UNITED STATES DISTRICT COURT
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.,

Plaintiff(s),

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, JOE FALKENBUERG, ANNE CASSENS, MICHAEL P. ORTNER, DEB RUSSELL, AND JOE ALLEN IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE COUNTY BOARD OF COMMISSIONS FOR FALL RIVER COUNTY, SOUTH DAKOTA, BRYAN J. KEHN, DELORIS HAGMAN, EUGENIO B. WHITE HAWK, WENDELL YELLOW BULL, AND LYLA HUTCHINSON 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,

Defendant(s).

Case No.: 12-5003

MEMORANDUM IN SUPPORT OF ALL DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Plaintiffs use the term "early voting" to mean in-person absentee voting, although the political science literature and experts refer to the same as "convenience voting." (SMF ¶¶ 45-46.). Neither term is used in South Dakota law. Rather, "absentee voting" is allowed, both in-person and by mail. S.D.C.L. § 12-19. Chapter 12-19 allows a registered voter to cast an absentee ballot (S.D.C.L. § 12-19-1), request an absentee ballot by mail (§ 12-19-2), and apply for an absentee ballot in-person from the person in charge of the election during regular office hours up to 3:00 p.m. on the day of the election (§ 12-19-2.1). *As of 2012*, absentee voting begins no later than 46 days prior to the election. S.D.C.L. § 12-16-1. The requirement that "[a]bsentee voting shall begin no earlier and no later than forty-six days prior to the election" *was not added until 2011* by Session Law 2011, ch 79, § 1, which became effective for the 2012 election cycle.

While now, as of 2012, state statute requires absentee voting for period to begin 46 days prior to an election, S.D.C.L. § 12-16-1 does not mandate that it be done "in-person" nor does it require such voting to occur within county borders. No law requires in-person absentee voting at a satellite office or in more than one location in a county. All decisions regarding where in-person absentee voting may occur are left to the discretion of each respective county commission.

Importantly, state law does not require a satellite office within Shannon County. S.D.C.L. § 12-19-53. Plaintiffs have not alleged that any South Dakota statute has been violated, nor can they. Shannon County residents have always been able to begin absentee voting 46 days prior to the election since that statute was enacted in all methods allowed and required under South Dakota statute. Shannon County residents have always been able to cast in-person absentee ballots at their designated polling place - the Fall River County Courthouse. Furthermore, and in

excess of what is required, Defendants have often previously provided an additional in-person absentee voting at a location in Shannon County. Significantly, Shannon County offered a satellite office in Shannon County for the full statutory time period, due to additional HAVA funding received from the Secretary of State, for both the 2012 primary and general elections. Shannon County has also passed a resolution providing for the full statutory period of in-person absentee voting within Shannon County through January 1, 2019. See Defendants' Motion to Dismiss on Mootness Grounds, Doc. 77. Defendants by this reference incorporate herein the entirety of Doc. 78, and the Court should find this case moot.

Any county, if faced with significant funding shortages, could curtail its in-person absentee voting locations or hours as long as it offers the minimum required in S.D.C.L. § 12-19-2.1. Such decisions are within the discretion of the county commission, based upon funding issues or other concerns. Local governments are routinely asked to prioritize services it may provide for its citizens based on funding constraints.

Shannon County faces the direst of funding issues of any county in the state and perhaps in the country. Of the ten poorest counties in South Dakota, Shannon County ranks dead last as far as taxable income provided via property taxes. (SMF ¶ 3.) Local governmental officials have the unwelcome but necessary duties of prioritizing which county services can be funded and which services will be decreased or eliminated.

In order to provide a regular election budget for 2012, the Shannon County Commission had to make severe sacrifices. The Shannon County Commission had to completely eliminate any county funding whatsoever for county services in the following departments: Judicial System, Court-Appointed Attorney, County Jail, Juvenile Care, Support of Poor, Weed Control, and Conservation of Natural Resources. Each Shannon County Commissioner has also agreed to receive no payment for serving as a commissioner. (SMF ¶ 6.)

Defendants have given Plaintiffs what they sued to obtain, for both 2012 elections and future elections. Therefore, it is difficult to determine what exactly Plaintiffs currently seek through this litigation. Plaintiffs made no assertion or arguments in their mootness briefing, filed Doc. 81, and thus have waived any argument that they are still entitled to declaratory judgment. Apparently, Plaintiffs press on to have a permanent injunction granted for exactly what they have already obtained, based upon Shannon County's past conduct. Accordingly, it is important for the Court to rule on Defendants' Motion to Dismiss on Mootness Grounds before taking up this motion.

It is important for the Court to note the timeline of when Help America Vote Act (HAVA) funds became available to pay for a satellite office in Shannon County. Prior to May 25, 2008, *no* absentee voting expenses were covered by HAVA money, and Shannon County had to bear all such expenses. (SMF ¶¶ 5 & 14.) After May 25, 2008, only some expenses incurred by Shannon County were reimbursable under the HAVA plan crafted by the Secretary of State. (SMF ¶ 16.) Regular staff's normal eight-hour work day and associated payroll expenses were deemed not reimbursable under HAVA until March of 2012. (SMF ¶¶ 16 & 18.)

Shannon County's population is 95% Native American. (SMF ¶ 48.) It is undisputed that Shannon County voters consistently elect representatives of their choice. (SMF ¶ 49.) One set of such representatives is the Shannon County Commission. *See* S.D.C.L. § 7-7-1.1 An elected body the County Commission acts on behalf of Shannon County residents. In so acting, the Commission is charged with the responsibility to maintain the fiscal stability of the County and the designation of polling places. S.D.C.L. §§ 7-8-20; 12-14-1. In balancing these interests, the Shannon County Commission previously designated the Fall River County Courthouse, along with other sites, as the location for in-person absentee voting. By the nature of a representative

form of government, this decision was made by the Native American residents of Shannon County.

No other county is required to have two in-person polling places for absentee voting. By forcing Shannon County to provide services above and beyond what is required by South Dakota law, a finding in Plaintiffs' favor would impose an unequal burden on the Native American residents of Shannon County. It seems incongruous that the Voting Rights Act ("VRA"), a law enacted to protect minority voters, would be used by 25 individuals to thwart the will of an entire county of minority voters by reversing the fiscally responsible and entirely legal choices made by their elected representatives thereby subjecting them to a loss of services or higher taxes.

II. STANDARD

Plaintiffs seek no monetary damages. Plaintiffs only seek a permanent injunction and have since waived any request to a declaratory judgment. In fact, this Court found in its September 27, 2012 Order that "Plaintiffs' request, therefore, is not to fix a past wrong, but is a request that all defendants, including Gant, provide in-county, in-person, early voting for every election cycle in the future and for the full statutorily set time period". (Doc. 95.)

"Although a case may not be moot, a plaintiff still has the burden of showing that equitable relief is necessary, and the mere possibility of future injury is insufficient to enjoin official conduct." Olagues v. Russoniello, 770 F.2d 791, 799 (9th Cir.1985)(*citing* U.S. v. W.T. Grant Co., 345 U.S. 629, 633 (1953)). "[t]he Supreme Court's admonition that any injunction regarding government functions is generally only permitted in 'extraordinary circumstances,' as officials should be given the 'widest latitude' possible while performing their official duties." Olagues, 770 F.2d at 799 (internal quotations and citations omitted).

When determining whether to grant or deny a request for a permanent injunction, Plaintiffs must satisfy the four factors required in Monsanto Co. v. Geertson Seed Farms, 130 S.Ct. 2743, 2756 (2010). Those factors are as follows:

1. Plaintiffs have suffered an irreparable injury;

2. that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

3. that, considering the balance of hardships between the plaintiffs and defendants, a remedy in equity is warranted; and

4. that the public interest would not be disserved by a permanent injunction.

"An injunction should issue only if the traditional four-factor test is satisfied." Monsanto, 130 S.Ct. at 2757.

