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

CHRIS 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 FALKENBUERG, 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 and Fall River Counties,

Defendants.

Civ. No. 12-5003

PLAINTIFFS' REPLY BRIEF

COME NOW, the Plaintiffs, by and through their attorney of record, Steven D. Sandven, and submit this Reply Memorandum consistent with the Court's Scheduling Order and in response to the Motion to Dismiss filed by the South Dakota Secretary of State, Jason Gant (hereinafter "Defendant Gant") and the Brief in Opposition to the Motion for Preliminary Injunction filed by Fall River County; Shannon County; Fall River County Board of Commissioners; Shannon County Board of Commissioners; Joe Falkenburg, Anne Cassens, Michael P. Ortner, Deb Russell, and Joe Allen in their official capacity as members of the Fall River County board of commissioners; Bryan J. Kehn, Deloris Hagman, Eugenio B. White Hawk, Wendell Yellow Bull, and Lyla Hutchinson in their official capacity as members of the Shannon County board of commissioners; Sue Gange; and James Sword (hereinafter the "County Defendants").

STANDARD OF REVIEW

Defendant Gant's first basis for dismissal - that Plaintiffs lack standing - must be evaluated under Rule 12(b)(1) of the Federal Rules of Civil Procedure, whereas Defendant Gant's second basis for dismissal - that Plaintiffs lack a cause of action - comes under Rule 12(b)(6). *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89, 92 (1998) (explaining that the absence of a valid cause of action "does not implicate subject-matter jurisdiction" and that any analysis of a plaintiff's alleged cause of action must be conducted after "resolving a dispute concerning the existence of an Article III case or controversy"). "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." Scheuer v.

Rhodes, 416 U.S. 232, 236 (1974); *see also* Leatherman v. Tarrant Cnty. Narcotics and Coordination Unit, 507 U.S. 163, 164 (1993). In other words, the factual allegations in the complaint must be presumed true, and the plaintiff must be given every favorable inference that may be drawn from the allegations of fact. Scheuer, 416 U.S. at 236.

Under Rule 12(b)(1), those seeking to invoke the jurisdiction of a federal court - Plaintiffs in this case - bear the burden of establishing that the court has jurisdiction to hear their claims. *See* U.S. Ecology, Inc. v. U.S. Dep't of Interior, 231 F.3d 20, 24 (D.C. Cir. 2000). Although courts examining a Rule 12(b)(1) motion to dismiss - such as for lack of standing - will "construe the complaint in favor of the complaining party," *see* Warth v. Seldin, 422 U.S. 490, 501 (1975), the "'plaintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (2d ed. 1987). Thus, a court may consider material other than the allegations of the complaint in determining whether it has jurisdiction to hear the case, so long as the court accepts the factual allegations in the complaint as true. *See* Jerome Stevens Pharm., Inc. v. FDA, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005).

To survive a motion to dismiss under Rule 12(b)(6), a complaint need only contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,'" such that the defendant has "'fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (*quoting* Conley v. Gibson, 355 U.S. 41, 47 (1957). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion to dismiss, a plaintiff must furnish "more

than labels and conclusions" or "a formulaic recitation of the elements of a cause of action" in order to provide the "grounds" of "entitle[ment] to relief." Twombly, 550 U.S. at 555-56. Instead, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. at 570. A complaint is considered plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). This amounts to a "two-pronged approach," under which a court first identifies the factual allegations that are entitled to an assumption of truth and then determines "whether they plausibly give rise to an entitlement to relief." Id. at 1950-51.

ARGUMENT

This action is brought pursuant to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2004) to prohibit the current voting practice that has resulted in discrimination, i.e., a practice that has provided minorities with "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As of the time the Complaint was filed, Defendant Shannon County offered six days of early voting for Shannon County residents compared to the 46 days of early voting granted to all other South Dakota citizens. In other words, Shannon County residents get approximately 13% of the time allotted for early voting in every other South Dakota county. This discriminatory implementation of the state's election procedures violates Section 2 of the Voting Rights Act. *See* Thornburg v. Gingles, 478 U.S. 30, 47 (1986)(explaining that "the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions

to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives").

I. PLAINTIFFS HAVE STATED A CAUSE OF ACTION AGAINST FALL RIVER COUNTY AND ITS OFFICIALS.

Defendant Counties argue that "Fall River County has never been involved in Shannon County's determination regarding whether to have and how to fund early voting for Shannon County residents." Defendant Counties' Brief in Opposition to Motion for Preliminary Injunction, ¶ 9. While that statement may be true from all outward appearances, in reality it is not the case at all.

Shannon County contracts with the contiguous County of Fall River for enumerated services of officials, including those of the auditor who is to perform election services. The current Shannon – Fall River Contract **(Exhibit 1A)** was signed by Defendants Fall River and Shannon County on December 20, 2011 - approximately one year and three months after Defendants Sword and Ganje threatened to resign if Shannon County raised the issue of early voting. Indeed, Mr. Sword's desire to dangle his resignation over the heads of the Shannon County Board of Commissioners is evident from the express language of the contract. For example, pursuant to Section 18 of the described contract, "Fall River and the County Officials have the ability and right to terminate this contract and/or resign their position at any time, and *with or without justification, and without notice*." Id. Emphasis added. Indeed, the agreement contains no less than three provisions that address the ability of Fall River County officials to resign without notice.

In the alternative, upon executing the Agreement, Shannon County is severely hampered if it should choose to terminate the services of Fall River. For example,

Section 3 of the Agreement prohibits Shannon County from removing any county official, "unless the County Official has committed misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression or gross partiality." Id. Section 2 then reiterates that "[n]othing in this Contract shall be construed to place any restrictions upon Fall River and the County Officials' ability and right to terminate this contract and/or resign their position at any time, with or without justification, and without notice." Further, if Shannon County determines that Fall River County has breached the parties' agreement, Section 20 therein ensures that Shannon County will "reimburse Fall River County for all attorney fees, expenses and cost associated with any dispute arising between the parties" – *regardless of fault or liability.* Id. The Agreement also holds Shannon County liable for "all attorney fees, expenses or costs associated which may be incurred as a result of any action related to this Contract and/or the duties to be performed pursuant to this Contract" – again, regardless of fault or liability.[1] Id.

