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

MARK WANDERING MEDICINE, et al., Plaintiffs, v. LINDA McCULLOCH, in her official capacity as Montana Secretary of State, et al., Defendants.	CASE NO. 1:12-CV-135-DWM 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, 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* 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. Indeed, the United States previously filed a Statement of Interest in this case at the preliminary injunction stage and also participated as *amicus curiae* on appeal before the Ninth Circuit in this case in order to address the interpretation and application of Section 2 in this context.

The plaintiffs in this case alleged, among other things, that the location of the site for in-person late registration and early voting in Big Horn, Blaine, and Rosebud counties discriminates against Native Americans in violation of Section 2. Compl. ¶¶ 161-63, ECF No. 1. On April 4, 2014, following the Ninth Circuit's dismissal of plaintiffs' appeal from the denial of a preliminary injunction and further discovery in this Court, the plaintiffs and the defendant counties and county officials ("county defendants") filed cross-motions for summary judgment

pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See* Pls.' Mot. Summ. J. , ECF No. 159; County Defs.' Mot. Summ. J., ECF No. 163.

In their brief in support of summary judgment, Mem. Supp. County Defs.' Mot. Summ. J., ECF No. 166 ("Defs.' Mem."), the county defendants argue that plaintiffs' claims are not cognizable under Section 2 of the Voting Rights Act and thus argue they are entitled to judgment as a matter of law. The limited purpose of this Statement is to explain why the county defendants' interpretation of Section 2 lacks merit and therefore cannot support a grant of summary judgment in their favor. This Statement does not address any other issue pending before this Court.

I. BACKGROUND

This case involves two provisions of Montana election law that make it easier for Montanans to exercise their electoral franchise. The first is known as "late registration," and the second is known as "early voting." Together, the two provisions offer a convenient one-stop approach to registration and voting that allows a voter to register and vote with a single visit to a local office any time within a 30-day window preceding an election.

Late registration is an option for Montanans who miss the regular mail-in registration deadline 30 days before an election. *See* Mont. Code. Ann. § 13-2-301. Starting the day after the regular registration deadline and continuing until the close of the polls on Election Day, an eligible voter may register to vote or

update the voter's existing registration information by appearing in person at the county election office or other location designated by the county election administrator. *See* Mont. Code Ann. § 13-2-304.

Early voting, which is also known as in-person absentee voting, allows any registered voter to receive, mark, and submit an absentee ballot in person at the county election office or other location designated by the county election administrator. *See* Mont. Code. § 13-13-222. The early-voting period begins as soon as absentee ballots become available—which is typically about 30 days before the election—and continues until noon on the day before the election. *See* Mont. Code Ann. §§ 13-13-205, -211.

Late registration and early voting most often take place at the county election office, which usually is located in the county clerk's office in the county seat. However, as this Court has recognized, Montana law permits a county to create satellite election offices so that late registration and early voting can take place in more than one location. *See* Order at 9-10 (recognizing that the Secretary of State "had, and has, the ability to issue a directive telling the counties that they *must* establish satellite voting offices for in-person absentee voting and late voter registration"), ECF No. 153; Pls.' Mem. Supp. Mot. Prelim. Inj. Ex. 9 (Election Advisory #A01-12), ECF No. 4-2.

Big Horn, Blaine, and Rosebud counties currently offer late registration and early voting only in their respective county seats. Each of these counties is geographically large and sparsely populated. Each county also has a substantial Native American population, most of which lives on or near Indian reservations located within those counties at a great distance from the county seat. Thus, the issue in this case is whether the location of the existing late registration and early voting sites results in Native Americans having "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), in violation of Section 2.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In deciding whether there is a genuine issue of material fact, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A "genuine issue" is one

whose resolution could establish an element of a claim or defense and, therefore, could affect the outcome of the action. *Id.*

III. ARGUMENT

A. Section 2 applies to the location of late registration and early voting sites.

The county defendants assert that the plaintiffs' claim is not cognizable under Section 2 because it concerns early and absentee voting. They claim that early and absentee voting is "convenience voting," and therefore lacks protection under Section 2 of the Voting Rights Act. Defs.' Mem. 9-15. 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]." 42 U.S.C. § 1973(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." 42 U.S.C. § 1973l(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. 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 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. *Chisom* , 501 U.S. at 403 (quoting *Allen*, 393 U.S. at 567). That broad scope plainly includes the voting procedures at issue here.

Recognizing the Act's broad scope, courts have 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.*, *Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom. Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *Spirit Lake Tribe v. Benson County*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968); and *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004). No court has ever held that any voter registration procedure or ballot-access issue is outside of Section 2's purview.

Thus, it is hardly unsurprising that the cases on which the county defendants rely do not support 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. Elections*, 2007 WL 2892667 (N.D. Ill. 2007) —*see* Defs.' Mem. 10-14—are simply irrelevant. Those cases did not involve claims under the Voting Rights Act in the first place, and thus say literally nothing about the scope of the Act. Similarly, *Denis v. N.Y. City Bd. of Elections*, 1994 WL 613330, *3 (S.D.N.Y. 1994) —see Defs.' Mem. 10—did not involve polling locations or early voting of any kind, so it sheds no light on the Act's coverage of those practices. In any event, contrary to the county defendants' characterization, the court in *Denis* simply held that the plaintiffs had failed to meet their burden of showing that, under the totality of the circumstances, black or Latino voters had been prevented from voting in a particular primary election.

The three cases county 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 sites in areas removed from African–American communities can have the effect of abridging the right to vote." *Id.* 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, but 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 county defendants' argument and rule instead, consistent with the Act's plain text and well-established precedent, that Section 2's protections apply to the accessibility and location of any late registration and early voting opportunities that a jurisdiction offers.

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

The county defendants also argue that Section 2 "requires Plaintiffs to demonstrate that . . . the Counties' failure to provide satellite locations [for late registration and early voting] . . . prevented them from electing representatives of their choice." Defs.' Mem. 20. They further claim that they are entitled to

summary judgment here because undisputed facts show that some Indian-preferred candidates have been successful in Montana. Because the county defendants' interpretation of Section 2 conflicts not only with the plain language of the statute but also disregards binding Ninth Circuit 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." 42 U.S.C. § 1973(b). The county defendants, by contrast, would require the plaintiffs to show that they "cannot elect representatives of their choice." Defs' Mem. 15. The county 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 opportunity to elect. The county 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 decide 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 might make voting decidedly more difficult for Native American voters than for white voters, they would have no claim as long as enough of them were willing to bear the difficulty. But that simply cannot be the law.

In support of their argument, the county defendants cite *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012), *aff'd on other grounds sub nom. Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013). But nothing in *Gonzalez* remotely supports the county defendants' argument, and the court itself recites the statutory language. *Id.* at 407. Indeed, when the county defendants asserted the same position before the Ninth Circuit on appeal that they now assert before this Court on summary judgment, they were met with open skepticism. *See* Tr. 10/10/2013 at 27-36 (Ex. 1).

Moreover, because determining whether a disputed practice violates Section 2 requires a totality-of-the-circumstances analysis, *see* 42 U.S.C. 1973(b), this Court has already recognized that "the election of a few minority candidates is not dispositive of a plaintiff's ability to elect representatives." Order 17, ECF No. 153 (quoting *Windy Boy v. Big Horn Co.*, 647 F. Supp. 1002, 1018-20 (D. Mont. 1986)). The election of a few minority candidates is also not dispositive of a plaintiff's *opportunity*, relative to other members of the electorate, to elect representatives of their choice. *See Gingles*, 478 U.S. at 75 ("[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."). The Court should therefore reject the county defendants' argument.

