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

THOMAS POOR BEAR, et al., Plaintiffs, v. THE COUNTY OF JACKSON, et al., Defendants.	CASE NO. 5:14-CV-5059-KES **STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA**

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit. The United States has a strong interest in the resolution of this matter, which implicates the interpretation and application of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (formerly 42 U.S.C. § 1973). In addition to providing a private right of action, Congress gave the Attorney General broad authority to enforce Section 2 of the Act. *See* 52 U.S.C. § 10308(d) (formerly 42 U.S.C. § 1973j(d)). Accordingly, the United States has a substantial interest in ensuring that Section 2 is properly interpreted and that it is vigorously and uniformly enforced.

The plaintiffs in this case allege, among other things, that the location of the site for in-person voter registration and in-person absentee voting in Jackson County discriminates against Native Americans in violation of Section 2. Compl. ¶ 1, ECF No. 1. In lieu of an answer, the defendants filed a motion to dismiss. In their brief in support of the motion, the defendants argue, among other things, that the plaintiffs' claims are not cognizable under Section 2 of the

Voting Rights Act and argue that the Court should therefore dismiss the complaint for failure to state a claim for which relief can be granted or grant judgment on the pleadings. The limited purpose of this Statement of Interest is to explain why the defendants' interpretation of Section 2 lacks merit and therefore cannot support either dismissing the plaintiffs' complaint or granting judgment on the pleadings. This Statement does not address any other issue pending before this Court.

I. BACKGROUND

This case involves two provisions of South Dakota election law that make it easier for residents to exercise their electoral franchise. The first is in-person voter registration, and the second is no-excuse in-person absentee voting. Starting 46 days before an election, until the voter registration deadline 15 days before an election, residents can register and vote in one stop at locations designated by the county. *See generally* S.D.C.L. chs. 12-4, 12-19. After the registration deadline, in-person absentee voting continues at the designated locations until Election Day. Nothing in South Dakota law prohibits a county from creating satellite election offices so that one-stop in-person voter registration and in-person absentee voting can take place in more than one location. Nor does South Dakota law require that there be a one-stop site in the county seat.

The only location for one-stop in-person voter registration and in-person absentee voting in Jackson County is the election office in Kadoka, the county seat. Compl. ¶ 30. Jackson County is geographically large and sparsely populated. It also has a substantial Native American population, most of which lives on or near the Pine Ridge Indian Reservation at a great distance from the county seat. On average, Native American citizens in Jackson County must travel twice as far as white citizens in the county to use the one-stop in-person voter registration and in-

person absentee voting site in Kadoka. Compl. ¶ 34. Native Americans in Jackson County also lag their white counterparts on a variety of socioeconomic measures, including access to reliable transportation. *See* Compl. ¶ 35-36. As a result, Native American citizens residing in Jackson County face significantly greater burdens and have substantially less opportunity than white citizens with respect to casting in-person absentee ballots and using in-person voter registration. Compl. ¶ 63.

Plaintiffs have asserted two causes of action under Section 2. The first raises the question whether the location of the existing in-person voter registration and in-person absentee voting site leads to a discriminatory result of Native Americans having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice," 52 U.S.C. § 10301(b). Compl. ¶ 67. The second raises the question whether the location was adopted or maintained purposefully to discriminate against Native Americans. Compl. ¶ 73.

II. MOTION TO DISMISS STANDARD

When reviewing a motion to dismiss a complaint for failure to state a claim, a court must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party. *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436, 438 (8th Cir. 2013). The court may consider the complaint, some materials that are part of the public record, and materials embraced by the complaint. *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has a facial plausibility when the plaintiff pleads factual content that allows

the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

As a general rule, a motion for judgment on the pleadings is reviewed under the same standard as a motion to dismiss for failure to state a claim. *See Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012); *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009).

