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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)

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

21 The State in its Responsive Brief Regarding Navajo Plaintiffs' Claims asserts that  
22 the vast majority of people who voted at precincts on the Navajo Reservation did so  
23 successfully. On this basis the State contends that Navajo Plaintiffs have no claims under  
24 the Voting Rights Act or the Civil Rights Act. While acknowledging that, at least as to the  
25 primary election, the Voter Identification Requirements have had a disproportionate impact  
26 on Navajo voters and recognizing the historical, social and economic challenges of Navajo  
27 voters, the State contends that the Voter Identification Requirements do not deprive  
28

1 Navajos of the right to vote in violation of Section 2 of the Voting Rights Act, 42 U.S.C.  
2 § 1973(a) or 42 U.S.C §1971(a) of the Civil Rights Act. The State appears to rely on the  
3 fact that a majority of Navajo voters were able to comply and essentially argues that it is  
4 premature to enjoin the law without a longer experience of disenfranchised Navajo voters.

5 The results of the primary election provide a compelling basis for this Court to  
6 conclude otherwise. These results, as detailed in the Navajo Plaintiffs' Supplemental Brief,  
7 established that 188 voters on the Navajo Reservation were required to cast conditional  
8 provisional ballots and only 17 of these ballots were accepted.<sup>1</sup> Application of the Voter  
9 Identification Requirements effectively deprived at least 171 Navajo electors of their right  
10 to vote.<sup>2</sup> In the three counties in which the Navajo Reservation is located, 33,504 ballots  
11 were cast and counted. Of these, 9,419 were cast on the Navajo Reservation. There were  
12 23,615 ballots cast off-Reservation.<sup>3</sup> Although the number of Navajo ballots was less than  
13 a third of the total number of ballots cast in the three counties, the number of conditional  
14 provisional ballots cast on the Reservation (188) was 120% higher than the number cast off  
15 the Reservation (156). And while 53 of the 156 conditional provisional ballots cast off  
16 Reservation were ultimately counted (34%), only 17 of the 188 conditional provisional  
17 ballots cast on Reservation were counted (9%).<sup>4</sup> The disparate effect of the application of  
18 the Voter Identification Requirements to voters on the Navajo Reservation is obvious. It  
19 can be expected that at the November general election, with a much higher turnout rate,

20 \_\_\_\_\_  
21 <sup>1</sup> These 17 accepted ballots include a blank ballot in Navajo County apparently cast by  
22 election officials on behalf of Agnes Laughter. *See* Affidavit of Agnes Laughter, attached  
hereto as Exhibit 129.

23 <sup>2</sup> Observations by Election Day Technicians at seven Coconino County polling places on  
24 the Navajo Reservation were that a number of persons left the polling places without  
25 casting any ballot. *See* Affidavits of Coconino County EDT Technicians, attached hereto  
as Exhibits 130-136.

26 <sup>3</sup> These do not include ballots that were cast on other Indian reservations in the three  
counties. *See* Exhibits 124-126 to Supplemental Brief of Navajo.

27 <sup>4</sup> *See* Corrected Last Page of Exhibit 127 to Supplemental Brief of Navajo, attached hereto  
28 as Exhibit 137.

1 more than 500 Navajo voters will be disenfranchised.<sup>5</sup>

2 **Early Voting Does Not Cure the Discriminatory Effect of the Voter Identification**  
3 **Requirements.**

4 The State contends that early voting allows Navajo voters to avoid the burdens of  
5 Voter Identification Requirements at the polls. The evidence at the hearing established that  
6 Navajos prefer to vote at the polls and are much less likely to use early voting than are non-  
7 Indian voters. The results of the September Primary Election confirmed this. In Coconino  
8 County, which contains the urban Flagstaff area, 22% of the voters (2,878) in non-  
9 Reservation precincts cast early ballots while early ballots were cast by only 5% of the  
10 Navajo Reservation voters (113).<sup>6</sup>

11 Much early voting consists of mailed in ballots. For Navajo voters who only speak  
12 Navajo or have little proficiency in English, this option is not available because translation  
13 service is not available, and for all of the other reasons established at the hearing and in the  
14 Navajo Plaintiffs' earlier briefs to the Court. The State contends that availability of  
15 translators at early voting sites provides opportunities for early voting in person for Navajo  
16 voters without identification. For Navajos accustomed to voting at a particular polling  
17 place—usually the chapter house—on Election Day, voting in person at an earlier time and  
18 a different location is a new, relatively unknown and foreign idea. Even knowledgeable  
19 Navajo voters are not familiar with early voting. *See* State's Resp. at 4, Ins. 5-10 ("Mr.  
20 Gorman stated that he did not believe that language assistance was available to Navajo  
21 voters who voted early. Mr. Gorman also stated in cross examination that he had never

