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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

Bobby D. Sanchez, Vinton Hawley, John Williams Jr., Robert James and Ralph Burns,

Plaintiffs,

v.

BARBARA K. CEGAVSKE, in her official capacity as Secretary of State for the State of Nevada, The County of Washoe, a political subdivision organized under the laws of the State of Nevada, the County of Mineral, a political subdivision organized under the laws of the State of Nevada, Marsha Berkbigler, Bob Lucey, Kitty Jung, Vaugn Hartung, and Jeanne Herman, in their official capacities as Washoe County Commissioners, Nancy Black, Paul MacBeth and Jerrie Tipton, in their official capacity as Mineral County Commissioners, Christopher Nepper, in his official capacity as Clerk-Treasurer of Mineral County, Luanne Cutler, Registrar of Votes for Washoe County.

Defendants.

Case No. 3:16-CV-00523-MMD-WGC

DEFENDANT SECRETARY OF STATE'S OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

Defendant, BARBARA CEGAVSKE, in her official capacity as Secretary of State for the State of Nevada ("Secretary"), by and through counsel, Nevada Attorney General ADAM PAUL LAXALT, and Senior Deputy Attorney General LORI M. STORY, hereby

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Opposes Plaintiffs' Emergency Motion for Preliminary Injunction and Declaratory Relief. This Response is based upon the attached Points and Authorities, exhibits, and the pleadings and papers on file herein.

MEMORANDUM POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs have sued the Secretary of State, Barbara Cegavske as well as the county commissioners and clerk for Mineral County, Nevada and the county commissioners and registrar of voters for Washoe County, Nevada claiming state and federal constitutional violations and a statutory violation of Section 2 of the Voting Rights Act (VRA) of 1965, as amended, which reads:

> Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation.
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C.A. § 10301.

Plaintiffs contend that the Mineral and Washoe County officials' refusal to set up in-person voter registration and in-person early voting at a location within the Paiute Indian Reservations in Shurz (Washoe County), Nevada and in Nixon (Mineral County),

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Nevada, as well as an in-person polling location on Election Day in Nixon, violates their rights under this provision of the VRA.

This issue developed after Mr. Bret Healy visited with the Chairman of the Walker River Paiute Tribe, Bobby Sanchez, and the Chairman of the Pyramid Lake Paiute Tribe, Vinton Hawley in early August of 2016 and suggested that they should request such accommodations from the local election officials.

Mr. Healy, whose education centered on Animal Science, is a consultant with Four Directions, a 501(c)(4) entity, with a focus on "empowering American Indian citizens in the American electoral process." Affidavit of Bret Healy, (ECF #11), ¶ 1. Healy claims to have played "a significant role" in the establishment of in-person satellite voting locations on American Indian Reservations in three states during the past decade. *Id.* at ¶ 2.

Healy visited with Chairman Hawley of the Pyramid Lake Paiute Tribe (Pyramid) on August 8, 2016, and apparently persuaded him of the Tribe's need for in-person early voting and Election Day voting at the Tribal capitol in Nixon, Nevada, which is located approximately 46 miles from Reno, Nevada, the county seat for Washoe County. ECF #11, ¶¶ 10, 12. By the next day, Healy had drafted a letter demanding such accommodation for Chairman Hawley's signature and had hand-delivered that letter to the Deputy Voter Registrar in Reno. *Id.* at ¶ 3. A copy of a slightly revised version of the letter was also delivered to the Registrar of Voters and to Secretary Cegavske on August 11, 2016. *Id.* at ¶ 14. The original letter demanded a response by August 22, 2016. However, the Registrar of Voters, Luanne Cutler, was out of the office until August 22, 2016, so a two-day extension of the deadline was granted. *Id.* at ¶ 15.

Healy also visited with Chairman Sanchez of the Walker River Paiute Tribe on August 10, 2016, delivering a similar message related to equal election access for the Walker Tribal members and he obtained permission to pursue the request from Sanchez. ECF #11, ¶ 23. Both Tribal groups informed Healy that they had office space and internet available for use during voter registration and voting. *Id.* at ¶¶ 12, 23.

