IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHRIS BROOKS, FRANCIS RENCOUNTRE, GLORIA RED EAGLE, SHARON CONDEN, JACQUELINE GARNIER, JENNIFER RED OWL, EDWINA WESTON, MICHELLE WESTON, MONETTE TWO EAGLE, MARK A. MESTETH, STACY TWO LANCE, HARRY BROWN, ELEANOR WESTON, DAWN BLACK BULL, CLARICE MESTETH, DONOVAN L. STEELE, EILEEN JANIS, LEONA LITTLE HAWK, EVAN RENCOUNTRE, CECIL LITTLE HAWK, SR., LINDA RED CLOUD, LORETTA LITTLE HAWK, FAITH TWO EAGLE, EDMOND MESTETH, and ELMER KILLS BACK, JR.

Plaintiffs,

v.

JASON GANT, in his official capacity as SOUTH DAKOTA SECRETARY OF STATE, SHANNON COUNTY, SOUTH DAKOTA, FALL RIVER COUNTY, SOUTH DAKOTA, SHANNON COUNTY BOARD OF COMMISSIONERS, FALL RIVER BOARD OF COMMISSIONERS, JOE FALKENBUERG, ANNE CASSENS, MICHAEL P. ORTNER, DEB RUSSELL, and JOE ALLEN in their official capacity as members of the County Board of Commissioners for Fall River County, South Dakota, BRYAN J. KEHN, DELORIS HAGMAN, EUGENIO B. WHITE HAWK, WENDELL YELLOW BULL, and LYLA HUTCHISON in their official capacity as members of the County Board of Commissioners for Shannon County, South Dakota, SUE GANJE, in her official capacity as the County Auditor for Shannon and Fall River Counties, and JAMES SWORD, in his official capacity as Attorney for Shannon and Fall River Counties,

Defendants.

Civ. No. 12-5003

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

INTRODUCTION

Plaintiffs, enrolled members of the Oglala Sioux Tribe and registered voters, reside in Shannon County – one of the poorest counties in the entire United States. They often share necessities and activities with other Tribal members to make life a little easier which includes taking time off from work on Election Day to drive others to the polls.[1] To alleviate undue hardship for future elections, Plaintiffs desire an in-person absentee voting location in Shannon County during the legally mandated 46-day period for so long as the law mandates it.

Plaintiffs have only had access to the following number of partial days of in-person absentee voting in Shannon County during the 2004, 2006, 2008 and 2010 election cycles:

0	2004 primary election
16	2004 general election
0	2006 primary election
0	2006 general election
2	2008 primary election
2	2008 general election
0	2010 primary election
22	2010 general election.

Sandven Aff. Ex. 5 S. Ganje Answer to Interrogatory 2.

For all other South Dakota registered voters, in-person early voting was available in the county of residence for approximately 32 days before the primary election and 32 days before the general elections – with the exception of Todd County and Shannon County.

Unfortunately, Defendants have placed Plaintiffs in the awkward position of having nowhere else to turn except for the courts to seek relief. When Shannon County

[1] Plaintiffs do not like traveling to Hot Springs because of racial animosity. Sandven Aff. Ex. 21 Dawn Black Bull Affidavit.

voters wrote to Secretary of State Gant on November 16, 2011, November 26, 2011 and December 19, 2011 seeking assistance with a Shannon County location, he did not respond. Sandven Aff. Ex. 17-19 Indeed, he didn't even undertake an investigation to ascertain whether the Plaintiffs' claims were viable. *JG 38:7-11*.[2] Instead, he gave the documents to his attorney thereby making it a "legal" issue. *JG 99:18-102:10*. Despite being the chief state election officer for South Dakota,[3] when asked to explain why he never made an effort to work with the Shannon County Commission to improve the administration of in-person early voting (hereinafter "early voting") in Shannon County, Secretary of State Gant responded that it was not his responsibility to ensure elections run smoothly.[4] *JG 92:3-5.*

Neither could Plaintiffs obtain relief from their Shannon County elected officials.[5] Plaintiffs requested early voting in their requests to Shannon County Commission dated November 14 and November 26, 2011. Sandven Aff. Ex. 10 and 11. The Oglala Sioux Tribe requested early voting in Shannon County in 2010. Sandven Aff. Ex. 15. Defendant

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[2] Herein the following abbreviations are used for deposition transcripts (relevant portions) attached to the Sandven Affidavit:

Ex. 1 - JG for Jason Gant (Secretary of State)
Ex. 2 - CN for Chris Nelson (Former Secretary of State)
Ex. 3 - SG for Sue Ganje (Shannon County Auditor)
Ex. 4 - LH for Lyla Hutchinson (Chairperson of Shannon County Commission)
Ex. 25 - OS for Oliver J. Semans (Four Directions)
Ex. 26 - RB for Richard Braunstein (Plaintiffs' Expert)

[3] *See* SDCL §§ 12-4-33, 1-8-1, 1-8-1.1, 12-1-5 (2010).

[4] On his website, Secretary of State Gant holds himself out to the public as direction all statewide election. Available at http://sdsos.gov/content/viewcontent.aspx?cat=secretary&pg=/secretary/officeduties_chiefelectionsofficer.ssht (accessed on January 9, 2011).

[5] Defendant Sword showed Oliver J. Semans, Four Directions, a draft notice of termination of Shannon County auditor and states attorney services (signature lines for himself and Sue Ganje) on August 3, 2011 and 30 days before he formally presented same at a Shannon County Commission meeting. OS 84:21-87:20. *See also* Sandven Aff. Ex. 27 Affidavit of Oliver J. Semans.

Shannon County Commissioner Lyla Hutchinson stated they did not seek funding for an early voting location in Shannon County because they did not know if they could make such a request. *LH 179:01-12*. In fact, they never even bothered to investigate the issue. *SG 43:11-44:07*. Defendant Ganje was informed on May 1, 2008 before the primary election and October 10, 2008 before the general elections that HAVA funding could be used for an early voting location in Shannon County. Sandven Aff. Ex. 13 and 14. However, she never even bothered to report the same to the Shannon County Commission. *SG 52:24-53:03*. Again, there were only 2 days of early voting in Shannon County before the 2008 primary election and 2 days of early voting before the general election despite the notices of available funding. Not surprisingly, a survey of Shannon County residents found widespread distrust of both Fall River County and Shannon County employees. Sandven Aff. Ex. 12, ¶ 23.

Rather than resolve the parties' issues, Defendants have chosen to subject Plaintiffs' electoral franchise to an abusive and destructive memorandum of agreement that does little to alleviate the usurpation of Plaintiffs' constitutional rights. Additionally, Plaintiffs' rights to equal protection cannot be created by a contract; rather, their rights are enshrined in the Voting Rights Act, the Fourteenth Amendment, and the Constitution of the State of South Dakota.

Perhaps the greatest tragedy of all is that Plaintiffs have no elected leaders on which they can place their trust. Plaintiffs ask for one simple thing: to have the same rights and opportunities as every other voter in the State of South Dakota. While not disputing the Plaintiffs' assertions, not one elected official expended an iota of energy to

investigate the Plaintiffs' claims or attempt to fashion a remedy – until the initiation of this lawsuit.

STANDARD OF REVIEW

Summary judgment is an effective court tool to "secure the just, speedy, and inexpensive determination of every action" and is not a disfavored remedy. *Harnagel v. Norman*, 953 F.2d 394, 395-296 (8th Cir. 1992) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). "Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 852-853 (8th Cir. 2012) (citing *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011). The Court must not weigh the evidence, but "determine whether the record, when viewed in light most favorable to the non-moving party, shows no genuine issue of material fact and that the moving party is entitled to judgment as matter of law." *Langley v. Allstate Ins. Co.*, 995 F.2d 841, 844 (8th Cir. 1993) (citing Fed. R. Civ. P. 56(c)).

