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

14 MARIA M. GONZALEZ, et al.,
15 Plaintiffs,
16
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)

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

(Assigned to the Hon. Roslyn O. Silver)

22 Plaintiffs Navajo Nation and Agnes Laughter ("Navajo Plaintiffs") respond to the
23 State Defendants' Post-Hearing Brief filed in this matter on February 16, 2007. The State
24 does not contest the past racial discrimination against Navajos living on the Reservation
25 with regard to education, socio-economic status, housing, healthcare or voting rights. It
26 claims, instead, that substantial improvements have been made to remedy past
27 discrimination and that past discrimination has no causal relationship to the current
28 disparity in voting access between Navajos and non-Indians. The State also contends that

1 such disparity is not significant enough to have legal consequences. In addition, the State
2 claims that the injunction sought by Navajo Plaintiffs against enforcement of the ID
3 Requirement at the polling places on the Reservation is over-inclusive. Finally, the
4 contention is made that the balance of harm is in the State's favor because there are no
5 impending state-wide elections and the intent of the initiative (Prop. 200), to combat voter
6 fraud, is in the public interest. Navajo Plaintiffs counter such claims and demonstrate why
7 the requested relief should be granted.

8 **1. *Past Discrimination Has a Lingering Effect Upon Navajo Access to Voting.***

9 The history of racial discrimination in education on the Reservation, together with
10 such discrimination in health care and socio-economic factors, has had a lingering effect
11 upon Navajos living on the Reservation. The evidence established that between 8,600 and
12 15,000 Navajos are functionally illiterate in English. Ex. 111 at 1; Ex. 117; Ex. 156 at 42;
13 Prel. Inj. Hr'g Tr. 54, 8/30/06. They live in remote areas of the Reservation without
14 electricity, telephones, natural gas or direct mail service. *Id.* at 50-54; Ex. 108 at 24; Ex.
15 109; Ex. 115 at 3. They pick up mail only when they get to town which can be as
16 infrequently as once a month. *See* Ex. 158 at 13. Federal Courts have recognized that
17 conditions such as these can be the result of the lingering effects of discrimination:

18 Past discrimination can seriously impair present-day ability of minorities to
19 participate on an equal footing in the political process [and] may also lead to
20 present solid economic disadvantages which in turn can reduce participation in
political affairs.

21 *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002, 1016 (D. Mont. 1986) (quoting
22 *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir. 1984)); *see also*
23 *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006); *Cottier v. City of Martin*, No.
24 02-5021, 2006 WL 3499804, at *13 (D. S.D. Dec. 5, 2006, *enforced*, 2007 WL 474085) (D.
25 S.D. Feb. 9, 2007). While these cases involved vote dilution claims and the present case
26 involves vote denial, most of the cases involve Indian tribes and the legal standards are
27 generally relevant to both dilution and denial claims under Section 2.¹

28 _____
¹ While the Senate Factors are relevant to all Section 2 claims, polarized voting is more

1 Defendants have offered no evidence to contradict the present socio-economic and
2 political disadvantage of a significant portion² of the Navajo community living on the
3 Reservation. Defendants claim, however, that the history of discrimination has not affected
4 the ability of Navajos to vote at elections. The State contends the disparity between the
5 number of Reservation voters and non-Reservation voters who are required to cast
6 conditional provisional ballots is so insignificant as to have no legal consequence. The
7 facts, however, demonstrate otherwise.

