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9
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.

No. CV06-1268 PHX ROS (Lead)

No. CV06-1362 PCT JAT (Cons.)

**STATE DEFENDANTS’ POST-
HEARING BRIEF**

(Assigned to the Honorable Roslyn O.
Silver)

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18 The State Defendants submit the following Post-Hearing Brief concerning the
19 Navajo Plaintiffs’ request for a preliminary injunction. For the reasons set forth
20 below, the State requests that this Court deny the Navajo Plaintiffs’ request for a
21 preliminary injunction against the identification at the polls requirement within the
22 Navajo Nation. This memorandum will focus on the issues concerning Section 2 of
23 the Voting Rights Act that were the subject of the February 8, 2007, hearing.
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25 **I. Plaintiffs Are Not Likely to Prevail on the Merits of Their Claim That**
26 **Requiring Identification at the Polls Violates Section 2 of the Voting**
27 **Rights Act.**

28 Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, prohibits any “voting

1 qualification or prerequisite to voting or standard, practice, or procedure” that “results
2 in a denial or abridgement of the right of any citizen of the United States to vote on
3 account of race or color . . .”¹ A violation of this requirement

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5 is established if, based on the totality of circumstances, it is
6 shown that the political processes leading up to nomination
7 or election in the State or political subdivision are not
8 equally open to participation by members of a class of
9 citizens protected by subsection (a) of this section in that its
10 members have less opportunity than other members of the
11 electorate to participate in the political process and to elect
12 representatives of their choice. The extent to which
13 members of a protected class have been elected to office in
14 the State or political subdivision is one circumstance which
15 may be considered: *Provided*, that nothing in this section
16 establishes a right to have members of a protected class
17 elected in numbers equal to their proportion in the
18 population.

19 42 U.S.C. § 1973(b). “Section 2 plaintiffs must show a casual connection between
20 the challenged voting practice and [a] prohibited discriminatory result.” *Smith v. Salt*
21 *River Project Agric. Improvement and Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)
22 (quoting *Ortiz v. City of Philadelphia Office of the City Comm’rs*, 28 F.3d 306, 312
23 (3d Cir. 1994)). The “results test” under Section 2 is based on an analysis of the
24 “totality of circumstances.” *Id.* at 594. The typical factors that are relevant to the
25 “totality of circumstances” analysis do not support relief in this case.

26 ¹ The complete text of 42 U.S.C. § 1973(a) provides:

27 No voting qualification or prerequisite to voting or standard, practice, or
28 procedure shall be imposed or applied by any State or political
subdivision in a manner which results in a denial or abridgement of the
right of any citizen of the United States to vote on account of race or
color, or in contravention of the guarantees set forth in section
1973b(f)(2) of this title, as provided in subsection (b) of this section.

1 The record does not establish several factors that are relevant in Section 2 cases:

- 2 • evidence of racially polarized voting;
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- 4 • the use of voting practices or procedures that enhance discrimination
against the Navajo;
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- 6 • exclusion from candidate nomination processes;
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- 8 • political campaigns with racial appeals;
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- 10 • an inability to elect members of the minority group to public office;
- 11
- 12 • a lack of responsiveness on the part of the elected officials to the
needs of the minority group.

13 *See Smith*, 109 F.3d at 594 (listing factors typically considered in Section 2 claims).

14 For example, Jack Jackson, a former State legislator who is now assistant to the
15 president of Diné College, testified that he served for nearly 20 years in the State
16 Legislature and described his work with former Governor Hull regarding legislation to
17 establish the School Facilities Board. *See Reporter’s Transcript of Proceedings:*
18 *Preliminary Inj. Hr’g—Day Three*, at pp. 66, 71-72. Senator Jackson noted that
19 Governor Hull had taught on the Navajo Nation and, was familiar with the educational
20 issues of concern to him. *Id.* at p. 72. Both Senator Jackson and Dr. Tommy Lewis
21 testified concerning the support that the State has provided to the Diné College, which
22 is operated by the Navajo Nation. *Id.* at pp. 51, 78-79. Senator Jackson also described
23 his work with the State School Facilities Board to have additional schools on the
24 Navajo Nation to reduce the travel time for students. *Id.* at pp. 72-74. In addition,
25 members of the Navajo Nation have been elected to the Arizona State Legislature,
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1 school boards and county offices. *Id.* at 83; Reporter’s Transcript of Proceedings:
2 Preliminary Inj. Hr’g—Day Three, at p. 106; *Shirley v. Apache County Superior*
3 *Court*, 109 Ariz. 510, 513 P.2d 939 (1973). The record does not establish a lack of
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5 responsiveness by Arizona’s State government or an inability to elect candidates of the
6 Navajo people’s choice.

