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ATTORNEY FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA

Bobby D. Sanchez, Vinton Hawley, Johnny  
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 Berkgigler, Bob  
Lucey, Kitty Jung, Vaughn 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 Voters for  
Washoe County.

Defendants.

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

COME NOW, Plaintiffs, by and through their undersigned counsel, and respectfully file this Memorandum in Opposition to Defendant Secretary of State's Motion to Dismiss. In support of their argument, Plaintiffs hereby incorporate by reference their Memorandum in Support of Injunctive Relief at Docket 26, their Reply to Defendant Washoe County's Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction and their reply to Mineral County

Defendants' Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction and further state as follows:

### **INTRODUCTION**

In opposing Plaintiffs' motion, Defendant Cegavske refused to address Plaintiffs' substantial evidence of discriminatory impact, disproportionate burdens, and disenfranchisement. Instead of confronting Plaintiffs' evidence that Indians living on the Reservations of the Pyramid Lake Paiute Tribe ("PLPT") and Walker River Paiute Tribe ("WRPT") have been discriminated against for more than 100 years in all areas of life including elections, Defendant offered unsupported speculation that the harm to Plaintiffs and the abridgment of their voting rights was simply because they chose to reside on their respective reservations. That statement alone demonstrates the discrimination and complete ignorance of Defendant Cegavske as to the way-of-life of Tribal members residing on the Reservations of WRPT and PLPT.

Contrary to Defendant's assertions, the deprivation of the right to vote is irreversible and irreparable. Thus, Plaintiffs respectfully request that the Court grant preliminary injunctive relief.

#### **I. MISSTATEMENTS IN DEFENDANT CEGAVSKE'S RESPONSE.**

Unfortunately, to ensure this Court receives an accurate picture of the facts involved in this case, major misstatements made by Secretary Cegavske must be clarified at the outset.

First, Defendant Cegavske claims that Defendants offered arrangements for a field registrar to be available at a location in Schurz and Nixon during the dates requested by the Plaintiffs. Doc. 37 at ¶ 4. This is false. There was no offer of a field registrar. However, Washoe County did offer to provide training if the Tribe could recruit someone willing to work for free. What Defendant Cegavske also fails to tell this Court is that by the time this offer was made training had already been completed in Washoe County. In any event, a field registrar still cannot

register voters past October 8<sup>th</sup> and would not be available on all dates requested by the Plaintiffs for in-person voter registration – only on two of those days requested by PLPT could a field registrar register voters. The only relief Defendant Mineral County offered was to transport some forms to the WRPT.

Second, none of the Plaintiffs reside in a mail-in only precinct. A mail-in only precinct has less than 200 registered voters. Nixon currently has approximately 190 registered voters, but has been assigned to vote on Election Day at Natchez Elementary school in Wadsworth. Plaintiffs have NOT made any claims about mail-in precincts – this case is strictly about in-person voter registration and in-person early voting sites within the Reservations of the PLPT and the WRPT.

Lastly, Defendant Cegavske avers the following:

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.

Doc. 37 at ¶ 11. Then she concludes with the following:

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

*Id.* Defendant Cegavske completely misstates the Committee Report. The portion cited above was discussing the history of the 1975 extension of the VRA – and most importantly, was discussing Section 5 – not Section 2 which is the subject of this case.

## **II THE SECRETARY OF STATE IS A PROPER PARTY TO THIS ACTION.**

Defendant Cegavske argues that she should be dismissed from the action, because 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." Doc. 37 at ¶ 6. That is patently false as Defendant Cegavske had everything to do with the Counties' initial inaction and subsequent refusal of the Tribes' request for in-person registration and in-person voting sites on the respective Reservations.

First, on August 9, 2016, Bret Healy, representative for the Plaintiffs, approached the Defendant Washoe County<sup>1</sup> requesting the establishment of in-person registration and in-person voting sites within the Reservations of the WRPT and the PLPT.<sup>2</sup> Mineral County was initially receptive to the idea of meeting with the Plaintiffs to discuss their request. Doc 3; Exhibits 5-15. But then on August 19, 2016, Defendant Nepper abruptly ceased any discussions with the Plaintiffs because "[he] talked with the Secretary of State's office and they have asked me not to respond as this issue is at the state level." *Id.*; Exhibit 23. The Secretary's interference delayed the Tribes' request for equality until August 24, 2016.

