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' SECOND 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. 45). As demonstrated below, Defendants' motion should be denied in its entirety.

I. INTRODUCTION

As set forth in Plaintiffs' motion for partial summary judgment, to be filed shortly hereafter, Defendants violated Section 2 of the Voting Rights Act by limiting in-person absentee voting to a single location, located disproportionately farther from Indian populations than from white populations. Having engaged in limited affirmative discovery, having produced not a single expert report in response to those of Plaintiffs, and having refused to participate in a court-ordered settlement conference, Defendants seek to escape the jurisdiction of this Court, alleging that an eleventh hour resolution to place a satellite office for in-person registration and in-person absentee voting on the Pine Ridge Reservation for a limited number of federal elections somehow renders this case non-justiciable. Simply put, Defendants' actions are too little, too late.

Whether viewed as an issue of mootness or of ripeness, Defendants' opening of a satellite office—for a limited time and for federal elections only—does not affect the justiciability of this case one whit, because:

- Plaintiffs are entitled to judgment on liability for the established violation of the Voting Rights Act by Defendants;
- Plaintiffs are entitled to remedies, including federal monitoring and pre-clearance of future changes in election procedures, for the established violation of the Voting Rights Act by Defendants;

• Defendants' purported plan is limited, voluntary, and unguaranteed, and does not address Defendants' continuing failure to provide equal access to in-person registration and in-person absentee voting for Plaintiffs in non-federal elections; and

• Defendants' plan is for a limited time and not binding on future County Commissions.

In short, Defendants' actions have not addressed the Plaintiffs' requested relief for a satellite office for *all* future elections (both federal and non-federal) and their motion as to the lack of justiciability runs afoul of the settled public policy doctrine that defendants should not be allowed to block a plaintiff's access to court on the basis that they claim to have voluntarily ceased their allegedly illegal conduct, while they remain free to resume it at any time.

For all of these reasons, Defendants' resolution in no way divests this Court of jurisdiction or limits Plaintiffs' ability to prosecute this action. Accordingly, the motion to dismiss should be denied.

II. STATEMENT OF FACTS

Plaintiffs filed this action on September 18, 2014, alleging that Jackson County violated the Voting Rights Act by providing in-person voter registration and in-person absentee voting only in the county seat of Kadoka and refusing to open a satellite office for in-person voter registration and in-person absentee voting on the Pine Ridge Reservation. (Compl., ECF Doc. No. 1.) The Complaint sought both a preliminary injunction and a permanent injunction requiring establishment of a permanent satellite office for in-person registration and in-person

absentee voting in Wanblee, as well as the imposition of pre-clearance of future changes to election procedure and appointment of a federal monitor.

Facing a hearing on the motion for a preliminary injunction, Plaintiffs agreed through a telephonic settlement conference conducted by the Magistrate Judge to open a satellite office for absentee voting in Wanblee for an 11-day period in advance of the 2014 general election. After the Court denied Defendants' motion to dismiss, the parties engaged in extensive discovery. Plaintiffs took nine fact depositions, obtained more than 3,000 pages of document production and served extensive expert witness reports by two highly qualified professors, Gerald R. Webster and Garth Massey. Defendants, by contrast, did not depose all of the Plaintiffs, serve any expert witness reports of their own, or depose the Plaintiffs' experts.

As demonstrated in Plaintiffs' motion for summary judgment, to be filed shortly after this memorandum, discovery conclusively established Plaintiffs' claims and left no disputed issues of material fact. Discovery likewise showed that Defendants' legally insufficient defenses were also bereft of factual support. For example, despite Defendants' repeated claim that the only reason they had not opened a satellite office was a lack of funding – which in any event is not a defense to a Voting Rights Act violation – County Auditor Vicki Wilson admitted at her deposition on August 11, 2015 that she had not even bothered to submit a request for reimbursement for the thousands of dollars in expenses allegedly incurred in opening the Wanblee office in 2014 because "I have not had time." Ex. A to the Declaration of Matthew Rappold in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss ("Rappold Decl."), Vicki Wilson Depo., 143:21-23.

As the close of discovery neared, Plaintiffs sought to schedule a settlement conference with the Magistrate Judge, as ordered by the Court in the Scheduling Order dated June 3, 2015.

