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11 Agnes Laughter

12 **UNITED STATES DISTRICT COURT**
13 **DISTRICT OF ARIZONA**

14 MARIA M. GONZALEZ, et al.,

15 Plaintiffs,

16 v.

17 STATE OF ARIZONA; et al.

18 Defendants.

No. CV 06-1268-PHX-ROS (LEAD)
CV 06-1362-PHX-ROS
CV 06-1575-PHX-ROS

(Consolidated)

**SUPPLEMENTAL BRIEF OF NAVAJO
NATION AND AGNES LAUGHTER
REGARDING VOTING RIGHTS ACT
AND CIVIL RIGHTS ACT**

(Assigned to the Hon. Roslyn O. Silver)

22 Pursuant to this Court's Order dated September 11, 2006, Plaintiffs Navajo Nation
23 and Agnes Laughter submit this Supplemental Brief in support of their Voting Rights Act
24 and Civil Rights Act claims. The evidence previously presented to the Court and the
25 results of the September 12, 2006 Primary election demonstrate that the voter identification
26 requirements violate the Voting Rights Act and Civil Rights Act. Plaintiffs continue to
27 request that this Court enjoin the enforcement of the Proposition 200 voter identification

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1 requirements under Fed. R. Civ. P. 65(a)(2) on the grounds that it violates the Voting
2 Rights Act and Civil Rights Act.

3 This Brief is supported by the following Memorandum of Points and Authorities, the
4 Affidavits and Exhibits attached hereto and the record in this matter.

5 RESPECTFULLY SUBMITTED this 25th day of September, 2006.

6 Sacks Tierney P.A.

7
8 By: s/ Judith M. Dworkin

9 Judith M. Dworkin
10 Marvin S. Cohen
11 Patricia Ferguson-Bohnee

12 Attorneys for Plaintiffs Navajo Nation and
13 Agnes Laughter

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 The Voter Identification Requirements have limited the ability of Navajos to
17 exercise their right to vote in State and Federal elections to a much greater degree than
18 these Requirements have limited voting by non-Indian voters. Prior to the September 12,
19 2006 Primary Election ("Primary Election") both Navajo Nation officials and County
20 officials were concerned that the new Voter Identification Requirements would have a
21 significant disproportionate effect on Navajo voters.¹ The results of the Primary Election
22 establish that these concerns were well justified.

23
24
25 ¹ See Testimony of Leonard Gorman and Candace Owens, Prelim. Inj. Hr'g Tr. 89-93, 56-
26 60, 69, 102-103, August 30, 2006, excerpts attached hereto as Exhibits 120-121; Decl. of
27 Larry Goodman, Prel. Inj. Tr. Exhibit 102; Decl. of Dorothy Lee, Prel. Inj. Tr..Exhibit 105;
28 Affidavit of Yvonne Bigman, Prel. Inj. Tr. Exhibit 106; Decl. of Vincent Denetdeal, Prel.
Inj. Tr. Exhibit 107; Affidavit of Leila Hel-tulley, M.S.W., Prel. Inj. Tr. Exhibit 100.

1 **II. BACKGROUND**

2 **A. Evidence at the Preliminary Injunction Hearing Indicated that Ms.**
3 **Laughter and Other Navajo Electors Would Be Less Likely Than Other**
4 **Off-Reservation Citizens To Have Identification Deemed Acceptable For**
5 **Voting at the Polls at the Primary Election and Subsequent Elections**

6 Testimony and other evidence at the hearing indicated that Navajo voters by their
7 culture and circumstances will be less likely than other voters to have identification deemed
8 acceptable by the defendants.² Many Navajos will have trouble providing identification
9 with correct addresses. An individual's "address" on a reservation is not specifically
10 described by a street number, rural route number, lot and block or metes and bounds.
11 Addresses typically describe the location of a residence by distance from a landmark, such
12 as a Chapter House. The same address can appear in several different formats that may
13 make comparison difficult.³