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

The county defendants also disregard the plain text of the statute when they argue that, in order to establish a Section 2 violation, the plaintiffs must prove they would be or are unable to vote in the absence of the requested satellite offices. *See* Defs.' Mem. 21-23. Specifically, the county defendants assert that they are entitled to summary judgment on the ground that "[t]here is no allegation or proof that Plaintiffs could vote if in-person absentee voting was offered at a satellite office in the locations requested, but cannot, or even do not, without it." *Id.* at 22. But the county defendants again miss the point. Section 2 ensures that if a jurisdiction provides expanded voter registration and ballot-access opportunities—such as the late registration and early 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 county 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 late registration and

early voting, not that the plaintiffs themselves are *unable* to participate in the political process by using preexisting voting methods. 42 U.S.C. § 1973(b). The touchstone for Section 2 is inequality of opportunity. In other words, the county defendants cannot effectively require Native Americans to accomplish in one day what they permit other members of the electorate to accomplish in 30 days, particularly in light of the depressed socioeconomic status of Native-Americans relative to white voters, and the totality of the circumstances, in these jurisdictions.

Accordingly, the county defendants are not entitled to summary judgment even if plaintiffs cannot show that they are unable to cast a ballot in all circumstances.

D. Section 2 does not require independent causation.

The county defendants also assert that Section 2 requires the plaintiffs to show that "travel distance alone causes any prohibited discriminatory result." Defs.' Mem. 24. They claim that the plaintiffs may not, as a matter of law, meet their burden under Section 2 by showing that travel distance to late registration and early voting sites produces a discriminatory result when "combined with a number of other factors." *Id.* But the county defendants offer no analysis or authority to support their claim. In fact, there is none.

First, the county defendants' argument is irreconcilable with Section 2's text, which expressly requires courts to consider "the totality of circumstances"

when determining whether a challenged voting practice results in discrimination. 42 U.S.C. § 1973(b). The Act's legislative history identifies several factors that Congress considered relevant to certain types of Section 2 claims, and it notes that courts may consider other factors that they find to be relevant in a particular case. S. Rep. No. 97-417 at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207. *See generally Thornburg v. Gingles*, 478 U.S. 30, 43-46 (1986) (discussing Section 2 and its legislative history). Indeed, as the Supreme Court has explained, the essence of a Section 2 claim under the totality-of-circumstances test is that "a certain electoral law, practice, or structure *interacts with social and historical conditions* to cause an inequality in the opportunities enjoyed by [voters of different races] to elect their preferred representatives." *Id.* at 47 (emphasis added). The text of Section 2 thus *requires* a court to consider whether a challenged practice produces a discriminatory result when combined with other relevant factors.

Second, the Ninth Circuit has already considered and rejected the county defendants' argument. In *Farrakhan v. Washington*, 338 F.3d 1009, 1016-19 (9th Cir. 2003) (*Farrakhan I*), a Section 2 challenge to the State of Washington's felon disfranchisement laws, the Ninth Circuit held that independent causation is not required. The district court there had held that a plaintiff must show that a challenged voting practice, "by itself," caused a discriminatory result—the same

standard now advanced by the county defendants. But the Ninth Circuit reversed, observing that the district court's standard conflicted with "the plain language of the VRA, its legislative history, and other well-established judicial precedent." *Id.* at 1017. Under the totality-of-circumstances test, a plaintiff need not show that a challenged practice alone caused a discriminatory result. *Id.* at 1018. Rather, a plaintiff may prove causation by pointing to the interaction between the challenged practice and other relevant factors and by showing how that interaction results in the discriminatory impact. *Id.* at 1019; *see id.* ("[U]nder *Salt River* and consistent with both Congressional intent and well-established judicial precedent, a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances."). *Farrakhan I* remains binding authority and thus requires this Court to reject the county defendants' argument.

Nor does anything in *Gonzalez* support the county defendants' narrow interpretation of causation. *See* 677 F.3d at 405-07. Applying the same causation standard used in *Farrakhan I*, the Ninth Circuit in *Gonzalez* merely affirmed a finding that the plaintiffs had offered no proof of causation. The causation standard, already settled in *Farrakhan I*, was not even an issue in *Gonzalez*.

IV. CONCLUSION

For the foregoing reasons, the county defendants' interpretation of Section 2 lacks merit and cannot support a grant of summary judgment in their favor.

Date: April 25, 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 1.4(c)(2).

Dated: April 25, 2014.

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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Statement of Interest of the United States of America complies with the Local Rule 7.1(d)(2) and contains 3,448 words, excluding the caption and certificates of service and compliance. The undersigned has relied upon the word count of Microsoft Word, the word processing system used to prepare this Statement. The original document and all copies of this Statement are in compliance with this rule.

Dated: April 25, 2014.

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

Exhibit 1

UNITED STATES DISTRICT COURT OF APPEALS

FOR THE NINTH CIRCUIT

Mark Wandering Medicine, et al,	Case No.12-35926
Plaintiffs-Appellants,	D.C. No. 1:12-cv-00135-RFC
-vs-	District of Montana Billings
Linda McCulloch, et al,	
Defendants-Appellees.	ORAL ARGUMENT

BEFORE: The Honorable Barry G. Silverman
The Honorable William A. Fletcher
The Honorable Consuelo M. Callahan

APPEARANCES: Mr. David Bradley Olsen
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PROCEEDINGS: The above-entitled matter came on for oral argument on the 10th day of October, 2013, in the Federal Building, Portland, Oregon.

I N D E X

JUDGE SILVERMAN: Now take up 12-35926, Wandering Medicine versus United States and McCulloch. I believe the appellants have decided that they're going to divide up their time with an amicus view. Go ahead with this, please, before we get going.

MR. OLSEN: Yes, Your Honor. We have ceded seven minutes of our time --

JUDGE SILVERMAN: (Unintelligible). We left something in the robbing room. Be right back.

(Brief pause.)

UNIDENTIFIED VOICE: I apologize.

JUDGE SILVERMAN: No problem. All righty. I'm sorry. Introduce yourself again.

MR. OLSEN: Thank you. David Bradley Olsen, Henson & Efron, Minneapolis, appearing pro bono on behalf of the plaintiffs-appellants.

JUDGE SILVERMAN: How are you dividing the time?

MR. OLSEN: We would like to cede seven minutes of our time to the Department of Justice and reserve three for rebuttal.

JUDGE SILVERMAN: So you're going to take ten --

MR. OLSEN: I'll take ten.

JUDGE SILVERMAN: -- three, they get seven.

MR. OLSEN: Correct.

JUDGE SILVERMAN: Gotcha. Okay.

MR. OLSEN: May I begin?

JUDGE SILVERMAN: Please.

MR. OLSEN: May it please the Court, in 1986 the United States Supreme Court in Gingles versus Thornburg said that Congress intended the Voting Rights Act eradicate inequalities in the political opportunities that exist due to the vestigial effects of past purposeful discrimination. Said Gingles, the ultimate test under Section 2 is whether a challenged practice based on the totality of the circumstances interacts with social and historical conditions to create an inequality in the opportunities enjoyed by minority and white voters.

We're here today in 2013 because Montana Indians living on reservations are still fighting for equal opportunities to participate in the political process with respect to late registration to vote and the ability to vote early by absentee.

JUDGE SILVERMAN: Let me ask you this procedurally. I want to make sure I got the story straight. This is an appeal of a preliminary injunction, right?

MR. OLSEN: That is correct.

JUDGE SILVERMAN: Mandatory injunction still remains to be seen --

MR. OLSEN: Correct.

JUDGE SILVERMAN: -- for permanent relief down the road. The way I read the record, it looks like as a practical matter, what was tried in district court for this preliminary injunction dealt with the 2012 election, and leaving -- leaving for the permanent injunction permanent relief down the road. And if -- if that's true, I don't know what we can do about the 2012 election. Looks like that's come and gone.

MR. OLSEN: The complaint, Your Honor, asks for relief not only with respect to the 2012 election, but with all -- with respect to all future elections as well.

JUDGE SILVERMAN: I understand that. That's why I asked you, that's where the permanent injunction down the road comes in. Looks like what was actually tried was 2012 election, right?

MR. OLSEN: From a theoretical standpoint, should this Court find that the Voting Rights Act has been violated, conceivably it could remand, the district court could void the election because it was an unlawful election. That's unlikely to happen, but conceivably it could. And because the Court could order that relief, the case is not moot, and because it's necessary for this Court to define the correct test and correct the fundamental error of law committed

by the district court, it's necessary for this Court to rule.