As Wright and Miller have noted:

> Since an injunction is regarded as an extraordinary remedy, it is not granted routinely; [footnote omitted] indeed, the court usually will refuse to exercise its equity jurisdiction unless the right to relief is clear... [H]istorically, and even today, the main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy.

Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d § 2942 (1995).

"Litigants with garden-variety election challenges such as ballot counting or election administration have been redirected from federal court to the state tribunals. In so doing, the court has recognized that the Constitution leaves to the states broad power to regulate the conduct of federal and state elections." Montgomery v. Leflore County Republican Executive Committee, 776 F.Supp. 1142, 1146 (N.D.Miss. 1991)(*citing* Duncan v. Poythress, 657 F.2d 691, 702 (5th Cir.1981)); Hubbard v. Ammerman, 465 F.2d 1169 (5th Cir.1972)(federal courts should "not intervene in state election contests for the purpose of deciding issues of state law"), cert. denied, 410 U.S. 910 (1973); Powell v. Power, 436 F.2d 84, 86 (2d Cir.1970)("federal

courts are neither equipped, nor empowered, to rectify every alleged election irregularity"). In Duncan v. Poythress, 657 F.2d 691, the Fifth Circuit held that administration of elections is generally a matter of state concern, and that more than an ordinary dispute over the counting and marking of ballots is required for federal intervention to be appropriate. *See* Griffin v. Burns, 570 F.2d 1065, 1078 (1st Cir. 1978), Powell v. Power, 436 F.2d 84 (2d Cir. 1970). While many of these decision deal with § 5 of the VRA, the analysis and conclusion of the courts is instructive to this case. With this legal background, it is all the more important to hold Plaintiffs to the standards of Monsanto.

III. ARGUMENT & AUTHORITIES

1. Plaintiffs' Have Failed to Establish Standing Required for Article III Jurisdiction

Plaintiffs have failed to prove Article III standing. Without such a showing, the Court does not have jurisdiction to consider this matter. The Complaint was brought on behalf of 25 named plaintiffs. (Doc. 1). Despite naming numerous Plaintiffs, only five Plaintiffs submitted affidavits and only *two* of those affidavits were filed in support of the Motion for Summary Judgment.[1] Each Plaintiff must individually demonstrate standing. U.S. v. Hays, 515 U.S. 737, 743-44 (1995). A review of the record, including the affidavits submitted by Plaintiffs, illustrates that Plaintiffs have failed to prove standing, at the summary judgment stage, necessary to enable the Court to maintain jurisdiction[2]. Constitution Party v. Nelson, 639 F.3d 417, 420-22 (8th Cir. 2011).

Standing "is perhaps the most important of the jurisdictional doctrines." Hays, 515 U.S. at 742. The United States Supreme Court has clearly indicated "the irreducible constitutional minimum of standing" which contains three elements. Id. First, the Plaintiff must have suffered

[1] Monette Two Eagle, Clarice Mesteth, Edmond Mesteth, Stacy Two Lance and Dawn Black Bull submitted affidavits. (Docs. 49-13, 49-14, 49-15, 49-16, 47-17 respectively). Of those, Dawn Black Bull and Clarice Mesteth also submitted affidavits in support of summary judgment. (Docs. 93-9 and 93-10 respectively).

[2] Plaintiffs' Statement of Material Facts likewise fails to present facts showing injury-in-fact to the individually named Plaintiffs. *See generally* Doc. 91-2.

an "injury in fact" which is defined as an invasion of a legally-protected interest that is a) concrete and particularized; and b) actual or imminent, not conjectural or hypothetical. Id. at 743. Second, there must be a causal connection between the injury and the conduct complained of. Id. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id. The U.S. Supreme Court has characterized these principles by repeatedly refusing "to recognize a generalized grievance against allegedly illegal government conduct as sufficient for standing to invoke the federal judicial power." Id. The burden is upon the party seeking the exercise of jurisdiction in his favor, to clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. Id.

"The rule against generalized grievances applies with as much force in the equal protection context as in any other." Id. In Allen v. Wright, the U.S. Supreme Court made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury "accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct." 468 U.S. 737, 755 (1984)(*accord* Hays, 515 U.S. at 743-44). "Only those citizens able to allege injury as a direct result of having *personally* been denied equal treatment may bring such a challenge, and citizens who do so carry the burden of proving their standing, as well as their case on the merits." Hays 515 U.S. at 746 (*citing* Allen, 468 U.S. at 755).

The Supreme Court has used juror selection as an example, *citing* Powers v. Ohio, 499 U.S. 400 (1991). Powers held that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race." But of course, where an individual juror is excluded from the jury because of race, that juror has *personally* suffered the race-based harm recognized in Powers, and it is the fact of *personal* injury that is required. Hays, 515 U.S. at 746-47.

"Federal courts, bound by Article III, are 'not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution.'" Dillard v. Chilton Co. Commission, 495 F.3d 1324, 1331 (11th Cir. 2007)(*citing* Hein v. Freedom From Religion Found, Inc., 551 U.S. 587, 598 (2007)). "[A] plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." Id. at 642-43 (*quoting* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). As in Lance v. Coffman, "[t]he only injury . . . allege[d] is that the law . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." 549 U.S. 437, 442 (2007)(per curium).

For Plaintiffs to demonstrate standing under their VRA claims, they must demonstrate that they:

(1) ha[ve] personally suffered or will suffer some distinct injury-in-fact as a result of defendant's conduct;
(2) the injury can be traced with some degree of causal certainty to defendant's conduct;
(3) the injury is likely to be redressed by the requested relief;
(4) the plaintiff[s] must assert his own legal rights and interest, not those of a third party;
(5) the injury must consist of more than a generalized grievance that is shared by many; and
(6) the plaintiff's complaint must fall within the zone of interests to be regulated or protected by the rule of law in question.

Newman v. Voinovich, 789 F.Supp. 1410, 1415 (S.D. Ohio 1992)(*citing* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471-77 (1982)). "Moreover, when ... the plaintiff is seeking injunctive relief he must establish that he personally faces a realistic, immediate, and non-speculative threat of being prospectively subjected to or harmed by the particular conduct at issue." Newman, 789 F.Supp. at 1415.

The proof necessary to show Article III standing increases with each successive stage of litigation. Constitution Party, 639 F.3d at 420-22. In describing the obligation to prove Article III standing at the summary judgment stage, the Court in Lujan stated:

> Since these are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof *i.e.*, with the manner and degree of evidence required at the successive states of the litigation.

Lujan, 504 U.S. at 561. To prove standing, at the summary judgment stage, the plaintiff cannot rest on mere allegations but must set forth specific facts which for the purposes of summary judgment are taken as true. Id. In cases such as this, where the non-moving party bears the burden of proof, the non-moving party may not rely on "mere pleadings" but must "by affidavits or other as otherwise provided in [Fed.R.Civ.P. 56] – set out specific facts showing a genuine issue for trial." Celotex Corporation v. Catrett, 477 U.S. 317, 324 (1986); Fed.R.Civ.P. 56. "If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed.R.Civ.P. 56.

As provided above, Plaintiffs may not assert the legal rights of a third party. Here, twenty of the twenty-five Plaintiffs provide no evidence whatsoever that they personally suffered or will suffer some distinct injury-in-fact, that the injury can be traced with some degree of causal certainty to defendant's conduct or that the injury is likely to be redressed by the requested relief. Rather, read in light most favorable to Plaintiffs, the record provides a "generalized grievance" that is shared by many. As to twenty Plaintiffs, this alone establishes their failure to maintain Article III standing. Allen, 468 U.S. at 755.

