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

MARK WANDERING MEDICINE, HUGH CLUB FOOT, LENARD ELK SHOULDER, CHARLES BEAR COMES OUT, WINFIELD RUSSELL, JAMES DAY CHILD, WOODROW BRIEN, SARAH STRAY CALF, MARTY OTHER BULL, NEWLYN LITTLE OWL, DONOVAN ARCHAMBAULT, ED MOORE, PATTY QUISNO, MICHAEL D. FOX, and PHYLLIS POND CULBERTSON, Plaintiffs, v. LINDA MCCULLOCH, in her official capacity as Montana Secretary of State, GERALDINE CUSTER, in her official capacity of Rosebud County Clerk and Recorder, Rosebud County, ROBERT E. LEE, DOUGLAS D. MARTENS, and DANIEL M. SIOUX, in their official capacity as members of the County Board of Commissioners for Rosebud County, Montana, SANDRA L. BOARDMAN, in her official capacity of Blaine County	Case No.: CV 12-135-RFC **COUNTY DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Clerk and Recorder, Blaine County, CHARLIE KULBECK, M. DELORES PLUMMAGE and FRANK DEPRIEST, in their official capacity as members of the County Board of Commissioners for Blaine County, Montana, DULCIE BEAR DON'T WALK, in her official capacity of Big Horn County Election Administrator, Big Horn County, SIDNEY FITZPATRICK, JR., CHAD FENNER, and JOHN PRETTY ON TOP, in their official capacity as members of the County Board of Commissioners for Big Horn County, Montana, and KIMBERLY YARLOTT, in her official capacity of Big Horn County Clerk and Recorder, Big Horn County,

Defendants.

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11. *Who is Early Voting – An Individual Level Examination* article by Grant W. Neeley and Lilliard E. Richardson, Jr., published by The Social Science Journal, Vol. 38 (2001) pp. 381-392

12. *Early Voting and Turnout*, article by Paul Gronke, Eva Galanes-Rosenbaum and Peter A. Miller, published by American Political Science Association, Vol. 40, No. 4 (Oct. 2007) pp. 639-645

13. 2010 Census: Montana Profile, Population Density by Census Tract, U.S. Census Bureau, http://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Montana.pdf (red dots added to reflect the three Defendant County's county seat).

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COUNTY DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

COME NOW Defendants Geraldine Custer, in her official capacity of Rosebud County Clerk and Recorder, Rosebud County; Robert E. Lee, Douglas D. Martens, and Daniel M. Sioux, in their official capacity as members of the County Board of Commissioners for Rosebud County, Montana; Sandra L. Boardman, in her official capacity of Blaine County Clerk and Recorder, Blaine County; Charlie Kulbeck, M. Delores Plummage and Frank Depriest, in their official capacity as members of the County Board of Commissioners for Blaine County, Montana; Dulce Bear Don't Walk, in her official capacity of Big Horn County Election Administrator, Big Horn County; Sidney Fitzpatrick, Jr., Chad Fenner, John Pretty On Top, in their official capacity as members of the County Board of Commissioners for Big Horn County, Montana; and Kimberly Yarlott, in her official capacity of Big Horn County Clerk and Recorder, Big Horn County ("County Defendants") by and through Lance Pederson, Donald A. Ranstrom, and Michael B. Hayworth, their attorneys, and respectfully submit their Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction.

BACKGROUND

Plaintiffs erroneously use the term "early voting" to mean absentee voting, although the political science literature and experts in the field refer to "early voting" as "convenience voting." Ex. 11-12. Montana law allows "absentee

voting," both in-person and by mail. MCA § 13-13-201. A registered voter may request an absentee ballot by mail (§ 13-13-213), cast an absentee ballot (§ 13-13-201), and apply for an absentee ballot in-person from the election administrator up to noon on the day before the election. § 13-13-211. An absentee ballot may be delivered through a third person under certain circumstances. §§ 13-13-212, -214. A registered voter can also absentee vote by appearing in person at the office of the election administrator and applying for, receiving and marking the ballot. § 13-13-222. A resident may also set up a permanent absentee ballot request, so that he does not need to make a request for each election. § 13-13-212. State law only allows an absentee ballot to be mailed or delivered to the election office or a polling place within the elector's county. § 13-13-201.

