UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

THOMAS POOR BEAR, DON DOYLE, CHERYL D. BETTELYOUN, and JAMES RED WILLOW, Plaintiffs, v. 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, in his official capacity as Jackson County Commissioner; LARRY DENKE, in his official capacity as Jackson County Commissioner; LARRY JOHNSTON, in his official capacity as Jackson County Commissioner; JIM STILLWELL, in his official capacity as Jackson County Commissioner; and RON TWISS, in his official capacity as Jackson County Commissioner, Defendants.	Case No.: 14-5059 **DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

COMES NOW Defendants the County of Jackson, the Board of Commissioners for the County of Jackson, Vicki Wilson, Glen Bennett, Larry Denke, Larry Johnston, Jim Stillwell, and Ron Twiss ("Defendants") by and through Sara Frankenstein and Rebecca L. Mann of Gunderson, Palmer, Nelson and Ashmore, LLP, their attorneys, and respectfully submit this Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss.

PRELIMINARY MATTERS

Plaintiffs consistently and erroneously inform the Court there is no in-person registration on the Pine Ridge Indian Reservation within Jackson County. (Doc. 27 at pp. 1, 2, 10.) Contrary to this contention, in-person registration is available in Wanblee at the WIC/CHN office and the Department of Social Services SNAP and TANF office. Next, the phrase "early voting" should not be used to identify South Dakota's absentee voting statutory scheme. South Dakota does not offer "early voting". It allows a voter to apply for an absentee ballot and to vote the absentee ballot up to 46 days before the election. SDCL §§ 12-19-2, 2.1. Finally, Plaintiffs assert that Defendants somehow "made the decision" to offer in-person absentee voting in Kadoka. (Doc. 27 at pp. 2, 17, 25, 26.) This is contrary to South Dakota law which requires the person desiring to vote in-person absentee to "apply in person at the office of and to the person in charge of the election for an absentee ballot during regular office hours". SDCL § 12-19-2.1 (emphasis added). The "person in charge of the election" is the county auditor SDCL § 12-1-3(7) whose office is at the county seat. Defendants made no decision whatsoever to "make" or "put" an in-person absentee voting office "only" in Kadoka. (Doc. 27 at pp. 2, 17, 25, 26.)

ARGUMENT AND AUTHORITIES

I. Plaintiffs have not Pleaded Standing Sufficient for Article III Jurisdiction

Plaintiffs lack Article III standing because they have not pleaded any factual allegations demonstrating they have suffered a concrete and particularized and actual or imminent injury in fact. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). Plaintiffs claim their injury is "the denial of the equal opportunity to vote and the additional burden on Plaintiffs to take advantage of Early Voting" (Doc. 27) sufficiently set forth in the Complaint as:

> 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.

(Doc. 1 at ¶ 63.) Conspicuously absent from the Complaint is any factual allegation whatsoever that any Plaintiff faced any burden to voting, in-person or otherwise, at all. The Complaint is devoid of any statistics purporting to support Plaintiffs' alleged injury. The "denial of an equal opportunity to vote" (Doc. 27 at p. 10) is not "actual" if there are no statistics to support the alleged injury. If the "denial of an equal opportunity to vote" truly existed, Plaintiffs should be able to provide factual allegations that Native American voter turnout is lower in general, use of absentee ballots are lower, and registration is lower. They pleaded no such allegations, making their alleged injury "conjectural or hypothetical". *Friends of the Earth*, 528 U.S. at 180 (2000). Plaintiffs instead provide only conclusory allegations, which is insufficient to plead Article III standing. *See Arkansas Right to Life State PAC v. Butler*, 146 F.3d 558, 560, (8th Cir. 1998) ("Vague and conclusory allegations of harm are insufficient to create standing.") (*citing Renne v. Geary*, 501 U.S. 312, 316 and 324 (1991)).

