

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
PRELIMINARY INJUNCTION
AND MEMORANDUM IN
SUPPORT OF MOTION**

**ORAL ARGUMENT
REQUESTED**

Defendants.

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Pursuant to Fed. R. Civ. P. 65(a) and D.S.D. Civ. LR 7.1, Plaintiffs Thomas Poor Bear, Don Doyle, Cheryl Bettelyoun, and James Red Willow (“Plaintiffs”) respectfully move this Court for a preliminary injunction ordering Defendants to establish a satellite office for in-person registration and in-person absentee voting in Wanblee, Jackson County, South Dakota, for the full statutory period (or any part remaining thereof at the time of the entry of the order) provided by South Dakota law in advance of the upcoming general election on November 4, 2014. This motion is supported by the memorandum below and the declarations filed separately. Plaintiffs request oral argument.

I. INTRODUCTION

“In decision after decision, [the Supreme] Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Section 2 of the Voting Rights Act prohibits voting practices and procedures which result “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). A violation of Section 2 is established if it is shown that voting opportunities are not “equally open to participation” by minorities in that those minority citizens 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). This is a straightforward case showing that Indian voters in Jackson County will have less opportunity to participate in the upcoming November election as a result of the Defendants’ tenuous refusal to provide for in-person registration and early voting on the Pine Ridge Reservation.

Specifically, Jackson County, which has a population that is about half white and half Indian, is making early voting available in Kadoka, a town that is over 90% white, for 46 days

before the November 4 election, and has refused to set up a satellite office for early voting in Wanblee, a town on the Pine Ridge Reservation that is over 90% Indian. In-person voter registration is also available in Kadoka until 15 days before Election Day, but not in Wanblee. Kadoka and Wanblee, the two largest towns in Jackson County, have voting age populations that are almost equal. Indian citizens in Jackson County have to travel, on average, almost two hours round-trip to go to Kadoka—which is twice as long as the average round-trip travel time required for white citizens. The time and resources required for a trip to Kadoka, combined with the depressed socioeconomic status of Indians in Jackson County, make in-person registration and early voting effectively unavailable for many Indians in Jackson County. As a result, Jackson County provides a benefit to white citizens—early voting and in-person registration—that is not provided equally to Indian citizens. The result is that Indians in Jackson County have “less opportunity than other members of the electorate to participate in the political process,” in violation of Section 2 of the Voting Rights Act. *See id.* The County’s refusal to make early voting and in-person registration equally available to Indian citizens is all the more egregious given that there is funding available to establish a satellite office in Wanblee. The County is aware of such funding, yet still claims lack of funding as an excuse for refusing to open the satellite office.

Additionally, the Plaintiffs will suffer irreparable harm if a satellite office is not established in Wanblee in advance of the upcoming general election. Once the right to participate equally in an election is denied, it cannot be regained; the election is over and there are no “do-overs.” The potential harm to Plaintiffs—the abridgement of the right to vote—far outweighs the potential hardship on the Defendants, which should be minimal given that there is funding available for the satellite office. And, finally, the public interest will be served by

upholding federal law and protecting the constitutional rights of the Indian citizens of Jackson County.

For reasons set forth more fully below, Plaintiffs ask the Court to grant preliminary injunctive relief in advance of the upcoming general election.

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”). Plaintiffs reside in Jackson County, South Dakota, within the boundaries of the Pine Ridge Reservation.

Defendant Jackson County (“the County”) is a political subdivision and public corporation organized under the laws of South Dakota. Defendants Glen Bennett, Larry Denke, Larry Johnston, Jim Stilwell, 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. S.D. Codified Laws (“S.D.C.L.”) § 12-14-1 (2014). Defendant Vicki Wilson (“Wilson”) is the Jackson County Auditor 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 Legislature, county, and precinct officers; and forwarding the abstracts of votes cast at general or special elections to the Secretary of State. S.D.C.L. § 7-10-5 (2014).

A. Early Voting Is Currently Available Only at the County Seat of Kadoka

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). 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). 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). (The 46-day period of in-person absentee voting and portion of that time during which in-person registration is available will be collectively referred to as “Early Voting” in this memorandum.)

