12-35926

United States Court of Appeals
for the
Ninth Circuit

MARK WANDERING MEDICINE, HUGH CLUB FOOT, LENARD ELK SHOULDER, CHARLES BEAR COMES OUT, WINFIELD RUSSELL, JAMES DAY CHILD, WOODROW BRIEN, SARAH STRAY CALF, MARTY OTHER BULL, NEWLYN LITTLE OWL, DONOVAN ARCHAMBAULT, ED MOORE, PATTY QUISNO, MICHAEL D. FOX, FRANK JEFFERSON and PHYLLIS POND CULBERTSON,

Plaintiffs-Appellants,

- against -

LINDA McCULLOCH in her official capacity as MONTANA SECRETARY OF STATE, GERALDINE CUSTER, in her official capacity as ROSEBUD COUNTY CLERK AND RECORDER, ROSEBUD COUNTY, ROBERT E. LEE, DOUGLAS D. MARTENS, and DANIEL M. SIOUX, in their official capacity as members of the County Board of Commissioners for Rosebud County, Montana, SANDRA L.BOARDMAN, in her official capacity as BLAINE COUNTY CLERK AND RECORDER, BLAINE COUNTY, CHARLIE KULBECK, M. DELORES PLUMMAGE and FRANK DEPRIEST in their official capacity as members of the County Board of Commissioners for Blaine County, Montana, DULCE BEAR DON'T WALK, in her official capacity as BIG HORN COUNTY ELECTION ADMINISTRATOR, BIG HORN COUNTY, SIDNEY FITZPATRICK, JR., CHAD FENNER, JOHN PRETTY ON TOP, in their official capacity as members of the County Board of Commissioners for Big Horn County, Montana and KIMBERLY YARLOTT, in her official capacity as BIG HORN COUNTY CLERK AND RECORDER BIG HORN COUNTY,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT FOR THE DISTRICT OF MONTANA
CASE NO. 1:12-CV-00135-RFC

APPELLANTS' REPLY BRIEF

STEVEN D. SANDVEN
STEVEN D. SANDVEN LAW OFFICE PC
3600 South Westport Ave., Ste. 200
Sioux Falls, South Dakota 57106
Tel: (605) 332-4408

DAVID BRADLEY OLSEN
HENSON & EFRON, P.A.
220 South Sixth Street, Ste. 1800
Minneapolis, MN 55402
Tel: (612) 339-2500

Attorneys for Appellants

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STANDARD OF REVIEW

This Court reviews *de novo* the district court's conclusions of law regarding the application of § 2 of the VRA, as well as its mixed findings of law and fact. Smith v. Salt River Project Improvement & Power Dist., 109 F.3d 586, 591 (9th Cir. 1997). As explained below, the district court applied the wrong legal standard in its analysis, and rejection, of Appellant Indians' (hereafter "Tribal Members") VRA § 2 vote denial claims. Tribal Members need not, as the district court erroneously determined, plead and prove as an essential element of their claim that they are unable to elect representatives of their choice. The question, instead, is whether, based on the totality of circumstances, Tribal Members can show that, on account of their race or color, they have less opportunity to participate in the political process and, therefore, less opportunity to elect representatives of their choice. *See* 42 U.S.C. § 1973(a) and (b). Because the district court denied injunctive relief based on an erroneous interpretation of the governing § 2 standard, this Court should reverse and remand.

As an aside, Montana law allows absentee voting both in-person and by mail pursuant to MONT. CODE ANN. § 13-13-201 (2011). Montana law also provides for late-registration pursuant to MONT. CODE ANN. § 13-2-304. However, what can only be construed as an admission by omission, Appellees failed to address

late-registration and in-person absentee voting requirements in their answering briefs.

ARGUMENT

I. TRIBAL MEMBERS HAVE STANDING.

"[S]tanding is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy," Davis v. Passman, 442 U.S. 228, 239 n.18 (1979), and it exists if there is an injury in fact, causally connected to the conduct complained of, that is likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Tribal Members have established each of the necessary elements.

An injury in fact exists because Tribal Members have shown that, on account of their race or color, they have less opportunity to participate in the political process and, therefore, less opportunity to elect representatives of their choice. Salas v. Sw. Texas Junior Coll. Dist., 964 F.2d 1542, 1547-49 (5th Cir. 1992) (finding VRA § 2 "protects the right to vote of both racial and language minorities," and that "[t]he standard . . . is whether minorities have *equal access to the process* of electing their representatives") (emphasis added). All Tribal Members live a great distance from the late registration and in-person absentee voting places located in the county seats, and each has been denied the same late-registration and in-person absentee voting opportunities available to non-minorities who have demonstrably greater access to late-registration and in-person absentee

voting available at the county seat. The harm is real, and it is particularized and personal to each Tribal Member.

