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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CITIZENS EQUAL RIGHTS ALLIANCE, INC. (CERA), MONTANA CITIZENS RIGHTS ALLIANCE (MCRA), CHRISTOPHER KORTLANDER, TERRY A. CODDENS, and DEBORAH WINBURN,	Cause No. CV-07-74-BLG-RFC
Plaintiffs,	
v.	**SECRETARY OF STATE'S BRIEF IN SUPPORT OF MOTION TO DISMISS**
BRAD JOHNSON, in his official capacity as Secretary of State for the State of Montana; ELAINE GRAVELEY, in her official capacity as Elections and Government Services Division Deputy to the Secretary of State; and CYNDY MAXWELL, in her official capacity as Clerk and Recorder for Big Horn County, Montana,	
Defendants.	

By motion filed July 13, 2007, Defendants Brad Johnson, Montana Secretary of State, and Duane Winslow, Acting Elections Deputy (collectively, "Secretary of State"), have moved pursuant to Fed. R. Civ. P. 12(b)(1) & (2) to dismiss the complaint of Citizen's Equal Rights Alliance, et al. This brief supports that motion.

ALLEGED FACTS

The Secretary of State recites the following facts as alleged in the Complaint.

Plaintiff Citizens Equal Rights Alliance (CERA) is an organization incorporated in South Dakota "to ensure the equal treatment of all citizens in the exercise of their rights, including the right to vote." (Compl. ¶ 4.) Montana Citizens Rights Alliance has a similar mission and has members that include registered voters in Big Horn County, Montana. (Compl. ¶ 5.) Plaintiffs Christopher Kortlander, Terry A. Coddens, and Deborah Winburn are registered voters in Big Horn County and are not members of any Indian Tribe. (Compl. ¶ 6.) Additionally, Kortlander and Winburn are members of CERA and Winburn was a candidate for Sheriff of Big Horn County in the 2006 general election. Id.

Defendant Brad Johnson serves as Montana's Secretary of State. (Compl. ¶ 7.) Pursuant to his duties enumerated in Mont. Code Ann. §§ 13-1-201 to 13-1-209, "the Secretary of State is the chief election officer and it is his responsibility to obtain and maintain uniformity in the application, operation, and interpretation of the election laws . . . ." The Secretary of State does not have the authority under statute to prosecute or enforce violations of election law. At the time of the actions alleged in

the Complaint, Elaine Graveley was employed in the Secretary of State's office as Deputy of the Elections and Government Services Division. (Compl. ¶ 8.) She has since retired, and pursuant to Fed. R. Civ. P. 25(d) should be automatically substituted with her successor in official capacity, Acting Deputy Duane Winslow.

Plaintiffs allege that ballot boxes were left unlocked at precincts 5 and 7 on November 7, 2006, Election Day. (Compl. ¶ 14h.) Both polling locations are within the boundaries of the Crow Indian Reservation. (Compl. ¶ 14g.) Plaintiffs also allege that Mr. Coddens was a non-Indian poll watcher at precinct 7 and was asked to leave the polling location by an election judge after the polls closed. (Compl. ¶ 14i.) Although Plaintiffs assert that the ballot boxes were left unlocked at both precincts 5 and 7, the affidavit executed by Mr. Coddens only states that he was a poll watcher at precinct 7 where he allegedly witnessed the unlocked ballot box and was asked to leave the polling location at 8:13 pm. (Coddens Aff.)

Two days after the election and too late for Ms. Maxwell to timely correct the problem, Mr. Kortlander informed the county election administrator, Cyndy Maxwell, that the ballot boxes at precincts 5 and 7 were unlocked on Election Day. (Compl. ¶ 14j.) The following day, Mr. Kortlander faxed Mr. Codden's affidavit to the Secretary of State's office on Friday, November 10, 2006. (Compl. ¶ 14m.)

Plaintiffs called the Secretary of State four days after the election, on a Saturday, November 11. (Compl. ¶ 14n.) The Secretary of State referred Mr. Kortlander to federal law enforcement officials. Id. The following day, a Sunday, Plaintiffs again called the Secretary of State's Office, and Elections Deputy

Elaine Graveley repeatedly referred Plaintiffs to federal law enforcement officials. (Compl. ¶¶ 14q & 14s.) Most of Plaintiffs' factual allegations are directed to nonparties; only six of 28 factual allegations even mention the Secretary of State's office. (Compl. ¶¶ 13, 14m, 14n, 14q, 14s, & 15.)