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Healy spoke or corresponded with the Registrar of Voters in Washoe County and the County Clerk in Mineral County. Both informed him that they were communicating with the Secretary of State's Office related to the request for voting accommodations in tribal communities. ECF #11, ¶¶ 16, 25. As noted, Healy and the Tribes brought Secretary Cegavske into the discussions by providing her with a copy of their demand letter. *Id.* at ¶ 12. Healy was also informed by the Washoe County Voter Registrar that it was her decision, in consultation with the County Commission, as to where to locate early voting sites. *Id.* at ¶ 16. The Mineral County Clerk deferred responding to the request until he had an opportunity to discuss the matter with the Secretary of State's office to ascertain his authority and obligations as the County Clerk. *Id.* at ¶ 25; Exhibit 1.

Ultimately, both local election officials declined the request for special accommodations on Tribal lands, asserting that the timing of the request and a lack of available resources and staff prevented acquiescence. ECF #11, ¶ 19; ECF #11-27. While alternatives were offered, it appears that the Plaintiffs would not be satisfied with arrangements for a field registrar to be available at a location in Shurz and Nixon during the dates requested for in-person registration. *Id.*

The request for specific accommodations for Indian voters came to the counties just shortly before the date by which ballots must be printed and ready for delivery to military and overseas residents. Under the law, sample ballots must be printed with the voter's location for early voting and Election Day voting. NRS 293.565. As a result, and logistically, any request for specific registration and voting locations which comes to the county election officials less than three months before the general election cannot easily be granted. These legal requirements together with the unanticipated expense of granting such last minute requests foreclosed a positive response. The counties' denials of the late requests are not made for discriminatory purpose and should have no such effect.

The Secretary of State has no authority to direct the counties to respond in any particular manner to such request and her only role in these events was to attempt to facilitate a discussion among the parties to establish the true nature of the request and

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the explore the options that might be available to the local election officials in their efforts to accommodate the Tribes' requests.

II. ARGUMENT

A. The Secretary of State is not a Proper Party to this Action and She Should Be Dismissed.

A dismissal under Federal Rule of Civil Procedure 12(b)(6) is essentially a ruling on a question of law. *North Star International v. Arizona Corp. Comm.*, 720 F.2d 578, 580 (9th Cir. 1983). In considering a request to dismiss, all material allegations in the complaint are accepted as true and are to be construed in the light most favorable to the non-moving party. *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). For a defendant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Halet v. Wand International Co.*, 672 F.2d 1305, 1309 (9th Cir. 1982). Dismissal can be based on the lack of a cognizable theory or the absence of sufficient facts under a cognizable theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-534 (9th Cir. 1984).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957). While there is no need for detailed factual allegations in the complaint, a plaintiff is obligated to provide the "grounds" of his "entitle[ment] to relief" which requires more than labels and conclusions. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"); *cf. Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Here, Plaintiffs name the Secretary of State as a defendant in this matter based solely upon her position as the state election officials under NRS 293.124. And, other than

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a suggestion that the county election officials conferred with the Secretary about the matter – a fact not surprising given that the Plaintiffs copied the Secretary with their demand letters and thus brought the matter to her attention – the complaint offers nothing to suggest that the Secretary had any authority to intercede in the counties' handling of the request or that she did anything to influence their decision. Their claim that because she has a statutory mandate to ensure fair and equal elections in Nevada means that she is responsible to direct the local election officials on locations and times for registration and voting is unsupported by any evidence or by state or federal law. Specifically, as the Plaintiffs acknowledge in their amended complaint and in the Emergency Motion, it is the county clerk or county registrar of voters, under the provisions of NRS 293.205, NRS 293.213, NRS 293.2735, NRS 293.309 and NRS 293.3561, who have the authority and discretion to establish voter registration satellite offices and to determine the locations for voting within their own county. *See* ECF 10, ¶¶ 37, 38, 39; ECF #11, pp. 3–4.