III. ARGUMENT

A. Section 2 applies to the location of in-person voter registration and in-person absentee voting sites.

The defendants assert that the plaintiffs' claim is not cognizable under Section 2 because it concerns in-person absentee voting, which the defendants claim is merely a "voting convenience," and therefore lacks protection under Section 2 of the Voting Rights Act. Defs.' Br. Supp. Mot. Dismiss ("Defs.' Br.") 3, 19, 20, ECF No. 23; *see also* Defs.' Reply to Pls.' Mem. Opp. Mot. Dismiss ("Defs.' Reply") 11-16, ECF No. 28. Not so.

Any determination of what Section 2 means "must begin[ ] with the language of the statute itself." *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012). Section 2 is categorical: states can use "[n]o" voting "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a language minority group]." 52 U.S.C. § 10301(a). The Act contains a broad definition of the right to vote that encompasses, "*all* action necessary to make a vote effective," including, among other things, "registration . . . casting a ballot, and having such ballot counted properly." 52 U.S.C. § 10310(c)(1) (formerly 42 U.S.C. § 1973*l*(c)(1)) (emphasis added); *accord Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969). If Congress had meant to exempt a category of voting procedures from scrutiny under

the Voting Rights Act, it could have done so. In sharp contrast to the Voting Rights Act, Congress did precisely that with respect to the Help America Vote Act. *See* 52 U.S.C. § 21081 (providing that, provided certain criteria are met, "[n]othing in this section shall be construed to prohibit" the continued use of "a particular type of voting system"). But as the Supreme Court explained in *Chisom v. Roemer*, 501 U.S. 380 (1991), it is "difficult to believe" that Congress "withdrew, without comment, an important category of elections" from the Voting Rights Act's protection. *Id.* at 404. To the contrary, the legislative history of the Act, and of Section 2, in particular, is "indicative of an intent to give the Act the broadest possible scope." *Id.* at 403 (quoting *Allen*, 393 U.S. at 567). That broad scope includes the voting procedures at issue here.

The plain meaning of the Act is confirmed by the case law. Courts have consistently interpreted Section 2 to cover all manner of voting procedures. In particular, courts have repeatedly entertained Section 2 claims that involve access to polling places, to voter registration, and to opportunities for absentee and early voting. *See, e.g., Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 552-53 (6th Cir.) ("[T]he plain language of Section 2 does not exempt early-voting systems from its coverage . . . . Nor has any court held that the Voting Rights Act does not apply to early-voting systems."), *stay granted*, 135 S. Ct. 42 (2014); *North Carolina State Conf. of NAACP v. McCrory*, 997 F. Supp. 2d 322, 380-82 (M.D.N.C.) (denying defendants' motion for judgment on pleadings regarding Section 2 results and purpose challenges to various practices, including early voting and late registration procedures, finding that "Plaintiffs have *pleaded* adequate factual matter to make these claims plausible" (emphasis in original)); *on appeal, League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 238 (4th Cir.) (applying Section 2 to various practices including procedures for late registration and early voting, and noting that "courts have entertained vote-denial claims

regarding a wide range of practices"), *stay granted*, 135 S. Ct. 6 (2014); *Wandering Medicine v. McCulloch*, CV 12-135-BLG-DWM, at *16 (D. Mont. Mar. 26, 2014) (order denying defendants' motion to dismiss in part because plaintiffs presented a viable Section 2 claim based on defendants' refusal to establish a satellite registration and absentee voting office); *Brooks v. Gant*, No. CIV 12-5003-KES, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012) (denying a defendant's motion to dismiss in part because plaintiffs' allegations of burdens accessing in-person absentee voting office suffice to show "less opportunity" under Section 2); *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1254-55 (M.D. Fla. 2012) (recognizing that Section 2 required the court to determine "whether the State of Florida, having decided to allow early voting, has adopted early voting procedures that provide *equal* access to the polls for all voters in Florida."); *Spirit Lake Tribe v. Benson County*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (granting preliminary injunction in Section 2 challenge alleging unequal access to polling place locations); *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom. Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968). No court has ever held that any voter registration procedure or ballot-casting issue is outside of Section 2's purview.