JUDGE SILVERMAN: Even if it's not moot -- let's assume for the sake of discussion it's not moot, even though there is very little we can probably do about the 2012 election. There was evidence, wasn't there, presented by the counties that they can't do, in the -- in the couple of weeks before the election, what they -- what you wanted them to do. There was evidence to the contrary, too, but there was some evidence they just couldn't do what you wanted. You filed the lawsuit less than a month before the election.

Even if it's not moot, why would the district court have abused his discretion saying, look, it's just -- it's too -- too short a time to accomplish what you want?

MR. OLSEN: Because voting, Your Honor, is a fundamental right. The irreparable harm is established by an abridgment of that right. The counties argued as a matter of administrative convenience that it might be difficult for them to establish satellite voting within the few days remaining before the 2000 -- 2012 election.

JUDGE SILVERMAN: They -- they can't do it.

MR. OLSEN: They -- they said they can't.

JUDGE SILVERMAN: Okay. And you said they can. And the judge heard evidence back and forth, and they -- you know, within his discretion said I agree with them. How can we find that's an abuse of discretion if there was some evidence to support what he -- what he did?

MR. OLSEN: We don't think there was any evidence to support what he did, and as a matter of fact and law, the district court got that wrong.

JUDGE FLETCHER: Well, let me go to the (unintelligible) not the question of (unintelligible) convenience because I think actually, you know, that could have gone either way. I mean, it was a pretty short time. What if the district judge made a flat out mistake of law? Then -- then how -- then how are we supposed to look at this case?

MR. OLSEN: We're asking here that you remand with specific instructions to apply the correct test under the Voting Rights Act.

JUDGE FLETCHER: And are you arguing that the district judge made a flat out mistake of law?

MR. OLSEN: Absolutely we are.

JUDGE FLETCHER: And this mistake of law, as I'm just trying to understand what you've said in your brief and what the government has said in its amicus

brief, the mistake of law is that the district judge concluded that because the Indians on the reservation were able to elect representatives of their choice, that was the end of the matter with respect even as to the opportunity claim. And that's wrong?

MR. OLSEN: We believe that's absolutely wrong, Your Honor.

JUDGE SILVERMAN: Therefore, we should void the election?

MR. OLSEN: I'm saying that conceivably that is one remedy that could be applied. We're not asking the Court to do that. We're asking --

JUDGE SILVERMAN: If you're not asking to do that, then what are you -- what remedy do you want?

MR. OLSEN: The remedy we want is for the Court to declare the correct test under the Voting Rights Act because it's necessary to proceed in this litigation and all future litigation.

JUDGE CALLAHAN: That isn't really a typical remedy. That's just asking the Court to -- that -- that sometimes we look at it -- you know, I'm not sure that takes you out of mootness. If you're not asking to void the election -- you know, I don't know, is it -- are you -- if you -- are you asking the Court to vacate entirely what was said on the preliminary

injunction so that the -- because I -- what I understand to some extent that the counties are saying that they -- they weren't -- you know, the timing did not also allow them to develop a complete record, and so you still have the permanent injunction out there.

So, you know, I guess why not just say it's moot and let everyone go back and start on a clean slate? It's not even going to be the same judge, right? That judge retired, is my understanding.

MR. OLSEN: Although if we were to do that, we're now approximately a year out from the 2014 elections. When this suit was filed, it was approximately a year out from the 2012 elections. We're going to be in the same position in 2014 that we were in in 2012 unless an appellate court clarifies the correct standard to be applied in this voting rights litigation.

JUDGE CALLAHAN: Well, okay. So let's talk about the standard that you're asking. My understanding is that Subsection (b) of 42 U.S.C. 1973 says that in making a claim that the political processes are not equally open to the -- the litigant must show two things; one, that members of the protected class have less opportunity than other members of the elective to participate, and, two, that they have less opportunity to elect representatives of their choice.

So which -- you're -- you're asking -- you don't want "and" to be interpreted as "and." You don't want to -- you want this Court to say that they don't have to put on any evidence of number two, right?

MR. OLSEN: In a vote denial case, that is our position.

JUDGE CALLAHAN: How do we, if -- if that --

JUDGE FLETCHER: That can't be right. What you mean is less opportunity, and the fact that you can elect some doesn't mean you had an equal opportunity.

MR. OLSEN: Our position, Your Honor, is that the "and to elect representatives of their choice" is not dispositive in a voting rights (unintelligible) case.

JUDGE CALLAHAN: But I think you're asking for more; that it still would be some evidence, wouldn't it?

MR. OLSEN: It's one factor that can be considered (unintelligible).

JUDGE CALLAHAN: My understanding is that you're asking to say that "and" doesn't really mean "and," and so there's no requirement of any showing on the second part of it.

MR. OLSEN: What we're asking this Court to say is that in a vote denial case, where the right to vote has been denied or abridged, based on account of race, that

the fact that certain minorities have had ability to elect representatives and representatives have been elected becomes virtually irrelevant. The statute says what it says.

JUDGE CALLAHAN: You're writing out the "and" really in terms of -- and -- and that's where I'm trying to -- if -- if "and" -- you would have to find it to be ambiguous to look at the -- if you do statutory construction, if you say the language is clear, then before you look at the legislative intent of Congress, you would say that it was ambiguous, and so that you would look to it, even though everyone always peeks under the covers anyway.

But that being said, I -- what I'm understanding you to say is that the "and" doesn't mean "and"; that that's what you're asking this Court to declare.

MR. OLSEN: We are asking the Court to say that in a vote denial case. Absolutely, we are.

JUDGE SILVERMAN: Do I understand correctly, in -- in Montana you can vote by -- by mail, is that right?

MR. OLSEN: Correct.

JUDGE SILVERMAN: And on the voting day they could go to the offices where you wanted the absentee voting to take place, is that right, on election day?

MR. OLSEN: On election day you can go to a polling

place. They do have polling places on the reservation on election day. But 30 days prior to election, there's no ability to register to vote at those places, and there's no ability to vote absentee at those places. They've got to drive tremendous distances to the county seats.

JUDGE SILVERMAN: Unless they go on election day and they take their ballot to the -- to the polling place.

MR. OLSEN: That would have to be before 8:00 a.m. on election day if it's an absentee ballot.

JUDGE SILVERMAN: Did you identify anybody who was not able to vote, actual name? Come up with a single human being who couldn't -- who couldn't vote?

MR. OLSEN: No, we did not, nor do we think that's the correct issue in this case. The question is not whether the plaintiffs had any ability whatsoever to vote despite any hurdles that may have been thrown in front of them. The --

JUDGE SILVERMAN: Is there anybody who couldn't jump over the hurdles?

MR. OLSEN: Not to my understanding, no. Not -- not this group of plaintiffs.

JUDGE FLETCHER: Now, let's go back to the mootness question. When you were asking for the preliminary

injunction in front of the district court, was your argument directed solely at a preliminary injunction with respect to the immediately upcoming election or was it also asking for a preliminary injunction that would require preparation for the future elections? What was -- how -- how was your argument --

MR. OLSEN: It was phrased in terms of 2012 and all future elections. The remedy in 2012 alone would be no remedy at all.

JUDGE FLETCHER: Well, but I'm asking you what you were asking out of the district judge. I understand that if -- if you don't get anything ever, you don't get anything ever. But I'm asking what was -- what was the question that the district judge thought was being presented to him and what was the question that he thought he was answering? Was it only as to the 2012 election or was it for more than that?

MR. OLSEN: It was for 2012 and all future elections. And that's even in our complaint.

JUDGE FLETCHER: Even as to the -- even as to the preliminary --

MR. OLSEN: Even as to the preliminary, correct.

JUDGE SILVERMAN: What would have been left for the permanent injunction?

MR. OLSEN: The district court had the opportunity

to consolidate the two into one hearing, and didn't do that. The -- from my standpoint, the preliminary injunction would have been mere cleanup after the correct test was applied and relief granted at the preliminary stage.