Although having submitted affidavits, the remaining five Plaintiffs likewise fail to establish Article III standing. The affidavit of Monette Two Eagle makes no mention of absentee voting or voting at Hot Springs at all. (Doc. 49-13). In their opening affidavits, Clarice Mesteth, Stacy Two Lance, and Dawn Black Bull state generally that they cannot travel to Hot Springs

during a normal work day and that such travel would be an additional expense, but they fail to indicate that they were unable to vote on the days of in-person absentee voting provided by Shannon County in Shannon County, by mail or on Election Day. (Docs. 49-14, 49-16 and 49-17). Edmond Mesteth also raises only a general grievance in stating, "I spend my income on providing for my family and should not have to incur travel costs to and from Hot Springs and the wear and tear on my vehicle." (Doc. 49-15). These assertions do not prove, or even allege, that any Plaintiff was dissuaded from or unable to cast a ballot for a candidate of his or her choice in any particular election.

In support of Plaintiffs' Motion for Summary Judgment, Clarice Mesteth and Dawn Black Bull submit additional affidavits. (Docs. 93-9, 93-10). Clarice Mesteth and Dawn Black Bull both generally state a general distrust of Fall River County officials, a belief that their votes will not be counted if mailed in, and thus a preference for voting in-person. Id. No affiant has introduced evidence to show that any votes cast in a manner other than in-person absentee voting were uncounted. Mere suspicions regarding deficiencies in alternative methods of voting do not constitute evidence for the proposition that votes for candidates of their choice have not, in the past, or will not, in the future, be counted. Bishop v. Bartlett, 575 F.3d 419, 425 (4th Cir. 2009)(allegations based on speculation will not withstand a standing challenge).

Additionally, both Clarice Mesteth and Dawn Black Bull express their opinion that it would be "easier" to vote if in-person "early voting" were offered in Shannon County for 46 days. (Doc. 93-9 at ¶ 10; Doc. 93-10 at ¶ 14). While one could think of myriad ways in order to make voting "easier", Plaintiffs have not provided any evidence that they were unable in the past, or will be unable in the future, to participate in the electoral process and cast ballots for the candidates of their choice. In fact, neither Clarice Mesteth nor Dawn Black Bull ever utilized in-person absentee voting at a location in Shannon County when offered. (SMF ¶ 50). Instead,

they consistently choose to cast their votes on Election Day itself in Shannon County. Id. Ultimately, no Plaintiff has demonstrated injury-in-fact or a causal connection between that injury and a policy or practice implemented by Defendants.

Plaintiffs' failure to show injury-in-fact is punctuated by their allegation that Defendants violated S.D.C.L. § 12-16-1 by failing to provide 46 days of in-person absentee balloting in Shannon County. S.D.C.L. § 12-16-1 provides in part, "[a]bsentee voting shall begin no earlier and no later than forty-six days prior to the election." (Doc. 1 ¶ 50). Plaintiffs point to past elections to illustrate Defendants were in violation of S.D.C.L. § 12-16-1 by not providing additional polling places for in-person absentee voting within Shannon County. (Doc. 91 at ¶ 18). S.D.C.L. § 12-16-1 does not, however, require in-person absentee voting nor does it require such voting to occur within any county's borders. Moreover, *S.D.C.L. § 12-16-1 did not include the quoted language* requiring 46 days of absentee voting *until 2011* when added by Session Law 2011, ch 79, § 1. As such, the quoted language cannot be used to establish any violation in past election cycles. *This year of 2012 is the first election cycle where this language is applicable.* Defendants provided in-county, in-person absentee voting for the full statutory period in 2012. Plaintiffs' have been provided all and more than what is required by S.D.C.L. § 12-16-1. Any assertion that Defendants will violate S.D.C.L. § 12-6-1 in future elections is at best conjectural and hypothetical.

Plaintiffs cannot show injury-in-fact that is traced to Defendants' conduct. A review of the affidavits submitted by the five Plaintiffs shows no more than a generalized grievance with no indication that they suffered an "injury-in-fact" that is concrete and particularized and actual and imminent, not conjectural or hypothetical. Hays, 515 U.S. at 743. As described above, Plaintiffs did not provide the Court with any factual assertions in the form of affidavits or stipulated facts necessary to meet the burden of proving Article III standing at the summary

judgment stage. Constitution Party, 639 F.3d at 420-22. Because none of the Plaintiffs can prove injury-in-fact, they cannot prove a causal relationship between the injury and the challenged conduct or that the injury likely will be redressed by a favorable decision as required by Pucket v. Hot Springs School District No. 23-2, 526 F.3d 1151, 1157 (8th Cir. 2008). In addition, Plaintiffs must prove that they have suffered an irreparable injury before the Court may grant a permanent injunction. Monsanto Co., 130 S.Ct. at 2756. Without such a showing, Plaintiffs claims must be dismissed.

2. Plaintiffs have not met the factors required for a permanent injunction.

A. Plaintiffs have not suffered an irreparable injury.

i. 14th Amendment Equal Protection Claim

"While it is axiomatic that voting is a fundamental right, it is also well established that the state may provide structure to and limitations on the voting process which may impose burdens on voters." NAACP v. Cortes, 591 F.Supp.2d 757, 764 (E.D. Penn. 2008)(*citing* Anderson v. Celebrezze, 460 U.S. 780 (1983)). As the Supreme Court explained in Anderson:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus paper test" that will separate valid from invalid restrictions .... [A Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications with burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden plaintiff's rights. Only after weighing all these factors is the reviewing court in any position to decide whether the challenged provision is unconstitutional.

460 U.S. at 789.

> Not every burden that a State's election system places on ballot access, voting, and association is unconstitutional. The relevant standard ... involves a balancing test between the severity of the burden and the importance of the State's interest:
>
> [The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff

> seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests may give necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Spencer v. Blackwell, 347 F. Supp. 2d 528, 534 (S.D. Ohio 2004)(*citing* Anderson, 460 U.S. at 780)). "If an election regulation imposes a 'severe' burden, the State regulation must be narrowly drawn to serve a compelling state interest … If the regulation imposes a lesser burden, however, the State regulation must be justified only by important state regulatory interest." Id.

In order to prove an equal protection claim, plaintiffs must allege and prove that a state actor intentionally deprived them of a constitutional right. Ramratan v. New York City Board of Elections, 2006 WL 2583742 (E.D.N.Y. 2006)(*citing* Shannon v. Jacobowitz, 394 F.3d 90, 95-96 (2d Cir.2005)). Federal courts must allow state courts to determine state election law absent a showing that state actors "intentionally acted to deprive plaintiffs of their constitutional rights." Ramratan 2006 WL 2583742 at * 4. A plaintiff's Fourteenth Amendment claim must be dismissed if Plaintiffs do not prove intended discrimination on the basis of race. Welch v. McKenzie, 765 F.2d 1311, 1315 (5th Cir.1985).

"As in any suit under § 1983 the first inquiry is whether the plaintiff has been deprived of a right secured by the Constitution and laws." Hutchinson v. Miller, 797 F.2d 1279, 1282 (4th Cir. 1986)(*citing* Baker v. McCollan, 443 U.S. 137, 140 (1979)).

> The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. ... But a discriminatory purpose is not presumed … there must be a showing of clear and intentional discrimination. …

Snowden v. Hughes, 321 U.S. 1, 8 (1944)(internal quotation and citations omitted).

> Mere violation of a state statute does not infringe the federal Constitution ... [because] [a] construction of the Equal Protection Clause which would find a violation of federal right in every departure by state officers from state law is not to be favored.

Id. at 11-12 (internal citation omitted). *See also* Lunde v. Oldi, 808 F.2d 219, 220-21 (2d Cir. 1986)(negligent actions of election officials which deprived plaintiff of his right to vote did not violate plaintiff's rights to equal protection and his complaint pursuant to U.S.C. § 1983 was properly dismissed). Plaintiffs showing of discrimination must be "clear and intentional." Id. "Plaintiffs must demonstrate more than a misunderstanding or a misapplication of the law on the part of the defendants, and mere speculation regarding defendants' alleged discriminatory intent will not suffice." Dill v. Lake Pleasant Central School Dist., 2004 WL 2381528, * 4 (N.D.N.Y. 2004).