It is therefore hardly surprising that the defendants cannot cite a single case that supports their argument. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969), *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), and *Gustafson v. Illinois State Bd. of Elections*, 2007 WL 2892667 (N.D. Ill. 2007)—*see* Defs.' Reply 12, 14-15—are simply irrelevant. None of those cases involved claims under the Voting Rights Act in the first place. They thus say

literally nothing about the scope of the Act. The defendants' reliance on the panel decision in *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014) —*see* Defs.' Reply 12-14—is equally misplaced. That case did not involve a challenge to either polling locations or early voting of any kind. Moreover, the panel decision expressly acknowledged that vote-denial challenges *are* cognizable under Section 2, *see Frank*, 768 F.3d at 754-55; it simply denied that the plaintiffs in the case before it had established a violation on the merits, *id.* at 753-55. Thus, nothing in *Frank* bears upon the question now before this Court.[1] Finally, *Denis v. N.Y. City Bd. of Elections*, 1994 WL 613330, *3 (S.D.N.Y. 1994)—*see* Defs.' Reply 12—is even less apposite. *Denis* involved rejection of a Section 2 claim when the plaintiffs had "failed to offer evidence supporting the existence of a single one of the factors contained in the Senate Report accompanying the 1982 Amendments to the Voting Rights Act—factors which, when taken together, constitute the totality of the circumstances that can establish a Voting Rights Act violation." *Id.* at *8. It would be completely premature at this stage of the proceedings here for this Court to address the merits of the plaintiffs' claims.

The three cases the defendants cite that do involve early or absentee voting also do nothing to support their argument here. In each case, the court assumed that Section 2 covers the practices at issue. Indeed, in *Jacksonville Coalition for Voter Protection v. Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004), the court expressly declared that "polling places constitute a 'standard, practice, or procedure with respect to voting' under Section 2, and that placing voting

[1] Defendants fail to mention *Frank*'s subsequent history. Three days after the panel issued its merits decision reversing the district court, the Supreme Court vacated the panel's earlier stay of the district court's decision. *See Frank v.Walker*, 135 S. Ct. 7 (Oct. 9, 2014) (mem). After the panel's decision was denied by an equally divided en banc court, over an extensive dissent, 2014 WL 5326463 (7th Cir. Oct. 10, 2014), the panel stayed the mandate of its decision pending a petition for certiorari, *Frank* ____ WL ____ No. 14-2058 (7th Cir. Oct. 15, 2014), and the time for petitioning for certiorari has not yet run.

sites in areas removed from African–American communities can have the effect of abridging the right to vote." 351 F. Supp. 2d at 1334 (citing *Perkins v. Matthews*, 400 U.S. 379, 387 (1971)). Similarly, in *Brown v. Detzner*, 895 F. Supp. 2d 1236 (M.D. Fla. 2012), the court recognized that Section 2 required it to determine "whether the State of Florida, having decided to allow early voting, has adopted early voting procedures that provide *equal* access to the polls for all voters in Florida." *Id.* at 1254-55. To be sure, the plaintiffs in *Jacksonville Coalition*, *Brown*, and *Jacob v. Bd. of Directors of Little Rock Sch. Dist.*, 2006 WL 2792172 (E.D. Ark. 2006), were unsuccessful. But they were unsuccessful not because Section 2 did not apply to their claims. Rather, they were unsuccessful because they had failed to establish a likelihood that the early-voting practices at issue would have the discriminatory effect that Section 2 requires plaintiffs to establish. *See Brown*, 895 F. Supp. 2d at 1249-55; *Jacob*, 2006 WL 2792172 at *2; *Jacksonville Coalition*, 351 F. Supp. 2d at 1333-36.

Accordingly, this Court should reject the defendants' argument. Applying the Act's plain text and well-established precedent, this Court should rule instead that Section 2's protections apply to the accessibility and location of any in-person voter registration and in-person absentee voting opportunities that a jurisdiction offers.

B. Section 2 does not require the plaintiffs to prove an inability to elect their preferred candidates.

The defendants also contend that "[w]ithout alleging the Plaintiffs cannot elect candidates of their choice, Plaintiffs have failed to allege a § 2 VRA claim." Defs.' Br. 25; *see also* Defs.' Reply 5-9. Not so. The defendants' argument misconceives the nature of the plaintiffs' challenge to the county's practices. Because the defendants' interpretation of Section 2 conflicts

with the plain language of the statute as well as Supreme Court precedent, their argument fails as a matter of law.

