the legislative committee hearings and floor debates regarding the bill further suggests the law was enacted for a discriminatory purpose.

We also contend that House Bill 1247 was passed in direct response to the ACLU's successful lawsuit in *Janis v. Nelson*, Civ. Action No. 09-5019 (D.S.D. May 25, 2010). The plaintiffs in *Janis* challenged the unlawful manner in which election officials were enforcing the State's felon disfranchisement law and asserted constitutional and statutory

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claims, including under Section 2 of the Voting Rights Act.¹ The Section 2 claim was based on an expert report that showed denying people the right to vote regardless of their sentence would have a negative and disparate impact on Native Americans. The parties settled the case and had a continuing obligation to monitor enforcement of the agreement. See Exhibit A. Therefore, the State's assertions in its submission that it "is unaware of any pending or future litigation concerning the changes or related voting practices," or that it is unaware of any racial impact the bill will have are false. For all of these reasons, we respectfully request the Department of Justice object to House Bill 1247.

A. South Dakota has a history of discriminating against Native Americans in all aspects of political and social life.

During the 1975 hearings on the amendments to the Voting Rights Act, Congress made extensive findings regarding instances of discrimination that language minority groups in uncovered jurisdictions, including Native Americans, face with respect to exercising their right to vote. Representative Peter Rodino, chair of the House Judiciary Committee, noted the "instances of discriminatory plans, discriminatory annexations, and acts of physical and economic intimidation" language minorities faced, and compared the situation to the experience of African-Americans in Section 5 covered jurisdictions.² Representative Robert Drinan also concluded that there was "evidence that American Indians do suffer from extensive infringement of their voting rights," and that the Department of Justice "has been involved in 33 cases involving discrimination against Indians since 1970."³ House members also took note of various court decisions documenting voting discrimination against Native Americans, including *Klahr v. Williams*, 339 F.Supp. 922, 927 (D. Ariz. 1972) (finding that legislative redistricting in Arizona had been adopted for the purpose of diluting Indian voting strength)⁴, *Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring) (noting that literacy "tests have been used at times as a discriminatory weapon against

¹ The defendants in *Janis* filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss the plaintiffs' Section 2 claim for failure to state a claim upon which relief could be granted. The district court denied the motion, finding that the plaintiffs' allegations regarding the disproportionate number of Native Americans sentenced to probation and the racially discriminatory impact of removing felons regardless of their sentence were sufficient to support a Section 2 claim. 2009 WL 5216902 *6-7 (D.S.D. Dec. 30, 2009). At least one other court has recognized the application of the Voting Rights Act to felon disfranchisement laws. See *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (ruling that, before a litigant can challenge a state's felon disfranchisement law under Section 2 of the VRA, he or she must establish racial bias within the criminal justice system).

² 121 Cong. Rec. 16,244 (1975) (statement of Rep. Rodino).

³ 121 Cong. Rec. 16,262 (1975) (statement of Rep. Drinan).

⁴ Cited in Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm., 94th Cong., 1st Sess., Appendix 1225-30 (1975) (hereinafter "1975 House Hearings").

. . American Indians")⁵, and *Goodluck v. Apache County*, 417 F.Supp. 13, 16 (D. Ariz. 1976) (finding that a county redistricting plan had been adopted to diminish Indian voting strength).⁶

Congress amended and extended the Voting Rights Act in 2006 given its extensive findings of present day discrimination against racial and language minorities.⁷ These findings were based on the significant number of objections interposed by the Department of Justice in the covered jurisdictions; Section 2 litigation filed to prevent dilutive techniques from adversely affecting minorities; enforcement actions filed to protect language minorities; and the tens of thousands of federal observers dispatched to monitor polls in covered jurisdictions. The Department of Justice has sent federal election monitors to several counties in South Dakota, including Bennett, Buffalo, Charles Mix, Dewey, Mellette, Shannon, Todd and Ziebach.⁸ Congress concluded that “without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.”⁹