JUDGE CALLAHAN: Isn't there an argument that the preliminary injunction was really only as to the 2012, and the permanent was going to address the 2014 and future elections? I mean, everyone was just up against -- I mean, we're talking days before the election when these hearings were happening.

MR. OLSEN: Certainly that was part of the defense, that it was difficult to do in the limited time provided. But our complaint was we wanted relief not only for 2012, but for all future elections.

JUDGE CALLAHAN: But what was Judge -- if Judge Cebull -- what -- what did he think he was going to do on the permanent injunction? Didn't he think he was going to address future elections on that?

MR. OLSEN: Obviously the future -- that would make the injunction permanent. We're already asking for relief into the future. It's temporary relief. It has to be made permanent with rules.

JUDGE FLETCHER: What happens if we find that this appeal is moot because the only thing being appealed is

a preliminary injunction, and the thrust of the request for the preliminary injunction was as to the 2012, that's the only thing that Judge Cebull thought he was deciding at the preliminary injunction, so we say it's moot? What happens with respect to the law of the case?

Now, it's going to go back to a different judge, and you're going to argue to that different judge that Judge Cebull made a mistake as to law in interpreting the word "opportunity." Is this new district judge going to say, well, listen, that's the law of the case, that's already been done? What happens?

MR. OLSEN: I can only speculate on that, Your Honor, but in my experience, when I go to a district judge, when another has already decided the case before him or decided the law, they generally tend to follow their predecessors.

JUDGE SILVERMAN: What if we said we think it's moot because you were really arguing about 2012 and that -- that train has left, but we don't -- we don't endorse the reasoning of the district judge? District judge should -- new district judge should rethink it when it goes back for the permanent injunction. Does that satisfy what you're -- what you're after?

MR. OLSEN: If we had the correct test declared,

that's what we're asking for today.

JUDGE CALLAHAN: Well, no, sir, it wouldn't satisfy (unintelligible).

MR. OLSEN: If I could finish, please. But if you declared the case moot, I don't know that you would have the power to do that.

And I'm just -- I'm just about out of time. I would like to refer you to Babbitt versus UFW National Union, U.S. Supreme Court '79, where they said the policy implications for adjudication of election procedure disputes assures the construction of the statute will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

Unless this court pronounces the test, we could be in the 2014 elections before we even get a preliminary decision. And we can be in the same position again because the Court has applied the wrong test and is likely to apply the wrong test absent guidance from this Court.

JUDGE SILVERMAN: Thank you. We'll hear from the government's amicus. Morning.

MS. FLYNN: Morning.

JUDGE CALLAHAN: Morning.

MS. FLYNN: May it please the Court, Erin Flynn on behalf of the United States. Your Honors, we just want to be clear that we're participating solely as to the legal standard under Section 2 of the VRA in this appeal. Judge Callahan, you raised earlier the plain text of Section 2(b) as a starting point in the analysis for the district court's analysis of this case.

JUDGE CALLAHAN: I mean, it seems me that the Department of Justice wasn't terribly happy with the voting rights case that was decided before the Supreme Court this year, and -- but this is a different section, so the Department of Justice is teeing up with cases on this particular section.

MS. FLYNN: Right. Well, Shelby County, Your Honor, addressed only Section 4(b) really. The Court's holding in Shelby County only addressed Section 4(b) of the VRA and whether or not --

JUDGE CALLAHAN: But it's sort of an indication that the Supreme Court is pulling back a little.

MS. FLYNN: I wouldn't agree with that, Your Honor, at all. The Supreme Court looked at Section 5 in the context of Section 2 being an available remedy to protected groups under the statute. And if anything, the importance of Section 2 is enhanced, given that

Section 5 right now, until Congress -- and unless Congress amends Section 4(b) --

JUDGE CALLAHAN: Right. So get me back past the plain language here because it seems to me you're asking to write out an "and."

MS. FLYNN: No, Your Honor. And -- and that's where I want to start, is with the plain language, because the plain text of Section 2(b) requires the plaintiffs to show, based on the totality of the circumstances, only that the political process isn't equally open to them because they have less opportunity than other members of the electorate to participate in the political process, and to elect the representatives of their choice.

And what the district court did here, Your Honors, is err because he required the plaintiffs to show unequal access and an inability to elect representatives of their choice in order to state a Section 2 violation. And requiring the plaintiffs to show an inability to elect the representatives of their choice under Section 2(b) is not the same as the statutory showing that they're required to show less of an opportunity to elect candidates of their choice.

And so what the district court did here was say that plaintiffs have to show they had no opportunity to

elect representatives of their choice in order to prevail under Section 2. And the plain text of Section 2(b) requires them only to show less of an opportunity. And so we say that that's where the district court erred in looking at the (unintelligible).

JUDGE CALLAHAN: But you're not saying -- I -- I heard Mr. Olsen to say that they don't think they need to show anything under Number 2.

MS. FLYNN: No. We're saying that in this context, what the district court does is what district courts do in all Section 2 cases, is look at the totality of the circumstances to determine is there less of an opportunity to -- to participate in the political process and less of an opportunity to elect candidates of choice.

In these types of claims where you have ballot access and registration issues, it's normally going to follow from less of an opportunity to elect -- I mean to participate in the political process that plaintiffs have less of an opportunity to elect candidates of their choice. So the standard isn't that plaintiffs can't vote or that they can't elect candidates of their choice. It's that they have less of an opportunity relative to other members of the electorate.

So when we're looking here, the plaintiffs are basically, you know, your --

JUDGE CALLAHAN: So is any evidence that they have elected candidates of their choice, is that irrelevant then?

MS. FLYNN: The -- the minority electoral success is one factor in a number of factors that the Supreme Court has said courts look to under Section 2. The relevance of minority electoral success is going to vary with the nature of the claim and all the universe of cases looking at (unintelligible).

JUDGE CALLAHAN: So it's not irrelevant, though?

MS. FLYNN: It's not completely irrelevant, but there are other factors that, in this sort of ballot access and registration case, become more important to the totality of the circumstances analysis. And what the district court did here was not only misinterpret the statutory language to require the plaintiffs to show an inability to elect candidates of their choice to prevail, which was wrong because they only need to show less of an opportunity to participate in the process and elect candidates of their choice, but then on top of it, even if the Court had recited the right standard, which it didn't, it would look only to minority electoral successes, one factor in a number of

factors that could be relevant. And courts don't treat ability to elect when they're treating it as one factor as dispositive in any case.

And so there's kind of two levels of error here. The district court got the statutory text wrong, and then even if the district court had gotten the statutory text correct, which he didn't, he wouldn't normally --

JUDGE CALLAHAN: The argument that he sort of misspoke because it does look like that he did look to some totality of the factors. It doesn't look like that's the only thing he looked to.

MS. FLYNN: Your Honor, on the basis of what the district court said, I think it's difficult to say that he misspoke because on Page 7 he said the issue is whether the -- there's less access to in-person absentee voting and late registration, and that plaintiffs are unable to elect representatives of their choice. And he goes on to say the plain text and the cases applying Section 2(b) require plaintiffs to show both unequal access and an inability to elect. And that's not the statutory showing. It's not what the plain text requires.

Again, on Page 12, he says that there is an explicit requirement that Section 2 plaintiffs show

that the challenged practice results in their inability to elect candidates of choice. Again, that's not the statutory showing. And on 14, he says since the plaintiffs are able to elect their candidates of choice without the satellite offices, their Section 2 claim is likely to fail.

And even if, you know, there was some doubt as to what the district court meant, on appeal the county defendants repeatedly say in their brief that the statutory standard is that plaintiffs have to show they can't vote, and that they can't elect candidates of their choice. And that's on Pages 8, 15, 58, and 59 of the county defendant's brief. They say repeatedly that the plaintiffs have to show actual vote denial, which isn't the standard under Section 2 of the VRA.

And so I don't think that, you know, we can just take for granted that the district court misspoke in this case, Your Honor.