Montana law does not require that absentee voting occur anywhere other than at the county courthouse. In-person absentee voting may only be accomplished "by appearing in person *at the office of the election administrator* . . ." § 13-13-222 (emphasis added). "Election administrator" means the county clerk and recorder or the individual so designated by the county, and "[a]ll county officers . . . must keep their offices at the county seat." §§ 13-1-101(9) and 7-4-2111. Plaintiffs have not alleged that any Montana statute has been violated, nor can they.

In addition to all of these methods of absentee voting, each Plaintiff can also vote on Election Day at their local precinct polling place, which include polling places at the precise locations Plaintiffs sue for absentee voting sites – Lame Deer, Crow Agency, and Ft. Belknap. Plaintiffs' claims cannot be construed as one of vote "denial" but rather voting convenience.

While citing no evidence, Plaintiffs allege that other counties offer in-person absentee voting at satellite offices, whereas Defendant Counties do not. This assertion is untrue. Exhibits 1-4. No Montana County offers absentee voting or late registration services anywhere other than at each county's courthouse. Id.

STANDARD

When determining whether to grant a motion for a preliminary injunction, Plaintiffs must establish each of the four factors laid out in Winter v. Natural Resources Defense Council., 129 S.Ct. 365, 374 (2008). Those factors are as follows:

1. The likelihood of the movant's success on the merits;
2. That movant is likely to suffer irreparable harm in the absence of the preliminary relief;
3. The balance between that harm and the harm that the relief would cause to the other litigants tips in movant's favor; and
4. The preliminary injunction is in the public's interest.

"A preliminary injunction is an extraordinary remedy never awarded as of right." Id. at 376. Plaintiffs must establish that irreparable harm is likely, not just possible. Id. Injunctive relief should only be granted in limited circumstances, and "[t]his is especially so when the moving party seeks a *preliminary* injunction, which is brought before the parties have had the chance to fully develop the facts through discovery." NAACP v. Cortes, 591 F.Supp.2d 757, 763 (E.D. Penn. 2008) (emphasis in original).. "Since an injunction is regarded as an extraordinary remedy, it is not granted routinely; indeed, the court usually will refuse to exercise its equity jurisdiction unless the right to relief is clear." Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2942 (1995).

ARGUMENT & AUTHORITIES

I. Plaintiffs' Have Failed to Establish Standing Required for Article III Jurisdiction

Plaintiffs lack Article III standing. All Defendants have moved to dismiss based upon lack of standing. (Doc. 36.) Without each Plaintiff individually demonstrating standing, the Court does not have jurisdiction to consider this matter. U.S. v. Hays, 515 U.S. 737, 743-44 (1995).

II. Factors in Consideration of Plaintiffs' Motion for Preliminary Injunction

"[A] plaintiff . . . has the burden of showing that equitable relief is necessary, and the mere possibility of future injury is insufficient to enjoin official

conduct." Olagues v. Russoniello, 770 F.2d 791, 799 (9th Cir.1985)(*citing* U.S. v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). "[t]he Supreme Court's admonition that any injunction regarding government functions is generally only permitted in 'extraordinary circumstances,' as officials should be given the 'widest latitude' possible while performing their official duties." Olagues, 770 F.2d at 799 (internal quotations and citations omitted). Plaintiffs do not meet the four factors required for a preliminary injunction, nor do they demonstrate that satellite offices are "necessary" or that this case exhibits "extraordinary circumstances."

A. The likelihood of the movant's success on the merits.

Plaintiffs must also establish a substantial likelihood of success on the merits before a preliminary injunction is granted. It is not likely that Plaintiffs will succeed on the merits of their claims.

1. Equal Protection Claim

States and their legislatures "prescribe[]" "[t]he Time, Places, and Manner of holding Election for Senators and Representatives." U.S. Const. art. I, Section 4, cl.1. The Constitution gives only Congress, not the courts, authority to alter those state regulations. Id. Consistent with the 10th Amendment, the States have retained the power to regulate elections. Gregory v. Ashcroft, 501 U.S. 452, 461-62 (1991). States have an interest in protecting the integrity, efficiency, and fairness of their ballots and election process. Timmons v. Twin Cities Area New

Party, 520 U.S. 351, 358 (1997). It is the local concerns of the state and counties that the 10th Amendment, as well as the Supreme Court's jurisprudence, protects. *See e.g.* Burdick v. Takushi, 504 U.S. 428, 439-40 (1992); McDonald v. Bd. Of Election Comm'rs, 394 U.S. 802, 803, 807 (1969)(rejecting an equal protection challenge to Illinois' absentee ballot law, which allowed only four categories of citizens to vote by absentee ballot).

