

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

WAYNE S. SMITH,	)	Civ. No. 11-4001-KES
)	
Plaintiff,)	
)	
v.	)	STATE DEFENDANTS'
	)	MOTION TO ALTER OR
STATE OF SOUTH DAKOTA,	)	AMEND FEBRUARY 10
	)	ORDER PURSUANT TO
Intervenor Defendant,	)	FED. RULE CIV. PROC. 59(e)
	)	AND MOTION FOR
and	)	JUDGMENT ON THE
	)	PLEADINGS AND
JASON GANT in his official and	)	SUMMARY JUDGMENT
personal capacity as Secretary of State)	
of South Dakota; CHRIS NELSON in)	
his personal capacity, former)	
Secretary of State; MIKE MILSTEAD)	
in his official and personal capacity)	
as Minnehaha County Sheriff;)	
DEPUTY SHERIFF JEFF GROMER,)	
in his official and personal)	
capacity,)	
)	
Defendants.)	

Intervenor Defendant State of South Dakota and Defendant Secretary of State Jason Gant in his official capacity ("State Defendants"), submit this motion. State Defendants move for alteration or amendment of the Court's Order Granting Preliminary and Permanent Injunction (Doc. 40) pursuant to Federal Rule of Civil Procedure 59(e). State Defendants also move for judgment on the pleadings and summary

judgment pursuant to Federal Rules of Civil Procedure 12(d) and 56. The grounds for this motion are as follows:

1. Defendant Gant did not act under color of state law, and Plaintiff has no standing against Defendant Gant. In addition, any claims against Defendant Gant are not ripe, and there are no grounds for injunctive relief against Defendant Gant. Resultantly, Defendant Gant cannot be sued under § 1983, and State Defendants respectfully request that the Court alter or amend its February 10 Order to dismiss Defendant Gant.

2. The State of South Dakota is immune from suit under the Eleventh Amendment and is not a “person” subject to suit under § 1983. It is also not subject to damages, injunctive relief, or attorney’s fees as an intervenor under 28 U.S.C. 2403(b). For these reasons, State Defendants respectfully request that the Court alter or amend its February 10 Order to remove injunctive relief against the State and grant the State judgment on the pleadings or summary judgment on all relief requested in Plaintiff’s Amended Complaint.

Part of the authority for this motion is the transcript of the hearing on January 27, 2011. State Defendants have ordered the transcript, but it is not expected to be received until late next week. State Defendants will file their accompanying brief pursuant to D.S.D. Civ. LR 7.1(B) as soon as the transcript is received.

Dated this 15th day of February, 2011.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ Bobbi J. Rank
Bobbi J. Rank
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215
bobbi.rank@state.sd.us

Richard M. Williams
Assistant Attorney General
rich.williams@state.sd.us

Attorneys for State Defendants

pld215_bjr(dh)

CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2011, a true and correct copy of State Defendants' Motion to Alter or Amend February 10 Order Pursuant to Fed. Rule Civ. Proc. 59(e) and Motion for Judgment on the Pleadings and Summary Judgment and was served electronically through the CM/ECF system upon the following persons:

Robert Doody
Andrew Knecht
American Civil Liberties Union
South Dakota Chapter
401 East 8th Street, Suite 226
Sioux Falls, SD 57103
605-332-2508
rdoodu@aclu.org
aknecht@aclu.org
Attorneys for Plaintiff Smith

Douglas M. Deibert
200 East 10th Street, Suite 200
P.O. Box 2498
Sioux Falls, SD 57101
(605) 336-0828
ddeibert@cadlaw.com
Attorney for County Defendants

/s/ Bobbi J. Rank
Bobbi J. Rank
Assistant Attorney General
Office of the Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215
bobbi.rank@state.sd.us

pld215_bjr(dh)