

No. 12-35926

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARK WANDERING MEDICINE, ET AL.,
Plaintiffs-Appellants,

v.

LINDA MCCULLOCH, ET AL.,
Defendants-Appellees.

On Appeal from the
United States District Court for the District of Montana
Civil Action No. 1:12-CV-00135-RFC

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF
THE NATIONAL CONGRESS OF AMERICAN INDIANS
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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**MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE
BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE**

Pursuant to this Court’s Rule 29, the National Congress of American Indians (“NCAI”) respectfully requests leave to file this brief *amicus curiae* in support of Appellants. Counsel for Plaintiffs-Appellants and Counsel for Defendant-Appellee Secretary of State consents to the filing of this brief. Counsel for county Defendants-Appellees oppose NCAI’s request to file an *amicus curiae* brief, necessitating the filing of this motion.

NCAI has a substantial and compelling interest in ensuring that American Indian and Alaska Native voters are afforded a fair and equal opportunity in their respective states to cast votes in national, state, and local elections. NCAI organizes Native Vote, a national non-partisan campaign to mobilize American Indian and Alaska Native voters. Native Vote seeks to educate, encourage Indian voter participation, and protect Indian voting rights.

Due to the rural location of many Indian tribes, the high poverty rate on many Indian reservations – some of which span distances larger than some states – and the added barriers to transportation, American Indian and Alaska Native voters face significant disadvantages when compared to their neighboring non-Indian communities. Some of these disadvantages could be resolved in a sensible manner through fostering greater partnership between states and tribes in administering voting mechanisms geared to improve voter turnout and simplify the voting

process, such as early voting or late registration services. For these reasons, NCAI is particularly interested in providing its input and perspective in this matter.

Amicus Curiae's substantial and compelling interest in submitting this brief encompasses the need to provide significant historical context to the issues addressed in the underlying voting rights matter. Also, as the largest and oldest national organization advocating on behalf of tribal governments, some of which are located in Montana, NCAI offers a unique perspective on local issues affecting Montana's tribes, which it feels compelled to share with this Court. Therefore, *Amicus Curiae* respectfully requests that the Court grant leave to file this brief.

Respectfully submitted by *counsel for the Amicus Curiae*

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**BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF
AMERICAN INDIANS, IN SUPPORT OF PLAINTIFFS-
APPELLANTS AND IN SUPPORT OF REVERSAL**

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Office of Tribal Services, Bureau of Indian Affairs, U.S. Interior Dept., AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT (2005), *available at* <http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf>,.....9

“Rosebud County Poverty Report Card,” Montana Poverty Study 2011 County and Reservation Data, *available at* <http://www.montana.edu/extensionecon/countydata/Rosebud.pdf> 10

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Trib Choudhary, NAVAJO NATION DATA FROM US CENSUS 2000, T33—Important Data on American Indian Tribes and Alaska Natives, *available at* <http://www.navajobusiness.com/pdf/NNCensus/Census2000.pdf>.....8

INTEREST OF THE *AMICUS CURIAE*¹

Amicus Curiae National Congress of American Indians (“NCAI”) is the oldest and largest national organization representing the interests of American Indians. NCAI’s membership is comprised of Indian tribal governments and individual tribal members.

NCAI files this brief as *amicus curiae* because voting is a fundamental right that should be enjoyed by all Americans under federal law, including American Indians and Alaska Natives residing on or near reservations. However, American Indians and Alaska Natives have been historically discriminated against during elections, and they disproportionately face distance barriers and have far less access to mechanisms meant to compensate for the challenges presented by living in remote locations (e.g., lack of computer/printer/internet access or difficulty accessing vehicles/public transportation).