(ECF Doc. No. 38.) Defendants refused. Ex. B to Rappold Decl., Email from S. Frankenstein to Plaintiffs' counsel, Sept. 15, 2015. Defendants' strategy was revealed on November 13, 2015, when the Jackson County Commission passed Resolution #2015-16 ("Resolution 16") to open a satellite office in Wanblee for federal primary and general elections through 2022; entered into a Memorandum of Agreement with the Secretary of State in which the Secretary of State agreed to provide funding for a satellite office for in-person voter registration and in-person absentee voting for federal elections until 2022; for the first time produced those documents to Plaintiffs; and filed their motion to dismiss arguing that Plaintiffs' claims were no longer ripe for adjudication.

Resolution 16 provides that "Jackson County shall provide a satellite office in Wanblee, Jackson County … for the statutory absentee voting period … for in-person absentee voting and voter registration prior to the primary and general elections for the election years of 2016, 2018, 2020, and 2022[.]" (ECF Doc. No 47-12.) Resolution 16 does not address elections that may be held in any other years and does not address any special elections that may be held. Yet at least some elections are held in Jackson County every year – for example, South Dakota law calls for "annual" school board elections. S.D.C.L. § 13-7-10. School board elections have been held in Jackson County for the Kadoka District every year in April for at least the last six years. *See* Ex. C to Rappold Decl., "South Dakota Municipal and School Election Dates," Bates-labeled SD SoS Document 4057-4060 (reflecting Kadoka Area School District election scheduled for April 14, 2015); Ex. D. to Rappold Decl., Unapproved Minutes of the Kadoka Area School Board, April 9, 2014, pg. 2 (certifying 2014 Kadoka Area School Board election results); Ex. E to Rappold Decl., Unapproved Minutes of the Kadoka Area School Board, May 8, 2013, pg. 2 (certifying the results of the Kadoka Area School Board election held April 16, 2013); Ex. F to Rappold Decl.,

Unapproved Minutes of the Kadoka Area School Board, April 11, 2012, pg. 2 (certifying 2012 Kadoka Area School Board election results); Ex. G to Rappold Decl., Unapproved Minutes of the Kadoka Area School Board, April 13, 2011, pg. 2 (certifying 2011 Kadoka Area School Board election results); Ex. H to Rappold Decl., Unapproved Minutes of the Kadoka Area School Board, April 14, 2010, pg. 2 (certifying 2010 Kadoka Area School Board election results). School board elections for 2016 have not yet been set but the federal primary is set for June, not April, of 2016. *See* Ex. I to Rappold Decl., 2016 Election Calendar prepared by S.D. Secretary of State. Similarly, under South Dakota law, special elections need not be held at the same time as federal elections or other regularly scheduled elections. *See, e.g.*, S.D.C.L. §§ 7-18A-19, 6-8B-2, 12-11-1. And nothing in South Dakota law requires that Resolution 16 be honored by a future Jackson County Commission. S.D.C.L. § 7-18A-2.

Also on November 13, 2015, the Commission entered into a Memorandum of Agreement ("MOA") with the South Dakota Secretary of State. In that MOA, the Secretary of State agreed that certain expenses associated with opening an in-person absentee satellite voting location for federal elections in Jackson County in 2016, 2018, 2020, and 2022 may be reimbursed, up to the amount of $61,684. (ECF Doc. No. 47-10 at 3.) Like Resolution 16, the MOA is silent as to elections that may be held in years other than 2016, 2018, 2020, and 2022, or at times other than when federal elections are being held. And by its terms, the MOA "depends upon the continued availability of appropriated funds and expenditure authority from Jackson County for these purposes" and is "terminated should HAVA funds become unavailable for the purposes described herein for any reason." (ECF Doc. 47-10 at 2.)

Furthermore, the Secretary of State's office's Rule 30(b)(6) designee testified in deposition on December 11, 2015 that there is no guarantee that HAVA funds will be available

to Jackson County. Ex. J to Rappold Decl., Kea Warne Depo., 46:5-16. According to the Secretary of State's office, there is currently approximately $6.5 million in the South Dakota state-held Help America Vote Act ("HAVA") account, which would be the source of Jackson County's reimbursements under the MOA. *Id.* at 44:4-10. South Dakota's state-held HAVA funds are used for a number of voting-related purposes, including local election improvements, statewide initiatives, and administration and implementation of HAVA in South Dakota by the Secretary of State's office. *Id*. at 45:9-23. The Secretary of State's office does not expect additional funds to be appropriated to South Dakota by the federal government under HAVA. *Id*. at 44:11-19; 46:21-47:1. The $61,648 supposedly made available for Jackson County under the MOA has not been segregated from South Dakota's HAVA funds generally, and the Secretary of State's office has not budgeted to ensure these funds are available for Jackson County. *Id.* at 45:4-8; 46:17-21. The Secretary of State's office does not prioritize certain types of HAVA reimbursement requests; rather, reimbursements are made on a first-come, first-served basis. *Id.* at 45:24-46:4. Significant expenditures by other counties or by the Secretary of State's office could deplete these funds at any point. Hence, the Secretary of State's office "can't really say whether there would be funds in there by 2022 or not" for Jackson County. *Id.* at 46:5-16.

