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

CHRIS BROOKS, et al., Plaintiffs, v. JASON GANT, South Dakota Secretary of State, et al., Defendants.	)	Case 5:12-cv-05003-KES

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION

I. Introduction

The American Civil Liberties Union (ACLU) supports the complaint and motion filed by the Plaintiffs in this action seeking an injunction prohibiting Defendants from failing to establish at least one poling place for early voting within Shannon County that is open starting 46 days before primary and general elections. In 64 of South Dakota's 66 counties, residents may vote early at their local county auditor's office starting 46 days before an Election Day. In 2012, Shannon County residents will have only six days of early voting in primary and general elections.

Shannon County lies wholly within the boundaries of the Pine Ridge Indian Reservation, and the failure to provide early voting at a polling place on the Reservation for the same length of time as provided in South Dakota's 64 incorporated counties would treat American Indian voters differently and make it more difficult for Indians to vote. For the reasons discussed below, the disparate treatment of residents on the Reservation would dilute Indian voting

strength in violation of Section 2 of the Voting Rights, 42 U.S.C. § 1973, which protects the right of racial and language minorities "to participate in the political process and to elect representatives of their choice." Administrative convenience cannot justify the denial or dilution of the Indian vote, while an injunction would be in the public interest, including that of non-Indians as well as Indians.

II. Past and Continuing Discrimination

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) (citing S.Rep. No.97-417, 97th Cong.2nd Sess. 28-9 (1982)). South Dakota, as other Western states, has a long history of discriminating against American Indians.

The Dakota Territory was created by an act of Congress in 1861, which restricted suffrage in the first legislative election, as well as office holding, to free white men who were citizens of the United States. Act of Congress of March 2, 1861, 12 Stat. 239, sec. 5. The initial territorial assembly meeting in 1862 placed similar limitations on the right to vote and hold office. 1862 Dakota Terr. Laws 21. *See also,* Act of January 14, ch. 19, § 51, 1864 Dakota Terr. Laws; Civil Code § 26, 1866 Dakota Terr. Laws 1, 4 (providing that Indians cannot vote or hold office). Indians were prohibited from entering ceded lands without a permit. Ch. 46, 1862 Dakota Terr. Laws 319. Jury service was restricted to "free white males." Ch. 52, 1862 Dakota Terr. Laws 374. The territory immediately asked Congress to extinguish title "to the country now claimed and occupied by the Brule Sioux Indians," Ch. 99, 1862 Dakota Terr. Laws 503,

and to extinguish title to land occupied by the Chippewa Indians. Ch. 100, 1862 Dakota Terr. Laws 505. It praised the "indomitable spirit of the Anglo-Saxon," and described Indians as "red children" and the "poor child" of the prairie. Dakota Territory Session Laws, First Session 1862, Preface.

As white expansion into Indian Country intensified, there were numerous conflicts between the Sioux tribes and emigrants, settlers, and the U.S. Military.[1] The Territorial Legislature described Indians, no longer as the "poor child," but as the "revengeful and murderous savage." Ch. 38, 1866 Dakota Terr. Laws 551. It further passed a law making it a crime to harbor or keep on one's premises or within any village settlement of white people any reservation Indians "who have not adopted the manners and habits of civilized life." Ch. 19, 1866 Dakota Terr. Laws 482.

South Dakota became a state in 1889, and enacted laws restricting voting and office holding to free white males and citizens of the United States. Act of March 8, 1890, ch. 45, 1890 S.D. Laws 118; S. Dak. Stat. sec. 3424, Parsons 2d rev. ed., 1001. Indians who sustained tribal relations, who received support from the government, or who held untaxable land were prohibited from voting in any state election. *Id.* The establishment of precincts on Indian reservations was also forbidden. Act of March 12, 1895, ch. 84, 1895 Dakota Terr. Laws 88.