ARGUMENT

Section 2 of the Voting Rights Act broadly prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure ... which results in a denial or abridgment of the right ... to vote on account of race or color," or on the account of a person's membership in a "language minority group." 42 U.S.C. § 1973(a); 42 U.S.C. § 1973b(f)(2). To succeed on a Section 2 claim, the Plaintiffs must satisfy the three *Gingles* factors that include the following: (a) the minority group is sufficiently large and geographically compact to constitute a majority in the district; (b) the minority group is

politically cohesive; and, (c) the majority group votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

While it was formulated in the context of a multimember district election cases, the *Gingles* threshold inquiry applies to other types of Section 2 claims. *Id.* (citing *Growe v. Emison*, 507 U.S. 25 (1993) (single-member districts); *Voinovich v. Quilter*, 507 U.S. 146 (1993) (alleging current district lines diluted minority voting strength). The "lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors." *Johnson v. DeGrandy*, 512 U.S. 997, 1012 (1994).

While Plaintiffs must generally demonstrate all three *Gingles* factors, the Supreme Court also noted that district courts must consider the facts of each case, and that there may be circumstances where the *Gingles* preconditions do not apply. Writing for a unanimous Court, Justice O'Connor stated:

> Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim we assume arguendo to be actionable today. The complaint in such a case is not that black voters have been deprived of the ability to constitute a majority, but of the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority.

Magnolia Bar Ass'n, Inc. v. Lee, 994 F.2d 1143, 1146 (5th Cir. 1993) (quoting *Voinovich*, 507 U.S. 146 (1993)).

A. SHANNON COUNTY VOTERS "ARE SUFFICIENTLY LARGE AND GEOGRAPHICALLY COMPACT."

The first *Gingles* factor states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The first factor "refers to the compactness of the minority population, not to the compactness of the contested district." *Bush v. Vera*, 517 U.S. 952, 997 (1996) (Kennedy, J., concurring). Section 2 of the Voting Rights Act ultimately requires the Plaintiffs demonstrate that the impacted voters are a cohesive minority group that has historically faced discrimination. The first precondition is required to show that minority voters have the "potential to elect representatives in the absence of the challenged structure or practice." *Gingles*, 478 U.S. at 50 n. 17.

Shannon County encompasses the Pine Ridge Indian Reservation and is designated Section 5 pursuant to the Voting Rights Act. In 2011, its total population was estimated to be 13,928 people and 92.4 percent of the population is classified as Indian.[6] In fact, Shannon County is the densest Indian county in the entire United States. Sandven Aff. Ex. 12, ¶ 11.

The potential for Shannon County Indian voters to elect the candidate of their choosing increases when Shannon County Indian voters have more days to vote. Indeed, it is well documented that increased access to voting results in higher voter turnout. Sandven Aff. Ex. 12, ¶ 27. In this factual situation, when Shannon County voters have been given more access to early voting, turnout is generally higher. For instance, in the 2010 general election when Shannon County had 22 partial days of early voting, overall turnout was 34.9%. Sandven Aff. Ex. 28. In contrast, turnout was 56.98% in the 2004

[6] US Census Bureau, State and County QuickFacts, available at http://quickfacts.census.gov/qfd/states/46/46113.html.

general election when early voting was offered through private funding. Sandven Aff. Ex. 29. In 2006, no early voting days were offered, and turnout decreased to 31.34%. Sandven Aff. Ex. 29.

As Dr. Braunstein's report noted, "[t]he sum of [the voting behavior literature] has demonstrated that the capacity of voters to cast an early ballot increases turnout because of the convenience and increased access to the ballot." Sandven Aff. Ex. 12, ¶ 27. Shannon County voters clearly have the potential to elect the candidates of their choice, particularly in close statewide elections.[7] As a result, Indians in Shannon County are geographically and politically disadvantaged.

B. SHANNON COUNTY VOTERS ARE POLITICALLY COHESIVE

Shannon County voters share a similar history and culture that is unique from the rest of the state of South Dakota. As a result, they share many similar interests and concerns, and they demonstrate that cohesiveness during elections. "A showing that a significant number of minority group members usually vote for the same candidates is one way of proving political cohesiveness necessary...[to establish] minority bloc voting within the context of § 2 of the Voting Rights Act of 1965, 42 U.S.C.S. § 1973." *Gingles*, 478 U.S. 30 at 56. The causes for racial bloc motive do not matter; plaintiffs only need to show correlation. *Id*. at 63. However, there is no set correlation standard and Plaintiffs only need to show a tendency for the same candidates. *Holder v. Hall*, 512 U.S. 874, 904 (1994).

[7] While early voting required a reason for requesting an absentee ballot in 2002, Shannon and Todd County voters are often credited with delivering Democratic Senator Tim Johnson with one of the narrowest victories in state history. This is a great example of Indian voters electing the minority preferred candidate (of the 3118 Shannon County voters who voted in 2002, 91.5 % voted for Senator Tim Johnson).

While party registration is not dispositive, the strong correlation between race and political party in Shannon County found by Plaintiffs' expert witness makes political party the best measuring tool for political cohesion. As stated in Richard Braunstein's Expert Report:

> "These findings are consistent with the last decade of South Dakota elections. There is little doubt that American Indians in Shannon County are politically cohesive in state and national elections. In fact, Shannon County had the highest percentage of Democratic Party votes for U.S. President in both the 2004 and 2008 elections.[8] From the comparative county voting statistics within South Dakota elections and its voting behavior in U.S. Congressional and Presidential elections, it is clear that Shannon County voters are politically cohesive.

Sandven Aff. Ex. 12, ¶ 13.

Statistics are not the only relevant source to show cohesion. *Bone Shirt v. Hazeltine*, 336 F.Supp.2d (citing *Whitfield v. Democratic Party of Ark.*, 890 F.2d 1423, 1428 (8th Cir. 1989)). Plaintiff and Oglala Sioux Tribal Historian Clarice Mesteth states that she always votes for the Democratic candidates because they are more responsive to the needs of Indians. Sandven Aff. Ex. 22. Moreover, she states that her relatives and other Tribal Members vote the same way. *Id.*

As was noted in *Bone Shirt v. Hazeltine*, there is an overwhelming nonstatisical record of Tribal political cohesion regardless of political party. The Oglala Sioux Tribe, located within Shannon County on the Pine Ridge Indian Reservation, belongs to the United Sioux Tribes organization that advocates for the "economic and social development of the Indian people." *Bone Shirt v. Hazeltine*, 336 F. Supp.2d 976, 1004 (D.S.D. 2004). There are several Indian newspapers that report on Indian political, social, and cultural topics. *Id*. Moreover, non-Indian specific newspapers in South Dakota also

[8] From http://en.wikipedia.org/wiki/Shannon_County,_South_Dakota (last accessed June 25, 2012).

report about Indians issues. *Id*. Many newspapers even run a popular column entitled "The Rez of the Story" by Vince Two Eagles who explains Indian views on topical issues.[9]

Recently, more than 100 Indians united in protest over the sale and distribution of alcohol in Whiteclay, Nebraska - which lies directly across the border from the alcohol-free Pine Ridge Indian Reservation - for "tribal women to take control and protest alcoholism in Whiteclay and on the [Pine Ridge Indian Reservation]."[10] This protest came on the heels of the Oglala Sioux Tribe filing a complaint in the U.S. District Court of Nebraska against the brewers, retailers and distributors of beer in Whiteclay. This non-statistical evidence demonstrates Indian cohesiveness.