These facts, tied with the lack of any specific allegations which implicate the Secretary of State as having taken any action in deciding these issues for the local election officials or any showing that she has authority to exercise any control over the counties' decisions as to registration and polling locations, requires that the Secretary of State be dismissed from the action. The attached evidence, provided in conjunction with the arguments laid out herein, show that the Secretary of State has no authority to impose her will upon the local election officials on issues related to the registration or polling locations and times in the counties. The evidence further shows that she took no actions in opposition to the Plaintiffs' requests. Rather, she attempted, as the state election official, to facilitate discussions with the counties and the Tribes to come to some reasonable and appropriate resolution of the problems that the requests posed for the counties.

Plaintiffs have failed to state a claim against Secretary of State Cegavske for which relief may be granted. Fed.R.Civ. Pro. 12(b). She should be dismissed from this case.

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B. Legal Standard for Preliminary Injunction

Courts must consider the following elements in determining whether to issue a preliminary injunction: (1) a likelihood of success on the merits; (2) likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships; and (4) advancement of the public interest. *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008). Because the elements are conjunctive, the party seeking the injunction must satisfy each element.

a. Plaintiffs Have Not Shown a Likelihood of Success on the Merits.

"Voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979). Despite this truth, the right to vote in any manner and the right to associate for political purposes through the ballot are not absolute. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S.Ct. 533, 536 (1986). The Constitution provides that States may prescribe certain framework for the exercise of this right, including "prescribe[ing] the Times, Places and Manner of holding Elections." U.S. Const., art. I, § 4, cl. 1. Under this Constitutional provision, states retain the power to regulate their own elections. *Sugarman v. Dougall*, 413 U.S. 634, 647, 93 S.Ct. 2842, 2850 (1973); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 544, 550 (1986). While a fundament right is implicated, strict scrutiny of such regulation is impractical and would "tie the hands of the States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433–34, 112 S. Ct. 2059, 2063–64 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 1569–1570 (1983).

The VRA was passed to ensure that all citizens enjoy the rights guaranteed by the Fifteenth Amendment by prohibiting policies or processes that interfere with the ability of minorities to cast their votes for the representatives of their choice. *See generally, U.S. v. Board of Comm'rs of Sheffield, Ala.* 435 U.S. 110 (1978); *Allen v. State Bd. of Elections*, 383 U.S. 544, 556 (1969). Conditions commonly encountered and sought to be ameliorated by the amendment include literacy tests and redistricting to dilute the

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strength of the vote of groups within a district. S. Rep. No. 97–417, 97th Cong., 2d Sess., at 5–7 (1982).

In the Senate Committee report to accompany the 1982 amendment to the VRA, several factors were suggested for courts to consider when determining if, within the totality of the circumstances in a jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2. These factors include:

> [1.] the history of official voting-related discrimination in the state or political subdivision;
> [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 voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
> [4.] the exclusion of members of the minority group from candidate slating processes;
> [5.] the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
> [6.] the use of overt or subtle racial appeals in political campaigns; and
> [7.] the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. No. 97–417, at 28–29.

The Judiciary Committee also noted that the court could consider additional factors, such as whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members or where the policy underlying the state or political subdivision's use of the challenged standard, practice, or procedure is tenuous.

To establish a violation of section 2 of the VRA, plaintiffs must show "that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by [American Indians, a 'language minority group' protected by the Act…] in that [their] members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C § 10301. In *Thornburg v. Gingles*, the Supreme Court identified three

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preliminary circumstances that must be established to show that a multi-member district diluted the ability of minorities to elect representatives of their choice. 478 U.S. 30, 50-51 (1986). The *Gingle* factors include a showing that (1) the population of American Indians "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) American Indians are "politically cohesive"; and (3) the "white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, ... usually to defeat the minority's preferred candidate." *Id.* If the *Gingle* factors are met, then the Court moves to consider the issue of vote dilution. *Old Person v. Cooney,* 230 F.3d 1113, 1120 (2000). Ultimately, it is the plaintiffs' burden to produce evidence that its members had less opportunity than did other residents in the district to participate in the political processes *and* to elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 766 (1973) (emphasis added).