Despite passage of the Indian Citizenship Act of 1924, 8 U.S.C. § 1401(a)(2), which

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[1]This history is discussed in many places, *e.g.*, Edward Lazarus, *Black Hills: White Justice* (New York; HarperCollins, 1991); Paul H. Carlson, *The Plains Indians* (College Station; Texas A & M U. Press, 1998); Dee Brown, *Bury My Heart at Wounded Knee* (New York; Holt, Rinehart & Winston, 1971); Jeffrey Ostler, *The Plains Sioux and U.S. Colonialism from Lewis and Clark to Wounded Knee* (Cambridge, England; Cambridge U. Press, 2004); Guy Gibbon, *The Sioux: The Dakota and Lakota Nations* (Oxford, England; Blackwell, 2003); Ralph K. Andrist, *The Long Death: The Last Days of the Plains Indian* (Norman, Oklahoma; Oklahoma U.

granted full rights of citizenship to Indians, South Dakota officially excluded Indians from voting and holding office until the 1940s. *Buckanaga v. Sisseton Independent School District*, 804 F.2d 469, 474 (8th Cir. 1986). Even after the repeal of state law denying Indians the right to vote, as late as 1975 the state prohibited Indians from voting in elections in counties that were "unorganized" under state law. *Little Thunder v. South Dakota*, 518 F.2d 1253, 1255-57 (8th Cir. 1975). The three unorganized counties were Shannon, Todd, and Washabaugh, whose residents were overwhelmingly Indian. The state also prohibited residents of the unorganized counties from holding county office until as late as 1980. *United States v. South Dakota*, 636 F.2d 241, 244-45 (8th Cir. 1980).

Fall River County also imposed restrictions on voter registration in Shannon County. Joe American Horse, a tribal member and resident of Shannon County, attempted to register to vote prior to the November 1984 general election. His application was rejected by the Fall River County auditor, however, as untimely despite the fact that it was received by the county auditor prior to the deadline that had been agreed upon and publically announced. In an lawsuit filed by American Horse, the court ordered his application, as well as others that had been similarly rejected, to be accepted and the applicants be allowed to vote in the upcoming elections. *American Horse v. Kundert*, Civ. No. 84-5159 (D. S.Dak. Nov. 5, 1984). For a discussion of the case, *see Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976, 1024 (D. S.Dak. 2004).

For most of the 20th century, voters were required to register in person at the office of the county auditor. S.D.C. §§ 16.0701-.0706 (1939). Getting to the county seat was a hardship for many Indians who lacked transportation, and particularly for those in unorganized counties who

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Press, 1964).

were required to travel to another county to register. State law, moreover, did not allow the auditor to appoint a tribal official as a deputy to register Indian voters in their own communities. Registration of Voters, Op. S.D. Att'y Gen., 1963-1964 Rep. S.D. Att'y Gen. 341 (May 28, 1964). There was one exception, however. State law required the tax assessor to register property owners in the course of assessing the value of their land. Thus, taxpayers were automatically registered to vote, while non-taxpayers, many of whom were Indian, were required to make the trip to the courthouse to register in person. *Bone Shirt*, 336 F.Supp.2d at 1024. Mail in registration was not fully implemented in South Dakota until 1973. Ch. 70, 1973 S.D. Laws 111.

Shannon and Todd Counties became covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in 1975. Federal Register 41 (Jan. 5 1976): 784. Section 5 requires covered jurisdictions to submit voting changes for federal approval, or preclearance, before they may be implemented and show that they have neither a discriminatory purpose or effect. *Beer v. United States*, 425 U.S. 130, 141 (1976). The attorney general of South Dakota derided the 1975 law as a "facial absurdity," and advised the secretary of state not to comply with the preclearance requirement. "I see no reason," he said," to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General." William Janklow, 1977 South Dakota Opinions of the Attorney General 175; 1977 Westlaw 36011 (S. Dak. Attorney General). Accordingly, from 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in Shannon and Todd Counties but submitted fewer than ten for preclearance. Two of the submissions were made only after suits were filed by the United States. *United States v. Tripp County, South Dakota*, Civ. No. 78-3045 (D. S.Dak. Feb. 6, 1979)

(ordering state to submit reapportionment plan for preclearance); *United States v. South Dakota*, Civ. No. 79-3039 (D. S.Dak. May 20, 1980) (enjoining implementation of a revision of organized and unorganized counties absent preclearance). Following a suit by tribal members in Shannon and Todd Counties in 2002, the court entered a consent order requiring the submission of the remaining unprecleared voting changes. *Quick Bear Quiver v. Hazeltine*, Civ. No. 02-5069 (D. S.Dak. Dec. 27, 2002).