Plaintiffs allege violations of the federal Voting Rights Act and Civil Rights Act, and the Fourteenth and Fifteenth Amendments to the U.S. Constitution. Plaintiffs named Secretary of State Brad Johnson, Deputy Elaine Graveley, and local election administrator Cyndy Maxwell, to the suit. They request as relief that this Court enjoin Defendants to follow election laws and to "regulate all polling places and election-related practices to the full extent of the law." (Compl., Prayer ¶ 3.) Plaintiffs' only specific request for relief is that all polling places be removed from Indian reservations around the State. (Compl. ¶ 15.)

ARGUMENT

Plaintiffs attempt to invoke the broad structural remedies of federal voting rights law in response to an isolated alleged polling place incident that broke no law, had no alleged affect on the election, did not give rise to any challenge to the election results, and did not even prompt the alleged victim and witness to report it. Instead, based on a third person's complaint to and request for information from the Secretary of State's office several days after the election incident, Plaintiffs sue those same State officials based on their failure to take various unspecified actions that lie beyond the Secretary of State's duties and powers. This is not a federal voting rights case.

I. PLAINTIFFS LACK STANDING TO BRING CLAIMS AGAINST STATE DEFENDANTS.

Under the "case or controversy" requirement of article III, section 2 of the United States Constitution, Plaintiffs must allege facts sufficient to show standing: (1) a concrete and imminent "injury in fact", (2) a causal connection between the defendants and the alleged injury, and (3) a likelihood that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). "A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit. In that event, the suit should be dismissed under Rule 12(b)(1)." Cetacean Cmty. v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004) (citations omitted). Plaintiffs have failed to allege any of the three essential elements of standing.

A. The Secretary of State Threatens No Imminent Injury to Plaintiffs.

Of Plaintiffs' twenty-eight factual allegations, only one describes an allegedly wrongful incident involving any official acting under color of state law: the exclusion by a single election judge of a single poll watcher, after polling, at a polling place containing unlocked ballot boxes. (Compl. ¶ 14l.) Even then, Plaintiffs do not allege any connection between that single incident and any concrete injury to them, either through dilution of their vote or through the non-election of Ms. Winburn. They allege that "nearly every contested race" involved both Indian and non-Indian candidates (Compl. ¶ 12), but fail to mention the results of any of those races, and do not attempt to connect any of those results to an alleged incident isolated to just two precincts.

Nor could Plaintiffs allege that they face any future injury sufficient to warrant equitable relief. "The Supreme Court has repeatedly cautioned that, absent a threat of ***immediate and irreparable harm***, the federal courts should not enjoin a state to conduct its business in a particular way." Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1042 (9th Cir. 1999) (en banc). Plaintiffs' demand for a vague injunction against the Secretary of State "from implementing [unspecified] practices and procedures" can be based on nothing more than their bare allegation that the incident at issue will recur, and that amounts to pure speculation that the same few ballot boxes will be unlocked and the same election judge (if still serving) will exclude one of the poll-watching defendants after the polls close. This amounts to "a chain of speculative contingencies" that "rules out standing in this case." Eggar v. City of Livingston, 40 F.3d 312, 317 (9th Cir. 1994); cf. Thomas v. County of Los Angeles, 978 F.2d 504, 508 (9th Cir. 1992) (finding sufficiently concrete and imminent injury where "numerous instances of police misconduct have occurred in a small six by seven block area . . . and . . . plaintiffs have alleged that the misconduct is purposefully aimed at minorities and that such misconduct was condoned and tacitly authorized by department policy makers.").

For the same reasons, Plaintiffs' "failure to establish a likelihood of future injury similarly renders their claim for declaratory relief unripe." Hodgers-Durgin, 199 F. 3d at 1044. Essentially, they seek a judicial declaration no more specific than that the Secretary of State "must regulate all polling places and election-related practices to the full extent of the law." (Compl., Prayer ¶ 3.) Such an abstract

advisory opinion "outlining the permissible scope of future [Secretary of State actions] . . . clearly runs counter to the purposes of Article III jurisdiction." Hillblom v. United States, 896 F.2d 426, 431 (9th Cir. 1990).

