12-35926

United States 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,

- against -

LINDA McCULLOCH in her official capacity as MONTANA SECRETARY OF STATE, GERALDINE CUSTER, in her official capacity as 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 as 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 as 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 as BIG HORN COUNTY CLERK AND RECORDER BIG HORN COUNTY,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT FOR THE DISTRICT OF MONTANA
CASE NO. 1:12-CV-00135-RFC

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

In District Court, Appellants sought declaratory and injunctive relief alleging Appellees acted under color of state law to deprive Indian voters equal elections by arbitrarily failing to establish satellite office locations in Fort Belknap, Lame Deer, and Crow Agency in violation of the Constitution of the State of Montana, the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1983, and Section 2 of the Voting Rights Act. As such, this case arose under the Constitution, laws or treaties of the United States, and subject matter jurisdiction in the District Court was based on 42 U.S.C. § 1973 and 28 U.S.C. § 1331. The District Court had jurisdiction to grant both declaratory and injunctive relief under 28 U.S.C. § 1292, Rule 65 of the Federal Rules of Civil Procedure, and the general legal and equitable powers of the District Court.

Venue is proper under 28 U.S.C. § 1391(b), as the events giving rise to the claim occurred in the District of Montana. Jurisdiction is conferred on this Court by 28 U.S.C. § 1292.

The United States District Court for the District of Montana Billings Division entered an order denying Appellants' motion for preliminary injunction on November 06, 2012. Excerpts of Record 001-019 [hereinafter E.R. 001-019]. Appellants filed a timely notice of appeal on November 09, 2012. E.R. 175-177.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in denying Appellants' request for preliminary injunctive relief?

The District Court denied Appellants' request because there was not a likelihood of success on their Voting Rights Act claim and the Appellees would suffer hardship.

2. Did the District Court err by misinterpreting the requirements for proving a Section 2(a) claim under 42 U.S.C. § 1973?

The District Court required proof that Appellants could not elect candidates of their choice beyond the "totality of the circumstances."

The District Court held that any circumstantial evidence of discriminatory intent paled in comparison to the direct evidence that satellite locations were denied for logistical reasons. Based thereon, the District Court held that Appellants were unlikely to succeed on their constitutional claims.

STATEMENT OF THE CASE

A. Procedural History

Appellants filed their verified complaint in U.S. District Court for the State of Montana on October 10, 2012. E.R. 258. On that same day, Appellants filed a

motion for a preliminary injunctive relief seeking an order requiring Appellees to establish satellite office locations at the tribal headquarters of three federally-recognized Indian tribes at Fort Belknap Agency,[1] Lame Deer,[2] and Crow Agency[3] for the 2012 general election and for the full period authorized by Montana law for all future elections. E.R. 258. Additionally, the Appellants sought a declaration that the Appellees' failure to provide such satellite offices violated Section 2 of the Voting Rights Act, the Indian Citizenship Act, the Fourteenth Amendment to the

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[1] Fort Belknap Tribe (43 mile round trip to county seat): The Fort Belknap Reservation covers 675,336 acres with 92% of the Reservation located in Blaine County. U.S. Census Bureau, State and County Quick Facts, http://quickfacts.census.gov/qfd/states/30/30035.html. Blaine County has a population of 6,491 of which 48.9% are Indian. Id. Chinook, the off-reservation county seat, has a population of 1,203 of which 9.3% are Indian. Id. Fort Belknap Agency, the tribal headquarters, maintains a population of 1,293 of which 96.6% are Indian. U.S. Census Buereau, "American FactFinder," http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_1-_DP_DPDP1.

[2] Northern Cheyenne Tribe (113.8 mile round trip to Big Horn county seat): The Northern Cheyenne Indian Reservation covers 444,000 acres in Rosebud and Big Horn Counties. U.S. Census Bureau, State and County Quick Facts, http://quickfacts.census.gov/qfd/states/30/30035.html. Its population is 4,789 of which 92% are Indian and 5.7% are non-Indian. Id. Lame Deer, the tribal headquarters, has a total population of 2,052 of which 93.7% are Indian and 4.3% are non-Indian. United States Census Bureau, "American FactFinder," http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkm. Rosebud County and the Northern Cheyenne Reservation overlap. U.S. Census Bureau, State and County Quick Facts, http://quickfacts.census.gov/qfd/states/30/30087.html. 61.9% of the Rosebud County population consists of non-Indians and 34.1% are Indian. Id. Forsyth, the Rosebud County seat, maintains a population of 1,777 of which 95.0% are non-Indian and 1.6% is Indian. Id.

[3] Crow Nation (27.2 miles from county seat): The Crow Indian Reservation covers approximately 2.2 million acres. The Tribe consists of 11,000 enrolled members of whom 7,900 reside on the Reservation.Montana Office of Indian Affairs – Crow Nation, http://tribalnations.mt.gov/crow.asp. 85% of the tribe speaks Crow as their first language. Id. Crow Agency, the tribal headquarters, has a population of 1,616 people of which 2.0% are non-Indian and 96.7% are Indian. U.S. Census Bureau "American FactFinder," http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bmk.

United States Constitution and the Montana Constitution. The Honorable Judge Richard Cebull held a hearing on October 29 and October 30, 2012. At the end of the hearing, the District Court issued an oral ruling denying the preliminary injunction. E.R. 020-027. The District Court issued a written Order denying the motion for preliminary injunctive relief on November 06, 2012, Election Day. E.R. 001-019.

Appellants filed a notice of appeal to this Court on November 09, 2012. E.R. 175-177. Appellants filed a motion to stay proceedings with the District Court on November 20, 2012. E.R. 268. On the same day, Appellees filed a motion to dismiss the appeal as moot. After briefing, this Court denied the Appellees' motion to dismiss on February 20, 2012. E.R. 270.

B. Statement of Facts.

Appellants are Indians residing on the Fort Belknap, Crow and Northern Cheyenne Indian Reservations who allege they have been denied their fundamental right to vote. They are protected class members under 42 U.S.C. § 1973. Appellants seek an equal opportunity to the electoral franchise by requiring Appellees to establish satellite late registration and early voting office locations at the tribal headquarters of each reservation in future elections.

This case involves two provisions of Montana election law that make it easier for Montanans to exercise their electoral franchise. The first is known as

"late registration," and the second is known as "early voting." Together, the two provisions offer a convenient one-stop approach to registration and voting that allows a voter to register and vote with a single visit to a local office any time within a 30-day window before Election Day.

Late registration is an option for Montanans who miss the regular mail-in registration deadline 30 days before an election. *See* MONT. CODE ANN. § 13-2-301 (2011). Starting the day after the regular registration deadline and continuing until the close of the polls on Election Day, an eligible voter may register to vote or update the voter's existing registration information by appearing in person at the county election office or other location designated by the county election administrator. *See* MONT. CODE ANN. § 13-2-304 (2011).

Early voting, which is also known as in-person absentee voting, allows any registered voter to receive, mark, and submit an absentee ballot in person at the county election office or other location designated by the county election administrator. *See* MONT. CODE ANN. § 13-13-222 (2011). The early-voting period begins as soon as absentee ballots become available—typically 30 days before the election—and continues until noon on the day before the election. *See* MONT. CODE ANN. §§ 13-13-205, 13-13-211 (2011).