Second, the Secretary's office corresponded with Mr. Healy for over a week. He was not told – not one time – that she had no authority to grant the relief he was requesting on behalf of the Tribes. In fact, Mr. Healy was not told until August 24th that the establishment of in-person voting and registration sites was a local issue. Doc. 3.

Third, Defendant Cegavske actually provided the legal advice to Washoe County that it had no legal obligation to grant the requests. Affidavit of Bret Healy ("Healy Aff.") at ¶ 1-2. Defendant Cutler informed Mr. Healy of that fact and also relayed that they were relying on that advice and not asking their own district attorneys to determine their denial of the request.<sup>3</sup> *Id.*

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<sup>1</sup> Mr. Healy first approached Mineral County on August 12, 2016, to discuss in-person registration and in-person early voting sites.

<sup>2</sup> Mr. Healy also requested an in-person Election Day voting site for the PLPT.

<sup>3</sup> 2014 election results demonstrate that Defendant Cegavske may have an ulterior motive for declining the Tribes' request for the establishment of in-person registration and voting sites

Finally, and most importantly, Defendant Cegavske, as chief elections officer, has the authority to direct the counties to come into compliance with the Voting Rights Act. In fact, her office admitted to Mr. Healy that they could step in if a county was operating an election improperly. Clearly, Defendant Cegavske's argument is convoluted at best. She simply cannot avoid the fact that as the state's elected official and chief elections officer charged with the oversight of the electoral process, she is ultimately responsible for any violation of election rules, regulations, or statutes that infringes upon an individual's right to vote. In the case at bar, she has failed to obtain and maintain uniformity in the application, operation, and interpretation of the election laws – which includes the Voting Rights Act.

Furthermore, the Secretary of State plays a much larger role in the electoral system than she admits. According to NRS 293.124, the Secretary of State serves as “the Chief Officer of Elections for this State.” As such, she is “responsible for the execution and enforcement of the provisions of title 24 of NRS and all other provisions of state and federal law relating to elections in this State.” *Id. See Secretary of State v. Burk*, 124 Nev. 579, 588, 188 P.3d 1112, 1118 (2008); *Nevada State Democratic Party v. Nevada Republican Party*, 256 P.3d 1, 10 (Nev. 2011).

As chief state election official, the Secretary of State must set the parameters for elections and intercede when federal law is being violated. *See* NRS 293.247. The Secretary of State may

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within the boundaries of the Reservations. Specifically, in 2014 Defendant Cegavske received 43.74% of the votes cast in Hawthorne (83.57% Anglo) whereas in Schurz (predominant Indian population) Defendant Cegavske only received 25.16% while her opponent received 66.88% of the votes. Accordingly, Defendant Cegavske's opponent wins Schurz by 38.47% more than she wins Hawthorne. Voting results are no different on the Reservation of the Pyramid Lake Paiute Tribe. In Incline Village (86.90% Anglo), Defendant Cegavske received 56.70% of the vote whereas in Nixon she only received 8.89% in comparison to her opponent who received 86.67%. Hence, Defendant Cegavske wins Incline Village – a predominantly Anglo community – by 16.35% while losing Nixon – the Tribal Capital – by 77.78%, a spread of 94%. Healy Aff. Exhibit 14.

“provide interpretations and take other actions necessary for the effective administration of the statutes and regulations governing the conduct of primary, general, special and district elections in this State.” *Id.* As chief elections officer charged with ensuring federal election laws, including the Voting Rights Act, are being followed, a direct line of causation exists between the Defendant’s conduct and the injuries to the Plaintiffs. Accordingly, Defendant Cegavske is a proper party to this action.

### **III. PLAINTIFFS HAVE DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS.**

Contrary to Defendant Cegavske’s argument regarding the purported test to which this case must be reviewed, the 1982 Senate Report lays out the proper test for Section Two Voting Rights Act cases as follows:

Disproportionate educational, employment, income level and living conditions rising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, ***Plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.*** (Emphasis added)

*S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982) at 29 n. 114.* Plaintiffs only have to show that the alleged standard, practice and procedure denies the right to vote. If it denies the right to vote, it violates Section 2(a).