A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Legal conclusions alleged in a complaint are not accepted as true and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (*quoting Twombly*, 550 U.S. at 555). Plaintiffs contend their injury is particularized because they must travel twice as far as whites to vote in-person absentee. However, there are no factual allegations by any of the Plaintiffs that they do not have access to vehicles or that travel is a hardship. Plaintiffs assume greater distance translates into greater expenses, with no factual support for this assumption. Driving to Kadoka

is not required to vote, or even to vote absentee. The Complaint does not allege what the "convenience and benefits of casting an in-person ballot" and voting in-person absentee actually takes *more time and effort* than voting on Election Day because the voter must first fill out an application to receive an absentee ballot.

Moreover, Plaintiffs have not alleged facts showing "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth*, 528 U.S. at 181. Plaintiffs contend Native Americans must travel greater distances to cast an in-person absentee ballot, but pleaded no facts indicating distance prevents anyone from voting.

It is not dispositive that this Court and the District of Montana have rejected standing arguments in previous in-person absentee satellite office cases because those cases are distinguishable. The *Wandering Medicine v. McCulloch* complaint contained statistical factual allegations supporting the plaintiffs' alleged injury that their right to participate in the political process had been hindered by defendants' failure to establish satellite offices. (District of Montana, Case 1:12-cv-00135-RFC, Doc. 1, October 10, 2012.) It further alleged the failure to have a satellite office caused the disparity in voter turnout, providing statistics to support the allegations. *Id.* Similarly, the *Brooks v. Gant* complaint contained statistical allegations. (District of South Dakota, Case 5:12-cv-05003-KES, Doc. 1, January 13, 2012.) In that complaint, the plaintiffs alleged statistical facts and also that "they themselves have been denied their fundamental right to vote." *Brooks v. Gant*, Case 5:12-cv-05003-KES, 2012 WL 4482984, *7 (D.S.D. Sept. 27, 2012.)[1] Plaintiffs in this case have provided no allegations that they

[1] The remaining cases Plaintiffs cite as federal courts that "have reached the same conclusion" do not address standing. *See* (Doc. 27 at pp. 13-14) (*citing Spirit Lake Tribe v. Benson County, N.D.* Civ. No. 2:10-cv-095, 2010 WL 422614 (D.N.D. October 21, 2010); *Miss. State Chapter of Operation PUSH v. Allain ("Operation PUSH I")*, 674 F. Supp. 1245 (N.D. Miss. 1987); *Miss.*

themselves have been denied the right to vote. No Plaintiff has even alleged they cannot in-person absentee vote in Kadoka. Nor is there any statistical allegation contained in the Complaint. Plaintiffs' Complaint contains no more than conclusory allegations and general grievances which are insufficient to invoke Article III Jurisdiction.

II. The Voting Rights Act[2]

A. Plaintiffs have not Alleged they are Unable to Elect Their Preferred Candidates

Plaintiffs' have failed to plead or even recognize the second prong of a Section 2 claim, which requires Plaintiffs to prove they are unable to elect candidates of choice. A violation of Section 2 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) 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.

52 U.S.C. § 10301(b) (emphasis added). Plaintiffs have not pleaded or alleged they are unable to elect representatives of their choice. Instead, they argue only vote dilution claims require proof of this second prong and chastise Defendants for failing to analyze the Senate Factors. There is no need to analyze the Senate Factors when Plaintiffs have not even pleaded a basic Section 2 violation.

State Caption, Operation PUSH Inc. v. Mabus, ("Operation PUSH II"), 932 F.2d 400 (5th Cir. 1991); *Brown v. Dean*, 555 F.Supp. 502 (D.R.I. 1982)).

[2] Plaintiffs refer to the "results test". This term merely indicates that a VRA claim, as opposed to a due process claim, does not require proof that Defendants purposefully discriminated, but rather that the effect of Defendants' actions was discriminatory. This so-called "results test" describes the current version of the VRA, but does not change the basic requirements necessary to make out a VRA claim. The "results test" is merely subsection (b) that was added in 1982. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

> A violation of section 2 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 protected class, "in that its members have less opportunity than other members of the electorate **[1]** to participate in the political process **and [2]** to elect representatives of their choice."