As a District Court in Montana noted:

> Plaintiffs must also prove causation—that the failure to have satellite in-person absentee voting and late registration places has a discriminatory impact on Native Americans. *Gonzalez v. Arizona,* 677 F.3d 383, 405 (9th Cir.2012). "Although proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, proof of "causal connection between the challenged voting practice and a prohibited discriminatory result" is crucial ..." *Id.* Said otherwise, a § 2 challenge "based purely on a showing of some relevant statistical disparity between minorities and whites," without any evidence that the challenged voting qualification causes that disparity, will be rejected. *Id.*

Mark Wandering Med. v. McCulloch, 906 F. Supp. 2d 1083, 1088 (D. Mont. 2012), *order vacated, appeal dismissed sub nom. Med. v. McCulloch*, 544 F. App'x 699 (9th Cir. 2013) (emphasis added).

b. Applying the Senate's Section 2 Factors

Plaintiffs are residents in areas that have been identified and classified as mailing precincts under Nevada law. NRS 293.343 provides that if a precinct has or is reasonably expected to have less than 200 registered voters, the county clerk may designate such precinct as a mailing precinct, wherein the registered voters are provided with official

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mailing ballots, including the supplies necessary to return the ballot to the county clerk without cost. Plaintiffs argue that this arrangement discriminates against them because there is no local office for in-person voter registration or in-person early and Election Day voting, while other areas that are similarly remote from the county seat, such as Incline Village in Washoe County, with a 2010 population of 8,777,[1] are provided with such in-person services. They claim that the Incline Village location is evidence of discrimination because that community is a majority Anglo community. They finally assert that discrimination in education, employment, and health care hinder their ability to participate effectively in the political process and that the county officials' denial of their request is intended to prevent them from electing representatives of their choice or have only a tenuous connection to the reasons proffered for the policy.

c. Plaintiffs do not Demonstrate any History of Official Voter-Related Discrimination by the State of Nevada or the Counties.

In their amended complaint and their emergency motion, Plaintiffs point to historical instances of generalized discrimination against Native Americans during the 1800s. These instances are not in any way related to vote dilution or any other aspect of election participation. In the motion for preliminary injunctions, they outline the effects of the federal legislation designed to grant land allotments and rights of citizenship to Native Americans.[2] Although this history is not a good reflection on the attitudes of the federal government or of the country as a whole during that period, Plaintiffs have not provided this Court with any history of voter-related discrimination against Native Americans directly attributable to the defendants. However, in an attempt to malign the defendants and paint them as bad actors generally, they make reference to voter registration litigation which has been favorably settled and which is unrelated to the issues raised today.

[1] https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml# (last checked 9/28/16).
[2] The General Allotment or Dawes Act of Feb. 8, 1887.

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The discrimination referred to by the Plaintiffs' "expert," McCool, has nothing to do with attempts to prevent Native Americans from participating in the election process. Rather, it is the sad history of the conflict between the white settlers and the local tribes in competition for land which held promise of rich mineral deposits and rare water sources. The Senate Report for the 1982 amendments to the VRA specifically provides that the provisions of the Act are not "the basis of some permanent stigma for events which had occurred before 1965, but rather on the basis of a careful review of the contemporaneous record of ongoing voting rights discrimination…" S. Rep. 97-417, at 8–9.[3]

d. Plaintiffs do not Demonstrate that Voting in the Elections of the State or Political Subdivision is Racially Polarized.