However, perhaps the greatest example of political cohesiveness is evidenced by the auction that was scheduled for 2000 acres of the sacred Black Hills prairie Ple' Sa. The Sioux tribes united to raise money to purchase the land at auction. The various tribes themselves pledged funds, but individual Tribal Members advocated for Ple' Sa online, raising over $300,000 from around the world. Coverage of the tribes' efforts to purchase back part of the Black Hills was featured in national online and print newspapers.[11] As a result of this effort, the tribes stopped the sale of the Black Hills prairie and have currently agreed to purchase the sacred land for nine million dollars.

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[9] *See e.g.* Vincent Two Eagles, *The Rez of the Story: Party Platforms and Our Duty*, YANKTON PRESS & DAKOTAN (Sept. 11, 2012), available at http://yankton.net/articles/2012/09/11/opinion/editorials/doc504eb9437d702584325723.txt.

[10] Ruth Moon, *More than 100 March, Protest Whiteclay Liquor Sales*, RAPID CITY JOURNAL (Aug. 27, 2012).

[11] *See e.g.* Kristi Eaton, *Auction Cancelled for SD Land Considered Sacred*, Associated Press (Aug. 23, 2012), available at http://www.huffingtonpost.com/huff-wires/20120823/us-buying-the-black-hills/#.

Finally, Defendants have insinuated throughout discovery that low voter turnout demonstrates that Indians are not politically active, and as such, they are not politically cohesive. However, Plaintiffs urge this Court to follow its previous holding that "political cohesion exists despite evidence of low voter turnout." *Boneshirt*, 336 F.Supp. at 1010. Indeed, weak voter turnout more adequately demonstrates a "lack of *ability* to participate effectively in the political process." *Id*. at 1009-1010 (citing *Gomez v. Watsonville*, 863 F.2d 1407, n. 4 (9th Cir. 1988)(emphasis in original).

In light of the long history of Indians having unique political, social, and cultural issues, Defendants simply cannot dispute the fact that Shannon County Indian voters are politically cohesive. Shannon County voters are insular and lean heavily democratic as acknowledged by Secretary of State Gant who stated, "[h]istorically Shannon County has voted Democrat very solid [sic]." *JG 156:02-20*.

C. HISTORICALLY, THE MAJORITY GROUP DEFEATS THE SHANNON COUNTY PREFERRED CANDIDATE.

The final *Gingles* precondition requires the Plaintiffs to demonstrate that the majority group votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. This precondition is established by showing "a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes." *Id*. (citing *Thornburg v. Gingles*, 478 U.S. at 56). The Supreme Court notes that establishing a white voting bloc will vary from district to district and is dependent on a number of factors including, but not limited to "the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral devices, such as majority vote requirements, designated posts, and prohibitions against bullet voting; the percentage of registered voters in the district who are members of the

minority group; [and] size of the district." *Id*. (noting that the list of factors is illustrative and not comprehensive). Because this litigation focuses on the treatment of one county as compared to all other counties in South Dakota, Plaintiffs assert that these factors should be analyzed on a state-level.[12] As explained in Dr. Braunstein's report, "American Indians have had success electing preferred candidates to the state legislature. This is an expected result given the highly compact nature of their electoral district." Sandven Aff. Ex. 12, ¶ 14.

There clearly exists a white voting bloc in South Dakota that has successfully voted to block the minority-preferred candidate. It is not necessary to show "an absolute monolith." *Sanchez v. Colorado*, 97 F.3d 1303, 1319 (10th Cir. 1996). Dr. Braunstein's expert report compares Shannon County voter behavior and state-wide voter behavior in past elections. This was a descriptive study that compares voting behavior while "correlating them with factors from the Census Bureau and factors from the Secretary of State's website." *RB 83:1-6.* In other words, it does not seek to predict future voting behavior based on race and other factors, but explains past voting behavior with a simple

[12] This Court previously found that a majority bloc was sufficiently able to defeat the minority preferred candidate at the district level. *See generally Bone Shirt v. Hazeltine*, 336 F.Supp. 2d 976 (D.S.D. 2004) (stating "In all categories listed above, even when using defendants' threshold, the rate at which Indian-preferred candidates are defeated by white bloc voting does not fall below 58 percent. Furthermore, in the contests that are most probative of white bloc voting, the percentages are above that threshold. Considering all this evidence in the aggregate, the court concludes that the white majority in District 26 "votes sufficiently as a bloc to enable it . . . usually to defeat the [Indian] preferred candidate." *Gingles*, 478 U.S. at 51. The court finds that this evidence is sufficient to establish "legally significant" white bloc voting within the meaning of the third *Gingles* factor. See 478 U.S. at 55.")

comparison between race and voting history.[13] Dr. Braunstein elaborates further on how Shannon County voters' cohesiveness relates to their ability to elect their preferred candidate by stating:

> "Moreover, they are cohesive in their opposition to majority voters in the state of South Dakota who, in a large majority of state-wide elections, are far more likely to elect Republican candidates for Governor, Attorney General, State Auditor and State Treasurer. While the majority of American Indians present in Shannon County are able to prevail in district elections, including state legislators from the current District 28 and previous constructions of Shannon County voters, they are typically opposed to the dominant majority of South Dakota voters who are approximately 87 percent White and 63 percent Republican." Sandven Aff. Ex. 12, ¶ 13.

Focusing on the nature of the dilutive electoral devices, it is clear that the lack of an early voting location in Shannon County dilutes the ability of Indians in Shannon County to exercise their fundamental right to vote while the same problems are not apparent in white majority counties further increasing the ability of majority group to defeat the minority preferred candidate. For example, Pennington County offers an early voting location at the County Courthouse in Rapid City while also offering an early voting satellite location in Wall, South Dakota. *JG 65:25-66:05*. This was met with no dispute and provides an excellent contrast to the difficulty of getting similar treatment for Shannon County Indian voters.

[13] In his report, Dr. Braunstein notes that the relationship between race and partisanship was very strong. In his deposition, he was asked to explain why he relied on the partisanship variable. He explains, "So [the correlation between Indian race and Political Party] is a strong correlation. .752 or 75.2, that's a strong correlation. [...] So once you get up into this range, it's better to leave one of those two variables out rather than have two that do the same thing. And that's a condition called serial correlation. And it's a source error. All right? So a good research will not put two variables that basically perform the same in a single model." *RB 77-78: 22-25; 1-6.*

In conclusion, Shannon County turnout is higher when Shannon County voters have access to early voting indicating that the denial of equal treatment makes it easier to defeat the Indian preferred candidate.

D. TOTALITY OF THE CIRCUMSTANCES

Once Plaintiffs have established that Shannon County voters are geographically and politically cohesive, Plaintiffs must show a discriminatory impact under a totality of circumstances. Section 2 of the Voting Rights Act prohibits the use of voting practices that are purposefully discriminatory, as well as those that "result" in discrimination. *Thornburg v. Gingles*, 478 U.S. 30 (1986). Indeed, the central purpose of the 1982 amendment of Section 2 was to reject the discriminatory intent test in voting cases, such as *Mobile v. Bolden*, 446 U.S. 55 (1980), because it was "unnecessarily divisive," placed an "'inordinately difficult' burden of proof on plaintiffs, and it 'asks the wrong question." *Gingles*, 478 U.S. at 44 (quoting the legislative history). The "right" question, according to the Court and legislative history is whether a challenged practice results in the denial of minority groups "equal opportunity to participate in the political process and to elect candidates of their choice." *Id*.

