THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division
T. CHRISTIAN HERREN, JR
BRYAN L. SELLS
Attorneys
Voting Section, Civil Rights Division
U.S. Department of Justice
Room 7264 NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0792
Facsimile: (202) 307-3961
bryan.sells@usdoj.gov

MICHAEL W. COTTER
United States Attorney
VICTORIA L. FRANCIS
Assistant U.S. Attorney
U.S. Courthouse
2601 Second Avenue North
Box 3200
Billings, MT 59101
Telephone: (406) 247-4633
Facsimile: (406) 657-6989
victoria.francis@usdoj.gov

Attorneys for the United States

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-RFC 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 because it implicates the proper interpretation and application of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *See* 42 U.S.C. § 1973j(d) (authorizing the Attorney General to enforce Section 2 on behalf of the United States).

The plaintiffs' complaint alleges, 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. The plaintiffs seek a preliminary injunction requiring the defendants to open one additional site in each county that will provide Indian voters with greater access to the political process. *Id.* at 39-40.

The purpose of this brief is to supply the Court with expert analysis demonstrating that Native Americans in the affected counties have significantly less access to in-person late registration and early voting than their white counterparts. This evidence, along with the evidence adduced by the plaintiffs, establishes that the plaintiffs are likely to succeed on the merits of their Section 2 claim.

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 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.

Although late registration and early voting most often take place at the county election office, which is usually located in the county clerk's office in the county seat, 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. 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 the county seat. Each of those counties is geographically large and sparsely populated. Each of those counties 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.

II. ARGUMENT

Plaintiffs seeking a preliminary injunction must establish that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th Cir. 2011). The plaintiffs here can meet that standard.

A. The plaintiffs are likely to succeed on their Section 2 claim.

Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, prohibits voting practices and procedures that result in discrimination on the basis of race, color, or membership in a language minority group. *See* 42 U.S.C. § 1973(a). It prohibits, for example, unequal access to voter-registration sites, *see 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), and unequal access to voting sites, *see Spirit Lake Tribe v. Benson* County, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982). *See also Jacksonville Coalition for Voter Protection v. Hood*, 351 F. Supp. 2d. 1326 (M.D. Fla. 2004) (unequal access to early voting sites); *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968) (unequal access to absentee voting opportunities).

A violation of Section 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). *See generally Thornburg v. Gingles*, 478 U.S. 30, 43-46 (1986) (discussing Section 2 and its legislative history). When evaluating the totality of circumstances, there is

no requirement that any particular number of factors be proved or that a majority of them point one way or the other. *See id.* at 45. Rather, "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.* (quoting S. Rep. No. 97-417, at 30 (1982)).

The attached declaration of Professor Gerald R. Webster, chair of the geography department at the University of Wyoming, demonstrates that Native Americans in Big Horn, Blaine, and Rosebud counties have significantly less access than whites to late registration and early voting. *See* Ex. 1 at 3-4, 9 (Webster Decl.). Professor Webster calculated the average distance to the single late registration and early voting site in each county for Native Americans and whites, and he found large and statistically significant racial disparities in each county. Table 1 below summarizes Professor Webster's findings. In short, Native Americans in the three counties have to travel much greater distances than their white counterparts to access the site in their respective counties.

Table 1

Mean Distance to County Courthouse for Voting-Age Residents, in Miles

	Whites	Indians	Disparity
Big Horn County	11.61	22.02	189%
Blaine County	9.77	31.45	322%
Rosebud County	16.79	44.85	267%

Source: Ex. 1 (Webster Decl.) at 9.

Professor Webster also found that Native Americans in the three counties have substantially higher poverty rates and substantially lower access to vehicles than their white counterparts. *See* Ex. 1 at 2-3, 7-8 (Webster Decl.). In Big Horn and Blaine counties, for example, Native Americans are more than twice as likely as whites to be in poverty, and in Rosebud County, which also has the largest disparity in travel distances, the disparity in poverty rates is greater than 400%. Similar disparities obtain in access to vehicles. In Big Horn and Blaine Counties, Native American households are more than three times as likely as white households to lack access to a vehicle. In Rosebud County, the disparity is greater than 200%. These two factors suggest that Native Americans are much more likely to lack the resources necessary to overcome the greater distances to their late registration and early voting site.

Finally, and for illustrative purposes only, Professor Webster calculated what the average distance to the nearest early voting site would be if each county were to open a satellite office as the plaintiffs request. *See* Ex. 1 at 4-5, 10 (Webster Decl.). He found that the satellite office would greatly reduce both the average distance for Native Americans and the racial disparity in each county. This demonstrates the availability of a remedy that would provide Indian voters in the three counties with much greater electoral opportunity.

The statistical evidence contained in Professor Webster's declaration is highly probative of a Section 2 violation not merely because it demonstrates racial disparities in access to the polls but because the racial disparities it demonstrates are so extreme. Native American voters in the three counties are *much* farther from the late registration and voting site than their white peers, and they are *much* less likely to have the resources necessary to bridge the gap.