22 \_\_\_\_\_  
23 <sup>5</sup> The county-wide turnout for the three counties in the 2006 primary election was 21%.  
24 The turnout in the 2004 general election was 65%, approximately 3 times higher. State of  
25 Arizona Official Canvasses for the 2004 General Election and the 2006 Primary Election,  
26 attached hereto as Exhibits 138 and 139. At the 2006 general election, the Navajo Nation  
will be holding its own election for President and so the turnout on-Reservation for both  
elections will probably exceed 65%.

27 <sup>6</sup> Voters in urban areas are much more likely to cast early ballots than voters in rural areas.  
28 Even in the rural Apache and Navajo counties, 50% more early ballots were cast off the  
Reservation than were cast on-Reservation.

1 voted early, and upon further examination Mr. Gorman appeared to be unfamiliar with  
2 some of the early voting process.").

3 Furthermore, there are limited opportunities for early voting on the Navajo  
4 Reservation. The Counties have few early voting locations on the Navajo Reservation, and  
5 it is unclear whether the electors even know that these locations exist. Coconino County  
6 lists early voting locations on its website, but neither Apache County nor Navajo County  
7 list their early voting locations on their websites.<sup>7</sup>

8 Coconino County is 18,617 square miles, the second largest county in the lower  
9 forty-eight states. Forty-six percent of the County is comprised of Indian reservation land.  
10 In Coconino County, there is no early voting location on the Navajo Reservation. There is  
11 one early voting location at the Moencopi Community Center on the Hopi Reservation,  
12 adjacent to the Navajo Nation. This site is open during the weekdays for early voting. One  
13 outreach worker, Alta Edison, provides outreach assistance to Navajo voters throughout  
14 Coconino County.<sup>8</sup>

15 Navajo County is 9,959 square miles and 55% of the County is reservation land. The  
16 Navajo County Recorder employs one full-time outreach worker, Doris Clark, to provide  
17 election outreach work to Navajo citizens. The Navajo County Elections Office also  
18 employs an outreach worker to provide election assistance to Navajo voters. Navajo  
19 County will provide early voting at the following sites on the Navajo Reservation on the  
20 following seven business days:<sup>9</sup>

21 \_\_\_\_\_  
22 <sup>7</sup> The Coconino County Elections website currently lists the early voting locations for the  
23 primary but not the general election, *available at* <http://www.coconino.az.gov/elections.aspx?id=355>.

24 <sup>8</sup> *Id.*; U.S. Census Bureau, State and County Quick Facts, Coconino County, *available at*  
25 <http://quickfacts.census.gov/qfd/states/04/04005.html>; Wikipedia Encyclopedia, Coconino  
26 County, AZ, *available at* [http://en.wikipedia.org/wiki/Coconino\\_County](http://en.wikipedia.org/wiki/Coconino_County); Coconino County  
27 Profile, Arizona Dep't of Commerce, *available at* [http://new.azcommerce.com/doclib/commune/coconino\\_county.pdf](http://new.azcommerce.com/doclib/commune/coconino_county.pdf); Coconino County Website, *available at* <http://www.coconino.az.gov/outreach.aspx?id=362>.

28 <sup>9</sup> Navajo County Profile, Arizona Dep't of Commerce, *available at* [http://www.azcommerce.com/doclib/COMMUNE/Navajo\\_County.pdf](http://www.azcommerce.com/doclib/COMMUNE/Navajo_County.pdf); Affidavit of Laurette Justman,



1 The State relies on mailed communications from the County Elections Offices as a  
2 basis for contending that identification documents are being provided to every registered  
3 voter. This argument fails to account for the limited postal service in remote areas of the  
4 Reservation: (1) Navajos do not receive mail at their homes; (2) a high rate of election  
5 mail never reached the voters as evidenced by a high rate of return to the counties;  
6 (3) trading posts that once served as mail delivery locations have closed; (4) individuals  
7 who did not renew their post office boxes have different addresses although they may not  
8 have moved; (5) those who have changed or not renewed their post office boxes will not  
9 receive election mail; and (6) some electors may not pick up their election mail before an  
10 election.