Gonzalez v. Arizona, 677 F.3d 383, 405, (9th Cir. 2012) (*citing* 42 U.S.C. § 1973(b)) (emphasis added). The totality of the circumstance test is *how* minorities prove they have less opportunity to participate and elect candidates of choice. If there is no allegation they cannot elect candidates of choice, a claim under the Voting Rights Act has not been stated.

The text of § 2 of the VRA itself is plain, and the United States Supreme Court has clearly interpreted that text. In order to make out a § 2 VRA claim, the Supreme Court has held that Plaintiffs must prove *both* (1) that the members of the protected class have less opportunity to participate in the political process; *and* (2) the minority class members' inability to elect representatives of their choice. *Chisom v. Roemer*, 501 U.S. 380, 397 (1991).

> As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of "the right" to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process and to elect representatives of their choice." 42 U. S. C. § 1973 (emphasis added). It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.

Chisom, 501 U.S. at 397 (emphasis added). *See also Ortiz v. City of Philadelphia Office of City Comm'rs Voter Registration Div.*, 28 F.3d 306, 312, 315 (3rd Cir. 1994) (a vote denial case where the court held "Nor was there evidence that minorities experience difficulty in electing representatives of their choice."); *Wandering Medicine v. McCulloch*, Case 1:12-cv-00135-RFC-

DWM, Doc. 153, *16 (D. Mont. March 26, 2014) ("However, as argued by County Defendants, to demonstrate a violation of § 2, Plaintiff must also show causation and that Plaintiffs have less opportunity to elect representatives of their choice."); *Jacob v. Bd. of Directors of Little Rock Sch. Dist.*, 2006 WL 2792172 (E.D. Ark. 2006) (plaintiffs argued that their legal cause in support of their request for relief was that denial of a satellite office had a tendency to diminish the ability of minorities to elect candidates of choice, which was refuted by evidence showing a satellite office was not necessary for minorities to elect candidates of choice); *Windy Boy v. Big Horn County*, 647 F.Supp. 1002, 1019 (D. Mont. 1986) ("It is axiomatic that if Indian voters are routinely electing candidates of their choice, no violation of Section 2 can be made out. A showing of electoral success can negate findings in favor of plaintiffs on the other [Senate] factors.").

Defendants have no "confusion" between a vote denial and vote dilution claim. (Doc. 27 at pp. 17 and 23.) Both claims require Plaintiffs to plead and prove they are unable to elect candidates of choice. It is unknown which analysis in *Gingles* at pages 44-45 Plaintiffs contend is not appropriate as those pages discuss the Senate Factors—which Plaintiffs certainly contend are relevant; and the "results test"—which is merely subsection (b) of Section 2 of the VRA. Plaintiffs may be arguing that only vote dilution claims require proof of inability to elect candidates of choice ("a claim of 'vote dilution' can be brought were—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") (Doc. 27 at p. 17) but nothing in *Gingles* or other VRA cases indicate this premise.

Plaintiffs attempt to side-step the preferred candidate requirement arguing an allegation that Indian voters have less opportunity to cast an in-person ballot "also establishes that the practice denies Indian voters an equal opportunity to elect their preferred candidates" citing *Chisom* for the opposite of what it holds. (Doc. 27 at p. 23.) Plaintiffs cite *Chisom* for the proposition that any abridgement of the opportunity of minorities to participate in the political process inevitably impairs their ability to influence the outcome of an election. Plaintiffs mislead by failing to cite the very next sentences of *Chisom*, which holds that more is required to prove a § 2 VRA case. "The statute does not create two separate and distinct rights." *Chisom*, 501 U.S. at 397. "It would distort the plain meaning of the sentence [in Section 2 of the VRA] to substitute the word 'or' for the word 'and.' Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." *Id.*

