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10 **IN THE UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 Maria M. Gonzalez, et al.,
13 Plaintiffs,

14 v.

15 State of Arizona, et al.,
16 Defendants.
17

No. CV06-1268 PHX ROS (Lead)
No. CV06-1362 PCT JAT (Cons)

No. CV06-1575 PCT EHC (Cons)

**REPLY IN SUPPORT OF MOTION
TO TRANSFER AND TO
CONSOLIDATE**

(Assigned to the Honorable Roslyn O.
Silver)

19 The Navajo Nation, a federally recognized
20 Indian Tribe, and Agnes Laughter,

21 Plaintiffs,

22 v.

23 Jan Brewer, individually and in her official
24 capacity as Secretary of State of the State of
25 Arizona, et al.,

26 Defendants.
27
28

1 The attempt by the Navajo Nation and Agnes Laughter (the “Navajo Plaintiffs”)
2 to distinguish their claims by highlighting their focus on Navajo Nation issues does not
3 override the risks of inconsistent adjudications of common legal questions, the burden a
4 multi-trial scenario places on the parties and the Court, and the very real threat that
5 multiple decisions, followed by multiple appeals, in these late challenges may create
6 chaos in the state voting system that cannot be relieved before the upcoming elections.

7 The action brought by Plaintiffs – the third such challenge brought in recent
8 weeks to Proposition 200’s voter requirements – is precisely the type of case that should
9 be transferred and consolidated with the two previously consolidated actions. The
10 Navajo Plaintiffs assert legal theories virtually identical to claims pending in the
11 previously consolidated actions, namely that the identification at the polls requirement is
12 a poll tax, unreasonably burdens the right to vote, and violates the Civil Rights Act and
13 Voting Rights Act. *See* Complaint in Case No. CV06-1575 PCT EHC. The table of
14 claims at pages 4 and 5 of the Navajo Plaintiffs’ Response to Motion to Transfer and
15 Consolidate (“Response”) displays the similarity between these claims and the claims in
16 the previously consolidated actions. Any inconsistencies in decisions issued by different
17 judges on these overlapping issues will lead to confusion among voters and election
18 officials on the eve of upcoming elections. Moreover, parallel proceedings will make
19 unnecessary and disruptive demands on the resources of the Court and the parties.

20 The substantial overlap of legal theories, challenging the very same provisions of
21 state election law under the very same provisions of federal law, is alone enough to
22 justify consolidation. Rule 42(a), Fed.R.Civ.P., authorizes the Court to consolidate any
23 “action involving a common question of law *or* fact.” (emphasis added); *see Johnson v.*
24 *Celotex Corp.*, 889 F.2d 1281, 1284 (2d Cir. 1990) (“Rule 42(a) . . . empowers a trial
25 judge to consolidate actions for trial when there are common questions of law *or* fact to
26 avoid unnecessary costs or delay.” (emphasis added)).

27 The Navajo Plaintiffs contend that factual circumstances unique to members of
28 the Navajo Nation and the Navajo Plaintiffs’ exclusive focus on the impact of the

1 Arizona rules on the Navajo Nation warrant a separate trial for their overlapping legal
2 claims. However, “the facts and legal issues need not be identical to warrant
3 consolidation.” *In re Olsten Corp. Securities Litigation*, 3 F.Supp.2d 286, 293
4 (E.D.N.Y. 1998)(ordering consolidation of federal securities claims despite fact that one
5 action involved a medicare audit and others involved medicare fraud, and despite fact
6 that the class period in one action started before and ended during the class period in the
7 other actions.); *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F.Supp. 1196, 1211
8 (S.D.N.Y.1992) (finding consolidation appropriate even though not all facts in original
9 case applied to defendants in second action); *Lloyd v. Industrial Bio-Test Laboratories,*
10 *Inc.*, 454 F.Supp. 807, 812 (S.D.N.Y.1978)(consolidating cases even though one action
11 involved common stock and other action involved options issues, and even though not
12 all of the individual defendants named in one action were also named in the other).
13 Thus, the fact that unique factual circumstances may be alleged does not itself prevent
14 consolidation.

15 Instead, when deciding if consolidation is appropriate, the court must consider
16 whether “judicial economy favor[s] consolidation.” *Johnson*, 899 F.2d at 1285.
17 “Consolidation is generally ordered ‘so long as any confusion or prejudice does not
18 outweigh efficiency concerns.’” *In re Olsten Corp. Securities Litigation*, 3 F.Supp. 2d at
19 293 (quoting *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 129 (S.D.N.Y.
20 1997)). The “critical question,” then, is “whether the specific risks [to the plaintiff] of
21 prejudice and possible confusion [are] overborne by the risk of inconsistent
22 adjudications of common factual and legal issues, the burden on the parties, witnesses
23 and available judicial resources posed by multiple lawsuits, the length of time required
24 to conclude multiple suits as against a single one, and the relative expense to all
25 concerned of the single-trial, multiple-trial alternatives.” *Arnold v. Eastern Air Lines,*
26 *Inc.*, 681 F.2d 186, 193 (4th Cir. 1982), *cert. denied* 464 U.S. 1040 (1984); *see Johnson*,
27 899 F.2d at 1285; *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir.
28 1985); *In re Olsten Corp. Securities Litigation*, 3 F.Supp. 2d at 293.

