UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Thomas Poor Bear, Don Doyle, Cheryl D. Bettelyoun, and James Red Willow,

Plaintiffs,

vs.

Case No. 5:14-cv-05059-KES

The County of Jackson, a political subdivision and public corporation organized under the laws of the State of South Dakota; the Board of Commissioners for the County of Jackson, a political subdivision and public corporation organized under the laws of the State of South Dakota; Vicki Wilson in her official capacity as the Jackson County Auditor; Glen Bennett, Larry Denke, Larry Johnston, Jim Stilwell, and Ron Twiss, in their official capacities as Jackson County Commissioners,

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Defendants.

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Plaintiffs Thomas Poor Bear, Don Doyle, Cheryl Bettelyoun, and James Red Willow ("Plaintiffs") respectfully submit this memorandum of law in opposition to Defendants' Motion to Dismiss (ECF Doc. No. 23). As demonstrated below, Defendants' motion should be denied in its entirety.

I. INTRODUCTION

The Complaint alleges a straightforward case in which Defendants' refusal to provide for in-person registration and in-person absentee voting on the Pine Ridge Reservation has denied equal opportunities for Plaintiffs and other Indian voters in Jackson County to participate in elections. Defendants' actions also have imposed greater burdens on Plaintiffs and other Indian voters than on white voters to participate in elections. The Complaint alleges that Jackson County, which has a population that is about half white and half Indian, makes in-person absentee voting available only in Kadoka, a town that is more than 90% white, for 46 days before elections, and allows in-person registration and voting at the same time until 15 days before the election only in Kadoka. Defendants refuse to set up a satellite office for the same in Wanblee, a town on the Pine Ridge Reservation that is more than 90% Indian. (In-person absentee voting and the availability of in-person registration combined with in-person absentee voting during a portion of the absentee voting period will be referred to collectively in this memorandum as "Early Voting.") As a result, Indian citizens in Jackson County have to travel, on average, twice as long as the average round-trip travel time required for white citizens in order to take advantage of Early Voting. The time and resources required for a trip to Kadoka, combined with the depressed socioeconomic status of Indians in Jackson County, make in-person absentee voting effectively unavailable for many Indians in Jackson County. Jackson

County thus provides a benefit to white citizens—in-person absentee voting and in-person registration—that is not provided equally to Indian citizens.

The County's decision to make Early Voting available only in Kadoka leads to a discriminatory result that violates Section 2 of the Voting Rights Act ("VRA"). Section 2 ("Section 2") of the VRA prohibits voting practices and procedures that result "in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group]." 52 U.S.C. § 10301(a). A Section 2 violation is established if it is shown that voting opportunities are not "equally open to participation" by minorities in that those minority citizens have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). As described in detail in the Complaint, Defendants' refusal to make Early Voting equally available to all Jackson County voters results in less opportunity for Plaintiffs and other Indian voters to participate in the political process.

The Defendants also acted with a discriminatory purpose in violation of the 14th Amendment to the United States Constitution and Section 2 of the Voting Rights Act. Both the 14th Amendment and Section 2 prohibit implementation of voting practices with a racially discriminatory purpose. The Complaint alleges that there is funding available for the satellite office in Wanblee, and that Defendants are aware of the funding but, nonetheless, claim a lack of funds as the sole reason to reject the request to establish the satellite office in Wanblee. The Complaint therefore states a claim of discriminatory purpose under Section 2 and the 14th Amendment.

Defendants nevertheless argue that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because Plaintiffs allegedly lack standing to pursue their claims because the

injury generally affects all Indians in Jackson County and is not unique to Plaintiffs, and pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiffs (i) allege only that voting has been made more difficult for them, not that they have been prevented from voting entirely, and (ii) do not sufficiently allege an intentional discrimination claim.[1] Defendants' arguments are premised on misconstruing precedent – and in some instances simply ignoring controlling Supreme Court authority – and disregarding the actual well-pleaded factual allegations in the Complaint, which must be accepted as true on this motion. Accordingly, the Court should deny Defendants' Motion in full.

II. STATEMENT OF FACTS

A. The Parties.

Plaintiffs Thomas Poor Bear, Don Doyle, Cheryl Bettelyoun, and James Red Willow are members of the Oglala Sioux Tribe and reside on the Pine Ridge Reservation in Jackson County. Complaint, ¶¶ 9-13, ECF No. 1. Plaintiffs Poor Bear, Don Doyle, and James Red Willow reside in Wanblee; Plaintiff Cheryl D. Bettelyoun resides in Long Valley. *Id.* ¶¶ 9-12. Plaintiffs filed the Complaint in this case on September 18, 2014, alleging that, because of Defendants' refusal to establish a satellite office in Wanblee for Early Voting, they and other Indian citizens "residing in Jackson County face significantly greater burdens and have substantially less opportunity than the white population to avail themselves of the convenience and the benefits of casting in-person absentee ballots and using in-person registration." *Id.* ¶ 63.

The Defendants named in the Complaint are (1) Jackson County, a political subdivision and corporation organized and existing under the laws of South Dakota, *id.* ¶ 14; (2) Vicki

[1] Defendants also mention Fed. R. Civ. P. 12(c), but a motion under Rule 12(c) – which is appropriate only "[a]fter the pleadings are closed" – is premature at this time and, in any event, Defendants make no argument specific to Rule 12(c).

Wilson, the Jackson County Auditor, sued in her official capacity, *id.* ¶ 15; (3) the Board of Commissioners for Jackson County, Compl. ¶ 16; (4) Glen Bennett, the Chairman of the Board of Commissioners for Jackson County, sued in his official capacity, *id.* ¶ 17; (5) and the remaining four members of the Board of Commissioners for Jackson County – Larry Denke, Larry Johnston, Jim Stilwell, and Ron Twiss – all sued in their official capacities, *id.*¶¶ 18-21.