#### **(i) History of Discrimination.**

Defendant Cegavske argues that Plaintiffs have only pointed to historical instances of generalized discrimination. However, the Defendants ask that Plaintiffs and other Tribal members travel to border towns in which to cast a ballot and register. Not all discrimination is publicized but that does not mean it does not exist. In fact, border towns are notorious for discriminating against Reservation Indians and Nevada communities are no different. In an individual survey, a majority of PLPT and WRPT Tribal members stated a lack of trust for

County officials. Healy Aff. Exhibit 5. Most respondents (3/5 to 2/3) cited individual discrimination as the reason for their distrust. *Id.*

Further, of those WRPT and PLPT Tribal members surveyed, a number of them stated that the people in charge of registration were reluctant to hand them the necessary forms, they were made to complete additional forms even though they were already registered, people in charge of elections were rude, and people complained that these Tribes' members were even voting. Healy Aff. Exhibit 13. Most often, the PLPT and WRPT Tribal members felt discriminated against simply for being Tribal members. *Id.*

ii. Racial Polarization.

Defendant Cegavaske raises the subject of mailing precincts to bolster her argument as to polarization. Doc. 37 at ¶ 11. Mailing precincts have absolutely no bearing on this case. Plaintiffs demonstrated very clearly that Indians tend to vote democratic – Defendant Secretary of State provided no evidence or argument to the contrary.

iii. Disparity in Education, Employment, Health Care.

Defendant Cegavske's following argument regarding the aforementioned Senate Factor is simply nothing short of discrimination:

Although Native Americans are not required to do so, the 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.

Doc. 36 at ¶ 12. Blaming the victim for their circumstances is absurd. Defendant Cegavske's bold statement that the Counties have nothing to do with these matters is simply unsupported.

iv. Number of Native Americans Elected.

Plaintiffs aver that no Indian from WRPT or the PLPT have ever been elected to local office. Defendant provides no evidence to the contrary.

v. Responsiveness.

Defendant Cegavske argues that Plaintiffs' assertions that she directed Mineral County not to reply to the Plaintiffs' request is blatantly false. Doc. 37 at ¶ 13. Evidence presented by the Plaintiffs demonstrates that the Secretary made such a directive.

In the independent survey, less than 7.5% of WRPT and PLPT Tribal members answered yes to the question "to your knowledge has any county official or official from the Nevada Secretary of State's office ever inquired about equal access to the ballot box for Tribal members residing on the PLPT and WRPT Reservations." Healy Aff. Exhibit 1. In fact, neither the current Secretary of State nor her predecessors have ever completed a voter access study. *Id.* Defendant Washoe County does have a voter outreach program, but it fails to reach members of the PLPT. *Id.* The County spent "close to \$100,000 on early voting workers for the Primary" but never did any outreach to plaintiffs to determine need.

If the Defendants had been more responsive, they would have ascertained that in-person registration and in-person early voting sites on each of the Reservations is highly desired by PLPT and WRPT Tribal members. Specifically, 85% of PLPT Tribal members and 89% of WRPT Tribal members desire the establishment of an in-person registration site on their respective Reservations. *Id.* Over 90% of both PLPT and WRPT Tribal members desire to have an in-person early voting site on their Reservations. *Id.*

vi. Tenuousness of Policy.

First, Defendant Cegavske argues that the federal ballot publication requirements of the Uniformed and Overseas Citizens Absentee Voting Act requires ballots be mailed to overseas



voters no later than 45 days before the election which would fall on September 23. Doc 37 at ¶ 14. Defendant infers that this statute prohibits Plaintiffs' request as untimely. Plaintiffs first made the request for in-person registration and voting sites on August 9th. If the Secretary of State had not interfered by instructing the counties not to answer, there would have been no issue with the federal statute.

Second, Defendant Cegavske denies that she instructed the Counties that they have no legal obligation to accommodate the request. That is false and contradicted by the Plaintiffs' evidence.

Third, the Counties have not promulgated any formal rules as to how they establish early voting locations. For example, in her letter dated September 23, 2016, Defendant Cutler stated that she uses the following criteria to make her decision: (1) Is it ADA compliant? (2) Can they receive a wi-fi signal from the Counties' equipment? (3) Do they have an empty area large enough to accommodate County equipment and workers? (4) Do they have adequate electrical outlets? (5) Is there a large enough population base to support the expenditure? **Exhibit 1**. But then in their Opposition memorandum, they conveniently add two more factors: (1) Does the site serve as many voters as possible in each geographical area of the community by providing access near their home or place of work, as much as practical and good stewardship of the Count's resources allow; and (2) Are sites located in the north, east, south and west quadrants of the main voter population base areas in this county. Doc. 38 at ¶ 6. Clearly, there is no uniformity in how they make their decisions on where to establish in-person early voting and registration sites.