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8 Plaintiffs argue that a history of discrimination in voting, education, health care
9 and socioeconomic factors along with the impact of the identification requirements at
10 the recent statewide elections support their claim for relief under Section 2. *See*
11 Navajo Plaintiffs’ Opening Statement at 6. Regarding discrimination in voting,
12 Plaintiffs present historical evidence concerning the failure to recognize Native
13 Americans as citizens of the United States until 1924, Navajo Plaintiffs’ Ex. 157 at 1,
14 and the Department of Justice consent decree in 1989 that prompted significant
15 changes to election procedures within the Navajo Nation. Navajo Plaintiffs’ Ex. 163.
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17 There is no doubt that opportunities to influence elections and participate in the State
18 political processes have changed significantly over the years. Now, each county has at
19 least one fulltime outreach staff person who is responsible for working with the Navajo
20 Nation on election issues. Navajo Plaintiffs’ Exs. 140, 141, 165. As required by
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22 Section 203 of the Voting Rights Act, language assistance is available at all phases of
23 the election process. Defendants’ Exs. 406, 407; Plaintiffs’ Ex. 165. Early voting and
24 satellite offices are located on and near the Navajo Nation. Navajo Plaintiffs’ Exs.
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26 140, 141, 179. Chapter houses are used as polling places in most elections, and
27 election requirements are publicized at chapter houses. Defendants’ Exs. 6, 7, 9, 10,
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1 11. Voters who did not have the required identification at the recent elections could
2 generally present the identification at chapter houses in order for their conditional
3 ballots to count. Defendants' Exs. 409, 410. Because Arizona is subject to Section 5
4 of the Voting Rights Act, the Department of Justice preclears every change that affects
5 voting within the Navajo Nation, as is true statewide. Defendants' Exs. 406, 407.
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7 Thus, although there may have been historic barriers to voter participation, the
8 requirements of the Voting Rights Act and related consent decrees have dramatically
9 changed the conduct of elections within the Navajo Nation.
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11 Recent changes in Arizona's funding for school facilities have also resulted in
12 statewide standards for all public schools and state funding to comply with the
13 standards. This program, referred to as Students FIRST, was enacted in response to
14 the Arizona Supreme Court's decision in *Roosevelt Elementary Sch. Dist. v. Bishop*,
15 179 Ariz. 233, 877 P.2d 806 (1994), which held that the previous system of financing
16 school facilities based on property taxes within a school district violated the "general
17 and uniform" clause of the Arizona Constitution. *See Hull v. Albrecht*, 192 Ariz. 34,
18 36, ¶ 2, 960 P.2d 636 (1998); *see also* Arizona Revised Statutes (A.R.S.) §§ 15-101 to
19 -104. (Students FIRST program). Arizona also has a separate system of funding
20 maintenance and operations expenses of public schools through a formula that
21 provides equalized funding to schools statewide. *See* A.R.S. §§ 15-2001 to -2132. In
22 addition, although Dr. Lewis testified that the Navajo language and culture could not
23 be taught in State public schools, the Arizona Attorney General has advised that
24 Navajo language and culture can, in fact, be taught in public schools within the Navajo
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1 Nation. *See* Ariz. Att’y Gen. Op. I01-006, 2001 WL 228507 (Feb. 15, 2001)
2 (analyzing the impact on the Navajo Nation of Proposition 203, which largely
3 eliminated bilingual education programs at State public schools). Although there may
4 have been problems with access to educational services historically, Arizona’s public
5 school system and its current funding system do not reflect a bias against Native
6 Americans or the Navajo. Likewise, there is no evidence that links issues concerning
7 inadequate access to health care or economic opportunities within the Navajo Nation
8 to discrimination by the State. Furthermore, Plaintiffs have not shown that the
9 discriminatory impact of the voter identification laws “is attributable to racial
10 discrimination in the surrounding social and historical circumstances.” *Farrakhan v.*
11 *Washington*, 338 F.3d 1009, 1019 (9th Cir. 2003). Even if the Navajos’ lower
12 socioeconomic status, poor health care, and decreased educational opportunities are
13 indeed due to discrimination, Plaintiffs have not demonstrated that these inadequacies
14 caused the slightly lower compliance with the voter identification laws at Navajo
15 reservation precincts.