B. Early Voting in Jackson County Is Not Equally Available to Indian Citizens

South Dakota has "no excuse" absentee voting, which permits any qualified voter to vote by absentee ballot. S.D.C.L. § 12-19-1 (2014); Compl. ¶ 22. Absentee voting begins 46 days before an election and continues until Election Day. *Id.* ¶¶ 22 & 23. In-person absentee voting is available at the office of the county auditor in each county in South Dakota. *Id.* ¶ 23. Once absentee voting has begun, citizens may register to vote and vote in-person absentee at the same time at the office of the county auditor until 15 days before Election Day. *Id.*

The southern half of Jackson County comprises a portion of the Pine Ridge Reservation. *Id.* ¶ 25. According to the 2010 Census, the population of Jackson County is 52.0% American Indian or Alaska Native (alone); 42.7% white (alone); and 4.5% white and American Indian or Alaska Native. *Id.* ¶ 27. Also according to the 2010 Census, the voting age population of Jackson County is 44% American Indian or Alaska Native (alone); 51% white (alone); and 3.9% white and American Indian or Alaska Native. *Id.* Kadoka and Wanblee are the two most populous cities or towns in Jackson County. *Id.* ¶ 29.

Early Voting in Jackson County is currently available only in Kadoka, which is the County Seat and is not on the Pine Ridge Reservation. *Id.* ¶¶ 30-31. The 2008-2012 American Community Survey ("ACS") estimates that the population of Kadoka is 94.5% white and 5.2% American Indian or Alaska Native. *Id.* ¶ 28. According to the 2010 Census, the voting age

population of Kadoka is 84% white and 12% American Indian or Alaska Native. *Id.* The town of Wanblee, where Plaintiffs seek to have Early Voting made available, is on the Pine Ridge Reservation and, according to the 2008-2012 ACS, has a population that is 95.5% American Indian or Alaska Native and 1.6% white. *Id.* According to the 2010 Census, the voting age population of Wanblee is 92% American Indian or Alaska Native and 3.5% white. *Id.*

The location for Early Voting in Jackson County is, on average, significantly closer to and more convenient for the white citizens of Jackson County than for the Indian residents. *Id.* ¶ 32. The distance from Wanblee—where the vast majority of the population is Indian—to Kadoka—where Early Voting is available and the vast majority of the population is white—is approximately 27 miles, which equates to about 32 minutes of travel time. *Id.* ¶ 33. There is a significant disparity between the average time it takes for white residents of Jackson County to reach Kadoka and the average time it takes Indian residents to reach Kadoka. *Id.* ¶ 34. On average, Indians must travel twice as far as whites (which takes, on average, twice the time) in order to reach the location for Early Voting.

The problem created by the greater distance that Indians, on average, must travel to reach Kadoka is exacerbated by the significant number of Indians without access to reliable transportation. According to the 2006-2010 ACS estimates, 22.3% of occupied housing units in Jackson County in which there is at least one person who is American Indian or Alaska Native (alone) have no vehicle available. *Id.* ¶ 35. By contrast, *no* occupied housing units in Jackson County in which whites reside have no vehicle available. *Id.* Similarly, the challenges created by the greater distance and limited access to reliable transportation are only further exacerbated by the poverty and unemployment rates for Indians in Jackson County. According to the 2006-2010 ACS estimates, in Jackson County, 52.9% of Indians live below the poverty level, 44.2%

are unemployed and 75.1% have received Food Stamps/SNAP benefits within the last 12 months. *Id.* ¶ 36. By contrast, only 11.5% of whites in the County live below the poverty level, 1.4% are unemployed, and 1.5% have received Food Stamps/SNAP benefits within the last 12 months. *Id.*

C. Funding Is Available for Early Voting in Wanblee but Defendants Refuse to Establish a Satellite Office

On May 6, 2013, Plaintiff Poor Bear, Vice President of the Oglala Sioux Tribe, wrote the Board of Jackson County Commissioners to ask the Board to establish and staff a satellite office for voter registration and in-person absentee voting in Wanblee. Compl. ¶ 37. The letter requested that the satellite office be established for the primary and general elections in 2014 and for all future elections. *Id.* On May 13, 2013, O.J. Semans, executive director of Four Directions, Inc., attended the meeting of the Board and presented the request for the satellite office in Wanblee. *Id.* ¶¶ 37-38.

Between November 2013 and February 2014, a task force charged with revising South Dakota's plan for implementing the Help America Vote Act ("HAVA") met several times to revise the plan. *Id.* ¶ 39. The task force approved a revised plan in February 2014, which included a provision for Jackson County to use HAVA funds to establish a satellite office. *Id.* The Revised HAVA Plan provides that "a county may be allowed to use HAVA funds to set-up an additional in-person satellite absentee voting location" if the jurisdiction has (1) "50% more individuals below the poverty line than the rest of the county" and (2) the voters living in the jurisdiction "[l]ive, on average, 50% farther from the existing county seat or other satellite location than the rest of the county." *Id.*¶ 49. The Revised HAVA Plan specifies that Jackson County satisfies the criteria for establishing additional in-person satellite absentee voting locations. *Id.*¶ 50. The Complaint alleges that Defendants were regularly provided with updates

about the work of the HAVA task force to revise South Dakota's HAVA plan, and were provided with drafts of and a copy of the final revised HAVA plan ("Revised HAVA Plan") that the task force approved in February 2014.[2] *Id.* ¶ 40.

In April 2014, Bret Healy, a consultant for Four Directions, Inc., attended a meeting of the Board of Commissioners where he explained the funding that would be available through the Revised HAVA plan to establish a satellite office in Jackson County. *Id.* ¶ 41. On June 20, 2014, the Board of Commissioners met and discussed the request for a satellite office in Wanblee. *Id.* ¶ 42. Despite having heard Mr. Healy's presentation two months earlier, the minutes from the June 20, 2014 meeting falsely state that,

> The state HAVA [Help America Vote Act] plan does not designate the expense of such sites by the three counties as being allowable reimbursable expenses with the HAVA grant funds. This would be an additional expense for Jackson County.

Id. ¶ 43. The Board discussed the Revised HAVA Plan, but the Board voted not to establish the Early Voting site in Wanblee "due to no county funding available." *Id.* ¶ 44. Of course, Defendants knew that funding for the proposed satellite office in Wanblee was and is currently available under the Revised HAVA Plan. *Id.* ¶¶ 45-46. The pretextual reason given for the denial of the request for a satellite office in Wanblee is tenuous, in that there is funding available for the satellite office. *Id.* ¶ 62.