The Eighth Circuit has held that Plaintiffs must plead discrimination because of race in order to make out a VRA or § 1983 claim. Pettengill v. Putnam County R-1 School District, 472 F.2d 121, 122 (8th Cir. 1973). The Eighth Circuit explicitly adopted the rationale in Powell v. Power, 436 F.2d 84 (2d Cir. 1970), finding "no Constitutional basis" for overseeing "the administrative details of a local election" unless the denial of voting was for reasons of race. Pettengill, 472 F.2d at 122. The Powell court held that 42 U.S.C. § 1983 requires a plaintiff to allege racial discrimination, or in other words, purposeful or intentional discrimination. Pettengill, 472 F.2d at 86.

Plaintiffs fail to provide any proof that the Shannon County Commissioners, in determining the number of in-person absentee voting days at a satellite office they could afford, purposefully discriminate against people of their own race. It is undisputed that Shannon County Commissioners have been majority Native American at all times relevant to this case, and Shannon County voters, 96% of which are Native American, easily elect their candidates of choice in county commission races. There simply is no evidence that Native American

commissioners, elected by a 95% Native American majority, chose the number of in-person absentee voting satellite office days in an effort to purposefully discriminate against their own people. All evidence indicates that these decisions were make due to severe funding shortages. The Court must dismiss the 14th Amendment claim, and the state constitutional claim for the same reasons.

ii. The VRA

In any Section 2 case, the burden is on the plaintiff to prove that the challenged situation constituted a cognizable claim under § 2 of the VRA, and based on the "totality of the circumstances," the challenged practice has resulted in members of a protected class having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." United States v. Jones, 57 F.3d 1020, 1023 (11th Cir. 1995)(*quoting* § 2, and *citing* Thornburg v. Gingles, 478 U.S. 30, 9-80 (1986)). The inquiry into the "totality of circumstances" is often guided by a number of factors set forth in the Senate Report accompanying the 1982 amendment. *See* League of United Latin American Citizens, Council No. 4434 v. Clements, 986 F.2d 728, 844-45 (5th Cir. 1993). The Senate Factors are not always used in episodic cases, however.

Section 2 cases, which have involved "entrenched electoral practices" such as at-large elections or existing district voting plans, utilize the Senate Factors. United States v. Brown, 494 F.Supp.2d 440 (S.D. Miss. 2007). This case, however, involves episodic, or "one of a kind" practices. The Senate Report notes that "[i]f the challenged practice relates to a series of events or episodes, the proof sufficient to establish a violation would not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers." S.Rep. No. 97-417, at 207. Taking their cue from this comment, most of the relatively few courts that have addressed alleged episodic violations of § 2 generally have not applied the Senate Factors.

United States v. Jones, 846 F.Supp. 955, 964 (S.D.Ala.1994)(*citing* Welch, 765 F.2d 1311, and Brown v. Dean, 555 F.Supp. 502 (D.R.I.1982)). "Whether these factors are considered or not, however, 'the ultimate test would be … whether, in the particular situation, the (episodic) practice operated to deny the minority (plaintiff) an equal opportunity to participate and to elect candidates of their (sic) choice.'" Id. (*quoting* S.Rep. No. 97-417, at 30); Welch, 765 F.2d at 1315.

As described in U.S. v. Brown, it is not proper to apply the Gingles preconditions to a non-districting § 2 VRA case. Id. Nor is it proper to apply the Senate Factors.

> The Court in Thornburg distilled the Senate's factors into three "necessary pre-conditions" for establishing that a multimember district violates § 2: (1) the minority group must be sufficiently large and geographically compact to comprise a majority in a single member district; (2) the minority group must be politically cohesive; and (3) the white majority must vote sufficiently as a group to defeat the minority group's preferred candidate. Thornburg, 478 U.S. at 50-51, 106 S.Ct. at 2766-2767. Although these factors have come to be applied to a variety of claims brought under the VRA, some have suggested that the particular inquiry proposed in Thornburg is more suited to the context of that case – to cases involving challenges to redistricting plans that allegedly dilute the minority vote through, for example, the use of multimember districts – than to cases alleging that the minority's right to vote has been denied by statute or by fraud. *See, e.g.,* Ortiz v. Philadelphia Office of City Comm'rs Voting Registration Div., 824 F.Supp. 541, 523 (E.D.Pa.1993)(*holding* that the Senate factors are more appropriate guideposts of a § 2 violation in the context of a voter purge law than are the Thornburg factors, with the court observing that "[t]his conclusion does not reflect the view that Thornburg is *only* applicable to vote dilution claims; it merely reflects [the court's] view that the Thornburg factors, while probative in the context of vote dilution cases, are peripheral issues bearing little relevance to the plaintiffs' claim presently before the court"); *See also* Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the VRA: A New Strategy*, 103 Yale L.J. 537, 555 (1993)(*noting* that "[c]ourt opinions often do not distinguish between vote denial and vote dilution, and courts have applied vote dilution standards to cases involving vote denial"). In the instant case, I find that the Senate factors are more useful in addressing the allegations at issue, particularly given that the third Thornburg factor – demonstrating the defeat of the minority's preferred candidate by the white majority – is wholly inapplicable to an election in a district that is 90% African American and Latino, and in which a Latino candidate has been elected for over twenty years.

Denis v. New York City Bd. of Elections, 1994 WL 613330, *6, n.6 (S.D.N.Y. 1994). In Denis, the plaintiffs' brought a non-redistricting case under § 2 of the VRA. The court found that the proper test was the "totality of the circumstances" test, which included the familiar Senate Factors. Id. at * 2, *5-6. The court, though citing Gingles, recognized that the preconditions were not at issue in a non-redistricting case, and found the totality of the circumstances factors to be those listed in the Senate Factors. Id.

Defendants have found no non-redistricting § 2 VRA cases that use the Gingles preconditions, due to legal precedent, the Senate legislative history, and sheer common sense. The preconditions on their face address redistricting claims, and play no part in the legal determination of this case. Rather, the Court must use the ultimate test – whether the Plaintiffs have less opportunity (not convenience) to vote *and* are unable to elect their candidate of choice in county elections.

a. Plaintiffs fail to plead a cognizable claim under the VRA

Plaintiffs cannot succeed on the merits of their VRA allegation. The essence of Plaintiffs' claim is the Native American Plaintiffs of Shannon County are treated differently than whites in *other* South Dakota counties. Plaintiffs do not allege that Shannon County Native American plaintiffs are treated differently than Shannon County whites, which is the proper standard of comparison under the VRA. Plaintiffs' proposed comparison cannot serve as a basis for a VRA claim under the law.

An analogous case ruled on nearly the exact issue presently before this Court. In Jacksonville Coalition for Voter Protection v. Hood, 351 F. Supp. 2d 1326, 1335-36 (N.D. Fla. 2004), the plaintiffs sued for more early polling places. The Court found the plaintiffs were not likely to prevail on the merits. A detailed review of this case is instructive. The Jacksonville Coalition court stated as follows:

> Plaintiff's Emergency Motion for Preliminary Injunction argues that "African Americans in Duval County have less opportunity than other members of the state's electorate to vote in the upcoming election.". . . Their claim is based on the fact that Duval County has the largest percentage of African-American registered voters of any major county in the state, and, yet, other similarly sized counties with smaller African-American registered voter percentages have more early voting sites. Based on this, Plaintiffs argue that African-American voters in Duval County are disproportionately affected and, therefore, that the County's implementation of early voting procedures violates Section 2 of the VRA of 1965, 42 U.S.C. § 1973.
>
> Plaintiffs also assert a claim pursuant to Title 42, United States Code, Section 1983 in that Defendants' actions constitute a violation of their rights under the Fourteenth and Fifteenth Amendments of the United States Constitution. Lastly, Plaintiffs claim that Defendant Hood has a duty to ensure that the state's election laws are applied uniformly throughout the state, and that this duty has been violated by Duval County's having fewer early polling sites than similarly-sized counties. Fla. Stat. §97.012.