In both *White v. Register*, 412 U.S. 755 (1973), and *Whitcomb v. Chavis*, 403 U.S. 124 (1971), "[t]he Court identified the opportunity to participate and the opportunity to elect as inextricably linked." *Chisom*, 501 U.S. at 397. "For all such claims must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives to one's choice." *Id.* at 398. The Supreme Court found that even if there was great wisdom supporting a finding meant to "preserve claims based on an interference with the right to vote in judicial elections while eschewing claims based on the opportunity to elect judges, we have no authority to divide a unitary claim created by Congress." *Id.* In other words, even if courts would like to assure plaintiffs that they had a right to be free from unequal opportunity to participate in the political process (VRA prong one only), the unitary right created by Congress is one that prohibits unequal opportunity under the VRA only if it denies the minority group the ability to

elect candidates of choice. The explicit holding of *Chisom* has addressed Plaintiffs' theory and found it without merit.

Plaintiffs suggest they only need to allege "based on the totality of the circumstances, that the challenged practice unequally burdens minority voters and/or unequally benefits white voters" (Doc. 27 at p, 16) but cite no authority for this proposition. This is contrary to the text of the Voting Rights Act and Supreme Court authority interpreting the Voting Rights Act. Plaintiffs argue there are different "theories" and "legal framework" of a Section 2 claim in an attempt to distinguish *Jacksonville Coalition for Voter Protection v. Hood*, 351 F.Supp.2d 1335-36 (M.D. Fla. 2004). To prove *any* violation of a Section 2 claim, Plaintiffs must prove *both* (1) that the members of the protected class have less opportunity to participate in the political process; *and* (2) the minority class members' inability to elect representatives of their choice. 52 U.S.C. § 10301(b); *Chisom*, 501 U.S. at 397; *Gonzalez*, 677 F.3d at 405. Plaintiffs' failure to plead or allege they are unable to elect candidates of choice is fatal to their Voting Rights Act claim and that claim must be dismissed. *Jacksonville* is instructive because the plaintiffs in that case sued for more early voting polling places. 351 F.Supp.2d at 1335. The court recognized that driving to an early voting site and waiting in line may be inconvenient, but "inconvenience does not result in a denial of 'meaningful access to the political process.'" *Id.*

B. Plaintiffs Fail to Allege Causation

Plaintiffs have not alleged a causal connection between the challenged practice and some harm, which is dispositive of their claim. *Gonzalez*, 677 F.3d at 407, n. 35. Plaintiffs argue a causal connection is not required, is merely an "idea", contending only some allegation of harm is necessary. (Doc. 27 at p. 21.) However, "proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial". *Gonzalez*, 677 F.3d at 404

(*quoting Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)). There must be a connection between the challenged practice and the prohibited discriminatory result. *Id.* Showing a prohibited discriminatory result (i.e. harm) is not enough. The *Gonzalez* plaintiffs did not lose because they failed to show "harm" as Plaintiffs suggest (Doc. 27 at p. 21.); rather the *Gonzalez* plaintiffs' claim "failed because there was no proof of a causal relationship between Proposition 200 and any alleged discriminatory impact on Latinos." *Gonzalez*, 677 F.3d at 406. If Plaintiffs case is viable under the VRA, they must allege that there is a causal connection between the harm they claim (denial of the right to vote) to the challenged practice (no satellite absentee voting office in a specific location). Plaintiffs have failed to allege or prove a causal relationship between the challenged voting practice and any illegal harm. This is the linchpin of any § 2 VRA case, and Plaintiffs do not meet the requirement.

Plaintiffs concede they have "'fail[ed] 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". (Doc. 27 at p. 23) (*quoting* Doc. 23 at p. 22.) Such a concession is fatal to their VRA claim. These allegations are necessary to properly plead a VRA claim because causation is critical. The *Wandering Medicine* plaintiffs survived a motion to dismiss because they alleged causation supported by statistical evidence:

> Here, unlike the situation in *Gonzalez*, Plaintiffs allege a causal relationship between failure to establish satellite offices and a discriminatory impact on Native Americans. In support of this allegation, Plaintiffs provide absentee voting data (Compl., Doc. 1 at ¶¶ 57-68), comparative residence rates of Native Americans and non-Native Americans in the areas at issue (*id.* at ¶¶ 57-92), and the significant driving distances in these areas (*id.* at ¶ 119.)