Establishing the proposed satellite office in Wanblee will not undermine any legitimate interest of the Defendants, especially given that the cost and burden on the County to designate a satellite office will be negligible in comparison to the irreparable harm that Plaintiffs have

[2] The revised HAVA plan was published in the Federal Register on July 2, 2014 and became effective on August 1, 2014. *Id.* ¶ 51.

already suffered, and will continue to suffer, as a result of the violation of their statutory and Constitutional rights. *Id.* ¶ 61.

D. History of Discrimination

In South Dakota, there is a long history of racial discrimination against Indians, including discrimination in voting. Compl. ¶ 54. When South Dakota became a state in 1889, the right to vote was largely restricted to free white men and it was illegal to create precincts on Indian reservations. *Id.* ¶ 55. Although the federal Indian Citizenship Act of 1924 gave full rights of citizenship to Indians, South Dakota continued to ban Indians from voting or holding office until the 1940s. *Id.* ¶ 56. Indians in "unorganized counties" could not vote until the mid-1970s and residents of unorganized counties could not hold county office until 1980. *Id.* ¶ 57. The portion of Jackson County that is part of the Pine Ridge Reservation (and in which Wanblee is located) was a part of such an "unorganized" county, Washabaugh, until 1983. *Id.* In more recent years, officials in South Dakota have drawn election districts so as to reduce the power of Indian voters, by drawing district boundaries so as to exclude land owned by tribal members, and only include white voters; by "packing" minorities into as few districts as possible; or otherwise malapportioning districts so as to dilute Indian representation. *Id.* ¶ 58. Additionally, in 2004, this Court found that there was racially polarized voting in an area including Jackson County. *Id.* ¶ 59.

Due in large part to the disparity in socio-economic status and the history of racial discrimination, turnout of Indian voters has historically been very low in South Dakota, despite the fact that the state typically ranks high overall in voter turnout. *Id.* ¶ 60.

III. PROCEDURAL HISTORY

Plaintiffs filed the Complaint on September 18, 2014 (ECF No. 1), seeking both preliminary and permanent injunctive relief. Plaintiffs filed a motion for preliminary injunction on October 10, 2014 (ECF No. 13). After a mediation with Magistrate Judge Duffy, *see* Minute Order dated October 15, 2014 (ECF No. 21), the Defendants agreed to open a satellite office in Wanblee from October 20 until November 3, 2014. Defs.' Br. at 8 n.2. Defendants have not agreed to open a satellite office in Wanblee in any future election, and Plaintiffs still seek a permanent injunction ordering the Defendants to do so. Compl. (Prayer for Relief) ¶ 3.

IV. LEGAL STANDARD

When evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must assume that all facts in the Complaint are true and construe any reasonable inferences in the light most favorable to the plaintiff. *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008). To survive a motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The allegations in the complaint must "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). "A motion to dismiss for lack of jurisdiction under rule 12(b)(1) which is limited to a facial attack on the pleadings is subject to the same standard as a motion brought under Rule 12(b)(6)." *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003) (citation omitted).

In considering a motion to dismiss under Rule 12(b)(6), a court may consider the Complaint, materials embraced by the Complaint, and some materials that are part of the public record. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). In their Motion

to Dismiss, Defendants seem to rely on the settlement of Plaintiffs' Motion for Preliminary Injunction (ECF No. 13). *See* Defs.' Br. at 3-4 n.1, 8 n.2, 12, 26. That settlement, however, pertained only to the motion for preliminary injunction and did not affect the permanent relief that Plaintiffs seek in the Complaint.

V. ARGUMENT

A. Plaintiffs Have Standing to Pursue Their Claims

To show standing, Plaintiffs must allege that they have (1) "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Plaintiffs have alleged each of these required aspects to demonstrate standing.

First, the Complaint alleges facts showing that Plaintiffs have "suffered an 'injury in fact.'" *Id.* Plaintiffs' injury is the denial of the equal opportunity to vote and the additional burden on Plaintiffs to take advantage of Early Voting. The Complaint sufficiently describes Plaintiffs' injury: "Plaintiffs and other Native American citizens residing in Jackson County face significantly greater burdens and have substantially less opportunity than the white population to avail themselves of the convenience and benefits of casting in-person absentee ballots and using in-person registration." Compl. ¶ 63. The denial of an equal opportunity to vote is concrete and particularized, and actual and imminent. Plaintiffs are all registered voters residing on the Pine Ridge Reservation and must travel approximately twice the distance as white voters, on average, to vote in-person absentee in any given state or federal election. *Id.* ¶¶ 9-13, 32-34. The greater distance they must travel in order to take advantage of in-person absentee voting translates to

greater expenditures of time and gas money, which all combine to make in-person absentee voting harder to access for Plaintiffs than for white voters, on average. *Id.* ¶¶ 9-13, 23, 33-35; *see Perkins v. Matthews*, 400 U.S. 379, 387 (1971) ("The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise.").

Second, the Complaint alleges facts showing that Plaintiffs' "injury is fairly traceable to the challenged action of the defendant." *Friends of the Earth, Inc.*, 528 U.S. at 180. The injury – that it is harder for Plaintiffs and other Indians to take advantage of the 46 days of in-person absentee voting than it is for white voters, on average, in Jackson County – is directly traceable to the action of Defendants. Defendants denied the request by Plaintiff Poor Bear and the Oglala Sioux Tribe to open a satellite office for in-person absentee voting and in-person registration in Wanblee; such an office would have made in-person absentee voting available on a more equal basis to Plaintiffs. Compl. ¶¶ 37-53.

Finally, Plaintiffs allege facts showing "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc.*, 528 U.S. at181. A decision favorable to Plaintiffs and which requires Defendants to create a permanent satellite Early Voting office in Wanblee would equalize the distance, on average, for white and Indian voter to cast an in-person absentee ballot. Compl. ¶¶ 33-34. Furthermore, an order requiring Jackson County to obtain preclearance for future changes in voting law and appointing Federal observers will help ensure that Defendants cannot perpetuate systems that have the effect of denying or abridging Indians' right to vote. Compl. (Prayer for Relief) ¶ 4-5.