11 In a very recent Missouri trial court decision a strict photo identification requirement  
12 was struck down. The Missouri Court explained:

13 the photo ID burden placed on the voter may seem minor or inconsequential  
14 to the mainstream of our society for whom automobiles, driver licenses, and  
15 even passports are a natural part of everyday life. However, for the elderly,  
16 the poor, the under-educated, or otherwise disadvantaged, the burden can be  
17 great if not insurmountable, and it is those very people outside the  
mainstream of society who are the least equipped to bear the costs or navigate  
the many bureaucracies necessary to obtain the required documentation.

18 *Weinschenk v. Missouri*, No. 06AC-CC00656, slip. op. at 9 (Cole County Cir. Ct, Mo. Sept.  
19 14, 2006). While Missouri's statute is more restrictive than Arizona's, Arizona's law is  
20 having a draconian impact on the Navajo voters – a protected class. Although the Arizona  
21 Voter Identification Requirements may be flexible for non-Indians living off the  
22 Reservation, these Requirements do not provide real options to a significant number of  
23 Navajo voters on the Reservation – elders, living in remote areas, without utilities, postal  
24 service or transportation, and without English language skills.

25 **The Voter Identification Requirements Violate Section 2 of the Voting Rights Act**

26 The State recognizes that a Section 2 claim of vote denial can be demonstrated by  
27 the totality of circumstances. As the Ninth Circuit Court of Appeals observed in  
28 *Farrakhan v. Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003): "a voting practice or

1 procedure violates the VRA when a plaintiff is able to show, based on the totality of the  
2 circumstances, that the challenged voting practice results in discrimination on account of  
3 race." While the State recognizes this principle, it asserts that the facts in the present case  
4 are insufficient, citing *Johnson v. Florida*, 405 F.3d 1214 (11th Cir. 2005)(en banc) and  
5 *Ortiz v. City of Phil. Voter Reg. Div.*, 28 F.3d 306 (3rd Cir. 1994). State's Resp. at 8.

6 In *Johnson* as in *Farrakhan*, the issue was felon disenfranchisement. The Eleventh  
7 Circuit declined to follow the Ninth Circuit holding in *Farrakhan* and relied heavily on its  
8 observation that "[f]elon disenfranchisement laws are unlike other voting qualifications.  
9 These laws are deeply rooted in this Nation's history and are a punitive device stemming  
10 from criminal law." *Johnson*, 405 F.3d at 1228. In *Ortiz*, the Court held that a purge  
11 statute was a legitimate means of averting voter fraud particularly where a recent city  
12 election had been invalidated on the basis of such fraud. The *Ortiz* plaintiffs contended that  
13 the purge statute violated Section 2 because of the low voter turnout by Latinos and  
14 African-Americans. This low turnout resulted in a disproportionate number of Latinos and  
15 African-Americans being purged from the voter rolls. The Court, in ruling against the  
16 *Ortiz* plaintiffs, noted that the low voter turnout was not, in any way, caused by the  
17 challenged statute. By contrast, in the present case, the disenfranchisement of at least 171  
18 Navajo voters on the Reservation was directly caused by the Voter Identification  
19 Requirements. Neither *Johnson* nor *Ortiz* provides any basis for the State's contention that  
20 the September Primary voting statistics are not sufficient to establish a Section 2 claim.  
21 The disenfranchisement of 171 Navajo voters at the Primary Election and the prospective  
22 disenfranchisement of more than 500 Navajo voters at the General Election are more than  
23 enough to establish such a claim.<sup>12</sup>

24 Voting practices and procedures that serve as a deterrent to voting have been found  
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26 <sup>12</sup> The right to vote is "precious and fundamental" and "preservative of all rights." "The  
27 franchise is fundamental to our American way of life." *Brown v. Dean*, 555 F. Supp. 502,  
28 504 (D. R.I. 1982); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Katzenbach v. Morgan*  
384 U.S. 641, 654 (1966).

1 to violate Section 2 of the Voting Rights Act. In *Brown v. Dean*, 555 F. Supp. 502, 505 (D.  
2 R.I. 1982) the court held that moving a polling place to a location less convenient for black  
3 voters in Providence, Rhode Island violated Section 2 because it would inhibit the ability of  
4 this protected class to cast their ballots—notwithstanding the good faith of the Board that  
5 established the polling location. In the present case, the effect of the Voter Identification  
6 Requirements on the protected class of Navajo voters is more inhibiting than the effect of  
7 changing the polling place in *Brown*.