Appellees (hereafter "Counties") respond that Tribal Members are asserting a "generalized grievance," but their reliance on U.S. v. Hays for that proposition is misplaced. *See* 515 U.S. 737 (1995). Hays concerned a Louisiana redistricting plan that drew District 4 as "'[a] Z-shaped creature' that 'zigzagged through all or part of 28 parishes and five of Louisiana's largest cities.'" Id. at 740. Four individuals successfully challenged the gerrymandered layout in the district court, but while the case was on appeal the state legislature passed a new plan and the plaintiffs no longer lived in the redrawn District 4. Id. at 743. On those unique facts, the Supreme Court concluded that, "[w]here a plaintiff does not live in such a district, he or she does not suffer those special harms . . . [and] that plaintiff would be asserting only a generalized grievance against governmental conduct of which he or she does not approve." Id. at 745.

Here, unlike Hays, Tribal Members all reside on Reservations located in the counties claimed to be in violation of VRA Section 2, and all desire the same access to in-person absentee voting and late-registration as is given to non-minorities, and which has been denied to them on account of their race or color. Tribal Members, therefore, have alleged "special harm," and they have standing to seek redress because "voters who allege facts showing disadvantage to themselves

as individuals have standing to sue." Baker v. Carr, 369 U.S. 186, 204-06 (1962) (stating that, in a voting rights case, the question is whether the plaintiffs "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"). Each Tribal Member is asserting his own, personal right to have the same opportunities to participate in the political process as non-minorities—not some generalized grievance.

In a case currently pending in the United States District Court for the District of South Dakota, and on nearly identical facts, a trial court recently concluded that plaintiff Indians:

> [S]uffered an injury in fact because they are denied the fundamental right to vote early within their county, which has an overwhelming population of Native Americans, when almost all other white voters in South Dakota's counties are afforded early voting rights within their own counties . . . [therefore, the harm] is sufficiently particularized and concrete and is not speculative or imaginary; thus, the first factor of standing is satisfied.

Brooks v. Gant, No. CIV. 12–5003–KES, 2012 WL 4482984, at *3 (D.S.D. Sept. 27, 2012) (citing Constitution Party of S.D. v. Nelson, 639 F.3d 417, 421 (8th Cir. 2011)). Just like the Indian plaintiffs in Brooks, Tribal Members have standing in this case because all reside on Indian Reservations and, unlike white voters

throughout the State, each is significantly burdened by the prohibition of Reservation satellite late-registration and in-person absentee voting locations.

The mere fact that Tribal Members were able to vote at all or had options other than late-registration and in-person absentee voting at their tribal headquarters does not, as Counties argue, defeat their claim or ameliorate the harm. Nor should this or any other Court accept such a dangerous interpretation of § 2, because to do so would be not unlike finding that a protected class member who pays a discriminatory poll tax in order to cast his ballot lacks standing to challenge the practice because his vote still counts. The question in that circumstance, as here, is not whether the protected class member was able to vote; it is whether he has a lesser opportunity to participate in the political process on account of his race or color.

Expressly rejecting a similar argument, the Senate Judiciary Committee Report explained:

> [F]or purposes of Section 2, the conclusion in the Mobile plurality opinion that "There were no inhibitions against Negroes becoming candidates and that in fact negroes had registered and voted without hindrance," would not be dispositive. Section 2 adopts the functional view of "political process," used in White rather than the formalistic view espoused by the plurality in Mobile.

S. Rep. at n. 120. Under the Senate's "functional view," the VRA was plainly intended to protect minority voters in situations precisely like those here, where a

government decision has the effect *in its application* of providing them with less opportunity to participate in the political process.

Counties do not dispute that Tribal Members have less access to in-person absentee voting and late-registration. Nor can they dispute that, due to a documented history of official discrimination, poverty, and lack of access to motor vehicles, the in-person absentee voting obstacles faced by Tribal Members are well established and borne out in Montana absentee ballot usage in each county. *See* Appellants' Excerpts of Record ("E.R.") 180-190, 249-257. Tribal Members, therefore, have established an injury in fact.

Tribal Members have also established the remaining two elements for standing. First, a causal connection exists because the complained of harm emanates from the Secretary's and Counties' prohibition of satellite in-person absentee voting and late registration offices at locations on the Reservations near where Tribal Members live. And, second, Tribal Members' injury is likely to be redressed by a favorable decision because this Court is being asked to remand to the district court to consider, under the appropriate legal standard, whether injunctive relief is appropriate.