Defendants argue that the Plaintiffs have not alleged they have standing because they have not sufficiently alleged an "injury in fact." Defs.' Br. at 6-9. According to Defendants,

Plaintiffs have presented only "generalized grievances," and have not alleged that they were or will be unable to vote. Defendants do not make any substantive argument with respect to the second and third factors required for standing.

Defendants' argument that Plaintiffs allege a "generalized grievance" and have not been "personally denied equal treatment by the challenged discriminatory conduct," Defs.'Br. at 6, fails, as the Complaint plainly alleges that Defendants' actions have denied or impaired Plaintiffs' individual right to vote. *See* Compl. ¶ 63. The fact that, in addition to Plaintiffs, the rights of other Indian citizens to vote have also been denied or impaired does not transform Plaintiffs' claims into a "generalized grievance." If that were true, every case in which voters other than the plaintiffs were affected by the defendants' actions would be barred because plaintiffs would be asserting "generalized grievances." The Supreme Court has noted that "the fact that the deprivation of [a plaintiff's] right to vote … was shared by all residents of the city does not necessarily mean that his injury is merely a 'generalized grievance.'" *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) (relying on *FEC v. Akins*, 524 U.S. 11, 25 (1998)). Where a harm is concrete, though widely shared, there may be an injury in fact. *See id.*, citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974).

Defendants' argument that there can be no injury unless it is impossible for Plaintiffs to vote is similarly flawed. According to Defendants, only a complete denial of all opportunities to vote is a cognizable injury. Defs.' Br. at 8-9. But the plain language of Section 2 makes clear that Plaintiffs do not need to allege that they have been completely deprived of the right to vote; the statute prohibits the "denial or *abridgement*" of the right to vote, not simply the denial of the right. 52 U.S.C. § 10301(a). A violation of Section 2 occurs when the processes are "not

equally open" and voters have "less opportunity" – not simply when they are *completely closed* and voters have *no opportunity* to participate in the political process. *Id.* at § 10301(b).

Ignoring the plain language of Section 2, Defendants spend almost two pages naming allegations that Plaintiffs "fail" to make – such as that they cannot vote absentee by mail, absentee by messenger, or on Election Day; or that their votes have not been counted. Plaintiffs do not need to make these allegations, as they do not need to allege that they have been completely denied the right to vote in order to plead an injury. If Defendants' position were true, when taken to its logical conclusion, it would mean that a county could decree that only white voters may vote in-person absentee for the 46-day period, but as long as Indians are permitted to vote on Election Day, Indian voters would have no injury and thus no standing. Such a result is absurd and contrary to the Voting Rights Act and the 14th Amendment.

In a case very similar to this one – where Indian plaintiffs sought access to satellite offices for early voting on Reservations – the United States District Court for the District of Montana rejected the defendants' argument that plaintiffs lacked standing because the plaintiffs had failed to allege that they were unable to vote by any means. *Wandering Medicine v. McCulloch*, Civ. No. CV 12-135-BLG-DWM, Slip Op. (D. Mont. Mar. 26, 2014). The court rejected the argument because "Plaintiffs have alleged residence in the counties and reservations at issue and that their right to participate in the political process through voting has been hindered by the Defendants' refusal to establish satellite offices." *Wandering Medicine*, Order on Motion to Dismiss, pg. 6. Plaintiffs here have made the same allegations. *See* Compl. ¶¶ 1-3, 9-13, 30-32, 61-63, 67-68, 72-73. Numerous other federal courts have reached the same conclusion in similar circumstances. *See Brooks v. Gant*, No. CIV 12-5003-KES, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012) (satellite office for in-person absentee voting); *Spirit*

Lake Tribe v. Benson Cnty., N.D., Civil No. 2:10-cv-095, 2010 WL 4226614, at *1,4-5 (D.N.D. Oct. 21, 2010) (closing of polling places); *Miss. State Chapter of Operation PUSH v. Allain* ("*Operation PUSH I*"), 674 F. Supp. 1245 (N.D. Miss 1987), *aff'd sub nom., Miss. State Chapter, Operation PUSH Inc. v. Mabus*, ("*Operation PUSH II*), 932 F.2d 400 (5th Cir. 1991) (failure to mandate satellite registration); *Brown v. Dean*, 555 F. Supp. 502, 505 (D.R.I. 1982) (relocation of a polling place).

The cases cited by Defendants in support of their argument are clearly inapposite. In both *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1335 (11th Cir. 2007), and *Lance v. Coffman*, 549 U.S. 437, 441 (2007), the intervenors or plaintiffs did not allege that their personal voting rights were denied or abridged, but only that a court's actions exceeded its authority. Here, however, Plaintiffs have alleged that Defendants' actions affect their individual ability to vote.

Plaintiffs have Article III standing and have adequately pled the facts necessary to establish their standing.[3]

B. Plaintiffs Have Stated a Claim for Relief Under the "Results" Test of Section 2 of the Voting Rights Act

1. Legal Framework for a VRA "Results" Claim

Section 2 prohibits a political subdivision from imposing or applying any voting practice or procedure "in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group]." 52 U.S.C. § 10301(a).[4] A violation of Section 2:

[3] In the unlikely event the Court finds that Plaintiffs have not adequately pled facts necessary to establish standing, Plaintiffs respectfully request leave to amend the Complaint.

[4] The VRA defines "language minority group" to include persons who are American Indian. 52 U.S.C. § 10310(c)(3).

> is established if, based on the totality of 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) [of this section] in that its members have *less opportunity than other members of the electorate to participate in the political process* and to elect representatives of their choice.

Id. § 10301(b) (emphasis added). A violation of Section 2 does not require discriminatory intent. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 [in 1982] to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test.'"). "The essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred [representatives]." *Id.* at 43-47; *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1017-18 (8th Cir. 2006).