Currently, the county courthouse in Kadoka, the County seat, is the only place in Jackson County where Early Voting is available. A portion of the Oglala Sioux Tribe’s Pine Ridge Reservation (“the Reservation”) comprises 56.95% of the area of Jackson County. Declaration of Dr. Gerald R. Webster in Support of Plaintiffs’ Motion for a Preliminary Injunction (“Webster Decl.”) ¶ 9. In Jackson County, approximately 22% of the white population lives on the Reservation, whereas 91% of the Indian population lives on the Reservation. Webster Decl. ¶¶ 10-11. Wanblee, the location of the requested satellite office, is on the Reservation. Kadoka, however, is not on the Reservation. Population data for these areas are set forth below.

Table 1: Population by Race in Jackson County

	Total Population	White Population	Percent White	American Indian Population	Percent American Indian
Jackson County	3,067	1,564	50.99%	1,384	45.13%
Kadoka	616	582	94.48%	32	5.19%
Wanblee	740	12	1.62%	707	95.54%

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

Table 2: Voting Age Population by Race in Jackson County

	Total Voting Age Population (VAP)	White VAP Population	Percent of VAP that is White	American Indian VAP Population	Percent of VAP that is American Indian
Jackson County	2,123	1,229	57.89%	798	37.59%
Kadoka	472	447	94.70%	23	4.87%
Wanblee	440	10	2.27%	409	92.95%

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.

B. Defendants Have Denied Requests for an 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 to request that Jackson County establish a satellite office for Early Voting in Wanblee. Declaration of Thomas Poor Bear in Support of Plaintiffs' Motion for a Preliminary Injunction ("Poor Bear Decl.") ¶ 15, Ex. 1. In the letter, Poor Bear informed the Commissioners that Oliver (O.J.) Semans, Sr. ("Semans"), Executive Director of Four Directions, a nonprofit group dedicated to empowering American Indian citizens in the electoral process, would attend the Commissioners' next meeting to discuss the matter further and to answer any questions the Commissioners had regarding the request. *Id.* Semans and his colleague, Bret Healy ("Healy"), attended the next Commissioners' meeting, on May 13, and presented the Tribe's request. Declaration of Oliver J. Semans, Sr., in Support of

Plaintiffs' Motion for a Preliminary Injunction ("Semans Decl.") ¶ 3 & ¶ 11, Ex. 5 at 9-10. Semans presented information on the possible use of funding provided by the Help American Vote Act ("HAVA"). *See 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." *Id.*

Between November 2013 and February 2014, a task force charged with revising South Dakota's plan for implementing HAVA met several times. Semans Decl. ¶ 4. 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. Semans Decl. ¶ 5, Ex.1 at 12-13. 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. *See* Semans Decl. ¶ 10, Ex. 4.

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. Declaration of Bret Healy in Support of Plaintiffs' Motion for Preliminary Injunction ("Healy Decl.") ¶ 3; Semans Decl. ¶ 12, Ex. 6 at 2-3. He explained that the Revised HAVA Plan would become final 30 days after publication in the Federal Register. Healy Decl. ¶ 3; *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. Semans Decl. ¶ 12, Ex. 6 at 2-3. When the Commissioners revisited the issue at their June 20, 2014 meeting, they voted against establishing the satellite office in Wanblee on the basis that funding was not

available. Semans Decl. ¶ 8, Ex. 2 at 15. As of June 20, the HAVA plan had not yet been published in the Federal Register, *see* 79 Fed. Reg. 127 (July 2, 2014).

Contrary to the Commissioners' stated rationale for denying the Tribe's request, HAVA funding is available to establish the satellite office. Semans Decl. ¶ 5, Ex. 1 at 12-13. The Revised HAVA Plan was published in the Federal Register on July 2, 2014, and went into effect 30 days later on August 4, 2014. *See* 79 Fed. Reg. 127 (July 2, 2014). 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." Semans Decl. ¶ 9, Ex. 3. Defendants refuse to establish a satellite office despite the fact that they are aware funding is available.

