

BRAD CARLYON
Navajo County Attorney
P.O. Box 668
Holbrook, AZ 86025
(928) 524-4307
Jason S. Moore
Deputy County Attorney
jason.moore@navajocountyaz.gov
Attorney for the State
Attorney ID #019911

Attorneys for Navajo County Defendants

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Maria M. Gonzalez, et. al.,

Plaintiffs; and

Inter Tribal Council of Arizona, et. al.,

Plaintiffs;

v.

State of Arizona, et. al.

Defendants

NO. CV-06-1268-PHX-ROS
NO. CV-06-1362-PCT-JAT

**RESPONSE OF NAVAJO
COUNTY DEFENDANTS TO
GONZALEZ PLAINTIFFS'
AMENDED MOTION FOR
ATTORNEY'S FEES AND
COSTS AND MEMORANDUM
IN SUPPORT**

On behalf of Navajo County Defendants in this matter, the Navajo County Elections Director and the Navajo County Recorder, undersigned counsel hereby respectfully responds to Gonzalez Plaintiffs' Amended Motion for Attorney's Fees and Costs and Memorandum in Support.

While Navajo County does not dispute that Gonzalez Plaintiffs may be entitled to an award of attorney's fees and costs in some appropriate amount, it is respectfully submitted that any such award that might be forthcoming should be awarded against the State of Arizona solely and not the County Defendants in this matter.

I.) AN AWARD OF ATTORNEY'S FEES AND COSTS AGAINST NAVAJO COUNTY DEFENDANTS IS UNJUST AND DOES NOT FURTHER THE PURPOSES OF THE ATTORNEY FEES STATUTES

Gonzalez Plaintiffs argue that they are entitled to an award of fees pursuant to 42 U.S.C. §

1 1973gg-9(c) and 42 U.S.C. § 1988. However, as Gonzalez Plaintiffs concede, an award of
2 attorney's fee pursuant to those statutes is inappropriate if it would be "unjust." See *Farrar v.*
3 *Hobby*, 506 U.S. 103, 118 (1992) (O'Connor, J., concurring), *Hensley v. Eckerhart*, 461 U.S. ,
4 424, 429 (1983), *Gilbrook v. City of Westminster*, 177 F.3d 839, 878 (9th Cir. 1999).

5 In this matter, Navajo County and the remaining County Defendants were named as parties
6 solely because of their responsibility in enforcing state elections laws. The named county parties
7 in this matter do not have the authority to ignore the requirements of state law in performing the
8 duties of their offices, and the Plaintiffs in this matter have never contended otherwise at any
9 stage in these proceedings. To the extent that Gonzalez Plaintiffs suffered any harm or accrued
10 any claim subject to legal redress, it was the direct result of the actions of the Arizona State
11 Legislature. Navajo County had no role in passing the legislation that was the subject matter of
12 this case. The County Defendants have a responsibility to enforce the law as set forth by the
13 state legislature. In so doing, they are merely performing what can at best be described as a
14 ministerial duty, and they have no discretion to do otherwise. Without doubt, it would be
15 "unjust" for this Court to make an award of attorney's fees and costs against the innocent
16 Navajo County Defendants for doing nothing more than following state law and doing their jobs.
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19 The Court should also carefully note that an award of attorney's fees and costs against the
20 Navajo County defendants will not further the purposes of 42 U.S.C. § 1988 or the other statutes
21 relied upon by Gonzalez Plaintiffs. The purpose of 42 U.S.C. § 1988 was to allow access to the
22 judicial system for those with civil-rights grievances (see *Hensley*, 461 U.S. at 429) and,
23 presumably to serve as a deterrent to civil rights violations. The Plaintiffs in this matter can be
24 made whole with an award of attorney's fees and costs against the State and without making the
25 County Defendants in this matter subject to a judgment. Further, an award of fees and costs
26 against the County Defendants can have absolutely no deterrent impact on the counties as to
27 future civil rights violations, as they are solely at the mercy of the Arizona State Legislature. In
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1 fact, quite arguably, making the County Defendants jointly and severally liable with the State for
2 an award of costs and attorney's fees would be contrary to the purposes the statute is supposed to
3 serve. Forcing the blameless counties in this matter to share Gonzalez Plaintiffs' attorney's fees
4 and costs with the State might have less of a deterrent impact on the State—which is, after all,
5 actually the party responsible for the NVRA violations the Courts ultimately found to exist in
6 this case.

7 **II.) GONZALEZ PLAINTIFFS' CANNOT BE SAID TO HAVE "PREVAILED" OVER**
8 **NAVAJO COUNTY**

9 As Gonzalez Plaintiffs note, Section 1988 required a two-pronged inquiry: (1) whether the
10 plaintiff is a prevailing party, and (2) if the plaintiff is a prevailing party, what constitutes a
11 reasonable fee award. *See Farrar*, 506 U.S. at 114.

12 While the Gonzalez Plaintiffs have obtained some of the legal relief they requested and have
13 been successful in invalidating at least some aspects of the state law, Navajo County respectfully
14 would submit that in order to be considered a "prevailing party," the Plaintiff and Navajo County
15 Defendants would have had to have taken positions in this litigation contrary to one another.
16 That simply never occurred. From the outset of this litigation, Navajo County took the role of a
17 nominal party and simply agreed to be bound by whatever Judgment ultimately came of out of
18 the litigation. Navajo County never opposed Gonzalez Plaintiffs in the trial court, the Ninth
19 Circuit Court of Appeals, or the United States Supreme Court. Having now obtained some
20 portion of the relief they originally requested in this case, Gonzalez Plaintiffs cannot be said to
21 have "prevailed" over Navajo County, at least not in any ordinary sense of how the word would
22 be commonly understood. The word "prevail" implies by its very nature that there have to be
23 two parties taking materially different positions against one another in the litigation. Having
24 never taken a position adverse to Gonzalez Plaintiffs, it is impossible to see how Gonzalez
25 Plaintiffs "prevailed" over the Navajo County Defendants. The Gonzalez Plaintiffs never had a
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