

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

DAKOTA RURAL ACTION, DALLAS)
GOODTOOTH, INDIGENOUS)
ENVIRONMENTAL NETWORK, NDN)
COLLECTIVE, SIERRA CLUB, AND)
NICHOLAS TILSEN,)

Plaintiffs,)

vs.)

KRISTI NOEM, in her official)
capacity as Governor of the State of)
South Dakota, JASON RAVNSBORG,)
in his official capacity as Attorney)
General, and KEVIN THOM, in his)
official capacity as Sheriff of)
Pennington County,)

Defendants.)

Civ. 5:19-cv-5026-LLP

**ANSWER OF
STATE DEFENDANTS**

COME NOW, Defendants South Dakota Governor Kristi Noem, and South
Dakota Attorney General Jason Ravnsborg, in their official capacities
(collectively, Defendants), by and through their counsel of record, and hereby
submit the following Answer to the Complaint and state as follows:

- a. Plaintiffs' Complaint fails to state a cause of action upon which relief
may be granted against Defendants.
- b. Defendants deny each and every allegation contained in Plaintiffs'
Complaint except as otherwise specifically admitted herein, and remit
Plaintiffs to a strict proof thereof.

The paragraph numbers below correspond with the numbered paragraphs in Plaintiffs' Complaint.

INTRODUCTION

1. Paragraph 1 is a summary of Plaintiffs' case to which no response is necessary. To the extent an answer is required, the paragraph is denied.

2. Paragraph 2 makes legal assertions to which no response is necessary.

3. As to Paragraph 3, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation.

4. As to Paragraph 4, Defendants admit that Senate Bill No. 189 entitled "An act to establish a fund to receive civil recoveries to offset costs incurred by riot boosting, to make a continuous appropriation therefor, and to declare an emergency" ("S.B. 189" or "The Act") was passed to address acts of force or violence during potential protests. Defendants deny the remainder of Paragraph 4.

5. Defendants deny Paragraph 5.

JURISDICTION AND VENUE

6. As to Paragraph 6, Plaintiffs make a legal assertion to which no response is necessary.

7. As to Paragraph 7, Plaintiffs make a legal assertion to which no response is necessary.

8. As to Paragraph 8, Plaintiffs make a legal assertion to which no response is necessary.

9. Defendants deny Paragraph 9.

PARTIES

10. As to Paragraph 10, Defendants admit that Dakota Rural Action, Inc. is a South Dakota corporation with its principal place of business in Brookings, South Dakota. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of the paragraph.

11. As to Paragraph 11, Defendants lack knowledge or information sufficient to form a belief about the truth of the statement regarding Dallas Goldtooth. Defendants deny that Plaintiff Indigenous Environmental Network (“IEN”) is an organization registered in Minnesota. Defendants admit that a business named Indigenous Educational Network of Turtle Island is registered in Minnesota. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of the paragraph.

12. As to Paragraph 12, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation.

13. As to Paragraph 13, Defendants lack knowledge or information sufficient to form a belief about the truth of the statement regarding Nicholas Tilsen. Defendants admit that NDN Collective, Inc. is a corporation registered in South Dakota. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of the paragraph.

14. Defendants admit that Kristi Noem is the Governor of the State of South Dakota and the Complaint lists her as being sued in her official capacity.

The remainder of Paragraph 14 is a legal assertion to which no response is necessary.

15. Defendants admit that Jason Ravensborg is the Attorney General of the State of South Dakota and the Complaint lists him as being sued in his official capacity. The remainder of Paragraph 15 is a legal assertion to which no response is necessary.

16. Defendants admit that Kevin Thom is the Sheriff of Pennington County and the Complaint lists him as being sued in his official capacity. The remainder of Paragraph 16 is a legal assertion to which no response is necessary.

STATEMENT OF FACTS

I. THE “RIOT BOOSTING” ACT

17. Defendants admit Paragraph 17.

18. Defendants admit that Paragraph 18 (a) and (b) contain portions of The Act. Defendants deny that these portions represent The Act in total or that such portions are more relevant than other non-cited portions of The Act.

19. Defendants admit Paragraph 19.

20. Defendants deny Paragraph 20.

21. Defendants deny Paragraph 21.

22. Defendants deny Paragraph 22.

23. Defendants admit that an individual need not be physically present during a riot to be covered by The Act. Defendants deny the remainder of Paragraph 23.

24. Defendants deny Paragraph 24 to the extent that it implies The Act is unconstitutional. Defendants admit that a criminal conviction is not necessary to enforce provisions of The Act.

25. As to Paragraph 25, Defendants admit the title of The Act includes the words “a fund to receive civil recoveries to offset costs incurred by riot boosting, to make a continuous appropriation therefore, and to declare an emergency.” Defendants deny the title should be used for interpretive purposes or that the title encompasses the entirety of The Act’s purpose. SDCL 2-14-9 (stating titles “constitute no part of any statute”).

