

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' MOTION FOR
SUMMARY JUDGMENT**

Defendants.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
A. Indian Residents do Not Have Equal Early Voting Opportunities in All Jackson County Elections	3
B. Defendants Denied Requests for a Permanent Office for Early Voting in Wanblee on the Pine Ridge Reservation.....	5
C. Early Voting is Less Available to Indian Citizens of Jackson County than to White Citizens.....	8
D. Socioeconomic Barriers Amplify the Effects of Geography to Reduce Access to Early Voting	10
E. Historic Discrimination Against Indians Amplifies the Effects of Geography to Reduce Access to Early Voting	12
III. ARGUMENT	15
A. Defendants’ Actions Violate Section 2 of the Voting Rights Act	16
1. Access to In-Person Registration and Early Voting Sites Is a Part of “Voting” As Defined in the VRA.....	18
2. Jackson County’s Refusal to Establish a Permanent Satellite Office for Early Voting on the Reservation Violates Section 2.....	19
a. Providing Permanent Early Voting Only in Kadoka Disproportionately Benefits White Citizens and Burdens Indian Citizens in Jackson County.....	19
b. The Totality of the Circumstances Supports a Violation of Section 2.....	21
IV. CONCLUSION.....	24

TABLE OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969).....	18
<i>Am. Horse v. Kundert</i> , No. 5:84-cv-05159 (D.S.D. 1984).....	13
<i>Amini v. City of Minneapolis</i> , 643 F.3d 1068 (8th Cir. 2011)	15
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	15
<i>Arizona v. Inter Tribal Council of Ariz., Inc.</i> , 133 S.Ct. 2247 (2013)	18
<i>Bear v. Cnty. of Jackson</i> , No. 5:14-CV-5059-KES, 2015 WL 1969760 (D.S.D. May 1, 2015)	16, 17, 18, 19
<i>Black Bull v. Dupree Sch. Dist.</i> , No. 3:86-cv-03012 (D.S.D. 1986).....	13
<i>Bone Shirt v. Hazeltine</i> , 336 F. Supp. 2d 976 (D.S.D. 2004)	13, 21, 23
<i>Bone Shirt v. Hazeltine</i> , 461 F.3d 1011 (8th Cir. 2006)	17, 21, 23
<i>Brooks v. Gant</i> , CIV. 12-5003-KES, 2012 WL 4482984 (D.S.D. Sept. 27, 2012)	18, 19
<i>Brown v. Dean</i> , 555 F. Supp. 502 (D. R.I. 1982).....	17, 19
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986).....	15
<i>Chao v. Hall Holding Co.</i> , 285 F.3d 415 (6th Cir. 2002)	15
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991).....	18, 19

<i>Emery v. Hunt</i> , 615 N.W.2d 590 (S.D. 2000)	13
<i>Gonzalez v. Arizona</i> , 677 F.3d 383 (9th Cir. 2012) (en banc), <i>aff'd on other grounds</i> , <i>Arizona v.</i> <i>Inter Tribal Council of Ariz., Inc.</i> , 133 S.Ct. 2247 (2013).....	18, 23
<i>Janis v. Nelson</i> , No. CR 095019-KES, 2009 WL 5216902 (D.S.D. Dec. 30, 2009)	13
<i>League of United Latin Am. Citizens v. Perry</i> , 548 U.S. 399 (2006)	23
<i>Little Thunder v. South Dakota</i> , 518 F.2d 1253 (8th Cir. 1975)	13
<i>Miss. State Chapter of Operation PUSH, Inc. v. Allain</i> , 674 F. Supp. 1245 (N.D. Miss 1987), <i>aff'd sub. nom</i> , <i>Operation PUSH I</i> , 932 F.2d 400	19
<i>Miss. State Chapter, Operation PUSH, Inc. v. Mabus</i> , 932 F.2d 400 (5th Cir. 1991)	17, 18, 19
<i>Montes v. City of Yakima</i> , 40 F. Supp. 3d 1377 (E.D. Wash. 2014)	15
<i>Presley v. Etowah Cty. Comm'n</i> , 502 U.S. 491 (1992)	19
<i>Spirit Lake Tribe v. Benson Cty., N.D.</i> , Civil No. 2:10-cv-095, 2010 WL4226614, at **1-2 (D.N.D. Oct. 21, 2010).....	17, 19
<i>Thornburg v. Gingles</i> 478 U.S. 30 (1986)	16, 17, 23, 24
<i>U.S. v. Day Cnty.</i> , No. 1:99-cv-01024-RHB (D.S.D. 2000)	13
<i>U.S. v. Charleston Cty., S.C.</i> , 365 F.3d 341 (4th Cir. 2004)	15
<i>U.S. v. South Dakota</i> , 636 F.2d 241 (8th Cir. 1980)	13
<i>Wandering Medicine v. McCulloch</i> , No. 1:12-cv-00135-BLG-DWM (D. Mont. Mar. 26, 2014)	19

<i>Weddell v. Wagner Cmty. Sch. Dist.</i> , No. 4:02-cv-4056-KES (D.S.D. 2003).....	13
--	----

Statutes

52 U.S.C. § 10301.....	<i>passim</i>
S.D.C.L. § 7-10-5 (2014).....	3
S.D.C.L. § 12-14-1 (2014).....	3
S.D.C.L. § 12-4-5 (2014).....	3
S.D.C.L. § 12-19-1 (2014).....	3
S.D.C.L. § 12-19-1.2 (2014).....	3
S.D.C.L. § 12-19-2.1 (2014).....	3
S.D.C.L. § 12-19-7 (2014).....	3

Other Authorities

79 Fed. Reg. 127 (July 2, 2014).....	6, 7
Fed. R. Civ. P. 56.....	1, 15

Definitions of Food Security,

U.S. DEP'T OF AGRIC., http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx (last visited Dec. 9, 2015)	12
---	----

Pursuant to Fed. R. Civ. P. 56 and D.S.D. Civ. LR 56.1, Plaintiffs Thomas Poor Bear, Don Doyle, Cheryl Bettelyoun, and James Red Willow (“Plaintiffs”) respectfully move this Court for partial summary judgment for liability on their First Claim for Relief, Violation of Section 2 of the Voting Rights Act (“VRA”), 52 U.S.C. § 10301. This motion is supported by the memorandum below, the Plaintiffs’ Rule 56.1 Statement, and the declarations filed separately. Plaintiffs request oral argument.