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

Early Voting is much more convenient for Jackson County's white citizens, who are clustered in and around Kadoka. 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 the only site currently available for Early Voting. Webster Decl. ¶ 13.

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

Webster Decl. Table 1a. 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. This difference

is not *de minimis*. 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.

If a site for Early Voting is established in Wanblee, 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. *Id.* ¶ 14. 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. 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. *See id.* Table 1b.

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 28 miles from Wanblee, and it takes roughly 30 minutes to travel between the towns. *See* Declaration of James Red Willow in Support of Plaintiffs’ Motion for Preliminary Injunction (“Red Willow Decl.”) ¶ 7; Declaration of Don Doyle in Support of Plaintiffs’ Motion for Preliminary Injunction (“Doyle Decl.”) ¶ 10; Declaration of Cheryl Bettelyoun in Support of Plaintiffs’ Motion for Preliminary Injunction (“Bettelyoun Decl.”) ¶ 5.

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 Wanblee during voting hours on Election Day can be a hardship. *See* Red Willow Decl. ¶ 18. 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. Doyle Decl. ¶ 12. In 2006-2010, 22.2% of all occupied Native American housing units in Jackson County had no access to a vehicle. Webster Decl. Table 3 and ¶ 16. At the same time, zero of the occupied white housing units in Jackson County has 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 of Jackson County have to find someone who has a car and pay that person to drive them there. Going round-trip from Wanblee to Kadoka takes more than an hour, and can take more than two hours if the weather is bad. Red Willow Decl. ¶¶ 7-8. Gas for the trip currently costs about \$30. Bettelyoun Decl. ¶ 8.

The high poverty and unemployment rates among Indians in Jackson County make the trip to Kadoka even more burdensome. The poverty rate among Indians in Jackson County is 46.1%, whereas the poverty rate for whites in Jackson County is 8.2%. Webster Decl. ¶ 15. 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 2008-2012, the unemployment rate for Indians in Jackson County was 40.6%, compared to a rate

of 4.2% for whites. U.S. Census Bureau, 2008-2012 American Community Survey, Table S2301. In 2008-2012, an estimated 92.6% of Indian households in Jackson County were receiving SNAP benefits, compared with only 4.6% of white households. U.S. Census Bureau, 2008-2012 American Community Survey, Table S2201.

Finally, the prejudice of Kadoka's white population has been demonstrated to Plaintiffs by a range of people, from white high school students yelling "Dirty Indians, go back to the Res" to Indian high school students at a basketball game, to Jackson County law enforcement officials setting up road blocks at the border of the Reservation. Doyle Decl. ¶¶ 15, 18-23. 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* Red Willow Decl. ¶¶ 10-13; Bettelyoun Decl. ¶¶ 14-16; Doyle Decl. ¶¶ 13-23; Poor Bear Decl. ¶¶ 12-13. All Plaintiffs have felt discriminated against in Kadoka. *Id.* 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!" Doyle Decl. ¶ 16. Plaintiffs Poor Bear and Doyle have been followed around in stores in Kadoka as though they were going to steal something. Doyle Decl. ¶ 14; Poor Bear Decl. ¶ 11. Prejudice has affected Plaintiffs' abilities to access government services provided by Jackson County in Kadoka. *See* Bettelyoun Decl. ¶ 16; Doyle Decl. ¶¶ 13-23; Poor Bear Decl. ¶ 12; Red Willow Decl. ¶ 10. Additionally, voting by mail is not an adequate substitute, as some Plaintiffs do not trust that their ballots will be counted if they mail them in, *see* Poor Bear Decl. ¶ 9, Red Willow Decl. ¶ 15, and Doyle Decl. ¶ 9, and therefore would not vote by mail.