Finally, Defendant Cegavske argues that "[i]t 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." *Id.* at ¶ 14. There are numerous reasons

why the United States Post Office does not work for Indians residing on Reservations. First, Tribal members have weak understanding of the election process, especially voter registration by mailed in paper application. Healy Aff. Exhibit 1. Many don't understand the mail in application process— don't understand the voter registration process. *Id.* Most importantly, on the Voter Registration Application, it states “(14) Important ... your signature is required. Failure to do so is a felony.” Healy Aff. Exhibit 9. Because the Secretary of State provides no outreach to these communities, threats of felony convictions is a major deterrent for anyone who would otherwise be willing to assist in the registration process.<sup>4</sup>

Additionally, there are numerous issues associated with the use of the postal service in general.

The first leak in the pipeline can occur if the request is never received if it is received, then losses can occur at the point of verifying the voter's identity and eligibility to receive a ballot. If there is a registration problem, then the attempt to vote is thwarted at this point. If the ID is validated, then a ballot is sent to the voter to be cast. If the mailed ballot is not received by the voter, there another pipeline leak. If the ballot is marked by the voter, it is then returned – but it could get lost in the return mail, thus frustrating the attempt to vote. If the ballot is returned for counting, it must again undergo identification verification. If there has been a registration error that was not manifest earlier, then the pipeline loses another vote. The final step is the accurate tabulation of the returned ballot.<sup>5</sup>

Healy Aff. Exhibit 2. But ultimately, the problem with using the mail involves the lack of trust associated therewith. Only 24% of PLPT Tribal members and 20% of WRPT Tribal members trust that their vote will be counted if mailed. Healy Aff. Exhibit 1.

#### **IV. SECTION 1983 IS SUBSTANTIATED.**

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<sup>4</sup> Of those Tribal members surveyed, after knowing of the felony, less than 20% said they would be willing to help with voter registration or to ask their family to assist them with voter registration.

<sup>5</sup> Stewart III, Charles. "Losing Votes by Mail." New York University Journal of Legislation and Public Policy, Symposium Issue - Helping America Vote: The Past, Present, and Future of Election Administration, 13.3 (Fall 2010): 573-601.

Defendant Cegavske argues that the Plaintiffs can show no discriminatory animus by Defendant Cegavske. Doc. 37 at ¶ 15. Plaintiffs hereby specifically adopt by reference its Reply to Defendant Washoe County's Opposition to Plaintiffs' Emergency Motion for Injunctive Relief.

**V. PLAINTIFFS' RIGHT TO VOTE IS FUNDAMENTAL AND THE BALANCE OF THE EQUITIES FAVORS THE ISSUANCE OF A PRELIMINARY INJUNCTION.**

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481 (1964). Because of the preferred place it occupies in our constitutional scheme, "any illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury." *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984).

Once the right to vote is denied or suppressed, there is no way to remedy the wrong. As the court held in *Spirit Lake Tribe*, "there is simply no remedy at law for such harm other than an injunction." *Spirit Lake Tribe v. Benson County*, 2010 U.S. Dist. LEXIS 116827, \*12 (D.N.D. Oct. 21, 2010). Members of the Pyramid Lake Paiute Tribe and Walker River Paiute Tribe will suffer irreparable injury if they are denied the equal opportunity to vote in the 2016 election.

**CONCLUSION**

Defendant Secretary of State has the ultimate responsibility for the application, operation and interpretation of applicable election rules, and therefore, should not be dismissed from this action.

Dated this 3rd day of October, 2016.

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CERTIFICATE OF SERVICE

I, Rendal B. Miller, hereby certify that on the 3rd day of October 2016, I electronically filed the foregoing Plaintiffs' Reply to Defendant Secretary of State's Opposition to Plaintiffs' Emergency Motion for Preliminary Injunction and Declaratory Relief with the Clerk of Courts for the United States District Court for the District of Nevada by using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

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