8 The evidence from the first two elections in which the ID was required indicate
9 consistent disparities between on and off-Reservation voters. In Coconino County, for
10 example, voters on the Reservation constituted only 13.63% of the electors who cast their
11 ballots in the 2006 General Election. However, more than 52%, or 162, of the 309 persons
12 who had to cast conditional provisional ballots because of lack of identification were voters
13 from Reservation precincts. While 39 of the off-Reservation ballots were ultimately
14 counted, only 9 of the on-Reservation votes were counted. Ex. 137. For the three counties,
15 only 10 of the on-Reservation precinct conditional provisional ballots were counted of the
16 267 cast. *Id.* The State's assertion that Navajo Plaintiffs have not provided any evidence
17 that there is even one person without identification is in error. St. Op. Stmt. at 5. The
18 election results demonstrate that the ballots of at least 257 on-Reservation voters were not
19 counted for lack of identification. In addition, the affidavits of Agnes Laughter and John
20 Yazzie Lowe establish that they have no identification usable at the polls. Ex. 112; Ex.
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22
23 important for a vote dilution claim than it is for a vote denial claim. *See Farrakhan v.*
24 *Washington*, 338 F.3d 1009, 1015 (9th Cir. 2003) ("*Farrakhan I*"); *Smith v. Salt River*
25 *Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 596 n. 8 (9th Cir. 1997). "At a
26 minimum, Section 2 requires evidence that the challenged provision results in
27 discrimination," *Farrakhan I*, 338 F.3d at 1022, and "_ voting qualification that denies
citizens the right to vote in a discriminatory manner violates the VRA," *id.* at 1016
(quoting 42 U.S.C. § 1973). Neither *Salt River* nor *Farrakhan I* analyzed vote dilution as a
factor necessary for establishing vote denial.

28 ² With a voting age population of approximately 60,000, this cohort of 8,600 to 15,000
Navajos who are functionally illiterate in English constitutes between 14.3% and 25%—
clearly a "significant" portion of the voting age population. Ex. 109.

1 118. The election results, shown below, demonstrate a consistent disparity between the
 2 ability of on-Reservation voters and off-Reservation voters to satisfy the ID Requirement:

3 Conditional Provisional Ballots -- Cast & Not Counted
 4 As a Percentage of the Total Ballots Counted

	2006 Primary Election		2006 General Election	
	Navajo Reservat'n Ballots Cast as % of Total Ballots	Navajo Reservat'n Condit'l Ballots Cast as a % of Total Condit'l Ballots	Navajo Reservat'n Ballots Cast as % of Total Ballots	Navajo Reservat'n Condit'l Ballots Cast as a % of Total Condit'l Ballots
Coconino County	13.63%	63.64%	16.42%	52.43%
Apache County	63.80%	97.14%	71.70%	91.30%
Navajo County	27.38%	38.46%	26.66%	61.76%
Total Three Counties	28.51%	54.65%	31.94%	58.42%

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13 The election officials charged with implementing the ID Requirement predicted
 14 these ubiquitous results. Ex. 115 at 1 ("[The Procedures] will effectively disenfranchise a
 15 significant number of minority language voters within Coconino County"); Lenora Johnson
 16 Depo. at 32, 41. The results of both elections in all three counties showed that the election
 17 officials were correct.

18 **2. *The Lingering Effects of Discrimination Caused the Disparate Impact.***

19 Defendants claim that the Navajo Plaintiffs have presented no evidence that the
 20 history of discrimination in education, health care and socio-economic factors has a causal
 21 relationship to the failure of more Navajos than non-Indians to comply with the ID
 22 Requirement. The Navajo Plaintiffs did provide testimony concerning the causal
 23 relationship. After Dr. Lewis testified to the long history of discrimination against Navajos
 24 in education, "all the way from 1868 to the present," he was asked whether "this history of
 25 discrimination in education affect[s] the ability of Navajos to comply with the voter
 26 identification requirement?" His response demonstrated the causal connection:

27 Yes. Many of them have a problem in understanding the whole purpose.
 28 Many of them don't have the level of education and training that is necessary
 to understand the need to have multiple forms of identification, particularly
 our older people. Miss Laughter was probably one prime example. She and
 others in her age group don't have identification.

1 Prel. Inj. Hr'g Tr. 46-47, 2/8/07. With regard to elderly Navajos, Senator Jackson pointed
2 out that "[b]ecause they don't have a formal education, they don't have access to
3 information. So, therefore, they don't vote." *Id.* at 77. Leonard Gorman's testimony
4 established how socio-economic factors for elderly Navajos made the ID Requirement
5 more burdensome for them than for non-Indians. Prel. Inj. Hr'g Tr. 50-56, 89-93, 8/30/06.

6 The State asserts that Navajo Plaintiffs have not shown that the discriminatory
7 impact of the ID requirement is attributable to racial discrimination and the surrounding
8 social and historical circumstances. St. Post Hr'g Br. at 6. Federal cases indicate that once
9 a present disadvantage resulting from past discrimination is shown, the burden of proof as
10 to causation shifts to the defendants.