14 Nation members are less likely than other electors to have a photo identification
15 deemed acceptable by defendants for three reasons: (1) the Navajo Nation does not issue
16 photo identification cards; (2) at least 20% of homes located on the Arizona portion of the
17 Navajo Reservation lack access to a vehicle so that a significant portion of the population
18 has no reason to obtain a driver license; and (3) there is no need for a member of the
19 Navajo Nation living on the Reservation to obtain an Arizona identification card. In the
20 State of Arizona, a number of residents lack a driver's license; and even though a Navajo
21 may have an Arizona driver's license or operating card, the address may not be correct. If
22 an individual seeks to change his/her address with the Department of Motor Vehicles, an
23 individual must pay a fee in order to obtain a new card.

24
25 _____
26 ² *See Id.*

27 ³ Letter to John Tanner from Candace Owens dated September 28, 2005, Prel. Inj. Hr'g.
28 Exhibit 115.

1 There are a number of reasons why Navajo electors living on the Reservation are
2 less likely than other electors to have other forms of identification. Navajos do not receive
3 property tax statements. Navajos are less likely to have utility bills than other Arizona
4 electors. The uncontroverted evidence established that 33% of the housing units lack
5 complete plumbing, 62% lack telephone service; over 56% of Navajo households are
6 heated by wood. Navajos are less likely than other Arizona residents to have a vehicle
7 insurance card or an Arizona vehicle registration card. Navajos with bank accounts are
8 unlikely to use their private banking information as a form of identification. Navajos do
9 not have tribal identification cards or census cards. Tribal and federal Certificates of Indian
10 Blood contain only the individual's name and census number and are not considered
11 identification by tribal members.⁴

12 While the identification documents acceptable at the polls may be commonly held
13 by non-Indian voters, the uncontroverted evidence at the Hearing indicated that a
14 significant proportion of Navajos do not commonly hold these documents.

15 **B. The Results of the Primary Election Establish the Disproportionate**
16 **Impact on Navajo Electors**

17 Because of the implementation of the Voter Identification Requirements, Plaintiff
18 Agnes Laughter and a disproportionate number of other qualified Navajo electors were
19 denied an opportunity to participate in the Primary Elections.⁵ Preliminary reports indicate
20 that there was confusion at the polls, the identification requirement was not uniformly
21 applied, and numerous Navajos did not even fill out a ballot due to the identification
22 requirements.⁶

23
24 ⁴ Prel. Inj. Hr'g Tr. 59-60, Aug. 30, 2006.

25 ⁵ See Second Affidavit of Leila Help-Tulley, attached hereto as Exhibit 122; Affidavit of
26 Candace Owens attached hereto as Exhibit 123.

27 ⁶ Affidavits to be supplied.

1 Detailed information concerning voting on the Navajo Reservation provides a clear
2 contrast between voting experiences on-Reservation and off-Reservation. That contrast is
3 most striking in Coconino County. While only 14% of that county's vote was cast on the
4 Navajo Reservation, 64% of the conditional provisional ballots were cast at on-Reservation
5 precincts. Use of conditional provisional ballots was ten times greater at on-Reservation
6 precincts than off-Reservation. Of those conditional provisional ballots cast on-
7 Reservation, only 18% were subsequently counted as compared with 38% of non-
8 Reservation ballots. At the Hearing, the evidence indicated that early voting is not a
9 realistic option for on-Reservation electors. The results from the Primary Election bear this
10 out. Of the 2,991 early votes cast in Coconino County, only 4% were cast by Navajo on-
11 Reservation electors.⁷

12 Navajo Reservation voting results from the three counties in which the Reservation
13 is located show that a much larger percentage of conditional provisional ballots were cast at
14 Reservation polling places than at polling places located off the-Reservation. And a much
15 higher percentage of early ballots were cast off-Reservation than were cast on-Reservation.