The ACLU has brought, or participated in, litigation on behalf of Native Americans in South Dakota. See *Weddell v. Wagner Cmty Sch. Dist.*, Civ. No. 02-4056 (D.S.D. Mar. 18, 2003) (successful challenge to at-large election system which resulted in election of an American Indian to the school board); *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010) (challenge to redistricting plan for city council elections); *Blackmoon v. Charles Mix County*, 386 F.Supp.2d 1108 (D.S.D. 2005) (successful challenge to malapportioned redistricting plan which resulted in creation of one majority-Indian district and election of Yankton Sioux tribal member); *Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976 (D.S.D. 2004) (successful challenge to state redistricting), aff’d 461 F.3d 1011 (8th Cir. 2006); *Kirkie v Buffalo County, S.D.*, Civ. No. 03-3011 (D.S.D. Feb. 12, 2004) (successful challenge to county districting plan); *Janis v. Nelson*, Civ. No. 09-5019 (D.S.D. May 25, 2010) (successful challenge to the State’s unlawful application of its felon disfranchisement law which had a disproportionate effect on Native Americans given their overrepresentation in the criminal justice system).

⁵ Cited in 121 Cong. Rec. 16,245 (1975) (statement of Rep. Edwards).

⁶ Cited in 1975 House Hearings, Appendix 1225-30, and in 121 Cong. Rec. 16,250 (1975) (statement of Rep. Young).

⁷ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577.

⁸ <http://www.justice.gov/opa/pr/2006/November/06-crt-752.html>;
<http://www.justice.gov/opa/pr/2010/June/10-crt-665.html>

⁹ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577, Secs. 2(b)(8) and (9).

In *Bone Shirt v. Hazeltine*, the plaintiffs brought a claim under Section 2 of the Voting Rights Act, arguing the State's adopted redistricting plan diluted the voting strength of Native Americans by packing them into one of the proposed districts in lieu of increasing their voting age population in an adjoining district. 336 F.Supp.2d at 1052. The district court ruled the redistricting plan violated Section 2 based in part on its factual finding that a pervasive and continuing history of discrimination against Native Americans in various aspects of political and social life, including the criminal justice system, exists. *Id.* at 1031. In reaching its decision, the court relied upon a report from the South Dakota Advisory Committee to the United States Commission on Civil Rights in 2000 in which the Advisory Committee concluded that Native Americans "perceive 'that the administration of justice at the Federal and State level is permeated by racism,' that many Indians 'have lost confidence in our democratic institutions and have no reason to expect reforms,' that 'Native Americans do not fully participate in local, state, and federal elections,' and that 'despair is not too strong a word to characterize the emotional feelings of many Native Americans who believe they live in a hostile environment.'" *Id.* at 1030. The 2000 Report included testimony from Thomas Hennies, the former Chief of Police for Rapid City, who stated he "personally know[s] that there is racism and there is discrimination and there are prejudices among all people and that they're apparent in law enforcement." *Id.* Dan Holloway, the former County Sheriff for Pennington County, also told the Advisory Committee "that prejudice and the perception of prejudice in our community were 'true or accurate descriptions.'" *Id.*

During the *Bone Shirt* trial, Belva Black Lance, who worked for the tribal housing authority, testified that police officers frequently stopped her whenever she left the reservation and that she had even been stopped twice in one day. *Id.* at 1031. Because of this type of racial profiling and harassment, Black Lance rarely left the reservation. *Id.* When she bought a new car, she registered it in Mellette County which is off of the reservation and had not been stopped since. *Id.* Other witnesses included Native American legislators such as former Representative Thomas Van Norman who discussed how "many Indians 'fear going off the reservation to the store at certain places because they think they're going to get harassed by police unfairly.'" *Id.* Senator Jim Bradford testified about being repeatedly stopped by police off the reservation once they saw his tribal license plates which he considered to be racial profiling. *Id.*

In affirming the district court's decision, the Eighth Circuit concluded:

The record is clear that South Dakota's history of discrimination against Native-Americans has limited their ability to succeed in the state political process. The vestiges of this discrimination remain, dampening Native-American interest in South Dakota politics and affecting the ability of Native-Americans to register, to vote, and to participate in the electoral process. Further, the 'historic effects of discrimination in the areas of health, employment, and education impact negatively' on the ability of Indians to participate in the political process."