III. LEGAL STANDARD

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the Court must determine whether the moving party is lodging a "facial attack" or a "factual attack." *Osborn v. U.S.*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990). Defendants' motion is a factual attack because it challenges the factual existence of subject matter jurisdiction, irrespective of the pleadings. *Middlebrooks v. U.S.*, 8 F. Supp. 3d 1169, 1173 (D.S.D. 2014). As such, the trial court may consider matters outside the pleadings. *Osborn*, 918 F. 2d at 729. The

Court is therefore "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* at 730 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F. 2d 884, 891 (3d Cir. 1977)).

IV. ARGUMENT

PLAINTIFFS' CLAIMS ARE JUSTICIABLE

The claims alleged in the Complaint are plainly justiciable, and the subsequent events relied on by Defendants do not render those claims moot or unripe. Those closely-related doctrines consider whether adjudication of a matter would be premature and whether a change in circumstance has ended the controversy. *See* Erwin Chemerinsky, *Federal Jurisdiction*, 117, 129 (5th ed. 2007). Put differently, "ripeness asks whether there yet is any need for the court to act[,]" while mootness "asks whether there is anything left for the court to do." *Brooks v. Gant*, No. CIV 12-5003-KES, 2013 WL 4017036, at *6 (D.S.D. Aug. 6, 2013) (quoting 13B Charles Alan Wright, et al., *Federal Practice and Procedure* § 3532.1 (3d ed.).

Defendants argue that Plaintiffs' claims are not justiciable because Resolution 16 requires Jackson County to provide in-person absentee voting at a satellite office in Wanblee. Defendants neglect to mention that the Resolution and MOA: (1) do not cover elections that are not held at the same time as federal elections (for example, school board elections are on a different calendar than federal elections and any special elections); (2) do not guarantee funding for the satellite office in *any* election cycle; and (3) do not address the other forms of relief requested by Plaintiffs (federal monitors for Jackson County elections and preclearance for changes to election law in Jackson County).

Further, public policy concerns weigh heavily in favor of Plaintiffs. Defendants' ripeness argument is an attempted end-run around the well-established principle that "a defendant's

voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). A defendant should not be allowed to block a plaintiff's access to court by arguing lack of ripeness or mootness on the basis that it has voluntarily ceased the allegedly illegal conduct, while it remains free to resume it at any time. *See Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 697 (8th Cir. 2012) (if that were so, "the courts would be compelled to leave [t]he defendant . . . free to return to his old ways"); *see also Nextel West Corp. v. Unity Twp.*, 282 F.3d 257, 264 (3d Cir. 2002).

A. Plaintiffs' Claims Are Not Moot.

Although Defendants labeled their motion as one based on ripeness, they rely on the mootness concept that a court lacks subject matter jurisdiction when there is no longer a case or controversy. Defendants' aversion to using the term "mootness" is understandable, as this case is decidedly a live case and controversy.

Initially, it is undisputed that Defendants' purported plan does not affect any elections other than federal elections. At a minimum, all of Plaintiffs' claims relating to non-federal elections remain justiciable.

As to the claims relating to federal elections, Plaintiffs are entitled to a judgment of liability based on the initial violation of the Voting Rights Act, and consideration of an effective remedy, such as federal monitoring and pre-clearance and an order that would bind future county commissions, which Defendants' voluntary resolution does not. "Mere voluntary cessation of allegedly illegal conduct does not moot a case; otherwise, the courts would be compelled to leave '[t]he defendant … free to return to his old ways.'" *Ctr. for Special Needs Trust*, 676 F.3d at 697, quoting *City of Mesquite*, 455 U.S. at 289. When a local government entity voluntarily

alters its allegedly illegal practice but is free to resume it, a federal court may retain its power to determine the legality of the practice. *City of Mesquite*, 455 U.S. at 289 (refusing to dismiss a constitutional challenge to an ordinance that had subsequently been repealed, since the repeal "would not preclude [the city] from reenacting precisely the same provision if the District Court's judgment were vacated").