I. INTRODUCTION

Section 2 of the Voting Rights Act is violated when minority citizens 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). Here, the facts are undisputed that, by refusing to provide a satellite office for in-person registration and in-person absentee voting for all but federal elections on the Pine Ridge Reservation, Defendants have made it significantly more difficult for Indians to vote in Jackson County than for whites.

The following over-arching facts are undisputed:

- Indian citizens in Jackson County must travel, on average, *twice the distance* and *twice the time* that white citizens must travel to reach the only permanent location for in-person absentee voting and in-person registration (together, “Early Voting.”).
- Indian citizens must travel, on average, almost an hour longer round-trip, and 31 miles farther round-trip than white citizens to take advantage of Early Voting.
- If a permanent site for Early Voting is added in the town of Wanblee on the Reservation, however, the great disparity between Indian citizens and white

citizens in travel times and distances to a site for Early Voting would be eliminated.

- The unequal access that Indians have to Early Voting in Kadoka is exacerbated by the high rates of poverty among Indians in Jackson County compared to the low rates of poverty among whites in Jackson County, evidenced by lower rates of access to motor vehicles.
- Historical discrimination against Indians in South Dakota has been severe and well documented.

Significantly, all of these facts are supported by detailed expert reports, not one of which has been controverted by Defendants. Indeed, Defendants failed to serve a single expert report. Additionally, under the law that this Court already noted in its May 1, 2015 opinion denying the Defendants' first motion to dismiss, the applicable legal standards are clear. The undisputed facts of this case, further detailed below, combine to demonstrate a totality of circumstances that Defendants provide "less opportunity" for Indians than for whites in Jackson County to "participate in the political process," and, therefore, Plaintiffs are entitled to partial summary judgment for liability on their First Claim for Relief, Violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

II. STATEMENT OF FACTS

Plaintiffs Thomas Poor Bear ("Poor Bear"), Don Doyle ("Doyle"), Cheryl D. Bettelyoun ("Bettelyoun"), and James Red Willow ("Red Willow") are registered voters and enrolled members of the Oglala Sioux Tribe ("Tribe") who reside in Jackson County, South Dakota, within the boundaries of the Pine Ridge Reservation. Plaintiffs' Statement of Material Facts Pursuant to LR 56.1 ("Rule 56.1 Statement") ¶ 1.

Defendant Jackson County (“the County”) is a political subdivision and public corporation organized under the laws of South Dakota. Rule 56.1 Statement ¶ 2. Defendants Glen Bennett, Larry Denke, Larry Johnston, Kenneth Graupmann, and Ron Twiss (collectively, “Commissioners”) are the Jackson County Commissioners and as such are responsible for providing election precincts and designating polling places in the County. Rule 56.1 Statement ¶ 3, S.D. Codified Laws (“S.D.C.L.”) § 12-14-1 (2014). Defendant Vicki Wilson (“Wilson”) is the Jackson County Auditor, Rule 56.1 Statement ¶ 4, and as such is responsible for making and delivering notices of elections; making abstracts of and canvassing the votes cast in any special or general election; issuing certificates of election to members of the county and precinct officers; and forwarding the abstracts of votes cast at general or special elections to the Secretary of State. Rule 56.1 Statement ¶ 4, S.D.C.L. § 7-10-5 (2014).

A. Indian Residents do Not Have Equal Early Voting Opportunities in All Jackson County Elections

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), Rule 56.1 Statement ¶ 5. Beginning 46 days prior to the election and continuing until the day before the election, absentee voters may cast their ballots either by mail or in person at the office of the County Auditor. S.D.C.L. §§ 12-19-1.2, 12-19-2.1, 12-19-7 (2014), Rule 56.1 Statement ¶ 6. Once absentee voting has begun, citizens may register to vote and vote in-person absentee at the same time up until 15 days before Election Day. S.D.C.L. § 12-4-5 (2014), Rule 56.1 Statement ¶ 7. (The 46-day period of in-person absentee voting and the portion of that time during which in-person registration is available are collectively referred to as “Early Voting” in this memorandum.) Even though the County is approximately half white and half Indian, the only location at which to currently vote early in all elections in Jackson County is in the majority-white county seat of Kadoka. U.S.

Census Bureau, 2010-2014 American Community Survey. Tables B01001, B01001A, B01001C, Rule 56.1 Statement ¶ 8. This means that Indian citizens in Jackson County must travel, on average, *twice the distance* and *twice the time* as white citizens to reach for in-person absentee voting and in-person registration opportunities. Rule 56.1 Statement ¶ 42. Although the County passed a resolution on November 13, 2015 to provide Early Voting at a satellite office in Wanblee, this resolution only provides for a satellite office for four federal election cycles (2016, 2018, 2020 and 2022) and does not include a satellite voting office for local elections, such as those for school board or special elections. Rule 56.1 Statement ¶ 9. For all school board and other local elections that do not occur at the same time as regularly scheduled federal elections, Early Voting is still only available in Kadoka, and for *all* elections after 2022, Early Voting will still only be available in Kadoka. Rule 56.1 Statement ¶ 10.