The plain language of the statute requires that an analysis of whether a violation of Section 2 has occurred is based upon the "totality of the circumstances." The factors to be considered in assessing the "totality of the circumstances" include, but are not limited to:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> (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 unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

> (5) 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;
>
> (6) whether political campaigns have been characterized by overt or subtle racial appeals;
>
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 1021-22 (citing *Gingles*, 478 U.S. at 36-37). Two other factors are also probative in the totality-of-the-circumstances test: (8) "a significant lack of response from elected officials to the needs of the minority group," and (9) whether "the policy underlying the jurisdiction's [action was tenuous]." *Id*. at 1022. These nine factors are referred to as the "Senate Factors." "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles*, 478 U.S. at 45.

Thus, in a Section 2 case of this type, the Plaintiffs must allege, based upon the totality of the circumstances, that the challenged practice unequally burdens minority voters and/or unequally benefits white voters. The Senate Factors used to analyze the "totality of the circumstances" that are particularly pertinent to the type of Section 2 claim alleged in the Complaint (sometimes called a "vote denial" claim, but more appropriately termed a "ballot access" claim), include any history of official discrimination touching the right of minority citizens to register, to vote, or otherwise to participate in the democratic process (the first Senate Factor), and the extent to which socioeconomic disparities hinder minority citizens' ability to participate effectively in the political process (the fifth Senate Factor). *See Gonzalez v. Arizona*, 677 F.3d 383, 405–06 (9th Cir. 2012) (en banc) (considering the Senate factors in evaluating a Section 2 challenge to Arizona's voter ID law), *aff'd on other grounds*, *Arizona v. Inter Tribal Council of Ariz.*, 133 S.Ct. 2247 (2013). The extent of racially polarized voting (the second

Senate Factor), is relevant in considering the broader implications of providing unequal access to Indian voters. And whether the policy underlying the challenged practice is tenuous (the ninth Senate Factor) is also particularly relevant here. *See Ortiz v. City of Phila.*, 28 F.3d 306, 312-313, 316 (3rd Cir. 1994).

Defendants' argument that the Complaint fails to state a claim is premised entirely on a confusion between a ballot access/vote denial claim such as this one and a vote dilution claim. While ballot access claims involve restrictions on citizens' access to registration or the ballot box, a claim of "vote dilution" can be brought where—even though minority voters are able to register, cast a ballot, and have that ballot counted in a nondiscriminatory manner—a practice such as racially discriminatory redistricting denies minority voters an equal opportunity to elect their candidates of choice. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006). Because the instant litigation involves a ballot access claim, the analysis set out for vote dilution cases in *Gingles*, 478 U.S. at 44-45 is not appropriate.

2. Plaintiffs Have Pled Facts to Sustain a Section 2 Results Claim

Under the appropriate vote denial framework, the Complaint adequately alleges the elements of a "ballot access" claim. The Complaint alleges that Jackson County's decision to provide Early Voting only in Kadoka, and not in Wanblee on the Reservation, when considered in the totality of the circumstances, unequally burdens minority voters and/or unequally benefits white voters and results in Indians having less opportunity than whites to participate in the political process in Jackson County. As discussed *supra*, Indian voters in Jackson County must travel, on average, twice as far as white voters to reach the Early Voting site in Kadoka, Compl. ¶ 34, and the Complaint adequately alleges facts related to the first, second, fifth and ninth

Senate Factors. Notably, Defendants do not argue that Plaintiffs fail to allege facts to support any of the Senate Factors; indeed, the Defendants make no mention at all of the Senate Factors.

As discussed *supra*, the fifth Senate Factor, the extent to which minorities "bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," is highly probative in the analysis of the totality of the circumstances for a ballot access claim. The Complaint alleges facts to support the fifth Senate Factor, in that Indians in Jackson County experience high rates of poverty and high rates of unemployment. Compl. ¶ 36. Socioeconomic disparities in these areas are well-recognized as hindrances to the ability of minorities to participate in the electoral process. *Gingles*, 478 U.S. at 69 ("[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.").

The first Senate Factor, a history of official discrimination related to voting, weighs heavily in favor of Plaintiffs and is alleged at length in the Complaint. Compl. ¶¶ 54-58. The second Senate Factor, the existence of racially polarized voting, similarly weighs heavily in favor of Plaintiffs in this case. *Id.* ¶ 59. And the last Senate Factor, that the policy underlying the decision was tenuous, also weighs in favor of Plaintiffs, as Defendants claim lack of funding as a reason not to establish the satellite office, yet there is funding available and Defendants are now and have been aware of the funding. *Id.* ¶¶ 43-44, 46-52.

Given allegations regarding the robust history of racial discrimination against Indians in South Dakota, the depressed socioeconomic status of Indians in Jackson County that is a result of that history of discrimination, the existence of racially polarized voting, and the Defendants' tenuous justification for denying the request for a satellite office in Wanblee, Plaintiffs have

adequately pled that the totality of the circumstances weighs heavily in favor of a finding of a violation of Section 2.

Federal courts have applied Section 2 to situations—like this one—where minority voters were denied equal access to voter registration locations and polling places. For example, in *Spirit Lake Tribe*, 2010 WL 4226614, at *5, a district court granted a preliminary injunction against the closing of polling places after adoption of a vote-by-mail program. *See also Operation PUSH I*, 674 F. Supp. 1245, *aff'd sub nom., Operation PUSH II*, 932 F.2d 400 (concluding that Mississippi violated Section 2 by, among other things, failing to provide for satellite registration on a uniform statewide basis, to the detriment of minority voters); *Brown*, 555 F. Supp. at 505 (enjoining the relocation of a polling place under Section 2 because it "may well abridge [minorities'] free exercise of the right to vote."); *see also Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J. dissenting) ("If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites and § 2 would therefore be violated."). And both this Court and the District of Montana denied motions to dismiss in cases very similar to this one, where plaintiffs sought equal access to early voting sites. *See Brooks*, 2012 WL 4482984, at *7; *Wandering Medicine*, Slip Op. 12-18.