The agreement between the counties of Fall River and Shannon is clearly written so that Fall River and its officials can control Shannon County through the continued use of threatened resignations if the issue of early voting continues to be raised. As such, Fall River County has been directly involved in Shannon County's determination regarding "whether to have and how to fund early voting".

II. THE COMPLAINT STATES A CAUSE OF ACTION AGAINST THE SECRETARY OF STATE.

[1] The 2011 agreement contained similar provisions. **Exhibit 1-B.** No reference to attorney fees or early voting were included in earlier agreements. **Exhibits 1-C – 1-I.** Auditor and Auditor Clerk salaries for Shannon County were $15,000.00 in 2007, $15,300.00 in 2008, $30,200.00 in 2009, $40,500.00 in 2010, $35,500.00 in 2011 and $34,200 in 2012.

Defendant Gant argues that Plaintiffs have failed to allege any scenario under which he is responsible for the alleged misconduct. Defendant Gant's Motion to Dismiss, ¶ 9. Defendant Gant clearly underestimates his authority over the electoral process. For example, he has notification responsibilities for the Voting Rights Act pursuant to SDCL 12-3-6 which provides as follows:

> Whenever the United States department of justice and the United States census bureau, acting pursuant to Public Law 94-73, designate any county in South Dakota to be covered under the provisions of the Voting Rights Act Amendments of 1975, the county so designated shall be governed by the provisions of 12-3-6 to 12-3-13, inclusive. The secretary of state shall notify those affected counties that they are covered by the provisions of Public Law 94-73. [2]

Further, Defendant Gant is Chairman of the Election Board who has the authority to promulgate rules to conform to the Voting Rights Act pursuant to SDCL 12-3-13 which provides:

> The state board of elections shall have the authority, pursuant to chapter 1-26, to promulgate rules to implement, administer and enforce 12-3-6 to 12-3-13, inclusive, and the state board of elections shall have further authority, pursuant to chapter 1-26, to promulgate rules to implement, administer and enforce further federal administrative rulings made pursuant to Public Law 94-73.

Defendant Gant's office is required to distribute early voting information [3] pursuant to SDCL 12-4-4.10:

> The secretary of state shall provide any absentee uniformed services and overseas voter information on voter registration procedures and how to vote absentee.

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[2] P.L. 94-73 Summary: An Act to amend the Voting Rights Act of 1965 to extend certain provisions for an additional seven years, to make permanent the ban against certain prerequisites to voting, and for other purposes.

[3] 12-4-8. Records prescribed by state board – Information required. For the purpose of expediting work of the county auditor, to promote uniformity in registration, and for the preparation of abstracts and other forms to be used by election boards, registration records shall be prescribed by the state board of elections. The state board of elections may require such information, on registration records, as is necessary to effectuate the state and federal election laws.

Defendant Gant also has a role in early voting pursuant to SDCL 12-19-2.3:

> Any voter identified as being covered by the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. 1973ff-1) as of January 1, 2011, may submit an application or request for an absentee ballot by facsimile or emailed image to the person in charge of the election. The secretary of state may authorize a person in charge of an election to accept an application or request for absentee ballot pursuant to this section through the system provided by the Office of the Secretary of State.

Defendant Gant recently proposed rules regarding early voting before the Election Board on November 29, 2011. *See* Exhibit 25. Finally, Defendant Gant is the Chief Elections Officer who has self-proclaimed the following:

> Our right to vote is one of the most important rights we have as Americans. The Secretary of State is the chief elections officer for the state, and I will make sure that we have best practices in place for our elections and re-counts. We have seen other states fail in their election process and cause much confusion and distrust in the election. I will work diligently with all County Auditors across South Dakota to identify our strengths and weaknesses and create a best practices template for everyone to utilize. As Secretary of State, my main goal will be to ensure that we have the best election system in America.

www.jasongant.com/vision.html. Clearly, as the state's elected official and chief elections officer charged with the oversight of the electoral process, he is ultimately responsible for any violation of election rules, regulations, or statutes that infringes upon an individual's right to vote. Coupled with his ability to control the distribution of HAVA funds, Defendant Gant is a necessary party to this action.

III. PLAINTIFFS HAVE ARTICLE III STANDING.

Defendant Gant argues that "[b]ecause the actions complained of are not within the Secretary of State's authority, redressability is also lacking because Gant could not order or direct the remedy requested." Defendant Gant's Motion to Dismiss, ¶10. Based thereon, Defendant Gant claims that the Plaintiffs do not have Article III standing to pursue their claims.

"[S]tanding is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy." Davis v. Passman, 442 U.S. 228, 239 n.18 (1979). Article III standing requires that the Plaintiff suffer an injury in fact, causally connected to the conduct complained of, that is likely to be redressed by a favorable decision by the court. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). To determine standing in a voting rights case, the court asks whether the plaintiffs "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult issues." Baker v. Carr, 369 U.S. 186, 204 (1962). Notably, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." Id. 205-06.

As to the first factor – injury in fact, decades of jurisprudence expanding and protecting the right to vote demonstrate Plaintiffs' injury in fact and establish that a case or controversy exists. Plaintiffs are citizens, residents and voters in Shannon County who are also enrolled members of the Oglala Sioux Tribe. As individual voters it cannot be denied that they have individual standing to challenge discriminatory election practices. LULAC v. Clements, 999 F.2d 831, 845-46 (5th Cir. 1993)("We agree that the standing of voters in a voting rights case cannot be gainsaid.") Racial discrimination by a government creates a substantial "stigmatic harm" that constitutes an injury in fact and establishes a case or controversy. *See* United States v. Hays, 515 U.S. 737, 744 (1995)(noting that racial classifications threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.") The concrete harm of this stigma, and a case or controversy, exists whenever a government acts with a racially

discriminatory purpose against a particular plaintiff or class of plaintiffs. This is especially so when the racial discrimination is directed towards voting, a "fundamental political right, because [it is] preservative of all rights. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). Accordingly, vote denial in any government run election is not a "hypothetical injury." It is precisely the sort of government action Section 2 of the Voting Rights Act was intended to reach.