II. THIS APPEAL IS NOT MOOT.

Federal law grants appellate courts broad authority to review a preliminary injunction order. *See* 28 U.S.C. § 1292. "The inability of the federal judiciary 'to

review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (citation omitted). "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" Texas v. U.S., 523 U.S. 296, 300 (1998) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 580-81 (1985)).

This appeal is not moot because there are no interim developments that have completely and irreversibly brought an end to allegedly unlawful conduct and its effects so that "neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." Cnty. of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). Just the opposite, the alleged harm is continuing in nature and it is, by definition, capable of repetition yet evading review.

The Supreme Court has noted that challengers to election procedures are often left with little remedy for current elections, and it is therefore appropriate to adjudicate challenges to clarify future elections. "Justiciability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election." Babbit v. UFW Nat'l Union, 442 U.S. 289, 301 n. 12 (1979) (citing Storer v. Brown, 415 U.S. 724, 737 n. 8 (1974)).

Tribal Members filed this action seeking relief for the 2012 election process, which has since concluded. But they were not looking for a one-time fix that would allow the Secretary and Counties to resume unlawful practices in 2013, 2014, or beyond. In fact, a remedy that would allow future and repeated repetition of the harm sought to be enjoined would be no remedy at all. To date, no satellite late-registration and in-person absentee voting offices have been opened on the Reservations, and there is no indication that Counties will open any before the 2014 election. Rather, and as the Answering Brief, DktEntry 30, makes clear, Counties take the position that there is no violation of the VRA, no harm, and that they have no authority or obligation to ever open any satellite offices. The harm, therefore, is continuing and, with the next Federal election only 14 months away, is capable of repetition yet evading review. *See* DktEntry 30 at 23 (Counties admitting that "[t]his case is not entirely moot . . . the permanent injunction claim continues at the district court level").

Injunctive relief is particularly appropriate under these circumstances because:

> [T]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Babbit, 442 U.S. at 301 n. 12 (quoting Storer, 815 U.S. at 737 n.8). Tribal Members are asking this Court to construe the VRA, and pronounce the

correct legal standard to be applied by the trial court on remand, thus increasing the likelihood of a decision on the merits prior to the 2014 elections. Because clarification of the controlling legal standard is necessary and appropriate to resolve an existing controversy, this appeal is not moot. *See* DeFunis, 416 U.S. at 316 (stating that no proceeding is moot where a case or controversy persists between interested parties).

III. THE SECRETARY IS A NECESSARY PARTY.

The Secretary asks that she be dismissed from this suit because she has no authority to authorize the requested relief. The Secretary's unduly restrictive interpretation of her own authority and responsibility, however, is belied by Montana's Constitution and statutory scheme.

Montana Const., Art. VI, § (4)(3), provides that the Secretary "shall" perform all duties provided by law. Under Montana law, the Secretary is the State's Chief Election Officer, and she has responsibility to insure that Montana's election code is applied, operated, and interpreted equally and uniformly. DktEntry 28-1 at 2; Mont. Code Ann. § 13-1-201 (2012).

In furtherance of her duties, the Secretary "shall" prepare and deliver to the election administrators written "directives and instructions" relating to and based on the election laws, with which each election administrator "shall comply." Mont. Code Ann. § 13-1-202(1)(a) and (3). In turn, each election administrator

"shall" provide data that the secretary determines necessary to evaluate the "accessibility of elections," and assist her in making recommendation to improve voter confidence in the integrity of the election process and "implementing the provisions of this section." Id., § 13-1-202(4) and (5). Because the words "shall," "directives," and "instructions" are all mandatory, not permissive, the Secretary is, by statute, duty-bound to "direct" and "instruct" the county election officials to comply with election laws.

In this regard, the Secretary's duty to "direct" the county officials is not limited to compliance with state election law.[1] Just the opposite, Mont. Code Ann. §§ 13-1-203(1) and 209 provide that the Secretary "shall advise" and assist election administrators with regard not only to the "application, operation and interpretation of Title 13," but also with regard to "implementation of the National Voter Registration Act of 1993," and the federal Help America Vote Act.

There can be no doubt, therefore, that the Secretary's duties as the State's Chief Election Official include the power and authority to direct and instruct the county officials regarding compliance with federal election law, including the VRA. To deflect from her clear Constitutional and statutory mandate, however, the Secretary points to several other sections of Montana's election code as support

[1] Mont. Code Ann. § 13-1-201 does not define the term "election law."

for her claim that she has no authority over county election officials. Again, however, she misreads the statutes governing her own authority.