Id. at 1330.

> A summary of Plaintiffs' argument is necessary at this point. Duval County has the largest percentage of African-American registered voters of Florida's most densely populated counties. Yet, Duval County only has five early polling sites, while similarly-sized counties with smaller percentages of African-American registered voters have more early voting sites…..The Court understands Plaintiffs to argue that because the percentage of African-American registered voters is higher in Duval County than other counties in Florida, any decision to have a smaller number of early voting sites in Duval County regardless of their placement will have a disproportionate impact on African-American registered voters and results in a Section 2 violation.

Id. at 1334. One would be hard pressed to find a more analogous case than Jacksonville on both the facts and law.

In determining Plaintiffs' argument regarding access to early voting locations, the Jacksonville court stated as follows:

> While it may be true that having to drive to an early voting site and having to wait in line may cause people to be inconvenienced, inconvenience does not result in a denial of "meaningful access to the political process." Osburn, 369 F.3d at 1289. Nor does the Court have the authority to order the opening of additional sites based merely on the convenience of voters.

Id. at 1335. The Jacksonville Coalition court addressed the plaintiffs' argument that a § 2 VRA violation exists when some counties with fewer minorities have more early polling places.

> The Court also notes that an acceptance of Plaintiffs' argument that a Section 2 violation occurs merely because some counties have more early polling sites would have far-reaching implications. Consider the fact that many states do not engage in any form of early voting. Following Plaintiffs' theory to its next logical step, it would seem that if a state with a higher percentage of registered African-American voters than Florida did not implement an early voting program a Section 2 violation would occur because African-American voters in that state would have less of an opportunity to vote than voters in Florida. It would also follow that a Section 2 violation could occur in Florida if a state with a lower percentage of African-American voters employed an early voting system, as commented on above, that lasts three weeks instead of the two week system currently used in Florida. This simply cannot be the standard for establishing a Section 2 violation.

Jacksonville Coalition at 1335-36. The court concluded with the following finding:

> While additional early voting sites for all voters, regardless of whom they might vote for, is a laudable goal, such a decision is not one for a federal court to order under the present circumstances. Instead, the power to do so under the Constitution and federal and state election laws under the facts in this case is left to the executive and legislative branches of both governments. Accordingly, because the remedy sought has no correlation to a race-based "meaningful access" case or to a race-based discrimination case, the Motion for Preliminary Injunction . . . is DENIED.

Id. at 1337-38.

The Jacksonville Coalition plaintiffs pursued the same legal theories as Plaintiffs do in this case. The Court should deny a preliminary injunction on the same reasoning and law as relied upon by the Jacksonville Coalition court.

A ruling in Plaintiffs' favor would open the floodgates to voting rights litigation. Any county with a higher minority population than another county, but with fewer early voting locations or hours, would be liable under the VRA. Any county with a higher minority population than another county, but with a farther drive for voters to the county courthouse, would be liable under the VRA. Any city with a higher minority population than another city, but a longer wait to early vote, would liable under the VRA. Any school district with no early

voting location, as opposed to another school district in the state or nation with an early voting location and fewer minorities, would be liable under the VRA. Any state that does not allow early voting, compared to another state that does and has fewer minorities, would be liable under the VRA. A favorable ruling for the Plaintiffs in this case would defy all previous VRA decisions on this issue, and pave the way for every political jurisdiction to be liable due to comparisons with any other political jurisdiction. As the Jacksonville Coalition court determined, Plaintiffs' proposed standard has such far-reaching implications that it "simply cannot be the standard for establishing a Section 2 violation." Id. at 1335-36.

The Southern District of New York held in accord. In Denis v. New York City Board of Elections, 1994 WL 613330 (S.D.N.Y. 1994), a non-redistricting § 2 VRA case, the court found that there was no legal authority to support the plaintiffs' assertion that their political subdivision at issue, a district within New York City, should be compared to other districts for comparison. Id. The plaintiffs in Denis argued that a VRA violation existed whenever voting irregularities occur in a predominately minority district, but not in predominantly white districts – even when the elections at issue are for district representatives. Id. The Denis plaintiffs suggested that the minority's vote was diluted city-wide because the voting irregularities that allegedly occurred only in minority districts had the effect of giving the vote of the average minority voter less weight than the vote of the average white voter in New York. Id. Significantly, the court held as follows:

> If such a claim were cognizable under the VRA, the Act would be converted into a voting fraud statute that could be used to challenge *any* voting irregularities occurring in minority communities. This is not a plausible interpretation of either the language or the purpose of the VRA.

Id. The Denis plaintiffs alleged the precise allegation at issue in this case – that a predominately minority political subdivision (Shannon County/District 68 of New York) provided different voting opportunities than other political subdivisions (other counties in South Dakota/other

districts in New York City). The Denis court found this claim not cognizable under the VRA. Id. at * 7. Interchanging the parties and jurisdiction relevant to this case into the holding from the Denis court, we get the following:

> That is, plaintiffs suggest that the [Native American] vote was diluted [state]-wide because the voting irregularities that allegedly occurred only in [Shannon County] had the effect of giving the vote of the average [Native American] voter less weight than the vote of the average white [South Dakota] voter. If such a claim were cognizable under the VRA, the Act would be converted to a voting fraud statute that could be used to challenge *any* voting irregularities occurring in minority communities. This is not a plausible interpretation of either the language or the purpose of the VRA.

Denis is so analogous that the parties and jurisdiction can be interchanged neatly. The Denis case is precisely on point and directly analogous to this case. As in Jacksonville, the courts uniformly dismiss such claims as not cognizable under the VRA.

In their Complaint, Plaintiffs cite Spirit Lake Tribe v. Benson County, North Dakota, 2010 W.L. 4226614 (D.N.D. 2010). This case indicates that the appropriate scope to determine unequal voter participation is within the county at issue. In Spirit Lake Tribe, the plaintiffs alleged that the closure of seven voting places on Spirit Lake Reservation within Benson County violated the law by not allowing Native Americans equal access to voting places. Plaintiffs sought a preliminary injunction to prevent the county from closing voting places located on the Spirit Lake Reservation and within Benson County. Id. at *2. The Court cited the VRA, which indicates that in order to determine disparate impact, the Court must analyze whether participation is equally open "in the state or political subdivision." Id. (*citing* the VRA, § 1973(b)). The Spirit Lake case was not brought against the state but rather against the political subdivision of Benson County. Therefore, the proper analysis focuses on the totality of the circumstances shown in the political subdivision (Benson County) and whether such circumstances demonstrate that county elections are not equally open to participation by Spirit Lake tribal members as other residents of Benson County. The Court analyzed whether there

were burdens that fell on the voting process on the Spirit Lake Reservation that did not exist elsewhere in Benson County. Id. at 5. The Court did not look at the burdens that fell on the voting process on the Spirit Lake Reservation that did not exist elsewhere in North Dakota. This distinction is significant. The Court held that "[A] system that might be entirely appropriate for the County as a whole, could well create significant burden on voting within the confines of the Spirit Lake Reservation." Id. at 5. The Court found that there was a much greater risk that the Native American population of Benson County would be disenfranchised by the adoption of the voting plan when compared to the dominant population's risk. Id. at 5. Again, the Court did not compare the Native American population's ability to vote as compared to the entire North Dakota population in their respective counties. The Court analyzed minority versus whites' access to polls within Benson County.

The very essence of Plaintiffs' claim, alleging a VRA violation because the Shannon County Native Americans have less opportunity to vote than white South Dakota residents in other counties, does not state a cognizable claim under the VRA. The Court should dismiss the VRA claim.

b. Plaintiffs have not proven a § 2 VRA claim.