16 Following is a Table summarizing the voting information from the Counties:

17 **COCONINO COUNTY STATISTICS**

18	NAVAJO BALLOTS AS % OF TOTAL	
19	COCONINO BALLOTS	13.63%
20	NAVAJO CONDITIONAL BALLOTS AS % OF	
21	TOTAL COCONINO CONDITIONAL BALLOTS	63.64%
22	NAVAJO EARLY BALLOTS AS % OF TOTAL	
23	COCONINO EARLY BALLOTS	3.78%

24 **APACHE COUNTY STATISTICS**

25	NAVAJO BALLOTS AS % OF TOTAL	
26	APACHE COUNTY BALLOTS	63.80%
27	NAVAJO CONDITIONAL BALLOTS AS % OF	
28	TOTAL APACHE CONDITIONAL BALLOTS	97.14%

⁷ Attached as Exhibit 127 are Tables summarizing the voting information from Coconino, Navajo and Apache Counties. That information is contained in Exhibits 124, 125 and 126 respectively.

1 NAVAJO EARLY BALLOTS AS % OF TOTAL
2 APACHE COUNTY EARLY BALLOTS 46.91%

3 **NAVAJO COUNTY STATISTICS**

4 NAVAJO BALLOTS AS % OF TOTAL
5 NAVAJO COUNTY BALLOTS 27.38%

6 NAVAJO CONDITIONAL BALLOTS AS % OF
7 TOTAL NAVAJO CONDITIONAL BALLOTS 38.46%

8 NAVAJO EARLY BALLOTS AS % OF TOTAL
9 NAVAJO COUNTY EARLY BALLOTS 21.96%

10 **3-COUNTY STATISTICS**

11 NAVAJO BALLOTS AS % OF 3 COUNTY
12 BALLOTS 28.51%

13 NAVAJO CONDITIONAL BALLOTS AS % OF
14 3 COUNTY CONDITIONAL BALLOTS 54.65%

15 NAVAJO EARLY BALLOTS AS % OF 3
16 COUNTY EARLY BALLOTS 15.23%

17 **C. Plaintiff Laughter Was Denied the Right to Cast a Ballot**

18 At Chilchinbeto Chapter, where Ms. Laughter voted, she was approached by voting
19 officials to request identification before she entered the polling location. After a five
20 minute wait she was allowed to enter the polling place. When she advised the precinct
21 officials that she did not have identification and could not return within the statutory three
22 days, she was asked to leave and was not given the opportunity to cast a conditional
23 provisional ballot. The voter identification requirements denied Ms. Laughter an
24 opportunity to cast a ballot in the Primary Election.⁸

25 Even if the poll workers had allowed Ms. Laughter and other similarly situated
26 Navajos to complete conditional provisional ballots, these ballots would not have been
27 counted unless the electors returned within three days with identification. In Coconino
28 County, only 18% of the conditional provisional ballots cast on the Navajo Reservation
were accepted as valid ballots as compared to 38% of off-Reservation conditional

⁸ See Second Affidavit of Leila Help-Tulley M.S.W., attached hereto as Exhibit 122.

1 provisional ballots. The voting rights of Ms. Laughter and other qualified Navajo electors
2 were forfeited because they failed to obtain voter identification.

3 Returns from the Primary Election confirm that the Voter Identification
4 Requirements are having a disproportionate effect on Navajo Reservation voters.

5 **III. ARGUMENT**

6 **A. The Voter Identification Requirements Deny Navajos The Right To Vote
7 In Violation Of Section 2 Of The Voting Rights Act**