461 F.3d at 1022 (internal citations omitted).

Bone Shirt and the other cited cases demonstrate that Native Americans in South Dakota continue to experience discrimination in the area of voting rights and that vigorous enforcement of Section 5's protections remains necessary today in order to avoid the retrogressive effects of voting changes like House Bill 1247.

B. Native Americans in South Dakota are overrepresented in South Dakota's criminal justice system.

According to the 2010 Census, the top three poorest counties in America are in South Dakota, and all three of them have a majority Indian population – Shannon County (96.0%); Todd County (88.1%); and Ziebach County (74.9%).¹⁰ In 2003, the Bureau of Justice Statistics issued a report entitled "Education and Correctional Populations," in which it found that 41.3% of state and federal inmates and 30.6% of probationers have a high school diploma or less as compared to only 18.4% of the general population.¹¹ The National Center for Education Statistics also reported in 2003 that Native Americans had an unemployment rate three times higher than whites.¹² Discrimination against Native Americans in the criminal justice system is yet another vestige of the racial discrimination that is part of South Dakota's long and contentious history.

In 2010, Dr. Steven P. Cole, Ph.D., a statistician and quantitative researcher, studied the impact on Native Americans of denying voting rights to people with felony convictions regardless of their sentence. *See* Exhibit B. He examined the racial make-up of South Dakota's criminal justice system with a focus on probationers, and his data consisted of

¹⁰ http://rapidcityjournal.com/news/nation-s-top-three-poorest-counties-in-western-south-dakota/article_2d5bb0bc-44bf-11e1-bbc9-0019bb2963f4.html; Ryan Lengerich, *Nation's Top Three Poorest Counties in Western South Dakota*, Rapid City Journal, Jan. 22, 2012, available at http://rapidcityjournal.com/news/nation-s-top-three-poorest-counties-in-western-south-dakota/article_2d5bb0bc-44bf-11e1-bbc9-0019bb2963f4.html; <http://quickfacts.census.gov/qfd/index.html>

¹¹ <http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf>. *See also* Charis E. Kubrin and Eric A. Stewart, *Predicting Who Reoffends: the Neglected Role of Neighborhood Context in Recidivism Studies*, available at http://www.gwu.edu/~soc/docs/Kubrin_predicting.pdf

¹² http://nces.ed.gov/pubs2005/nativetrends/ind_8_2.asp.

federal and state felony convictions from 2003 to 2009 by race and voting age population by race. The results from his study showed that, from 2003 to 2009, even though Native Americans made up 6.55% of the voting age population, they made up 14.14% of in-state felony convictions and 44.86% of federal felony convictions. Dr. Cole found these disparities to be statistically significant and concluded that “for in-state and federal convictions, the practice of denying voting rights to persons convicted of felonies regardless of their sentence had a significant disparate and negative impact on Native Americans in South Dakota.” *Id.*

More recent data show that Native Americans continue to be overrepresented in the criminal justice system. According to the 2010 census, Native Americans make up 8.36% of the state’s total population and 6.64% of the voting age population.¹³ However, based on data obtained for April 2012, Native Americans make up 30% of the State’s overall inmate population and 21.6% of all probationers.¹⁴ These high rates further support Dr. Cole’s conclusions.