Amicus agrees that Appellees violated Section 2 of the Voting Rights Act by failing to provide Native Americans equal access to the ballot box in Big Horn, Blaine, and Rosebud counties. Refusing to establish early voter and registration sites in satellite locations on Indian reservations discriminates against American

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Indians in violation of Section 2 of the Voting Rights Act (VRA), 42 U.S.C. § 1973.²

SUMMARY OF THE ARGUMENT

Appellants' request is not onerous—they seek to have one additional satellite voting site in each county in order to provide Indian voters with the same access that their non-Indian counterparts have to the political process.³ Appellants even offered to assist with resources in order to ensure that American Indian voters are not denied the same voting opportunities as non-Indians. The Montana Secretary of State noted that it is possible to open satellite offices on each reservation, but the counties have not agreed to provide services to their American Indian constituents on par with their non-Indian counterparts. The failure of Big Horn, Blaine, and Rosebud counties to provide late registration and early voting access to American Indians living on Indian reservations in Montana discriminates against Indian voters by denying them access equal access to all stages of the voting process in violation of Section 2 of the Voting Rights Act of 1965.⁴

² The Voting Rights Act of 1965, 42 U.S.C. § 1973; *see Mark Wandering Medicine v. McCulloch*, No. CV-12-135-BLG-RFC, Compl. ¶¶ 161-63, ECF No. 1., D. Mont. R. 1.1 (D. Mont. 2012).

³ *Id.* at 39-40.

⁴ *Id.*; 42 U.S.C. § 1973.

Because American Indians in Montana meet the standards for asserting a Section 2 claim under the Voting Rights Act, the Court should reverse the denial of Appellants' motion for injunctive relief and order the counties to establish satellite office locations in Fort Belknap, Lama Deer, and Crow Agency for all future local, state, and national elections. Providing satellite locations for in-person late registration and early voting in Fort Belknap, Lama Deer, and Crow Agency is a cost-effective solution that would address Appellants' voting rights claim in a manner that places minimal burdens on Big Horn, Blaine, and Rosebud counties.

ARGUMENT

I. AMERICAN INDIANS AND ALASKA NATIVES LIVING ON THE RESERVATION HAVE HISTORICALLY FACED VOTER DISCRIMINATION

Although American Indians and Alaska Natives understand that the best way to protect their rights is through active participation in the political system, efforts have been made to limit the American Indian vote. There are approximately 1.9 million tribal members that make up the total enrollment of America's 566 federally recognized Indian tribes.⁵ In 2004, American Indians voted in record numbers and their participation was credited as outcome determinative in several

⁵ Office of Tribal Services, Bureau of Indian Affairs, U.S. Interior Dept., AMERICAN INDIAN LABOR FORCE REPORT, at ii (2003).

rac⁶. Historically, however, American Indians and Alaska Natives have been forced to resort to the courts to protect their ability to participate in local, state, and federal elections and combat burdensome time, place, and manner voting regulations that effectually disenfranchised them.⁷

American Indians “have experienced a long history of disenfranchisement as a matter of law and of practice.”⁸ It was not until Congress passed the Indian Citizenship Act of 1924 that all Indians were granted United States citizenship.⁹ Prior to 1924, Indians were denied citizenship and the right to vote and could only become citizens through naturalization “by or under some treaty or statute.”¹⁰ The 1924 Act ended the period in United States history in which obtaining United States citizenship required an Indian to sever tribal ties, renounce tribal citizenship

⁶ See, e.g., Daniel McCool, Susan M. Olson & Jennifer L. Robinson, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 177-183 (2007); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 270-271 & n.7 (2004) (quoting Michael Barone, Grant Ujifusa & Douglas Matthews, *THE ALMANAC OF AMERICAN POLITICS* 1468 (2004)).

⁷ See *Harrison, et al. v. Laveen*, 67 Ariz. 337 (1948) (Native Americans are “residents of the state” and qualified to participate in state elections) overturning *Porter v. Hall*, 34 Ariz. 308 (1928); *Trujillo v. Garley*, No. 1353 (D.N.M. 1948); *Allen v. Merrell*, 353 U.S. 932 (1957).

⁸ *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

⁹ An Act of June 2, 1924, 43 Stat. 253, Pub. L. 175 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

¹⁰ *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).

and assimilate into the dominant culture.¹¹ With the passage of the Indian Citizenship Act and by operation of the Fourteenth Amendment, an Indian who is a United States citizen is also a citizen of his or her state of residence.¹²

Notwithstanding the passage of the Indian Citizenship Act, some states continued to deny Indians the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.¹³ It took nearly forty years for all fifty states to recognize American Indians' right to vote. For years, Arizona denied Indians the right to vote because they were "under guardianship," placing them on par with convicted felons, the mentally incompetent, and the insane.¹⁴ In other places, Indians were denied the right to vote unless they could prove they were "civilized" by moving off the reservation and renouncing their tribal ties.¹⁵ In 1956, Utah was one of the last states to ban a statute that prevented Indians residing on the reservation from voting because it did not count them as citizens of

¹¹ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.01[3], n. 42-44 (2012 Ed.).

