M. Laughlin McDonald
American Civil Liberties Union Fnd.
230 Peachtree Street, NW
Suite 1440
Atlanta, GA 3030-1513
(404) 523-2721
lmcdonald@aclu.org

Jon Ellingson
ACLU of Montana Fnd.
241 E. Alder, Ste. B
P. O. Box 9138
Missoula, MT 59802
406) 406-443-8590
JonE@aclumontana.org

Attorneys for *Amicus Curiae*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

MARK WANDERING MEDICINE, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No: 1:12-cv-00135-RFC
	)	
LINDA McCULLOCH in her official capacity as Montana Secretary of of State, et al.,	)	
	)	
Defendants.	)	
______________________________	)	

Amicus Brief of American Civil Liberties Union

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I. Introduction

Pursuant to the November 13, 2012, Order of this Court (Doc. 83), the American Civil Liberties Union (ACLU) files this amicus brief in support of the litigation brought by Plaintiffs seeking to require Defendants to provide satellite offices on the Crow, Northern Cheyenne, and Fort Belknap Reservations for late registration and in-person absentee voting. The failure to provide such offices will make it more difficult for American Indians to vote and for the reasons discussed below would abridge and dilute Indian voting strength in violation of Section 2 of the Voting Rights, which protects the right of racial and language minorities "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). Administrative convenience cannot justify the unequal burdens placed upon Indian voters, while injunctive relief would be in the public interest, including that of non-Indians as well as Indians.

This brief will focus on enactments by Montana territorial and state governments to deny American Indians the right to vote, and recent litigation in Big Horn, Rosebud, and Blaine Counties under Section 2 of the Voting Rights Act to protect the voting rights of American Indians.

II. The History of Discrimination In Voting In Montana

One of the factors probative of minority vote dilution under Section 2 is a "history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Thornburg v. Gingles*, 478 U.S. 30, 36-7 (1986). Montana, as other Western states, has a long history of discriminating against American Indians in many areas of life, including voting and political participation.

A. Territory of Montana

The Territory of Montana was organized in 1864, and the authorizing legislation expressly limited the franchise "to citizens of the United States, and those who have declared their intentions to become such." Act of 1864, 13 Stat. 85. Since American Indians were not citizens, they were not entitled to vote in territorial elections. Territorial legislation also made it explicit that voting in all elections - congressional, territorial, county, and precinct - was limited to "white male citizens of the United States." Acts, Resolutions and Memorials of the First Legislative Assembly of the Territory of Montana, at 875-76 (1864). Subsequent federal legislation enacted in 1867 continued the exclusion of non-citizen Indians from voting, while the territory passed laws the same year limiting voting and service on grand and trial juries to "white male citizens." Act of 1867, 14 Stat. 426; General Laws, and Memorials and Resolutions of the Territory of Montana, 4th Sess., at 69-70, 96-97 (1867). The territorial legislature continued to deny Indians the right to vote or serve on juries. It also made it a misdemeanor to establish a voting precinct "at any Indian agency, or at any trading post in the Indian country, or on any Indian reservation whatever." Laws, and Memorials and Resolutions of the Territory of Montana, 7th Sess., at 459-60, 471, 506 (1871); Laws, and Memorials and Resolutions of the Territory of Montana, Extra Sess., at 70-1 (1873).

B. Montana Statehood

The federal legislation admitting Montana to statehood in 1889 continued the existing restrictions on voting and directed that the state constitution make no distinction in civil or political rights based upon race, "except as to Indians not taxed." Montana Enabling Act of February 22, 1889, 25 Stat. 676. State law expressly provided that voters must be resident