Courts have routinely declined to dismiss cases where a governmental body ceased an illegal practice and promised not to resume it, since "[p]resent intentions may not be carried out," and "it is not certain that changes in leadership or philosophy might not result in reinstitution of the [challenged] policy." *United Food & Commercial Workers Int'l Union v. IBP, Inc.*, ("*UFCWIU*") 857 F.2d 422, 430 (8th Cir. 1988) (quoting *Phillips v. Pennsylvania Higher Educ. Assistance Agency*, 657 F.2d 554, 569-70 (3d Cir. 1981)); *see also Solomon v. City of Gainesville*, 763 F.2d 1212 (11th Cir. 1985). In another example, earlier this year Judge Viken of the District of South Dakota declined to dismiss a case on the basis of Defendants' "informal agreement" to cease their offending conduct. *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 772 (D.S.D. Mar. 30, 2015). In these cases, the public interest in having the legality of the practice settled "prevents a finding of nonjusticiability." *UFCWIU*, 857 F.2d at 430. Indeed, in a case with very similar facts, the Court recently found that the voting rights plaintiffs' claims were not mooted by defendants' voluntary conduct. *Brooks v. Gant*, No. CIV 12-5003-KES, 2012 WL 4748071 (D.S.D. Oct. 4, 2012).[1]

The test for whether a defendant's voluntary action moots the case is whether "it can be said with assurance that there is no reasonable expectation [ ] the alleged violation will recur"

[1] As discussed *infra*, the plaintiffs' claims in *Brooks* were later dismissed on ripeness grounds. With regard to the ripeness issue, the *Brooks* plaintiffs do not appear to have raised, and the court does not seem to have considered, the possibility that the plaintiffs would be injured by the lack of a satellite voting office for some elections during the time frame covered by the county's resolution.

and "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *Cty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added) (internal quotation marks, ellipses, and citations omitted). It must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *U.S. v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). The defendant bears the "formidable" burden of showing that "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 170, 189 (2000); *Ctr. for Special Needs Trust*, 676 F.3d at 697. This standard is "stringent." *Friends of the Earth, Inc.*, 528 U.S. at 170. "Voluntary cessation of offensive conduct will only moot litigation if it is clear that the defendant has not changed course simply to deprive the court of jurisdiction." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1188 (11th Cir. 2007).

Here, it is far from "absolutely clear" that Defendants' allegedly illegal conduct will not recur as to federal elections. As discussed previously, Resolution 16 may be revoked at any time by the Jackson County Commission. *See* 4, *supra*. The MOA similarly lacks any mechanism for enforcement by the Plaintiffs. Defendants' promise to provide access to satellite in-person absentee voting and voter registration in Wanblee is hollow, indeed.

Further, it is axiomatic that partial cessation of challenged conduct cannot moot unaddressed claims. *See, e.g., Rucker v. Sec'y of the Treasury of U.S.*, 751 F.2d 351, 355 (10th Cir. 1984) (abrogated on unrelated grounds by *Sorenson v. Sec'y of the Treasury of the U.S.*, 475 U.S. 851 (1986)). Defendants cannot argue with the fact that, on their face, Resolution 16 and the MOA fail to provide any relief as to certain elections. Even if Resolution 16 and the MOA gave Plaintiffs complete relief as to the elections they purport to cover – which Plaintiffs do not concede – the Court retains jurisdiction over the case as a whole. In the interest of judicial

economy and efficiency, the Court should adjudicate Plaintiffs' claims with regard to all future elections. Doing so would not only conserve judicial resources but ensure consistency across elections.

B. Plaintiffs' Claim Are Ripe.

"The ripeness doctrine is aimed at preventing federal courts, through *premature* adjudication, from entangling themselves in abstract disagreements." *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 863 (8th Cir. 2006) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985)) (emphasis added). It is "peculiarly a question of timing and is governed by the situation at the time of review, rather than the situation at the time of the events under review." *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 867 (8th Cir. 2013) (quotation marks omitted). Ripeness doctrine reflects the idea that courts should decide only "a real, substantial controversy," not a mere hypothetical question. 13B Charles Alan Wright, et al., *Federal Practice and Procedure* § 3532.2 (3d ed.); *see also Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005).