The plain text of Section 2(b) requires the plaintiffs to show only that the political process is not equally open to Native Americans because the practice at issue results in their having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). The defendants, by contrast, would require the plaintiffs to show that they "cannot elect candidates of their choice." Defs.' Br. 24-25. The defendants' formulation fundamentally alters the statutory test.

Section 2 contains a comparative standard: minority voters cannot be given "less opportunity" than other voters to participate and elect their preferred candidates. It does not require proof that minority voters lack all ability to elect. The defendants' formulation would give jurisdictions a green light to discriminate. Under their formulation, for example, it would not violate Section 2 for a jurisdiction to keep polling places open for twelve hours in majority-white precincts while having them open for only three hours in majority-Native American precincts: while this would almost certainly make voting more difficult for Native American voters than for white voters—that is, they would quite literally have "less opportunity" to participate—they would still be able to elect their preferred candidates as long as enough of them were willing to bear the difficulty. Indeed, under the defendants' formulation, Native American voters would lack any protection under Section 2 if they constituted only a small numerical minority within a jurisdiction with highly polarized voting: after all, they might not have been able to elect their preferred candidate under any circumstances. But it simply cannot be the law that in such a case, a jurisdiction can with impunity make it more difficult for them than for white voters to cast their ballots.

In support of their argument, the defendants cite *Chisom*, 501 U.S. at 397, for the proposition that "to make out a § 2 VRA claim . . . 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." Defs.' Br. 24. But this is not a proper reading of *Chisom*. Rather, the Court held there that where a plaintiff shows that minority voters have less opportunity than other voters to participate in the political process, the plaintiff necessarily also establishes that members of that group have less opportunity to elect candidates of their choice. *Chisom*, 501 U.S. at 397 ("Any abridgement of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election."). *Chisom* thus stands neither for an "inability" standard nor for the proposition that Section 2 challenges to ballot-casting procedures require two separate showings.

Moreover, because Section 2 requires a totality-of-the-circumstances analysis, *see* 52 U.S.C. § 10301(b), the election of a few minority candidates is not dispositive of a plaintiff's opportunity, relative to other members of the electorate, to elect representatives of choice, particularly in a case where plaintiffs are not advancing a vote-dilution claim. *See Thornburg v. Gingles*, 478 U.S. 30, 75 (1986) ("[T]he language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.").

Contrary to the defendants' argument, *Jacob v. Board of Directors of Little Rock School District*, 2006 WL 2792172 (E.D. Ark. 2006), *see* Defs.' Br. 25-26, does not undermine the plaintiffs' claim. The early voting location at issue in *Jacob* was the Pulaski County Courthouse, located in Little Rock, Arkansas. African Americans living in the county asked for additional

early voting locations, despite the fact that 64 percent of the African Americans living in the county resided in Little Rock and close to the courthouse. The district court thus ruled that additional early voting locations in the county were unnecessary to provide equal opportunities to participate because the courthouse was easily accessible by the protected class. In contrast, in Jackson County, residents of Wanblee, 95.5 percent of whom are Native American, must travel 54 miles round-trip to access the election services provided in Kadoka, easily accessible to its 94.5 percent white population. Compl. ¶¶ 28, 33.

A plain reading of the statutory language and Supreme Court precedent establishes that plaintiffs in a Section 2 lawsuit are not required to show an inability to elect candidates of choice. There is no precedent to support the defendants' proffered reading of Section 2. Accordingly, the Court should reject the defendants' argument.

C. Section 2 does not require the plaintiffs to prove that they would be unable to vote without a satellite location.

The defendants also disregard the plain text of Section 2 when they argue that "[w]ithout showing an inability to vote without in-person absentee voting at Wanblee . . . Plaintiffs cannot win on the merits of their claim." Defs.' Br. 27. But the defendants again miss the point. Section 2 ensures that if a jurisdiction provides expanded voter registration and ballot-casting opportunities—such as the in-person voter registration and in-person absentee voting provisions at issue here—it cannot extend those opportunities in a way that results in minority voters having less access to them than non-minority voters enjoy.

