UNITED STATES DISTRICT COURT OF APPEALS
FOR THE NINTH CIRCUIT

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, FRANK JEFFERSON and PHYLLIS POND CULBERTSON,

Plaintiffs/Appellants,

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 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

Case No.: 12-35926

D.C. No.: 1:12-cv-00135-RFC

U.S. District Court for Montana, Billings

APPELLANTS' RESPONSE TO ALL DEFENDANTS' JOINT MOTION TO DISMISS APPEAL AS MOOT

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,

Defendants/Appellees.

COMES NOW, the Appellants, 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, Frank Jefferson and Phyllis Pond Culbertson (hereinafter the "Appellants"), by and through their undersigned counsel, submit the following memorandum in opposition to Appellees' motion to dismiss.

PROCEDURAL BACKGROUND

On October 10, 2012, Appellants filed a complaint and a Motion for Preliminary Injunctive Relief in the United States District Court for the District of Montana asserting that the officials violated the Fourteenth Amendment of the

United States Constitution, 42 U.S.C. § 1983, the Constitution for the State of Montana, and the Voting Rights Act of 1965 in that they acted under the color of state law to deprive the Indian voters of Montana of the equal protection of the laws by arbitrarily failing to establish satellite office locations in Fort Belknap, Lame Deer, and Crow Agency. Appellants sought preliminary declaratory and injunctive relief ordering the officials establish satellite office locations within the boundaries of their respective reservations where they could register to vote and vote in-person absentee for the full period authorized by Montana law for all future elections. *See* Doc. 3.

On October 24, 2012, the officials filed a plethora of motions alleging that the Tribal members lacked standing to pursue their claims, failed to state a cause of action against the Secretary of State, the doctrine of laches was prohibitive, and the Tribal members failed to satisfy the requirements to justify the imposition of injunctive relief. *See* Doc. 36, 37, 51, and 52. Tribal members filed their responses to the motions on October 25 and 26, 2012. *See* Doc. 56 and 63.

Upon reviewing the evidence adduced at the hearing held on October 30, 2012, the Honorable Richard F. Cebull issued an order on November 6, 2012, denying the Appellants' request for injunctive relief.

STANDARD OF REVIEW

No proceeding is moot where a case or controversy persists between interested parties. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). Federal law grants Appellate Courts broad authority to review a preliminary injunction order. *See* 28 U.S.C. § 1292. "The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *Id*. (citation omitted).“A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. U.S.,* 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prod. Co.,* 473 U.S. 568, 580-581 (1985)). Thus, it is settled that a case is moot only when interim developments have completely and irreversibly brought an end to allegedly unlawful conduct and its effects so that "neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

It is well-established that disputes capable of repetition, yet evading review are not moot. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). The capable of repetition, yet evading review exception applies when “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining

party will be subject to the same action again." *Id*. (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

ARGUMENT

I. APPELLANTS' REQUEST FOR PRELIMINARY RELIEF UNDER THE VOTING RIGHTS ACT IS A LIVE CASE AND CONTROVERSY.

The policy implications for adjudication of election procedure disputes assures "'[the] construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.'" *Babbit v. UFW Nat'l Union*, 442 U.S. 289 (1979) (citing *Storer v. Brown*, 815 U.S. 724, 737 n.8 (1973)). In the case at bar, Appellants appeal, not to seek immediate injunctive relief, but because, as Appellees note, the parties are about to engage in a long, litigious court proceeding and the next Federal election is less than 18 months away, and the Appellants are not just seeking relief for the 2012 election – but for all future elections until the dispute is fully resolved. *See* Doc. 1 ("Grant preliminary and permanent injunctive relief by ordering Defendants to establish satellite office location where voters may register to vote and vote in-person absentee in Fort Belknap, Lame Deer, and Crow Agency immediately for the 2012 primary (sic) election and for the full period authorized by Montana law for all future elections, and further relief

as the interest of justice may require"); Doc. 3. ("Following the hearing, enter a preliminary injunction directing Defendants to open a satellite clerk and recorder's office in Lame Deer, Ft. Belknap Agency, and Crow Agency, to be open for in person late registration and in person absentee voting during dates and times consistent with other locations in Montana").

