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

14
15 MARIA M. GONZALEZ, et al.,

16 Plaintiffs,

17 v.

18 STATE OF ARIZONA; et al.

19 Defendants.

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

(Consolidated)

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

(Assigned to the Hon. Roslyn O. Silver)

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23 Plaintiffs Navajo Nation and Agnes Laughter ("Navajo Plaintiffs") seek to enjoin the
24 use of the voter identification requirement ("the ID Requirement") by officials of Coconino
25 County, Apache County, Navajo County, and the State of Arizona as to all precincts
26 located on the Navajo Reservation. This Brief responds to the questions raised by the
27 Court at the February 8, 2007 hearing.
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1 1. **Burden of Proof.** The burden of proof for establishing a violation of Section
2 2 of the Voting Rights Act ("VRA") is preponderance of the evidence. *Georgia v.*
3 *Ashcroft*, 539 U.S. 461, 474 (2003); *Magnolia Bar Ass'n v. Lee*, 793 F. Supp. 1386, 1412
4 (S.D. Miss. 1992). The Navajo Plaintiffs must prove by a preponderance of the evidence
5 that the totality of the circumstances supports the conclusion that the ID Requirement
6 denies members of the Navajo Nation—a protected minority—the same opportunity as
7 other members of the electorate to participate in the political process and to elect
8 representatives of their choice on account of their race and/or membership in a language
9 minority. *Farrakhan v. Washington*, 338 F. 3d 1009, 1016-1017 (9th Cir. 2003)
10 ("*Farrakhan I*") (citing 42 U.S.C. 1973(b); *Thornburg v. Gingles*, 478 U.S. 30, 43, 47
11 (1968)). In the context of its petition for a preliminary injunction, Navajo Plaintiffs have
12 demonstrated by a preponderance of the evidence that there is a sufficient likelihood of
13 success on the merits, irreparable injury to the Navajo Plaintiffs if preliminary relief is not
14 granted, and a balance of hardships favoring the plaintiffs that outweighs the State's
15 advancement of the public interest. *See Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d
16 1427, 1430 (9th Cir. 1995).

17 2. **The Circumstances in This Case Are More Compelling than Those in**
18 ***Farrakhan II***. Navajo Plaintiffs have presented evidence supporting seven of the nine
19 "typical factors" analyzed in Section 2 VRA cases and present a more compelling case than
20 that proffered by the *Farrakhan* plaintiffs. *Farrakhan I*, 338 F.3d at 1019 (citing to the
21 Senate Report accompanying the 1982 VRA Amendments); *Farrakhan v. Gregoire*, No.
22 96-076, 2006 U.S. Dist. LEXIS 45987, at *22-26 (E.D. Wash. 2006) ("*Farrakhan II*")
23 (denying the Section 2 vote denial claim). An analysis of the relevant factors is provided
24 below.

25 **Factor 1: The history of official voting discrimination.** The Washington Court
26 noted that the *Farrakhan* plaintiffs had offered no evidence of a history of official
27 discrimination in the state. *Farrakhan II*, at *25. Consequently, the first Senate factor
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1 weighed heavily in the defendants' favor in the Washington Court's totality of
2 circumstances analysis. *Id.* In contrast, the evidence in this case clearly establishes a
3 history of official discrimination against Indians, and particularly Navajos, in Arizona.
4 Although recognized as United States citizens in 1924, it was not until after the 1970 VRA
5 amendments, and even later in Apache County, that members of the Navajo Nation were
6 allowed to vote. Exh. 157 (Native Americans could only vote if they could read and write
7 the constitution without prompting); *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970). Efforts
8 to thwart the right to vote have continued to the present. *See Shirley v. Apache County*
9 *Superior Court*, 109 Ariz. 510, 513 P.2d 939 (Ariz. 1973) (Board of Supervisors failed to
10 certify Navajo candidate as the winner); *see also* Exh. 156, *Apache County High School*
11 *District 90 v. US*, No. 77-1511 (D. D.C. 1980) (finding that Navajo electors were not
12 afforded an opportunity to vote in a bond election); Exh. 154, DOJ Objection Letter re:
13 Navajo Language Election Procedures (1987) (finding that Apache County does not
14 adequately provide election information to Navajo language speakers in the Navajo
15 language in the same complete, accurate, and consistent manner as for English speaking
16 voters); Exh. 155, DOJ Objection Letter re: Navajo Language Election Procedures (1988)
17 (objecting to preclearance of Navajo language election procedures because it could not find
18 that the procedures provided effective access to the electoral process for Navajos); Exh.
19 161 and 163, *US v. Arizona*, No. 88-1989 (D. Arizona 1989) (U.S. filed a complaint
20 alleging that Navajos did not have adequate access to the electoral process due to lack of
21 bilingual language program for Navajo voters, a consent decree was entered); Exh. 111 at 4
22 (voter intimidation at the polls in 2002); Exh. 159, Att'y Gen. Op. No. I03-007 (2003)
23 (Attorney General responded to Speaker of the Arizona House of Representatives' inquiry
24 as to whether a tribal member can serve on the Commission on Appellate Court
25 Appointments).