There has been other voting rights litigation in South Dakota brought by tribal members challenging a variety of vote dilution measures, *e.g.*, *Buckanaga v. Sisseton Independent School District*, 804 F.2d at 474 (a successful vote dilution challenge to at-large elections for a school board); *Black Bull v. Dupree School District*, Civ. No. 86-3012 (D. S.Dak. May 14, 1986) (successful challenge to failure to provide sufficient polling places for school district elections);[2] *Fiddler v. Sieker*, No. 85-3050 (D. S.Dak. Oct. 24 1986) (successful challenge to the county auditor limiting the number of voter application forms provided to Indians);[3] *United States v. Day County, South Dakota*, No. CV 99-1024 D. S.Dak. June 16, 2000) (holding that Indians had been unlawfully denied the right to vote in elections for a sanitary district);[4] *Emery v. Hunt*, 615 N.W.2d 590, 597 (S. Dak. 2000) (successful challenge to an interim 1996 legislative redistricting plan as violating state constitutional law); *Weddell v. Wagner Community School District*, Civ. No. 02-4056 (D. S.Dak. Mar. 18, 2003) (successful challenge to at-large elections for school

[2]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1024.
[3]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1024-25.

[4]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1023-24.

board);[5] *Bone Shirt v. Hazeltine*, 200 F.Supp.2d 1150 (D. S.Dak. 2002) (three-judge court) (requiring state to submit its 2001 legislative redistricting plan for preclerance under Section 5); *Bone Shirt*, 336 F.Supp.2d at 1053 (order of single-judge court invalidating the state's 2001 legislative plan as diluting Indian voting strength); *Kirkie v. Buffalo County, South Dakota*, Civ. No. 03-3011 (D. S.Dak. Feb. 12, 2004) (invalidating a redistricting plan that packed Indian voters);[6] *Quick Bear Quiver v. Nelson*, 387 F.Supp.2d 1027 (D. S.Dak. 2005) (three-judge court) (enjoining county redistricting plan from being implemented absent preclearance); *Blackmoon v. Charles Mix County*, 2005 WL 2738954 (D. S. Dak. 2005) (enjoining a county redistricting plan as violating one person, one vote).

In invalidating the 2001 legislative plan, the district court in *Bone Shirt* found: there was "substantial evidence that South Dakota officially excluded Indians from voting and holding office;" Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile;" Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and although the accusations have proved to be unfounded they have "intimidated Indian voters;" "[n]umerous reports and volumes of public testimony document the perception of Indian people that they have been discriminated against in various ways in the administration of justice;" "Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process;" turnout rates for Indian voters were generally lower (usually 20%) than for whites; in

[5]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1024.

[6]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1024.

2000, there was a 20% disparity rate in registration between Indians and non-Indians; there was "a significant lack of responsiveness on the part of elected officials to Indian concerns." *Bone Shirt*, 336 F.Supp.2d at 1019, 1025-26, 1030, 1046.

In response to the decision in *Blackmoon v. Charles Mix County*, the county adopted a new plan that increased the size of the commission from three to five members and submitted it to the Department of Justice for preclearance under Section 5. DOJ objected to the plan concluding "that the county has not sustained its burden of showing that the proposed change does not have a discriminatory purpose." Letter from Grace Chung Becker, Acting Assistant Attorney General, to Sara Frankenstein, Feb. 11, 2008.

The long and continuing history of official discrimination in South Dakota and Shannon County that has touched the right of tribal members to register, to vote, or otherwise to participate in the democratic process strongly supports a finding that the shortening of early voting in Shannon County will have a discriminatory effect upon Indian voters in violation of Section 2 of the Voting Rights Act.