JUDGE FLETCHER: Well, as I read the district judge, and now reading the first sentence of that last paragraph on Page 12 to which you alluded but you didn't read the full text, I'll just read the first sentence. Finally -- this is now the district judge. "Finally, and most importantly, because of the explicit requirement that Section 2 plaintiffs prove that the

challenged procedure or lack thereof results in the inability to elect representatives of their choice," da, da, da. I mean that's the statement of the law. It is saying --

MS. FLYNN: Right. And that is correct.

JUDGE FLETCHER: -- that the plaintiff under Section 2 has to prove that they cannot -- that's essential to a Section 2 claim in his view.

MS. FLYNN: And that's what we're saying, is that that's a completely incorrect statement of the law.

JUDGE SILVERMAN: Okay. Thank you very much.

MS. FLYNN: Thank you.

JUDGE SILVERMAN: We will hear from the appellees. Before we start I guess, are you going to be taking all the time?

MR. QUINTANA: I certainly hope not, Your Honor. I -- my name is Jorge Quintana. I represent the state defendant, the Secretary of State. I expect to use maybe three minutes.

JUDGE SILVERMAN: What I meant was are you going to split it with --

MR. QUINTANA: We are going to split it, Your Honor.

May it please the Court, as I stated, my name is Jorge Quintana. I represent -- I'm a Special Assistant

Attorney General and chief legal for Secretary of State, and I'm here representing the state defendant.

The plaintiffs-appellants have failed to show that the Secretary of State is a necessary party. They did not and they cannot show that the Secretary of State violated any duty or any law. The plaintiffs have requested the specific relief of opening up late registration and in-person absentee offices. The Secretary of State does not issue absentee ballots, we do not open satellite --

JUDGE CALLAHAN: (Unintelligible) there isn't any case out there from the Supreme -- your state Supreme Court, why shouldn't we just sort of (unintelligible) this issue to the Supreme -- state Supreme Court and ask them to give us an answer?

MR. QUINTANA: Your Honor, I would not have an objection with that. That was brought up in the hearing by the attorney for the county defendants. And the -- Judge Cebull stated that, you know, it was six days before the election. There wasn't time to certify that question; although that dealt with whether or not satellite offices were even legal under the Montana code.

JUDGE FLETCHER: I think we know the answer to that now; that they are legal. The question is now whether

it's been compelled under Section 2.

MR. QUINTANA: The county defendants -- I don't want to speak for the county defendants. These are two separate cases. But the county defendants I believe in their brief argue that this may not -- the satellite offices may not be legal.

JUDGE FLETCHER: I may be wrong. I thought that had been settled, but...

MR. QUINTANA: From the Secretary of State point of view, we're relying on the letter advice given us to -- given to us by the attorney general that said satellite offices could be opened under the county's self-governing powers.

JUDGE FLETCHER: Right.

MR. QUINTANA: And it's --

JUDGE FLETCHER: That's what I'm referring to, yes.

MR. QUINTANA: And it's -- it's interesting because the -- the plaintiffs-appellants' theory of the case is that we should disregard that letter, that we should order the county commissioners to open up these satellite offices; yet they point to no law or case that agrees with this position that the Secretary of State can use her powers under Title 13 to force a outcome upon the county commissioners under their discretionary powers under Title 7, which is local

government under the Montana code annotated. And perhaps we'll hear an answer to that in rebuttal.

JUDGE SILVERMAN: You made a motion to dismiss in district court.

MR. QUINTANA: Yes, Your Honor, based on --

JUDGE SILVERMAN: Is that just laying out there? Is that --

MR. QUINTANA: It is, Your Honor. The -- the plaintiffs have stayed the proceedings. I mean, they can talk about how urgent the timing is, but they have stayed the proceedings below. So our motion to dismiss under 12(b)(1) for lack of standing and 12(b)(6) for failure to state a claim upon which relief can be granted is just sitting there in limbo, although the judge's decision did grant us a footnote, saying that we made a pretty decent argument.

JUDGE SILVERMAN: Your -- your three minutes are -- are up.

MR. QUINTANA: Then I hope I did well. Thank you, Your Honor.

JUDGE SILVERMAN: Thank you very much. Appreciate it.

MS. FRANKENSTEIN: May it please the Court, counsel. Good morning. I'm Sara Frankenstein representing the county defendants in this case.

It's important to note all the ways that one can vote in Montana, including Native Americans who reside in Montana. This case is about absentee voting. That's the second thing to clarify. It is not about the right to vote. It is about how and where and the logistics around receiving an absentee ballot.

There's five ways to receive an absentee application to -- to obtain an absentee ballot in Montana. First is you can mail in the application, postage prepaid by the county. Second, you can fax in your application for an absentee ballot. Third, you can hand it in in person at the election office. Fourth, you can send it with a designated person, whomever you choose, who can hand in that application and then receive your ballot for you. And, five, in Montana you can sign up for lifetime absentee ballots to be delivered to any address of your choice.

JUDGE FLETCHER: All of that goes to equal opportunity, ease of access. I'm not sure I want to get there yet. And I'm not sure the district judge even really got there. The district judge in his order says, well, you've got to show as a matter of requirement under Section 2 an inability to elect representatives of their choice. And as I view it, we really don't have much finding out of the district

court as to what differential difficulties the tribal members might or might not have. I understand that's the argument you're wanting to address to us, but I'm a little reluctant to go to that question without a little more out of the district judge.

MS. FRANKENSTEIN: Prong one and prong two, both within the text of the Voting Rights Act, prong two seems to be the thrust of the plaintiffs appeal, but they also must prove prong one, which is that there was unequal ability to vote. And all of these many methods --

JUDGE FLETCHER: It's unequal opportunity, not unequal ability. The word is "opportunity." That's the statutory word.

MS. FRANKENSTEIN: And there was absolutely no reference, no testimony from any plaintiff at all, indicating that any of these other ways are -- pose a problem, that they're unable to cast a vote, that they in fact don't vote, or that they're burdened in doing them. In fact, the plaintiffs do vote in these many different ways.

JUDGE FLETCHER: Let me ask you a different question. This may help focus your argument in a way that's helpful to me. You -- you've read the government's amicus brief, and you've heard the

government arguing here. Do you disagree with the government as to its abstract statement as to what the law requires, not yet applying them to the facts of this case?

MS. FRANKENSTEIN: Yes. And I think you're referring to prong two, about the word "and" in the second portion --

JUDGE FLETCHER: I'm not referring only to the word "and." I'm asking you, do you disagree with the government's description of what the government says is the meaning of Section 2?

MS. FRANKENSTEIN: Absolutely.

JUDGE FLETCHER: Okay. So what's your view of the meaning of Section 2?

MS. FRANKENSTEIN: If you look at the first section, which is Section (a), it tells you what the Voting Rights Act prohibits. It prohibits the denial of the opportunity to vote. You can also bring a vote dilution claim, but it's one of the two; vote denial or vote dilution. Section (b) tells you what you need to prove to prove Section (a). The totality of the circumstances and the various things you must prove as elements to prove a Section (a) claim.

Much of the discussion has been with regard to the second prong in (b), but they also needed to prove

prong one, which they did not prove, and they also needed to --

JUDGE FLETCHER: You -- you're losing me a little bit when you say prong one or prong two. What's prong one or prong two as you're using those terms?

MS. FRANKENSTEIN: Prong one is that members of the minority class have less opportunity than other members of the electorate to participate in the political process.

JUDGE FLETCHER: Okay. And prong two is --

MS. FRANKENSTEIN: That the minority has less opportunity to elect representatives of their choice.

JUDGE FLETCHER: So for both prongs, you view less opportunity is the applicable test?

MS. FRANKENSTEIN: No, Your Honor.

JUDGE FLETCHER: Well, you just said less opportunity is a lead in to both prong one and prong two.

MS. FRANKENSTEIN: I rely on the text of the Voting Rights Act.

JUDGE FLETCHER: I am, too. But I just heard you say prong one is less opportunity than other members to participate in the political process, and then you said prong two is less opportunity to elect representatives of their choice.