11 [W]hen there is clear evidence of present socioeconomic or political
12 disadvantage resulting from past discrimination, as there was in this case, the
13 burden is not on the plaintiffs to prove that this disadvantage is causing
reduced political participation, but rather is on those who deny the causal
nexus to show that the cause is something else.

14 *Marengo County Comm'n*, 731 F.2d at 1569. In *Whitfield v. Democratic Party of*
15 *Arkansas*, 890 F.2d 1423, 1431 (8th Cir. 1989), the Eighth Circuit said that "[o]nce lower
16 socio-economic status of blacks has been shown, there is no need to show the causal link of
17 this lower status on political participation" (citing *United States v. Dallas County Comm'n*,
18 739 F.2d 1529, 1537 (11th Cir. 1984)). The Court indicated that the district court had
19 required "an improper burden of proof of causal relationships by holding, in effect, that the
20 socio-economic factors and the effects of discrimination did not hinder blacks' ability to
21 participate in any legally significant way." *Whitfield*, 890 F.2d at 1431. The Court went on
22 to emphasize that the district court should have focused on actual voting patterns rather
23 than speculating on reasons why minority voters did not vote. *Id.* In the present case, the
24 history of discrimination in education and other socio-economic factors is unrefuted.
25 *Whitfield* suggests that the focus in the present case should be on the disparity in
26 conditional balloting in both elections in all three counties rather than speculating on why
27 Navajo voters did not present the requisite identification at the polls or return thereafter.
28 Recent decisions in the District of South Dakota have also held that once a history of

1 discrimination is shown, the burden is on those who deny the causal nexus to show that the
2 cause is something else. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1038 (D. S.D.
3 2004); *Cottier*, 2006 WL 3499804, at *13.

4 This line of authority has been cited with approval in the Ninth Circuit. In
5 *Farrakhan I*, the Ninth Circuit, after citing to *Marengo*, held that "under *Salt River* and
6 consistent with both Congressional intent and well-established judicial precedent, a causal
7 connection may be shown where the discriminatory impact of a challenged voting practice
8 is attributable to racial discrimination in the surrounding social and historical
9 circumstances." 338 F.3d 1009, 1019 (9th Cir. 2003).

10 The Navajo Plaintiffs have provided evidence that there is present socio-economic
11 and educational disadvantage resulting from past discrimination. In light of this
12 uncontradicted evidence, the burden has shifted to the State to demonstrate that the
13 disparate impact on conditional provisional ballots cast and counted was caused by factors
14 other than this disadvantage. No such evidence was presented.

15 **3. *The ID Requirement Discourages Navajo Electors from Voting.***

16 The evidence indicates the number of votes cast and counted, and the number of
17 conditional provisional ballots cast and counted. This data establishes the number of
18 persons who actually cast a ballot knowing that they didn't have identification and of those,
19 how many were counted. As the Court has recognized, though, an important consideration
20 can be the number of persons who left the polls without voting. In Ms. Help-Tulley's
21 affidavit, she reported that many elders at senior centers were discouraged by the new ID
22 Requirement and some stated that they would not vote in the upcoming elections because
23 of the ID Requirement. Ex. 100. Other officials made similar reports in their affidavits.
24 Ex. 101; Ex. 102; Ex. 107.

25 In the primary election, the information provided by the Coconino County poll
26 workers was qualitative rather than quantitative in nature and was a sampling of precincts
27 on the Reservation. Coconino County Election officials reported that many Navajo voters
28 left the polls without voting. Barbara Snider, an Election Day Technician for the Primary
Election, in Precinct 93 on the Reservation estimated that "approximately 25% of the voters

1 who entered this polling place did not have the proper form of identification. Some voters
 2 expressed frustration and disapproval at having to present identification. . . . I can only
 3 recall one voter who did not have any identification at all; others had at least one form of
 4 identification. Some voters walked away without voting any type of ballot; I do not recall
 5 how many." Ex. 132.³ The State has provided no evidence to challenge the credibility of
 6 this information.