¹² U.S. CONST. amend. XIV, § 1.

¹³ *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

¹⁴ *Harrison, et al. v. Laveen*, 196 P.2d 456 (1948).

¹⁵ California limited voting rights to white citizens; Idaho, New Mexico and Washington withheld the right to vote from Indians not taxed. The North Dakota Constitution limited voting to "civilized" Indians who have severed tribal relations. Daniel McCool, Susan M. Olson & Jennifer L. Robinson, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 10 (2007).

the State.¹⁶ This occurred thirty years after Congress passed the Indian Citizenship Act, and only several years prior to passage of the VRA in 1965.¹⁷

Since the passage of the Voting Rights Act, at least seventy-three cases have been brought under either the Voting Rights Act or the Fourteenth or Fifteenth Amendments in which Indian interests were at stake.¹⁸ The discrimination trends that emerge from these cases closely track the experience of African Americans, with discrimination shifting from *de jure* to *de facto* over time. Recent cases focus on the discriminatory application of voting rules with respect to registration, polling locations, and voter identification,¹⁹ as well as general overt hostility to Native voting. For example, in 2002 a South Dakota State legislator stated on the floor of the State Senate that he would be “leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the state by giving up tribal sovereignty.”²⁰

On a national level, in *Bush v. Gore*, the Supreme Court noted that “the State may not, by later arbitrary and disparate treatment, value one person’s vote over

¹⁶ *Allen v. Merrell*, 353 U.S. 932 (1957).

¹⁷ *Id.*

¹⁸ Daniel McCool, Susan M. Olson & Jennifer L. Robinson, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 45 (2007).

¹⁹ *Id.* at 46; *see id.* at 48–68 (collecting cases).

²⁰ *Boneshirt v. Hazeltine*, 336 F. Supp. 2d 976, 1046 (D.S.D. 2004) (quoting Rep. John Teupel).

that of another.”²¹ In this instance, there is clear disparate treatment between Indian and non-Indian voters which effectively values the non-Indian vote over the vote of American Indians residing on the reservation. The fact that the counties have authority to establish satellite offices does not change the fact that the authority is vested by the State Legislature, under the State Constitution, and must be consistent with well-established Supreme Court voting rights precedent.

The matter currently before this court is unfortunately another instance where the American Indian vote has effectively been silenced by actions, or inactions, of local election authorities and the courts.

II. AMERICAN INDIANS OVERWHELMINGLY RESIDE IN RURAL AREAS AND FACE MANY OBSTACLES TO VOTING INCLUDING POVERTY AND LACK OF TRANSPORTATION

The United States Supreme Court has recognized that “[n]o 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.”²² When balancing costs, the constitutional right to vote must be factored in as an overarching priority,

²¹ *Bush, et al. v. Gore, et al.*, 121 U.S. 525, 530 (2000); *see, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”).

²² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

especially when considering the voting rights of a historically disenfranchised class of citizens, such as American Indians living on reservations.

American Indians and Alaska Natives continue to face high levels of poverty. According to the 2000 Census,²³ American Indians and Alaska Natives living on reservations have an average real per capita income of \$12,452,²⁴ significantly lower than the national average of \$50,054.²⁵ Among tribal members

²³ For a number of reasons, census data related to American Indians and Alaska Natives is problematic. The census does not differentiate between individuals who are enrolled members of a tribe and those who self-identify as American Indian or Alaska Native, but are not associated with any tribal group. Additionally, the census generally does not distinguish between American Indians and Alaska Natives who live on reservations and those who have migrated to a non-Indian community or urban area. For these reasons, it is generally assumed that the disparities in income, employment, and well-being that are reflected in the census between Natives and non-Natives would be even more severe if data existed for on-reservation communities alone. A good example of this is the unemployment statistics. According to the census, 12% of American Indian and Alaska Natives are unemployed. The BIA Labor Force Report, which covers only enrolled members of federally-recognized Indian tribes living on or near a reservation, reports unemployment rates to be significantly higher at 49%. Office of Tribal Services, Bureau of Indian Affairs, U.S. Interior Dept., AMERICAN INDIAN LABOR FORCE REPORT, at ii (2003), available at <http://www.doi.gov/bia/laborforce/2003LaborForceReportFinalAll.pdf> (hereinafter “2003 BIA LABOR REPORT.”).