A portion of the Oglala Sioux Tribe's Pine Ridge Reservation ("the Reservation") comprises 56.95% of the area of Jackson County. Rule 56.1 Statement ¶ 11. In Jackson County, approximately 22% of the white population lives on the Reservation, whereas 91% of the Indian population lives on the Reservation. Rule 56.1 Statement ¶ 12. Wanblee, the location of a requested permanent satellite office for in-person registration and in-person absentee voting, is on the Reservation, while Kadoka is not. Rule 56.1 Statement ¶ 13. Population data for these areas are set forth below.

Table 1: Population by Race in Jackson County

	Total Population	White (alone) Population	Percent White (alone)	American Indian (alone) Population	Percent American Indian (alone)
Jackson County	3,180	1,548	48.68%	1,458	45.85
Kadoka	670	570	85.07%	65	9.70%

	Total Population	White (alone) Population	Percent White (alone)	American Indian (alone) Population	Percent American Indian (alone)
Wanblee	680	30	4.41%	609	89.56%

Source: U.S. Census Bureau, 2010-2014 American Community Survey. Tables B01001, B01001A, B01001C.

Table 2: Voting Age Population by Race in Jackson County

	Total Voting Age Population (VAP)	White (alone) VAP Population	Percent of VAP that is White (alone)	American Indian VAP Population	Percent of VAP that is American Indian
Jackson County	2,175	1,195	54.94%	860	39.54%
Kadoka	502	457	91.04%	34	6.77%
Wanblee	450	27	6.00%	382	84.89%

Source: U.S. Census Bureau, 2008-2012 American Community Survey, Tables B01001, B01001A, B01001C.

As is evident from the charts above, although the population of Jackson County is roughly half Indian and half white, the vast majority of the population in the county seat of Kadoka is white, and the vast majority of the population of Wanblee is Indian. Rule 56.1 Statement ¶ 14.

B. Defendants Denied Requests for a Permanent Office for Early Voting in Wanblee on the Pine Ridge Reservation

On May 6, 2013, Poor Bear, who is Vice President of the Oglala Sioux Tribe, sent a letter, on behalf of the Tribe, to the Commissioners requesting that Jackson County establish a satellite office for Early Voting in Wanblee. Rule 56.1 Statement ¶ 15. In the letter, Poor Bear informed the Commissioners that Oliver (O.J.) Semans, Sr. (“Semans”), Executive Director of Four Directions, would attend the Commissioners’ next meeting to discuss the matter and to answer any questions regarding the request. Rule 56.1 Statement ¶ 16. Semans and his

colleague, Bret Healy (“Healy”), attended the next Commissioners’ meeting, on May 13, and presented the Tribe’s request. Rule 56.1 Statement ¶ 17. Semans presented information on the possible use of funding provided by the Help American Vote Act (“HAVA”). *Id.* The Commission expressed concern over “funding of such a satellite office due to the tax limitation,” and “requested that more information be received on use of HAVA funding for this type of reimbursable expense.” Rule 56.1 Statement ¶ 18.

Between November 2013 and February 2014, a task force charged with revising South Dakota’s plan for implementing HAVA met several times. Rule 56.1 Statement ¶ 19. In February 2014, the task force approved a revised plan (“Revised HAVA Plan”), which explicitly provides that Jackson County may use federal HAVA funding to establish a satellite office. Rule 56.1 Statement ¶ 20. The South Dakota Secretary of State provided Jackson County with regular updates about the task force’s work on the Revised HAVA Plan, drafts of the proposed revisions, and a copy of the Revised HAVA Plan once the task force approved it in February 2014. Rule 56.1 Statement ¶ 21.

On April 8, 2014, Healy attended the Commissioners’ meeting, where he explained that the Revised HAVA Plan would provide funding for Jackson County to establish a satellite voting location in Wanblee. Rule 56.1 Statement ¶ 22. He explained that the Revised HAVA Plan would become final 30 days after publication in the Federal Register. *Id.*; *see also* 79 Fed. Reg. 127 (July 2, 2014). At the April 8 meeting, the Commissioners voted to take no action until they had had time to review the Revised HAVA Plan. Rule 56.1 Statement ¶ 23. The Commissioners next revisited the issue at their June 20, 2014 meeting. Rule 56.1 Statement ¶ 24. At the time of the June 20th meeting, Wilson had asked the Secretary of State whether the satellite office would be an allowed expense and had not received a response. Rule 56.1 Statement ¶ 25. Even though

Wilson had not yet received an answer from the Secretary of State's office, Wilson incorrectly advised the Commissioners at the June 20th meeting that "the HAVA plan doesn't designate the expense[s] of [a] satellite office as a reimbursable expense and it would be an additional expense for Jackson County." Rule 56.1 Statement ¶ 26. The Commissioners then voted against establishing the satellite office. Rule 56.1 Statement ¶ 27. Additionally, as of June 20, the HAVA plan had not yet been published in the Federal Register. *See* 79 Fed. Reg. 127 (July 2, 2014), Rule 56.1 Statement ¶ 28.