Although late registration and early voting most often take place at the county election office, usually located in the county clerk's office in the county

seat, Montana law permits a county to create satellite election offices so late registration and early voting can take place in more than one location. E.R. 241-246. Big Horn, Blaine and Rosebud Counties currently offer late registration and early voting only in the county seat. E.R. 185. Each county is geographically large and sparsely populated. Each county also contains a substantial Indian population, most of which lives on or near Indian reservations at a great distance from the county seat. E.R. 188, 207-208, 249.

The Blackfeet Nation was the first tribe in Montana to request a satellite office at their tribal headquarters. E.R. 247-248. For purposes of this appeal, the Blackfeet Nation's request is relevant because it culminated in two important memoranda. First, the Montana Attorney General issued a Letter of Advice Regarding Voting by Absentee Ballot to the Montana Secretary of State's Chief Legal Counsel concluding that Montana law authorized a county to have more than one early voting location. E.R. 241-246. Second, the Montana Secretary of State issued an Election Advisory to all county clerk and recorders informing them of their ability to open satellite locations and also addressing the appropriate standards, practices, and procedures to be followed when operating satellite locations. E.R. 238-240. Combined, these two documents should have allayed Appellees' primary concern regarding the legality and feasibility of opening a satellite office.

Overall, Tribal leaders or their designees made a total of twenty requests to Appellees before the Montana Secretary of State informed counties of the procedure for establishing satellite locations on August 28, 2012.[4] *See* E.R. 193-196, 198, 205.

On September 11, 2012, Fort Belknap Tribal member William Main contacted Blaine County officials to schedule a meeting to discuss a satellite office location at Fort Belknap. On September 12, the Blaine County Commission voted to deny the Tribe's request. E.R. 236. Despite their vote, Blaine County officers, Fort Belknap Tribal leaders and representatives from Four Directions[5] convened on September 13 to discuss the establishment of a satellite office. E.R. 206. During the meeting, Four Directions consultant Bret Healy offered to donate funds for the establishment of one satellite office location at Fort Belknap. E.R. 214. However, Blaine County officials refused to accept Mr. Healy's offer. E.R. 216. Additionally, Blaine County officials claimed that a satellite office location in Fort

[4] In 2009, the Missoula County Clerk concluded the main Clerk's office at the Missoula Courthouse did not meet the needs of Missoula County residents. Using her discretion as the county election administrator, Missoula County Clerk opened to open an "Elections Office" for in-person absentee voting. Missoula County's Clerk concluded "[t]he space required to run elections has grown and requires more room to ensure security and provide quality customer service. The [new office location] finally gives voters and staff the room they need to participate in the electoral process." Missoula County Press Release, The Elections Office Moved its Later Voter Registration Services and Counting Center from the Missoula County Courthouse to the Missoula County Fairgrounds (2009). *See also* Missoula County Press Release, Absentee Voting, Late Registration Beings Monday, October 4th (2010).

[5] Four Directions is a 501(c)(4) nonprofit formed to improving American Indian political participation.

Belknap could not be provided during the 2012 general election but believed it could be offered in future elections. E.R. 213-214. When asked if the 2012 general election was completely out of the question however, the Blaine County officials did not say no. E.R. 214. The Fort Belknap Tribe and Four Directions were not informed during the meeting that Blaine County Commission had already voted to deny the request for a satellite location. E.R. 214.

The parties reconvened on September 17, 2012, and tensions were high. E.R. 236. First, the Blaine County Sheriff was present but sat silently in the room during the entire meeting. E.R. 232. Moreover, Blaine County Attorney Ranstrom stated Fort Belknap Councilman Edward Moore, who suffers from facial paralysis, was giving him the "stink eye." E.R. 214-215, 232. Again, the Blaine County Commission failed to inform the Tribe and Four Directions they had already voted to deny the Tribe's request for a satellite location. E.R. 206.

On September 18, 2012, Crow Nation Chairman Cederic Black Eagle and Northern Cheyenne President Leroy Sprang sent letters requesting satellite county offices for in-person late registration and absentee voting at their respective tribal headquarters to Big Horn and Rosebud County officials. E.R. 234-235. Two days after Northern Cheyenne Chairman Sprang sent his request, Rosebud Clerk and Recorder Geraldine Custer ("Custer") denied the request because she did not believe there was sufficient staff and the voting system was too complex for a

satellite office. E.R. 200. However, Rosebud County Commissioner Robert E. Lee informed Four Directions Executive Director Oliver Semans that Custer did not have the authority to make this decision and the Rosebud County Commission would consider the request on September 28, 2012.

Northern Cheyenne and Four Direction representatives met with Custer on September 28, 2012. E.R. 224-227. Custer reiterated her belief that she did not have enough staff to open a satellite office. E.R. 201, 224. She further stated that she did not believe there was enough time to secure office space with high-speed Internet. She suggested that Tribal members could vote by mail or the Tribe could "bus people to Forsyth" to vote in-person absentee. E.R. 201.

The Rosebud County Commission did not vote on the Tribe's request on September 28, 2012. E.R. 201, 227. Despite county officials' concern that time was of the essence, the Rosebud County Commission rescheduled the meeting four days later on October 2, 2012. E.R. 227. At this meeting, Custer argued that the request should be denied because of potential voter fraud and stated she would not grant this request if "it was Negroes, Chinese, Asians, whatever, we could not do it." E.R. 202, 216. The Rosebud County Commission voted 2-1 to deny the Northern Cheyenne's request for a satellite location at their tribal headquarters. E.R. 218-223.

The Crow Nation also faced resistance from Big Horn County officials. Despite an offer from Four Directions to cover any expenses for a satellite county office for in-person absentee voting at tribal headquarters, E.R. 234, the Big Horn County Commission denied the Tribe's request. E.R. 207. At the October 1, 2012 Big Horn County Commission meeting, Big Horn Election Administrator Dulce Air Don't Walk used many of the same reasons made by Rosebud County officials: lack of time, staff, and office space. E.R. 201-202. She was also concerned about the "integrity of the ballot." E.R. 201-202. Big Horn County Commissioner John Pretty on Top stated he was voting to deny the request because "white people will get mad." E.R. 202.

The lack of a satellite location is particularly harmful for Indian participation. The United States' Statement of Interests expert report, E.R. 180-190, found in relation to in-person late registration and absentee voting:

- Indians had to travel 189% further in Big Horn County. E.R. 188.
- Indians had to travel 322% further in Blaine County. E.R. 188.
- Indians had to travel 267% further in Rosebud County. E.R. 188.
- Indians were more than twice as likely as whites to be in poverty in Big Horn and Blaine Counties. Disparity rates in poverty in Rosebud County exceed 400% between whites and Indians. E.R. 186.

- In Big Horn and Blaine Counties, Indian households are more than three times as likely as white households to lack access to a vehicle. In Rosebud County, the disparity is greater than 200%. E.R.187.

This report underscores the day-to-day reality of the Appellants. Fort Belknap Reservation has the highest poverty rate of all Montana Indian reservations. MONTANA'S POVERTY REPORT CARD, FORT BELKNAP INDIAN RESERVATION (2011), http://www.montana.edu/extensionecon/countydata/FortBelknap.pdf. Similarly, 59.8 percent of Northern Cheyenne Reservation residents are unemployed. MONTANA'S POVERTY REPORT CARD, NORTHERN CHEYENNE RESERVATION (2011), http://www.montana.edu/extensionecon/countydata/NorthernCheyenne.pdf. 34.8 percent of the population lives below the poverty line. Id. Over half (52.3%) of the Reservation's residents make less than $25,000 a year. Id. The median per-capita income is $7,736. Id. These numbers are consistent with the 59.8 percent unemployment rate and 34.8 percent of the population living below the poverty line. STATE TRIBAL ECON. DEVELOPMENT COMM'N, DEMOGRAPHIC & ECON. INFO. FOR NORTHERN CHEYENNE RESERVATION, (no date given), http://www.ourfactsyourfuture.org/admin/uploadedPublications/2695_N_Cheyenne_RF08_Web.pdf.