"While it is axiomatic that voting is a fundamental right, it is also well established that the state may provide structure to and limitations on the voting process which may impose burdens on voters." NAACP, 591 F.Supp.2d at 764 (*citing* Anderson v. Celebrezze, 460 U.S. 780 (1983)). As the Supreme Court explained in Anderson:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus paper test" that will separate valid from invalid restrictions …. [A Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications with burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden plaintiff's rights. Only after weighing all these factors is the reviewing court in any position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. "Not every burden that a State's election system places on ballot access, voting, and association is unconstitutional." Spencer v.

Blackwell, 347 F. Supp. 2d 528, 534 (S.D. Ohio 2004)(*citing* Anderson, 460 U.S. at 780)). "If an election regulation imposes a 'severe' burden, the State regulation must be narrowly drawn to serve a compelling state interest … If the regulation imposes a lesser burden, however, the State regulation must be justified only by important state regulatory interest." Id.

In order to prove an equal protection claim, plaintiffs must allege and prove that a state actor intentionally deprived them of a constitutional right. Ramratan v. New York City Board of Elections, 2006 WL 2583742 (E.D.N.Y. 2006)(*citing* Shannon v. Jacobowitz, 394 F.3d 90, 95-96 (2d Cir.2005)). Federal courts must allow state courts to determine state election law absent a showing that state actors "intentionally acted to deprive plaintiffs of their constitutional rights." Id. at *4. A plaintiff's Fourteenth Amendment claim must be dismissed if Plaintiffs do not prove intended discrimination on the basis of race. Welch v. McKenzie, 765 F.2d 1311, 1315 (5th Cir.1985). A discriminatory purpose is not presumed; there must be a showing of clear and intentional discrimination. Snowden v. Hughes, 321 U.S. 1, 8 (1944). Mere speculation regarding defendants' alleged discriminatory intent will not suffice. Dill v. Lake Pleasant Central School Dist., 2004 WL 2381528, *4 (N.D.N.Y. 2004).

Plaintiffs must plead discrimination because of race in order to make out a VRA or § 1983 claim. Pettengill v. Putnam County R-1 School District, 472 F.2d

121, 122 (8th Cir. 1973); *citing* Powell v. Power, 436 F.2d 84 (2d Cir. 1970). There is "no Constitutional basis" for overseeing "the administrative details of a local election" unless the denial of voting was for reasons of race. Pettengill, 472 F.2d at 122, 86.

Plaintiffs fail to provide evidence that County Defendants, in determining whether to have a satellite absentee voting office, chose not do so with the intent to discriminate based upon race. All evidence indicates that these decisions were made due to a serious lack of time and resources to comply with such an ill-timed request. Ex. 5-7, Doc. 4-14; 4-18; 4-34; 4-36.

In Denis v. New York City Board of Elections, 1994 WL 613330 (S.D.N.Y.1994), plaintiffs filed a motion for a preliminary injunction regarding voting irregularities in the 68th District of New York City. Id. at *3. The court dismissed the plaintiffs' case, finding they failed to state a cognizable claim under the Equal Protection Clause. Id. The court found that the plaintiffs did not allege that the defendants intentionally turned away minority voters because of their race or national origin. Id. Plaintiffs also did not allege that the mechanical irregularities that they claim effected voting in the 68th District were intended by defendants to suppress the votes of minority voters. "Because an allegation of discriminatory intent is central to any Equal Protection claim, including one challenging denial of the right to vote, plaintiffs have failed to state a cognizable

cause of action under that clause." Id. As in Denis, the Court should deny Plaintiffs' equal protection claim and the state constitutional claim, as they have failed to prove that a lack of a satellite office in the locations Plaintiffs demand is due to intentional racial discrimination.

2. The Voting Rights Act

The burden is on the plaintiff to prove that the challenged practice constitutes a cognizable claim under § 2 of the VRA, and based on the "totality of the circumstances," the challenged practice has resulted in members of a protected class having "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* § 2, and *citing* Thornburg v. Gingles, 478 U.S. 30, 9-80 (1986)).

i. Plaintiffs fail to plead a cognizable claim under the VRA

Plaintiffs cannot succeed on the merits of their VRA allegation. It is difficult to pinpoint Plaintiffs theories, but one theory may be that Native American Plaintiffs of the named counties are treated differently than whites in *other* Montana counties. Such a comparison cannot serve as a basis for a VRA claim under the law.