III. ARGUMENT

Granting injunctive relief is within the discretion of the District Court. *See Planned Parenthood v. Citizens for Cmty. Action*, 558 F.2d 861, 866 (8th Cir. 1977). In determining

whether to grant a preliminary injunction, the Court must consider “(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase v. Sys. Inc. v. C.L. Sys. Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim that Defendants Have Violated Section 2 of the Voting Rights Act (First Claim for Relief)

Plaintiffs are likely to succeed on the merits of their claim under Section 2 of the Voting Rights Act (“VRA”) because 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.¹ 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.*

¹Plaintiffs need not demonstrate “a mathematical (greater than fifty percent) probability of success on the merits,” but, rather, can satisfy this prong by proving that, “after a trial on the merits, with formal procedures and complete evidence,” they have a “fair chance of prevailing.” *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003).

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

Id. § 10301(b) (emphasis added). A violation of Section 2 does not require discriminatory intent. *Thornburg v. Gingles*, 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.’”).

The plain language of the statute requires the Court to assess whether a violation of Section 2 has occurred based upon the “totality of the circumstances.” 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 v. Hazeltine (“*Bone Shirt II*”), 461 F.3d 1011, 1021-22 (8th Cir. 2006). 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.”

Section 2 does not require a showing that voters cannot register or vote under any circumstance. *See, e.g., Miss. State Chapter of 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 Cnty., N.D.*, Civil 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, 504-06 (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 43-47; *Bone Shirt II*, 461 F.3d at 1017-18.

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 limitation bears more heavily upon minority citizens

(i.e., that minorities have “less opportunity” than whites to participate). *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. *Operation PUSH I*, 932 F.2d 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.*, 133 S.Ct. 2247 (2013); *Brooks v. Gant*, CIV. 12-5003-KES, 2012 WL 4482984, at *6 (D.S.D. Sept. 27, 2012).

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; *see also* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. Rev. 579, 596 (2013) (“Indeed, in *Gingles*, the Supreme Court underscored the importance of the fifth [Senate] factor, stating that the ‘essence of a § 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 black and white voters to elect their preferred

representatives.’”).³ Whether the policy underlying the challenged practice is tenuous (the ninth Senate Factor) also is particularly important. *See Ortiz v. City of Phila.*, 28 F.3d 306, 312-313, 316 (3rd Cir. 1994). The extent of racially polarized voting (the second Senate Factor), is relevant in considering the broader implications of providing unequal access to Indian voters.

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 Cnty. 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. CV 12-135-BLG-DWM, Slip Op. 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

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).

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), *affirmed 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 v. Dean*, 555 F. Supp. 502, 505 (D.R.I. 1982) (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 (1991) (Scalia, J. dissenting) (“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.”).

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

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

As set forth in Section II(C), 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 current location for early voting and in-person registration 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 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 is not *de minimis* and 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(D), 46.1% of Indians in Jackson County live below the poverty level, compared to only 8.2% of whites; in 2008-2012, 40.6% of Indians in Jackson County were unemployed, compared with only 4.2% of whites; and in 2008-2012, over 90% of Indian households in Jackson County received SNAP benefits, compared with less than 5% of white households. For the great number of Indian citizens in Jackson County who are struggling to meet their basic needs, the cost of going to Kadoka makes Early Voting, as a practical matter, simply 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. Historical discrimination against Indians in South Dakota is well documented, *see, e.g., Bone Shirt v. Hazeltine* (“*Bone Shirt I*”), 336 F. Supp. 2d 976, 1018-34 (D.S.D. 2004), *aff’d* 461 F.3d 1011 (8th Cir. 2006) so it is,

unfortunately, 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 totality of the circumstances also supports a finding that providing Early Voting only in Kadoka violates Section 2. As discussed *supra*, the fifth Senate Factor, the extent to which minorities “bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process,” is highly probative in the analysis of the totality of the circumstances for a ballot access claim. These factors put Indian voters in an already-vulnerable position that is only exacerbated by limited access to Early Voting. Here, there is no doubt that Indians in Jackson County continue to bear the effects of discrimination in areas such as education, employment, and health. For example, while 94.6% of white (non-Hispanic) residents over age 25 in Jackson County have a high school degree (or equivalent), only 74.4% of Indian residents do. U.S. Census 2008-2012 American Community Survey Tables C15002H and C15002C. And as discussed *supra*, the unemployment rate for

Indians in Jackson County, at 40.6%, is almost *ten 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. 30, 69 (1986) (“[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 the location for Early Voting is so high for many Indians in Jackson County that Early Voting is, effectively, out of reach.