Wandering Medicine, District of Montana, Case 1:12-cv-00135-RFC-DWM, Doc. 153, *16 (March 26, 2014) (emphasis added). Plaintiffs have made no such allegations. They have failed to allege a causal connection and do not support any allegations with statistical evidence or

voting data. Even so, lower turnout rates are not sufficient to establish the challenge practice is the cause of the alleged harm. *Salas v. Southwest Tex. Jr. College Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992).

Whether a county can or should have a satellite office "tells us nothing about [the challenged practice's] effects on a minority group's voting strength." *Holder v. Hall*, 512 U.S. 874, 881 (1994). Plaintiffs may not merely point to what Jackson County *could* do, under the discretion arguably provided by state law. *See generally Id.* A county's failure to expand their voting options "says nothing about the effects the [current system] has on the voting of [the] County's citizens." *Id.* at 882. One simply may not compare what the county could do (open a satellite office) to use as a benchmark to claim a VRA violation. *Id.* at 881-885 Without alleging and proving the Plaintiffs cannot elect candidates of their choice under the current system, Plaintiffs have failed to allege a § 2 VRA claim.

C. Convenience Voting is not a Fundamental Right, and a Demand for a Satellite Office to Offer Convenience Voting is Not a Cognizable Claim Under the Voting Rights Act.

The United States Supreme Court has held there is no right to an absentee ballot. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969). And "there is no fundamental right to early voting." *Brown v. Detzner*, 2012 WL 4356839, *14 (M.D. Fla. 2012). Absentee voting and other methods of voting before Election Day are called convenience voting in the political science literature. There is no right to anything other than casting a regular ballot on Election Day.

Numerous courts have found that demands for a satellite office are not cognizable claims under § 2 of the Voting Rights Act or are otherwise dismissed. *See e.g. Jacob*, 2006 WL 2792172 (court denied motion for preliminary injunction seeking an early voting site other than

at the county courthouse because voters still had the option of early voting at the county courthouse and plaintiffs were able to elect candidates of their choice thereby failing to make out a Section 2 claim); *Jacksonville*, 351 F.Supp.2d at 1335-36 (holding a request for more early polling places is not a cognizable claim under § 2 of Voting Rights Act); *Denis v. N.Y. City Bd. of Elections*, 1994 WL 613330, *3 (S.D.N.Y. 1994) (holding that voting irregularities occurring in a predominately minority district, but not in predominantly white districts, is not a cognizable claim under § 2 of the Voting Rights Act). *See generally Gustafson v. Illinois State Bd. Elections*, 2007 WL 2892667 (N.D. Ill. 2007) (Failure to require the same number of early voting sites in each county was not a violation of the Equal Protection Clause).

"Every individual does not have the right to the exact means and convenience in voting as he or she may desire . . ." *Wandering Medicine*, Case 1:12-cv-00135-RFC-DWM, Doc. 153, p. 8 (D. Mont. March 26, 2014) (*citing Jacksonville*, 351 F.Supp.2d at 1326). In *Frank v. Walker*, 2014 U.S. App. LEXIS 19108, the court found that "[f]or most voters who need them, the inconvenience of making a trip to the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Frank* at 4. (*citing Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008).

The *Frank* plaintiffs alleged that voters who lacked photo ID were "disenfranchised". *Id.* at 12. The court found that if voters lacked photo ID because the state made it "impossible, or even hard" for them to get photo ID, the plaintiffs could perhaps describe the situation as disenfranchisement. *Id.*

> But if photo ID is available to people willing to scrounge up a birth certificate and stand in line at the office that issues drivers' licenses, then all we know from the fact that a particular person lacks a photo ID is that he was unwilling to invest the necessary time. And *Crawford* tells us that 'the inconvenience of making a trip to

> the [department of motor vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." 553 U.S. at 198.