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20 The data from the 2006 statewide elections also do not support the claim that
21 Proposition 200 denies Navajo the right to vote “on account of race.” 42 U.S.C. §
22 1973(a). The election results show overwhelming compliance with Proposition 200’s
23 identification requirements both on and off the reservation. According to Plaintiffs’
24 statistics, approximately 98% of voters on reservation complied with the identification
25 requirements in the 2006 primary election, and 99% of voters on reservation complied
26 with the identification requirements in the 2006 general election. *See* Plaintiffs’
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1 Exhibits 127 & 137. While it is true that compliance was slightly higher in Apache,
2 Coconino and Navajo counties outside the boundaries of the Navajo Nation, the
3 evidence does not suggest that this slight discrepancy in on and off reservation
4 compliance is caused by race. *See* Plaintiffs' Exhibit 137, p. 4 (showing 1.08%
5 conditional provisional votes cast on reservation vs. 0.47% conditional provisional
6 votes cast off reservation). The evidence does not explain why fewer people returned
7 with identification within the Navajo Nation. Race-neutral explanations are possible—
8 the more rural nature of the Navajo Nation than other parts of the respective counties
9 or differences in the weather may make it less convenient for voters casting
10 provisional conditional ballots to return with identification, for example. But, there is
11 nothing in the record that provides evidence supporting any explanation for the slight
12 discrepancy in on-reservation and off-reservation compliance with Proposition 200.

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17 Moreover, the Section 2 analysis focuses on laws that infringe on the rights of
18 people to participate in the political process and to elect the candidate of their choice.
19 The evidence does not show that the law deprived the Navajo people of the
20 opportunity to elect the candidate of their choice. The only election that Plaintiffs
21 identify is the Sanders School District election in which two of the three successful
22 candidates for the school board were Navajo. Navajo Plaintiffs' Opening Statement at
23 35; Reporter's Transcript of Proceedings: Preliminary Inj. Hr'g—Day Three, at p.
24 106. They assert that but for the identification at the polls requirement all three
25 successful candidates would have been Navajo. However, Section 2 only protects the
26 opportunity to elect the candidate of choice—it does not ensure that every Navajo
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1 candidate will prevail or even ensure proportional representation. *See* 42 U.S.C. §
2 1973(b).

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4 In addition, another factor in the “totality of circumstances” analysis is
5 “whether the policy underlying the state or political subdivision’s use of such voting
6 qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.”
7 *Smith*, 109 F.3d at 594. Here, identification at the polls protects against voter fraud,
8 which is undeniably a legitimate, even compelling, State interest. *See Purcell v.*
9 *Gonzalez*, ____ U.S. ____, 127 S. Ct. 5, 7 (2006) (per curiam); *Crawford v. Marion*
10 *County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) (upholding Indiana
11 identification at the polls requirement). Although Plaintiffs assert that the requirement
12 is unnecessary on the Navajo Nation because people already know each other, the
13 legitimate statewide interest in preventing voter fraud is sufficient to justify the
14 statewide requirement.
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18 The totality of circumstances here, particularly the strong compliance with the
19 identification requirement both on and off the Navajo Nation, the legitimate public
20 policy objective served by the identification requirement, and the lack of any evidence
21 of a “causal connection”² between the law and a prohibited discriminatory result
22 indicate that the Plaintiffs are not likely to prevail on their Section 2 claim.
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24 **II. The Balance of Harms Favors Denying the Preliminary Injunction.**

25 According to the information in the record, the only election that affects parts of
26 the Navajo Nation is the March 13, 2007, Page Unified School District election in
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1 Coconino County. *See* Plaintiffs’ Exhibit 179. Early voting for this election has
2 already begun and by the time briefing closes on these issues, the election will be 2.5
3 weeks away. It is too late to change procedures for that election. *See Purcell*, 127
4 S.Ct. at 7. In addition, as the concurring opinion noted in *Purcell*, it is preferable that
5 Courts resolve the legal issues concerning identification at the polls based on a
6 complete record. *Id.* at 8 (Stevens, J., concurring). Preserving the status quo by
7 permitting continued implementation of the identification requirement throughout the
8 State permits the continued development of the factual record regarding compliance
9 with the identification requirement. *Id.* Because no statewide elections are near and
10 because most people at the most recent elections complied with the identification
11 requirement, there is minimal risk of harm to Plaintiffs by denying the preliminary
12 injunction.

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17 The State’s strong interest in implementing its State laws and the public interest
18 in implementing initiatives intended to combat voter fraud also favor continued
19 implementation of the identification requirement.

20 **III. Plaintiffs’ Requested Relief Is Both Overinclusive and Underinclusive.**

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22 The Navajo Plaintiffs have asked this Court to enjoin the implementation of the
23 voter identification law and procedures at polling places on the Navajo Reservation.
24 *See* Verified Complaint, ¶ 136, on file herein; Plaintiffs’ motion for Preliminary
25 Injunction, on file herein. However, enjoining the voter identification laws only at
26 polling places on the Navajo Reservation would be both overinclusive and
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28 ² *Smith*, 109 F.3d at 595.

1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 16th day of February, 2007, I caused the foregoing
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