In addition to assessing socioeconomic disparities, in considering the totality of the circumstances, a court may also consider the other Senate Factors. The first Senate Factor, a history of official discrimination related to voting, weighs heavily in favor of Plaintiffs. The District Court in *Bone Shirt v. Hazeltine* made specific, detailed findings concerning the history of voting discrimination against Indians in South Dakota. 336 F. Supp. 2d 976, 1018-34 (D.S.D. 2004), *aff’d* 461 F.3d 1011 (8th Cir. 2006). In a separate motion, Plaintiffs will ask this Court to take judicial notice of the history of discrimination—in voting and in other areas—that the Court found in *Bone Shirt*.

The second Senate Factor, the existence of racially polarized voting, also weighs heavily in favor of plaintiffs in this case. In *Bone Shirt v. Hazeltine*, this District Court found, and the Court of Appeals affirmed, a finding of racially polarized voting in South Dakota Legislative District 27, 461 F.3d 1011, 1022 (8th Cir. 2006), which contains all of Jackson County. 336 F. Supp. 2d 976, 1018-34 (D.S.D. 2004), *aff’d* 461 F.3d 1011 (8th Cir. 2006). The Court of Appeals characterized the racial polarization in District 27 as “an intolerable level.” *Bone Shirt II*, 461 F.3d 1011 at 1022. The existence of racially polarized voting, which measures group

behavior, amplifies the effect of limiting an individual's vote: in an election that is racially polarized, limiting access to the ballot for individual Indians has the ripple effect of making it harder for Indians as a group to elect their candidates of choice. In a separate motion, Plaintiffs will ask this Court to take judicial notice of the Court's finding of racially polarized voting in District 27 in *Bone Shirt*.

Finally, the last Senate Factor, that the policy underlying the decision was tenuous, also weighs in favor of Plaintiffs. Defendants' proffered reason for denying the request for a satellite office in Wanblee is cost. Semans Decl. ¶¶ 7-8, Ex. 2 at 14; ¶ 11, Ex. 5 at 9-10. But there is funding available through South Dakota's HAVA plan, and the Defendants are aware of the availability of the HAVA funds. The South Dakota Revised HAVA Plan specifically names Jackson County as one of three counties that meet the criteria to use HAVA funds to set up a satellite office for early voting. Semans Decl. ¶ 5, Ex. 1 at 12-13. Additionally, Defendants were made aware of the availability of HAVA funds at the April 2014 meeting of the County Commissioners. Healy Decl. ¶ 3; Semans Decl. ¶ 12, Ex. 6 at 2-3. In addition, Defendants were made aware of the availability of HAVA funds through repeated communication with the office of the Secretary of State. Semans Decl. ¶ 9, Ex. 3. As Secretary of State Jason Gant stated in response to a question about whether the County Auditor from another county (Buffalo) should know about the HAVA funding, "All Auditors have been notified about all of the HAVA task force meetings, the HAVA plan versions, and the one that was approved after the last HAVA meeting. Sorry [the Auditor] didn't read the information, but all counties were notified numerous times." *Id.* at Ex. 3. While Plaintiffs will pursue their claim of intentional discrimination separately from this motion, actions that "bear[] the mark of intentional discrimination" are nonetheless relevant to the Section 2 "results" analysis of the totality of the

circumstances. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (“In essence the State took away the Latinos’ opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation.”).

Given the robust history of racial discrimination against Indians in South Dakota, the depressed socioeconomic status of Indians in Jackson County that is a result of that history of discrimination, the extent of racially polarized voting, and the Defendants’ tenuous justification for denying the request for a satellite office in Wanblee, the totality of the circumstances weighs heavily in favor of a finding of a violation of Section 2. Indeed, while there is no need to show intentional discrimination to prove a claim under Section 2, the facts here – not just history, but the County’s blatantly false claim of inadequate funding as a pretext to for refusing to open a satellite office – amply support an eventual finding of discriminatory intent.