The ACLU sent an open records request to the Fall River/Shannon County Auditor’s office seeking the number of felons who had been removed from voter registration rolls from January 2010 to December 2011. In response, the county auditor indicated the cost of providing such information and noted that the list for Shannon County was 107 pages whereas the list for Fall River – which has a white population of 88.6% - was only 16 pages. *See Exhibits C and D.* The ACLU also requested information from Bennett County (61.5% Native American), Todd County (88.1% Native American), and Tripp County (14.0% Native American). These three counties, along with Shannon and Todd, are located in rural areas and each one borders another, thus creating a situation where you have a non-reservation (Fall River), reservation (Shannon), non-reservation (Bennett), reservation (Todd), and non-reservation (Tripp), right next to each other. The counties’ responses show that the felon removal rates compared to the voting age population significantly increases on the reservations. *See Exhibits E-G.* Particularly, in Bennett County, ten of the eleven removals were people with Native American names, and in Tripp County, at least half of those removed have Native American names. All of this data and information establish that House Bill 1247 will have a retrogressive effect on Native Americans and, thus, make it more difficult for them to participate in the political process.

¹³ http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html;
<http://quickfacts.census.gov/qfd/states/46/46113.html>;
<http://quickfacts.census.gov/qfd/states/46/46121.html>

¹⁴ <http://doc.sd.gov/about/stats/>

C. The history behind the introduction and passage of House Bill 1247 suggests it was enacted for a discriminatory purpose.

Prior to the enactment of House Bill 1247, South Dakota law provided that “[a] sentence of imprisonment in the state penitentiary for any term suspends the right of the person so sentenced to vote . . . during the term of such imprisonment.” SDCL § 23A-27-35. Section 12-4-18 also directed county auditors to remove from the voter registration rolls “[a]ny voter . . . who receives a felony sentence to the adult state penitentiary system including a suspended execution of a sentence.” SDCL § 12-4-18. However, a conflict existed in the Code in that SDCL § 12-18-10 allowed election challenges against a voter based on a felony conviction, regardless of the sentence.

During the 2008 elections, Eileen Janis and Kim Colhoff, both Native American women living on the Pine Ridge Reservation, attempted to vote and were denied because of their felony convictions despite the fact they were both sentenced to probation. Documents which the ACLU obtained further showed that county auditors were automatically removing the names of anyone convicted of a felony even if they were on probation. Janis and Colhoff, represented by the ACLU, filed a lawsuit and alleged that the State and counties’ policy and procedure of automatically removing their names from the voter rolls and those of similarly situated individuals violated federal and state law, including Section 2 of the Voting Rights Act. In support of their Section 2 claim, the plaintiffs relied upon Dr. Cole’s 2010 expert report.

The parties settled the case and, pursuant to the settlement, the Secretary of State specifically agreed to recommend and advocate a legislative fix to SDCL § 12-18-10 to clarify that only the votes of those serving a disqualifying felony sentence, i.e., a sentence of imprisonment, may be challenged.¹⁵ However, as of October 2011, the Secretary of State’s office still had not pushed for the introduction of such a bill. Also, when Jason Gant became Secretary of State, he changed the language on the State’s website and incorrectly informed voters that anyone serving a felony sentence loses the right to vote.

The ACLU repeatedly sent letters to the state Attorney General’s office and threatened to reopen the case to enforce the settlement agreement. *See* Exhibit E. In his written response, Secretary Gant stated that the proposed legislative fix to SDCL § 12-18-10 was never provided to him. However, Gant’s statement was clearly false given that, prior to

¹⁵ The defendants also agreed to submit the changes to its algorithm with respect to disqualifying felony sentences to the Department of Justice for preclearance, which Secretary of State Chris Nelson did on August 10, 2010.

leaving office, former Secretary of State Chris Nelson gave Gant a copy of the draft bill that all of the parties in the *Janis* case crafted. Gant had also indicated that he wanted to meet with the ACLU to address his obligations under the settlement agreement, but when Robert Doody, the ACLU of South Dakota's Executive Director, attempted to set up such a meeting, Gant never followed up. *See* Exhibit H. Moreover, the misinformation on the front page of the state's elections website regarding the voting rights of people with felony convictions was never corrected and requires voters to navigate several other web links before finding an accurate and more detailed statement of the law.¹⁶

Finally, during the 2012 legislative session, the Committee on Local Government, at the request of the BOE and Secretary Gant, introduced House Bill 1008 to amend Section 12-18-10 – the draft legislation that Secretary Nelson attached to his December 30, 2009 letter to Gant. However, Secretary Gant simultaneously advocated for the introduction and passage of House Bill 1247, the subject of the State's Section 5 submission currently under review. House Bill 1247 also was assigned to the Committee on Local Government. Secretary Gant openly supported this legislation even though he knew it directly conflicted with the language in House Bill 1008, would expand the denial of voting rights to include probationers, and that the law would have a discriminatory impact on Native Americans based on his knowledge of the *Janis* case.