26 **Factor 2: Racial polarization.** There was no indication of racial polarization
27 presented by the *Farrakhan* plaintiffs. In this case, the United States, in a 1994 action
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1 against the State of Arizona, produced evidence and examples of polarized voting on the
2 Navajo Reservation in obtaining an injunction against the election of judges in Navajo
3 County and Coconino County because the creation of the court divisions violated the VRA.
4 *United States v. Arizona*, No. 94-1845, 1994 U.S. Dist. LEXIS 17606, at *22 (D. Ariz.
5 1994). Racial polarization was also alleged by plaintiffs in *Clark v. Holbrook Unified*
6 *School District*, 703 F. Supp. 56, 57-58 (D Ariz. 1989).

7 **Factor 3: Unusually large election districts.** The *Farrakhan* plaintiffs presented
8 no evidence of unusually large election districts. In this case, the United States intervened
9 on behalf of the Navajos when Apache County attempted to create unusually large board of
10 supervisor districts to limit the political influence of Navajo voters. *Goodluck v. Apache*
11 *County*, 417 F. Supp. 13 (D. Ariz. 1975); Exh. 153 (1984) (DOJ denied preclearance to
12 unusually large supervisor districts in Navajo County); *see also* Exh. 156. Since this
13 involved a political subdivision of the state, it is also relevant to the first Senate factor.

14 **Factor 5: Discrimination in education, employment and health.** In *Farrakhan II*,
15 there was substantial evidence in support of the fifth factor. In this case, Navajo Plaintiffs
16 introduced extensive and uncontroverted documentary evidence and witness testimony that
17 established a history of discrimination in education against Indians, particularly Navajos.
18 This discrimination continues to the present day as exemplified by the refusal of school
19 districts in Page and Flagstaff to build high schools on the Reservation which forces Navajo
20 students to spend long hours being bussed to and from school. Prel. Inj. Hr'g Tr. 41-43, 45-
21 46, 73-75, Feb. 8, 2007. Navajos have not received the same opportunities for education as
22 Arizonans living off the reservation. *See* Exh. 147; Exh. 149; Exh. 150; Exh. 151; Exh.
23 152; Exh. 169; Exh. 171; Exh. 172; Exh. 173; Exh. 174; Exh. 178; Exh. 182; Exh. 183;
24 Exh. 185; Prel.Inj. Hr'g Tr. 61, Feb. 8, 2007. Senator Jack Jackson, Sr. and Dr. Tommy
25 Lewis testified regarding the inability of Navajos to obtain education without moving off of
26 the Reservation. Prel. Inj. Hr'g Tr. 35-38, 67, 69, Feb. 8, 2000; *see also* Exh. 185. After
27 Navajos were afforded an opportunity to vote in the 1970s, Apache County sought to pass a
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1 bond to fund schools off of the reservation in order to preclude any funding to build schools
2 on the reservation. The County did not want to spend funds to build a high school on the
3 Reservation even though over 50% of taxes come from Reservation, and there was no high
4 school on the Reservation. Exh. 160, *Apache High School District No. 90 v. United States*,
5 No. 77-1815 at 8 (1980). The documentary evidence also established discrimination in
6 healthcare and socio-economic status. Exhs. 121, 147, 109.

7 ***Factor 6: Whether political campaigns have been characterized by racial appeals.***

8 The *Farrakhan* plaintiffs presented no evidence in support of the sixth factor. In this case,
9 there is such evidence. In *Apache County High School Dist. 90*, the Court found that
10 polling places on-Reservation had been closed to prevent Navajos from voting in the school
11 board bond election. "The growing impact of the undiluted Indian vote has caused
12 consternation among the non-Indian residents of Apache County. . . . At the time of the
13 bond election, there was a general concern in the Anglo community that the Indians were
14 going to 'take over' through increasingly effective use of the franchise. Two members of
15 Plaintiff school board testified that they shared this concern." Exh. 160 at 7-8.