Here again, the defendants simply rely on the wrong standard. Section 2(b) requires only that plaintiffs demonstrate that Native Americans have *less opportunity* than other members of the electorate to use in-person voter registration and in-person absentee voting, not that the

plaintiffs themselves are *unable* to participate in the political process by using preexisting voting methods. 52 U.S.C. § 10301(b); *see Ohio State Conference of the NAACP*, 768 F.3d at 552 ("Section 2 applies to any 'standard, practice, or procedure' that makes it harder for an eligible voter to cast a ballot, not just those that actually prevent individuals from voting."). The touchstone for Section 2 is inequality of opportunity. In other words, the defendants cannot effectively require Native Americans to accomplish in one day what they permit other members of the electorate to accomplish in several weeks, particularly in light of the depressed socioeconomic status of Native Americans relative to white voters in Jackson County.

Accordingly, the defendants are not entitled to a dismissal, even if the plaintiffs have not alleged that they are unable to cast a ballot without a satellite election office in Wanblee.

D. The plaintiffs have alleged causation.

The defendants assert that the Court should dismiss this case because the plaintiffs have failed to allege "a causal relationship between the challenged voting practice and any harm . . . ." Defs.' Br. 22; *see also* Defs.' Reply 9-11. But even a brief review of the plaintiffs' complaint reveals that they have, in fact, alleged causation: the location of the in-person voter registration and in-person absentee voting site in Kadoka, interacting with demographic and socioeconomic factors, causes Native Americans to have less electoral opportunity than other citizens in Jackson County.

For instance, the plaintiffs allege that the in-person voter registration and in-person absentee voting office in Kadoka is "significantly closer to and more convenient for the white population of Jackson County than for the Native American population of Jackson County." Compl. ¶ 32. They allege that "[t]here is a significant disparity between the average time it takes for white residents of Jackson County to reach the county seat and the average time it takes for

Native Americans to reach the county seat," Compl. ¶ 34. And they allege, "*As a result*" of those geographic disparities, as well as socioeconomic disparities, the "Plaintiffs and other Native American citizens residing in Jackson County face significantly greater burdens and have substantially less opportunity than the white population to avail themselves of the convenience and benefits of casting in-person absentee ballots and using in-person registration." Compl. ¶ 63 (emphasis added).

The defendants do not explain why these allegations are insufficient. Rather, the defendants suggest that the plaintiffs must allege a causal connection between the location of the voting site and increased voter turnout. Defs' Br. 22. But, again, that is not the standard. The plaintiffs have alleged that the location of the early voting site makes voting more difficult for Native American citizens than for white citizens in Jackson County. That extra burden is the harm. While it might be true that more Native Americans would vote in the absence of that extra burden, Section 2 requires no such allegation as a matter of pleading. Under the defendants' formulation, jurisdictions would be free to impose disparate burdens on minority voters so long as those voters were able to overcome the burden and cast their ballots. That cannot be the law when Section 2 requires providing equal voting opportunities to minority and white citizens.

Accordingly, the Court should reject the defendants' argument and deny their motion to dismiss.

E. The plaintiffs have sufficiently alleged intentional race discrimination.

The defendants assert that the Court should dismiss the plaintiffs' claim of intentional discrimination under Section 2 because they failed to "plead factual allegations that the Defendants themselves intended to discriminate based on race," and that more than "a conclusory statement to that effect . . . is required to survive a motion to dismiss." Defs.' Br. 11-

12; *see also* Defs.' Reply 16-17. But, again, review of the complaint reveals that the plaintiffs have, in fact, alleged intentional race discrimination.