8 The Ninth Circuit recently affirmed that voting procedures should be enjoined under  
9 the Voting Rights Act if statistical evidence, together with a challenged practice "interacts  
10 with social and historical conditions to cause an inequality in the opportunities enjoyed by  
11 black and white voters to elect their preferred representatives." *Farrakhan*, 338 F.3d at  
12 1016 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). The Navajo Plaintiffs have  
13 provided not only statistical evidence demonstrating disparities in education, voting,  
14 healthcare, socio-economic status, utilities, access to vehicles, and housing, but also an  
15 overview of discrimination of Native Americans in the State of Arizona.<sup>13</sup> The Voter  
16 Identification Requirements "interact[]" with social and historical conditions to cause an  
17 inequality in the opportunities enjoyed by [Navajo] and white voters to elect their preferred  
18 representatives." *Id.*<sup>14</sup>

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19  
20 <sup>13</sup> See Navajo Nation Plaintiffs' Supp. Br. at 9-11; Test. of Leonard Gorman, Prel. Inj. Hr'g  
21 at 49-53, Aug. 30, 2006, Exh. 120 to Supp. Brief; Test. of John Lewis at 110-116, Prel. Inj.  
22 Hr'g, Aug. 31, 2006, Exh. 128 to Supp. Brief; First Amended Consent Decree in *US v.*  
23 *Arizona*, No. 88-1989 (D. Arizona 1993), attached hereto as Exhibit 142; see also  
24 *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 690 (D. Ariz. 1992)  
25 ("The Indian Intervenors proved that there have been wide-spread practices of  
26 discrimination against Native Americans [in Arizona]. The court also took judicial notice  
27 of that fact."); *Shirley v. Apache County Superior Court*, 513 P.2d 939 (Ariz. 1973);  
28 *Harrison v. Laveen*, 67 Ariz. 337, 340 (Ariz. 1948) (right to vote finally obtained by  
Indians in Arizona); *Begay v. Sawtelle*, 53 Ariz. 304, 309 (Ariz. 1939) (finding that an  
Arizona law prohibiting Indians from being eligible for a hunting and fishing license was  
unconstitutional). The EEOC brought a lawsuit against a diner in Page in 2002 because the  
diner prohibited the use of the Navajo language at work. See EEOC Press Release of *EEOC*  
*v RD's Drive In*, No. 02-1911, available at <http://www.eeoc.gov/press/9-30-02-c.html>.

<sup>14</sup> The State contends that the *Gingles* factors are controlling here. These factors have been  
used in vote dilution cases but are not as relevant in vote denial cases. The Ninth Circuit in

1 **The Voter Identification Requirements Violate the Civil Rights Act**

2 The Civil Rights Act prohibits differential treatment of voters within the same  
3 county or political subdivision. The combination of the new Voter Identification  
4 Requirements and the obstacles to early voting on-Reservation are standards, practices and  
5 procedures that diminish the opportunities for Navajo electors to cast their ballots in  
6 comparison with non-Indian electors.

7 The State argues that the failure to require identification for early voting has been  
8 accepted by the courts, citing *Common Cause v. Billups*, 439 F. Supp. 2d 1294, 1357 (D.  
9 Ga. 2006); and *Ind. Democratic Party v. Rokita*, No. 05-634, 2006 U.S. Dist. LEXIS 20321  
10 (S.D. Ind. April 14, 2006).<sup>15</sup> These cases are distinguishable from the claims before this  
11 Court. Racially discriminatory effects were not considered or analyzed in either decision.  
12 The Plaintiffs in *Rokita* unsuccessfully attempted to allege that Section 1971 "can be  
13 applied outside the context of racial discrimination." *Rokita*, 2006 U.S. Dist. LEXIS  
14 20321, \*176; *see also Common Cause*, 439 F. Supp. 2d at 1355. Neither case involved a  
15 protected language and racial minority class requiring official language translations in  
16 order to vote.

17 With regard to 42 U.S.C. § 1971(a)(2)(B), the State contends that the provision is  
18 inapplicable because voter identification does not involve errors or omissions on any record  
19 or paper, citing *Common Cause* and *Rokita*. Section 1971(a)(2)(B) provides that

20 no person acting under color of law shall deny the right of any individual to  
21 vote in any election because of an error or omission on any record or paper  
22 relating to any application, registration, or other act requisite to voting, if  
such error or omission is not material in determining whether such individual

23 *Farrakhan* discussed these factors but did not apply them.

