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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CITIZENS EQUAL RIGHTS ALLIANCE, INC. (CERA), *et al.*, Plaintiffs, v. BRAD JOHNSON, in his official capacity as Secretary of State for the State of Montana; *et al.*, Defendants, and TRACIE SMALL; ADA WHITE; SIDNEY W. FITZPATRICK, JR.; KENNARD REAL BIRD; and ELVIRA "NELLIE" LITTLE LIGHT, Proposed Defendant-Intervenors.	Case No. CV07-74-BLG-RSC **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

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It appears that Defendants have completely misread Plaintiffs' complaint. Defendants would have this Court believe that Plaintiffs allege nothing but a few minor, garden variety election irregularities. Nothing could be further from the truth.

Contrary to Defendants' assertions, and as set forth from the opening paragraph of their Complaint, Plaintiffs contend that Montana state and local election officials have engaged in a continuous, purposeful abdication of their duties to equally administer and regulate Montana elections. Under both the Guarantee Clause and Tenth Amendment to the United States Constitution, Defendants have jurisdiction to regulate state and local elections in Indian Country, and to judicially enforce such regulations when violated. *See Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal.4th 239, 148 P.3d 1126 (2006). Defendants' disavowal of this jurisdiction and refusal to administer and regulate Montana's election in an equal manner constitutes a standard, practice or procedure under the plain terms of the Voting Rights Act, 42 U.S.C. § 1973, and has denied Plaintiffs the opportunity to participate on equal terms in the political process. Moreover, given its intentional nature, Defendants' conduct also violates Plaintiffs' rights under the Fourteenth and Fifteenth Amendments to the United States Constitution. Viewing Plaintiffs' allegations liberally in their favor, as the Court must when deciding a motion under Rule 12(b)(6), it is plain that Plaintiffs have stated claims under the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution and that Defendants' motions to dismiss must be rejected.

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I. STANDARD OF REVIEW

Defendants spend little time reviewing the standards applicable to a Rule 12(b)(6) motion. This is telling. They are correct as far as they go, conceding that "[a]t this stage of the litigation, a court must accept petitioner's allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the complaint." Maxwell's Brief in Support of Motion to Dismiss ("Maxwell Br.") at 3 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

What Defendants fail to add is just how difficult it is for a defendant to demonstrate that a complaint fails to meet these standards: "The Rule 8 [pleading] standard contains a powerful presumption against rejecting pleadings for failure to state a claim." *Gilligan v. Jamco Devel. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (quotations omitted). Indeed, "[i]t is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Id.* (citing Wright & Miller, 5 FEDERAL PRACTICE & PROCEDURE § 1357, at 958 (1969)) (quotations omitted). Moreover, "Rule 12(b)(6) dismissals are especially disfavored in cases where [as here] the complaint sets forth a novel legal theory that can best be assessed after factual development," *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004), or alleges civil rights violations. *Johnson v. California*, 207 F.3d 650, 653 (9th Cir. 2000).

Thus, in ruling on the present motions, not only must the Court accept "all allegations of material fact as true and construe them in the light most favorable to the [plaintiff]," *Parks Sch. of Business v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995), the Court must also assume "that all general allegations embrace whatever specific facts might be necessary to

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support them," *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994), and must accept all "reasonable inferences" that may be drawn from the allegations in Plaintiffs' favor. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). Moreover, "in reviewing the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Gilligan*, 108 F.3d at 249 (quotations omitted). Whether the chances of recovery may appear "very remote and unlikely" is irrelevant to the Rule 12(b)(6) inquiry. *Id.* Finally, even if the Court does find Plaintiffs' Complaint insufficient for some reason, Plaintiffs should be granted (and respectfully request) leave to amend their Complaint in order to cure whatever deficiencies may exist. *See Mayes v. Leipziger*, 729 F.2d 605, 608 (9th Cir. 1984) (denying leave to amend after granting motion to dismiss reviewed "strictly"); *see also Metts v. Murphy*, 363 F.3d 8, 12 (1st Cir. 2004) (per curiam) (Section 2 claims generally should not be disposed of on motion to dismiss).