The legislative history of Section 2 indicates that "a variety of factors, depending upon the kind of rule, practice, or procedure called into question," are relevant in determining if a plan "results in discrimination." S.REP. NO. 97-417, 28-9 (1982). The factors (the "Senate factors") include:

a. 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;
b. the extent to which voting in the elections of the state or political subdivision is racially polarized;

c. 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;
d. whether members of the minority group have been denied access to [any candidate slating] process;
e. 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;
f. whether political campaigns have been characterized by overt or subtle racial appeals; [and]
g. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 28-29 (footnotes omitted). In the same report, Congress also listed two "[a]dditional factors that in some cases have had probative value ... to establish a violation." *Id.* at 29. They are:

h. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]
i. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29. Finally, Congress noted that, "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution." *Id.*

A. History of Official Discrimination.

There has been a significant history of discrimination against Indians in South Dakota and Shannon County. In a previous legislative redistricting voting rights case, this Court noted that "the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process." *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1022 (D.S.D. 2004). Despite this explicit acknowledgement, Plaintiffs would like to bring this Court's attention to several egregious discriminatory acts that have personally affected Indians in Shannon County:

◦ The Act of Congress which created the Dakota Territory in 1861 denied Indians the right to vote by restricting suffrage to free white men. Act to Provide a Temporary Government for the Territory of Dakota, 1862 Dakota Terr. Sess. Laws 21.

- The territory's civil code denied Indians the right to "vote or hold office." An Act to Establish a Civil Code, § 26, 1866 Dakota Terr. Sess. Laws 1, 4.

- When South Dakota became a state in 1890, its Constitution continued to limit suffrage and office-holding to male citizens or men who declared an intention to become citizens. S.D. Const. Art. VII (1890).

- In 1903, South Dakota's civil code was amended to provide that "Indians resident within this state have the same rights and duties as other persons; except that while maintaining tribal relations: (1) they cannot vote or hold office; and (2) they cannot grant, lease, or incumber [sic] Indian lands, except in the cases provided by special laws." S.D. Rev. Civ. Code § 26 (1903).

- In 1924, Congress passed the Indian Citizenship Act, which granted citizenship to "all non-citizen Indians born within the territorial limits of the United States." 43 Stat. 253, reprinted in IV Charles J. Kappler, *Indian Affairs: Laws and Treaties* 420 (1929). In 1951, South Dakota was the last state in the nation to officially grant voting rights to the Indians. *See* (Act of February 27, 1951 ch. 471, 1951 S.D. Sess. Laws 432 (repealing S.D.C.L. § 65.0801 (1939)).

- Historically, South Dakota law has provided "that persons shall vote in the precincts where they reside and not elsewhere." S.D.C.L. § 7213 (Hipple 1929).

- In 1890, the South Dakota Supreme Court held that county commissioners of organized counties had no authority to establish election precincts in attached unorganized counties. *State ex rel., Dollard v.. Bd. of County Comm'rs*, 46 N.W. 1127 (S.D. 1890). This decision meant that no person living in an unorganized county, such as Shannon County, could exercise their right to vote.

- In 1895, the South Dakota legislature gave county commissioners of organized counties the authority to establish precincts in the unorganized counties to which they were attached. However, the Act explicitly held that "[t]he provisions of this act shall not apply to any unorganized county within the boundaries of any Indian reservation." Act of Mar. 12, 1895, ch. 84, 1895 S.D. Sess. Laws 88.

- Residents of unorganized counties had no right to vote for or hold any office until 1895. Act of Mar. 12, 1895, ch. 84, 1895 S.D. Laws Sess. 88.

- In 1923, the South Dakota legislature gave voters in unorganized non-reservation counties the right to vote and run for highway board and school board. Act of Mar. 9, 1923, ch. 300, 1923 S.D. Sess. Laws 314.

- In 1933, voters in unorganized counties received the right to vote for county officers. Act of February 25, 1933, ch. 105, 1933 S.D. Sess. Laws 99. However, the prohibition on voting and running for county offices was not officially repealed until 1982. Act of March 2, 1982, ch. 28, 1982 S.D. Sess. Laws 91.

- As early as 1964, traveling to the county seat was recognized as a hardship for many Indians. 1964 S.D. OP. ATT'Y GEN. 341 (1964).
- In 1984, the Fall River County Auditor refused to register Indians who had attempted to register as part of a last-minute voter registration drive on Pine Ridge. *American Horse v. Kundert*, Civ. No. 84-5159 (D.S.D. 1984).
- In 1982, a state Attorney General's opinion indicates confusion over whether polling places could be located on Indian land. 1982 S.D. OP. ATT'Y GEN. 190 (1982).
- In 1986, Indian residents from the Cheyenne River Sioux Tribe brought a Section 2 suit against Ziebach County because of its failure to provide sufficient polling places. *See Black Bull v. Dupree School District*, Civ. No. 86-3012 (D.S.D. 1986).
- In *Weddell v. Wagner Cmty Sch. Dist. 11-4*, Civ. No. 02-4056 (D.S.D. 2002) access to polling places was an issue.

The racial issues surrounding Shannon County are difficult to ignore. Not only have they been explicitly addressed by this Court, Defendants have similarly acknowledged the existence of race-related issues. *See JG 157:22-158:01*; *CN 211:20-212:06*.

Based upon legal precedent issued by this Court, the first Senate factor weighs in favor of the Plaintiffs.

B. Racial Polarization.

The second Senate factor is the extent to which voting in the jurisdiction is racially polarized. *See Gingles*, 478 U.S. at 48-49. Voting is racially polarized, according to the Supreme Court, "where there is a consistent relationship between the race of the voter and the way in which the voter votes." *Id*. at 51 n. 21. Or, to put it another way, voting is racially polarized where "the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the [Indian] voters." *Id*. at 54.

In this case, the evidence produced by the Plaintiffs demonstrates that voting in Shannon County and South Dakota is highly polarized along racial lines. Defendants and Plaintiffs agree that Shannon County voters vote heavily for the Democratic candidate. *JG 151:22-24*. Perhaps the greatest evidence of division is the 2008 Presidential election where 51 counties voted for Presidential candidate John McCain. Shannon County, in contrast, not only voted overwhelmingly for President Obama, but also had the highest per capita voting percentage for President Obama in the entire nation. Sandven Ex. 12, ¶ 13.

The evidence demonstrates that there is a consistent relationship between the Indian voter and the Democratic candidate, who is generally perceived as being more friendly to Indians. Sandven Aff. Ex. 22. This is generally at odds with the rest of the state, which is largely white and Republican. As a result, the non-Indian majority voters dominate Shannon County voter preferences:

> "In the past decade of state and national elections, the preferred candidate of Native voters for U.S. House has obtained a majority of the state vote twice in five elections (2004 and 2006.) For U.S Senate, the preferred candidate has prevailed once in three elections (2002.) For U.S. President, the preferred candidate has not obtained a majority of the state vote in two elections. At the state level, the preferred candidates of Shannon County voters for state-wide office have not been successful in the past decade." Sandven Aff. Ex. 12, ¶14.

Moreover, Indian voters are an insular group due to the Reservation system. "That insularity exists in the state of South Dakota given the history and demographics of the reservation system in the state (and nation.) [*sic*] This works to polarize voting behavior more than one would expect in the average geographic community." Sandven Ex. 12, ¶ 16.