26. As to Paragraph 26, Defendants admit The Act, in part, creates the “riot boosting recovery fund.” Defendants deny the remainder of paragraph 26.

27. As to Paragraph 27, Defendants admit The Act, in part, provides “Money in the fund may be used to pay any claim for damages arising out of or in connection with a riot or may be transferred to the pipeline engagement activity coordination expenses fund.”

28. As to Paragraph 28, Defendants admit that Governor Noem held a press conference regarding The Act. Defendants admit that George Soros was given as an example of an individual commonly-known as one who funds protests. Defendants deny that Plaintiffs’ excerpt of that press conference accurately portrays the intent of The Act. Defendants further answer that statements made by Defendants describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act.

Eagleman v. Diocese of Rapid City, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839,

845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

29. As to Paragraph 29, Defendants admit that Governor Noem held a press conference regarding The Act. Defendants admit that the quoted words were said during that press conference. Defendants deny that Plaintiffs' excerpt of that press conference accurately portrays intent of The Act. Defendants further answer that statements made by Defendants describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

30. As to Paragraph 30, Defendants admit that Governor Noem's outside legal counsel testified regarding The Act. Defendants admit that, as part of that testimony, legal counsel mentioned professional protestors. Defendants deny that Plaintiffs' excerpt of that testimony accurately portrays the intent of The Act. Defendants further assert that statements made by Defendants or their agents describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839,

845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

31. As to Paragraph 31, Defendants admit that a protest occurred in North Dakota regarding the pipeline. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of the first sentence. Defendants admit that during Governor Noem's outside legal counsel's testimony regarding The Act, a slide was shown which was a reproduction of a graphic prepared by the North Dakota State Government, ND Response, which stated "661 professional protestors arrested in North Dakota." Defendants deny that Plaintiffs' excerpt of that testimony accurately portrays the intent of The Act. Defendants further assert that statements made by Defendants or their agents describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

32. As to Paragraph 32, Defendants admit that testimony before the Legislature included the quoted language. Defendants deny that Plaintiffs' excerpt of that testimony accurately portrays the intent of The Act. Defendants

further assert that statements made by Defendants or their agents describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

33. As to Paragraph 33, Defendants admit that Governor Noem held a press conference regarding The Act. Defendants admit that the quoted words were said during that press conference. Defendants deny that Plaintiffs' excerpt of that press conference accurately portrays the intent of The Act. Defendants further assert that statements made by Defendants describing The Act, or in support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the Legislature as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

34. As to Paragraph 34, Defendants admit that Governor Noem issued a press release regarding The Act. Defendants admit that the quoted words are present as part of that press release. Defendants deny that Plaintiffs' excerpt of that press release accurately portrays the intent of The Act. Defendants further assert that statements made by Defendants describing The Act, or in

support of passage of The Act, are not relevant to an analysis of the constitutionality of The Act. *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶¶ 11-12, 862 N.W.2d 839, 845-846 (isolated statements cannot be said to be the view of the as a whole); *South Dakota Farm Bureau, Inc. v. Hazeltine*, 202 F.Supp.2d 1020, 1029 (D.S.D. 2002) (intent of one or more legislators or sponsors is without legal significance).

35. Paragraph 35 is denied. All citizens of the state, including tribes, tribal members, and environmental groups, were equally allowed to participate in the legislative process.

36. As to Paragraph 36, Defendants admits the quoted language appears in The Act. Defendants deny the remainder of Paragraph 36.

37. As to Paragraph 37, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

II. THE CRIMINAL STATUTES

38. As to Paragraph 38, Defendants admit that SDCL 22-10-6 provides, “Any person who participates in any riot and who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence is guilty of a Class 2 felony” and that SDCL 22-10-6.1 provides, “Any person who does not personally participate in any riot but who directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence is guilty of a Class 5 felony.”

39. Defendants admit Paragraph 39.

40. Defendants admit Paragraph 40.

41. Defendants deny Paragraph 41.

42. Defendants deny Paragraph 42.

43. Defendants deny Paragraph 43.

44. Defendants deny Paragraph 44.

III. THE KEYSTONE XL PIPELINE

45. As to Paragraph 45, Defendants admit that TransCanada intends to build a pipeline known as the “Keystone XL” pipeline to carry crude oil.

Defendants admit that the Keystone XL route is planned to begin in Canada, passing through the provinces of Alberta and Saskatchewan, and then extend south through the states of Montana, South Dakota, and Nebraska.

Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of Paragraph 45.

