

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

ROSEBUD SIOUX TRIBE and )  
their members, OGALALA SIOUX )  
TRIBE and their members, and )  
LAKOTA PEOPLE’S LAW )  
PROJECT, Kimberly Dillion, and )  
Hoksila White Mountain, )

5:20-cv-05058-LLP

Plaintiffs, )

BRIEF IN SUPPORT OF  
DEFENDANTS’ MOTION  
TO DISMISS

v. )

STEVE BARNETT, in his official )  
capacity as Secretary of State for )  
the State of South Dakota and )  
Chairperson of the South Dakota )  
State Board of Elections; LAURIE )  
GILL, in her official capacity as )  
Cabinet Secretary for the South )  
Dakota Department of Social )  
Services; MARCIA HULTMAN, in )  
her official capacity as Cabinet )  
Secretary for the South Dakota )  
Department of Labor and )  
Regulation; and CRAIG PRICE, in )  
his official capacity as Cabinet )  
Secretary for the South Dakota )  
Department of Public Safety, )

Defendants. )

The Defendants, Steve Barnett, in his official capacity as the Secretary of State for the State of South Dakota, Laurie Gill, in her official capacity as Cabinet Secretary of the South Dakota Department of Social Services, Marcia

Hultman, in her official capacity as Cabinet Secretary for the South Dakota Department of Labor and Regulation, and Craig Price, in his official capacity as Cabinet Secretary for the South Dakota Department of Public Safety, hereby submit this motion to dismiss the claims of Plaintiffs Lakota People's Law Project, Kimberly Dillon, and Hoksila White Mountain of the Amended Complaint for failure to state a claim upon which relief can be granted and for lack of standing. Marcia Hultman, in her official capacity as Cabinet Secretary for the South Dakota Department of Labor and Regulation should be dismissed from the Amended Complaint because the Department of Labor and Regulation is not an agency that is required to provide voter registration services.

**MEMORANDUM OF LAW**

Federal Rule of Civil Procedure 12(h)(2) provides that a failure to state a claim upon which relief can be granted may be raised by a motion for judgment on the pleadings under Rule 12(c). "In deciding a Rule 12(c) motion, courts apply the same legal standard used for a motion to dismiss under Rule 12(b)(6). *Union Insurance Company v. Scholz*, 473 F. Supp. 3d 978 at 981 (S.D. Sd. 2020) citing *Ashley Cnty., Ark. V. Pfizer, Inc.*, 552 F.3d 659, 665 (8<sup>th</sup> Cir. 2009). A court must resolve all inferences in the non-moving parties favor when deciding a rule 12(c) motion. *Union Insurance Company*, 473 F. Supp. 3<sup>rd</sup> at 982 citing *Wishnatsky v. Rovner*, 443 F.3d 608, 610 (8<sup>th</sup> Cir. 2006). A court should generally ignore material outside the pleadings, however, courts can consider "materials that are necessarily embraced by the pleadings." *Union*

*Insurance Company*, 473 F. Supp. 3<sup>rd</sup> at 982 citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8<sup>th</sup> Cir. 1999).

The National Voting Right Act (“NVRA”) requires plaintiffs to provide written notice prior to bringing a civil action in district court for declaratory or injunctive relief unless a violation has occurred within 30 days before the date of an election for Federal office. 52 U.S.C.A. § 20510(b)(1), (2), and (3). Otherwise, a party may sue only after written notice is provided to the “chief election official of the state involved”. 52 U.S.C.A. § 20510(b)(1) and (2). The notice allows for an opportunity to correct any alleged violation within 90 days after receipt of the notice or within 20 days of receipt of the notice if the violation occurred within 120 days before the date of an election for Federal office. *Judicial Watch, Inc. v. Pennsylvania*, 524 F.Supp.3d 399, 409 (M.D. Pa. 2021) citations omitted, *Black Voters Matter Fund v. Raffensperger*, 508 F.Supp.3d 1283, 1292 (N.D. Ga. 2020) citing *Ga. State Conference of N.A.A.C.P. v. Kemp*, 841 F.Supp.2d 1320, 1335 (N.D. Ga. 2012); *Cromwell v. Kobach*, 199 F. Supp. 3d 1292, 1310 (D. Kan. 2016); *Broyles v. Texas*, 618 F.Supp.2d 661, 691 (S.D. Tx. 2009) citing *Ass’n of Community Orgs. For Reform Now*, 129 F.3d 833, 838 (6<sup>th</sup> Cir. 1977); *True the Vote v. Hosemann*, 43 F.Supp.3d 693, 716 (S.D. Ms. 2014); *Ga. State Conference of N.A.A.C.P. v. Kemp*, 841 F.Supp.2d 1320, 1335 (N.D. Ga. 2012). A Plaintiff who fails to comply with the NVRA’s notice requirement lacks standing. *Bellitto v. Snipes*, 221 F.Supp.3d 1354, 1362 (S.D. Fl. 2016) citing *Scott v. Schedler*, 771 F.3d 831, 835 (5<sup>th</sup> Cir. 2014); *True the Vote*, 43 F.Supp.3d at 714; *Broyles*, 618 F.Supp.2d at 691.