8 **1. Section 2 Prevents Any Voting Discrimination**

9 Congress enacted the Voting Rights Act of 1965 (42 U.S.C. §§ 1971-1973aa-6)
10 ("Act") "to rid the country of racial discrimination in voting," *Allen v. State Bd. of*
11 *Elections*, 393 U.S. 544, 548 (1969), and to ensure voting equality for language and racial
12 minorities. *See also Farrakhan v. Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003); *South*
13 *Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). In 1975, Congress amended the Voting
14 Rights Act to include provisions for language minorities. Addressing the Supreme Court
15 decision *Mobile v. Bolden*, 446 U.S. 55 (1980), Congress amended Section 2 in 1982 to
16 require that plaintiffs bringing lawsuits under Section 2 show only that an act resulted in a
17 denial or abridgment in the right to vote, rather than require a plaintiff to prove both
18 purpose and effect. *Smith v. Salt River Project Agric. Improvement and Power Dist.*, 109
19 F.3d 586, 594 (9th Cir. 1997) ("Section 2 requires proof only of a discriminatory result, not
20 of discriminatory intent").

21 Section 2 of the Act prohibits states or political subdivisions from using voting
22 qualifications, standards, practices, or procedures to deny or abridge the rights of citizens to
23 vote based on race or color or based on their membership in a language minority group. 42
24 U.S.C. § 1973(a); *see also Gomez v. Watsonville*, 863 F.2d 1407, 1411 (9th Cir. 1988). A
25 violation of Section 2 is established if,

26 based on the totality of the circumstances, it is shown that the political
27 processes leading to nomination or election in the State or political
28

1 subdivision are not equally open to participation by members of a class
2 of citizens protected by subsection (a) in that its members [members of
3 racial or language minority groups] have less opportunity than other
4 members of the electorate to participate in the political process and to
elect representatives of their choice.

5 42 U.S.C. § 1973(b) (emphasis added).

6 Although most cases challenging Section 2 since the 1982 amendments were
7 enacted involve vote dilution, vote denial is a cognizable claim under Section 2.
8 *Farrakhan*, 338 F.3d at 1016; *Johnson v. Gov'r of Florida*, 405 F.3d 1214, 1228 n. 26 (11th
9 Cir. 2005). "Vote denial occurs when a state employs a 'standard, practice, or procedure'
10 that results in the denial of the right to vote on account of race." *Id.* (quoting 42 U.S.C. §
11 1973(a) and *Burton v. City of Belle Glade*, 178 F.3d 1175, 1197-98 (11th Cir. 1999)).
12 While Plaintiffs do not dismiss that the voter identification requirements may dilute the
13 votes of Navajo voters, the Navajo Nation's Section 2 claim for purposes of the preliminary
14 injunction proceedings is more adequately described as a vote denial claim, challenging
15 those practices that prevent people from voting or having their votes counted. Historically,
16 examples of vote denial cases involved literacy tests, poll taxes, all-white primaries, and
17 English-only ballots. *See* Daniel P. Tokaji, *The Promise of Voter Equality: Examining the*
18 *Voting Rights Act at Forty: The New Vote Denial: Where Election Reform Meets the*
19 *Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006).

20 As the Supreme Court has noted, Section 2 prohibits all forms of voting
21 discrimination. *See Thornburg v. Gingles*, 478 U.S. 30, 45 n. 10 (1986). The Ninth
22 Circuit's recent vote denial case is instructive as to how a Section 2 vote denial claim
23 should be analyzed. *Farrakhan*, 338 F.3d 1009. In *Farrakhan*, the Court reviewed a
24 Section 2 challenge to Washington State's felon disenfranchisement law. *Id.* at 1011-12.
25 The Court found that Washington State's felon disenfranchisement law was a form of vote
26 denial subject to Section 2 of the Voting Rights Act. The Court held that "[f]elon
27 disenfranchisement is a voting qualification, and Section 2 is clear that any voting
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1 qualification that denies citizens the right to vote in a discriminatory manner violates the
2 VRA." *Id.* at 1016.

3 To determine whether a vote denial claim exists, the Ninth Court suggests an
4 evaluation as to whether the challenged practice "interacts with surrounding racial
5 discrimination in a meaningful way" to disproportionately impact minority voters. *Id.* at
6 1018. In *Farrakhan*, the Ninth Circuit based its finding of vote denial on evidence of
7 statistical disparities. *Id.* at 1019-20.⁹ Analyzing statistical disparities, this Court should
8 conclude that the voter identification requirements, interacting with social and historical
9 conditions, deny Navajos equal access to the political process. *Id.* at 1018.