Plaintiffs do not meet the requirements of the first Senate factor. In their effort to meet this prong, Plaintiffs refer, again, to national issues and suggest that the decision to make the Reservation areas mailing precincts is due to their propensity to vote democratic where the administration might be republican, citing to instances in North Carolina and in Florida where early voting was reduced to discourage democratic voters. This is complete speculation and Plaintiffs offer no evidence showing that there is any discriminatory animus in the county clerk's decision to deny the belated request for in-person registration and voting. Rather, as noted by Mr. Nepper, Mineral County's Clerk, the decision was based upon "time constraints, staffing, and budget limits." ECF #11-27. Also of note here is that Mineral County and Washoe County both have other mailing precincts which do not include Native Americans, including mailing precincts in Incline Village and the Reno-Verdi area. *Id.*; Exhibit 2. Thus, it cannot be said that the determination that a remote area with a small population should be designated a mailing precinct is based on any determination to polarize voting on the account of race.

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[3] While this language is specifically addressing preclearance requirements of the VRA section 4 for covered jurisdictions, the logic is also apropos to Plaintiffs' attempts to use ancient history to justify a claim of on-going voter discrimination.

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e. Plaintiffs' Suggestion that Designating the Tribal Areas as Mailing Precincts is a Voting Practice or Procedure that Enhances the Opportunity for Discrimination Ignores the Other Mailing Precincts Throughout the State that Do Not Include a Majority Native American Population.

As noted above, there are numerous other mailing precincts in the state which do not include Native Americans as the majority population. In Washoe County and Mineral County alone there are more than 135 mailing precincts, including Mineral County's Mina, Luna and Montgomery Pass communities and several in Incline Village, Washoe County. Exhibit 2. This should not be surprising given the geographic size of the counties in Nevada compared to their populations and taking into account the many smaller communities spread throughout the state. Also of note is the fact that Mineral County does offer in-person Election Day voting in Schurz at the Tribal Community Center. Exhibit 3.

f. Plaintiffs Have Not Shown that the Cause of any Disparity in Education, Employment, and Health Care for Native Americans is Due to Discrimination.

Initially, Secretary Cegavske questions the statistics provided by the Plaintiffs where it is not clear if they are comparing apples to apples. For example, they claim an unemployment rate for Indians in Nixon and Shurz at 26.1% and 35.4% respectively, and compare those rates to the unemployment rate Statewide for "Anglos" at 9.4%, citing to the 2010 census. It seems unlikely that the statewide unemployment rate listed in the census is for Anglos only.

As to the disparity in education, employment and health care, Plaintiffs offer no explanation about why the disparities exist, simply asking the Court to assume it is due to discrimination. Although Native Americans are not required to do so, they understandably often choose to live on reserved lands among other Native Americans. These locations afford Tribal members some benefits, such as sovereignty over their own people and lands, but the often remote locales also make it difficult for residents to obtain the best education or health care, or to gain well-paying employment. The Court should note, however, that it is not the county or even state election officials who determine

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these matters. Rather, the county elections officials are required to allocate limited resources to the best use in serving all of the citizens within their counties during the election process.

Finally, there is no proof offered by Plaintiffs that a mailing precinct denies citizens living within that precinct a full opportunity to register and to vote, particularly where a field registrar has been offered to help facilitate registration of Native Americans who do not have a state issued ID. In fact, Mineral County Clerk Nepper offered to provide the Walker River Paiute Tribe with voter registration forms "in an area designated by the tribe." ECF #11-27.

g. Plaintiffs have not Shown that the Number of Native Americans Elected is Attributable to the Mailing Precinct Designation.

Plaintiffs aver that no Native American candidate has ever been elected to office in either Washoe or Mineral County. This begs the question: How many Native Americans have offered themselves as candidates for generally elected public office? No information to answer this question is provided by the Defendants, completely undermining any weight this factor may carry in establishing a discriminatory effect.

h. Plaintiffs have not shown County Officials' Responsiveness to the Minorities Particularized Needs was Inappropriate or Discriminatory.