freeholders, while the Montana Constitution restricted the franchise to male citizens of the United States 21 years of age or older. Mont. Laws 1889, p. 124; Mont. Const. Art. IX § 2 (1889). These provisions excluded non-citizen, non-property owing Indians from voting. Voter registrars were required to be resident freeholders, qualified voters, and citizens, which excluded Indians from any role in the registration process. Laws, Resolutions and Memorials of the State of Montana, 3rd Sess., at 78-91 (1893). The exclusion of Indians from public life and their treatment as an inferior class were mandated by various state statutes and constitutional provisions: the Montana Constitution of 1889 provided that no person could be a representative, senator, governor, lieutenant governor, superintendent of public instructions, a justice of the supreme court or a member of the militia who was not a "citizen of the United States;" an 1891 law limited voting in school elections to citizen taxpayers; an 1897 law limited the right to vote on municipal bond issue to "tax payers;" a 1901 laws limited voting in road district elections to property taxpayers and provided for voter challenges on the basis of non-citizenship; a 1903 statute made it a misdemeanor for an Indian off the reservation to carry a firearm; a 1915 law made it a crime to sell or give liquor to an Indian; a 1919 law prohibited the establishment of voting precincts “within or at the premises of any Indian agency or trading post;” and, a 1923 law made it criminal to possess peyote, a substance used in Indian religious ceremonies. Mont. Const. of 1889, Art. V, § 3, Art. VII, § 3, Art. VIII, § 10, Art. XIV, § 1; Mont. Laws 1891, pp. 243-45; Mont. Laws 1897, pp. 226-28; Mont. Laws 1901, pp. 29, 115-16; Mont. Laws 1903, pp. 158-59; Mont. Laws1915, p. 60; Mont. Laws 1919, p. 235; Mont. Laws1923, p, 40.

Theoretically, Indians could become citizens and voters through service in the Armed Forces or operation of the Dawes Act of 1887 and the Burke Act of 1906, i.e., by accepting

allotments of land and severing all tribal ties. The state, however, effectively nullified these provisions of federal law by enacting a statute in 1911 providing that no person living upon an Indian reservation could be deemed a resident of Montana for purposes of voting unless the person had acquired a residence in some county in Montana prior to taking up residence upon the reservation. Mont. Laws 1911, p. 223. The Attorney General of Montana issued several opinions that Indian reservations should not be included in a voting precinct, that "wards" of the federal government could not vote, and that even those Indians who owned land in fee patent could not vote if they took part in the transactions of the tribe. 1 Ops. Mont. Atty. Gen'l 362 (1906); 5 Ops. Mont. Atty. Gen'l 240 (1913); 8 Ops. Mont. Atty. Gen'l 195 (1919). Public schools in Montana were traditionally segregated on the basis of race and no Indian child was allowed to attend public school unless under white guardianship or unless the child had severed tribal relations. 1 Ops. Mont. Atty. Gen'l 60 (1905); 5 Ops. Mont. Atty. Gen'l 460 (1914).

C. The Impact of the Indian Citizenship Act

All Indians born within the United States were granted citizenship by the Indian Citizenship Act of 1924. 8 U.S.C. § 1401(a)(2). Local Montana officials, however, opposed the granting of equal voting rights to Indians. C. H. Asbury, Superintendent of Crow Agency, wrote a letter to the Commissioner of Indian Affairs on June 9, 1924, after passage of the act, in which he declared that the state legislature would be justified in making an educational requirement for new voters, "as there are certainly many Indians that are absolutely incapable of voting intelligently." C.H. Ashbury, letter to the Commissioner of Indian Affairs, June 9, 1924, National Archives, Rocky Mountain Region, Denver, Colo. Others, taking a cue from southern states which had disfranchised blacks after passage of the Fourteenth and Fifteenth Amendments,

suggested it would be proper for the states to "discriminate" against Indians by enacting literacy tests or poll taxes or by denying the franchise outright to Indians living on reservations and enjoying immunity from state authority. N. D. Houghton, "The Legal Status of Indian Suffrage in the United States," 19 *Calif. L. Rev.* 507, 520 (1931).

Despite passage of the Indian Citizenship Act, Montana continued to restrict access by Indians to voter registration. It enacted a statute in 1937 requiring all deputy voter registrars to be "qualified, taxpaying" residents of their precincts. Mont. Laws 1937, p. 527. Since Indians living on the reservations were exempt from some local taxes, the requirement excluded virtually all Indians from serving as deputy registrars and denied Indians access to voter registration in their own precincts on the reservation. This provision of state law remained in effect until it was repealed in 1975. Mont. L. 1975, ch. 205. Also in 1937, the state enacted a statute cancelling all voter registration as of June 1, 1937, and requiring the re-registration of all voters. It also adopted a requirement that county clerks cancel any registration when three qualified electors presented an affidavit challenging a voter's qualifications. Mont. Laws 1937, p. 523-27. *And see*, "If you Don't Register You Won't Be Able to Vote," *Hardin Tribune-Herald*, June 18, 1937 (reporting that all voter registrations had been purged, and identifying deputy registrars, none of whom were Indian).