B. The Secretary of State Did Not Cause the Alleged Past Injury.

According to the Complaint, the Secretary of State's office had nothing to do with the alleged incident at the polling place until several days after Election Day, and then only because one of the Plaintiffs (not the alleged victim poll-watcher) called his office to complain. There are no allegations that the Secretary of State's office appointed the election judges or directed their alleged misconduct, or knew anything of the unlocked ballot boxes until Plaintiffs told them so.

Causation is an element of Section 1983 as well as standing. "In order for a person acting under color of state law to be liable under Section 1983 there must be a showing of personal participation in the alleged rights deprivation: there is no respondeat superior liability under section 1983." Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Thus, "[a] plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights." Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998). There are no such allegations here. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (denying civil rights claim when plaintiff "made no showing that [the Attorney General] directed, participated in, or had knowledge of any alleged misconduct on the part of [the prosecutor of Plaintiff].").

C. A Judgment Against the Secretary of State Cannot Redress Plaintiffs' Alleged Injury.

Plaintiffs misstate the Secretary of State's duties as "enforc[ing] constitutional, statutory, and administrative laws regulating the conduct of federal, state, county, and local district elections." (Compl. ¶ 15.) They do not, and cannot, cite any law of Montana that gives the Secretary of State the power of a law enforcement official. The Secretary of State's duty with respect to elections is "to obtain and maintain uniformity in the application, operation, and interpretation of the election laws ***other than*** those [criminal, election contest, and campaign practices provisions] in chapters 35, 36, or 37 of this title." Mont. Code Ann. § 13-1-201 (emphasis added). In carrying out his duties, his authority extends to prepare and deliver election forms and rules to local election administrators. Mont. Code Ann. § 13-1-202. Those election administrators are independently elected and bear primary responsibility for "administration of all procedures relating to [the conduct of elections]." Mont. Code Ann. § 13-1-301(2); Mont. Code Ann. § 7-4-2203 (election of county clerks). The Secretary of State does not count ballots, but only serves as secretary of the board that canvasses the county return for statewide offices. See Mont. Code Ann. § 13-15-502.

The enforcement of Montana election laws, and in particular the offense of election fraud, is placed in the hands of the electors themselves through civil contests and prosecutions through Title 13, Chapters 35 & 36. The appointment and retention of election judges rests with the County Commission. See Mont. Code Ann. §§ 13-4-101, -103. The Secretary of State's only duty with respect to the election judges is to

prepare and distribute training materials for election judges to be trained by the local election administrator. See Mont. Code Ann. §§ 13-1-203, -4-203. Plaintiffs do not claim that any instruction contained in those training materials directed the misconduct they allege.

The absence of any allegation that the Secretary of State personally participated in the alleged misconduct is telling. It is difficult to conceive, after all, a race-based conspiracy by a non-Indian statewide elected official and his non-Indian deputy to ally with historically disenfranchised and minority Indian tribal members in order to deprive other non-Indian Montanans of their right to vote. It turns the conventional voting rights case on its head, and as one court explained in the more typical case involving a specific allegation of illegal voting, "the most logical conclusion is that the illegal voters were accidents, not pawns." United States v. Jones, 57 F.3d 1020, 1024 (11th Cir. 1995) (quotation and citation omitted). Here, there is not even an allegation of a local miscount, let alone a conspiracy involving the State's top election official.

Therefore, for the same reason Plaintiffs cannot allege the personal involvement sufficient to state a Section 1983 claim, they have not alleged any likelihood that a judgment against the Secretary of State would redress their isolated and nonrecurring claimed injuries at the local election level. "Thus declaratory or injunctive relief against the [Secretary of State] cannot achieve the desired goal of having [a local election judge] cease his alleged unconstitutional conduct." See Eggar, 40 F.3d at 317.

II. PLAINTIFFS HAVE NOT PLEADED A VIOLATION OF THE VOTING RIGHTS ACT.

Section 2 of the Voting Rights Act provides in relevant part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner 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. . .

42 U.S.C. § 1973(a). A violation of Section 2 must be established by showing:

> based on the totality of circumstances . . . 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 class of citizens protected by subsection (a) of this section 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).

A. Isolated Polling Place Irregularities Are Not a "Standard, Practice, or Procedure" Imposed or Applied by the Secretary of State.