Contrary to the Commissioners' stated rationale for denying the Tribe's request, HAVA funding was available to fund the satellite office for federal elections. Rule 56.1 Statement ¶ 29. The Revised HAVA Plan was published in the Federal Register on July 2, 2014, and went into effect 30 days later on August 1, 2014. *See* 79 Fed. Reg. 127 (July 2, 2014), Rule 56.1 Statement ¶ 30. Furthermore, South Dakota Secretary of State Gant communicated with Wilson about the effects of the Plan and "answered a number of questions from Jackson County regarding the HAVA plan." Rule 56.1 Statement ¶ 31. Defendants refused to establish the requested satellite office despite the fact that they were aware that funding was available. Rule 56.1 Statement ¶ 32.

In October 2014, in order to settle a motion for preliminary injunction filed by the Plaintiffs, the Defendants agreed to open a satellite office in Wanblee for the last two weeks before the November 2014 election. Rule 56.1 Statement ¶ 33. HAVA funding was available for the satellite office in Wanblee. *Id.* Despite the County's supposed funding shortfalls, Wilson had not yet submitted a request for reimbursement of the costs of operating that office by the time of her deposition seven months later in June 2015 because she did "not [have] time" – even though she submitted reimbursement requests for other covered expenses during those seven

months and was told that she could submit the satellite office reimbursement request on the same form. Rule 56.1 Statement ¶ 34. In July 2015, Wilson finally submitted the reimbursement request form, which was promptly processed by the Secretary of State. Rule 56.1 Statement ¶ 35.

In June 2015, the State Board of Elections clarified that counties did not need to spend down their “county-held” HAVA funds before being reimbursed for the cost of a satellite office. Rule 56.1 Statement ¶ 36. Also in June 2015, the HAVA Grant Board, which was established pursuant to the Revised HAVA Plan, set out the parameters for counties to apply for and receive additional up to \$9,000 per federal election cycle for their “county-held” HAVA accounts once those accounts were depleted. Rule 56.1 Statement ¶ 37.

As discussed at length in Plaintiffs’ December 21, 2015 Opposition to Defendants’ Motion to Dismiss, on November 13, 2015, Jackson County and the Office of the Secretary of State of South Dakota entered into a memorandum of agreement (“Agreement”) in which the Secretary of State agreed to reimburse Jackson County “from the State’s state-held HAVA account...up to...\$61,684 to be used for an in-person absentee satellite voting site in accordance with the State HAVA Plan....” Rule 56.1 Statement ¶ 38. The Agreement covers only federal elections and terminates in 2023 or sooner, if funds become unavailable. Rule 56.1 Statement ¶ 39. The Secretary of State has made clear that counties need to plan to budget for these expenses on their own in the future. Rule 56.1 Statement ¶ 40.

C. Early Voting is Less Available to Indian Citizens of Jackson County than to White Citizens

When Early Voting is available only in Kadoka, it is much more convenient for Jackson County’s white citizens, who are clustered in and around Kadoka. Rule 56.1 Statement ¶ 41. Indians in Jackson County must travel, on average, *twice as far as whites* – which takes, on

average, *twice as much time* – in order to reach Kadoka (the only site for Early Voting in non-federal elections and the only site for Early Voting in all elections after 2022). Rule 56.1

Statement ¶ 42.

Table 3: Average Distance and Time to Reach Site for Early Voting in Jackson County

	Average Round-trip Travel Distance	Average Round-trip Travel Time
Whites	28.8 miles	51.4 minutes
Indians	59.8 miles	1 hour, 48 minutes

See id.

As shown in Table 3 above, Indians in Jackson County not only must travel, on average, twice as far to reach the site for Early Voting in Kadoka as whites, but the average time required to make the round-trip excursion is almost *an hour* longer. Rule 56.1 Statement ¶ 43. As a practical matter, allowing for a few minutes to actually vote, the average time required for Indians in Jackson County to take advantage of Early Voting is almost, if not more than, two hours. Whites, on the other hand, need spend, on average, only a little more than an hour to complete the trip and vote. Rule 56.1 Statement ¶ 44.

If a permanent site for Early Voting is established in Wanblee for all elections, however, Indian citizens in Jackson County will no longer have to travel, on average, twice as far as white citizens to take advantage of Early Voting in certain elections. Rule 56.1 Statement ¶ 45. Rather, the time and distance to get to an Early Voting site will be decreased for both whites and Indians, and the time and distance for the two groups will become comparable. *Id.* Rather than having an average round-trip time of one hour and 48 minutes to reach a site for Early Voting, Indian citizens will have an average round-trip of just over 31 minutes. And the average round-

trip time for whites would be reduced from 51.4 minutes to 38.2 minutes. Rule 56.1 Statement ¶ 46.

**Table 4: Average Distance and Time to Reach Site for Early Voting
in Jackson County with Sites in Both Kadoka and Wanblee**

	Average Round-trip Travel Distance	Average Round-trip Travel Time
Whites	20.6 miles	38.2 minutes
Indians	15.8 miles	31.2 minutes

See id.

Kadoka is approximately 27 miles from Wanblee, and it takes roughly 32 minutes to travel between the towns. Rule 56.1 Statement ¶ 47. For citizens living south of Wanblee, the distance and travel time are even greater. For Indians who live in Jackson County but work in distant parts of the Pine Ridge Reservation, getting to Kadoka during voting hours on Election Day can be a hardship. Rule 56.1 Statement ¶ 48. Access to Early Voting in Wanblee would alleviate this hardship.