D. The Years After World War II

Following World War II, for which many Indians were drafted or volunteered, there was a surge of political participation in the Indian community. An important manifestation of this participation was the establishment in 1944 of the National Congress of American Indians. Montana also participated in the Governor's Interstate Council on Indian Affairs, which began in

1949 and encouraged Indians to participate more in the larger political process.

Indians also occasionally ran for public office, but without success. Robert Yellowtail ran for the state senate in 1954 and was defeated. "Riley, Greenwald, Kalberg and Iverson Nominated," *Hardin Tribune-Herald*, July 22, 1954. William Wall, the Crow Tribal Chair, ran unsuccessfully for Congress in 1956. "Hawks and Miller Win Nomination," *Hardin Tribune-Herald*, June 7, 1956. Fourteen years passed before another Indian in Big Horn County, Ivan Small, ran for public office. He ran for sheriff in 1970 and was defeated. "The Candidates Speak," *Hardin Tribune-Herald*, May 28, 1970.

The obstacles facing Indian candidates were numerous and formidable. They included: racial polarization; the physical isolation of the Indian community; a depressed Indian socio-economic status; higher rates of Indian unemployment; the geographic size of the state which made campaigning more difficult for underfinanced Indian candidates; significant differences between Indian and non-Indian religions that divided the two communities; different language traditions; and lower levels of Indian educational achievement. As the Montana legislature has recognized, Native Americans "are caught in a network of mutually reinforcing handicaps ranging from material poverty to racism, illness, geographical and social isolation, language and cultural barriers, and simple hunger." Senate Joint Resolution no. 2, Laws of the State of Montana, 44th Sess. (1975), 1723-24.

The division between the tribes and non-Indian communities is further evident from the number of "states' rights" groups with a distinctly anti-Indian agenda organized in Montana in the 1970s. The United States Commission on Civil Rights reported in 1981 that:

> During the second half of the seventies a backlash arose against Indians and Indian interests. Anti-Indian editorials and articles appeared in both the local and the national media. Non-Indians, and even a few Indians as well, living on or near Indian reservations organized to oppose tribal interests. Senator Mark Hatfield (R-Ore.) said during Senate hearings in 1977 said that '[w]e have found a very significant backlash [against Indians] that by any other name comes out as racism in all its ugly manifestations.'

United States Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* (1981), 1. These states' rights groups have included Montanans Opposed to Discrimination (MOD) organized in 1974, the Citizens Rights Organization (CRO), which was formed in Big Horn County, and the Interstate Congress for Equal Rights and Responsibilities (ICERR) formed in 1976. In general, these organizations advocate that the states should have exclusive jurisdiction over all non-Indians and non-Indian lands wherever located. The organizations are also interested in eliminating or terminating the Indian reservations, and have clashed with the tribes over specific issues such as tribal sovereignty, hunting and fishing rights, water rights, appropriation and development of tribal resources, and taxation. The Civil Rights Commission also concluded that taxation was a:

> frequent arena of dispute between the States and local government and Indians. States, pressed for funding sources, aggressively sought to tap Indian assets on reservations that under Federal law were to be protected from State incursions. The State of Montana was particularly aggressive in this arena, frequently asserting that tribes were not governmental entities but rather something akin to property owners associations. This argument was rejected by the Supreme Court.

Quest for Survival (1981), 5.[1]

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[1]This history, including the diminishment of tribal lands, the relocation of Indians onto reservations in Montana, Indian assimilation and allotments, and shifting federal Indian policy, is discussed in numerous places. *See*, *e.g.*, Edwin Thompson Denig, *Five Indian Tribes of the Upper Missouri* (Norman; U. Okla. Press, 1961); Ralph K. Andrist, *The Long Death: The Last days of the Plains Indians* (Norman; U. Okla. Press, 1993);William Hodge, *The First Americans, Then and Now* (New York; Rinehart and Winston, 1981); E. A. Hoebel, *The Cheyennes: Indians*