²⁴ See Trib Choudhary, NAVAJO NATION DATA FROM US CENSUS 2000, T33— Important Data on American Indian Tribes and Alaska Natives, available at <http://www.navajobusiness.com/pdf/NNCensus/Census2000.pdf>.

²⁵ See DeNavas-Walt, et al., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, Table 1, at 6 (September 2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf>.

nationwide, 49% of the available labor force is unemployed.²⁶ Of the 51% of tribal members who are employed, 32% earn wages below the 2003 poverty guidelines established by the United States.²⁷

A. The Economic Disparity between American Indians Living on the Reservation in Montana Compared to Non-Indians Residing in Montana is Vast

The disparity between off-reservation and on-reservation unemployment in Montana is markedly vast. The overall unemployment rate is significantly lower than on the reservation. The Assiniboine and Sioux Tribes of the Fort Peck Reservation extends over parts of four counties. 7,023 Indians are eligible for services provided by the Secretary of the Interior for American Indian or Alaska Native peoples on the Fort Peck Reservation.²⁸ Of these, 57% are unemployed and 43% of those employed live below the poverty line.²⁹ In Big Horn County, unemployment was 12.5% in 2010.³⁰ In contrast, the Crow Tribe and the Northern Cheyenne Tribe, both of which reside in Big Horn County, have an average unemployment rate of 56%; the Crow Tribe has a 50% unemployment rate and the

²⁶ BIA AMERICAN INDIAN LABOR FORCE REPORT, State Table note, at 1 (2005).

²⁷ *Id.*

²⁸ *Id. at app.* (2005 Rocky Mountain Region Estimates of Indian Service Population and Labor Market Information, at 15).

²⁹ *Id.*

³⁰ See “Big Horn County Poverty Report Card,” Montana Poverty Study 2011 County and Reservation Data, *available at* <http://www.montana.edu/extensionecon/countydata/BigHorn.pdf>.

Northern Cheyenne has a 62% unemployment rate.³¹ In Blaine County, the unemployment rate was 6% in 2010.³² The Fort Belknap Indian Community, which is located in Blaine County, has a 79% unemployment rate.³³ That is a difference of 73 percentage points. Finally, in Rosebud County, the overall unemployment rate was 7.3% in 2010.³⁴

B. Failure to Provide American Indians Living on the Reservation with Equal Access to Early Voting and Late Registration Sites Severely Impacts Native Voters Because of Long-Standing Systemic Isolation

Making late registration and early voting available at the county seat, while not providing American Indians living on the reservation with the same access through satellite voting sites, has the practical effect of providing more voting resources to one community than another, or – more specifically – valuing the non-Indian vote over the Indian vote.

The cost of gas to travel to the county seats in Big Horn, Blain, and Rosebud counties alone is enough to discourage many tribal members from using the late registration and early voting mechanisms available in each county. The average

³¹ *Id.*

³² See “Blaine County Poverty Report Card,” Montana Poverty Study 2011 County and Reservation Data, available at <http://www.montana.edu/extensionecon/countydata/Blaine.pdf>.

³³ *Id.*

³⁴ See “Rosebud County Poverty Report Card,” Montana Poverty Study 2011 County and Reservation Data, available at <http://www.montana.edu/extensionecon/countydata/Rosebud.pdf>.

price for a gallon of gasoline in Montana is \$3.362.³⁵ According to the lower court's records, "it is roughly [a] 43-mile roundtrip from Chinook to Fort Belknap, a 27-mile roundtrip from Hardin to Crow Agency and back, and a hundred-and-nineteen-mile roundtrip from Forsyth to Lame Deer and returning."³⁶ It has been estimated that American Indians in Montana are asked to travel "three or 400 percent farther" than non-Indians, while "suffering 400 percent more poverty."³⁷