Mont. Code Ann. § 7-4-210 provides that that the county commissioners shall supervise the local officials; but it does not in any way diminish the Secretary's role to supervise the county commissioners and to insure the fairness and integrity of the entire state election process. Similarly, although Mont. Code Ann. § 13-1-301 may give local election administrators responsibility for the "conduct of elections" in each county, it does not take away the Secretary's Constitutional and statutory powers to insure compliance with governing law. The Secretary admits, in fact, that she has a duty to "assure uniform procedures are used in all counties." DktEntry 28-1 at 3.

Of particular application to this case is that the Secretary is charged with: "establishing by rule a standard application form for absentee voting"; "prescribing the form for provisional ballots"; adopting rules to implement handling and counting of provisional and challenged ballots, including establishment of procedures for verifying voter registration; and approving and enacting rules regarding the use of voting systems. Mont. Code Ann. §§ 13-1-210, 13-13-601, 13-13-603, 13-17-101, 107. Tribal Members, through this lawsuit, are asking only that the Secretary be ordered to perform her duties.

Counties similarly offer as a defense to their inaction that they were prohibited from opening satellite late-registration and in-person absentee voting offices because "they would have been required to have secure, ADA compatible facilities and it was unclear if such space was readily available." *See* DktEntry 30 at 12-13. But, again, although the standards for polling place accessibility are completely within the purview of the Secretary, Mont. Code Ann. § 13-3-205, and even though she has the power to waive ADA compliance when requested by local officials, Mont. Code Ann. § 13-3-212 (2012), the Secretary remained silent, and by doing so delayed the process and this proceeding.

To get around the fact that she was required by law to act, but did not, the Secretary argues that she was unaware until July 23, 2012, that Indians in Montana desired a satellite in-person absentee voting and late registration location. DktEntry 28-1 at 9. Contrary to that assertion, however, the district court specifically found that in May 2012, "an informal request was made to the private email address of a State Department employee." E.R. at 11, 191-196. But the District Court also found that the Secretary did not take action for the stated reason that she "was busy preparing for the June 2012 primary." E.R. at 11. These findings, together, demonstrate that Secretary's delays contributed to the harm suffered by Tribal Members.

Counties also claim that they cannot provide the requested relief because satellite late-registration and in-person absentee voting offices are prohibited by Montana law. But the Montana Attorney General and the Secretary have both determined that satellite in-person absentee voting and late-registration offices are allowed. E.R. 138-246. Glacier County, in fact, has opened and is operating a satellite location,[2] and the "Missoula County Election Office moves from the county courthouse to the fairgrounds during election season." DktEntry 30 at 10. Counties' argument that they are prohibited from offering any services outside the county seat or county election offices, therefore, is contrary to both law and fact. *See* DktEntry 30 at 10. The better, and correct interpretation of Montana law, as determined by its own Attorney General and the Secretary, is that County Clerks must keep their principal offices at the county seat, but may allow extension offices if necessary.

Consequently, although the Secretary ultimately supports Tribal Members' interpretation of the VRA, DktEntry 28-1 at 11, because she has failed, neglected, and refused to perform her Constitutional and statutory duties to insure fairness

[2] At the hearing, there was a dispute as to what type of services Glacier County was offering at their satellite location. However, a Glacier County Commissioner called by Tribal Members testified that, in that County, an individual could apply for and receive an absentee ballot in the satellite office. *See* E.R. 80-81 [Hr. Transcript 162:4-163:6].

and integrity in the voting process, Tribal Members have been denied opportunities to participate in the political process made available to non-minorities. The Secretary's refusal to act—or even to acknowledge her authority to do so—has therefore caused an injury in fact and she is a necessary and proper party to this suit.

IV. THE DISTRICT COURT ERRED IN IT'S INTERPRETATION OF THE LAW.

There is no dispute that Indians in Montana have not historically been able to elect representatives of their choice. However, due in part to court decisions that created majority-minority districts, Indians have had some recent electoral success at the local and, to a lesser extent, the state level. *See* Windy Boy v. Big Horn Cnty., 647 F.Supp. 1002, 1019 (D. Mont. 1986). The district court ruled that, because Indians have recently shown the ability to elect representatives of their choice, Tribal Members cannot prove a violation of the VRA. *See* E.R. 14. The district court erred its interpretation of Section 2, applied the wrong legal standard to the undisputed facts, and should be reversed.

"Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." Thornburg v. Gingles, 478 U.S. 30, 69 (1986). Practices that cause or result in discrimination create § 2 liability. *See* Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997). A

violation exists if, based on the totality of the circumstances, there is a causal connection between the challenged voting practice and a prohibited discriminatory result. *See* Gonzalez v. Arizona, 677 F.3d 383, 405-06 (9th Cir. 2012) (totality of circumstances standard used to determine whether unequal access interacts with "past and present reality" to depress political participation); Smith, 109 F.3d at 595-96 (reviewing the district court's findings in light of the totality of circumstances).

In evaluating Tribal Member's claims, the district court took judicial notice that Montana has a long history of official bias and discrimination against Indians. E.R. 9-10. The district court also took judicial notice that Montana's history of government sanctioned discrimination has resulted in current high levels of poverty, unemployment, and other social ills on Montana's Indian reservations, all of which act to depresses Indian political participation. E.R. 10-11. Based on these and other indisputable facts, the district court correctly concluded that Tribal Members have less opportunity to participate in the political process. E.R. 172-174 [Hr. Transcript 360:9-20; 361:24-362:1]. *See also* DktEntry 20 at 45 (Counties conceding that the district court found that Indians "face greater hardships to in-person absentee voting" than others).

In short, the record below establishes past official discrimination, that led to wide-spread poverty, which made it difficult or impossible for Indians to travel

long distance to polling places, which in turn depressed participation in the political process. Based on this "totality of circumstances," the challenged practice (refusal to allow satellite late-registration and in-person absentee voting locations on Reservations), is causally connected to a prohibited discriminatory result (denial of the same late-registration and in-person absentee voting opportunities as are available to non-minorities).

In complete disregard of the totality of circumstances, its own findings, and the controlling law, however, the district court concluded that the Montana Democratic Party's and Indian candidates' success in "recent years" absolutely precludes a § 2 claim. E.R. 10. But the district court applied the wrong legal standard, because VRA § 2(a) is violated if members of a protected class have less "opportunity" than other members of the electorate to participate in the political process and to elect representatives of their choice; which does not require a series of electoral defeats. *See* 42 U.S.C. § 1973(b).

Because there are no cases which make electoral success dispositive of a § 2 vote denial claim, Counties suggest that the district court did not really consider Indian electoral success to be dispositive. Their argument, which is not supported by the record, is that when the district court considered election of "representatives of their choice," it did not necessarily refer to Indian or minority candidates. But the record shows that the district court largely analyzed the success of Indian

candidates at the local level, E.R. 12-14, and that the trial court was clearly considering Senate Factor 7 ("the extent to which members of the minority group have been elected to public office") in its analysis of Tribal Members' ability to elect representatives of their choice. *Compare* E.R. 8-9 *with* E.R. 12-13. By doing so, the district court impermissibly conflated the wording of Senate Factor Seven with the text of 42 U.S.C. § 1973(b), and undoubtedly considered Senate Factor Seven to be mandatory and electoral success to be dispositive. DktEntry 30 at 34, 37 ("The District Court discussed many Indian-preferred candidates, many of which happen to be Indian themselves.").

The Supreme Court has explained the relevance of minority electoral success in the context of a § 2 vote dilution challenge to multimember districts:

> Under a "functional" view of the political process mandated by § 2 . . . the most important Senate Report factors bearing on § 2 challenges to multimember districts are the "extent to which minority group members have been elected to public office in the jurisdiction" and the "extent to which voting in the elections of the state or political subdivision is racially polarized."
>
> . . .
>
> In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress.

Gingles, 478 U.S. at 48 n. 15 (citations omitted).

This, however, is not a multimember district vote dilution case, and consistent with the Supreme Court's "functional view" of the VRA, this Court

cannot conclude that electoral success is of particular relevance to or precludes a § 2 vote denial claim. The political success of Appellee Daniel Sioux, an Indian Rosebud County Commissioner, does not tend to prove or disprove that Appellant Mark Wandering Medicine has been discriminated against on account of his race or color by the Counties' denial of satellite in-person absentee voting and late registration locations. In a vote denial case, as here, minority electoral success is, at best, of limited relevance and is, by no means, dispositive. Gingles, 478 U.S. at 75 ("[P]roof that some minority candidates have been elected does not foreclose a § 2 claim.").