There is no bright-line rule for distinguishing true controversies from hypothetical questions. 13B Charles Alan Wright, et al., *Federal Practice and Procedure* § 3532.2 (3d ed.); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-98 (1979). "The difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test . . . The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" *Babbitt*, 442 U.S. at 297-98 (internal citations omitted). The Eighth Circuit has distilled this principle into a two-part analysis of "the fitness of the issues for judicial decision and the hardship to the parties of

withholding court consideration." *Pub. Water Supply Dist. No 10 v. City of Peculiar*, 345 F.3d 570, 572-73 (8th Cir. 2003). "The party seeking to invoke jurisdiction must satisfy each prong to a minimal degree." *Brooks*, 2013 WL 4017036, at *4. The two prongs of the test must operate on a sliding scale. *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000) (citing *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995)).

1. Plaintiffs' Claims Relating to Non-Federal Elections Are Ripe.

At the outset, there is no possibility that Defendants' ripeness argument applies to claims relating to non-federal elections because Defendants' plan applies only to federal elections. All non-Federal election claims remain ripe.

Under South Dakota law, school board elections must occur annually between the second Tuesday in April and the third Tuesday in June. S.D.C.L. § 13-7-10. The school board may choose to hold the school board election in conjunction with the June primary election or a regular municipal election, but is not required to do so. S.D.C.L. §§ 13-7-10.3, 13-7-10.1. In odd-numbered years or even-numbered years when there is no federal primary election, Plaintiffs will be injured by the Defendants' refusal to open a satellite voting office in Wanblee. This will happen no later than 2017, because there is no federal primary or general election that year. Of course, the injury could manifest even earlier, and could occur as soon as April, 2016. The Kadoka Area School District, which includes the entire portion of Jackson County that lies within the Pine Ridge Reservation, has generally held its school board elections in April every year, and there is no reason to believe this would differ in 2016. *See* Ex. C to Rappold Decl., "South Dakota Municipal and School Election Dates," Bates-labeled SD SoS Document 4057-4060 (reflecting Kadoka Area School District election scheduled for April 14, 2015).

Also, special elections in South Dakota need not be held at the same time as federal elections or odd-year elections. Per S.D.C.L. § 7-18A-19, a "special election shall be held within sixty days after the filing of a petition under § 7-18A-15." This short time frame in which a special election is to be organized means that it is completely unfeasible for Plaintiffs to wait until such an election has been scheduled before seeking judicial intervention to ensure equal voting access. The likelihood of injury is therefore high. *See* Ex. A to Rappold Decl., Wilson Depo., 26:4-27:7. Voting is a fundamental right, and infringement of it causes grave injury. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized").

Lopez v. City of Houston, 617 F.3d 336, 341 (5th Cir. 2010), so heavily relied upon by Defendants, is inapposite. There, minority voters in Houston alleged that the city improperly changed the way it calculates its population for purposes of city council election districts. *Lopez*, 617 F.3d at 338. Plaintiffs filed their claims before the 2009 elections, seeking to halt those elections until the city added two seats to its city council and redistricted accordingly. *Id.* at 339. While the case was pending, the election was held as planned, without the changes requested by Plaintiffs. *Id.* Because new census figures would be available prior to the next election and the city would have another opportunity to redistrict, the court found that, to the extent the claims were based on speculation that the city would refuse to redistrict properly in the future, the Plaintiffs' claims were not ripe. Here, to the contrary, Defendants have admitted that elections will happen in Jackson County at times not covered by Resolution 16.

Defendants' reliance on *Brooks*, 2013 WL 4017036, is also misplaced. There, the discussion of ripeness assumed that the county's resolution covered all elections held during its

operative period, from August 3, 2012 to January 1, 2019, and the plaintiffs would therefore not face harm until 2019 (six years later), if at all. *Id.*, 5-6. The *Brooks* plaintiffs do not appear to have raised, and the court does not seem to have considered, the possibility that the plaintiffs would be injured by the lack of a satellite voting office for some elections during the time frame covered by the county's resolution.

2. Plaintiffs' Claims Relating to Federal Elections Are Ripe.

a. Plaintiffs' Federal Election Claims Are Fit for Review.

"The 'fitness for judicial decision' inquiry goes to a court's ability to visit an issue." *Pub. Water Supply Dist. No. 10*, 345 F.3d at 573 (quoting *Nebraska Pub. Power Dist.*, 234 F.3d at 1038). "While courts shy from settling disputes contingent in part on future possibilities, certain cases may warrant review based on their particular disposition." *Nebraska Pub. Power Dist.*, 234 F.3d at 1038. A case may be fit for judicial decision when "an issue is largely legal in nature," "may be resolved without further factual development," or "where judicial resolution will largely settle the parties' dispute." *Id.* A case "is generally ripe if any remaining questions are purely legal ones." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.3d 583, 587 (5th Cir. 1987).