MS. FRANKENSTEIN: Well --

JUDGE FLETCHER: Is that what you meant to say?

MS. FRANKENSTEIN: Well, I mean to say what the Voting Rights Act says. I mean to read it to you. It says, "and to elect representatives of their choice."

JUDGE FLETCHER: I -- I understand.

MS. FRANKENSTEIN: But does the opportunity modifies both one and two.

JUDGE FLETCHER: And that's the question.

MS. FRANKENSTEIN: First of all, I don't think it does, Your Honor. Secondly, it doesn't matter because they have opportunity and did in fact vote in other ways.

JUDGE CALLAHAN: Okay. I think -- I don't want to tell you how to spend your time, but I think to make it most productive for everyone, I think Judge Fletcher was asking you how do you interpret the language. And I guess what I just heard out of there is that you don't think "opportunity" modifies two, even though that's the way you just read it. You said opportunity to do one and opportunity to do two.

MS. FRANKENSTEIN: Then I read it wrong, Your Honor. I would rely on the text which says --

JUDGE CALLAHAN: You're saying "opportunity" does not apply to two. Now, both counsel for appellants

said -- they said different things in my mind; that -- the first counsel, Mr. Olsen, said they don't think that they need to even talk about prong two, that they're really -- they're not reading that as an "and." I did not hear government counsel, Miss Flynn, I believe -- I heard her say that it is -- it is an "and," but "opportunity" modifies one and two. And what the judge did hear was to focus on two, and not apply the totality of the circumstances to -- to everything.

So the question is if we're going -- if we -- if -- if we say it's not moot and we give statutory construction to it, then that's not about whether you win or lose. It's about what is the test. And if the test is opportunity to do one and opportunity to do two, then apply the totality of the circumstances, then that's -- but you're saying you disagree. You think it's opportunity to do one, and two stands alone.

MS. FRANKENSTEIN: I do, Your Honor. And that's how the U.S. Supreme Court has issued its interpretation of the statute in Chisom versus Roemer. It's also reflected in this Court's en banc opinion in Gonzalez versus Arizona.

JUDGE FLETCHER: You know, I read -- I read both of those cases differently than you do. And I certainly

would say that Farrakhan two goes the other way. Now, Farrakhan two is no longer binding. It was vacated. But I read both Roemer and Gonzalez to agree with what the government's reading is.

MS. FRANKENSTEIN: Your Honor, I would disagree. If you look at the cases that we have cited, other district courts and other courts of appeals have ruled in the same manner.

JUDGE FLETCHER: Well, you know, I think the only case you've got that rules your way is the District Court of Montana. As I read the circuit courts from elsewhere, they -- they agree with the government.

MS. FRANKENSTEIN: Your Honor, that's not true. In our brief we have a number of --

JUDGE CALLAHAN: You're saying you have a case exactly on point? We don't need to publish then. If there's a case exactly on point, then we cite that case and we're done.

MS. FRANKENSTEIN: I cited them throughout my brief where in a vote denial case, the Court indicates that they will not grant plaintiffs' relief because the plaintiffs were not able to show that the minority plaintiffs were unable to elect their candidates of choice. And I did cite those throughout my brief. That's oftentimes cited in these cases because, of

course, it's explicit within Section 2 of the Voting Rights Act.

The Court did not focus on only that in granting our motion to dismiss at the preliminary injunction hearing. The Court found a number of things. First, it found under the Voting Rights Act, the Native American plaintiffs did not prove less opportunity to participate politically. That's the prong one argument.

Two, we talked about prong two, that they did not prove.

Third, the plaintiffs didn't even plead causation. And causation is required, and if it's not there, it's dispositive of the plaintiffs' claim. There was no evidence showing causation, it wasn't even pleaded, and the plaintiffs at the hearing told the district court that we don't need to prove it.

Now on appeal, both the Department of Justice, as well as the plaintiffs, concede that they do have to prove causation, but they would like you to believe that it's a different test than that indicated in the case law.

JUDGE FLETCHER: You know, I am reading Pages 405 to 407 of the Gonzalez opinion, and I find no support for your argument. They keep -- you know, the Gonzalez

opinion keeps quoting the statutory language sometimes by inference and sometimes directly. I'll just read the first column on Page 405, the first paragraph under Section (a). "A violation of Section 2 (unintelligible) is established if," and then they quote the language of the statute that we have here in front of us. Said otherwise, the plaintiff can -- this is the prior court speaking, said otherwise the plaintiff can prevail on a Section 2 claim only if, quote, based on the totality of the circumstances the challenged voting practice results in discrimination on the account of race.

I see nothing in Gonzalez that tells us that there is a different test, opportunity or not opportunity, for the two prongs.

MS. FRANKENSTEIN: Your Honor, it lists it within numeral one before the first prong and in numeral two before the second prong. And you'll see no --

JUDGE FLETCHER: Of course, that's absolutely right in brackets. And preceded by the worth "opportunity."

MS. FRANKENSTEIN: Before the word "to elect representatives," I don't believe so. There's no opportunity --

JUDGE CALLAHAN: I think it's and members -- equally open to participation by members of a protected

class and that its members have less opportunity than other members of the electorate, one, to participate in the political process, two, to elect representatives (unintelligible).

JUDGE FLETCHER: (Unintelligible) is simply quoting the statute and inserting those brackets.

MS. FRANKENSTEIN: That's true, Your Honor.

JUDGE FLETCHER: We're back to the same argument. I would have expected, though, in Gonzalez, if there were a differential analysis for prong one and prong two, the Court might have said so. It never says a darn thing about it. It -- it keeps giving us the phrase "opportunity," followed by one and two.

MS. FRANKENSTEIN: Your Honor, this is a wonderful academic argument, but the truth of the matter is the plaintiffs didn't put on any proof that they had less opportunity to elect candidates.

JUDGE FLETCHER: That's a -- that's a different question. I would first like to understand what the statute means because I'm inclined to think that Judge Cebull got the statute wrong.

MS. FRANKENSTEIN: There would be no cases that indicate that, Your Honor. As you can see in the Department of Justice amicus brief, there are no cases in support of that theory. But, secondly, the

plaintiffs didn't prove that they had less opportunity to elect candidates of choice. No proof on that whatsoever. So --

JUDGE CALLAHAN: Maybe what -- Cebull did not abuse his discretion, but if the Court is going to do statutory construction going forward, that's -- it is more than a nice academic argument here.

MS. FRANKENSTEIN: Your Honor, first of all, I believe the plaintiffs need to plead this issue and they need to brief it; none of which was done before the district court. So while we can talk about this on -- on appeal, we really need to look at whether or not Judge Cebull abused his discretion.

JUDGE CALLAHAN: I think -- I understand why you want to stick to, you know, this is my argument, and I'm sticking to it, but oral argument is part of the -- when the judges want to ask questions, and we're looking at mootness, we're looking at what -- you know, all those things. We haven't discussed it, but, you know, it's not really helpful to marginalize the questions and keep deflecting them and saying it's an academic argument or it's this or that if that's what the Court wants to talk about because I think you want to give an answer to it, don't you?

MS. FRANKENSTEIN: Your Honor, my answer is --

JUDGE CALLAHAN: Otherwise the answer is that's an academic argument, and you don't need to think about it. And then we go back and think about that academic argument, and you've said nothing.

MS. FRANKENSTEIN: I've -- I've given my answer, and I'm happy to do it again. There is no word "opportunity" before the word clause "to elect representatives." There is no case law that indicates that should be inserted there. So our argument is Judge Cebull did not err when he found that the text should be read as the text is.

JUDGE SILVERMAN: Let me ask a practical question here with the academics for a minute.

JUDGE FLETCHER: If I can interject, as a former academic, I almost find that it really hurts a guy when they say that's just academic. I can recognize an insult.

MS. FRANKENSTEIN: I did not mean to do so, Your Honor.

JUDGE FLETCHER: No. That was facetious. Okay. Please go ahead.