10 **2. Social and Historical Conditions Impact the Ability of Navajos To**
11 **Equally Participate in the Electoral Process**

12 Arizona has a history of discrimination that has been an important factor in
13 detrimentally affecting the political participation of Native Americans in Arizona. As
14 explained by Mr. John Lewis at the Preliminary Injunction hearing held on August 31,
15 2006, Native Americans in the State of Arizona continue to bear the effects of
16 discrimination in areas such as education, employment, healthcare, socioeconomic status
17 and voting.¹⁰ See Arizona Housing Commission, Arizona Department of Commerce, *The*
18 *State of Housing in Arizona 2000* (November 1999), available at
19 <http://www.housingaz.com/UPLOAD/HsgReprt.pdf>. Native Americans are some of the
20 poorest residents of the state of Arizona. *Id.*; Prel. Inj. Trial Ex. 118. The Arizona
21 Department of Economic Security reported that in 1993, the average annual wage or salary
22 income of Native Americans living on reservations within the state was \$23,624 per year
23 and the median household income was \$14,457 per year. See *The Economic and Fiscal*

24 _____
25 ⁹ The *Farrakhan* Court did not analyze the Senate factors included in the Senate Report
26 accompanying the 1982 legislation because these factors are used primarily to determine
27 vote dilution cases. An analysis of the Senate Factors is not warranted in this case.

28 ¹⁰ Testimony of John Lewis, Prel. Inj. Hr'g Tr. 110-116, Aug. 31, 2006, attached hereto as
Exhibit 128.

1 *Impact of American Indian Reservations in Arizona*, Prepared for the Arizona Department
2 of Commerce (October 1994). Over 40% of Navajos living on the Reservation are in
3 poverty. Prelim. Inj. Exh. 109 at 3. This discrimination hinders Native Americans' ability
4 to participate effectively in the political process.

5 Court decisions illustrate discrimination against Native Americans in Arizona. Until
6 1947, the Corporation Commission denied business permits to Native Americans living on
7 reservations. *Bradley v. Arizona Corporation Commission*, 60 Ariz. 508, 141 P.2d 524
8 (Ariz. 1943)(holding that the State's denial of a business permit to a Navajo, living on the
9 Navajo Reservation was a violation of the Fourteenth Amendment to the Constitution and
10 Article 2, Section 13 of the Arizona Constitution). Native Americans did not obtain the
11 right to vote in Arizona until twenty-four years after Congress recognized Native
12 Americans as United States citizens. *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (Ariz.
13 1948) (overturning the decision of *Porter v. Hall*, 34 Ariz. 308, 271 P. 411 (Ariz. 1928) and
14 granting Native Americans the right to vote in state elections). As late as the 1970's,
15 elected officials thwarted efforts of successful Native Americans candidates to represent
16 their constituents. *Shirley v. Apache County Superior Court*, 109 Ariz. 510, 513 P.2d 939
17 (Ariz. 1973) (quashing a preliminary injunction and directing that Tom Shirley, an enrolled
18 member of the Navajo Nation who lived on the Navajo Reservation, be certified by the
19 Apache County Board of Supervisors as the duly elected Supervisor of Supervisorial
20 District No. 3 of Apache County). In 1998, the Arizona Supreme Court struck down an
21 amendment to the Arizona Constitution, Article XXVIII, enacted by the Arizona voters in
22 November 1988 requiring that all government business be conducted in "English and no
23 other language." *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984 (1998); *see also Yniguez v.*
24 *Mofford*, 730 F. Supp. 309, 316-17 (D. Ariz. 1990) (under the constitutional amendment,
25 Native American state legislators would be violating "their sworn oaths to obey the state
26 constitution, and thereby subject themselves to potential sanctions and private suits," if they
27 spoke to their constituents in their native languages); *aff'd in part, rev'd in part*, 939 F.2d

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1 727 (9th Cir. 1991), *vacated and remanded by Arizonans for Official English et al. v.*
2 *Arizona*, 520 U.S. 43 (1997).