III. Modern Voting Rights Litigation

In 1982, Congress amended Section 2 of the Voting Rights Act to restore a discriminatory "results" standard. The amendment was in response to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which held that to establish a violation of Section 2 minority plaintiffs had to prove that a challenged practice was adopted or was being maintained with a racially discriminatory purpose. Congress repudiated the intent standard for three basic reasons: it was "unnecessarily divisive" because it "involves charges of racism on the part of individual officials or entire communities;" the burden of proof was "inordinately difficult;" and it asked "the wrong question." S. Rep. No. 417, 97th Cong., 2d Sess. 36-7 (1982). The right question was whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice." H.R. Rep. No. 227, 97th Cong., 1st Sess. 29 (1981); S. Rep. No. 417, 28, 36-7. Thus, the standard for a Section 2 violation is not whether minorities have been denied the right to vote, but whether they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The Senate Report also identified seven factors (the "Senate factors") that could establish vote dilution: a history of discrimination; the existence of polarized voting; the use of enhancing devices (such as majority vote requirements); the presence of slatting groups; the continuing

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of the Great Plains (New York; Holt, Rinehart and Winston, 1978); Charles Royce, *Indian Land Cessions in the United States* (New York; Arno Press, 1971); Robert H. Lowie, *The Crow Indians* (Lincoln; U. Neb. Press, 1983); John Collier, *The Indians of the Americas* (New York; W. W. Norton, 1947); Laughlin McDonald, *American Indians and the Fight for Equal Voting Rights* (Norman; U. Okla. Press, 2010).

effects of past discrimination; the existence of racial campaign appeals; and the extent of minority office holding. H.R. Rep. No. 227, 29; S. Rep. No. 417, 28, 36-7. The Senate factors were illustrative, not exhaustive, and no particular number of them had to be proved. The ultimate question was whether the challenged practice denied the minority an equal opportunity to participate in the political process and to elect candidates of its choice, a question that could be answered only by "a searching practical evaluation of the 'past and present reality.'" *Id.* at 30. The restoration of the effect standard of Section 2 reopened the door for challenges to voting practices that discriminated against minority voters and had an immediate and substantial impact on minority voting rights in Montana, as well as across the nation.

A. Windy Boy v. County of Big Horn

The first suit brought in Montana after Section 2 of the Voting Rights Act was amended in 1982 was *Windy Boy v. County of Big Horn*, 647 F.Supp. 1002 (D. Mont. 1986), a challenge to at-large elections for the Big Horn county commission and two smaller school districts that shared a common board of education. The plaintiffs were members, or their spouses, of the Crow and Northern Cheyenne Tribes. They alleged that the at-large systems allowed the white majority to control the outcome of elections and prevented Indian voters from electing representatives of their choice. At the time the complaint was filed in 1983, no Indian, despite the fact that Indians were 41% of the voting age population, had ever been elected to the county commission or the school board.

Following a lengthy trial, with testimony from expert and numerous lay witnesses, the federal court concluded that at-large elections for the county commission and school board diluted Indian voting strength in violation of Section 2 of the Voting Rights Act. In doing so, it

made extensive findings of past and continuing discrimination:

> *There was “substantial probative evidence that the rights of Indians to vote has been interfered with, and in some cases denied, by the county.”
>
> *The evidence “tends to show an intent to discriminate against Indians.”
>
> *The county had failed “to appoint Indians to county boards and commissions.”
>
> *”[T]here has been discrimination in the appointment of deputy registrars of voters and election judges limiting Indian involvement in the mechanics of registration and voting.”
>
> *”[I]n the past there were laws prohibiting voting precincts on Indian reservations.”
>
> *Politics in Big Horn County was “race conscious” and “racially polarized.”
>
> *“[T]here is racial bloc voting in Big Horn County and . . . there is evidence that race is a factor in the minds of voters in making voting decisions.”
>
> *”Indians have lost land, had their economies disrupted, and been denigrated by the policies of the government at all levels.”
>
> *”[D]iscrimination in hiring has hindered Indian involvement in government, making it more difficult for Indians to participate in the political process.”
>
> *”[R]ace is an issue and subtle racial appeals, by both Indians and whites, affect county politics.”
>
> *There was “a strong desire on the part of some white citizens to keep Indians out of Big Horn County government.”
>
> *”Indians who had registered to vote did not appear on voting lists."
>
> *"Indians who had voted in primary elections had their names removed from voting lists and were not allowed to vote in the subsequent general elections."
>
> *Indians were "refused voter registration cards by the county."
>
> *"When an Indian was elected Chairman of the Democratic Party, white members

of the party walked out of the meeting."

*"Unfounded charges of voter fraud have been alleged against Indians and the state investigator who investigated the charges commented on the racial polarization in the county."

*"Indifference to the concerns of Indian parents" by school board members.

*"English is a second language for many Indians, further hampering participation."