Again, all of the available evidence tells the same story. Voting in Shannon County is highly polarized. Under these circumstances, the second Senate factor weighs heavily in favor of the Plaintiffs.

C. Voting Practices or Procedures that May Enhance the Opportunity for Discrimination.

The third Senate factor is "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." Senate Report at 29. There can be no dispute that South Dakota does, in fact, use such practices and procedures. For example, South Dakota uses a majority-vote requirement in some elections. S.D.C.L. §§ 9-13-25. South Dakota uses anti-single-shot provisions in some elections. *See* S.D.C.L. §§ 9-8-4; 9-9-3; 13-8-2; 9-13-6.1. The state uses multi-member districts and at-large elections. *See* S.D.C.L. §§ 7-8-10 (at-large elections); 9-8-4 (multi-member districts); 9-9-1 (at-large elections).

Most importantly, except for Shannon and Todd Counties, all eligible voters in the state of South Dakota can go to the courthouse geographically located within their respective county, register to vote, request and complete an absentee ballot in a single trip. *SG 151:05-18*; *JG 76:20-77:02*. Residents of Shannon County do not have this luxury. In fact, participating in the electoral process requires significant and timely travel from the reservation as acknowledged by the Defendants. *See CN 202:23-203:04*; *JG 65:19-21; JG 162:18-24*; *JG* 166:01-09; *JG* 226:10-18. Courts who have considered the issue of location of polling places have uniformly held that distance of a voting booth matters and failure to provide sufficient polling places on a reservation violates Section 2

of the Voting Rights Act. *See Black Bull v. Dupree School District*, Civ. No. 86-3012 (D.S.D. May 14, 1986); *Spirit Lake Tribe v. Benson County, ND*, 2010 WL 4226614 (D.N.D. October 21, 2010).

Based upon the foregoing, the third Senate factor weighs in favor of the Plaintiffs.

D. Denial of Access to Any Candidate Slating Process.

The fourth Senate factor is whether members of the minority group have been denied access to a candidate slating process. Minority candidates may also be denied effective access to the slating process if racial discrimination prevents them from actively seeking white votes and support. *See Perkins v. City of West Helena*, 675 F.2d 201, 209-10 (8th Cir. 1982). Shannon County is located within District 27. District 27 does not have a formal slating process for the legislature. *See Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976, 1037 (D.S.D. 2004). However, the Court held in *Bone Shirt* that "the evidence indicates that the county political party structure has hindered Indians from running for and getting elected to public office." *Id.*

This Court's legal precedent demonstrates that the fourth Senate factor weighs in favor of the Plaintiffs.

E. Socioeconomic Discrimination.

The fifth Senate factor is "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." The Senate report explains the rationale for this inquiry 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.

Senate Report at 29 n. 114.

Indians in Shannon County have a significantly depressed socioeconomic status that hinders their ability to participate effectively in the political process. In June 1997 *The New York Times* said of the Pine Ridge Reservation: "It is as poor as America gets. A visit to Pine Ridge is a striking reminder that most reservations remain places of bone-crushing poverty." Peter T. Kilborn, *For Poorest Indians, Casinos Aren't Enough*, N.Y. TIMES (June 11, 1997). After the 2010 census, media outlets across the nation produced lists of America's richest and poorest counties. Shannon County was listed as the third poorest county in the entire country. Ryan Lengerich, *Nation's Top Three Poorest Counties In Western South Dakota*, RAPID CITY JOURNAL (Jan. 22, 2012) (Todd and Ziebach counties rounded out the top three).

Struggle defines life in Shannon County. Even before birth, nothing is guaranteed. Infant mortality rates are 300 percent higher than the national average. Lisa Wirthman, *Pine Ridge Indian Reservation is Drowning in Beer*, DENVER POST (May 27, 2012). If an infant is fortunate enough to be born, there is a one in four chance that the child will be born with fetal alcohol syndrome, a permanent disorder that impacts lifelong learning and cognitive abilities. *Id*. After the child is born, there is a 58 percent chance that their grandparents rather than the biological parents will raise the child. *Id*. Long before adulthood, the child will have negative encounters with alcohol. Over 5,000,000 cans of beer were sold in Whiteclay, Nebraska across the border from the dry Pine Ridge Indian Reservation in 2010. *Id*. In 2008, 85 percent of Pine Ridge families were impacted by alcohol abuse. *Id*. Ninety percent of arrests in Pine Ridge were related to alcohol. *Id*.

As a teenager, the child will be forced to live with thoughts of suicide, either of themselves or of their friends; the current teen suicide rate on Pine Ridges is 150% higher than the national average. The Oglala Sioux Tribe Department of Public Safety (10/09-9/10) showed 196 suicide attempts with 9 completions. Attempts included 106 overdoses, 78 weapons, and 22 hangings. 72% of the calls involved females. The OST Ambulance Service Jan-Dec 2010 recorded 121 unsuccessful attempts and 4 suicides in 2010. Sandven Aff. Ex. 32.

The child's access to education will also be extremely limited. 18.8 percent of Shannon County residents over the age of 25 do not have a diploma; only 16.7 percent have a bachelor's degree. The 2011 drop-out rate among Indians in Shannon County was 6.2% percent, compared to 1.8 % for non-Indians. Sandven Aff. Ex. 33.

As an adult, the child will be forced to deal with health problems uncommon in the rest of America. Over 50 percent of Pine Ridge residents over the age of 40 have diabetes. Nicholas Kristof, *Poverty's Poster Child*, N.Y. TIMES (May 9, 2012). The tuberculosis rate is 8 times higher than the national average. *Id*. The average life expectancy on Pine Ridge is between 45 and 52 years. Setrige Crawford, *American Indian Tribe Sues Beer Breweries for $500 million*, CHRISTIAN POST (Feb. 9, 2012). The average American life expectancy is 77.5 years. *Id*.

While dealing with these issues, the odds are great that the young adult will still be living with his other grandparents. The housing shortage in Pine Ridge is so great that it is not uncommon for 10-12 people to share a house built for four. *Oversight Hearing on Indian Housing Before Sen. Comm. on Indian Affairs*, 110th Congress (2007) (Statement of John Yellow Bird Steel, OST President). These homes lack indoor toilets,

working furnaces, adequate roofs and windows. *Id*. As of 2007, 1700 HUD rental homes needed repair. *Id*. The lack of housing and overcrowding produces homelessness on the reservation with many people living in vehicles with no guarantee of even a warm shower in the morning. *Id*.

There is no guarantee of employment in adulthood. In 2007, the Oglala Sioux Tribe had 80% unemployment. *Id*. The average family income was $3,700 per year. *Id*. The 2010 Census reported the 53.5% percent of Indians in Shannon County were living below the poverty line, compared to 13.7% of all South Dakota residents.[14] The median household income for Shannon County Indian households equaled $24,392, compared to $46,369 state average. *Id*. The per capita income of Indians in Shannon County was $7,772 compared to 24,110 for all South Dakota residents. *Id*.

As the Supreme Court has recognized, "political participation tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles*, 478 U.S. at 69. *See also Stabler v. County of Thurston*, 129 F.3d 1015, 1023 (8th Cir. 1997) ("disparate socio-economic status is causally connected to Native Americans' depressed level of political participation"). The fifth factor does not require the Plaintiffs to prove that disparities were caused, in whole or in part, by racial discrimination or that disparities caused, in whole or in part, depressed levels of minority political participation. *See Whitfield v. Democratic Party*, 890 F.2d 1423, 1431 (8th Cir. 1989) (" '[o]nce the lower socio-economic status of blacks has been shown, there is no need to show the causal link of this lower status on political participation'").