In addition to the notice requirement of the NVRA, if this court does not have subject matter jurisdiction under Article III of the Constitution, the Plaintiffs lack standing to sue. *Carlsen v. GameStop, Inc.* 883 F.3d 903, 908 (8<sup>th</sup> Cir. 2016). A Plaintiff “bears the burden of showing that he has standing for each type of relief sought.” *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009). This Court must distinguish between a facial attack or factual attack on jurisdiction. *Carlsen*, 883 F.3d at 908, citing *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8<sup>th</sup> Cir. 1990). The Court restricts itself to the face of the pleadings in a facial attack “[a]nd the non-moving party receives the same protections as it would defending a against a motion brought under 12(b)(6).” *Id.* “In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.” *Id.*

**I. Plaintiffs Lakota People’s Law Project, Kimberly Dillon, and Hoksila White Mountain do not have statutory standing under NVRA’s notice requirement.**

By letter dated May 20, 2020, Rosebud Sioux Tribe, Oglala Sioux Tribe, and Four Directions provided notice, through their legal counsel, that they believed Defendants were not in compliance with 52 U.S.C. § 20504 and 52 U.S.C. § 20506 of the NVRA. (Docket Doc. 44 Ex. A). The letter was addressed to the South Dakota Secretary of State who is the chief election official for South Dakota. *Id.* and SDCL 12-4-33. Rosebud Sioux Tribe, Oglala Sioux Tribe, and Four Directions commenced a lawsuit on September 16, 2020. (Docket. Doc. 1).

Nearly a year later on August 10, 2021, the Complaint was amended by removing Four Directions from the Complaint and adding Plaintiffs Lakota People's Law Project, Kimberly Dillon, and Hoksila White Mountain. (Docket Doc. 44 ¶¶51, 59 and 62). Before a civil action may be brought, a person aggrieved by an alleged violation of the NVRA must provide written notice to the State's chief election officer and give an opportunity to correct the violation(s). 52 U.S.C.A. § 2510 (b), *Bellitto*, 221 F.Supp.3d at 1362 citing *Scott*, 771 F.3d at 836; *True the Vote*, 43 F.Supp.3d at 714; *Broyles*, 618 F.Supp.2d at 691. Only the aggrieved party that provided notice has the right to sue. *Black Voters Matter Fund*, 508 F.Supp.3d at 1295. Congress intended for the notice requirement to provide states with the opportunity to comply with the NVRA before facing litigation. *Cromwell*, 199 F. Supp. 3d at 1310. Plaintiffs Lakota People's Law Project, Kimberly Dillon, and Hoskila White Mountain did not provide written notice to the South Dakota Secretary of State that they were aggrieved by a violation of the NVRA. (Docket Doc. 44 Ex. A).