*A depressed socio-economic status makes it "more difficult for Indians to participate in the political process and there is evidence linking these figures to past discrimination."

Windy Boy, 647 F.Supp. at 1008-09, 1013, 1016-18, 1022.

The county did not appeal, and the court adopted single member districts for the county commission and the school board. At the next election held under the new plan, an Indian was elected to the county commission, the first in Big Horn County's history.

B. Thornburg v. Gingles

Within weeks after the decision in *Windy Boy*, the Supreme Court decided *Thornburg v. Gingles*, 478 U.S. 30 (1986), a challenge to multi-member districts used in North Carolina's 1982 legislative reapportionment plan, and in which the Court for the first time examined and applied amended Section 2. It held that to prevail on a Section 2 challenge to a multi-member voting system a plaintiff must prove three things (the "*Gingles* factors"): that the minority is geographically compact, *i.e.*, it can constitute a majority in one or more single member districts; that the minority is politically cohesive, or tends to vote as a bloc; and that the majority votes sufficiently as a bloc "usually to defeat the minority's preferred candidate." *Id.* at 50-1. The other Senate factors were deemed "supportive of, but *not essential to*, a minority

voter's claim." *Id.* at 48 n.15. As the Court explained, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47. Again, the Court made it clear that the standard under Section 2 for a vote dilution claim is not denial of the right to vote but an inequality in the opportunity to elect candidates of choice. The Court further held that "Section 2 prohibits all forms of voting discrimination, not just vote dilution." *Id.* at 45 n. 10.[2]

Gingles also simplified proof of racial bloc voting by providing that a plaintiff is not required to prove that voters were voting for reasons of race rather than for some other reason, such as religion, party affiliation, age, or name identification. According to the Court, "all that matters under § 2 . . . is voter behavior, not its explanations." *Id.* at 73. *See also*, *id.* at 63 ("under the 'results test' of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters").

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[2]The three *Gingles* factors have been held inapposite to challenges to "voting qualifications [which] disproportionately disqualify individuals of a certain race from voting." *Common Cause Southern Christian Leadership Conference of Greater Los Angeles v. Jones*, 213 F.Supp.2d 1106, 1110 (C.D. Calif. 2001). *See also*, *Welch v. McKenzie*, 765 F.2d 1311, 1315 (5th Cir. 1985) (Section 2 applies to episodic practices such as one -sided absentee ballot counting); *Goodloe v. Madison County Bd. of Election Comm'rs*, 610 F.Supp. 240, 243 (S.D. Miss. 1985) ("Section 2 on its face is broad enough to cover practices which are not permanent structures of the electoral system but nevertheless operate to dilute or diminish the vote of [minorities]"); *Brown v. Dean*, 555 F.Supp. 502, 505 (D. R.I. 1982) ("the use of polling place locations remote from black communities . . . was a practice or procedure which violates section 1973"); *Brown v. Post*, 279 F.Supp. 60, 64 (W.D. La. 1967) (election officials violated Section 2 by "allowing white voters opportunities to vote without affording the same opportunities to Negro voters"); *Stewart v. Blackwell*, 444 F.3d 843, 877 (6th Cir. 2006) (plaintiffs' claim that "they are disproportionately denied the right to have their ballots counted properly" was cognizable under § 2).

Thornburg v. Gingles, by focusing on demographics and racial patterns in voting, simplified decision making in challenges to at-large elections and added greater predictability to their outcomes. *Gingles*, together with the decision in *Windy Boy*, paved the way for more Section 2 vote dilution challenges by American Indians in Montana.

C. Blaine County

In 1999, the United States sued Blaine County alleging that at-large elections for its county commission diluted Indian voting strength in violation of Section 2 of the Voting Rights Act. *United States v. Blaine County, Montana*, No. CV 99-122-GF-DWM (D. Mont.). Both the district court and court of appeals agreed that the challenged system violated the statute. Indians were geographically compact and politically cohesive, and whites voted sufficiently as a bloc usually to defeat the candidates preferred by Indian voters. *United States v. Blaine County, Montana*, 363 F.3d 897, 900, 909-11 (9th Cir. 2004).