Based upon the fundamental nature of the right to vote, Plaintiffs have demonstrated that an injury in fact is present in this case. They have demonstrated that as chief elections officer and the individual in charge of distributing HAVA funds, Defendant Gant is causally connected to the conduct subject of Plaintiff's complaint. Now, as to the last factor, i.e., whether the injury is likely to be redressed by a favorable decision by the court, the clear answer is that Shannon County's receipt of HAVA funds would eliminate all injury and go a long way in redressing a century worth of discrimination aimed at the South Dakota Indian population residing in Shannon County.

Now, Defendant Gant would like this Court to believe that he would be unable to remedy the wrongs at the center of this dispute, because the "election expenses of a county are not expenses of the state even if those expenses are paid by or reimbursed through the Secretary of State's Office." Defendant Gant's Motion to Dismiss, ¶ 17. Defendant Gant overlooks the fact that he has HAVA funds at his disposal that were explicitly provided by the federal government to assist Shannon County in holding fair and open elections.[4] The question then arises: why does Defendant Gant refuse to utilize

[4] It appears from recent comments from Shannon County Commissioners that the only reason for restricting Shannon County voters to six days of early voting – instead of 46 days like the rest of South Dakota citizens – is because Shannon County does not have funding because of a limited tax base. Defendant Hutchinson states "she sympathizes with plaintiffs but the county can't afford

HAVA funds to establish early voting sites for Shannon County. The justification for his decision is that "[t]he policy for all HAVA fund expenditures has always been one of reimbursement of the expense." *See* Exhibit 20 of Complaint. However, no federal or state law exists that would prohibit him from ensuring Shannon County voters the rights afforded every other citizen. Specifically, the Congressional Research Council states in their January 24, 2012 memorandum that "[f]unds are distributed to the states by the Election Assistance Commission (EAC), established under HAVA,[5] but the law is silent on how local units of government receive funds from the state." **Exhibit 2.** In other words, Defendant Gant is imposing a restriction on disbursing federal funds to Shannon County that is not required by federal law.[6] Further, the duty for Defendants to conduct fair elections does not end when HAVA funds are exhausted.

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a more permanent voting site", "we can't even afford to have extra meetings" and "I can understand why the plaintiff wants what every other citizen gets, but we are simply out of money." **Exhibits 3, 4 and 5.**

[5] Title II of HAVA.

[6] In 2001, Congress resolved to address numerous inadequacies and irregularities in the administration of federal elections that had come to light in the wake of the 2000 presidential election. Among the problems that motivated Congress to act were "inadequate voter education; confusing ballots; outdated and unreliable voting machines; poll workers who were unable to assist voters who needed assistance because they were overwhelmed or undertrained, or both; and registered voters who were wrongly denied the right to vote." 148 CONG. REC. S2527 (2002) (statement of Sen.Daschle). Members of Congress emphasized the need for national standards in the administration of federal elections. *See* Election Reform: Hearings Before the Senate Committee on Rules and Administration, 107th Cong., 1st Sess., 132 (2001) (statement of Sen. Feinstein) ("I would be very supportive of legislation which would require States to meet uniform and nondiscriminatory standards in technology and administration."). After months of congressional debate and bipartisan negotiation, the enactment of the Help America Vote Act of 2002 asserted "the authority, and responsibility, of Congress to regulate the administration of Federal elections, both in terms of assuring that voting systems and procedures are uniform and nondiscriminatory for all Americans and in ensuring the integrity of federal election results." Id. at S2528 (statement of Sen. Dodd); *see also* id. at S2527 (statement of Sen.Daschle) ("Our system leaves it to States to decide the mechanics of election procedures. But the right to vote is not a State right. It is a constitutional guarantee. And it is up to us to see that it is protected."). Overwhelmingly adopted by the House and the Senate, the bill was signed by President George W. Bush on October 29, 2002.

HAVA established "federal requirements for the conduct of Federal elections to ensure that the most fundamental of rights in a democracy – the right to vote and have that vote counted – is secure." Id. at S2528-29 (statement of Sen. Dodd); *see also* id. at S2527 (statement of Sen. Daschle) ("By working together, our colleagues have produced legislation that will protect the most basic of all American rights: the right to vote, and to have that vote counted."). The standards were mandatory and were specifically drafted so that states would not be "allowed to opt out of the recommended changes in Federal elections." Id. at S2532 (statement of Sen. Dodd). On the contrary, "minimum Federal requirements would ensure that every eligible voter can cast a vote and have that vote counted." Id. (statement of Sen. Dodd). In recognition thereof, the Act specifically required states to be in compliance with the requirements by a certain date, and allowed state requirements to deviate from the federal requirements only to the extent that they remained consistent with federal law.[7] *See* 42 U.S.C. § 15484.

Interestingly, the Act does not mandate how states are to allocate HAVA funds. In other words, it is up to each state to decide how to implement these requirements. To receive funds each state had to adopt a state plan.[8] With respect to disbursing funds to individual counties, the South Dakota state plan notes the following:

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[7] The minimum requirements are delineated as follows: (1) Using a voting system that meets the minimum requirements of the Act; (2) Mandating provisional voting; (3) Creating a statewide, central voter registration system; (4) Requiring individuals registering to vote to provide certain information and requiring election officials to verify this information; (5) Requiring certain voters to satisfy an identification requirement before voting; (6) Requiring certain information be posted on Election Day; and (7) Establishing an administrative complaint procedure for handling alleged violations of Title III of the Help America Vote Act.

[8] The most recent South Dakota state plan is from 2010, according to Defendant Gant's website. It is the fifth revised version of the state plan. The most recent revision was necessary after passage of the Military and Overseas Voter Empowerment Act of 2009 (P.L. 111-84, 123 Stat. 2190) that required a state to revise the state plan to explain how it would comply with the new

> Counties are required to expend county-held accounts on Title III requirements before requesting state-held funds. ***Counties are reimbursed semi-annually from the state election fund.*** Any Title II amount in the state election fund not reserved for the counties, may be used for Title III requirements or for improving the administration of federal elections. The State may determine to increase the amount of the election fund reserved for individual counties. Emphasis added. **Exhibit 6.**

It is no secret there is a reciprocal relationship between voter turnout and early voting conducted in Shannon County. Early voting dropped to less than 3% or 1604 less votes in 2006 without an early voting location in Shannon County. **Exhibit 7.** Defendants have an obligation to ensure that Shannon County citizens can cast their early vote at a location in their county for the same number of days – and hours [9] – as other citizens of South Dakota. There is no legal reason why the State cannot use HAVA funds to establish early voting sites in Shannon County consistent with those established for every other county in the State of South Dakota. Accordingly, the injury complained of could be redressed by a favorable court decision.