3 As recent as 2002, Native American voters in Apache County faced intimidation
4 when voting at the polls on Election Day.¹¹ The tactics used to enforce the Voter
5 Identification Requirements also serve as voter intimidation. On September 12, 2006 at
6 some polling locations on the Navajo Reservation, individuals were turned away from the
7 polls if they did not have voter identification, not even allowed to cast a conditional
8 provisional as required by law.¹²

9 **3. The Voter Identification Requirements Prevent Navajos From**
10 **Participating In Elections**

11 Navajos are a protected class under the Voting Rights Act. The new Voter
12 Identification Requirements constitute a voting practice, procedure, or standard. 42 U.S.C.
13 § 1973. An elector without the required identification may cast a conditional provisional
14 ballot, but that ballot will not be counted unless the elector returns within three or five days
15 with identification. Returning to the County Recorder to provide identification is not
16 possible for many Navajo voters who lack transportation, resources, and identification.¹³
17 This process denies the voting rights of Agnes Laughter and other Navajos. *See Thompson*
18 *v. Willson*, 155 S.E.2d 401, 404 (Ga. 1967) ("A refusal to count [an elector's] vote
19 completely ignores it and is tantamount to a refusal to allow him to cast it.") Given the
20 social and historical conditions of the Navajo Nation and the statistical disparity between
21 the effects of the Voter Identification Requirements on Navajo voters as compared to non-
22 Indian voters, this Court should conclude that the Voter Identification Requirements deny
23

24 _____
25 ¹¹ Testimony of Penny Pew, Prel. Inj. Hr'g Exhibit 111.

26 ¹² *See* Second Affidavit of Leila Help-Tulley, Exhibit 122.

27 ¹³ Testimony of Leonard Gorman, Prel. Inj. Tr. 56, 66-68, Aug. 30, 2006; Second Affidavit
28 of Leila Help-Tulley, M.S.W.

1 Navajos an equal opportunity to participate in the voting process. *Farrakhan*, 338 F.3d at
2 1018; *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 310-316 (3rd
3 Cir. 1994) (recognizing that Section 2 violations occur when challenged voting practices
4 interact with social and historical conditions to deny minorities equal access to the political
5 process). The evidence presented at the hearing coupled with the results of the Primary
6 Election demonstrate that the identification requirements are causing an inequality between
7 the opportunities of Navajo and non-Indian voters to elect their preferred representatives.
8 *See Gingles*, 478 U.S. at 47.

9 **B. The Voter Identification Requirements Violate the Civil Rights Act, 42**
10 **U.S.C. Section 1971(a)**

11 **1. A Disproportionate Number of Navajo Voters Are Subject To**
12 **Voter Identification Requirements In Violation of 42 USC**
13 **1971(a)(2)(A)**

14 The Civil Rights Act prohibits differential treatment of voters within the same
15 county or political subdivision. Section 1971(a)(2)(A) provides that "[n]o person acting
16 under color of state law shall," when

17 determining whether any individual is qualified under State law or laws to
18 vote in any election, apply any standard, practice, or procedure different from
19 the standards, practices, or procedures applied under such law or laws to
20 other individuals within the same county, parish, or similar political
21 subdivision who have been found by State officials to be qualified to vote.