Turning to the totality of circumstances, the courts concluded:

> *there was a history of official discrimination against Indians, including "extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population;"
>
> *there was racially polarized voting which "made it impossible for an American Indian to succeed in an at-large election;"
>
> *voting procedures, including staggered terms of office and "the County's enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide," enhanced the opportunities for discrimination against Indians;
>
> *depressed socio-economic conditions existed for Indians; and,
>
> *there was a tenuous justification for the at-large system, in that at-large elections were not required by state law while "the county government depends largely on

residency districts for purposes of road maintenance and appointments to County Boards, Authorities and Commissions."

Id. at 913-14.

The court adopted a single member district plan as a remedy, and at the next election an Indian (Delores Plumage) was elected from the majority Indian district.[3]

D. Rosebud County

Rosebud County, home to the Northern Cheyenne Reservation, was also sued for its use of at-large elections as diluting Indian voting strength. Rather than face protracted litigation, as Big Horn and Blaine Counties had elected to do, the county entered into a settlement agreement adopting district elections. *Alden v. Rosebud County Board of Commissioner*, Civ. No. 99-148-BLG (D. Mont. May 10, 2000).[4]

IV. The Failure to Provide Satellite Offices Would Dilute Indian Voting Strength

Given the history of past discrimination and the depressed socioeconomic status of Indians on the Crow, Northern Cheyenne, and Fort Belknap Reservations, the failure to provide satellite offices for late registration and in-person absentee voting would result in the abridgment or dilution of Indian voting strength in violation of Section 2. As the United States notes in its

[3]For a further discussion of the Blaine County litigation, *see* Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* (New York; Cambridge U. Press, 2007), 111-130.

[4]Roosevelt County, home to the Fort Peck Reservation, and Ronan School District 30, on the Flathead Indian Reservation, were also sued for their use of at-large elections as diluting Indian voting strength. Rather than proceeding with litigation, they entered into settlement agreements adopting district elections. *United States v. Roosevelt County Board of Commissioners*, No. 00-CV-54 (D. Mont. Mar. 24, 2000); and *Matt v. Roman School District*, Civ. No. 99-94 (D. Mont. Jan. 13, 2000).

Statement of Interest (Doc. 45), American Indians in the three counties have to travel much greater distances to access their election sites than white voters. American Indians also have higher poverty rates and lower access to transportation than their white counterparts.

In addition, in 2012 five counties used satellite offices to provide services to residents who live great distances from the county seat. (Doc. 1, para. 118) This disparate treatment of Indian voters calls further into question the propriety of the failure to provide satellite offices on the Crow, Northern Cheyenne, and Fort Belknap Reservations.

Section 2 prohibits the denial of equal access to voter registration and voting sites. *See Operation Push v. Mabus,* 932 F.2d 400, 405 (5th Cir. 1991) (the state's "prohibition on satellite registration violated § 2")*; Spirit Lake Tribe v. Benson County*, 2010 WL 4226614 *1(D. N.D. Oct. 21, 2010) (enjoining the closing of voting places located on the Spirit Lake Reservation); *Jacksonville Coalition for Voter Protection v. Hood,* 351 F.Supp.2d 1326 (M.D. Fla. 2004). Accordingly, Plaintiffs should prevail on their Section 2 claim in this litigation.

V. Administrative Convenience Cannot Justify Dilution of Indian Voting Strength

The expense or administrative inconvenience of providing satellite offices on the reservations is far outweighed by the loss of the equal opportunity to vote that will be suffered by Indian voters. The right to vote is one of the most fundamental rights in our system of government. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The right to vote is entitled to special constitutional protection because:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. . . . [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights.

Reynolds v. Sims, 377 U.S. at 555, 562. *Accord*, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("[o]ther rights, even the most basic, are illusory if the right to vote is undermined"). Because of the preferred place it occupies in our constitutional scheme, "any illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury." *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984). *Accord*, *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) ("denial of the right to vote" constitutes irreparable injury); *Cook v. Luckett*, 575 F. Supp. 479, 484 (S.D. Miss. 1983) ("perpetuating voter dilution" constitutes "irreparable injury"); *Foster v. Kusper*, 587 F. Supp. 1191, 1193 (N.D. Ill. 1984) (denial of the right to vote for candidate of choice constitutes "irreparable harm"). *See also Elrod v. Burns*, 427 U.S. at 373 (the loss of constitutionally protected freedoms "for even minimal periods of time, constitutes irreparable injury").