An analogous case ruled on this exact issue. In Jacksonville Coalition for Voter Protection v. Hood, 351 F.Supp.2d 1326, 1335-36 (M.D. Fla. 2004), the

plaintiffs sued for more early polling places. The Jacksonville Court stated as follows:

> Plaintiff's Emergency Motion for Preliminary Injunction argues that "African Americans in Duval County have less opportunity than other members of the state's electorate to vote in the upcoming election.". . . Their claim is based on the fact that Duval County has the largest percentage of African-American registered voters of any major county in the state, and, yet, other similarly sized counties with smaller African-American registered voter percentages have more early voting sites. Based on this, Plaintiffs argue that African-American voters in Duval County are disproportionately affected and, therefore, that the County's implementation of early voting procedures violates Section 2 of the VRA . . .
>
> Plaintiffs also assert a claim pursuant to . . . § 1983 in that Defendants' actions constitute a violation of their rights under the Fourteenth and Fifteenth Amendments of the United States Constitution. Lastly, Plaintiffs claim that Defendant Hood has a duty to ensure that the state's election laws are applied uniformly throughout the state, and that this duty has been violated by Duval County's having fewer early polling sites than similarly-sized counties.

Id. at 1330.

> A summary of Plaintiffs' argument is necessary at this point. Duval County has the largest percentage of African-American registered voters of Florida's most densely populated counties. Yet, Duval County only has five early polling sites, while similarly-sized counties with smaller percentages of African-American registered voters have more early voting sites…..The Court understands Plaintiffs to argue that because the percentage of African-American registered voters is higher in Duval County than other counties in Florida, any decision to have a smaller number of early voting sites in Duval County regardless of their placement will have a disproportionate impact on African-American registered voters and results in a Section 2 violation.

Id. at 1334. In determining Plaintiffs' argument regarding access to early voting locations, the Jacksonville Court stated as follows:

> While it may be true that having to drive to an early voting site and having to wait in line may cause people to be inconvenienced, inconvenience does not result in a denial of "meaningful access to the political process." Nor does the Court have the authority to order the opening of additional sites based merely on the convenience of voters.

Id. at 1335 (internal citations omitted).

> The Court also notes that an acceptance of Plaintiffs' argument that a Section 2 violation occurs merely because some counties have more early polling sites would have far-reaching implications. Consider the fact that many states do not engage in any form of early voting. Following Plaintiffs' theory to its next logical step, it would seem that if a state with a higher percentage of registered African-American voters than Florida did not implement an early voting program a Section 2 violation would occur because African-American voters in that state would have less of an opportunity to vote than voters in Florida. It would also follow that a Section 2 violation could occur in Florida if a state with a lower percentage of African-American voters employed an early voting system, as commented on above, that lasts three weeks instead of the two week system currently used in Florida. This simply cannot be the standard for establishing a Section 2 violation.

Jacksonville, 351 F.Supp.2d at 1335-36.

> While additional early voting sites for all voters, regardless of whom they might vote for, is a laudable goal, such a decision is not one for a federal court to order under the present circumstances. Instead, the power to do so under the Constitution and federal and state election laws under the facts in this case is left to the executive and legislative branches of both governments. Accordingly, because the remedy sought has no correlation to a race-based "meaningful access" case or to a race-based discrimination case, the Motion for Preliminary Injunction . . . is DENIED.

Id. at 1337-38.

A ruling in Plaintiffs' favor would open the floodgates to voting rights litigation. Any county with a higher minority population than another county, but with fewer satellite office locations (or even satellite office days or hours), would be liable under the VRA. Any county with a higher minority population than another county, but with a farther drive for voters to the county courthouse, would be liable under the VRA. Any city with a higher minority population than another city, but a longer wait to absentee vote, would liable under the VRA. Any school district with no absentee voting location, as opposed to another school district in the state or nation with an absentee voting location and fewer minorities, would be liable under the VRA. Any state that does not allow no-excuse absentee voting, compared to another state that does and has fewer minorities, would be liable under the VRA. A favorable ruling for the Plaintiffs in this case would defy all previous VRA decisions on this issue, and pave the way for every political jurisdiction to be liable due to comparisons with any other political jurisdiction. As the Jacksonville Court determined, Plaintiffs' proposed standard has such far-reaching implications that it "simply cannot be the standard for establishing a Section 2 violation." Id. at 1335-36.