Plaintiffs must prove a causal connection between the challenged practice and some harm. A failure to show causation is dispositive. Id. at 407, FN35. In a very recent case, the Ninth Circuit, in Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012), the court dealt with whether a new law requiring documentary proof of citizenship in order to register to vote and requiring registered voters to present proof of identification to cast a ballot violated § 2 of the VRA. Gonzalez is a recent non-redistricting case in which the plaintiffs sought an injunction to prohibit these election law changes. Id. at 388. The decision focused primarily on the election law change to polling places. Id. at 404. The Gonzalez court recognized that the totality of the

circumstances test applies, not the Gingles preconditions. Id. at 405. The court recognized that a § 2 VRA plaintiff can prevail only if "based on the totality of the circumstances, … the challenged voting practice results in discrimination on account of race." Id. (internal citations omitted). "[P]roof of causal connection between the challenged voting practice and a prohibited discriminatory result is crucial." Id. (internal quotations omitted). The court recognized that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the Section 2 'results' inquiry." Id. "Said otherwise, a Section 2 challenge 'based purely on a showing of some relevant statistical disparity between minorities and whites,' without any evidence of the challenged voting qualification causes that disparity, will be rejected." Id.

The Gonzalez plaintiffs alleged that the election law changes requiring proof of citizenship to register and identification to vote unlawfully diluted Latino voters by providing them with less opportunity than other members than the electorate to participate in the political process. Id. at 406. The district court found that the election law changes did not have a statistically significant disparate impact on Latino voters. Id. The district court concluded that the plaintiffs' claim failed because there was no proof of a causal relationship between the election law changes and any alleged discriminatory impact on Latinos. Id. at 406. No expert testified to a causal connection between the election law requirements and the observed difference in voting rates of Latinos, and Gonzalez had failed to explain how the election law change interacted with the social and historical climate of discrimination to impact Latino voting in Arizona. Id. The Gonzalez court recognized that a § 2 analysis requires a "searching practical evaluation of the past and present reality, and that such examination is intensely fact-based and localized." Id. (internal citations and quotations omitted, emphasis added).

The Ninth Circuit Court of Appeals found that the district court did not clearly err in its finding. "To prove a § 2 violation, Gonzalez had to establish that this requirement, as applied to

Latinos, caused a prohibited discriminatory result." Here, Gonzalez alleged that single "Latinos, among other ethnic groups, are less likely to possess the forms of identification required under [the election law changes] to cast a ballot, 'but produced no evidence supporting this allegation.'" Id. at 407. Although the record contained Arizona's general history of discrimination against Latinos and the existence of racially polarized voting, Gonzales provided no evidence that Latinos' ability or inability to obtain or possess I.D. resulted in Latinos having less opportunity to participate in the political process and to elect the representatives of their choice. Id.

As in Gonzales, the Brooks Plaintiffs have produced no evidence of Plaintiffs' own inability to previously access in-person absentee voting within Shannon County resulting in Plaintiffs (or even Shannon County Native Americans in general) having less opportunity to participate in the political process. Plaintiffs allege that Shannon County's past in-person absentee voting arrangements caused low Shannon County voter turnout, but produce no competent, non-speculative evidence supporting the allegation, and the statistical data proves otherwise.

Not a single Plaintiff utilized in-person absentee voting at the satellite office, open the full statutory period within Shannon County, for the June 2012 primary election.[3] (SMF § 42.) Not a single Plaintiff has testified that he/she votes when such in-person absentee voting satellite office is or has been provided, whereas he/she does not vote otherwise. Nor does the evidence of the 25 Plaintiffs' voting behavior demonstrate that they were not able to utilize the satellite office in Shannon County when it has been offered, that they could not vote on Election Day, or that they could not or even have not voted by mail in the past. There is no evidence whatsoever that

[3] In paragraph 100 of the Complaint, Plaintiffs allege that they "desire to vote early at an in-person absentee voting location in Shannon County in the spring 2012 primary election . . . at some point during the 46 day early vote period authorized by South Dakota law." The 25 Plaintiffs sued for this convenience, then not one of them used it.

the Plaintiffs themselves voted more when in-person absentee voting was offered within their county.

The statistical data is as compelling. Shannon County voter turnout in primary elections has an *inverse* relationship to the number of in-person absentee voting satellite days available within Shannon County. (SMF ¶ 29.) In other words, Shannon County voter turnout *decreases* in primary elections when the County offers more in-person absentee voting. Id. The Shannon County voter turnout rate for general elections does not support the contention that satellite office access within the county stimulates voter turnout. (SMF ¶¶ 26-42).

The scholarly literature discussing the research in this area is in accord. Plaintiffs cite to no evidence whatsoever indicating a causal *or even statistical* relationship between in-person absentee voting and increased voter turnout. There is no evidence of a causal or even statistical relationship between in-person absentee voting and increased voter turnout in the nation, state, or county. (SMF ¶¶ 26-42.) There certainly are no such findings suggesting minorities' voter turnout rates increase due to in-person absentee voting.[4] (SMF ¶ 27). These issues are critical to Plaintiffs' case even if their case is cognizable under the VRA, and Plaintiffs have not met their burden.

Every court where a jurisdiction-to-jurisdiction comparison served as a basis for a plaintiff's § 2 VRA claim (rather than a comparison of the minority race versus the majority race in the same jurisdiction), has dismissed the claim as not cognizable under the VRA. If this Court allows Plaintiffs' VRA claim to survive, it must find that Plaintiffs have not proven their § 2 VRA case. If the Court does not dismiss this claim for failing to prove a cognizable claim under

[4] In the ACLU's amicus brief, filed March 5, 2012, the ACLU cited the National Congress of American Indians' effort to increase Native American voter turnout for the increase in turnout in 2004. The First American Education Project, "Native Vote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote in 2004, and the Results Achieved," is cited. This literature discusses the many things that have driven increased Native American voter participation, including economic development, educational improvement, visits from candidates such as Obama and Clinton, etc. Early voting is not cited as driving increased Native American voter turnout.

the VRA, it would be the first Court in the nation to allow such a claim to move forward, and would open the floodgates to allow comparisons of one jurisdiction's voting practices/laws against another's, and those scenarios are endless. In the alternative, if such a case is viable under the VRA, Plaintiffs have not shown any causal connection between the harm they claim they suffered (less access to voting) to the practice they allege as violative (limited in-person absentee voting within Shannon County in previous years), as they have provided no evidence indicating that they are able to or do vote due to in-person absentee access and do not or cannot vote without the same. Without such evidence, Plaintiffs have failed to demonstrate a causal relationship between the past challenged voting practice and any harm.

c. Plaintiffs have not proven that they have less opportunity than white voters in Shannon County to elect representatives of their choice.

Plaintiffs have not demonstrated that the Plaintiffs have not been able to elect candidates of their choice. In order to make out a § 2 VRA claim, the Supreme Court has held that Plaintiffs must prove *both* 1) that the members of the protected class have less opportunity to participate in the political process; *and* 2) the minority class members' inability to elect representatives of their choice. Chisom v. Roemer, 501 U.S. 380, 397 (1991). It is not enough to simply prove the first of the two elements – that the members of the protected class have less opportunity to participate in the political process. Id. "The statute does not create two separate and distinct rights." Id. "It would distort the plain meaning of the sentence [in Section 2 of the VRA] to substitute the word "or" for the word "and" such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." Id. In both White v. Register, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971), "[t]he Court identified the opportunity to participate and the opportunity to elect as inextricably linked." Id. at 397. "For all such claims must allege an abridgement of the opportunity to participate in the political process *and* to elect representatives to one's choice." Id. at 398.