II. ARGUMENT

A. Plaintiffs have standing to defend the integrity of their vote.

Defendants first assert that Plaintiffs lack standing to bring their claims. *See* Maxwell Br. at 4-5; Secretary of State's Brief in Support of Motion to Dismiss ("Secretary's Br.") at 5-9. However, just as Defendants appear to have misunderstood the gravamen of Plaintiffs' claims, so too do they misapprehend the basis of Plaintiffs' standing.[1]

[1] The Secretary challenges Plaintiffs' standing under Rule 12(b)(1) for lack of subject matter jurisdiction. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004). Other cases indicate that a challenge to standing under Rule 12 should be brought under Rule 12(b)(6). *See Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006). The difference in labeling appears to have little, if any, effect on the Court's review here.

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To establish standing, a plaintiff must allege (1) a concrete injury in fact, (2) that is caused by the conduct complained of, and (3) that may be redressed by a favorable ruling from the court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, Plaintiffs allege that their votes have been diluted and that they have been denied an equal opportunity to participate in the political process in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs further allege that these injuries have been caused by Defendants' wholesale abdication of their duties to administer and regulate federal, state and local elections on the Crow Indian Reservation, which has resulted in the various incidents alleged in Plaintiffs' Complaint – incidents that Defendants concede "could serve to deny or dilute" Plaintiffs' votes if presumed to be true, as the Court must here. *See* Maxwell's Br. at 9. These injuries can be redressed by an order from this Court declaring that Defendants have the authority to administer Montana's election laws on an equal basis both on and off the reservation and that their failure to do so is a violation of Plaintiffs' rights under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. It is difficult to conceive of a more straight-forward establishment of standing.

In light of this, the Secretary's more specific standing arguments are unavailing. First, contrary to the Secretary's assertions, *see* Secretary's Br. at 6-7, Plaintiffs' injuries are not unlikely to recur nor is their request for relief unduly abstract. Incidents similar to those alleged by Plaintiffs are all but certain to continue so long as Defendants continue to abdicate their duty to regulate elections equally on and off the reservation, and an order from this Court declaring Defendants' duties and the illegality of their failure to fulfill those duties is in no way an impermissible advisory opinion.

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Regarding causation, it is irrelevant that Defendants "had nothing to do with" the specific incidents that occurred at the Crow Agency polling place, as claimed by the Secretary. Secretary's Br. at 7. What *is* relevant is the chief election officer's position that he cannot, and therefore will not, administer and regulate the state's elections in an equal manner on and off the reservation, a failure that resulted in the incidents outlined in Plaintiffs' Complaint and thereby diluted Plaintiffs' votes in violation of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Similarly, it is irrelevant that "there is no respondeat superior liability under section 1983." *Id.* Plaintiffs are not seeking damages, nor seeking relief for negligence. *Compare id.* (collecting cases wherein plaintiffs sought to impose "liability" on defendants). Their claims challenge Defendants' intentional decision not to administer and regulate elections on the reservation in the same manner as off the reservation.

The Secretary's argument that Plaintiffs' claims cannot be redressed by this Court is also unavailing. The Secretary holds an office established by the Montana State Constitution and is the State's "chief election officer." Mont. Code Ann. § 13-1-201. Although the Secretary cunningly deflects responsibility for elections by arguing that "[local] election administrators bear *primary* responsibility," for conducting elections, this belies the Secretary's very title as chief election officer. *See Washington Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1267 (W.D. Wash. 2006), and *League of Women Voters v. Blackwell*, 432 F. Supp. 2d 723, 732 (N.D. Ohio 2005) (finding Washington and Ohio Secretarys of State to be proper defendants as states' "chief elections officer[s]"). Moreover, even if the Secretary's observation was accepted as true, the observation implies, at minimum, that the Secretary is secondarily responsible for elections, and is still accountable for his failures.