IV. ELEVENTH AMENDMENT IMMUNITY DOES NOT BAR PLAINTIFFS' CLAIMS.

Defendant Gant argues that he is entitled to Eleventh Amendment Immunity on all claims asserted by the Plaintiffs. Defendant Gant's Motion to Dismiss, ¶ 11. Generally speaking, sovereign immunity under the Eleventh Amendment bars actions in federal court against a state and its officers for most forms of relief. Va. Office for Prot. & Advocacy v. Stewart, 131 S.Ct. 1632, 1637-38 (2011); Pennhurst State Sch. & Hosp. v.

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law. The updated plan also includes information about using HAVA funds for additional personnel working on HAVA projects, meeting the requirements of Section 301(a)(4) for alternative language accessibility, and how the state intended to use a requirements payment of $350,000 it received in 2010. *See* Exhibit 6.

[9] *See* Complaint Exhibit 5 where Shannon County residents did not have access to early voting locations for the same number of hours as the vast majority of courthouses in South Dakota on the limited days early voting occurred in Shannon County. *See also* Complaint Exhibit 26

Halderman, 465 U.S. 89, 100-03 (1984). While the Eleventh Amendment entitles states to some immunity, no state or state official acting under the color of state law is immune from suits arising from the Fourteenth Amendment or the Voting Rights Act. Whatever immunity a state may have under the Eleventh Amendment "does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The states and officers are bound by obligations imposed by the Constitution and by federal statutes that comport with constitutional design." Alden v. Maine, 527 U.S. 706, 755, 119 S. Ct. 2240, 2265 (1999). Accordingly, "[t]he Eleventh Amendment and the principle of state sovereignty, which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment." Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

Defendant Gant continues to argue that he is entitled to immunity as a state official. However, since 1908, the Eleventh Amendment has provided no shield for a state official confronted with a claim that their action deprived another of a federally protected right. Ex parte Young, 209 U.S. 123 (1908). Additionally, by passing the Voting Rights act, Congress abrogated any sovereign immunity that may be raised. *See* Tennessee v. Lane, 541 U.S. 509, 509 n. 4 (2004)(explaining that "measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States"); Mixon v. Ohio, 193 F.3d 389, 399 (6th Cir. 1999)(finding "no reason to treat the enforcement provision of the Fifteenth Amendment differently than the identical provision of the Fourteenth Amendment" and thus assuming "jurisdiction over Plaintiffs' claim under the Voting Rights Act"); Reaves v. United States Dep't of Justice, 355 F.Supp.2d 510, 515-516 (D.D.C. 2005)(explaining that the Supreme Court has repeatedly upheld the application

of the Voting Rights Act against the States "as a valid exercise of Congress's power to enforce the guarantees of the Fifteenth Amendment against infringement by the states"). *See also* Dillard v. Baldwin County Comm'rs, 225 F.3d 1271 (11th Cir. 2000); Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001); City of Boerne v. Flores, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); S.C. v. Katzenbach, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966); U.S. v. Mississippi, 380 U.S. 128, 140, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965). According to the foregoing legal precedent, the Defendants are not entitled to the protection of the Eleventh Amendment from a suit seeking declaratory and injunctive relief brought under the Voting Rights Act.

V. PLAINTIFFS HAVE STATED A CLAIM UNDER 42 U.S.C. § 1983.

Defendant Gant argues that he has "no authority to establish early voting places in Shannon County nor may he conduct absentee voting in Shannon County." Defendant Gant's Motion to Dismiss, ¶ 15. And as such, he did not act under the color of state law and therefore did not cause the alleged injury claimed by the Plaintiffs. Id. Contrary to Defendant Gant's baseless assertions, he is ultimately responsible for the actions subject of Plaintiffs' complaint. There can be no doubt that the state has a compelling interest in maintaining fair elections. Burson v. Freeman, 504 U.S. 191 (1992). Defendants who hold public office owe the public a fiduciary duty to render honest services, including, when applicable, maintaining fair elections.

Plaintiffs' claims against Defendant Gant and the other party Defendants rest within their claims for violations of the United States Constitution as secured under 42 U.S.C. § 1983. The purpose of Section 1983 is to interpose the federal courts between

the States and the people, as guardians of the people's federal rights and to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." Mitchum v. Foster, 407 U.S. 225, 242 (1972). In order to find liability under section 1983 for violations of Plaintiffs' constitutional rights, federal courts generally require some sort of direct involvement, whether through encouragement, participation, or at the very least knowing acquiescence. Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984). Liability under section 1983 can be premised on explicit causation, deliberate indifference to the violation of Plaintiffs' constitutional rights, or personal abandonment of duties so as to cause the deprivation of the Plaintiffs' constitutional rights. Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978).

The Plaintiffs have alleged sufficient facts and provided supporting evidence to demonstrate that Defendant Gant either explicitly caused, encouraged, participated, or knowingly acquiesced in the violation of Plaintiffs' constitutional rights; at a minimum, he and others failed, and continue to fail, to adopt an appropriate state plan for HAVA funds to address the needs of the poorer counties in the State of South Dakota. Defendant Gant abandoned the duties of his position as Secretary of State and as Chairman of the Elections Board. He personally had a job to do, and he failed to do so. As such, Defendant Gant is subject to suit under section 1983.

VI. THE DATAPHASE FACTORS WEIGH IN FAVOR OF THE PLAINTIFFS.

Whether an injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability

that movant will succeed on the merits; and (4) the public interest. Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981). In applying the Dataphase factors, the court is not to apply a "wooden" or "mathematical" standard, but rather to "flexibly weigh the case's particular circumstances to determine whether the balance of the equities so favors the movant that justice requires [intervention] to preserve the status quo until the merits are determined." United Indus. Corp. v. Clorox Co., 140 F.3d 1175, 1179 (8th Cir. 1998).