The poverty is just as extreme on the Crow Indian Reservation. 18.4 percent of families live below the poverty line; a startling 77.4 percent of families with children under five years of age are below the poverty line. U.S. Census Bureau, "American Fact Finder," http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP02. The Bureau of Indian Affairs calculated a 46.5 percent unemployment rate for tribal members. CENSUS AND ECON. INFO. CENT., DEMOGRAPHIC AND ECON. INFO. FOR CROW RESERVATION (no date given), http://www.ourfactsyourfuture.org/admin/uploadedPublications/2685_Crow_RF08_Web.pdf.

SUMMARY OF THE ARGUMENT

In this appeal, Appellants assert two arguments. First, Appellants contend that in determining the Appellants' likelihood of success on the merits, the District Court incorrectly interpreted Section 2 of the Voting Rights Act by viewing this action as a vote dilution rather than a vote denial claim. The District Court found that Appellants did not have an equal opportunity to participate in the political process but were still able to elect candidates of their choice at the local level. Based thereon, the District Court concluded Appellants were not likely to succeed on the merits of their voting rights claim. This erroneous interpretation of the Voting Rights Act effectively denies Section 2 claims for Indian minorities who

live in single-member majority-minority districts. Moreover, the District Court should have specifically excluded the success of minority candidates in the three counties because this factor has little relevance in analyzing a vote denial claim. A Section 2 vote denial claim is not defeated merely by a Defendant's successful showing that minority candidates have recently been elected because protected class members may still be denied the *equal opportunity* to elect candidates of their choice. 42 U.S.C. § 1973(b) (emphasis added).

To summarize, Section 2 of the Voting Rights Act has been violated if "the totality of the circumstances" indicate that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C.§ 1973(b). If the Court determines the processes in question are not equally open to participation, the Court then considers the totality of the circumstances. In making this determination, the Court assesses the Senate Factors. Some of the factors are more relevant to vote dilution claims, i.e., the extent to which members of the minority group have been elected to public office in the jurisdiction. While others are vital to vote denial claims, i.e., history of discrimination and the extent to which the minority group members bear the effects

of discrimination. The District Court clearly erred when it relied solely upon the factors utilized for a vote dilution claim in denying Appellants' vote denial claim.

Second, the District Court clearly erred in denying the Appellants' request for injunctive relief based upon the misperceived hardship on the Appellees. The evidence unequivocally demonstrated that there was no undue hardship to the county officials. Indeed, all three federally-recognized Indian tribes had secured ADA-compliant buildings with internet, phone, and facsimile access as well as tribal police security at no cost to Appellees.

Moreover, there could be no issues with the legality and practicality of establishing satellite offices because the Montana Secretary of State issued an election advisory in August 2012 outlining a State-endorsed method for providing early voting and late registration satellite office locations. E.R. 238-240. Despite this election advisory, all three counties refused to establish satellite locations because Montana ballots are numbered, must be submitted in sequential order, and county officials believed that their own human error would taint the election.

To counter Appellees' arguments, Appellants submitted evidence and testimony that satellite locations were offered in other Montana counties and that the election advisory guidelines could easily be accomplished while complying with Montana law. E.R. 207; E.R. 050-053 [Hr. Tr. 102:19-105:19]. This evidence, *in toto*, demonstrates that Appellees would not have experienced significant undue

hardship, particularly in light of the fundamental right being secured. Regardless, Appellees have more than enough time to resolve any impediments to a satellite early voting and late registration location before the 2014 federal primary election.

For these reasons, the District Court's denial of the motion for preliminary injunction should be reversed and remanded for further proceedings after clarifying that a violation of Section 2 of the Voting Rights Act on a vote denial claim occurs if "the totality of the circumstances" indicate that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). If the Court determines the processes in question are not equally open to participation, the Court then considers the totality of the circumstances. In making this determination, the Court assesses the Senate Factors. Some of the factors are more relevant to vote dilution claims, i.e., the extent to which members of the minority group have been elected to public office in the jurisdiction. While others are vital to vote denial claims, i.e., history of discrimination and the extent to which the minority group members bear the effects of discrimination.

ARGUMENT

STANDARD OF REVIEW

The scope of injunctive relief is reviewed for an abuse of discretion or application of erroneous legal principles. *See* United States v. Schiff, 379 F.3d 621, 625 (9th Cir. 2004). *See also* Rolex Watch, U.S.A., Inc. v. Michel Co., 179 F.3d 704, 708 (9th Cir. 1999) (finding the scope of injunctive relief granted was inadequate); Flexible Lifeline Systems Inc. v. Precision Lift, Inc., 654 F.3d 989, 994 (9th Cir. 2011) (stating the district court's reliance on an erroneous legal premise is ground for *de novo* review). The district court's refusal to modify or dissolve a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See* ACF Indus. Inc. v. California State Bd. of Equalization, 42 F.3d 1286, 1289 (9th Cir. 1994) (modify); Tracer Research Cor. v. Nat'l Envtl. Servs. Co., 42 F.3d 1292, 1294 (9th Cir. 1994) (dissolve). The denial of a request for a permanent injunction is reviewed for an abuse of discretion. *See* Cummings v. Connell, 316 F.3d 886, 897 (9th Cir. 2003).

The Ninth Circuit applies a two-part test for determining whether a district court has abused its discretion when issuing or denying injunctive relief. Amylin Pharms., Inc. v. Eli Lilly & Co., 456 Fed. Appx. 676, 677 (9th Cir. 2011). First, the Court determines "de novo whether the trial court identified the correct legal rule to apply to the relief requested." Id. (citing Cal. Pharmacists Ass'n v. Maxwell-Jolly, 596 F.3d 1098, 1104 (9th Cir. 2010), cert. granted in part on other grounds

by Maxwell-Jolly v. Cal. Pharmacists Ass'n, Inc., 131 S. Ct. 992 (2011)). "A district court's order is reversible for legal error if [...], in applying the appropriate standards, the court misapprehends the law with respect to the underlying issues in litigation." Sports Form, Inc. v. United Press International, Inc., 686 F.2d 750, 752 (9th Cir. 1982) (citing Wright v. Rushen, 642 F.2d 1129, 1132 (9th Cir. 1981)). In Section 2 litigation, this also requires a *de novo* review of "mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 591 (9th Cir. 1997) (citations omitted).

However, if the district court applied the correct legal rule, the Court then determines if "'the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. (citing United States v. Hinkson, 585 F.3d 1247, 1262 (9th. Cir. 2009)).

At the District Court level, to justify the issuance of injunctive relief, Appellants must establish: (1) likelihood of success on the merits; (2) although not required – likelihood of suffering irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. Munaf v. Geren, 553 U.S. 674, 689-690 (2008).