B. The Threat of Irreparable Harm to the Plaintiffs Is Great

Because of both the importance of the constitutional right to vote and the very nature of voting itself, abridgment of the equal right to vote constitutes irreparable harm. The Supreme Court has repeatedly described voting as “a fundamental political right, because preservative of all rights.” *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (same). Indeed, “the right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” *Reynolds*, 377 U.S. at 555. “Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Thus, denial of equal access to voting constitutes irreparable harm because “[w]hen constitutional rights are threatened

or impaired, irreparable injury is presumed.” *Obama for America v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *see also Planned Parenthood*, 558 F.2d 861, 867 (Plaintiff’s “showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury.”).

Additionally, the loss of equal access to the ballot is not compensable by damages, and “[i]rreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages.” *Rogers Grp., Inc. v. City of Fayetteville*, 629 F.3d 784, 789 (8th Cir. 2010) (quoting *Gen. Motors Corp. v. Harry Brown’s, L.L.C.*, 563 F.3d 312, 319 (8th Cir. 2009)). Once the opportunity for equal participation in an election has been denied, there is no way to remedy the wrong. As the court noted in *Spirit Lake*, “[t]here is no process for ordering ‘re-votes’,” and “[o]nce an election is over, it is over and it is little consolation to say that the problem will be remedied in the next election.” *Spirit Lake Tribe*, 2010 WL 4226614, at *5.

Here, the irreparable harm is clear. Without an injunction, Plaintiffs will not have the same access to the ballot as their white counterparts in the upcoming election.

C. The Balance of the Equities Weighs in Favor of the Plaintiffs

As discussed above, the potential harm to the Plaintiffs, absent a preliminary injunction ordering that a satellite office be established in Wanblee, is great. Once the opportunity to participate fully in the electoral process, with the same opportunities and conveniences white voters have with respect to registration and voting, is lost for a certain election, it cannot be regained. The requested relief, however, would represent a minimal burden on Defendants. The Oglala Sioux Tribe has offered a building in Wanblee—at no cost to the County—for the satellite office, and Jackson County may use HAVA funds to cover the cost of running the office.

When the minimal cost to the Defendants of establishing the satellite office is weighed against the potential loss of equal access to the ballot, the balance of the equities tips in favor of the Plaintiffs.

D. The Public Interest Weighs in Favor of Granting the Immediate Injunctive Relief

Finally, the public interest favors injunctive relief and the immediate establishment of a satellite voting office in Wanblee. The right to vote is a “precious” and “fundamental” right and other rights risk becoming illusory when the right to vote is undermined. *See Harper*, 383 U.S. at 670; *Wesberry*, 376 U.S. at 17. Policies which extend this fundamental right to “permit[] as many qualified voters to vote as possible”—such as establishing satellite absentee voting offices—further the public interest. *Obama for Am.*, 697 F.3d at 436-37.

Given the fundamental importance of the right to vote, Congress passed, and renewed multiple times, the Voting Rights Act of 1965 with the intention of removing “voting restraints on account of race or color.” *NAACP v. New York*, 413 U.S. 345, 354 (1973) (quoting H.R. Rep. No. 89-439 at 11 (1965)). When the Voting Rights Act and other federal statutes protecting constitutional rights are enforced, the “core principles of our democracy,” *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 541 (E.D. Pa. 2003), are strengthened and the public interest is served. *See Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027, 1034 (D.S.D. 2005) (“[T]he public has an interest in ensuring compliance with federal laws, namely the VRA.”); *see also United States v. Raines*, 362 U.S. 17, 27 (1960) (reversing denial of preliminary injunction in voting rights case and holding that “there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights.”) Establishing the satellite office in Wanblee would ensure that Indian residents have the same

registration and early voting opportunities as others, thereby advancing the purpose of the Voting Rights Act and serving the public interest.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court order Defendants to establish a satellite office for in-person registration and in-person absentee voting in Wanblee, Jackson County, for the full statutory period (or any part remaining thereof at the time of the entry of the order) provided by South Dakota law in advance of the upcoming election on November 4, 2014.

Dated: October 9, 2014

BY:

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