A. Native Americans in Shannon County Would Suffer Irreparable Harm.

Irreparable injury is suffered when monetary damages cannot adequately compensate an injured party or where monetary damages cannot be calculated to a reasonable degree of certainty. *See* Hinz v. Neuroscience, Inc., 538 F.3d 979, 986 (8th Cir. 2008). Money simply cannot compensate a person for being deprived of their constitutional right to vote.

According to 2010 Census, approximately 96 % of the citizens in Shannon County are Indian. If they are forced to travel to Hot Springs, South Dakota to cast their early vote, they will suffer irreparable harm, because many of the residents will be unable to afford the time or the money to make such a trip. Most of the Pine Ridge Reservation's 3,800 miles of formal roads and 1,900 miles of informal roads are located in Shannon County. **Exhibit 8.** In 2008, there were 283 accidents, 6 deaths and 63 serious injuries on the Pine Ridge Reservation. Id. In 2009, there were 301 accidents, 13 deaths and 68 serious injuries. Id. In 2010, there were 315 accidents, 6 deaths and 75 serious injuries. Id.

Not only are the roads more dangerous in Shannon County, the drive is further for Shannon County residents to early vote in Hot Springs than any other county despite the large number of Shannon County residents living in poverty. **Exhibits 9 and 10.** 48 of 66 - or 77% - of the county seats in South Dakota where the courthouse is located is also the largest town in the county. **Exhibit 11.** The second largest community in Shannon County – Porcupine - is significantly further from the courthouse than the second largest city in other South Dakota counties. **Exhibit 12.** Voter turnout percentages are considerably lower for Shannon County residents than the rest of South Daktoa. **Exhibit 13.** Meade County is the second county in the state in which one of its cities is located a greater distance from its courthouse. **Exhibit 14.** However, residents in the 12 largest cities in Shannon County travel an average of 83.13 miles to the courthouse where residents in the 9 largest cities in Meade County average a mere 39.1 miles. Id. In other words, there is not a close second to the driving distances required for Shannon County residents to cast their vote in person at a courthouse.[10]

Defendants argue that the Plaintiffs have been unable to demonstrate they will be injured if the Court refuses to grant the requested relief. This simply is not the case. Plaintiff Two Eagle resides in Porcupine, South Dakota, where she cannot reach her residence without four wheel drive when the weather is bad. **Exhibit 27**. She is a single mother of three (3) children and is the sole provider for her 93 year old mother who is an amputee. Id. Plaintiff Two Eagle works full-time for the Oglala Sioux Tribe. Id. Because she does not own an automobile, she shares rides to and from work. Id. In order to cast a vote in Fall River County, she would have to take at least a half day off from

[10] It is no secret that the vast majority of Shannon County voters have supported Democrat candidates and Defendant Gant supports Republican candidates stated in his "Committee to Victory PAC." **Exhibit 15.**

work and arrange for a ride to drive her to Hot Springs which would consume anywhere from 1 hour 41 minutes to 2 hours 29 minutes. Plaintiff Clarice Mesteth also resides in Porcupine, South Dakota. **Exhibit 28**. She also must have a four wheel drive to reach her residence when the weather is bad. Id. She is a single mother and sole provider for seven (7) children. Id. Plaintiff Mesteth owns one vehicle that currently has approximately 199,000 miles on it. Id. Currently, she works full-time for the Oglala Sioux Tribe and would have to take time off from work to vote in Fall River County. Id. Plaintiff Edmond Mesteth resides in Porcupine, South Dakota on an unpaved road that is reachable only by four wheel drive in bad weather. **Exhibit 29.** He works for the Oglala Sioux Tribe on a part-time basis and shares custody of his daughter. Id. Plaintiff Stacy Two Lance resides in Porcupine, South Dakota, on an unpaved road. She works full-time for the Oglala Sioux Tribe. **Exhibit 30**. Plaintiff Two Lance has an eleven (11) year old daughter who struggles with epileptic seizures. Her daughter's special needs limit the realm of responsible sitters. Id. To vote on election date, Plaintiff Two Lance would have to take at least a half day off from work and arrange for a sitter. Id. Finally, Plaintiff Dawn Black Bull resides in Porcupine, South Dakota. **Exhibit 31**. She has legal and physical custody of five (5) children and works full-time for the Oglala Sioux Tribe. Id. Accordingly, she would have to take at least a half day off from work and arrange for a sitter to cast a vote in Fall River County.

Clearly, the remoteness of the one established early voting site, i.e., Fall River County, will cause irreparable injury to all Shannon County Indians as well as the individual Plaintiffs. There will be no adequate remedy at law for the irreparable harm

the members of the Tribe and the Plaintiffs will suffer by the Defendants' actions, unless the relief requested by the Plaintiffs is granted.

B. The Balance of Hardships Favors Granting the Injunction.

Defendant overdramatizes the State's public interest by asserting his view that an injunction would "be declaring the statutory framework imposing election duties on the counties unconstitutional" and the "Court would have to implicitly overrule the South Dakota Supreme Court's constitutional analysis holding that county election expenses are not expenses of the state or find that the South Dakota constitutional are unconstitutional under federal law." ¶ 23. This statement could not be further from the truth. In fact, no laws at all would have to be changed. Typically speaking, county election expenses are not expenses of the State. However, when a state applies for and accepts federal funds to assist in "Helping America to Vote", this general rule must fail.

Indians make up just over nine percent of South Dakota's population and nearly seven percent of its voting-age population. Indians in South Dakota have suffered a long history of disenfranchisement. For example, the Citizenship Act was passed in 1924, and yet, South Dakota continued to deny Indians the right to vote and hold office until the 1940's. Buckhanaga v. Sisseton Indian School Dist., 804 F.2d 469, 474 (8th Cir. 1986). Even after repeal of a state law denying the right to vote, the State of South Dakota – as late as 1975 – prohibited Indians from voting in elections in unorganized counties which included Shannon County. Little Thunder v. South Dakota, 518 F.2d 1253, 1255-57 (8th Cir. 1975). The state also prohibited residents of the unorganized counties from holding office until as recently as 1980. United States v. South Dakota, 636 F.2d 241, 244-45 (8th Cir. 1975).