Frank at 12-13.

Even if the poor are less likely to have a photo ID, the Seventh Circuit and Supreme Court found such a reason insufficient to deem the requirement unconstitutional. *Id.* at 8. The *Frank* court found that any procedural step in voting filters out some potential voters. *Id.* at 13. "No one calls this disenfranchisement, even though states could make things easier by, say, allowing everyone to register or vote from a computer or smartphone without travel." *Id.* at 13-14.

Even though the district court found a disparate outcome in white registered voters being more likely to possess photo ID than minorities, the *Frank* court found that such a disparate outcome does "not show a 'denial' of anything by Wisconsin, as §2(a) requires; unless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter." *Id.* at 25 (emphasis in the original). Jackson County does not make it difficult for Native Americans to buy a car, buy gas, or travel to Kadoka. There is no "denial" of anything by Jackson County.

> Section 2(b) tells us that §2(a) does not condemn a voting practice just because it has a disparate effect on minorities. (If things were that simple, there wouldn't have been a need for *Gingles* to list nine non-exclusive factors in vote-dilution cases.) Instead §2(b) tell us: "A violation of subsection (a) 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) in that its members have *less opportunity* than other members of the electorate to participate in the political process" (emphasis added). [The Wisconsin statute] does not draw any line by race, and the district judge did not find that blacks or Latinos have less "opportunity" than whites to get photo IDs. Instead the judge found that, because they have lower income, these groups are less likely to *use* that opportunity. And that does not violate § 2.

Id. at 27. "It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it)." *Id.* at 30.

The second prong of Plaintiffs' burden of proof requires them to show they are unable to elect representatives of their choice. 52 U.S.C. § 10301(b); *Chisom*, 501 U.S. at 397; *Gonzalez*, 677 F.3d at 405. Who wins an election is based upon who receives the most votes—all votes—in-person absentee votes as well as all other votes cast in every other allowable manner are all counted. No court has held that minorities who successfully elect their preferred candidates nevertheless suffer a violation of their rights under the Voting Rights Act simply because it was more inconvenient for them to access a location where they could obtain an absentee ballot when they were able to access another convenient location to vote.

In *McDonald v. Bd. Of Election Comm'rs*, 394 U.S. 802 (1969), a vote denial case brought under an Equal Protection analysis, the Supreme Court analyzed jail inmates' claims that they should be entitled to absentee ballots while incarcerated despite Illinois' statute not allowing for the same. The inmates could not leave prison to vote, and could not apply for an absentee ballot, but retained their voter eligibility, and therefore claimed that having no access to an absentee ballot violated their rights. The Supreme Court found that Illinois' law expanding absentee voting for some people but not for jail inmates had no impact on the inmates' ability to exercise their fundamental right to vote. *Id.* The *McDonald* Court found that absentee statutes were designed to make voting more available to some groups who could not easily get to the polls. *Id.* But despite allowing some to vote absentee and not expanding that option to others, the law did not operate as a whole to specifically disenfranchise inmate voters. *Id.* at 807-08. The inmate plaintiffs alleged that they were entitled to absentee ballots because they were

physically restrained from going to the polling place and were too poor to post bail to do so. *Id.* at 809, n.7. The Supreme Court found that "[s]ince there is nothing in the record to show that [the inmate plaintiffs] are in fact absolutely prohibited from voting by the State, . . . we need not reach these two contentions."