I. APPELLANTS DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS – SECTION 2 VOTING RIGHTS ACT.

A. A Brief History of Section 2 of the Voting Rights Act.

Section 2 of the Voting Rights Act prohibits voting practices and procedures that result in discrimination on the basis of race, color, or membership in a language minority group. 42 U.S.C. § 1973(a). It prohibits, for example, unequal access to voter-registration sites, *see* Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom.* Operation Push v. Mabus, 932 F.2d 400 (5th Cir. 1991), and unequal access to voting sites, *see* Spirit Lake Tribe v. Benson County, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); Brown v. Dean, 555 F. Supp. 502 (D.R.I. 1982). *See also* Jacksonville Coalition for Voter Protection v. Hood, 351 F. Supp. 2d. 1326 (M.D. Fla. 2004) (unequal access to early voting sites); Brown v. Post, 279 F. Supp. 60 (W.D. La. 1968) (unequal access to absentee voting opportunities). Indeed, even subtle but obvious state actions that effectively deny citizens' right to vote because of their race are subject to the Voting Rights Act. Allen v. State Bd. of Elections, 393 U.S. 544, 565-66, 89 S. Ct. 817, 831-32, 22 L. Ed. 2d 1 (1969).

In deciding claims brought under the Voting Rights Act, courts have distinguished actions that dilute one's vote (vote dilution) versus those that deny individuals an ability to cast a vote (vote denial). *See e.g.* Johnson v. Governor of Fla., 405 F.3d 1214, 1228 (11th Cir. 2005) (citing 42 U.S.C. § 1973(a)). *See also*

Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010), *overruled on other grounds*,[6] Farrakhan v. Gregoire, 602 F.3d 1072 (9th Cir. 2010). Vote dilution occurs when a State or political subdivision's voting standard, practice, or procedure results in weakening or "diluting" the minority group's vote. In the alternative, vote denial occurs when a state or political subdivision's voting standard, practice or procedure "results in the denial of the right to vote on account of race." Johnson, 405 f.3d at 1228.

[6] The Ninth Circuit subsequently overturned the Farrakhan, 590 F.3d 989, holding in Farrakhan v. Gregoire, 602 F.3d 1072 (9th Cir. 2010). While the Ninth Circuit has clearly stated 590 F.3d 989 has no precedential value, the Ninth Circuit's statement did not overturn the Ninth Circuit's longstanding case law as to how the Senate factors are weighed under the totality of circumstances test. *See e.g.* Gonzalez v. Arizona, 677 F.3d 383, 406 (9th Cir. 2012) (stating that the relevant factors in a vote dilution *and vote denial* case is the history of official state discrimination with respect to voting, racial polarization, and the evidence of education, employment and health that hinder effective participation that are the effects of discrimination). Additionally, although at first blush it appears that the Farrakhan, 623 F.3d 990 decision acknowledged the overturning of Farrakhan v. Gregoire, 590 F.3d 989, the Court specifically limited its decision to felon disenfranchisement suits under § 2, and therefore, does not invalidate the results tests recently utilized in Gonzalez:

> "In light of these considerations, we hold that plaintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state's criminal justice system must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent. *Our ruling is limited to this narrow issue, and we express no view as to any of the other issues raised by the parties and amici*." Farrakhan, 623 F.3d at 993.

As Section 2 litigation increased in the 1970s, the Courts began to develop a legal test to determine if relief was warranted. The Supreme Court provided a clear articulation of the plaintiff's burden of proof in Voting Rights Act litigation:

> "The plaintiffs' burden is to produce evidence to support findings that the political processes leading up to nomination and election were not equally open to participation by the group in question – that its member had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."

White v. Register, 412 U.S. 755, 766 (1973) (citing Whitcomb v. Chavis, 403 U.S. 124 (1971)). However, this interpretation of the Voting Rights Act was changed significantly in Mobile v. Bolden, 446 U.S. 55 (1980), where the Supreme Court, in a plurality opinion, reversed, holding that Section 2 required a plaintiff to show evidence of discriminatory intent or invidious purpose.

Two years after the Mobile opinion, Congress amended Section 2 to explicitly state that discriminatory intent or invidious purpose was not a relevant factor thereby reinstating the White v. Register test. *See* SEN. REP. NO. 97-417, 97th Cong., 2d Sess. (1982) at 28. [hereinafter "S. Rep. at 28]. During this process, the Senate Committee on the Judiciary articulated the following factors for a court's consideration:

1. the history of official voting-related discrimination in the state or political subdivision;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. the use of overt or subtle racial appeals in political campaigns; and,
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

The Senate Report also noted that the responsiveness of public officials and whether the policy underlying the standard, practice, or procedure is tenuous may also be relevant factors. S. Rep. at 28-29. While these factors were listed, the Senate Report noted that other factors may be relevant depending on the claim and that there was no threshold number of factors that needed to be proven. Id. However, the Senate Report provided clear direction on disparate socio-economic areas:

> Disproportionate educational, employment, income level and living conditions rising from past discrimination tend to depress minority political participation. *Where these conditions are shown, and where the level of black participation in politics is depressed, Plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.*

S. Rep. at 29 n. 114. (emphasis added).

Shortly thereafter, the Supreme Court interpreted Section 2 and totality of circumstances factors in Thornburg v. Gingles, 478 U.S. 30 (1986) [hereinafter "Gingles"]. Gingles was a vote dilution case[7] although its influence has clearly extended beyond the vote dilution context; Gingles is generally cited in any Section 2 Voting Rights Act claim. Gingles established a clear test for a vote dilution claim under Section 2. When asserting a vote dilution claim, the plaintiff must first demonstrate three preconditions: a minority group is sufficiently large and geographically compact to constitute a majority in the district, the minority group is politically cohesive, and the majority group votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *See* Id. at 50-51. Moreover, the Supreme Court also articulated that the most relevant Senate Factors for a vote dilution claim are: racial polarization in elections, the extent to which minority candidates have been elected, effects of past discrimination, racial bias in elections, and use of electoral devices that dilute the minority group's voting power. Id. at 48 n. 15.

However, no such clear test has been articulated for vote denial claims. Simmons v. Galvin, 575 F.3d 24, 50 n.24 (1st Cir. 2009) ("While Gingles and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge. . . . [and] the Supreme

[7] The vast majority of cases since Section 2 was amended in 1982 have been vote dilution claims.

Court's seminal opinion in Gingles . . . is of little use in vote denial cases") (citations omitted). The only certainty is that the "results" test and the totality of circumstances factors apply equally to vote denial and vote dilution. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 708 (2006). However, this has provided little guidance to plaintiffs and defendants in Section 2 vote denial litigation. Section 2 is "exceptionally vague. One has almost no guidance as to what illegally lessens the opportunity to vote." Goosby v. Town Bd., 180 F.3d 476, 500 (2d Cir. N.Y. 1999); *See also* Johnson, 405 F.3d at 1229 n.30 ("Moreover, the deep division among eminent judicial minds on this issue demonstrates that the text of Section 2 is unclear").