Plaintiffs do not even attempt to specify the "standard, practice, or procedure" they allege has violated the Voting Rights Act. But it is clear that an alleged incident attributed to a single public official--one election judge excluding a poll-watcher from a polling place with unlocked ballot boxes, absent any further allegation that this conduct itself led to vote dilution or disenfranchisement--is not the systemic harm the elaborate machinery of the Voting Rights Act is intended to address.

The Eleventh Circuit has offered the fullest explication of the essential "standard, practice, or procedure" element:

> Standard is defined as "something that is established by authority, custom, or general consent as a model or example to be followed."

> Webster's Third New International Dictionary 2223 (Philip B. Govie, ed. 1986). Practice is defined as the "performance or operation of something," "performance or application habitually engaged in," or "repeated or customary action." Id. at 1780. Procedure is defined as "a particular way of doing or of going about the accomplishment of something." Id. at 1807.

United States v. Jones, 57 F.3d 1020, 1024 (11th Cir. 1995) (footnote omitted). Thus, that court held that "run of the mill mistakes" that "are no more than the type of errors one would expect in the normal course of any election," did not qualify "[e]ven in light of the Supreme Court's mandate that we construe the Voting Rights Act broadly and consistent with its purpose and historical experience." Id. at 1023, 1024.

Under the Voting Rights Act, then, isolated "unacceptable and regrettable behavior" by polling place workers "does not rise to the level of a 'practice or procedure' implemented by [election officials]." Coleman v. Board of Educ., 990 F. Supp. 221, 231 (S.D.N.Y. 1997). Even taking Plaintiffs' most far-flung allegations as true, racially-motivated campaign appeals "not implemented by any official actor with responsibility for conducting the elections," let alone any named defendant, cannot amount to a cognizable "standard, practice, or procedure." Id. at 232. In a case where the proof went far beyond these incidents as well as the scope of the allegations at issue here, the court correctly found that the Plaintiffs had "failed to raise sufficiently serious questions" under the Voting Rights Act. Id. at 233.

Similarly, "isolated and singular incidences of misconduct and improper administration" do not fall under Section 2. Welch v. McKenzie, 592 F. Supp. 1549, 1558 (S.D. Miss. 1984), aff'd 765 F.2d 1311 (5th Cir. 1985). As the court affirming

Welch held, even the worst election abuses do not warrant federal court intervention when they are not "imposed or applied" by state elections officials:

> Otherwise stated, stolen elections in which the losing candidate was [a member of a protected minority group] are, while decidedly suspicious, not necessarily violations of the Voting Rights Act or the Constitution. ***There is a place for state election laws to operate***.

Welch v. McKenzie, 765 F.2d 1311, 1316-1317 (5th Cir. 1985) (emphasis added).

Such is the case here. Plaintiffs can seek the replacement of the election judge responsible for the alleged misconduct. See Mont. Code Ann. § 13-4-103. Any of the Plaintiffs could have contested the election on the ground of election law violations or illegal voting. See Mont. Code Ann. § 13-36-101. Ms. Winburn could have petitioned a court for a recount, and if she had grounds for believing the election judges violated the law governing vote counts, she would have been entitled to a presumption of an incorrect count. See Mont. Code Ann. §§ 13-16-301, -303.

However, as Plaintiffs must concede, the mere fact that ballot boxes are unlocked does not create a presumption of election fraud or inaccuracy; nothing in Montana law requires a specific means of securing ballot boxes, and there is no allegation of ballot tampering. Nor does the exclusion of a poll-watcher from a polling place after voting, but before counting has begun, amount to a violation of state election law. As Plaintiffs themselves explain, "[p]oll watchers shall also be permitted to observe all of the vote counting procedures of the judges after the closing of the polls and all entries of the results of the elections." (Compl. ¶ 141), citing Mont. Code Ann. § 13-13-120. Counting occurs in public, Mont. Code Ann. § 13-15-101, at a

centralized countywide "counting center" (usually the courthouse), Mont. Code Ann. § 13-15-207(2)(a) & (3)(a), and may begin before the polls close, Mont. Code Ann. § 13-15-307(1). On the face of the complaint, therefore, it was entirely consistent with state law for an election judge to close down a polling place after the end of voting so that the ballots could be taken to the central counting center and counted, publicly, in the presence of poll-watchers and anyone else who wished to observe.