House Bill 1008 was tabled early in the legislative session without any substantive testimony before Committee other than Gant acknowledging the bill was related to the *Janis* lawsuit. At the request of a Committee member, Gant offered to provide the Committee with a copy of the settlement agreement. The bill never passed out of Committee. On the other hand, Secretary Gant reached out to individual members of the legislature advocating for House Bill 1247 and testified in favor of the bill.¹⁷

During his testimony in favor of House Bill 1247, Secretary Gant argued that without the change in the law, felons convicted of the same crime, but who receive different sentences would be treated unequally with respect to the denial of voting rights. Gant avoided any discussion of the *Janis* case or Dr. Cole's expert report. In fact, when Tiffany Campbell, a lobbyist with the ACLU of South Dakota, testified in opposition to House Bill 1247 and discussed the disproportionate representation of Native Americans in the criminal justice system and the bill's racially discriminatory impact. She also stated that the Secretary of State's actions were in possible violation of the *Janis* settlement agreement, and the Chair of the Committee, Rep. Mark Kirkeby, struck

¹⁶ <http://sdsos.gov/Elections/Default.aspx>

¹⁷ <http://legis.state.sd.us/sessions/2012/index.aspx>

Campbell's reference to the *Janis* case from the record solely on the ground that he considered it "inappropriate" and he offered no further explanation.¹⁸ Thus, Secretary Gant's statements in the Section 5 submission that he is unaware of any pending litigation concerning House Bill 1247 or the bill's effect on racial and language minority groups are patently false.

House Bill 1247 passed the House with a vote of 51 to 18, and passed the Senate with a vote of 20 to 13. Every single Native American member of the legislature voted against the bill and several of them testified in opposition to the bill during the House and Senate debates. The Supreme Court has held that, in the context of Section 5, a history of pervasive, purposeful discrimination can be strong circumstantial evidence that a law was enacted for a discriminatory purpose. *See Rogers v. Lodge*, 458 U.S. 613, 624 (1982) ("Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo."). The record is clear that House Bill 1247 will have a retrogressive impact on Native Americans. The *Janis* case and the testimony and comments from opponents put legislators on notice that House Bill 1247 would have a discriminatory impact, but they nevertheless passed the bill without any fact-finding or further investigation. If House Bill 1247 is precleared, Native Americans will be even further hindered in their ability to equally participate in the electoral process in violation of Section 5.

D. Conclusion

Under Section 5, the presumption is that a change to a covered jurisdiction's voting laws, policies, or procedures will have a retrogressive effect, and the covered jurisdiction bears the burden of negating that presumption. *Branch v. Smith*, 538 U.S. 254, 263 (2003); *Georgia v. Ashcroft*, 539 U.S. 461, 471 (2003). The State of South Dakota has not offered any evidence to discount this presumption. Given the evidence showing the overrepresentation of Native Americans in the criminal justice system, the discriminatory purpose behind the law and, thus, the disparate impact House Bill 1247 will have on Native Americans, we respectfully urge the Attorney General to interpose an objection to House Bill 1247.

Thank you for your full and careful consideration of this matter. If you have any questions about this Comment Letter or other aspects of the

¹⁸ <http://legis.state.sd.us/sessions/2012/QuickFind.aspx>

State's submission, please contact Nancy Abudu at nabudu@aclu.org or 404-523-2721 ext. 218 (direct dial).

Respectfully submitted,



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