D. Socioeconomic Barriers Amplify the Effects of Geography to Reduce Access to Early Voting

The problem presented by the greater distances that Indians must travel to get to Kadoka is further compounded by socioeconomic barriers faced by Indians in Jackson County. A substantial number of Indians in Jackson County do not have access to reliable transportation, and there is no public transportation to Kadoka. Rule 56.1 Statement ¶ 49. In 2006-2010, 22.2% of all occupied Indian housing units in Jackson County had no access to a vehicle. Rule 56.1 Statement ¶ 50. At the same time, none of the housing units occupied by whites in Jackson County had no access to a vehicle. *Id.* Given the high rate of lack of access to a motor vehicle, in order to get to Kadoka many Indian residents in Jackson County have to find someone who has a car and pay that person to drive them there. Rule 56.1 Statement ¶ 51. Going round-trip

from Wanblee to Kadoka takes more than an hour, and can take more than two hours if the weather is bad. Rule 56.1 Statement ¶ 52. Gas for the trip currently costs about \$30. Rule 56.1 Statement ¶ 53.

In addition to paying someone to get a ride, many people on the Reservation may have to borrow a vehicle when they need to get somewhere. Borrowing a vehicle requires flexibility, making it difficult to keep appointments or get to a certain place by a certain time, Rule 56.1 Statement ¶ 54 (i.e. getting to the county clerk's office to vote before it closes). Furthermore, a trip off the Reservation poses additional uncertainties and challenges: the "sparsely populated" nature of the region makes it dangerous to travel in a potentially unreliable vehicle and there is a sense that police in counties with large Indian populations may target cars coming off Indian land. Rule 56.1 Statement ¶ 55.

The high poverty and unemployment rates among Indians in Jackson County make the trip to Kadoka even more burdensome, even for those who have access to a vehicle. The poverty rate among Indians in Jackson County is 46.1%, whereas the poverty rate for whites in Jackson County is 8.2%. Rule 56.1 Statement ¶ 56. Thus, the poverty rate in Jackson County for Indian residents is over 5.6 times greater than for white residents. *Id.* The unemployment rates and rates of participation in the Supplemental Nutrition Assistance Program ("SNAP") for Indians in Jackson County are similarly high. In 2010-2014, the unemployment rate for Indians in Jackson County was 29.9%, compared to a rate of 4.4% for whites and an overall rate in the county of 15.2%. Rule 56.1 Statement ¶ 57, U.S. Census Bureau, 2010-2014 American Community Survey, Table S2301, Rule 56.1 Statement ¶ 57. Almost 100% of Sioux children on the Reservation receive free or reduced school lunch, and in 2010-2014, an estimated 78.0% of Indian households in Jackson County were receiving SNAP benefits, compared with only 14.8%

of white households. Rule 56.1 Statement ¶ 58, U.S. Census Bureau, 2010-2014 American Community Survey, Table S2201. Even with SNAP benefits and free or reduced school lunches, nearly 40% of households on the Pine Ridge Reservation experience food insecurity.¹ Rule 56.1 Statement ¶ 59.

In addition to high rates of poverty and unemployment, Indians in Jackson County, like Indians in much of the rest of the country, experience higher rates of poor health and disabilities. Rule 56.1 Statement ¶ 60. Nationally, the maternity death rate for Indians is 26% higher than the rate of any other ethnic group. Rule 56.1 Statement ¶ 61. Similarly, the rate of death by other causes, many of which seem obsolete in other parts of the country (such as influenza and tuberculosis), is significantly higher for Indians. Rule 56.1 Statement ¶ 62.

Indians in Jackson County are also less likely to have as many educational opportunities as white residents. In 2010-2014, 15.3% of Indians over age 25 had no high school diploma compared to just 5.2% of whites. Rule 56.1 Statement ¶ 63, U.S. Census Bureau, 2010-2014 American Community Survey, Tables C15002A and C15002C.

E. Historic Discrimination Against Indians Amplifies the Effects of Geography to Reduce Access to Early Voting

In addition to socioeconomic barriers, fear of racial prejudice may further deter Indian residents from traveling off the Reservation to vote in Kadoka. Race discrimination against Indians is well established, both historically and in present day circumstances. In 1861, when the Dakota Territory was created, Indians were “explicitly prohibited... from claiming citizenship rights,” and from serving on juries or “entering ceded land without a permit.” Rule 56.1 Statement ¶ 64. Over the course of a century, land that had traditionally been the home to

¹ “Food insecurity” refers to a “household-level economic and social condition of limited or uncertain access to adequate food.” *Definitions of Food Security*, U.S. DEP’T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx> (last visited Dec. 9, 2015).

Indians was taken for white settlers, often violently. Rule 56.1 Statement ¶ 65. Indians were negatively stereotyped, and were referred to as “red children,” “revengeful and murderous savages,” and as “wild, turbulent and hostile people.” Rule 56.1 Statement ¶ 66. Today, a “sense of the moral and cultural superiority of Whites” continues to be felt by many whites in the County. Rule 56.1 Statement ¶ 67.

Indians were also systematically disenfranchised. After the Indian Citizenship Act was passed in the wake of WWI, South Dakota continued to use “various measures and laws to deny Native Americans the vote and keep them from holding office.” Rule 56.1 Statement ¶ 68. The practice of denying Indians who lived in unorganized counties the right to vote was only stopped in 1975 after a lawsuit successfully challenged the practice. *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975), Rule 56.1 Statement ¶ 69. Indian candidates from unorganized counties were not allowed to run for county office until 1980, after another successful lawsuit against the State. *U.S. v. South Dakota*, 636 F.2d 241 (8th Cir. 1980), Rule 56.1 Statement ¶ 70. Additional lawsuits successfully helped end discriminatory practices concerning voter registration, polling places, redistricting, and voter list maintenance. *See Am. Horse v. Kundert*, No. 5:1984-cv-05159 (D.S.D. 1984), *Black Bull v. Dupree Sch. Dist.*, No. 3:86-cv-03012 (D.S.D. 1986), *Weddell v. Wagner Cmty. Sch. Dist.*, No. 4:02-cv-4056-KES (D.S.D. 2003), *U.S. v. Day Cnty.*, No. 1:99-cv-01024-RHB (D.S.D. 2000), *Janis v. Nelson*, No. CR 095019-KES, 2009 WL 5216902 (D.S.D. Dec. 30, 2009), *Emery v. Hunt*, 615 N.W.2d 590 (S.D. 2000), *Bone Shirt v. Hazeltine* (“*Bone Shirt I*”), 336 F. Supp. 2d 976 (D.S.D. 2004), Rule 56.1 Statement ¶ 71.