3. Defendants Fail to Show that Plaintiffs' Results Claim Should Be Dismissed

Defendants seem to make three arguments related to Plaintiffs' Section 2 results claim. First, Defendants argue that the unequal burden on Indian voters alleged in the Complaint is not a sufficient basis for a Section 2 results claim. Defs.' Br. at 18-20. In making this argument, however, Defendants completely misconstrue the harm that Plaintiffs allege and attempt to fit the

Complaint in this case into the (incorrect) theory of the case in *Jacksonville Coal. for Voter Prot. v. Hood* ("*Hood*"), 351 F. Supp. 2d 1326 (M.D. Fla. 2004). Defendants argue that finding Plaintiffs' VRA claim cognizable would "open the floodgates to voting rights litigation," then proceed to list myriad situations that are in no way similar to the instant case. Rather than addressing the harm actually alleged in the Complaint, Defendants instead argue against a theory of Section 2 in which counties, cities, or states would be evaluated based solely on what other counties, cities, or states offer their citizens in terms of voting. Defs.' Br. at 19-20. This, of course, is not a theory of Section 2 put forth in the Complaint. Rather, the Complaint alleges that the Defendants' refusal to establish a satellite office in Wanblee "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [Indian] and white voters" in Jackson County "to elect their preferred [representatives]." *Gingles*, 478 U.S. at 43-47. Again, Defendants do not argue that Plaintiffs have not alleged facts to support the Senate Factors discussed *supra*, so do not argue that the "totality of the circumstances" alleged do not support a claim.

Defendants quote at length from *Hood*, 351 F. Supp. 2d 1326, seemingly in support of this first argument, but fail to explain how the case is in any way relevant. The case is inapposite for two reasons. First, plaintiffs in *Hood* had a theory of the case unrelated to Section 2. The plaintiffs in *Hood* argued that the Duval County officials had to provide early voting sites based on how *other* counties provided early voting sites. *Id.* at 1330. And the court in *Hood* found that three out of five early voting locations were in "predominantly African-American communities" and the locations of the requested additional sites were in non-minority communities. *Id.* at 1334. The facts from *Hood* simply do not fit in the legal framework of a claim under Section 2. Second, *Hood* was decided on a motion for preliminary injunction, which requires an evidentiary

showing of a likelihood of success on the merits, not simply the factual allegations to "state a claim to relief that is plausible on its face" that are required here. *Bell Atl. Corp.*, 550 U.S. at 570.

Second, Defendants discuss at length the idea that there must be a "causal connection between the challenged practice and some harm," and seem to argue that this causal connection has not been alleged because Plaintiffs have not alleged that they cannot vote or register under any circumstance. Defs.' Br. at 20-23. This argument misconstrues the "harm" prohibited by Section 2 – i.e., the "denial or *abridgement*" of the right to vote. 52 U.S.C. § 10301(a) (emphasis added). Section 2 involves a comparative standard: whether political processes "are not *equally* open to participation" by minority voters because those voters are given "less opportunity" than white voters to participate in elections and elect their representatives of choice – not whether political processes are *completely closed* or minority voters have *no* opportunity to vote. 52 U.S.C. § 10301(b) (emphasis added). *See, e.g., Operation PUSH I*, 932 F.2d 400 (restriction on voter registration violated Section 2 even though the challenged law did not absolutely bar any citizen from registering to vote and it was possible, with sufficient effort, for citizens to register); *Spirit Lake Tribe*, 2010 WL4226614, at *1-*2 (enjoining the county from closing polling places on the Reservation even though mail-in balloting was available); *Brown*, 555 F. Supp. at 504-06 (enjoining relocation of a polling place where plaintiffs allege that such change would make it "considerably more difficult" – but not impossible – for Black voters to vote).

Defendants' reliance on *Gonzalez*, 677 F.3d 383, a case about voter identification, to support their "causal connection" argument is misplaced. The failure by plaintiffs to prove "causation" in *Gonzalez* was a failure to show harm: "Gonzalez alleged that 'Latinos, among other ethnic groups, are less likely to possess the forms of identification required under

Proposition 200 to…cast a ballot,' but *produced no evidence supporting this allegation*." *Id.* at 407 (emphasis added). The district court had found that the challenged ID law did "not have a statistically significant disparate impact on Latino voters." *Id.* at 406. Here, the Defendants' refusal to open a satellite office for Early Voting in Wanblee causes a harm – the inequality of electoral opportunities enjoyed by Indian voters in Jackson County – and that harm has been adequately alleged in the Complaint.

Defendants' reliance on another voter ID case, *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) is similarly misplaced. The Seventh Circuit reversed the District Court's finding that Wisconsin's voter identification law violated Section 2 and the Fourteenth Amendment by reasoning that the factual findings that blacks and Latinos were statistically less likely to have acceptable identification or the documents required to obtain identification than whites did not equate to the required finding "that blacks or Latinos have less 'opportunity' than whites to get photo IDs." *Id.* at 753. By a 6-3 vote, the Supreme Court vacated the Seventh Circuit's decision to stay the District Court's permanent injunction pending the filing and consideration of a petition for writ of certiorari. *Frank v. Walker*, 135 S.Ct. 7 (2014). In any event, the Complaint here makes the much more direct allegation that because of distance and time, lack of access to transportation, and high poverty rates, Indian voters in Jackson County have less opportunity to vote in-person absentee at the only location available. Compl. ¶¶ 1-3, 34-36. Additionally, the *Frank* court makes clear that analyzing the "totality of the circumstances" is essential in a Section 2 case, *Frank*, 768 F.3d at 754, yet Defendants make no mention in their brief of the Senate Factors or the "totality of the circumstances." Indeed, Defendants claim that "Plaintiffs have not alleged anything other than disparate impact." Defs.' Br. at 24. To the contrary, as discussed in detail *supra*, the Complaint alleges sufficient facts in form and substance to support

at least Senate Factors one, two, five, and nine – which together amount to a robust set of allegations regarding the totality of the circumstances.

Within their "causation" argument, rather than addressing the factual allegations of the Complaint, Defendants again resort to attacking the allegations that Plaintiffs do not make: Defendants correctly observe that Plaintiffs "fail" to allege that they do not have any way at all to vote, or that they "vote less, use absentee ballots less, or cannot elect their candidates of choice," or that there is any effect on voter turnout. *Id*. at 22. But Defendants do not, and indeed cannot, explain why any of these allegations would be necessary to plead a claim, and cite no authority to support such an absurd proposition.