Moreover, the cost of transportation, which may be prohibitive for individuals living in severe poverty or on a fixed income, is compounded for many American Indians who live in remote, isolated locations. The ability to travel assumes that tribal members have access to cars or public transportation, which is not always the case. The 2000 census indicates that American Indians are twice as likely to have no vehicle available to them—14%, compared with 7% in the general population—and only about 6% of tribes have a public transit system.³⁸

In its order denying Appellants' motion for preliminary injunction, the district court stated that "testimony at the hearing established that it is relatively

³⁵ Daily Montana Gas Prices Information accessed March 26, 2013 *available at* <http://www.montanagasprices.com/Billings/index.aspx>.

³⁶ *Mark Wandering Medicine v. McCulloch*, Case No. CV-12-135-BLG-RFC., Transcript of Motion Hearing Proceedings, Oct. 29, 2012 at 59 (D. Mont. 2012).

³⁷ *Mark Wandering Medicine v. McCulloch*, Case No. CV-12-135-BLG-RFC., Transcript of Motion Hearing Proceedings, Oct. 30, 2012 at 274 (D. Mont. 2012).

³⁸ Bureau of Indian Affairs, TRANSPORTATION SERVING NATIVE AMERICAN LANDS: TEA-21 REAUTHORIZATION RESOURCE PAPER (2003).

simple for Native American voters in Montana to register to vote without driving to the county elections office”, noting that mail-in registration (in addition to the opportunity to register at voter registration drives) was available to tribal members.³⁹ This statement, however, contradicts the reality faced by an overwhelming majority of Native Americans. The United States District Court for the District of North Dakota has recognized that “...poverty and transience of the Reservation makes mail balloting more difficult for tribal members. The evidence suggests that Indians are more likely to have not received a ballot application, which when coupled with a decreased ability to vote in person, creates a disparate impact.”⁴⁰ The results are no different when considering these same barriers to receiving mail-in voter registration forms.

Not only are Indian tribes physically isolated, they are technologically isolated as well. The Federal Communication Center’s National Broadband Plan includes some key findings regarding telecommunications services on tribal lands. In Montana, 29.3% of the Northern Cheyenne reservation lacks wireless connectivity, which is in stark contrast to the 0.2% of households that are without

³⁹ *Mark Wandering Medicine v. McCulloch*, Case No. CV-12-135-BLG-RFC., 2012 at 15 (D. Mont. Nov. 06, 2012).

⁴⁰ *Spirit Lake Tribe v. Benson County*, CIV 2: 1 0-cv-095 at 6 (D.N.D. 2010).

wireless connectivity nationwide.⁴¹ Further, 59.2% of the Crow reservation lacks any wireline provider, while only 3.5% of the population nationwide has no wireline connectivity.⁴² On the Fort Belknap Indian Reservation, 82.6% of the population has access to only one wireline provider, while nationwide only 9.6% of the population has access to only one wireline provider.⁴³

These numbers suggest that Indian Country lacks the basic infrastructure necessary to make the current voting structure in Montana work for tribal residents. While the task of downloading a registration form from the internet, printing it out, completing it, and mailing it to the county seat is simple for the majority of citizens, that is not the case for Native Americans, many of who do not even have access to adequate broadband connectivity. As such, the failure of Big Horn,

⁴¹Please Note tribal telecommunications data may be inaccurate due to misreporting by communications providers servicing tribal lands. However, the Federal Communications Commission fully acknowledges that broadband connectivity on tribal lands is far below the national average. *See* State Broadband Data Development Program, “Native Nations” findings, Northern Cheyenne (June 30, 2012), *available at* <http://www.broadbandmap.gov/summarize/native-nations/northern-cheyenne>.

⁴² *See* State Broadband Development Program, “Native Nations” findings, Crow (June 30, 2012), *available at* <http://www.broadbandmap.gov/summarize/native-nations/crow>.

⁴³ *See* State Broadband Development Program, “Native Nations” findings, Fort Belknap (June 30, 2012), *available at* <http://www.broadbandmap.gov/summarize/native-nations/fort-belknap>.

Blaine, and Rosebud counties to provide satellite voting sites on the reservation, as Petitioners requested, places an unjust burden on American Indian voters.