In support of their contentions that Appellants' claims are moot, Appellees cite non-binding *Gjertsen v. Board of Election Commissioners*, 751 F.2d 199, 201-202 (7th Cir. 1984), for the proposition that all appeals of preliminary injunctions for elections are moot after an election has passed. However, the Appellants in this litigation, unlike in *Gjersten*, did not request a preliminary injunction just for one election, but for all future elections until a final order had been issued. *See* Doc. 1; Doc. 3. There is no guarantee that Appellants will receive their requested relief before the 2014 primary election, and therefore, a review of the District Court's preliminary injunction order is necessary to protect the Appellants' voting rights.

Appellees also cite *Gjertsen* for the proposition that this appeal is moot because the claims are still pending in district court. While it is true that the *Gjersten* appellants did not request a stay of proceedings in the district court, Appellants here filed a Motion for Abeyance on November 20, 2012 and are awaiting the District Court's ruling. *See* Doc. 84. Moreover, District Court

proceedings have not moved forward since issuance of the order. Indeed, no scheduling order for the permanent injunction has been issued to date.

In their appeal, the Appellants are contending that the District Court utilized an incorrect test in assessing whether a violation of the Voting Rights Act had occurred. This Court's review of the District Court's preliminary injunction order will ensure that all parties avoid expensive litigation using the wrong legal standard. In other words, both parties could potentially be arguing before the district court only to discover on appeal that the district court should have used a different standard for analyzing a vote denial claim under the Voting Rights Act. A review of the Court's order will provide relief to all parties.[1]

II. THE DENIAL OF SATELLITE VOTING LOCATIONS IS CAPABLE OF REPITITION YET EVADING REVIEW.

A. Appellees' Denial of Appellants' Request Occurred Too Close to the Election for the Dispute to be Fully Litigated.

The Ninth Circuit has interpreted the capable-of-repetition exception liberally within the context of potential future political candidates. *See e.g. Wolfson v. Brammer*, 616 F.3d 1045, 1055 (9th Cir. 2010) (citing *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000)). Indeed, "'[e]lection cases often fall within this exception, because the inherently brief duration of an election is almost invariably

[1] This is equally true even if the Appellate Court ultimately decides that the District Court applied the right legal test as a review now will reduce the uncertainty among the parties.

too short to enable full litigation on the merits.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1053-1054 (9th Cir. 2010) (citing *Porter*, 319 F.3d at 490)); see also *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983) (election cases are likely to escape review because appellate review often cannot be completed during the brief duration of an election).

Here, full litigation on the merits of the issues was never likely to be completed before the 2012 election. Four Directions, a non-profit organization, initially met with Big Horn, Rosebud and Blaine Counties in mid-September after the Secretary of State of Montana issued her advisory opinion for operating satellite voting locations on August 28, 2012. In the spirit of cooperation, Four Directions continued to meet with representatives from each County. Each County's final action denying Four Directions' request on behalf of the tribes for early voting did not occur until late September. Plaintiffs brought suit against Big Horn, Rosebud and Blaine County on October 10, 2012. The District Court did not issue its preliminary injunction order until Election Day, November 6, 2012. Indeed, no hearing on the merits could possibly be held within that short time period.

Appellees cite the Seventh Circuit case *Orion Sales, Inc. v. Emerson Radio Corp.*, 148 F.3d 840 (7th Cir. 1998) [hereinafter "*Orion Sales*"] for the proposition that an Appellate Court cannot review a preliminary injunction. (Doc. 6 at ¶ 9). But

even Appellees' own case law acknowledges "some short-term injunctions might fall within [the capable of repetition, yet evading review] doctrine." *Orion Sales* at 842.