[14] U.S. Census Bureau, 2006-2010 American Community Survey, available at: http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

Clearly, the fifth Senate Factor weighs in favor of the Plaintiffs.

F. Overt or Subtle Racial Appeals.

The sixth Senate Factor is the extent to which there have been overt or subtle racial appeals in recent elections. Racial appeals may manifest themselves in a variety of ways. *See Garza v. City of Los Angeles*, 756 F.Supp. 1298, 1341 (C.D. Cal. 1999) (citing examples of a minority candidate having a door slammed in his face and campaign literature destroyed as evidence of racial appeals during campaigns).

South Dakota's history of racial appeals is well-documented. For example in 1998 Elsie Meeks was a candidate for lieutenant governor. She stated the views that predominated during that period were that "Indians shouldn't be allowed to run on the statewide ticket and this perception by non-Indians that …we don't pay property tax…that we shouldn't be allowed [to run for office.]" *Bone Shirt v. Hazeltine*, 336 F.Supp.2d at 1036 (D.S.D. 2004). In yet another example, one member of the state legislature stated that he would be "leading the charge…to support Native American voting rights when Indians decided to be citizens of the State by giving up tribal sovereignty and paying their fair share of the tax burden." *Id*. at 1035-1036.

Perhaps the most egregious example of a racial appeal involves the highest officials of the State of South Dakota. In 1991 the South Dakota state legislature determined that "in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts."[15] According to the Census at that time, Indians of voting age comprised 60% of District 28A and less than 4% of District 28B. In 1996, the legislature abolished the two districts and required candidates for the House to run in

[15] An Act to Redistrict the Legislature, ch. 1, 1991 S.D. 1st Spec. Sess. Laws 1, 5 (codified as amended at S.D.C.L §§ 2-2-24 through 2-2-31).

District 28 at large.[16] Interestingly, the repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of repealing the legislation was Eric Bogue who had defeated Mr. Van Norman in the general election.[17]

It is not necessary to prove that racial appeals are a permanent or exceedingly pervasive feature of a jurisdiction's elections; instead, courts have found the existence of this factor based on a handful of salient incidents. *See, e.g.*, *Bone Shirt*, 336 F. Supp. 2d at 1041 (finding racial appeals based mostly on a 1978 newspaper article and 2002 newspaper article that both focused on allegations of voter fraud by American Indians); *United States v. Alamosa County*, 306 F. Supp. 2d 1016, 1025-26 (D. Colo. 2004) (finding racial appeals based on three elections where candidates identified own ethnicity); *Magnolia Bar Ass'n, Inc. v. Lee*, 793 F. Supp. 1386, 1410 (S.D. Miss. 1992) (finding racial appeals in Mississippi's judicial elections based on evidence from three elections).

The sixth factor also weighs in favor of the Plaintiffs.

G. Election to Public Office in the Jurisdiction.

The seventh Senate factor is the extent to which Indians have been elected to public office in the jurisdiction. The lack of success of minority candidates in a jurisdiction "is one of the two most probative indications of vote dilution." *United States*

[16] An Act to Eliminate the Single-member House Districts in District 28, ch. 21, 1996 S.D. Sess. Laws 45 (amending S.D.C.L § 2-2-28).
[17] *See* Minutes of House State Affairs Committee, Jan. 29, 1996, ¶ 5.

v. Marengo County Comm'n, 731 F.2d 1546, 1567 n. 34 (11th Cir. 1984). Following is the meager list of Indian representatives[18] for Shannon County:

Name	Office	District/County
Thomas Short Bull	State Senator 1982-1986	District 27-28 Shannon County
Richard "Dick" Hagen	State Representative 1982-2001 State Senator 2002	District 28 Bennett, Shannon, Todd Counties
Theresa "Huck" Two Bulls	State Senator 2004-2008	District 27 Bennett, Haakon, Jackson, Shannon
Ed Iron Cloud III	State Representative 2008-present	District 27 Bennett, Haakon, Jackson, Shannon
Kevin Killer	State Representative 2008-present	District 27 Bennett, Haakon, Jackson, Shannon
Paul Valandra	House Member	District 27
James Bradford	State Senator	District 27

In other words, over the last 100 years, approximately seven (7) Indians have been elected to state office from Shannon County. The fact that all of those individuals are from a majority-Indian District is unpersuasive, "because the election of Indians in majority-Indian districts, such as District 27, is unremarkable and not probative of whether there is dilution in neighboring majority-white districts." *Bone Shirt*, 336 F.Supp.2d at 1042.

This factor weighs in favor of the Plaintiffs.

H. Responsiveness of Elected Officials to Particularized Needs.

If officials are unresponsive, "it is evidence that minorities have insufficient political influence to ensure that their desires are considered by those in power." *United*

[18] Plaintiffs were unable to finding listing of identified Indian office holders in South Dakota but were able to confirm the indicated office holders as enrolled members of a federally-recognized Indian tribe.

States v. Marengo County Comm'n, 731 F.2d 1546, 1572 (11th Cir. 1984). Here, the evidence clearly demonstrates that the Defendants have been unresponsive to the particularized needs of the Indian community. In fact, their requests for assistance have been completely ignored by the elected officials.

There is no doubt that all Defendants were aware that Shannon County was having financial struggles. Former Secretary of State Chris Nelson testified that he knew money was an issue for funding early voting in Shannon County as early as September 24, 2010. *CN 183:18-184:09*. Defendant Gant knew Shannon County was one of the poorest county in the State of South Dakota. *JG 148:02-14*; *JG 196:03-11*. Finally, Defendant Ganje testified that she knew the reason Shannon County was not providing the same number of in-person days of absentee voting was because of funding issues. *SG 34:18-23*; *36:02-20*.

Despite this knowledge, neither Defendant Gant nor former Secretary of State Chris Nelson offered any assistance to Shannon County despite admitting early voting is a standard practice, and procedure. Sandven Aff. Ex. 7 Adms. 47, 48, 51; Sandven Aff. Ex. 8 Adms. 47, 48, 51. Indeed, not one of the Defendants conducted any research to even determine what costs were associated with early voting in Shannon County. *CN 26:08-18*; *JG 14:18-23*; *JG 15:06-11*; *JG 19:01-05*; *JG 38:07-11*; *JG 56:14-19*; *JG 92:25-93:09*; *LH 164:04-13; LH 165:01-13; LH 168:25-169:01-07*. It simply is not clear from the evidence how the Defendants could make the determination that they could not afford early voting in Shannon County if they did not know what it would cost in the first place.

Defendants were not even responsive to the needs of Shannon County when federal funds were first issued. For example, Defendant Nelson, in drafting the first HAVA State Plan did not take into consideration that Shannon County is listed as the third poorest country in the United States and may not be able to foot the initial expenses for each election. *See CN 24:19-25:04*; *CN 67:20-68:22*. Indeed, former Secretary of State Chris Nelson readily admitted that "there is probably no county whose county finances are as tight as Shannon County. That I would agree with" and yet, he failed to undertake any assessment of need when establishing the initial State HAVA Plan. *CN 111:07-09; CN 185:14-186:06*. Moreover, Defendant Nelson never conferred with the Oglala Sioux Tribe nor Shannon County residents to address election issues. *CN 105:10-18; CN 106:17-107:01; CN 108:04-10*.[19]

As to why former Secretary Nelson never met with Shannon County residents, he offers the following explanation:

> Q: All right. So you knew about all the voting issues going on down at Shannon County because of this litigation—
>
> A: Yes
>
> Q: --correct?
>
> A: Yes
>
> Q: Why didn't you do more to go ahead and assist with early voting down there?
>
> A: Again, I think that goes back to my philosophy of governing. And that is that each level of government has its responsibilities. The county commission in those counties has their designated responsibilities, county auditor has their responsibilities, and the Secretary of State has his responsibilities. And I respect those boundaries, try to give assistance, but

[19] Defendant Gant never conducted outreach in Indian country. *JG 208:01-10*.