One such example includes the city of Pryor in Big Horn County. Pryor has 618 residents, 410 of voting age, and 86.7% of the Pryor population is American

Indian. Ex. 14. A round trip from Pryor to Hardin, Big Horn's county seat, is 123 miles. A round trip from Pryor to the proposed satellite location of Crow Agency is 137.2 miles. While Pryor is a majority-Indian town, the residents of Pryor have the same issues as Plaintiffs, but a satellite location in Crow Agency does not help them. With any number of examples of other Native Americans, as well as whites, who are not advantaged by the proposed satellite offices, do those other residents have their own federal claims and deserve their own satellite office? Yes, under Plaintiffs' arguments. These scenarios of comparison are endless and cannot serve as the basis for an equal protection claim. Id. at 1335-36.

In Denis, the court found that there was no legal authority to support the plaintiffs' assertion that their political subdivision at issue, a district within New York City, should be compared to other districts for comparison. 1994 WL 61330 at *3. The plaintiffs in Denis argued that a VRA violation existed whenever voting irregularities occur in a predominately minority district, but not in predominantly white districts – even when the elections at issue are for district representatives. Id. The Denis plaintiffs suggested that the minority's vote was diluted city-wide because the voting irregularities that allegedly occurred only in minority districts had the effect of giving the vote of the average minority voter less weight than the vote of the average white voter in New York. Id. Significantly, the court held as follows:

> If such a claim were cognizable under the VRA, the Act would be converted into a voting fraud statute that could be used to challenge *any* voting irregularities occurring in minority communities. This is not a plausible interpretation of either the language or the purpose of the VRA.

Id. As in Jacksonville, the courts uniformly dismiss such claims as not cognizable under the VRA.

In their brief, Plaintiffs cite Spirit Lake Tribe v. Benson County, North Dakota, 2010 WL 4226614 (D.N.D. 2010). This case indicates that the appropriate scope to determine unequal voter participation is within the county at issue. In Spirit Lake, the plaintiffs alleged that the closure of seven Election Day polling places on Spirit Lake Reservation within Benson County violated the law by not allowing Native Americans equal access to voting places. Plaintiffs sought a preliminary injunction to prevent the county from closing voting places located on the Spirit Lake Reservation. Id. at *2. The Spirit Lake case was not brought against the state but rather against the political subdivision of Benson County. Therefore, the proper analysis focuses on the totality of the circumstances shown in the political subdivision (Benson County) and whether such circumstances demonstrate that county elections are not equally open to participation by Spirit Lake tribal members as other residents of Benson County. The Court analyzed whether there were burdens that fell on the voting process on the Spirit Lake Reservation that did not exist elsewhere in Benson County. Id. at 5. The Court did

not look at the burdens that fell on the voting process on the Spirit Lake Reservation that did not exist elsewhere in North Dakota. This distinction is significant. Spirit Lake discussed Election Day polling places, not absentee voting places. There is no allegation is the current case that any Plaintiff or other Native American residents cannot vote at their local polling place on the reservation on Election Day.

ii. Plaintiffs are not likely to prove a § 2 VRA claim.

Plaintiffs must prove a causal connection between the challenged practice and some harm. A failure to show causation is dispositive. Gonzalez v. Arizona, 677 F.3d 383, 407, n. 35 (9th Cir. 2012). In Gonzalez, the Court dealt with whether a new law requiring documentary proof of citizenship in order to register to vote and requiring registered voters to present proof of identification to cast a ballot violated § 2 of the VRA. Gonzalez is a recent case in which the plaintiffs sought an injunction to prohibit these election law changes. Id. at 388. The decision focused primarily on the election law change regarding polling places. Id. at 404. The court recognized that a § 2 VRA plaintiff can prevail only if "based on the totality of the circumstances, … the challenged voting practice results in discrimination on account of race." Id. (internal citations omitted). "[P]roof of causal connection between the challenged voting practice and a prohibited discriminatory result is crucial." Id. (internal quotations omitted). The court

recognized that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the Section 2 'results' inquiry." Id. "Said otherwise, a Section 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence of the challenged voting qualification causes that disparity, will be rejected." Id.

The Gonzalez plaintiffs alleged that the election law changes unlawfully diluted Latino voters by providing them with less opportunity than other members than the electorate to participate in the political process. Id. at 406. The district court found that the election law changes did not have a statistically significant disparate impact on Latino voters. Id. The district court concluded that the plaintiffs' claim failed because there was no proof of a causal relationship between the election law changes and any alleged discriminatory impact on Latinos. Id. at 406. No expert testified to a causal connection between the election law requirements and the observed difference in voting rates of Latinos, and Gonzalez had failed to explain how the election law change interacted with the social and historical climate of discrimination to impact Latino voting in Arizona. Id.