Other available evidence further supports the conclusion that the plaintiffs are likely to succeed on the merits of their Section 2 claim. The plaintiffs' complaint and brief in support of their motion for a preliminary injunction points to some of this evidence, including the history of discrimination against Native Americans in Montana, the underutilization of absentee voting in the three challenged counties, socioeconomic disparities, and the great distances that Indians must travel to take advantage of the electoral opportunities available to their white

counterparts. The Court may also take judicial notice of relevant findings made in other Montana voting-rights cases on behalf of Indians such as *United States v. Blaine County*, 363 F.3d 897, 912-914 (9th Cir. 2004) (discussing the history of discrimination and other totality-of-circumstances factors in Blaine County); *Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000) (discussing totality-of-circumstances factors in a challenge to statewide redistricting); and *Windy Boy v. Big Horn County*, 647 F. Supp. 1007, 1007-08 (D. Mont. 1986). This other evidence is "supportive of, but *not essential to*," the plaintiffs' claim. *Gingles*, 478 U.S. at 48 n.15.

The practical reality is that Indian voters in Big Horn, Blaine, and Rosebud counties do not have the same opportunity as white voters to take advantage of late registration and early voting. Indeed, this case presents extreme factual circumstances. The totality of the evidence before the Court thus establishes that the plaintiffs are likely to succeed on the merits of their Section 2 claim.

B. Native Americans in the three counties will suffer irreparable harm in the absence of immediate injunctive relief.

Denial or abridgment of the equal right to vote constitutes irreparable harm. *See Obama for America v. Husted*, 2012 WL 4753397 (6th Cir. Oct. 5, 2012); *Williams v. Salerno*, 792 F.2d 323, 330 (2d Cir. 1986) (voters "would certainly suffer irreparable harm if their right to vote [was] impinged upon."); *U.S. Student*

Ass'n Found. v. Land, 585 F. Supp. 2d 925, 944 (E.D. Mich. 2008) ("any disenfranchisement effected by the undeliverable ID or driver's license practices would indeed constitute irreparable harm."); *Montano v. Suffolk Cnty. Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) ("An abridgement or dilution of the right to vote constitutes irreparable harm."); *United States v. Berks County*, 250 F. Supp. 2d 525, 540-41 (E.D. Pa. 2003); *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984).

Part of the reason for this treatment of voting harms is the special importance of the right to vote in the American democratic tradition:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); *accord Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."). Money cannot fully compensate an individual for the loss of a right so fundamental. Part of the reason is also practical: a court simply cannot undo—by means of a special election or otherwise—all of the effects of an election

infected with racial discrimination. *See Sprit Lake Tribe*, 2010 WL 4226614 at *4-*5.

In this case, the irreparable harm is clear. Without an injunction, Native Americans in Big Horn, Blaine, and Rosebud counties will not have the same electoral opportunities as their white counterparts.

C. The balance of the equities tips in the plaintiffs' favor.

The relief that the plaintiffs seek here is appropriately tailored to the defendants' violation of federal law. They seek an order requiring the defendants to open a satellite office in each county that is accessible to Indian voters. While a permanent remedy could potentially entail a single site in each of three counties that is equally accessible to all residents in each of these counties, this preliminary remedy avoids the confusion that could result from moving the one existing site in each county to a more appropriate location on the eve of the election.

In addition, the preliminary remedy will not entail significant costs to the defendants because there are so few days remaining until the election and because, as is evident from the correspondence attached to the plaintiffs' brief, the plaintiffs have offered to cover the cost of operating those sites. As a result, the requested relief is unlikely to pose a significant burden on the defendants over the few days remaining before Election Day. Whatever burden there might be is easily outweighed by the risk of harm to Indian voters in the three affected counties.

The balance of the equities therefore favors the plaintiffs.

D. The public interest favors immediate injunctive relief.

The public interest also favors the plaintiffs. Section 2 represents "a strong national mandate for the immediate removal of all impediments, intended or not, to equal participation in the election process." *Harris*, 593 F. Supp. at 135. Ordering the defendants to provide Indian voters with the same electoral opportunities they provide white voters "serves the public interest by reinforcing the core principles of our democracy." *Berks County*, 250 F. Supp. 2d at 541.

Moreover, the public has a clear interest in the enforcement of Federal statutes that protect constitutional rights, including voting rights. *United States v. Raines*, 362 U.S. 17, 27 (1960) (reversing denial of preliminary injunction in voting rights case and holding that "there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights"); *United States v. E. Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979) ("[T]he United States has an interest in enforcing Federal law that is independent of any claims of private citizens. In the [voting rights] context the Supreme Court has characterized this as the highest public interest in the due observance of all constitutional guarantees.' (quoting *Raines*, 362 U.S. at 27)); *U.S. Student Ass'n Found. v. Land*, 585 F. Supp. 2d 925, 947 (E.D. Mich. 2008) (noting in the voting context that "the public has an interest in

the enforcement of federal statutes.") (internal citations and quotations omitted); *see Herman v. S.C. Nat'l Bank*, 140 F.3d 1413, 1425 (11th Cir. 1998) (discussing *E. Baton Rouge Parish Sch. Bd.*, 594 F.2d at 58); *see also Summit Cnty. Democratic Cent. and Exec. Comm. v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004) ("There is a strong public interest in allowing every registered voter to vote freely.").

III. CONCLUSION

For the foregoing reasons, the Court should grant the plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

MICHAEL W. COTTER
United States Attorney
VICTORIA L. FRANCIS
Assistant U.S. Attorney
District of Montana

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

/s/ Bryan L. Sells
T. CHRISTIAN HERREN, JR.
BRYAN L. SELLS
Attorneys
Voting Section
Civil Rights Division
U.S. Department of Justice
Room 7264 NWB
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 353-0792
Facsimile: (202) 307-3961

Counsel for the United States