24  
25 <sup>15</sup> While courts have held that absentee voting was an inherently different procedure from  
26 voting in person, justifying different standards, no court has yet dealt with early voting in  
27 person. Early voting in person is not an inherently different procedure from voting at the  
28 polls. The following testimony demonstrates that early voting and in-person voting only  
differ in that an individual does not have to provide identification: "Q: So in effect, it's  
almost identical to what the voter goes through at the polling place? A: Except there is no  
ID asked for." *See Test. of Candace Owens* at 106-107, Prel. Inj. Hr'g Tr., Aug. 30, 2006.

1 is qualified under State law to vote in such election.

2 The Voter Identification Requirements serve no useful purpose on the Navajo  
3 Reservation, but do allow inexperienced election officials to inadvertently deny the  
4 franchise to particular Navajo voters. While the *Rokita* and *Common Cause* courts did  
5 assert that no record or paper was involved in voter identification, neither court had any  
6 evidence before it relating to the practical application of Voter Identification Requirements  
7 in an actual election. Incidents that occurred in the September Primary Election  
8 demonstrate the applicability of this section of the Civil Rights Act. For example:

9       ▪ Navajo County records show that Plaintiff Laughter was given a conditional  
10 provisional ballot at Chilchinbeto Chapter House, that she produced identification  
11 acceptable to the County and that her ballot was counted. Ms. Laughter states in her  
12 affidavit that she produced no identification, was never given a ballot, was asked to leave  
13 the polling place without casting a ballot and did not return with identification. Ms.  
14 Laughter is a registered Republican. Communications with Navajo County suggest that  
15 one of the five Republican ballots cast was blank.<sup>16</sup>

16       ▪ At the Kayenta Precinct, although Navajo voter Alice Harris knew the poll  
17 workers, she was required to vote a conditional provisional ballot, because she failed to  
18 bring her identification with her on Election Day. She was told to return to the Kayenta  
19 Chapter House with her identification. After the election, she timely brought the required  
20 identification to one of the officials at the Kayenta Chapter House named by the County to  
21 receive identification. The Chapter has a copy of her identification. Frank Donald, Jr., the  
22 Community Services Coordinator for Kayenta Chapter, did not know what to do with the  
23 identification and never advised the County that she had timely provided appropriate  
24 identification. The conditional provisional ballot by Ms. Harris was not counted.<sup>17</sup>

25  
26  
27 <sup>16</sup> See Affidavit of Agnes Laughter, Exhibit 129. A supporting affidavit from the  
appropriate Navajo County official will be provided prior to the October 19 hearing.

28 <sup>17</sup> The determination that the ballot of Ms. Harris was not counted was available by calling

1 Notwithstanding her compliance with the Voter Identification Requirements, her ballot was  
2 not counted due to the election official's omission to fill in and submit to the County  
3 Recorder's office the record or paper establishing her compliance.

4       ▪ In addition, in Coconino County one Election Day Technician assigned to a  
5 polling place on the Reservation indicated that the marshal standing outside the polling  
6 place telling people what type of identification they needed may have deterred voters from  
7 entering the polls to cast a conditional provisional ballot.<sup>18</sup> The affidavit of Agnes  
8 Laughter states that the marshal at her polling place delayed her entry because she did not  
9 have identification.

10 **Conclusion**

11       The fact that most Navajo voters were able to provide identification and cast their  
12 ballots at the September Primary Election does not justify the application of the Voter  
13 Identification Requirements on the Reservation. At least 171 voters were denied the right  
14 to vote because of the Requirements; the Requirements had a substantially disproportionate  
15 disenfranchising effect on the racially protected class of Navajo voters. For all of the  
16 reasons stated above, in the Supplemental Brief and the Court's record, Proposition 200's  
17 Voter Identification Requirements violate the Civil Rights Act and the Voting Rights Act  
18 with regard to Navajos living on the Reservation and the implementation of these  
19 procedures should be immediately enjoined.

20  
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23  
24 the number provided on the provisional ballot voter receipt. Ironically, Frank Donald, Jr.  
25 also failed to bring identification on Election Day and he also completed a conditional  
26 provisional ballot. His vote did not count, though he was related to at least one of the poll  
27 workers. Declaration of Frank M. Donald, Jr., attached hereto as Exhibit 143.

28 <sup>18</sup> Affidavit of Bonny Lynn, attached hereto as Exhibit 134. Another individual presented  
an identification issued by the Navajo Nation, but the individual did not receive a  
provisional ballot. Instead, the individual completed a conditional provisional ballot.  
Affidavit of Denise Burley, attached hereto as Exhibit 136.

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DATED this 12th day of October, 2006.

Sacks Tierney P.A.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on October 12, 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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9 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
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