A district court within the Eighth Circuit held in accord with binding U.S. Supreme Court case law in Jacob v. Board of Directors of Little Rock School District, 2006 WL 2792172 (E.D. Ark. 2006). In Jacob, plaintiffs moved for preliminary injunction seeking a court order to establish an early voting site other than at the Polasky County courthouse. Id. at * 1. The Court denied the motion, finding that voters still had the option of early voting at the Polasky County courthouse. Id. As legal cause to support plaintiffs' motion for preliminary injunction, plaintiffs asserted that the denial of an early voting site has a tendency to diminish the ability of minorities to elect school board representatives of their choice. Id. The Jacobs Court found as follows:

> Plaintiffs' arguments regarding a negative impact on persons of color in the ability to elect school board representatives of their choice is seriously eroded by the recent school board election results. The African American candidates fared very well in the recent school board elections..... The evidence refutes Plaintiffs' earlier assertion that Court intervention was necessary or otherwise [the minority voters] will have less chance to elect representatives of their choice. Clearly African American voters were neither disproportionately affected nor disenfranchised by holding early voting only at the Polasky County courthouse. ....In short Plaintiffs have failed to present any evidence or even a colorable theory that would permit this Court's further inquiry by conducting a hearing on the issue of preliminary injunctive relief.

Id. at 2, (internal quotations and citations omitted). The Jacobs court went on to note the following:

> Plaintiffs have largely ignored the linchpin of injunctive relief – irreparable harm. Neither Plaintiffs nor Interveners have clearly stated their theory of irreparable harm. Like their first motion, their apparent theory is that their votes will be diluted due to the lack of additional early voting sites. That contention is disproved, however, by the actual election results and by the racial breakdown of early voters.
> *****
> The reasons asserted by the [Defendant] for not conducting early voting at the "polling place requested by Plaintiffs" appear valid. Certainly the [Defendants] have asserted legitimate nondiscriminatory reasons for its decision and has controverted Plaintiff's assertion that "there is no legitimate reason which can support denying the requested release." Once again, "[t]here is no evidence that the [Defendant] has exercised its lawful discretion in an arbitrary or discriminatory manner." Voters who wish to early vote may do so, either by traveling to the Polasky County courthouse during the early voting period or by absentee ballot. ...

> *****
> The [Defendant] has the right to run its own affairs free from the intrusion of federal courts unless and until it is shown that it is depriving citizens of rights guaranteed by federal law.

Id. at 2-3.

Plaintiffs have not offered proof that Native Americans in Shannon County have less opportunity to vote than white Shannon County residents. Nor have Plaintiffs alleged or offered proof that Native American Shannon County residents have less chance to elect candidates of their choice as compared to white Shannon County voters. Neither have Plaintiffs alleged that they *themselves* could not early vote on the days Shannon County approved for early voting in past elections. Plaintiffs have likewise not alleged that they could not early vote by driving to Hot Springs or by mail in previous elections. And Plaintiffs have not alleged that they could vote on Election Day in the convenience of their own local precincts in previous elections. Without showing an inability to vote without in-person absentee voting within their county, and therefore an inability to elect candidates of their choice, Plaintiffs cannot win on the merits of their claim.

"A vote 'dilution' claim alleges that a particular practice operates 'to cancel out or minimize the voting strength' of a minority group." Hall v. Virginia, 385 F.3d 421, 427 (4th Cir. 2004)(*citing* White v. Register, 412 U.S. 755, 765 (1973)). "In tern, a minority group's 'voting strength' is measured in terms of its' ability to elect candidates to public office." Id. (*citing* Gingles, 478 U.S. at 88).

> Any claim that the voting strength of a minority group has been "diluted" must be measured against some reasonable benchmark of "undiluted" minority voting strength as Justice Frankfurter once observed, "[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.

Id. at 428. Unless minority voters possess the potential to elect representatives *in the absence of the challenged structure or practice*, they cannot claim to have been injured by that structure or practice. Id. (emphasis added)(*citing* Gingles, 478 U.S. at 50, n.17).

Plaintiffs must prove that their ability to elect candidates of their choice was within their grasp, but is denied by the current voting practice. Id. at 430. It is undisputed that Native Americans make up the vast majority of Shannon County and can easily elect their candidates of choice in Shannon County elections, school district elections, city elections, District 27 elections, and any other local elections. Because they cannot establish their burden using any elections that actually occur within the political subdivision at issue – Shannon County -- plaintiffs assert that they cannot elect their candidates of choice in state-wide elections. Yet, Shannon County Native Americans voters could never form anything but a minority of the voters who vote in state-wide elections and therefore Shannon County Native Americans' ability to elect candidates of their own choice in state-wide elections was never within their grasp. Id.

> Section 2 is not violated unless minorities "have less opportunity *than other members of the electorate* to … elect representatives of their choice." … As a result, the question facing the plaintiffs is not whether a black-preferred candidate can be elected in the Fourth District after the 2001 Redistricting Plan. The question is whether black voters have less opportunity, in comparison to other voters of similar strength in the jurisdiction, to form a majority in the Fourth District, and thereby elect a candidate of their choice."

Id., (*citing* Gingles, 478 U.S. at 44).

> …. the 2001 redistricting plan does not change this fact for black voters in the Fourth District; their political fortunes remain tied to the interests of other voters in the district. Because the same is true for all other groups in the Fourth District that are too small to dominate an election with their own votes, the plaintiffs cannot establish that black voters in the Fourth District have less opportunity "than other members of the electorate" to elect candidates of their choice."

Id. at 431.

As in Hall, Plaintiffs have not alleged nor proven that they have less voting opportunity than white residents of Shannon County. Because they lose under the relevant legal standard,

Plaintiffs ask the Court to widen the relevant VRA considerations to state-wide elections. But Shannon County Democrat Native Americans never had the opportunity to win state-wide elections, as it is undisputed that South Dakota is majority Republican and votes as such in state-wide elections (with the exception of Congressional elections). Because Shannon County Native Americans are, and always will be "too small to dominate an election with their own votes" in South Dakota state-wide elections, other than Congressional elections, it is improper to widen the scope to state-wide elections. *See* Id.

B. Because there has been no injury, Plaintiffs cannot show they have no remedies available at law to compensate for an injury.

Plaintiffs' case is moot, they have not proven an injury-in-fact, nor have they pleaded a cognizable VRA claim. It follows that Plaintiffs cannot prove the second requirement either.

C. The balance of hardships between the Plaintiffs and Defendants

Under the VRA, the Supreme Court has instructed that the Court's analysis must engage in a "searching practical evaluation of the past and present reality." Thornburg v. Gingles 478 U.S. 30, 37 (1986). Balancing a county's cost to provide voting places is a consideration under the balance of harms factor. Spirit Lake Tribe v. Benson County, North Dakota, 2010 WL 4226614 at 5 (D.N.D. 2010). Certainly, the costs of what Plaintiffs propose should be weighed in terms of the Plaintiffs' complete indifference and avoidance of voting in the June 2012 primary at the in-person absentee voting satellite location within Shannon County, the satellite office's overall dismal usage rate, and the high cost per voter who actually used the location. Considering these real and non-speculative facts, as opposed to Plaintiffs' unsupported allegations, the Court must properly search and practically evaluate the present reality of the absentee voting facts in Shannon County, and the hardships at risk.

Severe funding constraints have already required Shannon County to completely eliminate funding for its county programs. These drastic cuts and eliminations freed up funds to

allow Shannon County to provide only *regular* election services. There simply are no funds to provide in-person absentee voting other than through the method Defendants have currently worked out with HAVA funding with the Secretary of State. Any other requirements forced upon Shannon County will cause harm to its residents. The harm to Shannon County and its residents is already extreme. Ordering anything other than what Shannon County is already doing (which is precisely what Plaintiffs sued for) harms Shannon County residents far more than it benefits them.

The Court must also consider the dire situation it which it would place Shannon County should the Court order anything other than what it is currently doing (which is exactly what Plaintiffs requested). No local government should be forced to cut even more statutorily-required governmental services, opening up many other avenues of liability and disservice to its citizens, to provide something more than the currently-offered but virtually unused voting convenience. The balance of harms weighs heavily against Plaintiffs' request.