South Dakota's discriminatory practices did not go unnoticed. Section 5 of the Voting Rights Act, which requires "covered" jurisdictions – defined as those that used a test or device for voting and in which voter participation was depressed – to preclear any changes in their voting practices or procedures and prove that they do not have a discriminatory purpose or effect. 42 U.S.C. § 1973c. The purpose of this requirement was "to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims." South Carolina v. Katzenbach, 383 U.S. 301, 328 (1965). South Dakota has two counties subject to Section 5 - one of which is Shannon County.

The enactment of the Voting Rights Act was openly welcomed by most states. The State of South Dakota was the exception. They openly refused to comply with the strictures of Section 5. In fact, the governor expressly informed the Secretary of State not to comply. 77 S.D.Op. Att'y Gen. 175 (1977). From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations effecting elections in Shannon and Todd Counties but submitted fewer than ten for preclearance. Limiting Shannon County voters to six (6) days of early voting is just another avenue for Defendants to disenfranchise the Indian voters in Shannon County. There is no substitute for the right to vote. If members of the Tribe are effectively and continually denied their right to vote, they will suffer irreversible hardship.

In the alternative, the Defendants will not suffer any significant hardship if the voting stations were established. Indeed, the Defendants have several options available to them that would create no hardship as explained more fully in Section VII herein.

Defendants would like to draw attention to the argument proffered by the Defendant Counties that "[i]n addition to internet access, Shannon County would need electronic poll books that it currently does not have and are expensive to purchase." Defendants' Brief in Opposition to Motion for Preliminary Injunction, ¶ 5. Their concerns are unfounded. For example, to obtain access to the internet, they could contact xfinity or CenturyLink. **Exhibit 16.** Further, Defendants could contact the ATT retail store on 1000 8th Street (Main Street next to Pizza Hut in Pine Ridge) at 605 867-1659 where any internet concerns can be addressed. Finally, Defendants could contact the Oglala Sioux Tribe regarding a suitable location with internet services. Indeed, the Tribe currently has internet services and has previously offered space for early voting. District Centers – where Tribal elections are conducted - for Eagle Nest, LaCreek, Medicine Root, Oglala, Pass Creek, Porcupine, Wakpamni and Wounded Knee all have internet services. Finally, the Oglala Lakota College centers located throughout Shannon County have internet services.

The suggestion that election poll books are necessary is a red herring. Minnehaha County – the most populated county in South Dakota – is not using electronic poll books this election cycle. Defendants Shannon and Fall River Counties are suggesting a requirement for early voting in Shannon contained in pending bill SB 58 – poll books - that has not been approved by the South Dakota legislature at the time they filed their brief. **Exhibit 17.**

In any event, the purported expense or administrative inconvenience is outweighed by the loss of the equal right to vote that will be suffered by the Plaintiffs. *See* Taylor v. Louisiana, 419 U.S. 522, 535 (1975)("administrative convenience" cannot

justify a state practice that impinges upon a fundamental right). Given the abundant evidence of discrimination, the Defendants cannot seriously argue that their interests would in any way be harmed by the issuance of injunctive relief. Clearly, the balance of hardship favors the Plaintiffs.

C. The Plaintiffs Will Succeed on the Merits.

The Plaintiffs are "not required to prove a mathematical (greater than fifty percent) probability of success on the merits," but rather that "with formal procedures and complete evidence, [the Plaintiffs have] a fair chance of prevailing." Heartland Academy Community Church v. Waddle, 335 F.3d 684, 690 (8th Cir. 2003). "[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove [its] case in full at a preliminary injunction hearing…." Id. (*citing* Univ. of Tex. V. Camenisch, 451 U.S. 390 (1981)).

Section 2 of the Voting Rights Act prohibits any political subdivision from enacting or employing "any standard, practice, or procedure . . . 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." 42 U.S.C. §1973(a). It is violated when it is shown that "political processes leading to nomination or election in the State of political subdivision are not equally open to participation by members" of a protected class, 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." Id. §1973(b).

Congress amended the Voting Rights Act in 1982 to clarify that plaintiffs seeking relief under Section 2 need only show that a policy or practice has a discriminatory result;

they need not prove improper or discriminatory intent. 42 U.S.C. § 1973(b); Thornburg v. Gingles, 478 U.S. 30, 43 (1986). "The new Section 2 enacts a standard which focuses on the results and consequences of challenged electoral practices rather than the motivation behind them." United States v. Marengo County Comm., 731 F.2d 1546, 1550 n.1 (11th Cir. 1986). Contrary to the Defendant Counties' argument that some statute or contract must be violated, the Voting Rights Act clearly states that what is important is whether a "policy or practice has a discriminatory result." Here, the practice of allowing early voting sites in every county with the exception of Shannon County has resulted in a discriminatory result.

Congress specified that among the "typical factors" relevant to determining a violation of Section 2 is as follows:

> Any history of official discrimination in the state or political subdivision that touched the right of the minority group to register, to vote, or otherwise to participate in the political process…the extent to which the state or political subdivision has used . . . voting practices or procedures that may enhance the opportunity for discrimination against the minority group . . .bear the effects of discrimination in such areas as education, employment, health, which hinder their ability to participate effectively in the political process [and]. . .the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure.

S.Rep.No. 97-417, at 28-29, reprinted in 1982 U.S.C.C.A.N. 177, 206-207.

The United States Supreme Court has made it crystal clear that the "location and accessibility of a polling place have a direct effect on a person's ability to exercise his franchise." Perkins v. Matthews, 400 U.S. 379, 387 (1971). "The Court specifically held that the use of polling places at locations remove from black communities, or at places calculated to intimidate blacks from entering (when alternatives were available), was a practice or procedure which violated [42 U.S.C. § 1973]." Id. The Court explained:

> Even without going beyond the plain words of the statute, we think it clear that the location of polling places constitutes a 'standard, practice, or procedure with respect to voting.' The abstract right to vote means little unless the right becomes a reality at the polling places on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his [or her] franchise. Given [1973's] explicit concern with both the purpose and the effect of a voting 'standard, practice, or procedure,' the location of polling places comes within the section's coverage. Id. at 387.