First, as already demonstrated, all issues in this case are alive and present a controversy. The same jurisprudential principles that bar a defendant from mooting out a case voluntarily applies in the purported ripeness scenario that Defendants have tried to create. They cannot simply state that they have a voluntary, unguaranteed, limited, and partial plan that is not binding on future County Commissions and wish this litigation away.

Here, discovery has already been completed on the federal elections issue, and, as set forth in Plaintiffs' motion for partial summary judgment, there are not any material factual

disputes. Assuming liability is found, the only issue remaining will be remedy, which could include prophylactic measures such as monitoring and pre-clearance that presume discontinuation of the bad conduct. Where, as here, all facts necessary to the resolution of the case have been established, the case is ripe. *Nebraska Pub. Power Dist.*, 234 F. 3d at 1039.

b. Plaintiffs Will Suffer Hardship if Resolution Is Delayed as to the Federal Election Claims.

To satisfy the hardship prong of the ripeness test, a plaintiff must allege that it "has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged statute or official conduct." *Pub. Water Supply Dist. No. 10*, 345 F.3d at 573 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). "Plaintiffs need not wait until the threatened injury occurs, but the injury must be 'certainly impending.'" *Pub. Water Supply Dist. No. 10*, 345 F.3d at 573 (quoting *Babbitt*, 442 U.S. at 298).

In this context, Defendants have not met their burden to establish that the issue as to Federal elections has been resolved, even going forward. Jackson County can rescind the resolution to provide a satellite office for in-person registration and in-person absentee voting in the event HAVA funding is unavailable to reimburse the county for the expenses of maintaining the office. Thus, Defendants' reliance on *Jenkins v. State of Missouri*, 158 F.3d 984 (8th Cir. 1998), is misplaced. In *Jenkins*, the Kansas City, Missouri School District challenged the district court's approval of a settlement agreement that required, among other things, that the school district complete certain construction projects. 158 F.3d at 986. The school district challenged the approval of the settlement agreement on the basis that funding for the construction might not be available. The court rejected that argument because funding was virtually guaranteed as a result of a constitutional amendment, passed after the appeal was argued, that allowed the school board to increase the local property tax levy. *Id.* The only way the needed funding would not

materialize was if the school board failed to approve the increase, a possibility the court characterized as "strictly hypothetical." *Id.* Here, as the Secretary of State's designee testified, the MOA can be terminated for numerous reasons, including a funding shortfall that is far from hypothetical. And the MOA is not even binding on future Jackson County Commissions.

C. Defendants' Request for Certification under 28 § U.S.C. 1292(b) is Premature and Should Therefore be Denied.

Defendants have requested that, should the Court deny their motion to dismiss, it include in its order language pursuant to 28 § U.S.C. 1292(b) that the decision involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal from the order may materially advance the ultimate termination of the litigation. Plaintiffs respectfully submit that any such request before the Court has ruled is premature and should therefore be denied.

CONCLUSION

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

Dated: December 21, 2015

BY:

/s/ Matthew Rappold

Matthew Rappold
[insert address]

Robert A. Kengle*
Maura Eileen O'Connor*
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW, Suite 400
Washington, D.C. 20005
Tel: (202) 662-8600

rkengle@lawyerscommittee.org
eoconnor@lawyerscommittee.org

Erik Snapp*
DECHERT LLP
77 West Wacker Drive
Suite 3200
Chicago, IL 60601
Tel: (312) 646-5800
Erik.Snapp@dechert.com

Neil A. Steiner*
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
Tel: (212) 698 3822
Neil.Steiner@dechert.com

Ann Mary Olson*
DECHERT LLP
One Bush Street
Suite 1600
San Francisco, CA 94104
Tel: (415) 262 4572
Annmary.Olson@dechert.com

*Admitted *pro hac vice*

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 5739 words.

BY:

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a true and correct copy of the foregoing Opposition to Motion to Dismiss, Attorney Declaration and Exhibits A through J, electronically via email upon the following persons herein designated:

Sara Frankenstein
Rebecca L. Mann
Gunderson, Palmer, Nelson and Ashmore, LLP
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
(605) 342-1078
sfrankenstein@gpnalaw.com
rmann@gpnalaw.com

Dated this 21st day of December, 2015.

/s/ Matthew L. Rappold
Matthew L. Rappold