C. BIG HORN, BLAIN, AND ROSEBUD COUNTIES HAVE THE AUTHORITY TO ESTABLISH SATELLITE VOTING OFFICES ON INDIAN RESERVATIONS AND THEIR FAILURE TO DO SO AMOUNTS TO A POLL TAX

Requiring tribal members to travel great distances in order to cast an early ballot and to register to vote results in Indian voters having to pay a fee in order to vote. This is effectively a poll tax in violation of the Fourteenth Amendment to the Constitution and well-settled Supreme Court precedent.⁴⁴

This poll tax could be averted by providing late registration and early voting opportunities at satellite locations on Indian reservations. In a Letter of Advice to lead Respondent Linda McCulloch, Montana Secretary of State, dated August 17, 2012, Montana's Deputy Attorney General advised that, under Article XI, Section 4 and Article IX, Section 6 of Montana's Constitution and applicable statutes, local counties have the authority to offer late registration and early voting ballots at

⁴⁴ U.S. Const. amend. XIV; *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966)(holding that “a State violates the Equal Protection Clause of the Fourteenth Amendment *whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth . . .*”)(emphasis added).

satellite locations outside of the county seat.⁴⁵ After receiving this letter, in Election Advisory #A01-12, dated August 28, 2012, the Montana Secretary of State released guidance to the counties regarding the establishment of satellite voting offices. In that advisory, the county costs for establishing a satellite voting office are described as “personnel, transportation, equipment, facility rent, facility security, telephone/internet lines and support, advertising, supplies, and training.”⁴⁶ While these resources place some burden on the county, Indian tribes generally are able to contribute their own resources to help offset those costs (*e.g.*, facilities, personnel, and office equipment), especially for the short, but critical, duration leading up to Election Day.

In written communications between Four Directions⁴⁷ consultant, Bret Healy, and the Fort Belknap Community, the Northern Cheyenne Tribe, and the Crow Nation, each tribe offered to provide the appropriate office space and

⁴⁵ Letter from Ali Bovingdon, Deputy Attorney General, Montana Department of Justice, to Linda McCulloch, Montana Secretary of State Regarding Voting by Absentee Ballot (Aug. 17, 2012).

⁴⁶ Montana Secretary of State, Election Advisory #A01-12, Optional In-Person Absentee Voting at Satellite Election Offices at 3 (Aug. 28, 2012).

⁴⁷ Four Directions is a non-profit organization dedicated to empowering American Indians citizens in the electoral process on a nonpartisan basis through voter registration, voter education and mobilization in American Indian communities.

security for maintaining a satellite voting office on each reservation.⁴⁸ Further, Four Directions estimated the cumulative cost for providing satellite offices to each community for a period of five days leading up to Election Day as \$7,039.79,⁴⁹ a cost which Four Directions offered to pay in full on behalf of the Tribes.⁵⁰ While Appellees openly dispute these cost estimates, it is worth noting that Four Directions' offer was not contingent on the amount in question. More importantly, and contrary to our election processes' basic notions of fairness, there are few, if any, additional costs imposed on the counties. Appellants have secured community resources and are more than willing to raise additional funds, or seek financial assistance, simply for equal access to the ballot box.

III. THE LACK OF EARLY VOTING SITES DENIES AMERICAN INDIAN VOTERS THE RIGHT TO VOTE IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT

Congress enacted the Voting Rights Act of 1965⁵¹ "to rid the country of racial discrimination in voting,"⁵² and to ensure voting equality for language and

⁴⁸ *Mark Wandering Medicine v. McCulloch*, Case No. CV-12-135-BLG-RFC., Exhibit 2. Affidavit of Bret Healy at 3 (D. Mont. 2012).

⁴⁹ *Id.* at 5 (calculated by adding the estimated costs for each county as determined by Four Directions: Blaine County - \$2,236.73; Rosebud County - \$2,610.18; and Big Horn County - \$2,192.88).

⁵⁰ *Mark Wandering Medicine v. McCulloch*, Case No. CV-12-135-BLG-RFC, Transcript of Motion Hearing Proceedings, Oct. 29, 2012 at 21 (D. Mont. 2012).

⁵¹ 42 U.S.C. §§ 1971-1973aa-6.

