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 **REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ON RIPENESS GROUNDS**

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 & Ashmore, LLP, their attorneys, and respectfully submit this Reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss on Ripeness

Grounds. This matter should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (h)(3) for lack of subject matter jurisdiction.

I. This Matter is Not Ripe for Adjudication

"The burden of proving subject matter jurisdiction falls on the plaintiff." *VS Ltd. Partnership v. Dep't of Houston & Urban Development*, 235 F.3d 1109, 1112 (8th Cir. 2000). Plaintiffs have failed to meet their burden and this matter must be dismissed. Plaintiffs' have not demonstrated their claims are fit for judicial review nor have they identified any hardship or immediate injury. From the outset, Plaintiffs' argue "Defendants' actions are too little too late" failing to recognize that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3) (emphasis added). "Federal subject matter jurisdiction may be raised at any time during litigation and must be raised *sua sponte* by a federal court when there is an indication that jurisdiction is lacking." *Alumax Mill Products., Inc. v. Congress Financial Corp.*, 912 F.2d 996, 1002 (8th Cir. 1990) (quotation and citation omitted) (emphasis added).

A. This Case is Not Fit for Judicial Review

"A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *National Right to Life Political Action Committee v. Connor*, 323 F.3d 684, 693 (8th Cir. 2003) (citations and quotations omitted)). There are a myriad of future events that may or may not occur and this Court should not speculate as to what the status of South Dakota's election laws or HAVA funds will be after 2022. *Brooks v. Gant*, Civ. No. 12-5003-KES, 2013 U.S. Dist. LEXIS 110175, 2013 WL 4017036 (D.S.D. August 6, 2013) is directly on point. The *Brooks* plaintiffs sued for a satellite office in Oglala Lakota (f/k/a Shannon) County at which voters could register to vote and vote

in-person absentee for the statutory period allowed by law. (*Brooks v. Gant* Complaint, Doc. 67-1.) The *Brooks* plaintiffs sought a declaratory judgment that the failure to provide the satellite office violated the Voting Rights Act, the Indian Citizenship Act, the 14th Amendment and the South Dakota Constitution. *Id.* They further requested preliminary and permanent injunctive relief ordering the defendants to establish a satellite office for "all future elections" and a declaratory judgment that the HAVA reimbursement policy violated the Voting Rights Act. *Id.* The *Brooks* defendants entered into a nearly identical Memorandum of Agreement with the South Dakota Secretary of State which provided funding for the satellite office for the next four election cycles. *Brooks*, 2013 U.S. Dist. LEXIS 110175 at *7.

This Court found that "this is the type of case that would benefit from the development of additional facts because the landscape of both the facts and the law are subject to immense change." *Id.* at *13. It was "impossible" to address the alleged harm when it was unsure as to future elections laws, available future funding for satellite offices and from what sources as well as the future of Oglala Lakota County. *Id.* at *13-14. This Court would not "proceed based solely on defendants' past wrongs" and would not "guess at the state of affairs as they will exist in 2019 and beyond." *Id.* at *14. "For the court to adjudicate this claim now would amount to an advisory opinion based on assumptions and speculation." *Id.* at *14 (*citing KCCP Trust v. City of North Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005)).

The exact same circumstances ring true in the case *sub judice*. It is unknown whether South Dakota's election laws will change or what the status of South Dakota's HAVA funds will be in 2023. The State HAVA Plan could change or no excuse absentee voting could be repealed. It is impossible to address the alleged injury as it may exist in 2023 under these circumstances.

It further is entirely speculative to suggest that approximately $6.5 million in HAVA funds will disappear before 2023 and this Court should not guess as to available funding in 2023.