The legal standard for an intent claim under Section 2 parallels the requirements for bringing a claim of intentional racial discrimination under the Constitution. *See Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990). "[W]hether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In *Arlington Heights*, the Supreme Court identified a non-exhaustive list of factors to consider in determining whether racially discriminatory purpose exists, including: whether the impact of the decision bears more heavily on one racial group than another; contemporaneous statements by the decisionmakers; the historical background of the decision; the sequence of events leading up to the decision; and whether the decision departs from the normal practice. *Id.* at 266-68; *see also Perkins v. City of West Helena*, 675 F.2d 201, 208-09 (8th Cir. 1982). The Eighth Circuit has also held that a court may look to the so-called "Senate Factors" in addition to the *Arlington Heights* factors when considering an intent claim under Section 2. *See Perkins*, 675 F.2d at 208-09. These factors, which are also probative in a results claim under Section 2, *see Gingles*, 478 U.S. at 49, are set out in the Senate Judiciary Committee's report on the 1982 amendments to the Voting Rights Act. S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 204-07; *see generally Rogers v. Lodge*, 458 U.S. 613, 619-622 (1982); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, (1976). Ultimately, "racial discrimination need only be one purpose, and not even a primary purpose, of an official act" to violate Section 2. *United States v. Brown*, 561 F.3d 420, 433 (5th Cir. 2009);

see also H.R. Rep. No. 97-226, at 30 n.101 (1982) (barring voting practices under Section 2 "if a discriminatory purpose was a motivating factor").

The plaintiffs' complaint has alleged facts that would permit a court to draw a reasonable inference of purposeful discrimination in the defendants' decision to maintain a single location in Jackson County for in-person voter registration and in-person absentee voting in Kadoka. For instance, the plaintiffs allege that the location has a disparate impact on Native Americans. Compl. ¶¶ 25-36, 63 (an *Arlington Heights* factor). They allege that South Dakota has a long history of racial discrimination against Native Americans, including discrimination in voting. Compl. ¶¶ 54-60 (both an *Arlington Heights* factor and the first Senate Report factor). They allege that voting in Jackson County is racially polarized. Compl. ¶ 59 (the second Senate Report factor). They allege that Native Americans lag their white counterparts on a number of socioeconomic measures that hinder their ability to participate effectively in the political process. Compl. ¶¶ 35-36 (the fifth Senate Report factor). And they allege that the defendants continued to reject a satellite election office for lack of funding even after funds became available. Compl. ¶¶ 37-53, 72 (tracking the additional Senate Report factor that looks to the "tenuous[ness]" of the challenged practice as well as *Arlington Heights*). From these allegations, a court could reasonably infer—as the plaintiffs allege—that the defendants' refusal to open a satellite office, particularly after funding became available, was motivated at least in part by race. The defendants observe, correctly, that the plaintiffs may not rest on conclusory allegations, but the complaint goes well beyond conclusory allegations.

In their reply, the defendants argue for the first time that the plaintiffs must allege "that there was no rational basis for the Defendants' decision." Defs.' Reply 17. Section 2 requires no such thing. The sole case upon which the defendants rely for their novel argument is *Gustafson*

v. Illinois State Bd. of Elections, 2007 WL 2892667 (N.D. Ill. 2007), a case which involved neither claims under the Voting Rights Act nor constitutional claims of racial discrimination. That case involved a ballot-access claim under the First Amendment and a *Bush v. Gore* style claim under the Fourteenth Amendment. It is apparent that the defendants are confusing their legal standards. No court has ever held that an intentionally discriminatory voting procedure violates Section 2 only if there is no rational basis to support it. *See, e.g., United States v. Brown*, 561 F.3d at 432-33; *Perkins*, 675 F.2d at 208-09.

Accordingly, the Court should reject the defendants' argument and deny their motion to dismiss.

IV. CONCLUSION

For the foregoing reasons, the defendants' interpretation of Section 2 lacks merit and cannot support a grant of a motion to dismiss.

Date: December 23, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Statement of Interest of the United States of America was served on all parties by filing through the Court's CM/ECF system, which automatically sends notice of filing to all attorneys of record. *See* Local Rule 5.1.

Dated: December 23, 2014.

By: /s/*Bryan L. Sells*_____
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