As the *Orion Sales* Court notes, appellate courts generally have jurisdiction "over a district court's preliminary injunction under 28 U.S.C. § 1292(a)(1)." *Id*. However, appellee's interpretation of *Orion Sales* is highly abusive of the facts and misleading on this point. In *Orion Sales*, a licensor and licensee entered into a three-year contract, effective April 1, 1995. *Id*. at 841. Within the year, the licensor and licensee would sue each other in federal court. *Id*. Nevertheless, both sides continued to operate under the agreement while suits were pending in federal courts until May 23, 1997 when the licensor terminated the agreement effective immediately citing their complaint as cause. *Id*. Upon receiving the notice of termination, the licensee immediately motioned the district court for a preliminary injunction and temporary restraining order preventing the licensor from terminating the agreement. *Id*. The district court granted the licensee's motion preventing the licensor from terminating the agreement on July 10, 1997. *Id.* at 842.

The licensor appealed to the Seventh Circuit Court of Appeals on July 14, 1997. *Id*. However, the court did not hear the appeal until June 4, 1998. *Id*. The agreement in dispute expired on March 31, 1998. *Id*. Therefore, at the time of the

appeal, there was no existing agreement that the Court could enjoin the licensor to the licensee. With these facts, the Seventh Circuit Court of Appeals held "the injunction ordered [licensor] not to terminate the License Agreement, but the agreement expired by its own terms on March 31, 1998 [...] Thus, the relief that [licensor] seeks – dissolution of the injunction—would have no effect, as the injunction has expired along with the agreement. *Id*. at 841 (citing *Henco, Inc. v. Brown*, 904 F.2d 11, 13 (7th Cir. 1990).

In contrast, Appellants still suffer ongoing harm that will reoccur in the 2014 elections without a court order. The Supreme Court has noted that challengers to election procedures are often left with little remedy for current elections, and it is therefore appropriate to adjudicate election challenges to clarify future elections. "Justiciability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election." *Babbit v. UFW Nat'l Union*, 442 U.S. 289, 301 n. 12 (1979) (citing *Storer v. Brown*, 415 U.S. 724, 737 n. 8 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2 (1971). While the 2012 general election has come and gone, another federal election is less than 18 months away at the time of filing. If the Court of Appeals does not hear the appeal, Plaintiffs will have no relief for the 2014 elections.

B. Appellants Will Be Subject to the Same Action in 2014, Potentially Before Resolution of District Court Proceedings.

The second element of the capable-of-repetition exception is that the complaining party is reasonably expected to be subject to the same action again. *At the latest*, Appellants are likely to be subject to the same harm in the 2014 primary election. In *FEC v. Wis. Right to Life, Inc.*, the Supreme Court noted that the 2-year window between elections was not enough time for the FEC and Wisconsin Right to Life, Inc. to resolve their dispute. *FEC*, 551 U.S. 449, 462-463. The Supreme Court's holding in *FEC* is an extension of the Court's long-standing application of the capable-of-repetition exception to election cases. For example, in *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1973), the Court stated,

> "The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review."

Similarly, the 2012 General Election is over but the 2014 primary is less than 18 months away as of this filing. Based thereon, there is a strong likelihood that the parties will still be engaged in this litigation and Plaintiffs will be subject to the same alleged illegality. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (citing *Lyons* at 109). If the Court of Appeals does not review the preliminary injunction order, Appellants will have no legal remedy for the 2014 elections.

CONCLUSION

Based upon the foregoing, there can be no doubt that a live controversy exists, because the Appellants requested preliminary relief not just for the 2012 but for all future elections until the case is resolved. Additionally, the Counties' actions are capable of repetition yet evading review because of the short duration of elections. Based upon the foregoing, the Court should find that the appeal is not moot.

Dated this 30th day of November, 2012.

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CERTIFICATE OF SERVICE

I, Terryl Matt, hereby certify that on the 30th day of November 2012, I electronically filed the foregoing Memorandum In Opposition to Appellees' Motion for To Dismiss Appeal as Moot by using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

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