As a result, judicial circuits have not applied a uniform test to determine when a standard, practice, or procedure violates Section 2. For example, the Eleventh Circuit reviews all the totality of circumstances factors but does not explicitly state which ones are most relevant. *See* Johnson 405 F.3d . The Ninth Circuit applies what has been termed a "disparate impact-plus" test. In other words, a plaintiff can prevail in a section 2 claim only if, based on the totality of the circumstances, the challenged voting practice results in discrimination on account of race. Gonzalez 677 F.3d at 405. The Gonzalez Court further noted that "[a]lthough proving a violation of § 2 does not require a showing of discriminatory

intent, only discriminatory results, proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial." Id. (citations omitted). *Accord* Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003). Several district courts did not address the results test or the totality of the circumstances when presented with a vote denial claim. *See* Black v. McGuffage, 209 F. Supp. 2d 889 (N.D. Ill. 2002); Common Cause v. Jones, 213 F. Supp. 2d 1106 (C.D. Cal. 2001). Another district court found in plaintiff's favor after determining "the use of a contested electoral practice or structure result[ed] in members of a protected group from having less opportunity to participate in the political process and to elect representatives of their choice" without analyzing the totality of the circumstance factors. United States v. Berks County, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003) (citing Gingles).

B. The District Court Erred By Inappropriately Considering Irrelevant Senate Factors and Overlooking Relevant Senate Factors under the Totality of the Circumstances Analysis.

The District Court failed to appropriately weigh the totality of the circumstances factors for a Section 2 vote denial claim when it stated the following:

> "I'm not really arguing with you as to whether or not early voting and late registration in these three counties, or other places, probably in Montana with Indian reservations, I'm not arguing that that -- that the opportunity is as equal to Indian persons as it is to non-Indians. *I agree with the position that -- just from the proof that has been produced at this preliminary injunction hearing, that because of*

> *poverty, because of the lack of vehicles, and that sort of thing, that it's probably not equal.* However, you still have to prove the second prong. And that is, that they are unable to elect representatives of their choice"

E.R. 025 [Hr. Tr. 06:5-16] (emphasis added).

However, the weighing of the totality of the circumstances is the test for determining whether there has been a violation of Section 2, and depending upon whether the Court is dealing with a vote denial or a vote dilution case, legal precedent demonstrates that certain Senate Factors will weigh more heavily than others. For example, in Gonzalez, 677 F.3d at 405-406, the Court held that the relevant factors in their vote denial case was the history of official state discrimination against the minority with respect to voting, the extent to which voting in the state is racially polarized, and the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process - Senate Factors One, Two and Five.

1. The District Court Acknowledged the Existence of a History of Official Voting-Related Discrimination in the State or Political Subdivision (Senate Factor One) and the Extent to Which Minority Group Members Bear the Effects of Discrimination in Such Areas as Education, Employment, and Health Which Hinder Their Ability to Participate Effectively in the Political Process (Senate Factor Five).

The first Senate Factor addresses the history of official voting-related discrimination in the state or political subdivision. The Fifth Senate Factor

considers the extent to which the minority group member bears the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. The District Court found that both these factors weighed in favor of the Appellants. E.R. 009-011. Courts considering vote denial claims have uniformly held that the first factor is imperative in finding a violation of Section 2. *See e.g.* Gonzalez, 677 f.3d at 405-406. "While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered." Gingles, at 45 (citing S. Rep. at 29-30). In this specific vote denial claim, evidence of historical discrimination and the effects of this discrimination through increased poverty and depressed political turnout are the most compelling factors. These factors most aptly capture the interaction of "a certain electoral law, practice or structure" with "social and historical conditions" that result in an inequality in the opportunity to vote. Gingles, at 47; Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586 (9th Cir. 1997).

Appellants are members of federally recognized Indian tribes that have suffered from a long and well-documented history of discrimination. E.R 009. Furthermore, Appellants still suffer the effects of this discrimination today. E.R. 011. These are the poorest areas of Montana and the United States. Finally, the Appellants demonstrated that there is depressed Indian voter turnout in general and

absentee ballot turnout in particular. E.R. 250-257. The existence of these factors demonstrates a cognizable Section 2 claim. *See* S. Rep. at 29 n. 114.

The District Court correctly considered the history of official discrimination as it relates to voting in Montana and the effects of discrimination that hinder a minority citizen's ability to participate effectively in the political process. Moreover, the District Court also found that the current practice of not establishing satellite early voting locations on Indian reservations denies Appellants the ability to participate equally in the political process. E.R. 26 [Hr. Tr. 361:15-362:2], ("I don't believe you have produced sufficient evidence for me to find not only that the members have less opportunity than other members of the electorate to participate in the political process. I think probably that the proof on the first element is arguably there"). Indeed, the District Court's written order held a history of discrimination did exist "that has touched the right of Native Americans to participate in the democratic process" and "poverty, unemployment, and limited access to vehicles render it difficult for residents of the three reservations to travel to the county seats to register late and cast in-person absentee ballots. E.R. 009-011.

After finding that the Appellants had satisfied Senate Factors 1 and 5, no further analysis of the other factors was required.

2. The Extent to Which the State or Political Subdivision Has Used Voting Practices Procedures that Tend to Enhance the Opportunity for Discrimination Against the Minority Group (Senate Factor 3).

The District Court concluded that the state and counties no longer use the practices articulated in the third senate factor, and based thereon, this factor weighed in favor of denying Appellants' vote denial claims. To the contrary, the presence of "large election districts, majority vote requirements, one shot provisions and other voting practices or procedures" speak to a vote dilution claim. Here, the Appellants' right to equal voting treatment has not been diluted, but denied. Appellants live on vast federal Indian reservations within large counties. Due to the historical relationship between Indians and whites in Montana, county seats were settled at great distances from Indian reservations. Though relations have improved, this historical fact in relation to the counties' practice that offers late registration and early voting only at the county seat places an undue hardship on Indians who desire and often need to vote early. Whether a state or county uses at-large election districts is irrelevant to a vote denial claim.

3. The Extent to Which Members of the Minority Group Have Been Elected to Public Office in the Jurisdiction (Senate Factor Seven).

The District Court incorrectly relied upon Senate Factor Seven in support of its determination that Appellants failed to satisfy their vote denial claim. *See* E.R. 025 [Hr. Tr. 360:18-20] ("However, you still have to prove the second prong. And that is, that they are unable to elect representatives of their choice. You didn't

plead it. And you haven't proved it"). In particular, the District Court overemphasized the importance of minority candidates for public office in the three counties. In all Section 2 claims, the "extent to which members of the minority group have been elected to public office in the jurisdiction" is one of many factors the Court may review. Gomez v. Watson, 863 F.2d 1407, 1412 (9th Cir. 1988) ("The Report emphasized, however, that this list of factors was not a mandatory seven-pronged test; the list was only meant as a guide to illustrate some of the variables that should be considered by the court").

However, Senate Factor Seven should be relied upon with caution. While it may be highly probative in vote dilution cases, Congress warned of its potential to bypass federal law even before its implementation:

> "[T]he election of a few minority candidates does not 'necessarily foreclose the possibility of dilution of the [minority] vote.' If it did, the possibility exists that the majority citizens might evade the section e.g. by manipulating the election of a 'safe' minority candidate. '*Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority groups' access to the political process, we would merely be inviting attempts to circumvent the Constitution.*"'

S. Rep. at 29 n. 115 (citing Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973) (emphasis added). In contrast, the District Court found this very factor to be *conclusive proof* of Appellants' access to the political process.

> "[T]he uncontroverted testimony of defense witness proved that Native American residents of the Crow, Northern Cheyenne, and Fort Belknap Indian Reservation are able to elect representatives of their

> choice [...] *alone* mandates a conclusion that Plaintiffs are not likely to succeed on the merits of a § 2 VRA claim"

E.R. 012 (emphasis added). In other words, the District Court failed to weigh the *totality* of the circumstances by making its decision solely on the presence of Indian representatives.