D. The public interest would be disserved in granting an unnecessary permanent injunction.

As indicated above, the residents of Shannon County can currently in-person vote absentee for the full statutory period at a satellite location in Shannon County, and will be able to through January 1, 2019. Shannon County voters have always been able to vote absentee by mail, or with the assistance of the Lakota Coordinator who makes home visits, or in Hot Springs. Shannon County residents no longer have a funded criminal justice system, poor relief services, weed control, and other valuable and necessary services for its people. The public's interest is not in having Shannon County provide one and only one county service. Rather, the public has an extremely strong interest in Shannon County providing all services counties should provide. All of the county's extremely scarce resources should not be judicially mandated to be spent on

only one service, and particularly when it is so sparsely used by the public and entirely unused by the Plaintiffs themselves.

Local governmental officials should be allowed to make the hard choices as to how to prioritize their finances, while remaining accountable to the voters through the election process. Litigation of this sort throws out the window all consideration regarding the budget, including other state- or federally-required governmental services that counties must fund. Those services, if unfunded and not provided, subject the county to lawsuits in other areas. It is fundamentally unfair and inequitable to force Shannon County through litigation to spend every last penny it has on funding elections when it has numerous other governmental functions it is required under law to provide.

2. Defendants have 11th Amendment Immunity

While in most cases the 11th Amendment does not apply to counties, it does in certain situations. The Supreme Court held in Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 124 Fn. 34 (1984), as follows:

> . . .[W]e have applied the Amendment to bar release against county officials "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 401, 99 S.Ct. 1171, 177, 59 L. Ed. 2d 401(1979). *See* e.g., Edelman v. Jordan, *supra* (11th Amendment bars suit against state and county officials for retroactive award of welfare benefits). The Courts of Appeals are in general agreement that a suit against officials of a county or other governmental entity is barred if the relief obtained runs against the state. See e.g., Moore v. Tangipahoa Parish School Board, 594 F.2d 489, 493 (5th Cir.1979); Carey v. Quern, 588 F. 2d 230, 233-234 (7th Cir.1978); Incarcerated Men of Allen County Jail v. Fair, 507 F. 2d 281, 287-288 (6th Cir.1974); Harris v. Tooele County School District, 471 F. 2d 218, 220 (10th Cir.1973). Given that the actions of the county commissioners and mental-health administrators are dependent on funding from the State, it may be that relief granted against these county officials, when exercising their functions under the MH/MR Act effectively runs against the State. Farr v. Chesney, 441 F. Supp. 127, 130-132 (D.C. Pa. 1977)(*holding* that Pennsylvania county commissioners acting as members of the board of the County Office of Mental Health and Retardation, may not be sued for back pay under the 11th Amendment).

So too in this case, a ruling against Shannon County implicates state funding. Eleventh Amendment immunity applies in such a context, barring Plaintiffs' claims.

That immunity extends to state law claims in federal courts. Federal courts cannot maintain a state law claim when Eleventh Amendment immunity is asserted. To the extent Plaintiffs' allege a state law claim, it is precluded by the State's Eleventh Amendment Immunity.

> The Eleventh Amendment bars federal court jurisdiction over state law claims against unconsenting states or state officials when the state is the real, substantial party in interest, regardless of the remedy sought…[t]his constitutional bar applies with equal force to pendent state law claims.

Cooper v. St. Cloud State University, 226 F.3d 964, 968 (8th Cir. 2000)(*citing* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)). For claims alleging violations of state law, prospective injunctive relief allowed by *Ex Parte Young* is unavailable to Plaintiffs. Pennhurst, 465 U.S. at 106 (*stating* that "it is difficult to think of a greater intrusion on state sovereignty that when a federal court instructs state officials on how to conform their conduct to state law."); Entergy, Arkansas v. Nebraska, 210 F.3d 997, 897 (8th Cir. 2000). With the assertion of Eleventh Amendment immunity the State law claims are barred in all respects.

Plaintiffs' have not contested that there is no private right of action under HAVA. Instead, Plaintiffs argue that Secretary of State Gant's disbursement of HAVA funds violates § 2 of the VRA. Plaintiffs' may not plead around their problem of a lack of standing by using the VRA. Rose v. Bank of America, 200 Cal.App.4th 1441, 1448-1449 (Cal. Ct. App. 2011)(if no private right of enforcement is established, Plaintiffs' may not maintain a claim under other statute); Glenn K. Jackson, Inc. v. Roe, 273 F.3d 1192, 1203 (9th Cir. 2001)(plaintiff cannot plead around bars to relief found in other causes of action.); Monroe v. Missouri Pacific Railroad Company, 115 F.3d 514, 519-520 (5th Cir. 1997)(Plaintiff cannot "artfully plead" around preemptive effect of other statute). Congress specifically granted the States immunity from suit for implementation of a HAVA plan. 42 U.S.C. § 15404(c).

CONCLUSION

If Plaintiffs' case survives Defendants' Motion to Dismiss on Mootness Grounds, Plaintiffs lack standing. Plaintiffs also cannot meet the four factors required before a permanent injunction may issue. As just one of the permanent injunction factors, Plaintiffs must plead cognizable 14th Amendment and VRA claims. Plaintiffs have not demonstrated that the Shannon County Commission, the Defendants responsible for determining whether and how many in-person absentee satellite voting days they can afford, made their decisions in years past with intent to discriminate against Native American voters. Plaintiffs have also not pleaded a legally-cognizable claim under the VRA, as indicated by every non-redistricting case reported that dealt with the scenario of basing a VRA claim on comparisons of one jurisdiction against another (rather than comparisons of the effect on one race versus another race within the same jurisdiction). Plaintiffs have also failed to prove a § 2 violation. The permanent injunction factors weigh in favor of Defendants, and the Court should grant Defendants' Motion for Summary Judgment.

Dated: October 1, 2012.

GUNDERSON, PALMER, NELSON
& ASHMORE, L.L.P.

By: */s/Sara Frankenstein*
Sara Frankenstein
Attorney for Defendants:
Shannon County, Fall River County, Fall River Board of Commissions, Joe Falkenburg, Anne Cassens, Michael P. Ortner, Deb Russell, Joe Allen, Shannon County Board of Commissions, Bryan J. Kehn, Deloris Hagman, Eugenio B.White Hawk, Wendell Yellow Bull, and Lyla Hutchison, Sue Ganje and James Sword

P.O. Box 8045
Rapid City, SD 57709
Telephone: (605) 342-1078
Telefax: (605) 342-0480
E-mail: sfrankenstein@gpnalaw.com

Dated this 1st day of October, 2012.

MARTY J. JACKLEY
ATTORNEY GENERAL

Richard M. Williams
1302 E. Hwy 14, Suite 1
Pierre, SD 57501
1-605-773-3215
Rich.Williams@state.sd.us

CERTIFICATE OF SERVICE

I hereby certify on October 1, 2012, a true and correct copy of **MEMORANDUM IN SUPPORT OF COUNTY DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT** was served electronically through the CM/ECF system upon the following individuals:

Steven D. Sandven
Steven D. Sandven Law Offices
300 North Dakota Avenue, Suite 106
Sioux Falls, SD 57104
E-mail: ssandvenlaw@aol.com
Attorney for Plaintiffs,

and

Richard M. Williams
Attorney General's Office
Sahr Building
222 East Capitol Avenue, Suite #15
Pierre, SD 57501
E-mail: Rich.Williams@state.sd.us
Attorney for Defendant, Jason Gant

By: */s/Sara Frankenstein*
Sara Frankenstein

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(B)(1), the undersigned counsel, relying on the Microsoft Word word count function, certifies that the body of this brief contains 11,993 words, excluding the caption, signature blocks, and this certificate.

By: */s/Sara Frankenstein*
Sara Frankenstein