Gonzalez alleged that single "Latinos, among other ethnic groups, are less likely to possess the forms of identification required under [the election law changes] to cast a ballot, 'but produced no evidence supporting this allegation.'" Id. at 407. Although the record contained Arizona's general history of

discrimination against Latinos and the existence of racially polarized voting, Gonzales provided no evidence that Latinos' ability or inability to obtain or possess I.D. resulted in Latinos having less opportunity to participate in the political process and to elect the representatives of their choice. Id.

As in Gonzales, Plaintiffs have produced no evidence of Plaintiffs' own inability to vote resulting in Plaintiffs' having less opportunity to participate in the political process. Plaintiffs allege that Native American usage of absentee ballots is lower than whites, but produce no evidence that a lack of a satellite location is the *cause* of this disparity.

Nor does the evidence of the Plaintiffs' voting behavior demonstrate that they could not vote on Election Day or that they could not or even have not voted by mail or the courthouse in the past. Ex. 5-7, C. There is no evidence that the Plaintiffs, or Native American residents in general, could vote when in-person absentee voting was offered at a satellite office in the locations requested, but cannot without it. Ex. 5-7.

The scholarly literature discussing the research in this area is in accord. There is no evidence of a causal relationship between in-person absentee voting and increased voter turnout in the nation, state, or county. Ex. 11-12. There certainly are no such findings suggesting minorities' voter turnout rates increase due to in-person absentee voting. Ex. 11. These issues are critical to Plaintiffs'

case even if their case is cognizable under the VRA, and Plaintiffs have not met their burden.

If such a case is viable under the VRA, Plaintiffs have not shown any causal connection between the harm they claim (denial of the right to vote) to the challenged practice (no satellite absentee voting office in a specific location), as they have provided no evidence indicating that they are unable to vote without a satellite office. Without such evidence, Plaintiffs have failed to demonstrate a causal relationship between the past challenged voting practice and any harm. This is the linchpin of any § 2 VRA case, and Plaintiffs do not meet the requirement.

a. Plaintiffs are not likely to prove that they have less opportunity than white voters in the subject counties to elect representatives of their choice.

Plaintiffs provide no evidence that they have not been able to elect candidates of their choice. In order to make out a § 2 VRA claim, the Supreme Court has held that Plaintiffs must prove *both* 1) that the members of the protected class have less opportunity to participate in the political process; *and* 2) the minority class members' inability to elect representatives of their choice. Chisom v. Roemer, 501 U.S. 380, 397 (1991). Plaintiffs cite this very case for the proposition that any abridgement of the opportunity of minorities to participate in the political process inevitably impairs their ability to influence the outcome of an election. Plaintiffs mislead by failing to cite the very next sentences of Chisom,

which hold that more is required to prove a § 2 VRA case. "The statute does not create two separate and distinct rights." Id. "It would distort the plain meaning of the sentence [in Section 2 of the VRA] to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." Id. In both White v. Register, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971), "[t]he Court identified the opportunity to participate and the opportunity to elect as inextricably linked." Chisom, 501 U.S. at 397.. "For all such claims must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives to one's choice." Id. at 398.

Plaintiffs cite cases regarding the locations of polling places, and assert that their locations are governed by the VRA. The Court should note, however, which cases discuss *Election Day* polling places, and *not absentee balloting locations*. This is significant, particularly in light of the fact that *no court in the nation has found that the location or number of absentee polling presents a cognizable claim under the VRA.* To the contrary – all courts which have been presented with a VRA claim regarding where or how many absentee voting sites are required have found such a claim *not cognizable* under the VRA.