1. Local and Special Elections

Brooks is not distinguishable on the grounds that the issue of non-federal (i.e. local) elections was not argued or addressed. Plaintiffs provide no evidence of a special or local election that will actually occur before 2023, that will not coincide with a primary or general election in 2016, 2018, 2020 or 2022. Instead, they *speculate* that a special election *could* occur at other times. SDCL § 7-18A-19 provides for a special election on petitions to refer county resolutions or ordinances to a public vote. It further allows such elections to occur at the primary, general, or statewide special election. *Id.* SDCL § 6-8B-2 concerns elections for the issuance of local government bonds. Those elections can occur at any annual election and special elections are not required. SDCL § 6-8B-3. Even a special election to fill a congressional vacancy must occur at the primary or general election if the vacancy is within 6 months of those elections. *Id.* Simply put, Plaintiffs cite no specific facts or evidence even *suggesting* that a special election will occur before 2023, or that if a special election occurs, it will not be consolidated with the primary or general elections. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations and citations omitted).

Nevertheless, the Memorandum of Agreement allows additional HAVA funds to be requested through the HAVA Grant Application process and requires Jackson County to appropriate and expend "funds to pay for federal elections in Jackson County, including funding for an in-person absentee satellite voting location until January 1, 2023." (Memorandum of

Agreement, Doc. 47-10, ¶¶ 4(b) and 5.) Any federal special election that did not coincide with the primary or general election is covered by the Memorandum of Agreement. The Memorandum of Agreement can also be extended or amended, and such anticipated amendments would include additional funding to cover increases in the cost for the satellite office. (Kea Warne Depo. 69:3-71:1, Doc 67-2.) This could include an increase in the mileage rate as well as additional costs for special federal elections.

Plaintiffs cannot identify a single election that is certain to occur before 2023 that is not covered by Resolutions and Memorandum of Agreement. Instead, they allege (with no citation whatsoever) that "Defendants have admitted that elections will happen in Jackson County at times not covered by Resolution 16." (Doc. 51 at p. 13.) Defendants have not admitted the same and it is *Plaintiffs* who have failed to demonstrate their case is fit for judicial review.

2. Applicability to Future Commissions

Plaintiffs' argument that the Resolutions are not binding on future county commissions is also speculative. There is no evidence or even a hint that Jackson County will repeal the Resolutions pursuant to SDCL § 7-18A-2. Furthermore, the Memorandum of Agreement provides that it "shall inure to the benefit of and be obligatory upon the legal representatives, agents, employees, successors in interests and assigns to the respective parties hereto." (Memorandum of Agreement, Doc. 47-10, ¶ 10.)

B. There is No Immediate Injury or Hardship to the Plaintiffs

Ripeness requires the Plaintiffs to demonstrate a live controversy exists such that they will sustain *immediate* injury from the operation of the challenged practice. *Employers Ass'n, Inc. v. United Steelworkers of America, AFL-CIO-CLC*, 32 F.3d 1297, 1299 (8th Cir.1994). There is no such immediate injury at this time. Plaintiffs cannot identify one single election that

is certain to occur before 2023 that will not be covered by Resolution # 2015-16 and the Memorandum of Agreement.

1. School Board Elections

There is absolutely *no injury* to the Plaintiffs in regards to school board elections because Jackson County is not responsible for administering school district elections. Plaintiffs' argument that this case is still ripe because the Resolutions and Memorandum of Agreement do not apply to school board elections is entirely without merit. The Kadoka Area School District, not Jackson County, is responsible for administering school board elections. For instance, the school board—not the county—"shall" select the date for the annual election. SDCL § 13-7-10. The school board business manager shall publish notices of school board vacancies (SDCL § 13-7-5), nominating petitions must be filed with the business manager (SDCL § 13-7-6), the business manager shall publish notice of the elections (SDCL §§ 13-7-8, 13-7-8.1), and the business manager must provide ballots and election supplies (SDCL § 13-7-13). More importantly, voting precincts and polling places "shall be determined by the school board." SDCL § 13-7-11.

While absentee voting is permitted for school elections, it must be conducted pursuant to chapter 12-19 (Absentee Voting) and absentee ballots cannot be voted at the county auditor's office without school board approval:

> Absentee voting shall be permitted in school district elections, including school district bond elections and shall be conducted pursuant to chapter 12-19. The school board, with the approval of the county auditor and board of county commissioners, may permit absentee ballots to be voted at the county auditor's office in the county of jurisdiction.