Indian voters will suffer irreparable injury if they are denied an adequate or equal opportunity to vote in elections. The threatened injury to Plaintiffs outweighs any harm that an injunction might cause Defendants. "Administrative convenience" cannot in any event justify a state practice that impinges upon a fundamental right. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

VI. An Injunction Would Be in the Public Interest

The Voting Rights Act is a congressional directive for the immediate removal of all barriers to equal political participation by racial and language minorities. When it adopted the remedial provisions of the Act in 1965, Congress cited the “insidious and pervasive evil” of discrimination in voting and acted “to shift the advantage of time and inertia from the perpetrators of the evil to its victims.” *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 328

(1966). In the legislative history of the 1965 Act, as well as the 1970, 1975, 1982, and 2006 extensions, Congress repeatedly expressed its intent "that voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago.'" *NAACP v. New York*, 413 U.S. 345, 354 (1973) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965)). *See also* S.Rep. No. 417, 5 ("[o]verall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally"); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577, Section 2(b)(3) ("[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965"). As the Court held in *Briscoe v. Bell*, 432 U.S. 404, 410 (1977), the Voting Rights Act "implements Congress' intention to eradicate the blight of voting discrimination with all possible speed."

Given the clear and unambiguous intent of Congress that the door to minority political participation be opened as quickly as possible, requiring satellite offices on the Crow, Northen Cheyenne, and Fort Belknap Reservation would be in the public interest. *See Harris v. Graddick*, 593 F.Supp. at 136 ("when section 2 is violated the public as a whole suffers irreparable injury"); *Johnson v. Halifax County*, 549 F.Supp. 161, 171 (E.D. N.C. 1984) (the "public interest" is served by enjoining discriminatory election procedures).

The public also has a broad interest in the integrity of elected government which is compromised by a system that fails to weigh the votes of all citizens equally. *See Cook v. Luckett*, 575 F. Supp. at 485 ("[t]he public interest must be concerned with the integrity of our representative form of government"). Subjecting the Indian voters on the Crow, Northern Cheyenne, and Fort Belknap Reservations to an "inequitable" system would be adverse to the public interest. *Watson v. Commissioners of Harrison County*, 616 F.2d 105, 107 (5th Cir. 1980).

VII. The Increasing Importance of the Indian Vote

There has been a significant growth in Indian political participation in recent elections at the national, state, and local levels. This increased participation will not only bring the Indian and non-Indian communities closer together, but will help lead to solutions of the problems that continue to face Indian communities. Failing to provide satellite offices on the Crow, Northern Cheyenne, and Fort Belknap Reservations can only impede this progress and be counterproductive to the larger interests of all the residents of Montana.

In 2004, the National Congress of American Indians launched a Native Vote Campaign to register Indian voters and increase turnout. According to NCAI President Joe Garcia, "increasing civic participation among American Indian and Alaska Native communities is imperative to protecting sovereignty and ensuring Native issues are addressed on every level of government." Quoted in "NCAI to launch updated Native Vote Web site," *Indian Country Today*, Jan. 11, 2008. The NCAI said it will "ramp up our voter participation in 2008," and targeted 18 states, from Alaska to Wyoming.

Jonathan Windy Boy, a American Indian and a member of the Montana House of Representatives, said in the past there has been a lot of skepticism among Indians about the idea

of voting. "Some people didn't vote as a point of pride - defiance, even," he said. "But that's all changed. There's much more of a sense today that we can work within this system." Quoted in "Native Americans Are finding Their Voice in Government," *Los Angeles Times*, April 22, 2007.

Many things are driving the increased Indian political participation - business development, new income from casinos, the need to interact with non-tribal governments, and obtaining state and federal funds for health clinics, education improvements, water-reclamation projects, and cleanup of old mining areas. According to Jefferson Keel, an officer both of the Chickasaw Nation in Oklahoma and the NCIA, "[t]here's been a sea change in my lifetime . . . people feel a real stake in the system." *Id.* Patrick Goggles, the first Northern Arapaho elected to the Wyoming state legislature in 2005, says "you have to participate in this political process. You can't just step back and complain about it." Quoted in "The Indian Vote: When Candidates Come Calling," Special Report of Reznet News, April 8, 2008.

An organization known as the Indigenous Democratic Network (INDN's List) was formed in 2005 to encourage and train Indians on how to run for political office. In 2006, INDN's List supported 26 candidates from 12 states, representing 21 tribes. The organization's founder, Kalyn Free, a member of the Choctaw Nation of Oklahoma, said that 20 of the candidates were elected to office, nine of whom were elected to office for the first time.