16 ***Factor 8: Lack of responsiveness on the part of elected officials to the***
17 ***particularized needs of the minority group.*** The *Farrakhan* plaintiffs presented no
18 evidence in support of the eighth factor. In contrast, the Navajo Plaintiffs presented
19 uncontroverted testimony by Dr. Lewis and Senator Jackson that the school boards of the
20 Page and Flagstaff high school districts had been unresponsive to the need for high schools
21 on the Navajo Reservation to reduce the long bus trips for the students. Prel. Inj. Hr'g Tr.
22 41-43, Feb. 8, 2007; *see also* Exhs. 172, 173, 178, and 182. Senator Jackson and Dr. Lewis
23 also testified that the Navajo Nation's Diné College received only \$17 million from the
24 Arizona Legislature, over a ten year period, although more than \$50 million per year is
25 derived by the State from taxes on-Reservation. Prel. Inj. Hr'g Tr. 51-52, 78, Feb. 8, 2007.
26 The lack of responsiveness by elected officials is exemplified by the facts in *Apache*
27 *County High School District, supra* (although, 24,000 of the 32,000 persons living in
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1 Apache County in 1970 were Navajo, there were four high schools in the non-Indian
2 southern portion of the County and no high schools in the Navajo northern portion of the
3 County). Testimony from Dr. Lewis provided that schools on-Reservation received
4 inadequate funding, which is a form of discrimination. Prel. Inj. Hr'g Tr. 40, Feb. 8, 2007.

5 **Factor 9: Whether the policy underlying the state's use of the prerequisite to**
6 **voting is tenuous.** The *Farrakhan* plaintiffs alleged that the policy underlying the denial of
7 voting privileges to prisoners was tenuous. The Court rejected their claim. In this case,
8 election officials from all three counties admitted that there was no record or history of
9 voter fraud or impersonation in their counties. See Exh. 5 at 2; Exh. 11 at 2; Exh. 14. In
10 addition, the uncontroverted evidence established that on the Navajo Reservation the
11 election officials at each polling place were familiar with the voters in their precinct. Exh.
12 129 at 1; Exh. 131 at 1; Exh. 143 at 1; Exh. 158 at 18; Prel. Inj. Hr'g Tr. 61-62, Aug. 30,
13 2006. The policy underlying the ID Requirement is tenuous at best.

14 The Navajo Plaintiffs have demonstrated that to varying degrees, there is evidence
15 in support of the relevant factors and the totality of the circumstances.¹ The State has
16 provided no controverting evidence.

17 3. **The Evidence Demonstrates by a Preponderance of Evidence that a Causal**
18 **Connection Exists.** The history of discrimination in education has resulted in thousands of
19 voting age Navajos being functionally illiterate in English. Exh. 117 (8,600 on the Arizona
20 portion of the Navajo Reservation); Exh. 111, at 1 (of the 31,000 voting age Navajos in
21 Apache County, over one-third are limited English proficient); Exh. 156 at 42 ("Over one
22 quarter of the [61,331] voting age citizens,² on the Navajo Reservation are illiterate [in
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24
25 ¹ In determining the totality of the circumstances, the "typical factors" contained in the
26 Senate Report was not presumed to be comprehensive or exclusive. *Farrakhan I* at 1016,
27 1019. Nor did Congress "intend any particular number of factors be proved or that a
28 majority of them point one way or the other." *Id.* at 1015 (quoting S. Rep. No. 97-417 at
28-29 (1982)).

² Exh. 109 at 1.

1 English], which is nearly 19 times the national illiteracy rate"). The ID Requirement is
2 complicated; its implementation on the Reservation is problematic, and compliance is
3 depriving many non-English speakers of the right to vote.³ Exh. 170 at 2.