SDCL § 13-7-14. Chapter 12-19 requires voters to apply to the "person in charge of the election" for an absentee ballot. SDCL §§ 12-19-2, 12-19-2.1, 12-19-2.3. The voted absentee

ballot "shall" be mailed or delivered to the "person in charge of the election". SDCL § 12-19-7. The "person in charge of the election" is "the county auditor in all cases except local elections for a municipality, school district, township, or other political subdivision, in which case it is the officer having the position comparable to the auditor in that unit of government if not specifically designated by law." SDCL § 12-1-3(7) (emphasis added). The person in charge of school district elections is the business manager, not the county auditor. Jackson County has no authority or control over school district elections.

2. Request for Federal Observers and Preclearance Remedies

Plaintiffs contend they are entitled to a judgment on liability based on an alleged *past violation* of the Voting Rights Act and consideration of effective remedies such as the appointment of federal observers and preclearance. However, this Court should not "proceed based solely on defendants' past wrongs". *Brooks*, 2013 U.S. Dist. LEXIS 110175 at *14. *Accord City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) ("[P]ast wrongs do not in themselves amount to that real and immediate threat of injury necessary to make out a case or controversy.") Moreover, ripeness requires a showing "that a live controversy exists such that the plaintiffs will sustain ***immediate*** injury from the operation of the challenged provision, and that the injury would be redressed by the relief requested." *Employers Ass'n, Inc. v. United Steelworkers of America, AFL-CIO-CLC*, 32 F.3d 1297, 1299 (8th Cir.1994) (emphasis added). There is no threat of immediate injury nor would the requested relief of federal observers and preclearance redress any injury. "The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again – a 'likelihood of substantial and

immediate irreparable injury.'" *Lyons*, 461 U.S. at 111. There is no so showing of any real or immediate threat to the Plaintiffs and thus the requested equitable remedies are unavailable.

Lastly, the appointment of federal observers and preclearance are equitable remedies that cannot be ordered without a showing of 14th or 15th Amendments violations. 52 U.S.C. §§ 10302(a) and (c). Violations of the 14th and 15th Amendments require a finding of intentional discrimination. *Lopez v. City of Houston*, 2009 U.S. Dist. LEXIS 43430, *65 (S.D. Tex. May 22, 2009) (*citing Davis v. Bandemer*, 478 U.S. 109 (1986)); *City of Mobile v. Bolden*, 446 U.S. 55, 61-62 (1980). Because this matter is not ripe, there is no subject matter jurisdiction for this Court to make any findings as to intentional discrimination, violations of the 14th or 15th Amendments or whether such equitable remedies are necessary.

II. Plaintiffs' Irrelevant Arguments

The remainder of Plaintiffs' arguments does not relate to ripeness and are not relevant to subject matter jurisdiction. Plaintiffs' belief they will succeed in their motion for partial summary judgment has no bearing on whether this matter should be dismissed for lack of jurisdiction—this court must satisfy itself of subject matter jurisdiction before considering the merits of the case. *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 101-102 (1998).

Likewise, Plaintiffs' criticisms of Defendants' discovery practice and declination to mediate are irrelevant to whether Plaintiffs have demonstrated the existence of subject matter jurisdiction. Plaintiffs go so far as to imply that Defendants refused to participate in a Court ordered settlement conference when in fact the Scheduling Order provided, "The parties will promptly contact a magistrate judge so that the possibility of settlement discussion with the assistance of a magistrate judge can be pursued." (Doc. 38 at ¶ 8) (emphasis added). Defendants did contact the magistrate judge and informed her they were not amenable to mediation at that

time. (Doc. 51-3.) The Scheduling Order did not order mediation, it directed the *possibility* of mediation be discussed, and it was.

Plaintiffs also imply Defendants did not produce Jackson County Resolutions 2015-15 and 2015-16 and the Memorandum of Agreement in a timely manner when in fact those documents were produced to Plaintiffs *the very same day* they were executed. (Defendants' Second Supplemental Rule 26 Disclosures, Doc. 67-3.)