Unfortunately, discrimination is not a thing of the past in South Dakota or Jackson County. Rule 56.1 Statement ¶ 72. Recent hate crimes and other racial incidents compound the sense many Indians have that leaving the Reservation makes them potential targets. For

instance, in January 2015, a group of middle school and high school students from the Pine Ridge Reservation attended a hockey game in Rapid City. During the game, beer was thrown at the students and some heard racial slurs telling them to “go back to the Rez.” Rule 56.1

Statement ¶ 73. Other hate crimes in the recent past include the 2009 conviction of two white youth who harassed and attacked a Lakota women and her children with their car, Rule 56.1

Statement ¶ 74, and an incident in 2008 when five white youth “allegedly shot from their car at Indians with a BB gun, threw bags of urine, and pelted them with rocks and eggs.” Rule 56.1

Statement ¶ 75.

Like many residents of the Pine Ridge Reservation, Plaintiffs have personally experienced the prejudice of Kadoka’s white population. Such racial bias has been demonstrated to Plaintiffs by a range of people, from white high school students yelling, “Dirty Indians, go back to the Res” at Indian high school students at a basketball game to Jackson County law enforcement officials setting up road blocks at the border of the Reservation. Rule 56.1

Statement ¶ 76. Such intense race-based hostility in and on the way to Kadoka makes Early Voting there even less accessible to Jackson County’s Indian citizens. *See* Rule 56.1 Statement ¶ 77. All Plaintiffs have felt discriminated against in Kadoka. Rule 56.1 Statement ¶ 78.

Plaintiff Doyle, while walking along the road to Kadoka with his elderly father in the late 1980s, was shot at by someone driving by who yelled, “[Expletive] Indians, you don’t belong here!”

Rule 56.1 Statement ¶ 79. Plaintiffs Poor Bear and Doyle have been followed around in stores in Kadoka as though they were going to steal something. Rule 56.1 Statement ¶ 80. Plaintiff Poor Bear was been refused service at a restaurant in Kadoka, while other white patrons were served with ease. Rule 56.1 Statement ¶ 81. Prejudice has affected Plaintiffs’ abilities to access government services provided by Jackson County in Kadoka. Rule 56.1 Statement ¶ 82.

III. ARGUMENT

Summary judgment is appropriate when the Court determines that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). “A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party; a fact is material if its resolution affects the outcome of the case.” *Amini v. City of Minneapolis*, 643 F.3d 1068, 1074 (8th Cir. 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 252 (1986)). If the court determines that no genuine issue of material fact is in dispute, the burden then shifts to the non-moving party, who “may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). *See also, U.S. v. Charleston Cty., S.C.*, 365 F.3d 341 (4th Cir. 2004), *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) (granting summary judgment to plaintiffs on Section 2 claims).

Plaintiffs emphasize that the bulk of the facts supporting this motion are based on expert opinions on issues such as average travel times, poverty rates and the effects of poverty, and the history and effects of racial discrimination in Jackson County. Defendants have offered no opposing expert opinions and did not depose the Plaintiffs’ experts or otherwise challenged those experts, and therefore there is nothing in the record (which may not be further developed because discovery closed on December 11, 2015) to rebut the evidence provided by the experts. *Chao v. Hall Holding Co.*, 285 F.3d 415, 424 (6th Cir. 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), Fed.R.Civ.P. 56(e), and *Anderson*, 477 U.S. at 261)(“The nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. It must present

significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for summary judgment.”).

A. Defendants’ Actions Violate Section 2 of the Voting Rights Act

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).² 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) [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* (“*Thornburg*”), 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.’”). Here, the significantly greater distance that Plaintiffs and other Indians in Jackson County must travel in order to take advantage of Early Voting, compared to white citizens, combines with the depressed socioeconomic status of and current and historical discrimination against Indians in Jackson County to result in less opportunity for Indian citizens in Jackson County to register and to vote.

As this Court acknowledged in its May 1, 2015 opinion, Section 2 does not require a showing that voters cannot register or vote under any circumstance. *Bear v. Cnty. of Jackson*, No. 5:14-CV-5059-KES, 2015 WL 1969760, at *4 (D.S.D. May 1, 2015) (“Plaintiffs need not

²The VRA defines “language minority group” to include persons who are American Indian. 52 U.S.C. § 10310(c)(3).

show they were unable to vote or that the challenged practices were more than an inconvenience, they only need to allege facts that, assumed to be true, show their legally protected right to equal access to the electoral process was infringed.”); *see also Miss. State Chapter, Operation PUSH, Inc. v. Mabus* (“*Operation PUSH I*”), 932 F.2d 400 (5th Cir. 1991) (restriction on voter registration violated Section 2 even though the challenged law did not absolutely bar any citizen from registering to vote, and notwithstanding that it was possible, with a sufficient expenditure of effort, for citizens to overcome the obstacles to registration imposed by the restriction); *Spirit Lake Tribe v. Benson Cty., N.D.*, No. 2:10-cv-095, 2010 WL4226614, at **1-2 (D.N.D. Oct. 21, 2010) (granting a preliminary injunction based on a Section 2 claim enjoining the county from closing polling places on the Reservation even though mail-in balloting was available); *Brown v. Dean*, 555 F. Supp. 502, 504 (D. R.I. 1982) (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, due in part to the limitations of public transportation and lack of access to private vehicles). Rather, 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. “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].” *Thornburg*, 478 U.S. at 47; *Bone Shirt v. Hazeltine* (“*Bone Shirt II*”), 461 F.3d 1011, 1017-18 (8th Cir. 2006); *see also Bear*, 2015 WL 1969760, at **4-5 (Plaintiffs need to “show their legally protected right to *equal access to the electoral process* was infringed.”) (emphasis added).