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The Secretary has the responsibility to "obtain and **maintain uniformity in the application**, operation, and interpretation **of election laws** other than those in chapters 35, 36, and 37 of [Title 13 of the Montana Code]."[2] Mont. Code Ann. 13-1-201 (emphasis added). Accordingly, the Secretary is expressly responsible for ensuring the equal application of all election laws in Chapters 1 through 34 of the Montana Code, which contain essentially the entirety of the State's election laws, including those related to polling places, election security, and voter identification, among others. Thus, it is simply no defense for the Secretary to state that the enforcement of Montana election laws "is placed in the hands of the electors themselves through civil contests and prosecutions through Title 13, Chapters 35 and 36." *See League of Women Voters*, 432 F. Supp. 2d at 728 (citing *Bush v. Gore*, 531 U.S. 98, 109 (2000) in stating "[a] state having power to ensure uniform treatment of voters cannot adopt policies leading to disparate treatment of those voters and thereafter plead 'no control' as a defense.").

B. Plaintiffs' claim falls within the plain meaning of the Voting Rights Act's text.

Perhaps the biggest flaw in Defendants' motions is their striking misreading and misrepresentation of Plaintiffs' Complaint. Defendants seek to portray the Complaint as reciting nothing more than a few unrelated, garden variety election irregularities not subject to challenge under the Voting Rights Act or the Fourteenth or Fifteenth Amendments. However, Plaintiffs' Complaint is clear that Defendants' culpability lies not in these distinct incidents,

[2] Chapter 35 criminalizes certain violations of election laws as misdemeanors. Mont. Code Ann. § 13-35-103 ("A person who knowingly violates a provision of the elections laws of this State …is guilty of a misdemeanor."). Chapter 36 is a limited election contest statute authorizing challenges to "contest the right of any person to any nomination or election to public office." *Id.* at § 13-36-101. Finally, Chapter 37 regulates campaign practices, including financial contributions fair campaigning, among others, for which the Commission of Political Practices has primary jurisdiction.

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but in their failure to administer Montana elections on the reservation in the same manner as elections off the reservation. *See* Complaint at ¶¶ 1, 14, 15.

Section 2 of the Voting Rights Act "guarantees a fair process" in American elections. *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998). Challenges under Section 2 have traditionally dealt with mechanisms such as at-large voting systems, multimember districts, and congressional district line-drawing. *See, e.g., League of United Latin American Citizens v. Perry*, --- U.S. ---, 126 S. Ct. 2594 (2006) (congressional line drawing); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (multimember district voting system). However, the Voting Rights Act "'should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination.'" *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (quoting *Chisom v. Roemer*, 501 U.S. 380, 403 (1991)), and the text of the act is in no way limited to such mechanisms. *See, e.g., Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (felon disenfranchisement law subject to Section 2); *Arakaki*, 314 F.3d at 1096 (restriction on race of candidates subject to Section 2). Instead, Section 2 provides in pertinent part:

> (a) 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 in contravention of the guarantees set forth in section 1973b (f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice....

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42 U.S.C. § 1973. Thus, as Defendants concede, all a Plaintiff must show to bring a claim under Section 2 of the Voting Rights Act is "that (1) the challenged situation constituted a qualification, prerequisite, standard, practice, or procedure and (2) as a result of the challenged situation, members of a protected class had 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" *United States v. Jones*, 57 F.3d 1020, 1023 (11th Cir. 1995) (quoting 42 U.S.C. § 1973(b) and citing *Gingles*, 478 U.S. 30); *see also* Maxwell's Br. at 7 (quoting *Jones*).

Defendants' continuous, purposeful abdication of their duties to equally apply Montana's election laws plainly constitutes a "standard," "practice," or "procedure" under the very definitions supplied by Defendants:

> Standard is defined as "something that is established by authority, custom, or general consent as a model or example to be followed." Webster's Third New International Dictionary 2223 (Philip B. Govie, ed. 1986). Practice is defined as the "performance or operation of something," "performance or application habitually engaged in," or "repeated or customary action." *Id.* at 1780. Procedure is defined as "a particular way of doing or of going about the accomplishment of something." *Id.* at 1807.