1 Here, the Navajo Plaintiffs' claims to prejudice are: 1) that because the issues in
2 the other cases are broader than the Navajo Plaintiffs' claims, such plaintiffs' costs will
3 be increased by forced participation in discovery and other proceedings irrelevant to
4 them; 2) that the broader scope of the other pending actions will cost the Navajo
5 Plaintiffs unnecessary delays (including a delay in the preliminary injunction hearing
6 they are seeking); and 3) the threat that the Navajo Plaintiffs' narrower claim will
7 become "lost in the multitude of facts and issues raised by the other parties . . ."
8 Response, at 9-10. These items do not threaten substantial prejudice or confusion.

9 First, nothing will require the Navajo Plaintiffs to participate in discovery
10 proceedings that are irrelevant to their claims. The Navajo Plaintiffs can choose to make
11 their case on facts specific to them, and can simply avoid depositions of or discovery
12 propounded upon other parties or witnesses. Next, the Court has already set an
13 expedited discovery, briefing and hearing schedule on the previously consolidated
14 preliminary injunction requests which ask the Court to preliminarily enjoin the same
15 voter identification requirements that the Navajo Plaintiffs seek to enjoin. The Navajo
16 Plaintiffs filed a request that Judge Carroll expedite their preliminary injunction request
17 for hearing by August 15, 2006, but per the parties' stipulation, Judge Carroll has
18 ordered that he will delay briefing and ruling on the Navajo Plaintiffs' motion to
19 expedite until this Court has ruled on the transfer and consolidation motion.
20 Furthermore, the schedule that the Navajo Plaintiffs asked for shaves only two weeks off
21 the expedited schedule in the already consolidated matters. Thus, there is virtually no
22 chance of unfair delay should the Court consolidate all these matters. Lastly, while the
23 earlier cases may include some claims not made by the Navajo Plaintiffs, and seek a
24 ruling of state-wide impact, the significant overlap in claims and the Navajo Plaintiffs'
25 obvious intent to vigorously pursue their claims mean little risk that the Navajo
26 Plaintiffs' claims will somehow become "lost" among other competing issues. Instead,
27 all three cases prominently urge challenges to the Arizona voter identification
28 requirements, thereby ensuring the Navajo Plaintiffs' claims will be fully explored.

1 On the other hand, the risks to court resources, party resources, and to the election
2 system itself are high if transfer and consolidation are not granted. First, though the
3 Navajo Plaintiffs' claims overlap substantially with the previously consolidated claims,
4 these plaintiffs ask the Court to devote resources of two judges to studying two sets of
5 State briefs, and to conduct two separate preliminary injunction hearings that will decide
6 many of the same legal issues. All of this occurs during the most hectic period in the
7 election cycle, and while the real risk still exists that other similar claims may be filed.
8 Moreover, failure to consolidate risks further inefficient use of judicial resources should
9 expedited appeals be taken in either of the cases (an event that is likely given the claims
10 and the pending election dates). Consolidation avoids handing the Court of Appeals
11 piecemeal analysis or serial decisions on overlapping legal issues. Thus, consolidation
12 serves the interest of preserving judicial resources.

13 Moreover, requiring separate decisions on similar claims risks the issuance of
14 inconsistent, or at least dissimilar, opinions. The confusion any such inconsistency
15 might create for election officials is compounded by the fact that any independent ruling
16 in the Navajo Plaintiffs' claim would address only the counties named there, and not all
17 other Arizona counties. This could create uncertain or chaotic conditions that would
18 not settle before the nearing elections.

19 Finally, failure to consolidate imposes substantial and unnecessary burdens on the
20 Defendants and their counsel. Absent consolidation, counsel for the Secretary of State
21 will be required to brief the claims in the Navajo Plaintiffs' action, and then file a second
22 brief covering those same issues in the previously consolidated actions. All the while,
23 discovery is proceeding actively in the consolidated matters per the Court's expedited
24 schedule, and efficient compliance with that schedule could be compromised if the
25 Secretary of State's counsel must duplicate either expedited briefing or discovery on her
26 side in these cases.

27 Consolidation is favored where, as here, concerns with preserving resources,
28 avoiding confusion, avoiding piecemeal study and decision on overlapping legal issues,

1 and preventing undue confusion in the efficient administration of the election system all
2 outweigh the limited risks of prejudice suggested by the Navajo Plaintiffs. Given the
3 foregoing, the balance here strongly favors consolidation, and the request for transfer
4 and consolidation should be granted. In addition, the Court should apply the current
5 and already expedited discovery and briefing schedule to the Navajo Plaintiffs' claims.

6 DATED this 19th day of July, 2006.

7
8 TERRY GODDARD
9 Arizona Attorney General

10 s/William A. Richards
11 Mary O'Grady, Solicitor General
12 William A. Richards, Asst. Attorney General
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Arizona Secretary of State

15 COPY of the foregoing filed electronically
16 this 19th day of July, 2006.

17 COPY of the foregoing mailed with Notice of
18 Electronic Filing this 19th day of July, 2006 to:

19 The Honorable Roslyn O. Silver
20 United States District Court
21 Sandra Day O'Connor U.S. Courthouse, Suite 624
22 401 West Washington Street, SPC 59
Phoenix, AZ 85003-2158

1 COPY of the foregoing filed electronically
2 in case No. CV06-1575 PCT EHC,
3 this 19th day of July, 2006, and copies of
4 the same mailed this 19th day of July, 2006, to:

5 The Honorable Earl H. Carroll
6 United States District Court
7 Sandra Day O'Connor U.S. Courthouse, Suite 521
8 401 West Washington Street, SPC 48
9 Phoenix, Arizona 85003-2151

10 By: s/Rachel Cruz

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