4 Plaintiff Agnes Laughter is an example of some of the elder cohort of functionally
5 English illiterate Navajos deprived of education. She stated in her testimony that she knew
6 she needed ID. She tried unsuccessfully to obtain a picture ID but had no birth certificate,
7 as she was born in a Hogan in 1932. Ms. Laughter had one form of ID, a bank statement,
8 which she chose not to show and, alone, would have been insufficient under the ID
9 Requirement. Ms. Laughter's inability to vote is a direct result of the lack of educational
10 opportunities available to Navajos. When asked whether she spoke or read any English,
11 she replied: "No, I didn't go to school. . . . If I had gone to school, I would have known it
12 all. . . . If I would have gone to school, I would be sitting among you guys, reading the
13 same thing that you are." Exh. 158, Agnes Laughter Depo. at 15:14-24.

14 Dr. Tommy Lewis testified that the limitation in Navajo education impedes the
15 ability of Navajo voters to comply with the ID Requirement. Prel. Inj. Hr'g Tr. 61, Feb. 8,
16 2007. Senator Jackson also testified that the history of discrimination in education affects
17 the ability of Navajo people, particularly the elderly, to comply with the ID Requirement.
18 *Id.* at 76-77.

19 Phil Harrison testified regarding the problems that Navajos have obtaining vital
20 statistics and other records that can be used to obtain identification. Prel. Inj. Hr'g Tr. 88-
21 89, Feb. 8, 2007. He testified that traditional Navajos have problems obtaining vital
22 records because records have been purged, never existed, or have been lost. *Id.* at 91-92.

23 _____
24 ³ Frank M. Donald, Jr., an employee of the Kayenta Chapter, did not bring identification
25 when he voted in the Primary Election. He was told by poll workers to bring his
26 identification to the Chapter in order to perfect his conditional ballot. He did not
27 understand these instructions, and his vote did not count. After the Election, at least two
28 voters brought identification to the Kayenta Chapter in order to perfect their ballots. At
least one of the ballots cast by a voter who subsequently provided identification was not
counted because the official designated by the County did not know what to do with the
identification. Exh. 143; Supp. Reply at 10-11.

1 As explained by Leonard Gorman in his testimony, traditional Navajos who arrive at
2 the polls without identification have a more difficult time returning with proper
3 identification. Prel. Inj. Hr'g Tr. 59-60, Aug. 30, 2006. Some like Ms. Laughter may not
4 have been able to obtain the necessary identification. Exh. 158 at 13-14. For those who do
5 have identification, the extensive preparation to again make the trip from home to the
6 official locations may not be possible within the time provided in the law. Prel. Inj. Hr'g Tr.
7 55-57, Aug. 30, 2006.

8 4. ***Limited Early Voting Opportunities Create Greater Burdens for Navajos to***
9 ***Comply with the ID Requirement than for NonNavajos.*** Early voting is comprised of
10 voting a ballot received by mail and voting at locations set up for early voting. Voting by
11 mail is not an option for many Navajo voters, including (1) the disproportionate number of
12 Navajos lacking phone and internet service; (2) those that lack mail delivery; and (3) those
13 that require language translation as mailed ballots are in English. The evidence
14 demonstrates that 62% of homes lack telephone service and there is no mail delivery to any
15 home on the reservation. Prel. Inj. Hr'g Tr. 59-60, Aug. 30, 2006. To request an early
16 ballot to be delivered by mail, an individual must call, write, or personally request an early
17 ballot. The lack of utilities and mail service on the Reservation put individuals living on
18 the Reservation at a disadvantage because the voter must travel to call, write, or otherwise
19 request an early ballot.

20 County officials generally understood that many Navajo voters would not have the
21 identification required to vote on election day and could only vote by early ballot. Prel. Inj.
22 Hr'g Tr. 102, Aug. 30, 2006; Lenora Johnson Depo. 32:1-10, 41:6-19. Nevertheless, on-
23 Reservation early voting opportunities were more limited for on-Reservation voters than
24 opportunities for off-Reservation voters. A review of Apache County's early voting
25 locations is illustrative of the disparate access to early voting locations on-Reservation as
26 compared to off-Reservation. Apache County is 11,218 square miles; 66% (7,402 square
27 miles) of which is Indian Reservation land. Reply Brief at 5. Seventy-four percent of the
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1 voting age population is Navajo. Exh. 111. There are 45 voting precincts located in
2 Apache County, 32 of these precincts are located on the Navajo Reservation. Exh. 186. Of
3 the approximately 45,000 registered voters in Apache County, nearly 35,000 are located on
4 the Navajo Reservation. Exh. 176. For the 2006 General Election, as compared to the 32
5 precinct locations for election day voting, early voting on the Reservation was held only at
6 Window Rock and Chinle from 10 a.m. to 3 p.m. for two days each for a total of twenty
7 hours. See Exh. 141 and Exh. 116 (map of Navajo Reservation showing location of the two
8 early voting locations in Apache County (at 1) and map of the State of Arizona showing the
9 portions of the Navajo Reservation within each of the three counties (at 2)). In contrast,
10 there were seven locations opened for forty-five hours for voters to cast early ballots off-
11 Reservation in Apache County. Exh. 186 at 1-2. Early voting locations in Coconino
12 County were similarly limited on-Reservation. Furthermore, while the official English
13 ballot was available at the start of early voting, October 6, 2006, for the General Election,
14 the official Navajo translation was not available in Coconino County until October 20,
15 2006.⁴ Exh. 165 at 2; Exh. 186.