Third, Defendants argue that Plaintiffs have not alleged that they have less opportunity "to elect representatives of their choice." *Id*. at 24-27. In so arguing, Defendants once again confuse this case—a ballot access case—with a vote dilution case. As discussed *supra*, a vote dilution case requires a different analysis than a ballot access case. *See Gingles*, 478 U.S. at 43-52. In any event, Plaintiffs' allegation that the Defendants' actions result in Indian voters having less opportunity to cast in-person ballots also establishes that the practice denies Indian voters an equal opportunity to elect their preferred candidates. *See Chisom*, 501 U.S. at 397 ("Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.").[5]

[5] Defendants' reliance on *Jacob v. Bd. of Dirs. of Little Rock Sch. Dist.*, No. 4:06-CV-01007 GTE, 2006 WL 2792172 (E.D. Ark. Sept. 28, 2006) does not further their argument. *Jacob* involved a preliminary injunction motion, which requires Plaintiff to submit evidence demonstrating a likelihood of success on the merits and irreparable harm, rather than a motion to dismiss in which the factual allegations must be accepted as true. Moreover, the *Jacob* plaintiffs proceeded on a theory of vote dilution and the court analyzed the case accordingly. *Id.* at *2. Therefore, the fact that the plaintiffs did not adequately prove (1) racially polarized voting or (2) that African Americans could not elect their representatives of choice prevented issuance of a preliminary injunction on a Section 2 vote dilution claim. *Id.* at *2; *Gingles*, 478 U.S. at 48-50.

C. Plaintiffs Have Stated a Claim for Relief Under the 14th Amendment and Section 2 of the Voting Rights Act Based on a Discriminatory Purpose

Plaintiffs allege that the refusal to establish a satellite office in Wanblee was motivated by a discriminatory purpose in violation of Section 2 of the VRA and the Fourteenth Amendment. Section 2 prohibits not only discriminatory results but also actions taken with a racially discriminatory purpose.[6] *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 765-66 (9th Cir. 1990). Similarly, the Fourteenth Amendment to the Constitution prohibits the implementation of voting practices with a racially discriminatory purpose. *Rogers v. Lodge*, 458 U.S. 613, 621-22 (1982); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Discriminatory intent is shown when racial discrimination was a motivating factor in the governing body's decision.[7] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* ("*Arlington Heights*"), 429 U.S. 252, 265-66 (1977); *United States*, 561 F.3d at 433. Direct evidence of discriminatory intent is not required. *Rogers*, 458 U.S. at 618. Rather, in alleging that Defendants made the decision "in part 'because of'" its adverse effects upon Indians, Plaintiffs may point to direct or circumstantial facts and rely on "normal inferences to be drawn from the foreseeability of defendant's actions." *Id.*; *United States*, 561 F.3d at 433.

The framework for analyzing discriminatory purpose in this context was established by the Supreme Court in *Arlington Heights*, 429 U.S. 252. Notably, Defendants fail to discuss

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[6] "'Discriminatory purpose'…implies more than intent as volition or intent as awareness of consequences...It implies that the decision maker …selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney* ("*Feeney*"), 442 U.S. 256, 279 (1979) (citation and footnote omitted). Defendants do not, and cannot, contend that Plaintiffs fail to state a claim under the *Feeney* standard.

[7] The rubric for proving intentional discrimination under Section 2 of the Voting Rights Act and the Equal Protection Clause is the same. *See generally Arlington Heights*, 429 U.S. at 265-68 (constitutional test); *United States*, 561 F.3d at 433 (Section 2 test; quoting *Arlington Heights*).

Arlington Heights or the framework from the case in their brief. *Arlington Heights* specifies that "an important starting point" for assessing discriminatory purpose is "the impact of the official action [, i.e.,] whether it bears more heavily on one race than another." *Id.* at 266 (internal quotation marks omitted). Additional evidentiary sources include, but are not limited to: (a) "[t]he historical background of the decision," (b) "the specific sequence of events leading up to the challenged decision," and (c) "[s]ubstantive departures" from what might typically might be expected, "particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached." *Id.* at 267-68. "Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the [challenged] law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter*, 471 U.S. at 228.

1. Plaintiffs' Allegations Satisfy the Arlington Heights Framework

First, as discussed in Section B, Defendants' decision to provide Early Voting only in Kadoka – a location that is twice the distance, on average, for Indian citizens than for white citizens, Compl. ¶ 34 – "bears more heavily on one race [Indians] than another [whites]." *Arlington Heights*, 429 U.S. at 266–68. Allowing Early Voting only in Kadoka provides an opportunity to white citizens that is not as readily available to the majority of Indian citizens in Jackson County. The fact that Defendants' decision "bears more heavily" on Indian residents of the County supports Plaintiffs' allegations of discriminatory purpose.

Second, the "historical background of the decision" and the "specific sequence of events leading up to the challenged decision" also support Plaintiffs' allegation that discriminatory intent tainted Defendants' decision to provide Early Voting in Kadoka, but not in Wanblee. The Complaint alleges that the Defendants received drafts of and the final copy of the Revised

HAVA Plan, which includes a specific provision for funding for Jackson County to use for a satellite office and even had someone attend one of their meetings to explain the availability of HAVA funds. Compl. ¶¶ 40, 41. Given the communications to Defendants regarding the Revised HAVA Plan and the plain language of the Plan, *see id.*¶¶ 49-50, 53, the Complaint alleges that Defendants were aware of the availability of HAVA funding to establish the satellite office in Wanblee. *Id.* ¶ 46. Despite knowing that funding was available, Defendants cited lack of funding as a pretextual excuse not to establish the office. *Id.* ¶¶ 42-44.