Secretary's Br. at 10-11 and Maxwell Br. at 8 (quoting *Jones*, 57 F.3d at 1024 (footnote omitted)). Defendants' continuous failure to equally apply Montana's election laws falls within the scope of almost all these definitions. It is far from the "inadvertent error" at issue in *Jones*. 57 F.3d at 1024. In addition, given how this course of conduct has pervaded Montana's government, both at the state level and local level, it is unquestionably a "systemic harm" that falls within the scope of, and threatens the "fair process" guaranteed by, the Voting Rights Act.

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Moreover, based on the "totality of the circumstances," it is clear that Defendants' failures have has resulted a political process that is "not equally open" to Plaintiffs and has deprived Plaintiffs of the opportunity to elect representatives of their choice. Taking Plaintiffs allegations as true, it is plain that all manner of illicit conduct has occurred on the Crow Reservation – including the distribution of multiple ID's and multiple voting – and that Defendants have done nothing to regulate or otherwise prevent such conduct. In conjunction with the facts that (1) Big Horn County is marked by politically cohesive racial communities that engage in bloc voting, *see* Complaint ¶¶ 11-12, (2) the Native American majority votes sufficiently as a bloc to generally defeat the minority's preferred candidates, *see id.*,(3) the overt racial appeals that marked the 2006 election campaign, *see id.* ¶¶ 15d-15f, and (4) the complete lack of justification for Defendants' inaction, such inaction results in the dilution of Plaintiffs' vote and a violation of the Voting Rights Act.

C. The intentional nature of Defendants' conduct supports Plaintiffs' claims under the Fourteenth and Fifteenth Amendments

In addition, given its intentional nature, *see* Complaint ¶¶ 1, 13, 14, 15, 22, 24, Defendants' conduct and the resulting dilution of Plaintiffs' vote also constitute violations of the Fourteenth and Fifteenth Amendments.[3] It is difficult to conceive of a more "pervasive error that undermines the organic processes of the ballot" or that "render[s] [an election] fundamentally unfair" than a flat refusal to administer and regulate election laws equally. *See* Maxwell Br. at 18 (quoting *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1183 (9th Cir. 1988)). Moreover, given that Defendants have jurisdiction to regulate elections

[3] Whether a vote dilution claim is cognizable under the Fifteenth Amendment is an open question. *See Voinovich v. Quilter*, 507 U.S. 146, 159 (1993). However, the amendment's prohibition on the "abridgement" of the right to vote supports an argument that such a claim is cognizable.

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on the reservation under the Guarantee Clause and the Tenth Amendment, *see Agua Caliente*, 40 Cal.4th 239, it is difficult to ascribe this refusal to anything except racial discrimination. In addition, even setting racial discrimination to the side, Defendants' failure to regulate electoral conduct on and off the reservation equally lacks a rational basis, and thus violates the Equal Protection Clause standing alone. *See, e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985).

D. Defendants' other arguments lack merit.

Defendants levy multiple sub-arguments in support of their broad assertions, none of which has merit. On a couple of instances, Maxwell asserts that no standard, practice or procedure has been "violated" in this case. *See* Maxwell Br. at 3, 8. That, of course, is not the relevant question here – the question is whether Defendants failure to administer and regulate elections equally is a standard, practice, or procedure that violates the Voting Rights Act. Maxwell also asserts that Plaintiffs allege no "permanent or structural barrier" to their vote, while at the same time conceding that the Voting Rights Act also prohibits "episodic" practices that "result in the denial of equal access to any phase of the electoral process for minority group members." *Id.* at 6-7; *see also* Secretary's Br. at 10. Plaintiffs, as thoroughly explained above, have in fact alleged a "permanent or structural barrier," but even if they had not, Maxwell has conceded that such an allegation is not necessary because "episodic" events are also actionable.