The District Court's denial of the preliminary injunction suggests the State of Montana has indeed reached the mountaintop of racial harmony. However, there is a long history of voter discrimination and discouraging minorities from running for office in Montana that cannot be easily undone. One of the critical findings in United States v. Blaine County, 363 F.3d 897 (9th Cir. 2004) was that the County's election structure discouraged Indians from running for the county commission. While Appellants do not dispute the recent success, this success is the direct result of past court orders and litigation requiring all three counties to divide their counties into districts for purposes of ensuring majority-minority districts for County Commission and School Board elections. *See* Windy Boy v. County of Big Horn, 647 F. Supp. 1007 (D.C. Mont. 1986); United States v. Blaine County, 363 F.3d 897 (9th Cir. 2004); Alden v. Rosebud County Board of Commissioners, Civ. No. 99-148 BLG (D.C. Mont. 2000). But the purpose of Section 2 of the Voting Rights Act was never to establish a minimum threshold of necessary voting rights but to vigilantly protect the right to the ballot box. The House of Representatives

Report on the 2006 reauthorization of the Voting Rights Act specifically noted the limiting influence of this factor, noting

> "Neither Hispanics nor Native Americans candidates have been elected to office from a majority White district. The only chance minority candidates have to be successful are in districts in which minority voters control the elections. The breadth of racially polarized voting and its impact on minority voters represents a serious concern to the committee [...] The potential for discrimination in environments characterized by racially polarized voting is great, as demonstrated by [...] the increased need for Section 2 litigation."

H.R. REP. NO. 109-478, 109th Cong. (2006) at 34-35. In other words, Indian *candidates'* newfound success due to court orders is not dispositive of a minority *voter's* right to equal participation.

4. Lack of Responsiveness on the Part of Officials.

The lack of responsiveness on the part of officials has limited determinative value in a vote denial claim. *See* McMillan v. Escambia County, Fla., 638 F.2d 1239 (5th Cir. 1981) (discounting responsiveness by holding "a slave with a benevolent master is still a slave"). Even within the context of a vote dilution claim, its determinative value is minimal. Old Person v. Cooney, 230 F.3d 1113, 1129 n.14 (2000) (stating this factor is of "limited relevance"); Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1213 n. 15 (5th Cir. 1989) ("We also note that a finding that city officials *are* responsive to concerns of minority residents is not enough, by itself, to defeat a voting dilution claim"). The Senate Report also notes its limited value.

> "A defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process."

S. Rep. at 29 n.116.

This case highlights the limited usefulness of this factor in analyzing a vote denial claim. Here, Tribal leaders and Indian voter advocates met with the Secretary of State's Office and the three County Commissions on multiple occasions prior to the beginning of the late registration and early voting period, and the District Court suggests that public officials were responsive. *See* E.R. 011-012. Despite these meetings, the Appellees still denied the Appellants an equal opportunity to participate and to elect candidates of their choice. Finding this factor dispositive would effectively allow public officials to merely meet and confer to avoid Section 2 court orders.

5. The Opportunity to Participate in the Electoral Process and to Elect Representatives of Their Choice is a Unitary Right.

The District Court misinterprets the long history of Section 2 of the Voting Rights Act by separating protected class members right to the equal opportunity to participate in elections from the right to elect the representatives of their choice. *See also* 42 U.S.C. 1973. However, the Supreme Court addressed this directly in

Chisom v. Roemer, 501 U.S. 380 (1991).[8] In Chisom at 390-391, the Supreme Court addressed the issue of whether the term "representative" includes judges in state judicial elections. Plaintiffs asserted that the Supreme Court of Louisiana judicial districts effectively diluted the black vote. At the time, five judicial districts were divided between the rural, predominately white portions of Louisiana while the two remaining judicial positions were in a multi-member district that encompassed all of New Orleans where a large black voting population was concentrated. Thus, African Americans could not elect "the candidate of their choice" because the current judicial districts diluted their vote.

While the Supreme Court's holding was "limited in nature" and not addressing "any question concerning the elements that must be proved to establish a violation of the Act," the Supreme Court issued lengthy dicta in response to the Fifth Circuit's holding in League of United Latin Am. Citizens Council, No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) [hereinafter "LULAC"] that Section 2 created two rights – (1) "to participate in the political process" and (2) "to elect representatives of their choice." *See* Id. at 396. Based on this holding, the Fifth Circuit found that judges were not representatives and therefore judicial elections could not be challenged if a protected class member could not elect representatives

[8] The District Court cites Chisom v. Roemer for the proposition that plaintiffs must demonstrate that they cannot elect candidates of their choice in addition to demonstrating that they do not have equal access to participation. *See* E.R. 7; *See also* E.R. 168 [Hr. T 356:16-23]; E.R. 171 [Hr. Tr. 359:1-4].

of their choice but that judicial elections could be challenged if a standard, practice or procedure affects a protected class member's participation in political process. Id. In other words, minority plaintiffs could not be denied the equal right to vote in a judicial election but could have their vote diluted.

The Supreme Court, however, found that the two phrases could not be easily separated, stating "the statute does not create two separate and distinct rights" and the Court has "no authority to divide a unitary claim created by Congress." *See* Chisom. Merriam-Webster's Dictionary defines unitary as "having the character of a unit: whole, undivided." "Unitary." Merriam-Webster Online Dictionary (2013), http://www.merriam-webster.com. As a unitary claim, a plaintiff is not required to prove one half or the other half of 42 U.S.C. 1973(b) under the totality of the circumstances result test.

> *"Any abridgement of the opportunity of members of a protected class to participate in the political process inevitability impairs their ability to influence the outcome of an election."*

Chisom, 501 U.S. at 397 (emphasis added).

In this case, the District Court's interpretation of 42 U.S.C. 1973(b) requires a plaintiff to demonstrate that *but for* the alleged practice, a minority group would have elected the representative of their choice, or in the alternative, a defendant to demonstrate that a minority group's chosen representative has been elected *in spite of* the alleged practice. *See* E.R. 014. It essentially makes Senate Factor Seven, the

extent to which minorities have been elected within the district, a mandatory burden of proof instead of one of many factors to be considered. Under the District Court's holding, there is no violation if minority candidates are being elected even if "the political processes [...] are not equally open to participation" by a protected class member. 42 U.S.C. 1973(b).

The District Court's interpretation of Section 2 is in violation of the Supreme Court's statutory analysis in Chisom.

> "The essence of a § 2 claim is that certain electoral law, practice, or structure interacts with social historical conditions to cause an inequality in the opportunities [...] to elect their preferred representatives."

Gingles, 478 U.S. 30. This ultimately requires a "searching practical evaluation of the past and present reality" of the totality of the circumstances. Id. (citing S. Rep. at 30). Congress and the Courts have refused to state which circumstances are particularly relevant to different types of claims. However, none of the factors is "talismanic, none alone has controlling weight, none provides safe harbor, and none yields per se violation." Earl Old Person v. Brown, 312 F.3d 1036, 1050 (9th Cir. 2002). In particular, the ability of members of a protected class to be elected under or in spite of a standard, practice or procedure "is just one factor, among the totality of the circumstances, and is *not dispositive*." Gingles, 478 U.S. at 96-97 (quoting Senator Dole, S. Rep., at 194) (emphasis added); *See also* Johnson v. De Grandy, 512 U.S. 997, 1007-1008 (1994) ("lack of electoral success is evidence of

vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes" (citations omitted)).