III. Depressed Socio-Economic Status and Reduced Political Participation

One of the many legacies of discrimination against Indians is a severely depressed socio-economic status. Based on the 2010 census, the unemployment rate for Indians in South Dakota was 16.4%, compared to 2.7% for whites. U.S. Census Bureau, 2010 American Community Survey 1-Year Estimates. The unemployment rates on the reservations were even higher. In 1997 the unemployment rate on the Pine Ridge Reservation was 80%. South Dakota Advisory Committee to the U.S. Commission on Civil Rights, Native Americans in South Dakota: An

Erosion of Confidence in the Justice System 6 (2000). Life expectancy for Indians is shorter than for other Americans. According to a report of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, "Indian men in South Dakota . . . usually live only into their mid-50s." *Id.* Infant mortality in Indian Country "is double the national average." *Id.* at 6-7.

Native Americans experience a poverty rate that is substantially greater that the poverty rate for whites. The 2010 census reported that 48.5% of Indians in South Dakota were living below the poverty line, compared to 10.3% of whites. The per capita income of Indians was $7,774 compared to $25,052 for whites. U.S. Census Bureau, 2010 American Community Survey 1-Year Estimates.

Of Native Americans 25 years of age and over, 21.2% have not finished high school, while 9% of whites are without a high school diploma. 15.7% of Indian households live in crowded conditions, compared to 1.0% for whites. Native American households are much more likely than white households to be without access to vehicles – 24.9% of Native American households are without access to vehicles versus 4.8% of white households. *Id.*

The link between a depressed socio-economic status and reduced political participation is direct. One of the seven primary factors identified in the legislative history of the 1982 amendment to Section 2 as probative of minority vote dilution is "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." S.Rep. No.97-417, at 28-9, cited in *Gingles*, 478 U.S. at 37. As the Supreme Court has recognized, "political participation tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor

employment opportunities, and low incomes." *Gingles*, 478 U.S. at 69. Numerous appellate and trial court decisions, including those from Indian country, are to the same effect. In *Buckanaga v. Sisseton Independent School District*, 804 F.2d at 475, the court concluded that "[l]ow political participation is one of the effects of past discrimination."

In a recent and related Section 2 case, *Spirit Lake Tribe v. Benson County, North Dakota*, 2010 WL 4226614 *3 (D. N.Dak. 2010), the court enjoined the closing of polling places on the Spirt Lake Reservation in North Dakota on the grounds, *inter alia*, that it "will have a discriminatory impact on members of the Spirit Lake Tribe because a significant percentage of the population will be unable to get to the voting places in Minnewauken [the county seat] to vote." Reducing the number of days of early voting in Shannon County will have a similar discriminatory impact on Indian residents of the Pine Ridge reservation. *See also Perkins v. Matthews*, 400 U.S. 379, 388 (1971) (acknowledging that the location of polling places "at distances remote from black communities" has an obvious potential from abridging the right to vote); *Brown v. Dean*, 555 F.Supp. 502, 505 (D. R.I. 1982) (enjoining the relocation of a polling place under Section 2 because it "may well abridge" minorities' free exercise of the right to vote).

Given the socio-economic status of Indians in South Dakota, it is not surprising that their voter registration and political participation have been severely depressed. As late as 1985, only 9.9% of Indians in the state were registered to vote. *Buakanaga v. Sisseton Independent School District*, 804 F.2d at 474. The South Dakota Advisory Committee to the U.S. Commission on Civil Rights concluded in a 2000 report that:

> For the most part, Native Americans are very much separate and unequal members of society. . . . [who] do not fully participate in local, State, and Federal

> elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality.

South Dakota Advisory Committee 38-9 (2000).

In view of the depressed socio-economic status of Indians, the shortening of early voting on the Pine Ridge Reservation would have an obvious deterrent effect on Indian voting and make it much more difficult for them to vote in person. To vote during the early voting period, except for the last six days, Indians would have to leave Shannon County and travel to Hot Springs in Fall River County. Given the distances they would have to travel to vote in person, their lack of access to vehicles, and their disparate socioeconomic status, the shortening of early voting would have a discriminatory effect upon Indians in violation of Section 2 of the Voting Rights Act[7].