That is why § 2 is written in terms of "opportunity." By definition, if one is afforded a lesser opportunity to participate in the political process, then one is also afforded a lesser opportunity to elect chosen representatives. Lost on the Counties and the district court is that the statute focuses on the "opportunity" to participate and the "opportunity" to elect—not on the actual election result. *See* Chisom v. Roemer, 501 U.S. 380, 397 (1991) ("Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election."). *See also* DktEntry 18 at 24-29.

Surely, Counties would not argue that a state could deny the vote to every second, third, or fourth member of a protected class without violating § 2, as long

as the class being discriminated against had some success in electing preferred candidates. Just as that reading of the statute would produce an absurd and unlawful result, so too is any reading that would preclude challenges to a practice by which Indians have lesser opportunity to participate in in-person absentee voting and late-registration, so long as some Indian-preferred candidates are being elected.

Commenting at the hearing below, the district court quoted from Chisom:

> And the case also says: "As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. The statute identifies two inextricably linked elements of a plaintiff's burden of proof," and they cite to White v. Register.

E.R. 171:9-16. But, having recognized that the opportunity to participate and the opportunity to elect preferred candidates are "inextricably linked," the district court proceeded to treat the concepts separately and give dispositive weight to electoral success.

Chisom holds only that a protected minority group cannot establish a VRA vote dilution violation solely based on a showing that their chosen representatives are not being elected, because the opportunity to "participate" is joined with the opportunity to "elect." Chisom, 501 U.S. at 397 (Section 2(b) refers to "an injury to members of the protected class who have less 'opportunity' than others 'to

participate in the political process *and* to elect representative of their choice.'"). A protected minority group, therefore, must only allege and prove that a standard, practice, or procedure has lessened their opportunity to participate in the political process and their "opportunity" to elect representatives of their choice. Electoral success is but one factor in the analysis.

As applied to the Fort Belknap, Northern Cheyenne, and Crow Indian Reservations, the district court's interpretation of the law will always permit federal, state, and local governments to severely restrict the rights of Indian voters, because Indians will usually get elected in reservation districts. E.R. 10 (district court stating that, "although all three counties previously used at large districts for the election of county commissioners, successful litigation in Windy Boy, Blaine County, and Montana, and Alden has remedied this problem . . . residents of these three reservations have been successful in electing candidates of their choice in recent years"). But Salas v. Southwest Texas Junior College Dist., 964 F.2d 1542, 1549 (5th Cir. 1992), cited by Counties, specifically warns against dismissing § 2 claims in areas where the protected minority represents a registered voter majority. And Tribal Members have found no court, including the Supreme Court in Chisom, that has rejected a § 2 vote denial claim because the protected class had some recent success in electing representatives in a State or political subdivision.

Gingles, as noted above, does not make a minority group's ability to elect representatives of their choice an essential element of a § 2 vote denial claim. 478 U.S. at 64, 73 ("Amended § 2 asks instead 'whether minorities have equal access to the process of electing their representatives.'"). This Circuit, in Gonzalez, recognized as much when it ruled that whether a plaintiff has proved less opportunity to participate in the political process and to elect candidates of their choice is determined by the totality of circumstances. 677 F.3d at 405; DktEntry 30 at 17. There is not, as Counties argue and the district court concluded, DktEntry 30 at 34-35, an independent "second prong" of the analysis that makes lack of electoral success an essential element of the claim. Gonzalez, 677 F.3d at 405. In fact, Gonzales mentions the phrase "to elect representatives of their choice" only one other time in passing, and does so only after the opinion concludes that plaintiffs had failed to establish a § 2 violation under the totality of the circumstances. *See* Id. at 407.

More than 25 years ago, Windy Boy v. Big Horn County specifically held that the success of several Indian candidates in the 1980's was irrelevant in determining a § 2 violation in Montana:

> A key question in this case becomes whether the success of Ruegamer, Belue, and Moccasin in recent elections is sufficient to overcome the findings of racially polarized voting and discrimination against Indians. The court finds it does not. Of the numerous Indians who have run for county or school board positions in Big Horn County since 1924, when Indians were given the right to vote, only

> one has been successful. Ruegamer, not an Indian but clearly the choice of Indian voters, was successful because of a five-way primary and because his only general election opposition was from a write-in candidate. These unique circumstances, which have not repeated themselves, do not demonstrate an ongoing ability of Indians to overcome racially polarized voting and influence the outcome of the elections.

647 F.Supp. 1002, 1019-20 (D. Mont. 1986). Windy Boy remains good law today, even if it is otherwise of only limited relevance because it concerned vote dilution claims in the context of an at-large voting system, and not vote denial as is the case here.