B. Plaintiffs Have Not Alleged an Inability to Participate Equally in the Political Process.

In a Section 2 claim, "[i]t is Plaintiffs' burden to show on the face of their [complaint] . . . that members of the minority community contained within [Bighorn County] are unable to equally participate in the political process leading to the nomination or election of a candidate of choice." Osburn v. Cox, 369 F.3d 1283, 1289 (11th Cir. 2004).

The most Plaintiffs claim in terms of voting rights injury is that they are "at a clear disadvantage" in Bighorn County elections, where they claim to be a Caucasian minority of 36.6% in a 59.7% Native American county. (Compl. ¶¶ 11 &14.) Yet despite the fact that "nearly every contested County race posited an Indian candidate endorsed by the Crow Indian Tribe against a non-Indian candidate," the only candidate of that they allege was not elected was Ms. Winburn. (Compl. ¶ 6.) Even then, Plaintiffs have failed to allege any connection between a single isolated incident and Ms. Winburn's failure at the polls. "A bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." Smith v. Salt

River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997). The mere allegation "that they were outvoted in relation to selecting the candidate of their preference" does not amount to a Voting Rights Act claim. Osburn, 369 F.3d at 1288.

At the end of the Section 2 analysis, "[t]he Plaintiffs have not alleged facts to support a claim that the minority group has been excluded from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting system." Osburn, 369 F.3d at 1289. Their Complaint's failure to mention any systemic inability to elect members of their race due to discrimination imposed by the State is an incurable and fatal defect in their Voting Rights Act claims.

C. The Election of Tribal Members Is a Vindication, Not a Violation, of the Voting Rights Act.

It is what one court called "the pinnacle of irony" for white Plaintiffs to "seek[] to invoke the jurisdiction and powers of a Federal District Court to question" the outcome of years of "litigation by the previously all but disenfranchised [Indian] citizens of [Bighorn] County." Rollins v. Dallas County Com., 1992 U.S. Dist. LEXIS 15345, *1 (S.D. Ala. May 13, 1992). In 1986 this Court made the same finding Plaintiffs seek, but on behalf of their purported persecutors:

> Indian participation in the political process has been . . . hampered by official acts of discrimination that have interfered with the rights of Indian citizens to register and to vote; past discrimination against Indians in hiring and appointments to boards and commissions; and reluctance to appoint Indians as election judges and deputy registrars of voters. The immense size of Big Horn County, along with the effects of discrimination in employment, health, and education, are additional barriers to full Indian participation in the electoral process . . . .

> The evidence demonstrated a strong desire on the part of some white citizens to keep Indians out of Big Horn County government. Indians for the most part have not been hired as public employees and have not been considered for appointment to boards and commissions. While some progress has been made on this front since this suit was filed, the effects on Indians of being frozen out of county government remain and will continue to exist in years to come.

Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1022 (D. Mont. 1986). Five years ago, the Ninth Circuit affirmed a finding that

> there was a history of discrimination by the federal government and the State of Montana from the 1860s until as recently as 1971. American Indians have a lower socio-economic status than whites in Montana; these social and economic factors hinder the ability of American Indians in Montana to participate fully in the political process.

Old Person v. Brown, 312 F.3d 1036, 1042 (9th Cir. 2002). Just three years ago, the Ninth Circuit again recited the "the history of official discrimination against American Indians in Montana." United States v. Blaine County, 363 F.3d 897, 913 (9th Cir. 2004).

Thus, it is clear that this Court's elimination of barriers to Indian participation in Bighorn County elections in Windy Boy, and not an isolated incident at a polling place, set the stage for the success of tribal members in recent elections (and the concomitant losses by their opponents). This "deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes." Garza v. County of Los Angeles, 918 F.2d 763, 776 (9th Cir. 1990).

Meanwhile, the only specific remedy Plaintiffs request--the radical step of removing all polling places from every Indian reservation in Montana--would itself

raise serious concerns under the Voting Rights Act. "The abstract right to vote means little unless the right becomes a reality at the polling place on election day. The accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise." Perkins v. Matthews, 400 U.S. 379, 387 (1971) (holding polling place location constitutes a "standard, practice, or procedure" under Section 5 of the Voting Rights Act). Relocating all polling places to distances remote from Indian reservations might well have the effect of abridging tribal members' right to vote. Id. at 388. These are reasons enough to dismiss Plaintiffs' claims. See Osburn, 369 F.3d at 1288 (dismissing political association claim when the voting rights remedy sought by Plaintiffs would likely be unconstitutional).