Plaintiffs rely on the denial of a belated request for special accommodation for the voters on the Pyramid Lake Paiute Indian Reservation to support their argument that officials have been unresponsive to the Indians' needs. They assert that the Secretary directed the counties not to respond to the request. This suggestion is patently false, given that both counties almost immediately met with Mr. Healy, discussed, and considered the requests. The facts are that the counties were unable to provide the staff, space and equipment necessary to meet the Tribe's demands and that the Secretary acted only to facilitate these discussions by hosting a conference call for all parties to attend. Exhibit 1; ECF # 11-27; *see also* Declaration of Katherine Siemon-Martin and attachments (Exhibit 4).

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i. Tenuousness of Policy

Next, Plaintiffs argue that the mailing precinct designation and the counties' inability to accommodate their belated request for in-person registration and in-person early voting in Nixon and Schurz is a policy that has only a tenuous relationship to true County resource restraints. They suggest that the request was made "in plenty of time" and would not be cost prohibitive. They offer nothing to support these conclusory statements, particularly given the small budget that a county such as Mineral might have and the federal ballot publication requirements of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), found at 52 U.S.C. § 20301 *et seq.* This federal statute requires that ballots be laid out, proofed, printed, tested, and mailed to overseas voters no later than 45 days before the election. This election cycle that date was September 23, 2016, a short month before the request for accommodation was able to be reviewed and discussed by county officials. It generally takes more than a month to complete ballot preparation.

Plaintiffs also assert, without evidence to support the assertion, that the Secretary instructed the counties that they have no legal obligation to accommodate the request. As the evidence provided here demonstrates, the Secretary took no such action. *See* Exhibit 1 and Declaration of Siemon-Martin. The Secretary did, however, recognize the limits of her jurisdiction and authority and advised the counties that they would have to make their own determinations and their own responses to the requests. *Id.*

Moreover, it is not clear from these pleadings and arguments how in-person early voting and Election Day voting opportunities would make it easier or more effective for Native American voters within the mailing precincts to participate in the election process. It is not clear why the Plaintiffs and their neighbors are more able to travel from their homes to a local polling location than they are to fill out their ballot and walk to their own mailbox to post it. Neither is it clear why the citizens in these communities state they are unable to access the internet, when the Plaintiffs have indicated through Mr. Healy that they have internet access available in their tribal spaces. ECF #11, ¶¶ 12 and 23. If such

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internet access is readily available and the citizens are able to travel to such a place to vote, how are they being discriminated against, if they must go to that same location in order to register to vote on-line or with the assistance of a field registrar? In fact, this case seems like a solution seeking a problem.

C. Section 1983 Claim

Plaintiffs next argue that they will prevail on their claims under 42 U.S.C. § 1983. The Equal Protection Clause permits some burdens upon the right to vote or upon the right to vote in a manner equal with other voters. *Selph v. Council of City of Los Angeles*, 390 F. Supp. 58, 62 (C.D. Cal. 1975). Unlike § 2 of the VRA, discriminatory intent is an essential element of Equal Protection claims alleging discrimination against voters. *Rogers v. Lodge,* 458 U.S. 613, 620–21 (1982). While a discriminatory purpose can sometimes be inferred from the totality of the relevant facts, *id.* at 618, direct evidence of the true purpose, a significant hardship that would be imposed on election administrators if they had to implement these procedures on short notice in the heat of a presidential election, should overcome such an inference.

As with the claims raised above, Plaintiffs can show no discriminatory animus on the part of the Defendants given that there are more than 135 mailing precincts designated in these two counties alone and only four of them are primarily Native American residents. Exhibits 2 and 3. Additionally, a history of discriminatory intent in other states does not prove discriminatory intent in this state.