7 This Court ordered each Arizona county to collect information at the General
 8 Election regarding persons who entered the polling places without identification and left
 9 without voting because of identification issues. These reports also indicate the ubiquitous
 10 disparate impact of the ID Requirement on Reservation voters:

2006 General Election				
	Total Voters Who Left the Polls Due to ID Issues	Total Persons Who Left the Navajo Reservat'n Polls Due to ID Issues	Navajo Reservat'n Ballots Cast as % of Total Ballots	Persons Who left Navajo Reservat'n Polls as a % of Total Who Left
Coconino County Ex. 177	110	50	16.42%	45% ⁴
Apache County Ex. 186 ⁵	Not reported	Not reported	71.70%	Not reported
Navajo County Ex. 175	54	32	26.66%	59%

17 Like many others, Plaintiff Agnes Laughter did not vote in the General Election.
 18 She explained in her supplemental affidavit that:

19 _____
 20 ³ See also Ex. 133 (Towler observed an elderly Navajo woman without any identification
 21 who did not cast any ballot and was concerned that a number of voters did not show up to
 22 vote because they didn't have identification.); Ex. 134 ("many elders had driver's licenses
 23 that were long expired"); Ex. 135 ("30% of the on-Reservation voters lacked paper ID and
 24 some walked out of the polling place without voting even when offered a conditional
 25 ballot"); Ex. 136 (one individual did not cast any ballot after being asked for identification);
 26 Ex. 131 (voter turnout was lower than normal due to the ID Requirement).

27 ⁴ Kaibeto Precinct (No. 65) reported that 103 persons had entered the polling place and left
 28 without voting, but that their reasons for voting had not been noted. If these 103 are added
 to the Coconino County totals, the proportion of persons who left Reservation precincts
 without voting increases to 72%. Ex. 177 at 12-15.

⁵ Apache County reported only persons who left from the Coronado and St. Johns polling
 places and did not make any report with regard to polling places on the Navajo
 Reservation. Ex. 415. Apache County "was unable to document the numbers of
 individuals who did not vote after entering voting precincts during the 2006 Election" as
 the poll workers were busy and did not have time to document these incidents. Ex. 186.

1 I did not vote on November 7, 2006, Election Day, because I was so afraid to
2 be turned away at the polls. . . . When Election Day came, my family and
3 relatives departed to vote in this election. As I pondered this opportunity for
4 them, I felt so alone knowing that these opportunities are not available to me
5 because I do not have identification to vote.

6 Ex. 169.

7 **4. The ID Requirement is Complex and Is Subject to Different Interpretations.**

8 The "Procedure for Proof of Identification at the Polls" (the "Procedure") drafted by
9 the Secretary of State to implement the ID Requirement of Prop. 200 is complex and
10 ambiguous. Ex. 56. By example, in their separate depositions, a number of election
11 officials reached different conclusions regarding whether a similar form of identification
12 would result in the issuance of a regular, provisional or conditional provisional ballot. *Id.*
13 In the case of Ms. Laughter, the County record indicated that she was given a provisional
14 ballot although she presented no ID and received no ballot. Ex. 170; Ex. 414.

15 The Procedure, comprised of five single-spaced pages, includes a special provision
16 instructing poll workers to allow Native Americans to vote a "regular" provisional ballot if
17 they have one form of "tribal identification" even if that form does not contain a photo or
18 address. Ex. 3. In contrast to the Procedure, the ID Requirement materials distributed to
19 registered voters by the three counties made no reference to the special rule for Native
20 Americans. Ex. 411 at 55, 59, 63; Ex. 412; Ex. 413. Notwithstanding the special rule,
21 Denise Burley, a Coconino County Election Day Technician, observed that an elector who
22 provided a "card from the Navajo Nation with the individual's name and census number"
23 received a conditional provisional ballot at the Primary Election. Ex. 136.