Furthermore, Hoksila White Mountain is a member of the Standing Rock Sioux Tribe and is not a member of either Plaintiff, Rosebud Sioux Tribe or Oglala Sioux Tribe. (Docket Doc. 44 ¶62). The alleged injuries suffered by Kimberly Dillon occurred prior to the November 2020 election and may cost her the opportunity to vote in 2022. *Id.* at ¶¶60 and 61. Kimberly Dillon was added to the Amended Complaint that was filed on August 10, 2021, and she did not provide notice therefore depriving Defendants an opportunity to correct her alleged injury. (Docket Doc. 44 ¶61). The notice requirement of 52

U.S.C.A. § 20510(b)(1) and (2) is to provide Defendants an opportunity, if need be, to correct the alleged injury prior to a civil action being brought. *Black Voters Matter Fund*, 508 F.Supp.3d at 1292 citing *Ga. State Conference of N.A.A.C.P.*, 841 F.Supp.2d at 1335; *Cromwell*, 199 F. Supp. 3d at 1310; *Broyles*, 618 F. Supp.2d at 691 citing *Nat'l Coalition for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 286 n. 2 (4<sup>th</sup> Cir 1998); *True the Vote*, 43 F.Supp.3d at 716 citing *Ga. State Conference of N.A.A.C.P. v. Kemp*, 841 F.Supp.2d 1320, 1335 (N.D. Ga. 2012).

Plaintiffs Lakota People's Law Project, Kimberly Dillon, and Hoksila White Mountain should be dismissed from the Complaint for lack of statutory standing. They should not be allowed to piggyback on the notice provided by other Plaintiffs. *Scott*, 771 F.3d at 836, *Bellitto*, 221 F. Supp.3d at 1363. The notice provided by Plaintiffs Rosebud Sioux Tribe and Oglala Sioux Tribe did not refer to Lakota People's Law Project, Kimberly Dillon, or Hoksila White Mountain by name. (Docket Doc. 44 Ex. A).

**II. Plaintiffs Lakota People's Law Project, Kimberly Dillon and Hoksila White Mountain do not have Article III Standing.**

The U.S. Constitution extends jurisdiction to the federal courts only over "cases" and "controversies." U.S. Constitution, Article III, Section 2, Clause 1. To have standing, a Plaintiff seeking injunctive relief must satisfy three elements. *Summers*, 555 U.S. 488 at 493 citing *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 180-181 (2000).

First, the plaintiff must have suffered an “injury-in-fact” which is concrete and particularized and actual and imminent, not conjectural or hypothetical. *Id.* Second, a plaintiff must establish the injury was fairly traceable to the challenged action of the Defendant. *Id.* Third, the injury must be likely to be redressed by a favorable decision. *Id.* To establish an “injury in fact,” a plaintiff must allege an “actual or imminent” invasion of a legally protected interest which is “concrete and particularized” in that it “affect[s] the plaintiff in a personal and individual way.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992). “[I]f a plaintiff lacks standing to sue, the district court has no subject-matter jurisdiction. *Carlsen*, 883 F.3d at 908, citing *ABF Freight Sys., Inc. v. Int’l Bhd. of Teamsters*, 645 F.3d 954, 958 (8<sup>th</sup> Cir. 2011).

**A. Lakota People’s Law Project does not have standing in its own right.**

For an organization to have standing it must have standing in its own right because of an injury to itself or must have standing as representative of its members that have been adversely affected. *Warth v. Seldin*, 422 U.S. 490, 511, 515 (1975). To determine if a Plaintiff has standing, “[a] federal court must ask ‘whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff’s position a right to judicial relief.’” *Roberts v. Wamser*, 883 F.2d 617, 620 (8<sup>th</sup> Cir. 1989) citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

To have standing in its own right, an organization must have suffered its own injury-in-fact that gives it a “personal stake in the outcome of the

controversy” which is caused by the Defendants conduct and is redressable by a favorable litigation outcome. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). Lakota People’s Law Project does not have standing in their own right to bring an action under the NVRA.

Only the United States Attorney General and those persons who are aggrieved by a violation of the statute can bring an action under the NVRA. 52 U.S.C.A. § 20510(a) and (b)(1). Only persons who allege their right to vote in an election for federal office are impaired by a violation of the NVRA. *Dobrovlny v. Nebraska*, 100 F. Supp. 2d 1012, 1031 (D. Ne. 2000) citing *Krislov v. Rednour*, 946 F. Supp. 563, 566 (N.D. Ill. 1996). Lakota People’s Law Project does not have the ability to vote, nor do they allege their ability to vote was impaired

**B. Lakota People’s Law Project does not have standing as the representative of its members.**

Since Lakota People’s Law Project does not have standing under a its own right, they must allege they have standing as representative of their members. Lakota People’s Law Project has not alleged that they are an organization that has members. (Docket Doc. 44 ¶¶51-58). Lakota People’s Law Project is a project of the Romero Institute, a 501(c)(3) nonprofit interfaith law and policy center. *Id.* at ¶51. Lakota People’s Law Project does not allege they have members in their organization, nor do they allege any members have been adversely affected by the alleged actions of Defendants. Lakota People’s Law Project alleges injuries because of having to expend additional resources on efforts to assist “individuals” and “voters”. *Id.* at ¶57.