One of the cases Counties cite, Ortiz v. City of Philadelphia Office of City Comm'rs Voter Registration Div., is actually more helpful, because it correctly concluded that determination of a § 2 claim must include an analysis of the totality of circumstances. 28 F.3d 306, 312 (3rd Cir. 1994) (affirming the district court's "extensive findings" concerning the "objective factors delineated in the Senate Judiciary Committee Report"). But neither Ortiz, nor any other case, supports Counties' contrary argument that electoral success is fatal to a § 2 claim.

The closest Counties came to finding a supportive case is Jacob v. Board of Directors of Little Rock School District, No. 4:06-CV-01007, 2006 WL 2792172, at *1 (E.D. Ark. Sept. 28, 2006), but that case is so unique on its facts that it provides no guidance whatsoever. At issue in Jacob was a polling location at the Pulaski County Courthouse, located in Little Rock, Arkansas, a medium-sized city

that serves as the state capitol. Although 64% of the 133,858 African Americans in Pulaski County lived within the Little Rock city limits, and in close proximity to the County Courthouse, they asked the court to order additional early voting locations.[3] Because the Courthouse was easily accessible by the protected class, however, the district ruled that additional early voting locations in Pulaski County were unnecessary to provide equal opportunities to participate. Here, in contrast, Ft. Belknap is 96% Indian, and is a 43 mile round trip to the county seat. E.R. 249. Crow Agency is 96% Indian and is a 27.2 mile round trip to the county seat. E.R. 249. And Lame Deer is 93.7% Indian and a 119.2 mile round trip to the county seat. E.R. 249.

Gustafson v. Illinois State Bd. Elections also fails to support Counties' position, both because it does not touch on the merits of the appropriate legal standard for a § 2 vote denial claim; and because the Gustafson plaintiffs failed to produce any evidence that the law had a discriminatory effect on a distinct group of people. *See* No. 06 C 1159, 2007 WL 2892667, at *1 (N.D. Ill. Sept. 30, 2007). Here, in contrast, Mont. Code Ann. § 13-13-222, as applied, functionally interacts with social and historical forms of discrimination to deny Indian voters equal access to participate in the political process.

[3] This analysis was determined by comparing the 2010 Census data of Pulaski County and Little Rock, AK.

Gustafson does, however, once again affirm that an electoral franchise, once granted, must be applied fairly and equally.

> To the extent that [Mont. Code Ann. §13-13-222] gave [Montana] voters new rights under the law, once given, these rights were subject to the principle that "the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter."

Gustafson, 2007 WL 2892667, at *5 (citing Bush v. Gore, 531 U.S. 98, 104 (2000)).

Because there is no precedent for their proffered reading of § 2, Counties predictably argue that granting relief to Tribal Members in this case will open the floodgates to an endless series of previously unrecognized claims. Citing to Brown v. Detzner, 895 F. Supp. 2d 1236 (M.D. Fla. 2012), for example, Counties express their fear that Tribal Members will next compare their situations to residents of other states, and then demand equality. The Detzner court, however, did not address an interstate comparison claim, instead stating that "the Court must consider whether the State of Florida, having decided to allow early voting, has adopted early voting procedures that provide equal access to the polls for all voters in Florida." Id. at 1254-55. Furthermore, and unlike Counties predict, Tribal Members have never alleged that they deserve the same voting rights as voters in other states; only the same rights offered to other Montana citizens, and in

particular those who are in similar localities, including Rosebud, Big Horn, and Blaine Counties.

Counties similarly sound Jacksonville Coalition for Voter Protection v. Hood as the warning bell against expanding the voting franchise to include in-person absentee voting because, despite having four satellite offices in African-American majority communities, the Jacksonville plaintiffs brought suit asking that four more satellite offices be established in outlying areas of the county. *See* 351 F. Supp. 2d 1326 (M.D. Fla. 2004). The Jacksonville court denied the request, however, noting that the minority plaintiffs were actually requesting additional polling places in non-minority areas of the county. Id. at 1337 ("[N]ot opening [the requested additional sites] does not result in African-American voters being denied 'meaningful access to the political process' . . . [because] African-American registered voters . . . live closer to the city-core and, therefore, closer to all existing early voting sites."). Neither the facts nor holding of that case have any relevance to this one.