In *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), the court dismissed a suit wherein working mothers alleged that Illinois' absentee ballot system was not equally open to them. The court reviewed the significant problem of voter fraud and other downfalls associated with absentee voting, finding that these "serious objections to judicially legislating so radical a reform in the name of the Constitution" were not warranted. *Id.* at 1130-31. "These problems created by absentee voting . . . may be outweighed by the harm to voters who being unable to vote in person will lose their vote if they can't vote by absentee ballot. But the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Id.*

Brown v. Detzner, 2012 WL 4356839 (M.D. Fla. 2012), held that "there is no fundamental right to early voting." *Id.* at *1, *14. The *Detzner* plaintiffs urged the court to find that fewer early voting days in Florida, as compared to other states, demonstrated a § 2 Voting Rights Act violation. *Id.* To the contrary, the *Detzner* court found that such comparisons "could have far-reaching implications." *Id.* at *15. The court recognized that Plaintiffs must demonstrate more than disproportionate impact to prove a § 2 claim. *Id.* at *10. The court mentioned that "every regulation that creates an election structure will necessarily disenfranchise some voters." *Id.* at *15, n. 23 (*citing Jacksonville*, 351 F.Supp.2d at 1332). "For example, the location of polling places makes it easier for voters who reside closer to that polling place to get

there than those who live further away. Additionally, a decision in Florida to have two weeks of early voting makes it more difficult for Florida voters to vote early than those voters in a state that allows four weeks of early voting." *Id.* at *16, n. 23 (*citing Jacksonville*, 351 F.Supp.2d at 1332, n.2). Despite that acknowledgement, the court found that because the current Florida law did provide some voting times important to minority voters, the court could not find that a change in early voting hours or days denied equal access at the polls. Id. at *15.

III. Equal Protection Claim and Voting Rights Act Intent Claim

Plaintiffs concede they must allege intentional discrimination but have not done so in their Complaint. Plaintiffs must plead factual allegations that the Defendants intended to discriminate on the basis of race. All that is contained in the Complaint are conclusory allegations that "Defendants have no legitimate, non-racial reason for refusal to establish the satellite office". (Doc 1 at ¶¶ 4 and 71.) Plaintiffs fail to make the necessary allegations and instead attempt to analyze discriminatory intent under *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252 (1977). Plaintiffs have not even *alleged* the necessary element of intent so analyzing whether there was discriminatory intent is not necessary. The Complaint alleges the request for a satellite office was denied due to funding concerns. (Doc. 1, ¶ 44.) Plaintiffs merely allege that "[u]pon information and belief, Defendants are aware of the availability of HAVA funding. . ." (Doc. 1, ¶ 46.) The Complaint does not allege that at the time Defendants initially denied the request, they knew HAVA funding would cover the expenses. On the contrary, the Complaint suggests Defendants did not know or understand funding was available and what expenses it might cover. The Complaint only suggests that "upon information and belief" Defendants "are" aware of such funding. Such allegations are not sufficient to support an intentional racial discrimination claim.

Moreover, Plaintiffs have not alleged the second half of an equal protection claim—that there was no rational basis for the Defendants' decision. Plaintiffs must allege both to sufficiently plead an equal protection claim.

> Even if it could be shown that Defendants' actions were intentionally or foreseeably discriminatory, Plaintiffs would still need to establish that the actions were inadequately related to a government interest. . . .
>
> Where the challenged government action does not involve a suspect classification or a fundamental right, the statute will be upheld if it bears a rational relationship to a legitimate public purpose. Where fundamental rights are implicated, however, strict scrutiny applies. While the right to vote itself is clearly a fundamental right, the manner in which that right is implemented moves into a grey area; where rights related to voting are in question, the Court must balance deference to the state's chosen mechanisms for implementing the vote and the need to ensure that voters are afforded equal protection.

Gustafson v. Illinois State Bd. Elections, 2007 WL 2892667. *8 (N.D.Ill. 2007) (internal citations omitted). As indicated *supra*, there is no right to an absentee ballot and "early voting" is not a fundamental right. *McDonald*, 394 U.S. at 807; *Brown*, 2012 WL 4356839 at *14. Plaintiffs do not allege there is no rational basis for Defendants' action and thus their claims must fail.

Dated: December 17, 2014.

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CERTIFICATE OF SERVICE

I hereby certify on December 17, 2014, a true and correct copy of **DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was served electronically through the CM/ECF system on the following individuals:

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