Plaintiffs cite Jacksonville, 351 F.Supp.2d at 1335-36, for this proposition, but Jacksonville finds that the number of absentee polling places *may not* present a

justiciable claim (Id. at 1332-33), drive time to an early voting site is a "convenience" issue that does not speak to vote denial (Id. at 1335), and comparing one county's absentee voting sites to another's is not the standard for establishing a § 2 VRA violation. Id. at 1336. Plaintiffs cite Perkins v. Matthews, 400 U.S. 379, 387 (1971), although an Election Day polling site case, for the proposition that locating polling sites far from minority communities may result in denial of the right to vote on account of race. Of course, when Election Day polling places are the *only* way to vote, it seems obvious that their location could potentially speak to a § 2 VRA claim. Plaintiff also fail to mention that Perkins deals exclusively with § 5 of the VRA, not § 2, and exclusively with Election Day voting locations where another voting method was not available to the plaintiffs. Plaintiffs cite Brown v. Dean, 555 F.Supp. 502, 505 (D.R.I. 1982), which is also an Election Day polling place case, where minority voters had no other option for voting other than on Election Day. Plaintiffs also cite Spirit Lake Tribe, 2010 WL 4226614 at *3, failing to mention that this case involved seven out of eight *Election Day* polling places which were going to be completely closed down, leaving the only Election Day polling place in an area not within the Spirit Lake Reservation. Id. at *1.

The three locations for which Plaintiffs seek absentee voting sites each have Election Day polling locations. Ex. 5-7. If Plaintiffs want to vote at a polling

location in Lame Deer, Crow Agency, and Ft. Belknap, they need only vote on Election Day.

In Jacob v. Board of Directors of Little Rock School District, 2006 WL 2792172 (E.D. Ark. 2006), plaintiffs moved for preliminary injunction seeking a court order to establish an early voting site other than at the Polasky County courthouse. Id. at *1. The Court denied the motion, finding that voters still had the option of early voting at the Polasky County courthouse. Id. The Jacobs court found that the Plaintiffs were able to elect candidates of choice in their local elections, and therefore could not make out a § 2 claim.

> The evidence refutes Plaintiffs' earlier assertion that Court intervention was necessary or otherwise [the minority voters] will have less chance to elect representatives of their choice. Clearly African American voters were neither disproportionately affected nor disenfranchised by holding early voting only at the Polasky County courthouse. . . . In short Plaintiffs have failed to present any evidence or even a colorable theory that would permit this Court's further inquiry by conducting a hearing on the issue of preliminary injunctive relief.

Id. at 2, (internal quotations and citations omitted). The Jacobs court went on to note the following:

> The reasons asserted by the [Defendant] for not conducting early voting at the "polling place requested by Plaintiffs" appear valid. Certainly the [Defendants] have asserted legitimate nondiscriminatory reasons for its decision and has controverted Plaintiff's assertion that "there is no legitimate reason which can support denying the requested release." Once again, "[t]here is no evidence that the [Defendant] has exercised its lawful discretion in an arbitrary or discriminatory manner." Voters who wish to early vote may do so,

> either by traveling to the Polasky County courthouse during the early voting period or by absentee ballot. …
>
> *****
>
> The [Defendant] has the right to run its own affairs free from the intrusion of federal courts unless and until it is shown that it is depriving citizens of rights guaranteed by federal law.

Id. at 2-3.

Whether other counties have a satellite office "tells us nothing about [the challenged practice's] effects on a minority group's voting strength." Holder v. Hall, 512 U.S. 874, 881 (1994). Plaintiffs may not merely point to what other counties do, or the subject counties *could* do, under the discretion arguably provided by state law, to show that the subject counties could do that as well. *See* Id. A county's failure to adopt the practices that other counties have adopted "says nothing about the effects the [current system] has on the voting of [the] County's citizens." Id. at 882. One simply may not compare its county practices to another county's practices, while both are allowed by state law, to use as a benchmark to claim a VRA violation. Id. at 881-885.

B. Because there has been no injury, Plaintiffs cannot show they have no remedies available at law to compensate for an injury.

Plaintiffs have not proven an injury-in-fact, nor have they pleaded a cognizable VRA claim, therefore this factor is irrelevant. Plaintiffs "remedies" are to simply vote on Election Day, vote via another person, vote by mail, or absentee

vote at their county courthouse. Plaintiffs may avoid injury by simply doing any of these things, thereby avoiding their "injury."

C. The balance of hardships between the Plaintiffs and Defendants / the claim is barred by the doctrine of laches

Plaintiffs request for a preliminary injunction is barred by the doctrine of laches. Laches requires proof of (1) a lack of diligence by the Plaintiffs; and (2) prejudice to County Defendants. In re Beaty, 306 F.3d 914, 926 (9th Cir. 2002) (internal quotations omitted). "An indispensable element of lack of diligence is knowledge, or reason to know, of the legal right, assertion of which is delayed." Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1241 (9th Cir. 1989) (quotation omitted). Plaintiffs knew as early as May 24, 2012 that they desired in-person absentee voting at a satellite office. *See e.g.* (Doc. 4-4.) Yet Plaintiffs did not commence this suit or request preliminary injunctive relief until October 10, 2012. (Doc. 1); *see also* Fed. R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court.")[1] Notably, absentee voting had already commenced by this time and it is physically impossible to provide Plaintiffs 30 days of absentee voting at a satellite office when the action was commenced 28 days before the election. Plaintiffs were not diligent in bringing their claim for a preliminary injunction.