Another tribal organization called "Prez on the Rez" was formed to get Democratic presidential candidates to campaign on the reservations and meet with tribal leaders and members. "American Indians seize moment to make political voices heard," *The Denver Post*, June 18, 2008. "More than ever before," said Prez on the Rez, "Indians are speaking." And that candidates were listening was evident from the fact that for the first time in history presidential

candidates campaigned on reservations in Montana. Then Senator Barack Obama visited the Crow Reservation in May 2008, and called it "one of the most important events we've had in this campaign." "Crow Tribe adopts candidate in historic visit," *Billings Gazette*, May 20, 2008. He was adopted into the Crow Tribe and given an Indian name, "One who helps people throughout the land." Crow Chairman Carl Venne explained the Indian interest in the presidential campaign by saying, "we want to become self-sufficient and be part of this great society."

A week later, Senator Hilary Clinton campaigned on the Flathead Indian Reservation. Joe MacDonald, the president of the Salish Kootenai College, gave her a beaded necklace and a pair of moccasins sewn by a tribal elder. "You have gone a million miles for American Indian people," he said, "so here's a pair of moccasins to help you on your journey." "Talking to tribes: Democratic hopeful courts Montana's Native vote," *Missoulian*, May 28, 2008. To enthusiastic cheers from the crowd of some 1,200 supporters, she promised to have a representative of Indian Country inside the White House to confer with on a daily basis. Both Clinton and Obama also made historic campaign visits to the Wind River Indian Reservation in Wyoming, and the Pine Ridge Indian Reservation in South Dakota. "The Indian Vote: When Candidates Come Calling," Special Report of Reznet News, April 8, 2008; "Dems woo Native American vote," Politico, June 18, 2008.

Indian Country Today reported in June 2008, that "American Indian voters, eager to shed a mistaken image of powerlessness, will play an important role in selecting the next president of the United States." "A Clear Winner: Indians," *Indian Country Today*, June 6, 2008.

As further evidence of increased Indian participation in the political process, in 2012 there were 161 Indian delegates to the Democratic National Convention, one of whom was

Denise Juneau, the Montana State Superintendent of Public Instruction. She was the first Indian to be elected to a statewide office in Montana, and gave an evening address to the National Convention. "American Indian Delegates Swarm Democratic National Convention," *Indian Country*, September 6, 2012.

Increased Indian office holding and political participation has certainly not redressed all the legitimate grievances of the Indian community nor realized all the goals of the modern movement for Indian self-determination, but it has conferred undeniable benefits. It has made it possible for Indians to participate in and influence elections, as well as elect candidates of their choice. It has made it possible for Indians to pursue careers in state and local politics and make the values and resources of Indians communities more available to society as a whole. It has provided Indian role models, conferred racial dignity, and helped dispel the myth that Indians are incapable of political leadership. It has also required whites to deal with Indians more nearly as equals, a change in political relationships whose implications are profound. Requiring the establishment of satellite offices on the Crow, Northern Cheyenne, and Fort Belknap Reservation will be an important step in the direction of establishing better working and political relationships between Indians and non-Indians, and will benefit the entire community.

Conclusion

For the reasons sated above, the relief Plaintiffs seek should be granted.

Respectfully submitted,

S/M. Laughlin McDonald

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M. Laughlin McDonald
American Civil Liberties Union Fnd.
230 Peachtree Street, NW
Suite 1440

Atlanta, GA 3030-1513
(404) 523-2721
lmcdonald@aclu.org

S/Jon Ellingson

Jon Ellingson
ACLU of Montana Fnd.
241 E. Alder, Ste. B
P. O. Box 9138
Missoula, MT 59802
406) 406-443-8590
JonE@aclumontana.org

Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2) of United States District Court Rules for the District of Montana, I certify that the word count calculated by Microsoft Word is 6,464 excluding the caption, the table of contents, table of authorities, and the certificates of service and compliance.

Respectfully submitted this 4th day of December, 2012

s/Laughlin McDonald

Laughlin McDonald
Attorney for Amicus Curiae ACLU

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2012, a true and accurate copy of the foregoing Amicus Brief was filed electronically with the Clerk of Court of the U.S. District Court, District of Montana, utilizing the CM/ECF system, which automatically sends email notification of the filing to the attorneys of record.

Respectfully submitted this 4th day of December, 2012

s/Laughlin McDonald

Laughlin McDonald
Attorney for Amicus Curiae ACLU