IV. Administrative Convenience Cannot Justify Dilution of Indian Voting Strength

The county Defendants argue that each county should be allowed "to make such decisions, based on budgetary and other concerns, when determining how to provide early voting for its county residents." Brief In Opposition, p. 5 (Doc. #45). To the contrary, the expense or administrative inconvenience of providing early voting is far outweighed by the loss of the equal right to vote that will be suffered by Indian voters on the Pine Ridge Reservation. As the court held in *Spirit Lake Tribe*, 2010 WL 4226614 *5, "the potential harm that would be suffered by Plaintiffs if they were deprived of their Constitutional right to vote outweighs any monetary harm which would fall upon Benson County."

[7]As Plaintiffs have pointed out: "For example, Kyle, South Dakota in Shannon County is 113 miles from Hot Springs, which means a roundtrip to vote early would require more than four hours of driving. Shannon County is one of the poorest counties in the nation, which means many residents would not be able to afford the drive, if they even have a car." Plaintiffs' Motion For Preliminary Injunction, p. 16 (Doc. # 2).

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); *Illinois Board of Election v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (the right to vote and have one's vote counted "is of the most fundamental significance under our constitutional structure"). 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"). Once the right to vote is denied or suppressed, there is usually no way to remedy the wrong. As the court held in *Spirit Lake Tribe*, ,2010 WL 4226614 *4, in enjoining the closing of polling places on the reservation, "there is simply no remedy at law for such harm other than an injunction."

Indian voters will suffer irreparable injury if they are denied an adequate opportunity to vote in the 2012 and future elections. The threatened injury to Plaintiffs outweighs any harm that

an injunction might cause Defendants. "Administrative convenience" cannot justify a state practice that impinges upon a fundamental right. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).[8]

V. 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 amendments and 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, at 5, reprinted in 1982 USCCAN 182 ("[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

[8]According to Plaintiffs' Motion For Preliminary Injunction, p. 8 (Doc. #2), "South Dakota has received millions of dollars in federal funds to assist with elections through the Help American Vote Act. Ex. 21, HAVA State Plan for South Dakota at 4 (March 2010)." These

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, an injunction prohibiting the reduction in early voting on the Pine Ridge 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 Indian voters in Shannon County to an "inequitable" system that is different from the one implemented in 64 other counties in the state would be adverse to the public interest. *Watson v. Commissioners of Harrison County*, 616 F.2d 105, 107 (5th Cir. 1980).

VI. The Increasing Importance of the Indian Vote

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funds could be used to offset the cost of providing early voting in Shannon County.

There has been a positive 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. Reducing early voting on the Pine Ridge Reservation can only impede this progress and be counter productive to the larger interests of all the residents of Shannon County and South Dakota.

In the 2000 presidential election, for example, the average turnout for Shannon, Buffalo, Dewey, and Todd Counties in South Dakota was 42.7%. Turnout in the same counties in the 2004 election, which was driven almost exclusively by Indian voters, grew to 65.2%, an increase of 22.5%, while turnout for the state as a whole grew by only 9.9%. 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," 37.

In 2004, the National Congress of American Indians (NCAI) 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.

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.* 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.

For the first time in history presidential candidates campaigned on reservations in Montana in 2008. 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 Pine Ridge

Reservation and the Wind River Indian Reservation in Wyoming. "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.

In the 2008 elections, 22 American Indians from 16 tribes and 11 states (Alaska, Arizona, California, Colorado, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Washington, and Wyoming) won their state and local contests. Kalyn Free, the president of INDN's List, said "tribal members are engaged at all levels of government in an unprecedented manner. To shape history, you have to be willing to make it." RESNET, "22 Natives From 11 States, 16 Tribes Win Elections," November 5, 2008.

Increased Indian office holding and political participation has certainly not redressed all the legitimate grievances of the Indian community, 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.

As the Indian population increases in South Dakota and the West, American Indians will play an increasingly important role in state and national politics. That will not only help address

the socioeconomic disparities of Indians but will help breakdown the barriers that continue to separate Indians and non-Indians. Requiring Shannon County to provide early voting on an equal basis on the Pine Ridge Reservation will not solve all the problems facing tribal members, but it will be a step in the direction of finding solutions. It will also be an important step in the direction of establishing better working and political relationships between Indians and non-Indians.

Conclusion

For the above and foregoing reasons, the ACLU as *amicus curiae* urges that the Plaintiffs' motion for injunctive relief on be granted.

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Respectfully submitted,

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