⁵² *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969).

racial minorities.⁵³ Addressing the Supreme Court decision *Mobile v. Bolden*, 446 U.S. 55 (1980), Congress amended Section 2 in 1982 to require that plaintiffs bringing lawsuits under Section 2 show only that an act resulted in a denial or abridgment of the right to vote, rather than require a plaintiff to prove both purpose and effect.⁵⁴

Section 2 of the Act prohibits states or political subdivisions from using voting qualifications, standards, practices, or procedures to deny or abridge the rights of citizens to vote based on race or color or based on their membership in a language minority group.⁵⁵ A violation of Section 2 is established if,

based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members [members of racial or language minority groups] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.⁵⁶

⁵³ See also *Farrakhan v. Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003) (“Farrakhan I”); *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

⁵⁴ *Smith v. Salt River Project Agri. Improvement and Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997) (“Section 2 requires proof only of a discriminatory result, not of discriminatory intent”).

⁵⁵ 42 U.S.C. § 1973(a); see also *Gomez v. Watsonville*, 863 F.2d 1407, 1411 (9th Cir. 1988).

⁵⁶ 42 U.S.C. § 1973(b) (emphasis added).

Section 2 claims are not limited to vote dilution claims, but prohibit all forms of voting discrimination.⁵⁷ Although most cases challenging Section 2 since the 1982 amendments were enacted involve vote dilution, vote denial is a cognizable claim under Section 2.⁵⁸

“Vote denial occurs when a state employs a ‘standard, practice, or procedure’ that results in the denial of the right to vote on account of race.”⁵⁹ Historically, examples of vote denial cases involved literacy tests, poll taxes, all-white primaries, and English-only ballots.⁶⁰ The claims presented by Appellants in this case are more adequately described as a vote denial claim, challenging those practices that prevent people from voting or having their votes counted.

As the Supreme Court has noted, Section 2 prohibits all forms of voting discrimination.⁶¹ The Ninth Circuit’s case in *Farrakhan I* is instructive as to how a Section 2 vote denial claim should be analyzed.⁶² In *Farrakhan I*, the Court reviewed a Section 2 challenge to Washington State’s felon disenfranchisement

⁵⁷ See *Thornburg v. Gingles*, 478 U.S. 30, 45 n. 10 (1986).

⁵⁸ *Farrakhan*, 338 F.3d at 1016; *Johnson v. Gov’r of Florida*, 405 F.3d 1214, 1228 n. 26 (11th Cir. 2005).

⁵⁹ *Id.* (quoting 42 U.S.C. § 1973(a) and *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-98 (11th Cir. 1999)).

⁶⁰ See Daniel P. Tokaji, *The Promise of Voter Equality: Examining the Voting Rights Act at Forty: The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006).

⁶¹ See *Thornburg v. Gingles*, 478 U.S. 30, 45 n. 10 (1986).

⁶² *Farrakhan I*, 338 F.3d 1009.

law.⁶³ The Court found that Washington State’s felon disenfranchisement law was a form of vote denial subject to Section 2 of the Voting Rights Act. The Court held that “[f]elon disenfranchisement is a voting qualification, and Section 2 is clear that any voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA.”⁶⁴

To determine whether a vote denial claim exists, this Court suggested an evaluation as to whether the challenged practice “interacts with surrounding racial discrimination in a meaningful way” to disparately impact minority voters.⁶⁵ *Amicus* submits that the lack of opportunity to participate in early voting on the reservation, compounded with the historical discrimination against American Indians in Montana, disenfranchises American Indian voters in Montana. The lack of early voting and late registration opportunities interact with social and historical conditions to deny American Indian voters the same opportunities as other members of the electorate to participate in the political process.⁶⁶

CONCLUSION

For the forgoing reasons, this Court should reverse the district court’s denial of Appellants’ request for relief and order Appellees to establish satellite office

⁶³ *Id.* at 1011-12.

⁶⁴ *Id.* at 1016.

⁶⁵ *Id.* at 1018.

⁶⁶ *Id.*

locations where voters may register to vote and vote in-person absentee in Fort Belknap, Lama Deer, and Crow Agency immediately and for the full period authorized by Montana law for all future elections.

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