In particular, polling places remote from communities of a protected class can have the effect of abridging the right to vote in violation of the Voting Rights Act. Perkins, 400 U.S. at 387.

In Brown v. Dean, 555 F.Supp.502 (D.R.I. 1982), the Court decided on a similar action for relief against use of a polling place established by the board. The Court held that the plaintiff sustained her burden of establishing probability of success on the merits of her allegations that the location of the polling place might well abridge black registered voters' free exercise of their right to vote. Id. In the decision, the court stated that the issue was "[w]hether or not the location of the polling place is an insult to the black community and may have the effect of inhibiting their voting." The Court held that proof of actual inhibition is irrelevant, and based thereon, the polling place was ordered to be changed. Id. at 506.

In United States v. McKinley County, 1986 No. 86-0029C, the District Court for the District of New Mexico entered a Consent Decree that provided, in addition to other relief, that the county reconfigure polling locations and increase the polling places from 19 to 25 after rural Indians challenged the number and location of the polling places, which would have required rural Indians to travel greater distances to vote. The very same traveling demands are made of the Plaintiffs in this case.

In Black Bull v. Dupree School District, No.86-3012 the United States District Court for the State of South Dakota found that the county's failure to provide sufficient polling places on the reservation to violate Section 2 of the Voting Rights Act, the First Amendment, the Fourteenth Amendment, and the 15th Amendment to the Constitution. Because of the scarcity of polling locations, Indian citizens had to travel many miles to vote in the school district elections at polls that were generally convenient for white voters. A settlement was reached wherein the District agreed to establish more polling places.

Despite the foregoing legal precedent, Defendant Counties rely upon the decision in Jacksonville Coalition for Voter Protection v. Hood, 351 Supp.2d 1326 (2004) to support their position that Plaintiffs are unlikely to succeed on the merits of their claims. However, that case is readily distinguishable from the instant action. In the Jacksonville case, the Defendants opened upon four additional polling sites – three of which were located in predominantly black communities. In the instant case, Shannon County is being offered one site for six (6) days. The Jacksonville plaintiffs argued that the citizens in outlying areas would have to travel further than those within the City. The Court found that those individuals were predominantly "non-minority registered voters." Id. at 1334. Accordingly, the relief sought by the minority plaintiffs would not have assisted the minority group but those individuals who were non-minority residents. Further, the Court found it infeasible to open additional early voting sites because the election was to be held within days of the hearing. The election in the present case is still months away.

As illustrated herein, the case at hand is even more egregious that all of the above-cited cases, because the County is forcing the Plaintiffs to either participate in the

electoral process via the United States postal service – a method the Plaintiffs mistrust - or travel many miles when many lack the financial resources to purchase gas or a reliable means of transportation. Further, post offices at Wounded Knee and Manderson have been closed. **Exhibit 18.** The Defendants' only justification for its decision is the cost which the Secretary of State could alleviate by distributing federal HAVA funds to the County.

Defendants contend that Plaintiffs have not demonstrated that Shannon County Indian voters have been unable to elect candidates of their choice. Defendant Counties Brief, ¶ 14. However, in their complaint, Plaintiffs alleged that the lack of early voting limits their ability to elect representatives of their choice:

> 114. Defendants' failure to establish early voting polling places within Shannon County for a full six (6) week period has resulted in Indians, including the Plaintiffs, having less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice, in violation of Section 2 of the Voting Rights Act.

Compl. at 25.

In Boneshirt v. Hazeltine, 461 F.3d 1022 (8th Cir. 2011), the Eighth Circuit Court of Appeals upheld a finding of "an intolerable level of racial polarization in Shannon County. The court noted the following:

> 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. United States v. South Dakota, 636 F.2d 241, 244-45 (8th Cir. 1980). 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. See Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1211-12 (5th Cir.1989). 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. Harvell v. Blytheville School Dist. No. 5, 71 F.3d 1382, 1390 (8th Cir. 1995).

Bone Shirt, 461 F.3d at 1022. Accordingly, it has already been shown that Indian voters in Shannon County have less opportunity to elect candidates of their choice.

Regardless of the intent or goals of the Defendants, the infringement and hindrance of the ability of the Plaintiffs and other similarly situated members of the Oglala Sioux Tribe to vote cannot stand; it violates the United States Constitution and the Voting Rights Act.

D. The Public Interest Factors Weighs in Favor of the Plaintiffs.

Defendant Gant argues that "the Plaintiffs request for relief requests this Court ignore certain substantive state statutory and constitutional provisions in order to hold Gant responsible for establishing early voting locations, absentee voting and paying for county expenses with state funds." Defendant Gant's Motion to Dismiss, ¶ 24. As the preceding analysis illustrates, Defendant Gant is incorrect – no laws would be declared invalid. Further, the right to vote occupies a pre-eminent position in the United States Constitution. "Voting is of the most fundamental significance under our constitutional structure." Reynolds v. Sims, 377 U.S. 533, 554 (1964); Harman v. Forssenius, 380 U.S. 528, 537 (1965); Elrod v. Burns, 427 U.S. 347, 373 (1976). In a democracy, the right to vote is both the wellspring and the protector of all other rights: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964). "In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal

basis with other citizens in the jurisdiction." Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

Based upon the foregoing, there can be no doubt that the public has a broad interest in the integrity of elections and seeing election practices applied in a non-discriminatory manner. Subjecting the Plaintiffs and other Shannon County voters to the Defendants' continuing unconstitutional and discriminatory electoral practices would be adverse to the public interest.