> not interference. And that applies not just to Shannon County, but every county in the state.

CN 192:16-193:06. In other words, former Secretary Nelson believed the county commission had the sole authority to determine the number of days to be provided for in-person early voting. *See also CN 44:09-13; CN 45:12-24; CN 55:10-22; CN 42:13-19; CN 77:08-20; CN 83:20-84:11; CN 87:20-88:04*.

Following along the lines established by former Secretary of State Nelson, Defendant Gant also took the position that even if there is unequal treatment of voters in the State of South Dakota, he would not step in unless he is asked by the county – because he does not "run their elections."[20] *JG 93:21-94:04; JG 106:23-107:12; JG 110:16-24*. Indeed, voting election issues in Shannon County were just not a priority for Defendant Gant. *JG 119:03-06*. That begs the question: who steps in if the county that is supposed to request such assistance is also the county responsible for the alleged violations, as we have here in this case?

In contrast, former Secretary of State Nelson informed Defendant Ganje in 2008 that Shannon County could utilize their Title II funds to pay for early absentee voting. *See* Sandven Aff. Ex. 13 and 14. *CN 38:24-39:22; CN 74:19-75:05*; *SG 55:19-56:05*. Accordingly, Shannon County had sufficient funding that would allow them to conduct early voting in May 2008. *CN 69:16-19; CN 27:15-28:01*; *SG 47:12-48:01; SG 51:03-21*; However, Defendant Ganje made no request in 2006 for funding, because "[she] didn't think it was in [her] rights to ask for more other than what was allowed." *SG 39:13-20*. Defendant Ganje made no request for funding in 2008. *SG 38:25-39:07*. In

[20] Defendant Ganje agrees with the Secretaries of State that it is the responsibility of the county commissions to establish the number of days for in-person absentee balloting. SG 35:16-22; SG 44:22-45:01; SG 75:21-76:01; SG 148:25-149:08.

that same year, and despite the existence of available funding, Shannon County only received two (2) days of in-person early voting. *SG 49:09-18*. In 2010 in-person early voting did not occur because Shannon County "didn't have the money to make it happen right away." *LH 156:21-24*.

The Defendants' unresponsiveness is best exemplified by their behavior in 2012. During this period, the Shannon County Commission was willing to approve only six (6) days of in-person early voting because of funding concerns. *LH 161:3-25; LH 162:01-08*. Indeed, Defendant Ganje was involved in the discussion with the Shannon County Commission as to whether two (2) days of in-person early voting would be sufficient. According to Defendant Hutchinson, Defendant Ganje told the Commission they needed to provide more days for Shannon County residents. *LH 163:19-24*. Defendant Hutchinson informed Defendant Ganje that is all the county can afford. *Id*. Instead of informing the Shannon County Commission that HAVA funding was available, Defendant Ganje simply told them that they need to "afford more." *Id*. But remember, Defendant Ganje was told in May of 2008 that HAVA funding was available for Shannon County. In fact, Defendant Ganje cannot recall whether or not she ever informed Shannon County Commission that additional HAVA funding was available. *SG 52:25-53:03; SG 79:15-18*. It was not until March 1, 2012 – approximately three (3) months after this litigation was initiated that Shannon County requested money for in-person early voting. *JG 89:13-19; JG 210:12-211:04*; *SG 191:24-192-13*.

The evidence clearly demonstrates, and the Defendants readily admit, that there was no attempt at resolution of Plaintiffs' concerns until this case was initiated. *SG*

30:18-31:02; SG 31:10-32:02; SG 191:02-12; *LH 172:06-16*; *JG 64:04-10*. Accordingly, this factor weighs in favor of the Plaintiffs

I. Tenuous of Policy.

The seventh Senate factor inquires whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. "[T]he tenuousness of the justification for a state policy may indicate that the policy is unfair." *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1571 (11th Cir. 1984). The Senate Report cautioned that "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities' fair access to the process." Senate Report at 29 n.117.

At a minimum, there are four issues that make the Defendants' policies and practices tenuous. First and foremost, the Secretary of State, when drafting the State HAVA plan, never took into consideration that Shannon County is one of the poorest counties in the entire United States. In compiling the plan, the former Secretary of State Chris Nelson utilized his discretion to allocate HAVA funding on an equal basis – regardless of need. *CN 278:15-21; CN 279:10-16; CN 280:16-25; CN 164:19-165:03; CN 183:18-184:09*. Defendant Gant adhered to the practices established by former Secretary Nelson, although he admitted that he would like to change the plan to an as-need basis. *JG 258:16-22*.

Until this litigation, the remaining disbursements were given evenly to each county; regardless of need or situation. *CN 32:09-33:08*. In fact, when asked whether he

offered to assist Shannon County with their funding shortfall, former Secretary of State Chris Nelson replied as follows:

Q: Did you say we have got $5 million sitting over here that can be transferred if that is depleted? We have more money here. Did you say that?

A: I don't know if I did or not. But I can tell you I would not have offered to transfer money specifically to Shannon County.

Q: Why not?

A: Because my policy was that we would transfer equal amounts to all counties. And at the end of 2010, that is what we did.

CN 164:19-165:03.

The second issue with the State HAVA Plan involves the requirement that each county front election costs and seek reimbursement from the Secretary of State at a later date. *CN 172:09-19; CN 175:20-176:04; CN 249:09-17; JG 243:14-21; JG 259:23-260:09.* A county, such as Shannon, with a limited property tax base does not have readily available funds on hand with which to ensure Plaintiffs' constitutional right to vote. In fact, Shannon County was forced to zero out the vast majority of their discretionary funds to satisfy their obligations. *JG 256:04-11*. A state HAVA plan that would take into consideration the particularized needs of each county would be much less tenuous than the policy currently in effect.

Third, it is remarkable that Shannon County usurps its residents' constitutional rights under the guise of insufficient funding when the State has plenty of HAVA funds that could alleviate their alleged financial hardships. It is uncontroverted that the Secretary of State has the sole discretion in determining how much HAVA funding to distribute to the counties. *JG 274:14-21; JG 275:10-18*. One could understand his reluctance to assist Shannon County if HAVA funding was severely limited. This simply

is not the case. For example, at the end of 2005, the State of South Dakota had $11, 567,067 of Title II funds remaining. *CN 122:25; CN 123:-03*. At the end of 2008, the balance of the fund was $4,714,346. *JG 20:19-24*. Currently, the Secretary of State maintains a balance of HAVA funding in the amount of roughly nine (9) million dollars. *JG 59:12-24*. Despite the fact that this money could be utilized to fund early voting in Shannon County, Defendants have chosen not to exercise their discretion to protect the rights of Indian voters in Shannon County. *CN 238:01-239:04*.

Finally, it is undisputed that Defendant Ganje could utilize HAVA funds to hire and train another employee to work out of Shannon County. *SG 84:13-18; SG 96:25-97:10; SG 98:07-12; SG 99:10-18*. However, for some unexplained reason, Defendant Ganje will not designate any responsibilities to staff in Shannon County. Specifically, she states as follows:

Q: All right. So we're going to go through this and talk about if you didn't use your own staff and you hired new people.