D. Nevada State Constitutional Claim

Plaintiffs are no more likely to succeed on a claim under the State's Constitution than they are under the VRA or the Equal Protection clause of the U.S. Constitution. The designation of mailing precincts falls within the County Clerk or Registrar of Voters' authority and there are many such district designated throughout the state that have no minority populations at all and certainly no Native American population majority

E. Irreparable Harm

Plaintiffs claim that they will suffer irreparable injury if they are not provided with

in-person voter registration and early voting. However, they provide no specific example of what this harm will be. Rather, they ask the Court to "presume" the existence of such harm just as they ask the Court to presume the discriminatory effect or intent of the mailing precinct designations. Even if it can be presumed, the nature of the irreparable harm and the actual cause of that harm must be considered, particularly where there is no evidence showing any discriminatory purpose behind the designation. *Anderson,* 460 U.S. 788-89, 103 S. Ct. at 1569-1570 (when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions); *Burdick,* 504 U.S. at 433-34, 112 S. Ct. at 2063-64.

Here, if the court enters a preliminary injunction requiring the counties to create and man a satellite office in Nixon and Schurz for in-person voter registration and early and Election Day voting, they face various expensive hurdles not accounted for by Mr. Healy in his spreadsheet. For example, NRS 293.345 requires that sample ballots include the location where in-person voting may occur. In order to meet the requirements of a court order and the requirements of this statute, new ballots would likely have to be printed for the mailing precincts in question. If not new ballots, an educational and public information program will have to be implemented to ensure that all residents of the mailing precincts are fully informed that they can go to the satellite offices to register and to vote.

Additionally, the counties, particularly the smaller Mineral County, will likely suffer financial and staff impacts that it cannot afford in these pressing times of a presidential election.

On the other hand, Plaintiffs and the other residents of the Pyramid Lake Paiute Tribe and the Walker River Paiute Tribe reservations and communities will still be able to register to vote and vote by mail, as do all other residents in the numerous mailing districts throughout the state.

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F. Balance of Equities

As noted above, while it may be somewhat inconvenient for residents of the Indian communities in Washoe and Mineral County to travel to a place where they can register to vote and vote in-person, it is more than a matter of inconvenience for the local election officials there. This is a hotly contested and unique presidential election which has put voters and candidates on edge, bringing challenges and questions that might otherwise not be present in a general election and taking staff time and resources to resolve. Additionally, the late date of the request complicates the ability for the officials to respond positively, given scheduling, staffing, and other logistical and economic concerns.

The Defendants face greater inequities if ordered to comply with the accommodation for this election cycle than Plaintiffs would if their motion is denied.

G. Public Interest

There is a great public interest in the accurate, careful, and smooth conduct of voter registration and polling. Compromising those goals to facilitate special treatment for a small number of citizens who have not demonstrated any discriminatory impact or intent in the mailing precinct designations for their communities is not in the public interest.

III. CONCLUSION

Because the Plaintiffs have not met their burden to show a likelihood of success on the merits of their claims or that the balance of hardships, equities and public interest weigh in their favor, the Court should deny the emergency motion for preliminary injunction. Considering the totality of the circumstances, the designation of the Paiute Reservation locales as Mailing Precincts cannot be found to be an electoral device to deny Native Americans equal access to the election.

Furthermore, because the Secretary of State is not a proper party to this case where the discretion for selection of registration and polling locations is left to the local election officials and because the allegations made against the Secretary in the Plaintiffs'

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paper are marginal and countered by the evidence submitted herewith, she should be dismissed from the case. Defendant Cegavske requests an order granting her dismissal.

DATED this 29th day of September, 2016.

ADAM PAUL LAXALT
Attorney General

By: /s/ Lori M. Story
LORI M. STORY
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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 29th day of September, 2016, I served a true and correct copy of the foregoing **DEFENDANT SECRETARY OF STATE'S OPPOSITION TO PLAINTIFFS' EMERGENCY MOTION FOR PRELIMINARY INJUUNCTION AND DECLARATORY RELIEF**, by electronic filing said document in the U.S. District Court CM/ECF electronic filing to:

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