VII. THE COURT, AND NOT SHANNON COUNTY, SHOULD FASHION A REMEDY.

Defendant Counties argue that the Court should stay the instant action to allow them time to fashion a remedy. However, it is the district court's responsibility to develop a constitutional remedy when it finds a violation of § 2 of the Voting Rights Act. 42 U.S.C.A. § 1973. Furthermore, the Counties have several alternatives available at their disposal, and yet, they have consistently failed to protect the voting rights of their minority constituents. First, Defendant Gant could fund the additional early voting sites with HAVA funds. Second, earmarking $10,000.00 annually would pay for early voting in Shannon County. According to Defendant Gant's website, early voting begins on April 20, 2012 for the primary election and September 21, 2012 for the general election. **Exhibit 19.** The current contract between Fall River and Shannon County requires early voting services be requested no later than January 20, 2012.[11] *See* Exhibit 1A. The costs for conducting early voting at a single location for an entire election cycle in Shannon County comparable to other counties is less than $22,000.00 or less than $11,000.00 every two years. **Exhibit 20.**

[11] Accordingly, Shannon County must request early voting 90 days before early voting begins in the rest of South Dakota on April 20, 2012 or no later than January 20, 2012. Id.

The Shannon County voters cannot hold their breath until Shannon and Fall River Counties work out early voting locations.[12] Defendant Shannon County has an annual budget of approximately $403,789 according to Defendant's brief. Hence, spending less than $22,000.00 to conduct early voting in Shannon County every two years is approximately 2.5% of Defendant Shannon County's budget – not including any HAVA funds. Clearly, Shannon County could set aside $11,000.00 per year to allow each resident their constitutional right to cast a vote.

Third, pursuant to Sections 4 and 5 of the counties' agreement, Shannon County pays the Auditor $14,200.00 and the Clerk $20,000.00 annually. Id. $7,604.00 is set aside for auditor expenses. Id. Accordingly, Shannon County is doling out a total of $41,804.00 to fund the auditor's office. Interestingly, this amount is more than what Shannon County paid for such services in 2011, i.e., approximately $31,000.00 annually, but was comparable to what was paid to Fall River County for the same services in 2010 – approximately $40,330.00 annually. **Exhibits 23 and 24.**

It is unclear why Shannon County is paying $41,804.00 to the Fall River County Auditor's office. This amount surely was not intended to cover the costs associated with early voting as Section 11 of the Agreement provides as follows:

> If Shannon shall approve early voting at a satellite office in Shannon County, South Dakota, then Shannon shall bear all expenses associated with operating and maintaining a satellite office for early voting. At the end of each month, Shannon shall reimburse Fall River for any wages, overtime, benefits, meals, mileage or other expenses necessarily incurred for the staffing of a satellite office. Shannon's approval of a satellite office and for early voting shall be at least (3) months prior to start of early voting. Id.

[12] The September 3, 2010 Shannon County minutes state that Defendant Sword presented a "30-Day Notice of Intent to terminate his contract and other Officials with Shannon County, which was drawn up and signed during the break, so this could be taken into consideration for any future actions taken by the Board." **Exhibit 21.** *See also* Affidavit of Oliver J. Semans. **Exhibit 22.**

It is estimated that the costs of an early voting location in Shannon County for 46 days would cost less than $22,000.00. *See* Exhibit 20. There is no reason as to why a portion of the $41,804.00 received by the Fall River County Auditor could not be used to establish an early voting site in Shannon County. There is no reason Defendant Gant cannot promulgate rules for early voting in Shannon County consistent with his proposals of ARSD 5:02:10:01 or 5:02:03:01 regarding early voting on November 29, 2011. **Exhibit 25.**

Shannon County has stated that lack of financial resources is the catalyst behind their refusal to grant its Indian residents their voting rights. According to the 2010 Census, there are 13,586 residents of Shannon County – 96% of which are Indian. No other county in the State of South Dakota has a higher percentage of Indian residents. Based upon the high percentage of Indian residents, Defendant Shannon County argues that its limited tax base restrains its ability to set aside funds for voting purposes. At this juncture, the unique circumstances of Shannon County must be placed into perspective.

Shannon County lies entirely within the boundaries of the Pine Ridge Indian Reservation. The vast majority of the land within Shannon County consists of trust land, and therefore, is not taxable by local government. **Exhibits 26.** However, one must also remember that the Oglala Sioux Tribe is responsible for the provision of services to all parcels of trust land in Shannon County.[13] In fact, the Tribe has an estimated budget of

[13]The Tribe has established the following departments/programs to provide such services: (1) Ambulance Service; (2) Attorney's Office; (3) Tribal Court; (4) Burial Assistance program; (5) Community Health; (6) Child Care and Development; (7) Commodity Food Distribution Program; (8) Community Action programs; (9) Conservation district; (10) department of education and planning; (11) elderly phone program; (12) emergency youth shelter; (13) employee assistance program; (14) environmental protection program; (15) grant program; (16) heard start; (17) healthy start; (18) home improvement program; (19) higher education; (20)

$95 million of which $65 million comes from federal grants. Further, the BIA Pine Ridge Office reports its budget to support fire control and social services at $3.3 million. Indeed, Shannon County receives federal grants due to its high number of Indian residents. For example, in 2001 Shannon County received a reported $169.5 million from the federal government. (FedStates, 2003). Accordingly, Shannon County cannot use the excuse of its limited tax base to justify its usurpation of voting rights, because the Tribe and the federal government assist in providing services that would otherwise have to be paid by the County.

Simply stated, Shannon County underestimates the money it has at its disposal. For example, on September 29, 2011, the County reported assets in the amount of $334,856.32 and liabilities in the amount of $205,150.52. *See* Exhibit 3. $30,000 of those liabilities were set aside for hospital claims. The fund balance percentage was 16.90%. Id. On November 4, 2011, the Board voted to remove the $30,000 set aside for hospital claims and move it to General Fund balance for operating cash. Id. There was no reason this money could not have been utilized to fund an early voting site in Shannon County.

CONCLUSION

For the foregoing reasons, Defendant Gant's Motion to Dismiss should be denied and Plaintiffs' request for injunctive and declaratory relief be granted.

February 21, 2012 STEVEN D. SANDVEN, Law Office PC

By:

JOBS program; (21) parks and recreation; (22) pesticide enforcement; and (23) rural water supply system.

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CERTIFICATE OF SERVICE

I, Steven D. Sandven, certify that on the 21st day of February, 2012, I filed the foregoing PLAINTIFFS' REPLY BRIEF with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record, Richard Williams, 1302 E. Hwy 14, Suite 1, Pierre SD 57501 and Sara Frankenstein, P.O. Box 8045, Rapid City SD 57709.

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