Plaintiffs also take issue with the amount of time it took Auditor Vicki Wilson to submit the request for reimbursement for the satellite office for the 2014 election, evidently arguing the time it took to submit the request disproves the County's position that the only reason it had not opened a satellite office was lack of funding. Not only is this issue irrelevant to subject matter jurisdiction, there is a distinct difference between seeking reimbursement from funds that are known to be available and agreeing to commit funds that do not exist. Jackson County had $24,534.90 in its state-held HAVA account as of December 31, 2014, and this would have been the balance of the account earlier in 2014 when the satellite office was requested. (State-Held Fund Statement for Jackson County, Doc. 47-9.) Prior to November 2, 2015, when the HAVA Grant Board Parameters became effective, counties had to spend down their state-held HAVA accounts before they could even *apply* for additional HAVA funds.

Without funds in Jackson County's state-held HAVA account to cover the satellite office expense, there was no way of knowing if additional HAVA funds would be available for a satellite office. Based on Jackson County's limited finances and diminishing state-held HAVA account, it could not agree to expend funds for a satellite office without the assurance that HAVA funds would be available. Even so, Auditor Wilson suffered tremendous personal issues during this time. Her husband passed away from cancer and she herself had been "gravely ill."

(Denke Depo. 42:1-17, Doc. 67-4.) The County's dire financial situation also greatly increased Auditor Wilson's work load when Jackson County was forced to eliminate the deputy auditor position, which contributed to the delayed request for reimbursement. *Id.*

Finally, Plaintiffs designate considerable attention to mootness, even though Defendants have not moved to dismiss on mootness grounds. Plaintiffs' lengthy argument regarding mootness is simply not applicable to ripeness considerations and should quickly be disregarded.[1]

> Plaintiff did not acknowledge, however, that the court's tests for mootness and ripeness are different. *See* 13B Wright & Miller § 3532.1 at 383 ("As compared to mootness, which asks whether there is anything left for the court to do, ripeness asks whether there yet is any need for the court to act."). The court previously determined that plaintiffs' claims were not moot because "it is likely" that HAVA funds will run out in 2019 and "plaintiffs will again be faced with the same hurdles to early voting that existed at the start of this litigation because Shannon County lacks the funding to permanently support early voting." Docket 106 at 9. Here, while there may be something left for the court to do, the court does not yet need to act because plaintiffs' alleged harm is not certain to occur now or in 2019. The court previously found that harm was only likely to recur. <u>This is a distinction that makes a difference</u>.

Brooks, 2013 U.S. Dist. LEXIS 110175 at *17-18 (emphasis added). Here, while Defendants dispute there is anything left for the Court to do, it is evident the Court does not yet need to act because the alleged harm is not certain to occur, if at all, until 2023.

In the last few pages of their brief, Plaintiffs finally address the "fitness" and "hardship" prongs relevant to ripeness. Yet they fail to actually analyze their claims pursuant to ripeness and argue the matter is fit for judicial review relying on mootness principles. Plaintiffs additionally fail to identify any immediate danger of injury under the hardship prong. Instead, they argue *Defendants* have failed to meet their burden of establishing "that the issue as to

[1] While Defendants do not agree mootness authorities are relevant to their motion to dismiss based on ripeness grounds, it is worth noting that the case of *Oglala Sioux Tribe v. Van Hunnik*, 100 F.Supp.3d 749 (D.S.D. Mar. 30, 2015), cited by Plaintiffs in their mootness argument, has a pending motion to reconsider the cited decision. *Oglala Sioux Tribe v. Van Hunnik*, Civ. No. 13-5020-JLV, Doc. 167 (April 27, 2015); Doc. 169 (April 27, 2015); Doc. 170 (April 27, 2015).

Federal elections has been resolved, even going forward", (evidently arguing Defendants have not proven the case is unripe) in an effort to shift the burden of establishing subject matter jurisdiction from Plaintiffs.

CONCLUSION

The Plaintiffs' claims are not ripe for adjudication and should be dismissed for lack of subject matter jurisdiction. If the Court denies this motion, Defendants request language included in the order pursuant to 28 § U.S.C. § 1292(b).

Dated this 8th day of January, 2016.

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CERTIFICATE OF SERVICE

I hereby certify on January 8, 2016, a true and correct copy of the **REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ON RIPENESS GROUNDS** was served electronically through the CM/ECF system on the following individuals:

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