The District Court's holding, however, effectively ends the ability of Indians in these three counties from bringing a Section 2 claim so long as Indians are elected to county level positions.[9] The Montana legislature could pass a new law that required Indians in Blaine, Rosebud and Big Horn counties to pass a written exam before being allowed to vote, and the District Court's legal analysis would uphold this provision because Indians in these counties would still have county-level representation. Taken the Court's logic to its extreme, the Montana legislature could pass a law requiring the hand delivery of ballots to only white voters and Indians would not have a Section 2 claim. This is absurd. The District Court's legal analysis effectively ends Montana Indians' Section 2 rights..

II. THE DISTRICT COURT ERRED IN CONCLUDING APPELLANTS' REQUESTED RELIEF WOULD CREATE SUBSTANTIAL HARDSHIP ON APPELLEES

A. The District Court abused its discretion in finding there was not an adequate location available on all three reservations and in failing to consider

[9] Although not mentioned in the District Court's order, the District Court found the success of the Democratic Party in Montana along with Defendant's witnesses' testimony that Native Americans largely vote for the Democratic ticket relevant. *See e.g.* E.R. 145-147 [Hr. Tr. 325:10-327:2]. The idea that a protected class member's right to vote can be determined by the success of a political party is dangerous and against the clear spirit of Section 2. One wonders if Plaintiffs would have been more successful in 2002 when the Republicans controlled the White House, the U.S. House of Representatives, the U.S. Senate, the Governor's Mansion, the State House, and the State Senate.

alternatives to administer early voting locations from the Montana Votes System.

The District Court denied Appellants' request for injunctive relief, because providing Appellants with equal voting rights would cause a substantial hardship on the Appellees as follows: (1) Appellees required secure, ADA compatible facilities and (2) the "Montana Votes" computer software is not user-friendly enough for two locations. E.R. 017-018.

1. Tribal Leaders Prepared Locations that were Secure and ADA Compliant.

When tribal leaders learned that the three counties would not offer late registration and early voting satellite locations but that a court order was being sought to enjoin the Appellees, the tribal leaders immediately took action to secure an appropriate site.

The uncontroverted testimony of Appellants' witness Fort Belknap Consultant William Thomas Main demonstrated that the Fort Belknap Indian Reservation leadership had already secured a site that addressed the District Court's concerns. Mr. Main had secured the approval of Tribal Judge Terry Healy for the use of the new Fort Belknap Community Court as a location for a satellite election office. E.R. 054-056 [Hr. Tr. 108:24-110:13]. Moreover, Mr. Main ensured that the new courthouse was ADA compliant. E.R. 056-057 [Hr. Tr. 110:17-111:20]. Additionally, local law enforcement were committed to protecting

the location. E.R. 059 [Hr. Tr. 114:2-20]; *See also* E.R. 063-064 [Hr. Tr. 122:1-123:6]. On cross, Mr. Main established that the proposed office location was a large room with phone, fax, and internet available. E.R. 060-062 [Hr. Tr. 118:23-120:2]. Finally, Fort Belknap Tribal Councilman Edward Moore confirmed Mr. Main's testimony that the Tribe had made significant efforts already and was willing to act immediately upon request. E.R. 065-066 [Hr. Tr. 126:5-127:7].

The uncontroverted testimony of Appellants' witness Northern Cheyenne Tribe Facilities Manager Kenneth Peppers demonstrated that the Northern Cheyenne had taken significant steps to secure an appropriate building. On direct examination, Mr. Peppers testified that the Tribe was ready to make the Tribal Council Chambers available; that the Chambers was an ADA compliant room with secure internet, phone and fax in an ADA compliant building with ample parking space. *See* E.R. 071-074 [Hr. Tr. 148:5-151:10]. On cross, Mr. Peppers further confirmed the availability of high speed internet and that local law enforcement was ready and able to protect the site. *See* E.R. 075 [Hr. Tr. 152:9-24]; E.R. 076 [Hr. Tr. 153:19-154:14]. Furthermore, Mr. Peppers testified that all of this would be provided to the county free of charge. *See* E.R. 078 [Hr. Tr. 157:13-25].

In addition to this testimony from Fort Belknap and Northern Cheyenne Tribal Members, Appellants submitted Crow Chairman Cedric Black Eagle's letter to Big Horn County Clerk and Recorder Kimberly Yarlott and Big Horn County

Commissioner John Pretty On Top stating the Tribe was ready to provide a secure office and funding for a satellite location. E.R. 234. Similar letters from the Northern Cheyenne were also submitted. E.R. 235.

The District Court ignored this evidence by noting, "All three counties would have been required to have secure, ADA compatible facilities and there was conflicting testimony as to whether this could be done in any of the three counties." E.R. 017. However, Appellees' witnesses never testified on this matter. Appellees' main witness Blaine County Clerk and Recorder Sandra L. Boardman never testified to the building and collateral issues. Ms. Boardman's testimony focused almost entirely on the difficulty associated with the Montana Votes system. Therefore, the District Court's finding was in clear error.

2. The "Montana Votes" Computer Program Was Not the Only Viable Alternative for a Second Early Voting Location.

The District Court abused its discretion in finding that the "Montana Votes" computerized absentee ballot system effectively prohibits a second early voting location within a county. Before the District Court could conclude that the "Montana Votes" system was too complicated, the District Court first had to determine that the "Montana Votes" system was the only legal way to operate two early voting locations within a county. However, the Secretary of State's Election Advisory noted that Clerk and County Recorders had wide discretion on this issue,

and furthermore, provided two alternatives to the "Montana Votes" system. *See* E.R. 238-240.

Montana election law requires absentee ballots to be sequentially numbered in the order that the ballots were given. *See* MONT. CODE ANN. § 13-13-233 (2011). Additionally, Ms. Boardman's testimony indicates that all Montana County Clerk and Recorders order ballots with the numbers pre-printed.[10] E.R. 102 [Hr. Tr. 238:19-20]. Both of the Secretary of State's alternatives however accounted for this legal requirement.

The first alternative has three easy steps. First, the satellite election office issues a ballot through the Montana Votes system. E.R. 239. Second, the satellite election office calls the main office to inform the main office that ballot number X has been issued. E.R. 239. Finally, the satellite office crosses out the ballot's

[10] It is not evident why a pre-printed number on the ballot makes it so difficult to have two locations when the computer system automatically assigns a number to each voter and subsequently the voter's ballot. The ballot's number appears to be a relic of a non-computerized voting system. As Ms. Boardman testified,

> "The Montana Vote system then prints out a label, and that label has a scanned – it has a bar code that needs to be scanned when that ballot comes back to us. So on that label, there goes on their signature affirmation envelope. *it has the ballot number on it. It is a unique number that the system issues showing the voter, with that ballot number, and that's all in that bar code*. And then the bar code has to be used, then, for when the ballot is returned to us, then we have to scan that bar code, and it brings us up to that voter's record so that we can compare the signature to make sure that is the person." E.R. 093 [Hr. Tr. 226:14-25].

The District Court did address this issue, but never asked the necessary final question, "Why not cross out the ballot's number so it corresponds with the bar code's ballot number?" *See* E.R. 107-109 [Hr. Tr. 243:24-245:13].

original number and writes the new issued number on the ballot. E.R. 239. The main office immediately voids the previous ballot. E.R. 239.