Nor are Tribal Members asking this Court to issue a sweeping proclamation that all unequal voting practices be declared illegal. Instead, Tribal Members ask only that this Court interpret the law, and mandate that the district court consider and appropriately weigh the most relevant factors to a vote denial claim concerning Indians on a reservation, including the history of official discrimination, the extent

of racial polarization in voting, the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination, and the lesser opportunities afforded to Tribal Members to participate in the political process and elect representatives of their choice. Tribal Members' claims extend no further, and if application of the proper test "opens the floodgates," it is only because discrimination and the resulting poverty have so removed the Indian community from the political process in Montana that special efforts to address the discrimination must be taken. In consideration of the VRA's remedial purpose, recognition of valid claims should be welcomed, not feared.

Counties finally, and also quite predictably, argue that refusal to open satellite late-registration and in-person absentee offices results in no harm and does not give rise to a § 2 claim because no voter has a fundamental right to vote early or by absentee. DktEntry 30 at 48. But the case on which Counties rely, McDonald v. Board of Election Comm'rs of Chicago, is not relevant—it was an equal protection suit against the State brought by prison inmates who were unable to vote at their precinct on Election Day, and were not included within the group allowed by statute to vote absentee. *See* 394 U.S. 802 (1969). The court denied

the equal protection claim because convicts are not a protected class, and did not reach the merits of the § 2 claim.[4] Id. This, of course, is not an "inmate" case.

McDonald does, however, stand for the proposition that, "[o]nce the States grant the franchise, they must not do so in a discriminatory manner." Id. at 801. That, of course, is a fundamental principle of the VRA, and Tribal Members, as members of a protected minority under 42 U.S.C. § 1973, are entitled to the same opportunity to participate in in-person absentee voting and late-registration that is being offered to other members of the electorate.

CONCLUSION

For all of the foregoing reasons, and because the district court erred its interpretation of § 2 and applied the wrong legal standard to the undisputed facts, this Court should reverse the district court's order denying their motion for preliminary injunction, find that Appellants are likely to succeed on the merits, pronounce the correct legal standard of review applicable to § 2 vote denial claims, and remand for further proceedings.

STEVEN D. SANDVEN LAW OFFICE PC

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[4] Similarly, working mothers are not a protected class. *See* Griffin v. Roupas, 385 F.3d 1128 (7th Cir. 2004). The harms cited by Counties, such as voting fraud, discussed in Griffin v. Roupas, are caused solely by absentee vote by mail. Id. at 1130-31.

/s/ Steven D. Sandven
Steven D. Sandven
STEVEN D. SANDVEN LAW OFFICE PC
3600 South Westport Avenue, Suite 200
Sioux Falls SD 57106
(605) 332-4408
ssandvenlaw@aol.com

AND

David Bradley Olsen
Henson & Efron, P.A.
220 South Sixth Street, Ste. 1800
Minneapolis, MN 55402
(612) 339-2500
dbo@hensonefron.com

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I, Steven D. Sandven, hereby certify that on the 29th day of April 2013, I electronically filed the foregoing APPELLANTS' REPLY BRIEF with the Clerk of Courts for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

Jorge A. Quintana
Chief Legal Counsel, MT SOS
PO Box 202801
Helena, MT 59620
jquintana@mt.gov

Sara Frankenstein
Gunderson, Palmer, Nelson & Asmore, LLP
PO Box 8045
Rapid City, SD 57701
sfrankenstein@gpnalaw.com

Rebecca L. Mann

Gunderson, Palmer, Nelson Asmore, LLP
PO Box 8045
Rapid City, SD 57701
rmann@gpnalaw.com

Michael B. Hayworth
Office of the Rosebud County Attorney
PO Box 69
Forsyth, MT 59327
mhayworth@rosebudcountymt.com

Donald A. Ranstrom
Office of the Blaine County Attorney
PO Box 1567
Chinook, MT 59523
dranstrom@co.blaine.mt.gov

Lance A. Pedersen
Office of the Big Horn County Attorney
PO Box 908
Hardin, MT 59304
lpedersen@co.bighorn.mt.us

Georgette Hogan Boggio
Big Horn County
PO Box 908
Hardin, MT 59304
ghogan@co.bighorn.mt.us

I, further, certify that all participants in the case are registered appellate CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

STEVEN D. SANDVEN LAW OFFICE PC

/s/ Steven D. Sandven
Steven D. Sandven
STEVEN D. SANDVEN LAW OFFICE PC
3600 South Westport Avenue, Suite 200
Sioux Falls SD 57106

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,456 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 Version 12.3.4 and size 14 font, Times New Roman.

Respectfully submitted this 29th day of April, 2013.

By:
/s/ Steven D. Sandven
Steven D. Sandven
STEVEN D. SANDVEN LAW OFFICE PC
3600 South Westport Avenue, Suite 200
Sioux Falls SD 57106
Attorney for Appellants