16 The evidence demonstrates that off-Reservation voters cast early ballots at higher
17 rates than on-Reservation voters. In Apache County, 31.35% of the ballots cast at off-
18 Reservation precincts were cast by early ballot. By contrast, only 9.8% of the ballots cast
19 on-Reservation were cast by early ballot. Exh. 137 at 2; Exh. 176. Similarly, 33% of off-
20 Reservation voters in Navajo County cast early ballots, while only 8% of on-Reservation
21 voters cast early ballots. Seven percent of voters on the Navajo Reservation in Coconino
22 County completed early ballots compared to 37.8% of off-Reservation voters.

23 5. *Evidence from the Primary and General Elections Demonstrates that there*
24 *Is a Disparate Impact in the Application of the ID Requirement.* In the Primary Election,
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26
27 ⁴ Language translation assistance is required to assist voters through all stages of the
28 electoral process. Compliance with language minority provisions of the VRA "is best
measured by results." 28 CFR § 55.16.

1 188 Navajo voters cast conditional provisional ballots of which only 24 were counted⁵ and,
2 in the General Election, 267 Navajo voters cast conditional provisional ballots of which
3 only 10 were counted⁶. The State advised the Court, that there was 98% compliance in the
4 primary and 99% compliance in the general election. Prel. Inj. Hr'g Tr. 115, Feb. 8, 2007.
5 Violations of the right to vote is not a matter of percentages as is evident in the decision of
6 the Supreme Court in *Bush v. Gore*, 531 U.S. 98, 107-109 (2000). In finding that the City
7 of Albuquerque's voter identification requirement violated the Equal Protection Clause, the
8 District Court of New Mexico relied on the Supreme Court's analysis that a disparate
9 counting of ballots cast by similarly situated voters violated the equal protection clause,
10 even though the problems may have only affected a small percentage of the ballots. See
11 *ACLU v. Santillanes*, No. 05-1136, slip op. at 53 (D. N.M. Feb. 12, 2007) (citing *Bush v.*
12 *Gore*, 531 U.S. at 109).

13 **Conclusion.** The interaction of (i) racial discrimination in the areas of voting,
14 education, healthcare and socio-economic status, (ii) the language minority provisions of
15 the VRA, and (iii) the limited early voting opportunities coupled with the ID Requirement
16 result in a violation of § 2 of the VRA. The "totality of the circumstances" establishes that
17 members of the Navajo Nation have less opportunity than other members of the electorate
18 to participate in the election process.

19 * * *

20 * * *

21 _____
22 ⁵ The conditional provisional ballot is only used when the voter has no identification. Each
23 County submitted documentation of the number of conditional provisional ballots cast and
24 the number that were subsequently counted. Exh. 175 at 4-6 (Navajo County); Exh. 186 at
25 3 (Apache County); Exh. 177 at 16-19 (Coconino County).

26 ⁶ At the hearing on February 8, the evidence established that a non-Navajo candidate for the
27 Sanders School Board defeated a Navajo candidate by 8 votes. Sixteen conditional
28 provisional ballots in that school district election were cast but not counted. See Exh. 186.
The ID Requirement could have affected the result of that election. At the time of the
hearing, counsel understood that two of the school district precincts were off-Reservation.
A further review of the evidence indicates that all of the precincts in which votes were cast
were on-Reservation.

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RESPECTFULLY SUBMITTED this 16th day of February, 2007.

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I hereby certify that on February 16, 2007, a complete, duplicate copy of this document was forwarded directly to Judge Roslyn O. Silver by First Class Mail, at the following addresses:

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