A: We can talk, but it's not going to happen.

Q: Explain.

A: I will not physically leave Shannon County ballots down there and I will always bring them back to my office daily.

Q: For ballot security concerns?

A: Correct.

Q: And that's a Sue Gange rule?

Q: That's correct.

A: Not required by South Dakota election rules and regs?

Q: I'm not aware of other counties that would have ballots leave their courthouse, so I can't say—I don't think there's a state law, no.

A: All right.

Q: Those are my rules, yes.

SG 85:08-25; SG 187:13-25; SG 249:20-250:01; SG 250:24-251:17; SG 252:20-253:04. In other words, because of her personal rules, Shannon County voters have not been allowed to exercise their right to vote in the same manner as every other resident of the State of South Dakota.

The seventh Senate factor heavily weighs in favor of Plaintiffs.

J. Other Factors.

The 1982 Senate Report and the subsequent *Gingles* decision note that the foregoing factors alone are not the only factors that can be considered. There may be other factors that were not anticipated by Congress that still show a disparate impact on the ability of a protected class to vote. Plaintiffs assert an additional relative factor is the long driving distances from locations within Shannon County to the Fall River County Auditor's office. Furthermore, Shannon County voters often lack reliable vehicles, public transportation, and the money necessary to drive the long trip to Hot Springs. In fact, all major population centers in Shannon County must drive at least 96 miles round trip to early vote in Fall River County. Additionally, voters in Kyle, SD, the largest population center in Shannon County, must drive 246 miles round trip to early vote.

Statistics support a finding that Shannon County voters do not want to drive to Hot Springs to early vote. According to Dr. Braunstein's survey, 66.2 percent of Shannon County voters surveyed would not drive to Fall River County to early vote. Sandven, Aff. Ex. 12, ¶ 22. 74.2 percent were hesitant about the idea of voting in Fall River County. *Id*. at 23. Indeed, Dr. Braunstein found a clear link between driving

distance and the willingness to drive to Shannon County - the closer a voter was to Hot Springs, the more willing the Shannon County resident was to drive to Hot Springs to vote. *Id*.

Additionally Plaintiffs assert the tension between the Fall River County government officials and citizens creates a circumstance that inhibits their ability to early vote in Fall River County. According to Plaintiffs, Indian voters feel discriminated against when they visit Fall River County. Dr. Braunstein found that 34.9 percent of respondents surveyed were hesitant to vote at Hot Springs because of distrust or perceived prejudice from Fall River County administrators. *Id*. at 24. One voter stated that she would not go to Fall River County anymore because she was harassed by a cop in front of her four year old daughter, who also will not go to Fall River County because of this incident. Sandven Aff. Ex. 22. Another voter stated that it is well known among Tribal Members that Fall River County police "target '65 license plates' for traffic stops." Sandven Aff. Ex. 12 ¶ 26.

E. DEFENDANTS' PRACTICES AND PROCEDURES DENY PLAINTIFFS THE EQUAL PROTECTION OF THE LAW.

"It is beyond cavil that voting is of the most fundamental significance under our constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citation and internal quotation marks omitted). In *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), the Supreme Court stated "[n]o right is more precious, since the right to vote is "preservative of all rights." *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 476 (6th Cir. 2008) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). 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 v. Sims*, 377 U.S. 533, 555 (1964). "[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). Of course, states have substantial latitude to design and administer their elections; for example, they may choose to allow or not to allow early voting. But "[h]aving once granted the right to vote on equal terms, the State may not, by later *arbitrary and disparate* treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S.98, 104-105 (2000) (emphasis added). In short, "state actions in election processes must not result in arbitrary and disparate treatment of votes." *Id.* (internal quotations omitted); *see also League of Women Voters*, 548 F.3d at 477 ("At a minimum, . . . equal protection requires non-arbitrary treatment of voters." (citation and internal quotation marks omitted)). This principle applies with full force in the context of early voting. *See O'Brien v. Skinner*, 414 U.S. 524 (1974).

"[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976). The Secretary of State's reimbursement requirement incorporated into the HAVA plan effectively creates two classes of South Dakota voters: one group receives the full period provided by the State legislature for early voting and the other group does not. This disparate treatment of voters is arbitrary: The Defendants have provided no justification most likely because no discernible justification for the reimbursement policy exists. Furthermore, even if there were an asserted justification, the relevant provisions must fail: They burden the

fundamental right to vote but are not necessary to any sufficiently weighty state interest. Here, Defendants' actions unquestionably result in disparate treatment of voters.

In formulating the HAVA plan, the Secretary of State withdrew from Shannon County residents a previously conferred right to vote in a particular manner – specifically, the right to cast an early ballot in their county in the forty-six days immediately preceding an election. And he did so while leaving that right intact for all other residents of the State of South Dakota. This disparate treatment is significant. As the Supreme Court has acknowledged, the days immediately preceding an election are critical for participation. "It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held," *Citizens United v. Fed. Election Comm'n,* ___ U.S. ___, 130 S. Ct. 876, 895 (2010). The Secretary of State's disparate treatment of voters is arbitrary. He has provided no justification for his decision to withdraw the ability to cast an early ballot from only one class of voters. The HAVA plan contains no justification; nor does federal law.

In short, the arbitrary incorporation of a reimbursement requirement cannot survive an Equal Protection review. The Constitution does not expressly protect the right to vote early or absentee, but because South Dakota has made those voting mechanisms available, it cannot then deny them to some of its citizens on an arbitrary basis. *See League of Women Voters,* 548 F.3d at 477.

F. SOUTH DAKOTA CONSTITUTION

South Dakota's Constitution provides that elections "shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." S.D. Const. Art. VI, § 19. Elections in South Dakota are not equal

because Plaintiffs do not have equal access to early voting. In Shannon County, early voting is available for fewer days, for shorter hours, and in the case of the 2006 election, not available at all.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for summary judgment, declare that the Defendants' failure to provide an early voting polling place in Shannon County for the full 46-day time period authorized by South Dakota law violates existing law, including § 2 of the Voting Rights Act, as amended, the Fourteenth Amendment to the United States Constitution, and the South Dakota Constitution, declare that the policy requiring reimbursement of HAVA funds violates the Voting Rights Act, issue a permanent injunction ordering the Defendants to establish and fund with HAVA or other state funds at least one early voting location in Shannon County for the full 46-day time period authorized by South Dakota law for all future elections, and grant Plaintiffs reasonable attorneys' fees, litigation expenses and costs pursuant to 42 U.S.C. § 1973(e) and § 1988.

Respectfully submitted this 21st day of September, 2012

By:

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D.S.D. Civ. LR 7.1 CERTIFICATE OF TYPE-VOLUME LIMIT COMPLIANCE

Pursuant to Rule LR 7.1(c), PLAINTIFFS' BRIEF IN SUPPORT OF SUMMARY JUDGMENT MOTION complies with the type-size limitation of LR 7.1(e). The name and version of this Word Processing system is Microsoft Word 2002, and this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify that the above-referenced brief contains 10,644 words including the certification of service.

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CERTIFICATE OF SERVICE

I, Steven D. Sandven, certify that on the 21st day of September, 2012, I filed the foregoing PLAINTIFFS' BRIEF IN SUPPORT OF MOTION OF SUMMARY JUDGMENT, STATEMENT OF UNDISPUTED MATERIAL FACTS and AFFIDAVIT OF STEVEN D. SANDVEN with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

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