The second alternative is even easier. First, the satellite election office issues a ballot through the Montana Votes system. E.R. 240. Second, the satellite election office crosses out the ballot number on the paper stub and issues a new sequential number indicating what satellite office the ballot is coming from. E.R. 240. In other words, Blaine County Ballot #004 would become Blaine County Ballot #004-Lame Deer. E.R. 240. The main office then voids any paper ballot with the corresponding number. E.R. 240.

Both of these alternatives address many of Ms. Boardman's concerns. Specifically, Ms. Boardman was concerned that they might have duplicate numbers. However, both systems provide a procedure to avoid ballot number duplication. Ms. Boardman also worried that she would not have the requisite trained staff with "C Numbers" to staff two locations. *See* E.R. 050-053 [Hr. Tr. 102:02-105:19]; E.R. 088 [Hr. Tr. 218:04-12]; E.R. 089-090 [Hr. Tr. 221:23-222:09]. But both alternatives specifically void the requirement for staff with "C Numbers;" instead a satellite location only needs two election officials or two trained election judges. E.R. 239.

Upon cross-examination, Ms. Boardman made it clear that the Election Advisory alternatives were viable; however, Ms. Boardman did not want to do

them because she was concerned about "human error" and the lack of bar code. *See* E.R. 120 [Hr. Tr. 283:9-23]. *See also* E.R. 128 [Hr. Tr. 293:4-17]. Despite her reservations, she explicitly admits that this system can be accomplished. E.R. 139-140 [Hr. Tr. 304:21-305:16]. *See also* E.R. 141 [Hr. Tr. 316:12-16].

The District Court's finding that the Montana Votes system prohibited an additional early voting location was in error, because Appellee's own testimony unequivocally demonstrates that the Secretary of State's Election Advisory was a viable alternative albeit with more steps than the Montana Votes system. An insignificant increase in difficulty or unfamiliarity should not deny any person's right to the equal access of political participation. The District Court clearly erred.

B. Appellees Can Correct Identified Problems Before the 2014 Federal Primary

The District Court did not rule on whether this alleged substantial hardship can be surmounted to provide a satellite office location in each county for the 2014 election. The 2014 federal primary is approximately thirteen months away. Therefore, the Appellees have ample opportunity to address all identified issues before the next election. Because Appellees have over a year to adopt a system that satisfies their concerns, any hardship is minimal.

III. APPELLANTS' RIGHT TO VOTE IS FUNDAMENTAL AND THE BALANCE OF THE EQUITIES FAVORS THE ISSUANCE OF A PRELIMINARY INJUNCTION.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Wesberry v. Sanders, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481 (1964). *See also* Spencer v. Blackwell, 347 F. Supp. 2d 528, 537 (S.D. Ohio 2004) (concluding the application of Ohio statute would impair right to vote and cause irreparable injury if temporary restraining order would not issue). Because of the preferred place it occupies in our constitutional scheme, "any illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury." Harris v. Graddick, 593 F. Supp. 128, 135 (M.D. Ala. 1984). *See also* Elrod v. Burns, 427 U.S. 347, 373 (1976) (determining the loss of constitutionally protected freedoms "for even minimal periods of time, constitutes irreparable injury"). *Accord* Dillard v. Crenshaw County, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) (holding the "denial of the right to vote" constitutes irreparable injury); Cook v. Luckett, 575 F. Supp. 479, 484 (S.D. Miss. 1983) (finding "perpetuating voter dilution" constitutes "irreparable injury"); Foster v. Kusper, 587 F. Supp. 1191, 1193 (N.D. Ill. 1984) (determining denial of the right to vote for candidate of choice constitutes "irreparable harm").

Once the right to vote is denied or suppressed, there is no way to remedy the wrong. As the court held in Spirit Lake Tribe, "there is simply no remedy at law for such harm other than an injunction." Spirit Lake Tribe v. Benson County, 2010

U.S. Dist. LEXIS 116827, *12 (D.N.D. Oct. 21, 2010). Indian voters will suffer irreparable injury if they are denied the equal opportunity to vote in the 2014 and future elections.

CONCLUSION

Section 2 of the Voting Rights Act has been violated if "the totality of the circumstances" indicate that "the political processes leading to nomination or election ... are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). If the Court determines the processes in question are not equally open to participation, the Court then considers the totality of the circumstances by utilizing the Senate Factors. The relevance of each Factor depends upon whether a vote denial or a vote dilution case is involved.

In the instant case, the District Court considered the history of discrimination (Senate Factor One) and determined that such history is well-established in the State of Montana. E.R. 009. The Court did not address Senate Factor Two – the extent to which voting in the elections of the state or political subdivision is racially polarized despite the fact that the Gonzalez Court found this factor relevant in a vote denial case. *See* E.R. 008; Gonzalez, 677 F.3d at 405. As for Senate Factor Three, the extent to which the state or political subdivision has

used voting practices or procedures that intend to enhance the opportunity for discrimination against the minority group, the Court held that "residents of the three reservations have been successful in electing candidates of their choice in recent years." E.R. 010. The District Court then concluded,

> "poverty, unemployment, and limited access to vehicles render it difficult for residents of the three reservations to travel to the county seats to register late and cast in-person absentee ballots."

(Senate Factor Five). E.R. 010-011. The District Court correctly omitted discussion of Senate Factors Four (the exclusion of members of the minority group from candidate slating process) and Six (the use of overt or subtle racial appeals in political campaigns). The District Court erred by placing too much emphasis on Senate Factor Seven, the extent to which members of the minority group have been elected to public office in the jurisdiction. Indeed, the Court held that "[t]his alone mandates a conclusion that Plaintiffs are not likely to succeed on the merits of their § 2 VRA claim." E.R. 012. Because Senate Factor Seven is not applicable in vote denial cases, the District Court erred in denying the Appellants' request for injunctive relief. *See* Gonzalez, 677 F.3d at 406 (holding that the history of official state discrimination with respect to voting, the extent to which voting in the state is racially polarized, and the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate

effectively in the political process are essential). *See also* Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010), *overruled on other grounds*, Farrakhan v. Gregoire, 602 F.3d 1072 (9th Cir. 2010) ("The extent to which members of the minority group have been elected to public office in the jurisdiction simply has no bearing on the question whether minorities are being denied the right to vote 'on account of race'").

In the interest of judicial economy, the Plaintiffs respectfully request that the Court clarify the appropriate test for a vote denial claim under the Voting Rights Act by remanding this case with specific instructions.

STATEMENT OF RELATED CASES

No related cases are pending and there have been no previous appeals concerning this matter.

Dated this 19th day of March, 2013.

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CERTIFICATE OF SERVICE

I, Steven D. Sandven, hereby certify that on the 19th day of March 2013, I electronically filed the foregoing APPELLANTS' OPENING BRIEF with the Clerk of Courts for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

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I, further, certify that all participants in the case are registered appellate CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,309 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 Version 12.3.4 and size 14 font, Times New Roman.

Respectfully submitted this 19th day of March, 2013.

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I, Steven D. Sandven, hereby certify that on the 19th day of March 2013, I mailed four copies of APPELLANTS' EXCERPTS OF RECORD to the Clerk of the Courts for the United States Court of Appeals for the Ninth Circuit and one copy to all listed attorneys of record by First Class Mail, pre-paid postage.

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