Indeed, while Plaintiffs have already made it abundantly clear that this is not a case about garden variety election irregularities, Defendants' analysis regarding a particular incident described in the Complaint is simply inaccurate and merits a response. Specifically,

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the Complaint alleges that Plaintiff Coddens, an election poll watcher, was excluded from the polling place at the close of the polls. *See* Complaint ¶¶15g-15*l*. Although Montana law explicitly states that "[p]oll watchers shall also be permitted to observe all of the vote counting procedures of the judges after the closing of the polls and all entries of the results of the election," Mont. Code Ann. 13-13-120, Maxwell remarkably argues that "no violation occurred." Maxwell Br. at 16. Regardless of where the vote counting may have occurred, all procedures necessary to count ballots, whether packaging, transporting, or counting, etc. are unquestionably "vote counting procedures" under the statute. Maxwell's unduly restrictive interpretation of this statute would allow for a potentially several hour gap in time, between the close of polls and counting, in which ballots could be handled by election officials without any check or balance in the form of poll watchers. Such an interpretation is nonsensical and is contrary to Legislature's constitutional imperative to enact legislation to "insure the purity of elections and guard against abuses of the electoral process." MONT. CONST. art. 4, § 3.

Maxwell next asserts that Plaintiffs cannot demonstrate any injury because they have not alleged that fewer non-Indians have been elected as a result of Defendants' conduct. A candidate's race is essentially irrelevant to the Section 2 inquiry, however. *See Ruiz*, 160 F.3d at 551. Maxwell also seeks to drape Plaintiffs' Complaint with the label "conclusory," forgetting that Rule 8 provides for notice pleading, not fact pleading, and that all the rule requires is that a complaint give defendant fair notice of plaintiff's claim. *See Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1270 n.3 (9th Cir. 2006). It need not state with precision all of the elements necessary for recovery.[4] *Id*; *see also Jackson v. Marion County*, 66 F.3d 151,

[4] Maxwell further asserts that Plaintiffs have failed to meet Rule 9's heightened pleading requirements for fraud. *See* Maxwell Br. at 15 n.2. However, Plaintiffs have not asserted a cause of action for fraud.

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153 (7th Cir. 1995) (generally "a plaintiff in a suit in federal court need not plead facts; he can plead conclusions."). Both Defendants also complain that Plaintiffs haven't pursued state law remedies, without providing any authority that requires them to do so. *See* Maxwell Br. at 15, 17; Secretary's Br. at 12. To the contrary, neither section 1983, *see Jones v. Bock*, --- U.S. ---, 127 S. Ct. 910, 919 (2007) (citing *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982)), nor the Voting Rights Act, *see Johnson v. De Grandy*, 512 U.S. 997, 1005 (1994), requires exhaustion.

Both Defendants also decry Plaintiffs' suggestion that all polling places be removed from the reservation if it is determined that such polling places are somehow beyond Defendants' jurisdiction. Plaintiffs recognize the severe nature of this remedy. Yet Defendants steadfastly refuse the far less severe remedy – a declaration that elections must be equally administered and regulated on and off the reservation. Plaintiffs leave the choice of remedy to the Court, but the current scheme whereby elections are held but not regulated cannot continue.

Finally, the Secretary rather odiously insinuates that whites should be excluded from the protections of the Voting Rights Act, deeming it the "pinnacle of irony" that Plaintiffs have brought this suit. Secretary's Br. at 14. The Act, however, does not speak of whites and non-whites, it speaks of "citizens" and white citizens are just as entitled to its protections as any other citizens when their right to vote is threatened. The fact that the Native Americans of Big Horn County were themselves once wrongfully deprived of their right to vote does not justify denying Plaintiffs' rights today.

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III. CONCLUSION

Taking Plaintiffs allegations as true, as the Court must, it is plain that Plaintiffs have stated causes of action under the Voting Rights Act and the Fourteenth and Fifteenth Amendments. Accordingly, Plaintiffs should be given the opportunity to proceed with their suit and set forth evidence that proves their claims.

Dated this 5th day of September, 2007.

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