Third, Defendants' "[s]ubstantive departure[ ]" from what typically might be expected leads to an inference of discriminatory intent. This is especially the case given that "the factors usually considered important by the decision-maker [i.e. funding] strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267. The County gives no reason, other than the non-existent funding concerns, for refusing to open the office. Compl. ¶ 4, 45, 49-50, 71. The "absence of a legitimate nonracial reason" for [the] adoption of an electoral practice or plan that has a discriminatory effect, mandates the conclusion that Defendants have a discriminatory purpose in violation of the Voting Rights Act. *Busbee v. Smith*, 549 F. Supp. 494, 517 (D.D.C. 1982) *aff'd*, 459 U.S. 1166 (1983); *Florida v. United States*, 885 F. Supp. 2d 299, 355 (D.D.C. 2012) (finding that "in some circumstances it is reasonable to infer discriminatory intent based on evidence of pretext.").

In *Garza*, the court found that, although defendants had motivations other than racial animus, by making the decision they did, defendants "intended to create the discriminatory result that occurred," therefore satisfying the question of discriminatory intent. *Garza*, 918 F.2d at 771. Similarly, it was foreseeable that Defendants' decision to put a satellite voting office in a majority-white part of the County, while denying a similar office in a majority-Indian part of the

County, would create "the very discriminatory result that occurred." *Id.*[8] Because the discriminatory impact of Defendants' decision was foreseeable, discriminatory intent is properly inferred.

Defendants do not, because they cannot, explain why these facts as alleged are insufficient to plead discriminatory purpose. Indeed, Defendants do not even discuss the Supreme Court's controlling analysis from the *Arlington Heights* case, and therefore do not argue that the Complaint does not allege the *Arlington Heights* factors discussed above. Given the "sequence of events" and the "absence of a legitimate nonracial reason" for not opening the office, Defendants' justification – that funding was not available – was completely pretextual. Compl. ¶ 62.

2. Defendants Cite No Authority to Support Dismissal of the Second Claim for Relief

As mentioned above, Defendants fail even to cite the appropriate analysis from *Arlington Heights* and therefore do not explain how the Complaint does not satisfy the requirements of *Arlington Heights*. Rather, Defendants spend two pages making general statements about States' rights to conduct elections and that an equal protection claim requires intentional discrimination, without arguing how these statements are relevant to the instant motion. Defs.' Br. at 10-11. Defendants argue that the Complaint is devoid of allegations regarding intentional discrimination ("other than a conclusory statement to that effect") – but that contention is contrary to the

[8] As Justice Stevens noted in *Washington v. Davis*, "[an] actor is presumed to have intended the natural consequences of his deeds" and "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." 426 U.S. at 253, 96 S.Ct. at 2054 (concurring opinion) (cited in *Busbee*, 549 F. Supp. at 516-17 *aff'd*, 459 U.S. 1166 (1983)). The "natural consequence" of the County's decision was the creation of unequal in-person voting opportunities. This outcome therefore serves as "evidence describing the subjective state of mind of the [County] actor[s]." *Id.*

extensive allegations described above regarding the Defendants' knowledge of the funding available for the satellite office and the allegation that, despite this knowledge, Defendants claimed lack of funding as an excuse, which must be accepted as true for the instant motion.

Although Defendants highlight the fact that states retain the power to regulate elections and discuss 42 U.S.C. § 1983 at length, this discussion is irrelevant. Plaintiffs allege the necessary requirements under § 1983; they allege that (1) Defendants acted in their official capacities and (2) that Defendants' actions deprived Plaintiffs of a constitutional right. Compl. ¶¶ 1, 5, 15-21, 73. The Complaint does not challenge the State's role in implementing elections; rather, Plaintiffs argue that Defendants cannot implement elections in a discriminatory manner.

Defendants' reliance upon *Denis v. New York City Bd. of Elections*, No. 94 CIV 7077 (KMW), 1994 WL 613330 (S.D.N.Y. Nov. 7, 1994) is misplaced. Unlike in *Denis* where plaintiffs failed to present evidence of discriminatory intent when seeking a preliminary injunction, Plaintiffs here allege facts in the Complaint sufficient to support a claim that Defendants had no legitimate non-racial reason for intentionally denying the request for a satellite office and made the decision, at least in part, because it would disadvantage Indian voters. Compl. ¶¶ 4, 62, 71-72.

Nor does the Seventh Circuit's recent decision in *Frank*, 768 F.3d 744, support Defendants' position. *Frank* was a voter ID case, and plaintiffs there did not even allege a discriminatory intent claim. Defendants fail to explain how a decision dealing with a voting procedure that is not at issue in this case and a different constitutional claim, and which has been stayed by a 6-3 majority of the Supreme Court, could possibly be relevant.

Plaintiffs' Complaint lays out a history of racial discrimination, details the social and economic factors exacerbating Defendants' discriminatory decision, and makes clear the

pretextual nature of Defendants' decision not to fund the office. Compl.¶ 4, 34-46, 54-63. The "reasonable inference" construed "in the light most favorable to the plaintiff[s]," is that Defendants' actions were taken with discriminatory intent. *Braden*, 588 F.3d at 594. Nothing more is required at the pleading stage.[9]

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss in full.

Dated: December 3, 2014

BY:

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[9] Defendants state at the outset of their brief that the case should be dismissed for lack of subject matter jurisdiction, yet Defendants fail to make any argument about subject matter jurisdiction in their brief. This Court has subject matter jurisdiction over this case because it arises under the Constitution and the laws of the United States. Compl. ¶ 7.

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CERTIFICATE OF COMPLIANCE WITH D.S.D. Civ. LR 7.1(B)(1)

The undersigned counsel, relying on the word count function in Microsoft Word, certifies that the foregoing written brief complies with the type-volume limitation set forth in D.S.D. Civ. LR 7.1(B)(1). The brief, excluding the caption, Table of Contents, Table of Authorities, signature blocks and Certificates, contains 9,416 words.

BY: s/s Matthew L. Rappold

CERTIFICATE OF SERVICE

The undersigned counsel certifies that he caused a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** on the following person, herein designated:

Sara Frankenstein
506 Sixth Street
Rapid City, SD 57701

In the following manner:

[X] **CM/ECF system**
[ ] personal delivery
[ ] first class mail
[ ] electronic mail

Dated this 3rd day of December, 2014.

BY: s/s Matthew L. Rappold