22 42 U.S.C. § 1971(a)(2)(A). Within Apache, Navajo, and Coconino counties, Navajos
23 utilize early voting at a significantly lower rate than non-Indians. The Primary Election
24 results confirm the evidence presented at the Hearing that Navajos much prefer to vote at
25 the polling places. In Coconino County 94.5% of Navajos cast their ballots at the polls and
26 were, therefore, subjected to the Voter Identification Requirements while only 78% of the
27 electors at non-Navajo voting precincts were subjected to these Requirements.¹⁴ Persons

28 ¹⁴ The results for the entire Navajo Nation in Arizona was that 91.7% were subjected to the
Voter Identification Requirements, while only 81.5% of off-Reservation electors in the
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1 who can and do participate in the electoral process by early ballot must provide only their
2 signature. Persons voting at the polls, must provide a signature and either one form of
3 identification or two forms of identification in order to vote. Therefore, a higher proportion
4 of Navajo voters are denied the right to vote because they do not have the appropriate
5 identification and, for reasons described above, do not avail themselves of early voting.
6 The results of the Primary Election in Coconino County also illustrate this disparity. While
7 only 13% of the votes cast County-wide came from Navajo precincts, 64% of the
8 conditional provisional ballots were cast at Navajo precincts. Of these only 18% of Navajo
9 ballots were subsequently counted, while 38% of conditional provisional ballots at non-
10 Navajo precincts were counted.¹⁵ The results of the implementation of the Voter
11 Identification Requirements on the Navajo Reservation within Coconino County establish
12 that these Requirements violate Section 1971(a)(2)(A) of the Civil Rights Act.

13 A federal court in Louisiana found absentee ballot practices discriminatory when
14 African Americans were not provided the same opportunities to vote by early ballot as
15 white individuals. *Brown v. Post*, 279 F. Supp. 60 (W.D. La. 1968). In *Brown*, the court
16 held that making absentee ballots available to white individuals in their private residences
17 without extending the same opportunity to African American residents constituted unlawful
18 discrimination, however unintentionally this result may have come about. *Id.*

19 Similarly, Navajo voters are not afforded the same opportunity to vote by early
20 ballot as white voters. While the discriminatory impact may be unintentional, non-Indian
21 voters have a greater opportunity to avail themselves of the less burdensome early voting
22 process. This constitutes unlawful discrimination. To create heightened requirements for
23

24 counties of Coconino, Apache and Navajo were subjected to these requirements. Exhibit
25 127.

26 ¹⁵ The Arizona portion of the Navajo Nation cast 28.5% of the 3-County vote, yet Navajo
27 electors cast 54.6% of the conditional provisional ballots. Only 12.8% of these ballots
28 were counted. In comparison, 43.6% of the off-Reservation conditional provisional ballots
were counted.

1 those voters who vote in person than for those voters who vote by mail in and of itself is a
2 discriminatory practice. The implementation of the Voter Identification Requirements at
3 the precincts on the Navajo Reservation clearly has a discriminatory effect on Navajo
4 electors in violation of Section 1971(a)(2)(A).

5 **2. The Voter Identification Requirements Are Not Material To**
6 **Determine Whether An Elector Is Qualified To Vote**

7 The voter identification requirements also violate Section 1971(a)(2)(B) of the Civil
8 Rights Act. Section 1971(a)(2)(B) prohibits the denial of the right to vote for an act or
9 omission that is not material to determining whether a voter is qualified to vote under state
10 law.

11 Courts have struck down voter laws that are not material in determining whether an
12 individual is qualified to vote. *United States v. Cartwright*, 230 F. Supp. 873 (M.D. Ala.
13 1964) (Discriminatory registration practices, resulting in disqualification of 4.6% of white
14 applicants and of 95.3% of African American applicants, violated 42 U.S.C. § 1971(a)). In
15 *Schwier v. Cox*, 412 F.Supp. 2d 1266 (N.D. Ga. 2005), *aff'd* 439 F.3d 1285 (11th Cir. 2006)
16 (after remand), the court held that the State violated 42 U.S.C. § 1971(a)(2)(B) when it
17 denied voter registration applicants the right to register to vote because they refused to
18 disclose their social security numbers. In *Schwier*, the Eleventh Circuit held that the
19 disclosure of an individual's social security number was not material in determining
20 whether an individual was qualified to vote under state law. In *Lake v. Perdue*, CV
21 2006CV119207 (Ga. Sup. Ct. September 19, 2006), a Georgia State Court declared the
22 State's voter identification requirement unconstitutional and permanently enjoined the voter
23 identification law. Although, the issue in *Lake* was whether the voter identification
24 requirements violated the Georgia Constitution, the order analyzes whether voter
25 identification is material to require a qualified elector to vote. In *Lake*, the Court found that
26 to require an otherwise qualified voter to comply with the subsequent condition to prove
27 identification resulted in a forfeiture of the right to have one's ballot counted. *Lake*, slip op.