JUDGE SILVERMAN: As -- as a practical matter, if you -- if you lose, what would you have to do? What do they want you to do?

MS. FRANKENSTEIN: I'm not sure what it is that the

plaintiffs are asking us to do.

JUDGE SILVERMAN: Well, don't they want you to designate somebody at board -- how do say that -- Belnap Agency --

MS. FRANKENSTEIN: Right.

JUDGE SILVERMAN: -- at Lame Deer and Crow Agency, designate somebody there to register people and receive absentee ballots?

MS. FRANKENSTEIN: Right. They're asking us to set up a satellite office, presumably now before the 2014 election.

JUDGE SILVERMAN: And a satellite office, you don't have to build a building there. You need to designate someone to do this, is that right?

MS. FRANKENSTEIN: Right. We would need --

JUDGE SILVERMAN: Is that a big deal? I mean, I'm having a hard time visualizing why that's such a -- such a big deal to do.

MS. FRANKENSTEIN: It is difficult, Your Honor. And I would ask that you take a look at Sandra Boardman's testimony. She was the one who talked a great deal about this. She's the election administrator in Blaine County. And she testified how it doesn't just require room that you can rent, but it requires ADA, high speed internet, but also somebody

with --

JUDGE SILVERMAN: High speed internet which is, what, like plug it into the wall or something?

MS. FRANKENSTEIN: Well, it's got to be high speed which isn't necessarily what all buildings would have. But it also has to have --

JUDGE SILVERMAN: Do they have internet up at these places?

MS. FRANKENSTEIN: I'm sorry. What?

JUDGE SILVERMAN: Do they have internet service in these places?

MS. FRANKENSTEIN: That was up in the air. Many people couldn't confirm whether or not they did.

JUDGE CALLAHAN: Are you saying you can't (unintelligible) --

JUDGE SILVERMAN: (Unintelligible) high speed internet at the headquarters of the tribe?

MS. FRANKENSTEIN: I'm sorry.

JUDGE SILVERMAN: They don't have high speed internet at the tribal headquarters?

MS. FRANKENSTEIN: There was mixed conclusions on that. Many people -- there was much testimony, for instance, Big Horn County, there was no testimony about any room that was available.

JUDGE SILVERMAN: Okay. So they need to have high

speed internet. What else do they need?

MS. FRANKENSTEIN: They need to have a Montana Votes computerized system there that has a scanner and somebody who's authorized to use it which requires a C-number which means you pass --

JUDGE SILVERMAN: Why is that such a big deal to get a scanner up there?

MS. FRANKENSTEIN: Because absentee ballots are -- are not just handed out. You must fill out your application, and then all your information is typed into Montana Votes. And then it produces a scan code or a bar code.

JUDGE SILVERMAN: Okay.

MS. FRANKENSTEIN: And that accompanies each absentee ballot. So then when you go and hand your ballot back in and say, here, I'm voting --

JUDGE SILVERMAN: Yes.

MS. FRANKENSTEIN: -- the clerk and recorder would scan in -- up would pop your name and your signature and it would take care --

JUDGE SILVERMAN: Why is that such a big deal to do? I don't get it.

MS. FRANKENSTEIN: Because there are not enough people who are C-certified to man both offices.

JUDGE SILVERMAN: We would need three people?

MS. FRANKENSTEIN: Yes, you would need three people at --

JUDGE SILVERMAN: One for -- one for Fort Belnap, one for Lame Deer, one for Crow Agency?

MS. FRANKENSTEIN: Right.

JUDGE SILVERMAN: What's the big deal with that? You have to get somebody --

MS. FRANKENSTEIN: You have to --

JUDGE SILVERMAN: -- there to do that.

MS. FRANKENSTEIN: You have to have a C-certification.

JUDGE SILVERMAN: Okay. So you have a C-certification. What's -- what, do you have to go to France to get those or anywhere -- where do you get a C-certification?

MS. FRANKENSTEIN: You have to go through the -- I believe it's a computerized training in order to do that.

JUDGE SILVERMAN: Is that a big deal to do?

MS. FRANKENSTEIN: Is it, Your Honor.

JUDGE SILVERMAN: Why?

MS. FRANKENSTEIN: Miss -- Miss Boardman indicated that it's a very -- it's not a user friendly method. But more importantly, Your Honor --

JUDGE CALLAHAN: That's why you couldn't do it in a

week, right?

MS. FRANKENSTEIN: Absolutely.

JUDGE CALLAHAN: But now we're talking about a year. So you don't have the same impediments for a year as you did for a week. And I think part of all that you have been saying is that the record needs to be further developed on what happens in 2014.

MS. FRANKENSTEIN: Your Honor, it was well developed about what would happen. Even if all of this is in place and we use the system that the plaintiffs propose, it would be impossible to have a recount. That was clear from Miss Boardman's testimony; that even if we had the time and the resources and everything to set this all up, you could not have a recount because their method that they proposed requires altering and voiding ballots, back and forth constant communications, of altering ballots, voiding its -- its corresponding ballot back at the home office, and doing this back and forth by phone and through the Montana Vote system.

JUDGE SILVERMAN: They do this elsewhere in Montana, don't they?

MS. FRANKENSTEIN: They do not, Your Honor.

JUDGE SILVERMAN: They don't have satellite voting elsewhere in Montana?

MS. FRANKENSTEIN: No, they do not. This is the first --

JUDGE FLETCHER: How do you deal in Montana with absentee ballots that are just sent in by mail? Are those counted on the same day?

MS. FRANKENSTEIN: Are those what? I'm sorry.

JUDGE FLETCHER: Are those counted on the same day?

MS. FRANKENSTEIN: I'm not sure on what day they're counted, but when they come in they have a bar code on them, so then they can scan it in, up pops your name and your signature (unintelligible).

JUDGE FLETCHER: I understand what you're saying. But I assume that any absentee ballots sent in will have a bar code on it. I think I'm hearing you say that you -- you think it's required that you do the scanning immediately in order for the counting. I'm not sure that that's so, meaning if you count absentee ballots in the week or ten days after the election when it's -- you know, when the absentee ballots might make a difference, so you -- you do it ten days later, and you don't do it necessarily at the remote location. You do it wherever you -- wherever you need to do it.

MS. FRANKENSTEIN: When the voter comes in and he says I want to absentee -- I want to vote absentee, you must take down their information and get their

signature and put it into the Montana Vote system because there has to be a signature in there to compare when the paper ballot comes in.

JUDGE FLETCHER: Yeah.

MS. FRANKENSTEIN: So you have to have access. It also tells you which sequential ballot to be issued to that voter, and that's told to you through Montana Vote. So you have to be in front of that computer screen and know, oh, this is voter number three.

JUDGE FLETCHER: You know, I have to say I'm unconvinced, but I also have to say that given the current state of the record and how little we have as a finding from the district judge, I'm quite unequipped to decide this.

MS. FRANKENSTEIN: I think it would be very helpful to go through the discovery process and do it through the permanent injunction rather than through this preliminary injunction appeal.

JUDGE CALLAHAN: Can you speak to mootness.

JUDGE FLETCHER: Yeah.

MS. FRANKENSTEIN: Yes, Your Honor. We do believe this case is moot. It's not (unintelligible) review -- capable of repetition, yet evading review because the case still is at the district court level. By nature it cannot be (unintelligible) review because the

plaintiffs, if they receive an adverse ruling there, they can seek review at that time.

JUDGE FLETCHER: It sounds as though it might be helpful. Until -- until I started hearing argument today, I didn't think it was. We're now told, well, listen, we're going to go back down and we're going to get another one of these last minute situations because of the time -- the time (unintelligible) going forward.

MS. FRANKENSTEIN: Your Honor, we do have a year. The plaintiffs filed a motion to stay the case. We were opposed to it. We don't have a ruling on that yet, so conceivably the district court could begin ruling on this case at any time.

JUDGE FLETCHER: And then time for appeal. I mean, what are we talking about?

MS. FRANKENSTEIN: Well, that's a good point. But if there's an appeal by the plaintiffs, that means they had an adverse ruling.