III. PLAINTIFFS HAVE NOT ALLEGED CONSTITUTIONAL VIOLATIONS.

Plaintiffs' failure to plead a proper Voting Rights Act claim sets them even further back from stating any cognizable constitutional claim. (The elements of Plaintiffs' claim under 42 U.S.C. § 1983 are indistinguishable for these purposes from the constitutional merits because Section 1983 is simply "the statutory vehicle" for bringing claims constitutional claims for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Magana v. Northern Mariana Islands, 107 F.3d 1436, 1442 (9th Cir. 1997); 42 U.S.C. § 1983.)

A. Plaintiffs Fail to Allege Racially Discriminatory Intent Sufficient to Support a Fourteenth Amendment Claim Against the Secretary of State.

Section one of the Fourteenth Amendment to the U.S. Constitution in part prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." Unlike a Voting Rights Act claim brought under the "result test" of the amended Section 2, the Constitution requires an allegation of discriminatory intent. Thus, in order for the Equal Protection Clause to be violated in a voting rights case, the "invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Valladolid v. National City, 976 F.2d 1293, 1298 (9th Cir. 1992) (citation omitted) (quoting Washington v. Davis, 426 U.S. 229, 240 (1976)).

At the complaint stage, then, "[t]o establish a Fourteenth Amendment claim, the Plaintiffs must not only plead that they lack the equal opportunity to participate in the political process, but must also demonstrate that this inequality results from the [challenged system] and that a racially discriminatory purpose underlies that system." Osburn v. Cox, 369 F.3d 1283, 1288 (11th Cir. 2004); see also Soules v. Kauaians for Nukolii Campaign Committee, 849 F.2d 1176, 1183-84 (9th Cir. 1988) ("Garden variety election irregularities" such as lax security and mishandled ballots do not render an election unconstitutionally unfair under the Fourteenth Amendment). Plaintiffs have failed to plead any facts that could support an assignment of discriminatory intent or racial animus to any of the named Defendants, and certainly have not pleaded even a suggestion that the incident they allege resulted from any

discriminatory intent on the Secretary of State's part. On its face, the Complaint fails to state a Fourteenth Amendment claim and should be dismissed. See Osburn, 369 F.3d at 1288.

B. Plaintiffs Fail to Allege a Denial of Access to the Ballot Sufficient to Support a Fifteenth Amendment Claim Against the Secretary of State.

Section one of the Fifteenth Amendment provides in full: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." The Section 2 vote dilution that Plaintiffs apparently attempt to claim has never been recognized by the Supreme Court to violate the Fifteenth Amendment. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 n.3 (2000); Arizona Minority Coalition for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 366 F. Supp. 2d 887, 911 (D. Ariz. 2005). Instead, the Amendment protects the right to register and to vote, Osburn, 369 F.3d at 1288, Reno, 528 U.S. at 334 n.3, and applies only to practices that directly affect a minority group candidate's access to the ballot, Arizona Minority Coalition, 366 F. Supp. 2d at 911, citing Reno, 528 U.S. at 334 n.3.

Such unconstitutional practices reach far beyond the incident Plaintiffs plead, such as a legal candidate restriction "which directly and expressly excludes all non-Hawaiians from qualifying as a candidate." Arakaki v. Hawaii, 314 F.3d 1091, 1095 (9th Cir. 2002). Plaintiffs do not claim they have been denied access to the ballot as a primary or general election candidate; indeed, one of them appeared on the ballot for Sheriff. See Arizona Minority Coalition, 366 F. Supp. 2d at 911. Nor do Plaintiffs

allege that they were prevented from registering to vote or from voting at all. See Osburn, 369 F.3d at 1288. Thus, "Plaintiffs have not backed up their purported Fifteenth Amendment claim with any factual allegations, and their claim fails to meet even Rule 8's liberal notice-pleading requirements." Arizona Minority Coalition, 366 F. Supp. at 910. Their claim should be dismissed.

CONCLUSION

For the foregoing reasons, the Secretary of State respectfully requests the Court dismiss Plaintiffs' complaint with prejudice for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted this 13th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2007, an accurate copy of the foregoing Brief in Support of Motion to Dismiss was served on the following persons by the following means:

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