Accordingly, in a Section 2 case of this type the Court must analyze, based upon the totality of the circumstances, whether the challenged practice imposes unequal burdens on minority voters and/or unequally benefits white voters. This showing can be made, for example, by a statistical analysis showing that the challenged practice bears more heavily upon minority citizens than others. *See Operation PUSH I*, 932 F.2d at 413 (“It . . . was appropriate for the court to consider evidence of statewide [voter registration] disparity to determine if Mississippi’s [registration] procedures violated § 2.”). However, the reviewing court must also assess the “totality of the circumstances” relevant to the challenged practice. *Id.* at 405; *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., Inc.*, 133 S.Ct. 2247 (2013); *Brooks v. Gant*, CIV. 12-5003-KES, 2012 WL 4482984, at *6 (D.S.D. Sept. 27, 2012).

1. Access to In-Person Registration and Early Voting Sites Is a Part of “Voting” As Defined in the VRA

Section 2 “covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgement of ‘the right’ to vote.” *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). The Supreme Court has instructed that the VRA “should be interpreted in a manner that provides ‘the broadest possible scope’ in combating racial discrimination.” *Id.* at 403 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)). The Act’s broad definition of the right to vote encompasses “all action necessary to make a vote effective,” including “registration...[and] casting a ballot.” 52 U.S.C. § 10310(c)(1); *see also Allen*, 393 U.S. at 565-66 (1969) (“[T]he [Voting Rights] Act gives a broad interpretation to the right to vote, recognizing that voting includes all action necessary to make a vote effective.” (internal quotation marks omitted)); *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 501 (1992).

Federal courts have applied Section 2 to situations where minority voters were denied equal access to voter registration locations and polling places. *See, e.g., Brooks*, No. 12-5003, 2012 WL 4482984, at *7 (denying motion to dismiss); *Wandering Medicine v. McCulloch*, No. 1:12-00135-BLG-DWM, slip op. at 12-18 (D. Mont. Mar. 26, 2014) (denying motion to dismiss); *Spirit Lake Tribe*, Civil No. 2:10-cv-095, 2010 WL 4226614, at *5 (Oct. 21, 2010) (granting a preliminary injunction against the closing of polling places after adopting a vote-by-mail program); *Miss. State Chapter of Operation PUSH, Inc. v. Allain*, 674 F. Supp. 1245 (N.D. Miss 1987), *aff'd sub. nom., Operation PUSH I*, 932 F.2d 400 (failure to mandate satellite registration to give greater access to African American voters found to be a Section 2 violation); *Brown*, 555 F. Supp. at 505 (court enjoined 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*, 501 U.S. at 408 (“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.”) Additionally, as this Court noted in its May 1, 2015 opinion, “The Senate Report makes clear that the comparative availability of absentee voting is also actionable under § 2.” *Bear*, 2015 WL 1969760, at *7 (citing S.Rep. No. 97–417, at 30 n. 119 (1982)), reprinted in 1982 U.S.C.C.A.N. 177).

2. Jackson County’s Refusal to Establish a Permanent Satellite Office for Early Voting on the Reservation Violates Section 2

a. Providing Permanent Early Voting Only in Kadoka Disproportionately Benefits White Citizens and Burdens Indian Citizens in Jackson County

As set forth in Section II, this case does not involve a marginal difference in the availability of voting opportunities between white and Indian citizens. Rather, Indian citizens in

Jackson County must travel, on average, *twice the distance* and *twice the time* that white citizens must travel to reach the Kadoka location for Early Voting in Jackson County. And, here “twice the distance” and “twice the time” is not a matter of five miles versus ten or five minutes versus ten. Rather, Indian citizens must travel, on average, almost an hour longer round-trip, and 31 miles farther round-trip than white citizens to take advantage of Early Voting. That extra hour translates into an extra hour of missed work, and those extra miles translate into a sometimes-prohibitive amount of money for gas. *See* Poor Bear Decl. ¶ 11; Bettelyoun Decl. ¶ 8; Doyle Decl. ¶ 11. If a permanent site for Early Voting is added in Wanblee, however, the great disparity between Indian citizens and white citizens in travel times and distances to a site for Early Voting will be eliminated; with sites in both Wanblee and Kadoka, the difference in round-trip times is reduced to seven minutes, with whites traveling an average of 38.2 minutes and Indians traveling an average of 31.2 minutes. Webster Decl. ¶ 14 & Table 1b.