[1] Defendants were served between October 11-15, 2012. (*See generally* Docs. 16-30.)

Additionally, suing for preliminary injunctive relief 28 days before the election is highly prejudicial to County Defendants. Not only can County Defendants physically not provide 30 days of in-person absentee voting at a satellite office due to the untimeliness of Plaintiffs' suit, it is simply not feasible to provide any satellite office this close to the election, which at the time of filing this brief, is 12 days before the election. While County Defendants' position is that a satellite office for absentee voting is contrary to Montana law, even if it were allowed, County Defendants must follow the directive of Secretary McCulloch in providing absentee voting at a satellite office. MCA § 13-1-202 provides:

> (1) In carrying out the responsibilities under 13-1-201, the secretary of state shall prepare and deliver to the election administrators:
>
> (a) written directives and instructions relating to and based on the election laws;
>
> (b) sample copies of prescribed and suggested forms; and
>
> (c) advisory opinions on the effect of election laws other than those laws in chapter 35, 36, or 37 of this title.
>
> ***
>
> (3) Each election administrator shall comply with the directives and instructions and shall provide election forms prepared as prescribed.

§ 13-1-202 (emphasis added). Secretary McCulloch, pursuant to § 13-1-202(c), provided an election advisory regarding in-person absentee voting at a satellite election. Doc. 4-2. The election advisory lists a number of requirements each county must meet. Id. Of course each county is responsible for the costs of opening a satellite office as "all costs of the regularly scheduled primary and

general elections shall be paid by the counties and other political subdivisions for which the elections are held." § 13-1-302.

It is simply not feasible to comply with the mandates for absentee voting at a satellite office this close to the election. *See e.g.* Jacksonville, at 1336 (finding it was not feasible to provide early voting a week before the election since additional voting machines needed to be ordered and programmed, sites needed to be checked out for security and availability, and additional staff was needed to run the sites). With "election resources . . . currently stretched to their limits", County Defendants would be prejudiced by a preliminary injunction requiring absentee voting at satellite offices this close to the election. Id. Ex. 5-7. Accordingly, Plaintiffs' request for preliminary injunction is barred by laches.

Ordering the counties to find, supply, train, staff, and pay for a satellite office harms the county residents far more than it benefits them. Id. No local government should be forced to cut statutorily-required governmental services, opening up many other avenues of liability and disservice to its citizens, to provide unnecessary voting conveniences. The balance of harms weighs heavily against Plaintiffs' request.

D. The public interest would be disserved in granting an unnecessary preliminary injunction.

As indicated above, residents can vote absentee in-person at their county courthouse, by mail, by a third person, or vote close to home on Election Day.

The public's interest is not in having counties provide solely election services, to the exclusion of other county services. Rather, the public has an extremely strong interest in counties providing all services required of counties under state law.

Local governmental officials should be allowed to make the hard choices as to how to prioritize their finances, while remaining accountable to the voters through the election process. It is fundamentally unfair and inequitable to the public to force counties through litigation to spend its very limited funding on unnecessary election conveniences when it has numerous other governmental functions it is required under law to provide. Those services, if unfunded and not provided, subject Defendant Counties to lawsuits in other areas.

CONCLUSION

The Court should deny Plaintiffs' motion for preliminary injunction without a hearing, as this case should be disposed of on legal grounds.

Dated this 24th day of October, 2012.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing County Defendants' Joint Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction complies with the Local Rule 7.1(d)(2) and contains 6,363 words excluding the caption, certificates of service and compliance, table of contents and authorities, exhibit index, and signature blocks. The undersigned has relied upon the word count of Microsoft Word, the word processing system used to prepare this Memorandum. The original document and all copies of said Memorandum are in compliance with this rule.

Dated this 24 day of October, 2012.

By: */s/Michael Hayworth*
Michael Hayworth

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CERTIFICATE OF SERVICE

I hereby certify on October 24, 2012, a true and correct copy of **COUNTY DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was served electronically through the CM/ECF system upon the following individuals:

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