46. As to Paragraph 46, Defendants admit that one of the planned routes shows the Keystone XL pipeline passing through portions of the following South Dakota counties: Harding, Perkins, Butte, Meade, Pennington, Haakon, Jones, Lyman, and Tripp.

47. As to Paragraph 47, Defendants admit that the cited case states, in part, that former “Secretary of State John Kerry denied TransCanada’s application on November 6, 2015.”

48. As to Paragraph 48, Defendants admit that Paragraph 48 provides a summary of a portion of the previously cited case and that cited case provides, in part, “The State Department issued the accompanying Presidential Permit on April 4, 2017.”

49. As to Paragraph 49, Plaintiffs make legal assertions to which no response is necessary.

IV. PLANNED ACTIONS OF PLAINTIFFS

50. As to Paragraph 50, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

51. As to Paragraph 51, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

52. As to Paragraph 52, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

Dakota Rural Action

53. As to Paragraph 53, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

54. As to Paragraph 54, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

55. As to Paragraph 55, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

56. As to Paragraph 56, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

The IEN Plaintiffs

57. As to Paragraph 57, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

58. As to Paragraph 58, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

59. As to Paragraph 59, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

The NDN Plaintiffs

60. As to Paragraph 60, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

61. As to Paragraph 61, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

62. As to Paragraph 62, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

63. As to Paragraph 63, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

64. As to Paragraph 64, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

65. As to Paragraph 65, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

The Sierra Club

66. As to Paragraph 66, Defendants lack knowledge or information sufficient to form a belief about the truth of this allegation.

The Challenged Law's Harm to Plaintiffs

67. As to Paragraph 67, Defendants deny that any objectively reasonable fear of prosecution for protected speech would arise under the application of The Act. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of this paragraph.

68. As to Paragraph 68, Defendants deny that any objectively reasonable fear of prosecution for protected speech would arise under the application of The Act. Defendants lack knowledge or information sufficient to form a belief about the truth of the remainder of this paragraph.

69. As to Paragraph 69, Defendants deny that any objectively reasonable fear of prosecution for protected speech would arise under the application of The Act.

70. Defendants deny Paragraph 70.

71. Defendants deny Paragraph 71.

V. OTHER SOUTH DAKOTA STATUTES THAT PREVENT RIOTS AND VIOLENCE

72. The first sentence of Paragraph 72 is a legal statement for which no response is necessary. To the extent a response is necessary, Defendants deny the first sentence of Paragraph 72. Defendants admit certain acts of violence are currently illegal under South Dakota law.

73. As to Paragraph 73, Defendants admit that SDCL 22-10-1 provides, “Any use of force or violence or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law, is riot. Riot is a Class 4 felony.” Defendants deny the remainder of Paragraph 73.

74. As to Paragraph 74, Defendants admit that SDCL 22-4A-1 provides, “Any person who, with the intent to promote or facilitate the commission of a crime, commands, hires, requests, or solicits another person

to engage in specific conduct which would constitute the commission of such offense or an attempt to commit such offense, is guilty of criminal solicitation.

Criminal solicitation is a:

- (1) Class 1 felony if the offense solicited is a Class A, B or C felony;
- (2) Class 2 felony if the offense solicited is a Class 1 felony;
- (3) Class 3 felony if the offense solicited is a Class 2 felony;
- (4) Class 4 felony if the offense solicited is a Class 3 felony;
- (5) Class 5 felony if the offense solicited is a Class 4 felony;
- (6) Class 6 felony if the offense solicited is a Class 5 felony; or
- (7) Class 1 misdemeanor if the offense solicited is a Class 6 felony.”

Defendants deny the remainder of paragraph 74.

75. As to Paragraph 75, Defendants admit that SDCL 22-10-9 provides, “Any person who assembles with two or more persons for the purpose of engaging in conduct constituting riot or aggravated riot or who, being present at an assembly that either has or develops such a purpose, remains there, with intent to advance that purpose, is guilty of unlawful assembly. Unlawful assembly is a Class 1 misdemeanor.” Defendants deny the remainder of Paragraph 75.

76. As to Paragraph 76, Defendants admit that SDCL 22-18-35 provides, “Any person who intentionally causes serious public inconvenience, annoyance, or alarm to any other person, or creates a risk thereof by:

- (1) Engaging in fighting or in violent or threatening behavior;
- (2) Making unreasonable noise;

(3) Disturbing any lawful assembly or meeting of persons without lawful authority; or

(4) Obstructing vehicular or pedestrian traffic; is guilty of disorderly conduct. Disorderly conduct is a Class 2 misdemeanor. However, if the defendant has been convicted of, or entered a plea of guilty to, three or more violations of this section, within the preceding ten years, the defendant is guilty of a Class 1 misdemeanor for any fourth or subsequent offense.” Defendants deny the remainder of Paragraph 76.