Where individuals are not able “to participate in and guide an organization’s efforts” the organization does not have associational standing. *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F. 3d. 803, 809 (8<sup>th</sup> Cir. 2007) citing *Ass’n for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. Of Trustees*, 19 F. 3d 241, 244 (5<sup>th</sup> Cir. 1994). Since there are no members of the Lakota People’s Law Project, they cannot have standing as a representative of its members.

In addition, the alleged injury Plaintiff Lakota People’s Law Project has incurred is expended time, effort, and thousands of dollars to assist individuals with registering to vote or updating their voter registration address. (Docket Doc. 44 ¶57). However, by their own declarations in their Complaint, part of Lakota People’s Law Project’s core mission is to “expand Native voter participation” and they have endeavored in that pursuit for a long time. *Id.* at ¶52. Much of the work Lakota People’s Law Project does takes place in South Dakota. *Id.* at ¶53. As part of their core mission, Lakota People’s Law Project has done several things. First, in 2018 and 2020 as part of their voter engagement work in South Dakota, they mobilized Standing Rock tribal members to register to vote and engaged in a robust Native voter turnout initiative in 2020. *Id.* at ¶54. Second, they plan to substantially expand their voter engagement activities in South Dakota in the coming year because there are significant opportunities for Native voters to make their voices heard in the 2022 elections. *Id.* at ¶55. Third, most Native voters they target are low-income and a large percentage are clients of South Dakota public assistance

agencies such as the Department of Social Services and those who obtain services from the Department of Public Safety. *Id.* at ¶56. By their own admissions, Lakota People’s Law Project objectives and practices are to conduct voter registration, expand its voter engagement, and target Native voters. In other words, Lakota People’s Law Project would not have been using its resources any differently regardless of Defendants’ alleged noncompliance with the NVRA and therefore has not been injured. Neither does Lakota People’s Law Project allege when and what election that their alleged injuries were to have occurred.

Lakota People’s Law project does not have members and is not aggrieved by any alleged violation of the NVRA. Therefore, Lakota People’s Law Project lacks an injury sufficient for Article III standing.

**C. Hoksila White Mountain has not suffered an injury-in-fact.**

At the outset, the injury Plaintiff Hoksila White Mountain alleges to have suffered is not clear. It appears from the Amended Complaint, that the alleged injury-in-fact that Hoksila White Mountain has suffered is that it is “more difficult for him to qualify for the ballot as a candidate for mayor” because of Defendants alleged failure to comply with the NVRA. (Docket Doc. 44 ¶66). Plaintiff Hoksila White Mountain lacks standing.

Plaintiff Hoksila White Mountain is not aggrieved by a violation of the NVRA. “It would be inconsistent with the purpose of the NVRA for Congress to create a private cause of action for persons who assert claims tied to state

ballot issues.” *Dobrovolny v. Neb.*, 100 F. Supp. 2d 1012, 1031 (D. Neb. 2000). Only “those persons who allege that their rights to vote in an election for federal office have been impaired by a violation of the NVRA.” *Id. at 1031*, *Broyles*, 618 F.Supp.2d. at 690. The candidacy for mayor of McLaughlin is a local city office and not a federal office. An action under the NVRA only applies to elections for Federal office. 52 U.S.C. § 20510(b). Since the mayoral office is a city office, Plaintiff Hoksila White Mountain lacks standing.

Furthermore, to the extent that the injury at issue is missing the opportunity of being elected, Hoksila White Mountain lacks standing to bring a claim under Sections 5 and 7 of the NVRA because he has not suffered an injury-in-fact. 52 U.S.C. § 20504 and 52 U.S.C. § 20506. Sections 5 and 7 of the NVRA apply to public assistance agencies and the Department of Public Safety providing voter registration services. Hoksila White Mountain has not alleged that he was not able to vote nor was denied voter registration services and therefore was not aggrieved by a violation of the NVRA. 52 U.S.C.A. § 20510 (b)(1).