JUDGE FLETCHER: Yeah, I'm assuming that's possible, but you might also get one. You might want to appeal, too.

MS. FRANKENSTEIN: Right. But it would be -- it wouldn't need to be fast-tracked if -- if we did.

JUDGE FLETCHER: You say it would not?

MS. FRANKENSTEIN: No. If the defendants got a

ruling, we wouldn't need to. We wouldn't ask for it to be fast-tracked. So the time frame isn't of importance to us, if I understood the question.

JUDGE FLETCHER: The (unintelligible) didn't want to fast-track if you lose. Is that what you're saying?

MS. FRANKENSTEIN: No. I'm saying the plaintiffs are the one who believe that the time is of the essence here, but they filed the motion to stay at the district court level.

JUDGE SILVERMAN: I think what Judge Fletcher is asking you is if -- if the judge says you have to do these things, you lost, you have to do all these things, you have put in wireless internet, you have to get the scanner and everything, you wouldn't ask to have -- you wouldn't appeal that on a fast-track basis?

MS. FRANKENSTEIN: Oh, I -- I suppose, depending how quickly that order came down before the election, that -- that's conceivable.

JUDGE FLETCHER: Yeah. I kind of think so.

JUDGE SILVERMAN: I see you are over your time. Thank you. (Unintelligible).

JUDGE FLETCHER: Well, you know, I would like to pursue mootness just one more -- little bit here, because the mootness is actually a tricky question

here.

What's your view as to the question that was presented to Judge Cebull and the question he answered? Was it just as to the 2012 election that the preliminary injunction was sought or was it also a preliminary injunction to get ready for the 2014?

MS. FRANKENSTEIN: Your Honor, I do not remember any evidence coming in regarding down the road two years from now in 2014 whether or not this can be done. All the evidence was whether we can get this going in eight working days -- six working days, eight actual days, before the election. So the evidence that came in was with regard to whether we can get this done in the following week.

JUDGE FLETCHER: And the complaint asks for preliminary and permanent injunction for both the 2012 and future elections. I understand that. I mean this is what the complaint says. But I'm trying to figure out what the actual preliminary injunction was that was sought. And it sounds as though the focus was on the 2012 election.

MS. FRANKENSTEIN: Certainly the evidence was, Your Honor.

JUDGE FLETCHER: Yeah. It would be helpful to the parties if we were to indicate at this time our

construction of the statute so that the district judge knows what to do when it goes back down?

MS. FRANKENSTEIN: Well, I don't know that procedurally that that's the method -- that's as if one is seeking an advisory opinion of the Court rather than a reversal of the district court's decision on the preliminary injunction. I don't believe that's the proper method of seeking appeal. I believe that the -- the district court should be allowed to determine the case, and that if the plaintiffs or either side are unhappy with it, they can seek review at that time.

JUDGE SILVERMAN: Yes. Let's just say we expressly -- we specifically express no opinion on the correctness of the ruling; how about that?

MS. FRANKENSTEIN: But instead --

JUDGE SILVERMAN: In other words, we don't say this is how we construe it, but we want to put you on notice, we're not -- we're not endorsing it either.

MS. FRANKENSTEIN: Oh. And affirm the decision, but --

JUDGE FLETCHER: No. Dismiss it as moot and say, and this is not to be construed in any way as our endorsing of the decisions by district court interpreting the law.

MS. FRANKENSTEIN: Certainly, Your Honor.

That's -- that was our request in the motion to dismiss on mootness ground. We didn't expect anything more than that.

JUDGE SILVERMAN: Anything else?

JUDGE FLETCHER: The reason we -- the reason we're suggesting it this way I think is to free up the district judge who will get this case, of course we know will not be Judge Cebull, to look at -- look at the legal question afresh rather than subject to the constraints of the law of the case.

MS. FRANKENSTEIN: I -- I would expect that, Your Honor.

JUDGE FLETCHER: Okay. Thank you.

JUDGE SILVERMAN: Mr. Olsen, I think you have three minutes left.

MR. OLSEN: If I may, since we finished with a discussion of mootness, I think I'll start there.

In 1998, Ruiz versus City of Santa Maria, this Court said, "Claims for injunctive relief are moot only when subsequent events make clear that the alleged violations are not reasonably expected to recur." Here they are not only reasonably expected to recur, the county has said it has no obligation to --

JUDGE CALLAHAN: (Unintelligible) 2012 is not going to reoccur.

MR. OLSEN: 2012 will not recur, no.

JUDGE CALLAHAN: Yeah --

MR. OLSEN: But --

JUDGE CALLAHAN: -- if you construe it narrowly. If you construe it more broadly, elections will continue, we hope, if the government ever gets back to work.

MR. OLSEN: The elections will continue, and the unequal opportunities to participate in the political process will also continue.

JUDGE SILVERMAN: I'm sort of curious why you didn't put this in a posture where we'd have a final order so we don't have this permanent injunction still pending. Why didn't you get the judge to just say this is not only my temporary ruling, this is my permanent ruling, and then we don't have this mootness issue?

MR. OLSEN: In -- in hindsight, that would have been a better way to proceed. I wasn't involved at the trial court level, so I don't have any further insight onto that.

JUDGE SILVERMAN: It's a real procedural mess the way we have it now.

MR. OLSEN: Well, it is, and it's also a legal mess because there has been no higher court, no appellate court, that has ever pronounced a clear standard in

cases like this. Most of the cases that have reached the appellate courts are vote dilution cases that are markedly different from --

JUDGE CALLAHAN: Do you say the same thing as the Department of Justice on interpreting the statute or am I --

MR. OLSEN: I -- I can't tell you that I said the same thing.

JUDGE CALLAHAN: What do you (unintelligible) --

MR. OLSEN: I meant to say the same thing.

JUDGE CALLAHAN: -- (unintelligible). I think they said something a little bit different than you did because to me you were writing out number two. They were reading in number two, but prefacing it with "opportunity." But you said, no, it is (unintelligible) an "and."

MR. OLSEN: Perhaps I wasn't clear. The statute says what it says. We believe that in both denial cases, the part about electing representatives, which was added to the statute in the context of vote dilution cases to essentially correct what the Congress viewed as a Supreme Court error in construing the statute, it was all in the contest of vote dilution cases.

And I reread the Senate report yesterday, and it

goes on and on talking about opportunities, opportunities, opportunities. And the only time we see the language "and to elect representatives" is in the context of the discussion to fix what Congress viewed as the --

JUDGE CALLAHAN: So you are reading it differently than they are.

MR. OLSEN: If I'm -- if I'm saying that, I'm not meaning to. If we look at Chisom versus Roemer --

JUDGE FLETCHER: Let's cut to the chase. Do you agree with the government's construction of this statute as expressed in the government's amicus brief?

MR. OLSEN: Yes.

JUDGE FLETCHER: Yes or no question.

MR. OLSEN: That's a yes.

JUDGE FLETCHER: Yes, okay.

MR. OLSEN: I may not have articulated that well, but that's a yes.

I have only got a few seconds left. In essence, the county's argument is that the county is able to discriminate in ways limited only by its imagination, but so long as Indians are elected at local levels to some extent, there can be no voting rights violation. That's not Congress's intent, and that's not what the law says. And if we look at Chisom versus Roemer, any

denial or abridgment of the right to vote is a voting rights violation. It says that flat out.

Thank you.

JUDGE SILVERMAN: Thank you. Thanks to all counsel. Case (unintelligible) is submitted. We will stand in recess.

STATE OF SOUTH DAKOTA)
:SS CERTIFICATE
COUNTY OF MINNEHAHA)

I, Kerry Lange, Court Reporter and Notary Public in the above-named County and State, certify that the above-entitled recording was transcribed by me, and the foregoing Pages 1 - 54, inclusive, are a true and correct transcript of said recording to the best of my ability.

Dated at Sioux Falls, South Dakota, this 28th day of October, 2013.

_____
Kerry Lange

Commission Expires: 7/12/17