77. As to Paragraph 77, Defendants admit that SDCL 22-18-40 provides, “Unless otherwise directed by law enforcement or other emergency personnel or to seek assistance for an emergency or inoperable vehicle, no person may stand upon the paved or improved or main-traveled portion of any highway with intent to impede or stop the flow of traffic. A violation of this section is a Class 1 misdemeanor.” Defendants deny the remainder of Paragraph 77.

78. As to Paragraph 78, Defendants admit that SDCL 22-10-11 provides, “Any person who, during a riot or unlawful assembly, intentionally disobeys a reasonable public safety order to move, disperse, or refrain from specified activities in the immediate vicinity of the riot, is guilty of a Class 1 misdemeanor. A public safety order is any order, the purpose of which is to prevent or control disorder or promote the safety of persons or property, issued by a law enforcement officer or a member of the fire or military forces

concerned with the riot or unlawful assembly.” Defendants deny the remainder of Paragraph 78.

79. As to Paragraph 79, Defendants deny The Act is unconstitutional.

CLAIMS FOR RELIEF

I. FIRST AMENDMENT – SPEECH AND EXPRESSIVE CONDUCT

80. Defendants deny Paragraph 80.

81. Defendants deny Paragraph 81.

82. As to Paragraph 82, Plaintiffs make a legal assertion to which no response is necessary. To the extent a response is required, Defendants deny Paragraph 82.

83. As to Paragraph 83, Plaintiffs make a legal assertion to which no response is necessary. To the extent a response is required, Defendants deny Paragraph 83.

84. As to Paragraph 84, Plaintiffs make a legal assertion to which no response is necessary. To the extent a response is required, Defendants deny Paragraph 84.

85. Defendants deny Paragraph 85.

86. Defendants deny Paragraph 86.

87. Defendants deny Paragraph 87.

88. Defendants deny Paragraph 88.

89. As to Paragraph 89, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegation.

90. Defendants deny Paragraph 90.

II. FOURTEENTH AMENDMENT – DUE PROCESS

91. Defendants deny Paragraph 91.

92. Defendants deny Paragraph 92.

III. PRAYER FOR RELIEF

93. Paragraph 93 is the Prayer for Relief for which no response is necessary.

AFFIRMATIVE DEFENSES

1. Defendants affirmatively allege that Plaintiffs have failed to state a claim upon which relief can be granted.

2. Defendants affirmatively allege Plaintiffs lack standing to bring this action.

3. Defendants affirmatively allege the matter is not ripe for review.

4. Defendants affirmatively allege that this action against them in their official capacities is barred by the Eleventh Amendment to the United States Constitution.

5. Defendants affirmatively allege that the action against them is barred by the doctrine of sovereign immunity, and that sovereign immunity has not been waived by the State of South Dakota, its public entities or employees for suits in federal court. SDCL 3-21-7 and 3-21-10.

6. Defendants affirmatively allege that this action is barred by Article III, § 27 of the South Dakota Constitution, SDCL 21-32-17 and 21-32A-2, and by the Eleventh Amendment to the United States Constitution.

7. Defendants are duly elected officials for the State of South Dakota, acting wholly within the scope of their office and entitled to qualified immunity.

8. Defendants affirmatively allege that this action is barred against them to the extent that they were acting only in a supervisory capacity. Defendants affirmatively allege that Plaintiffs are not entitled to recover damages against them to the extent they were only acting in a supervisory capacity. The doctrine of *respondeat superior* does not apply to actions brought pursuant to the provisions of 42 USC § 1983.

9. Defendants affirmatively allege that they possess only a general duty to see the laws of the state are implemented and that such a generalized duty does not subject Defendants to liability under 42 U.S.C. § 1983.

10. Defendants affirmatively allege that they possess only a general duty to see the laws of the state are implemented. Without a specific connection between a named defendant and the challenged statute, the challenge is in fact against the State and 11th Amendment immunity applies. Additionally, under 11th Amendment immunity, the State itself is not subject to injunctive relief.

11. Defendants affirmatively allege that the Court should abstain from hearing this matter under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and *Younger v. Harris*, 401 U.S. 37 (1971).

WHEREFORE, Defendants pray that Plaintiffs' Complaint be dismissed on the merits, that Defendants recover reasonable attorney fees, costs and

disbursements, and for such other and further relief that the Court deems proper and just.

JURY TRIAL DEMAND

Defendants demand trial by Jury.

Dated this 16th day of April, 2019

/s/ Richard M. Williams
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*Attorney for Governor Noem and
Attorney General Ravnsborg*

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of April 2019, I electronically filed the foregoing with the Clerk of the Court for the United States District Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Richard M. Williams
Richard M. Williams
Deputy Attorney General