In addition, as noted above, Hoksila White Mountain must show that he is “under the threat of suffering” an injury that is “actual and imminent, not conjectural or hypothetical.” *Summers v. Earth Island Ins.*, 555 U.S. 488, 493 (2009). The conclusion that Hoksila White Mountain would have had an easier chance of being elected if there had been no alleged violations of the NVRA is hypothetical. Plaintiff Hoksila White Mountain asks the Court to imagine that

there would have been a sufficient number of voters who would have voted for him in an election for city office. The Amended Complaint assumes that Hoksila White Mountain could have been elected if not for alleged violations of the NVRA by Defendants. This does not constitute an actual or imminent harm to satisfy standing.

**III. Defendant Marcia Hultman in her official capacity as Cabinet Secretary for South Dakota Department of Labor should be dismissed from this lawsuit.**

The NVRA only applies to “offices in the State that provide public assistance”. 52 U.S.C.A. § 20506(2)(A). The United States Department of Justice (“DOJ”) provides guidance as to what offices are considered to provide public assistance. <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last visited February 7, 2022). The DOJ guidance states that offices that provide public assistance would include offices that administer the Supplemental Nutrition Assistance Program (SNAP), the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the Temporary Assistance for Needy Families (TANF), the Medicaid program, and the State Children’s Health Insurance Program (SCHIP). By codified law, South Dakota requires the following offices to provide voter registration - those offices that provide driver licenses; food stamps; temporary assistance for needy families; women, infants, and children nutrition program; Medicaid; military recruitment; and assistance to the disabled as provided by the Department of Human Services. SDCL 12-4-2.

The South Dakota Department of Labor (“DLR”) does not provide “public assistance” as that phrase is understood in the NVRA. Plaintiffs’ allegation is that DLR should be providing a voter registration form when it receives an Economic Assistance Application from a TANF client. (Docket Doc. 39 ¶154). TANF is administered by the South Dakota Department of Social Services (“DSS”). SDCL Chapter 28-7A. Rules are adopted by DSS to implement eligibility qualifications, application procedure, and assistance level for TANF benefits. SDCL 27-7A-3(1) and SDCL 28-7A-4. There is nothing in South Dakota Codified Laws that allows DLR to administer the TANF program, and therefore, DLR is not required to provide voter registration services.

### **Conclusion**

Plaintiffs Lakota People’s Law Project, Kimberly Dillon, and Hoksila White Mountain did not provide the required prelawsuit notice as provided for in 52 U.S.C.A. § 20510(b)(2) and therefore lack statutory standing. In addition, Plaintiffs Hoksila White Mountain and Lakota People’s Law Project lack Article III standing.

Plaintiff Hoksila White Mountain’s alleged injury is the loss of the possibility he may have been elected in a city election. He lacks standing because the NVRA only applies to Federal elections and he was not a person aggrieved by a violation of the NVRA because he has not alleged he was unable to vote or denied voter registration services.

Plaintiff Lakota People's laws project does not have organizational standing because they are not an individual who is able to vote. Neither does Lakota People's Law Project have standing to sue on behalf of its members because they have no members. Furthermore, registering Native people to vote and expanding Native voter participation has long been a core part of their mission, and thus, they lack standing because they suffer from no injury-in-fact connected to Defendants' alleged violations of the NVRA since their mission has always been to register Native people to vote.

Marcia Hultman in her official capacity as Cabinet Secretary for the South Dakota Department Labor and Regulation should be dismissed because DLR is not a public assistance agency that is required to provide voter registration. DLR does not administer TANF as alleged in the complaint.

The Complaint should be dismissed with respect to Marcia Hultman, Kimberly Dillon, Hoksila White Mountain, and Lakota People's Law Project.

Respectfully submitted this 9<sup>th</sup> day of February 2022.

/s/ Clifton E. Katz  
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CERTIFICATE OF SERVICE

I hereby certify that on the 9<sup>th</sup> day of February 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western Division by using the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Clifton E. Katz

Clifton E. Katz

Assistant Attorney General

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