The unequal access that Indians have to Early Voting in Kadoka is exacerbated by the high rates of poverty among Indians in Jackson County compared to the low rates of poverty among whites in Jackson County. *See* Webster Decl. ¶ 15. One way this disparity is evident is in the relative rates of access to vehicles: in 2006-2010, 22.2% of Indian households in Jackson County had no access to motor vehicles, whereas 0% of white households in Jackson County had no access to motor vehicles. Webster Decl. Table 3. Additionally, even for those Indians who have access to a vehicle, the cost of traveling to Kadoka can be prohibitive. Poor Bear Decl. ¶ 11; Bettelyoun Decl. ¶ 8; Doyle Decl. ¶ 11. There is no public transportation in Jackson County. Doyle Decl. ¶ 12. As discussed *supra* Section II, 46.1% of Indians in Jackson County live below the poverty level, compared to only 8.2% of whites; in 2010-2014, 29.9% of Indians in Jackson County were unemployed, compared with only 4.4% of whites; and in 2010-2014,

78.0% of Indian households in Jackson County received SNAP benefits, compared with 14.8% of white households. For the great number of Indian citizens in Jackson County who are struggling to meet their basic needs, if Early Voting is available only in Kadoka, then it is out of reach.

Finally, the experience and expectation of hostility associated with traveling to Kadoka is a significant deterrent for many Indians in Jackson County. As discussed at length in Section II, historical discrimination against Indians in South Dakota has been severe and well documented. *See Massey Decl. 4-8; Bone Shirt I*, 336 F. Supp. 2d at 1018-34, *aff'd Bone Shirt II*, 461 F.3d 1011. It is, unfortunately, then no surprise that all four Plaintiffs might avoid going to the mostly-white town of Kadoka because of the discrimination and hostility they have faced or still face while there. Doyle Decl. ¶¶ 13, 23; Red Willow Decl. ¶¶ 9-10; Poor Bear Decl. ¶ 12; Bettelyoun Decl. ¶¶ 14-15. Plaintiffs have faced road blocks set up at the border of the Reservation, have been followed around in stores as though they were going to steal something, and have been shot at while walking along the road to Kadoka by someone yelling, “[Expletive] Indians, you don’t belong here!” Doyle Decl. ¶¶ 14, 16, 18-23; Poor Bear Decl. ¶ 13.

The difference in travel time and distance, the high rates of poverty and relatively low rates of access to vehicles, and the discrimination felt by Indians when they go to Kadoka combine to provide “less opportunity” for Indians in Jackson County to “participate in the political process” when Early Voting is available only in Kadoka.

b. The Totality of the Circumstances Supports a Violation of Section 2.

The factors that the Court may consider 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.

Bone Shirt II, 461 F.3d at 1021-22. 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.” The list of Senate Factors is “neither comprehensive nor exclusive,” and “there is no requirement that any particular number of factors be proved.” *Thornburg*, 478 U.S. at 45.

The Senate Factors used to analyze the “totality of the circumstances” that are particularly pertinent to the type of Section 2 claim at issue here (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*, 677 F.3d at 405-06 (en banc), *aff'd on other grounds*, *Arizona*, 133 S. Ct. 2247.³

The first Senate Factor, a history of official discrimination related to voting, weighs heavily in favor of Plaintiffs. As discussed in Section II, and at length in the Declaration of Garth Massey, the history of official discrimination against Indians in South Dakota related to voting is extensive and severe. Additionally, the District Court in *Bone Shirt I* made specific, detailed findings concerning the history of voting discrimination against Indians in South Dakota. 336 F. Supp. 2d at 1018-34, *aff'd Bone Shirt II*, 461 F.3d 1011 (8th Cir. 2006).

Turning to the Fifth Senate Factor, there is no doubt that Indians in Jackson County continue to bear the effects of discrimination in areas such as education, employment, and health. As discussed *supra*, the unemployment rate for Indians in Jackson County, at 29.9%, is *more than six times* the rate for whites. Socioeconomic disparities in these areas are well-recognized as hindrances to the ability of minorities to participate in the electoral process. *Thornburg*, 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.”). That effect is further magnified here, where, as discussed *supra*, the cost (both monetary and, for some, emotional) of traveling to Kadoka for Early Voting is so high for many Indians in Jackson County that Early Voting is, if available only in Kadoka, effectively out of reach.

³There is no requirement, however, that Plaintiffs show that the Early Voting scheme in Jackson County caused the relevant social and historical conditions in the County or that those conditions caused the denial of the request for a satellite office for early voting in Wanblee. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425-42 (2006) (affirming that Texas’s congressional redistricting plan violated the Section 2 results test without any finding that the plan caused the relevant social and historical conditions in Texas, or that those conditions caused the enactment of the plan).

These over-arching facts are undisputed: the disparate impact of the voting locations on Indians in Jackson County, the intense history of racial discrimination against Indians in South Dakota, and the depressed socioeconomic status of Indians in Jackson County that is a result of that history of discrimination. The totality of the circumstances conclusively supports a grant of partial summary judgment of Defendants' liability for a violation of Section 2.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant partial summary judgment for liability on their First Claim for relief.

Dated: December 24, 2015

BY:

/s/ Matthew L. Rappold

Matthew L. Rappold
Rappold Law Office
816 Sixth St.
PO Box 873
Rapid City, SD 57709
(605) 828-1680
matt.rappold01@gmail.com

Attorneys for Plaintiffs

Robert A. Kengle*
Maura Eileen O'Connor*
Arusha Gordon*
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

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

Erik Snapp*
DECHERT LLP
77 West Wacker Drive
Suite 3200
Chicago, IL 60601
Tel: (312) 646-5800
Erik.Snapp@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 8509 words.

BY:

/s/ Matthew L. Rappold

Matthew L. Rappold

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he served a true and correct copy of the foregoing Motion for Summary Judgment, Rule 51.6 Statement, Attorney Declaration and accompanying Exhibits 1-14 and the declarations of Bettlyoun, Doyle, Healy, Massey, Poor Bear, Red Willow Semans (and Exhibits) and Webster, 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 24th day of December, 2015.

/s/ Matthew L. Rappold
Matthew L. Rappold