1 at 12. The Court pointed out that the new requirements did not include a fail safe
2 procedure, "by which a qualified voter could by affidavit verify identification, then vote."
3 *Id.* Requiring the voter to return with identification was unacceptable. *Id.* at 12.

4 Similarly, requiring voter identification from Navajo voters is not material to
5 determine whether or not the individual is qualified to vote under Arizona law. A.R.S.
6 § 16-101 sets forth the qualifications for voters in Arizona. Arizona law provides that
7 every resident that is a citizen of the United States, is eighteen, has resided in the State
8 twenty-nine days preceding the election, is able to write his name or make his mark, has not
9 been convicted of treason or a felony, and has not been adjudicated an incapacitated person
10 is qualified to register to vote. A.R.S. § 16-101. Whether or not an individual is a citizen is
11 determined at the time of registration. *Id.*

12 It is well-established that Native Americans, over the age of eighteen, living on
13 reservations are eligible to vote in Arizona elections. *Harrison*, 196 P.2d 456; *Shirley*, 513
14 P.2d at 942. Ms. Laughter and other Navajo voters who are duly registered and meet the
15 other requirements set forth in A.R.S. § 16-101 are being prevented from voting because
16 they lack the identification required by defendants although they are qualified to vote and
17 are listed on the voter registration lists. Verification of the identity of the voter at the
18 polling place could easily be obtained by signature as is done with the early voter. Further,
19 the evidence demonstrates that there is no need for the State Voter Identification
20 Requirements as poll workers can personally verify the voter's identity at polling locations
21 located on the Navajo Reservation.¹⁶ The Voter Identification Requirements are not
22 material to determining whether an elector at a precinct on the Navajo Reservation is
23 qualified to vote under State law.

24 _____
25 ¹⁶ Testimony of Leonard Gorman, Prol. Inj. Hr'g Tr. 42-43, 60-63.; Aff. of Leila Help-
26 Tulley, M.S.W. Prel Inj. Trial Exhibit 100; ¶ 10; Decl. of Larry Goodman, Prel. Inj. Trial
27 Exhibit 102 ¶ 9; Decl. of Dorothy Lee, Prel. Inj. Trial Exhibit 105 ¶ 22; Aff. of Yvonne
28 Bigman, Prel. Inj. Trial Exhibit 106 ¶ 19; Decl. of Vincent Denetdeal, Prel. Inj. Trial
Exhibit 107 ¶ 16; Affidavit of Doris Clark, Prel. Inj. Tr. Exhibit 101.

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IV. CONCLUSION

For the foregoing reasons, Proposition 200's Voter Identification Requirements violate the voting rights of Navajos living on the reservation and the enforcement of such procedures should be immediately enjoined.

RESPECTFULLY SUBMITTED this 25th day of September, 2006.

SACKS TIERNEY P.A.

By: s/ Judith M. Dworkin

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 25, 2006, a complete, duplicate copy of this
3 document was forwarded directly to Judge Roslyn O. Silver by First Class Mail, at the
4 following addresses:

5 Hon. Roslyn O. Silver
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7 s/ Judith M. Dworkin

8 I hereby certify that on September 25, 2006, I electronically transmitted the attached
9 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
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