24 The confusion caused by the Procedure is illustrated by the affidavits of Rod Permar
25 and Frank Donald, Jr. Permar reported "great confusion because voters and the Inspector
26 were under the impression that the voter registration card was sufficient for voting." Ex.
27 131. Donald, a county contact person at Kayenta Chapter, was confused as to why two
28 electors brought ID to the Chapter House after the Primary Election. He failed to notify the
Election Officials in order for those ballots to be counted. Ex. 143; 409; *see also* Ex. 105.
In *ACLU v. Santillanes*, the New Mexico District Court struck down the photo

1 identification law, in part, because election officials were permitted "such unbridled
2 discretion that arbitrary and disparate treatment of similarly situated voters is almost certain
3 to result." No. 05-1136, slip op. at 53 (D. N.M. Feb. 12, 2007). The ambiguity of the
4 Procedure here gives election officials similar discretion.

5 The State asserted that a certificate of Indian blood (the "CIB") would permit a voter
6 to vote a "regular" provisional ballot. Prel. Inj. Hr'g Tr. 17, 2/8/07. Use of the CIB
7 presumes that (1) the CIB is considered a form of tribal identification; (2) the State and/or
8 counties advised voters that the CIB is an acceptable form of ID; and (3) the CIB is readily
9 accessible to voters. This presumption is in error. The CIB was not included as an
10 acceptable form of identification in the voter outreach materials provided to Navajos. Exs.
11 411-413. Navajos rarely use the CIB and do not consider it a form of "tribal
12 identification." Prel. Inj. Hr'g Tr. 47, 2/8/07; Prel. Inj. Hr'g Tr. 59-60, 93, 8/30/06. A
13 Coconino County Election Day Technician in a Reservation precinct, said that "no voter
14 used the Certificate of Indian Blood as a form of identification." Ex. 130.

15 **5. *Enjoining the ID Requirement on the Reservation is not Over-Inclusive.***

16 The State contends that an injunction against application of the ID Requirement on
17 the Navajo Reservation would be unacceptably over-inclusive because it would allow some
18 non-Indians to vote without providing identification. The need for any voter identification
19 on the Reservation is tenuous at best. The evidence from the three County election officials
20 established that there has been no case of voter impersonation at any polling place in their
21 counties. Ex. 5 at 1-2; Ex. 11; Ex. 14; *see also* Ex. 4 at 5. The percentage of voting-age
22 non-Navajos on the Reservation is under 4%. Ex. 109 at 1. The tenuous potential of voter
23 impersonation by a non-Indian is no justification for enforcing a law that has already
24 disenfranchised hundreds of Navajo voters.

25 **6. *This Case is Ripe for Preliminary Injunction.***

26 The State claims there is no need for immediate injunctive relief. However, a school
27 election is scheduled in the Page School District for March 13, 2007. Ex. 179. The Page
28 schools have a history of discrimination problems. In August, 2006, litigation to enforce
integration pursuant to *Brown v. Board of Education* resulted in an agreement by the

1 District to make good faith efforts to integrate the two elementary schools. Ex. 178.
2 Although 74% of the students live on-Reservation, all schools in the Page School District
3 are located off-Reservation. Ex. 174 at 3. Navajo voters should not be disqualified in this
4 election because of ID problems. In addition, there is a scheduled election in Apache
5 County which will include precincts on the Navajo Reservation to be held on May 15,
6 2007. There is a possibility of other elections in 2007 as well. Ex. 186 at 2.

7 ***Conclusion.***

8 Navajo Plaintiffs have presented unrefuted evidence of a disparate impact in voting
9 in the 2006 elections and a history of racial discrimination in education and voting. The
10 disparate impact is the direct result of the lingering effects of racial discrimination on
11 Navajos. The State denies the causal nexus; but provided the Court with no controverting
12 statistics, no evidence of the unreliability of election worker estimates of the numbers of
13 Navajos appearing without ID and no evidence of a race-neutral basis for the disparate
14 impact. Navajo Plaintiffs have demonstrated by a preponderance of evidence that there is a
15 sufficient likelihood of success on the merits, irreparable injury if relief is not granted and a
16 balance of hardships that weighs in favor of Navajo Plaintiffs. For all of the reasons stated
17 above and in the Court record, we request that this Court enjoin the ID Requirement.

18 RESPECTFULLY SUBMITTED this 23rd day of February, 2007.

19 SACKS TIERNEY P.A.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 23, 2007, 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:

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