

1 TERRY GODDARD
Attorney General
2 Firm Bar No. 14000
3 Mary O'Grady, No. 011434
Solicitor General
4 Carrie J. Brennan, No. 018250
Assistant Attorney General
5 1275 West Washington Street
6 Phoenix, Arizona 85007-1298
Tel: (602) 542-8305
7 Fax: (602) 542-8308
8 Attorneys for the State of Arizona and
the Arizona Secretary of State

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

11 Maria M. Gonzalez, et al.,
12 Plaintiffs,
13
14 v.
15 State of Arizona, et al.,
16 Defendants.

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

**STATE DEFENDANTS' RESPONSE
TO POST-TRIAL BRIEF OF
NAVAJO NATION AND AGNES
LAUGHTER REGARDING VOTING
RIGHTS ACT AND CIVIL RIGHTS
ACT**

(Assigned to the Honorable Roslyn
O. Silver)

19 The Post-Trial Brief of Navajo Nation and Agnes Laughter Regarding Voting
20 Rights Act and Civil Rights Act fails to establish that the Navajo Plaintiffs are entitled
21 to a preliminary injunction. Despite protestations to the contrary, the Navajo Plaintiffs
22 have failed to establish a causal connection between any alleged discrimination and the
23 challenged voting practice, as required by *Farrakhan v. Washington*. They have also
24 failed to identify any particular member of the Navajo Nation who is denied an
25 opportunity to vote by Proposition 200 and have not established that the totality of the
26 circumstances factors support a preliminary injunction.
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1 **I. The Navajo Plaintiffs Have Failed to Demonstrate the Requisite Causal**
2 **Connection to Support Their Section 2 Claim.**

3 In weighing the totality of circumstances to decide whether a challenged voting
4 practice results in vote denial, courts are required to consider “how the challenged
5 practice ‘interacts with social and historical conditions to cause an inequality in the
6 opportunities enjoyed by black and white voters to elect their preferred
7 representatives.’” *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th cir. 2003)
8 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)) (emphasis added) (*Farrakhan*
9 *I*). A plaintiff may show a causal connection “where the discriminatory impact of a
10 challenged voting practice is attributable to racial discrimination in the surrounding
11 social and historical circumstances.” *Id.* at 1019.

12 In *Farrakhan I*, a group of convicted felons sued the State of Washington on the
13 theory that the state felon disenfranchisement laws constituted improper race-based
14 vote denial in violation of Section 2 of the Voting Rights Act because racial bias in the
15 criminal justice system resulted in disproportionate conviction of minorities. *Id.* at
16 1010. The court in *Farrakhan I* determined that the district court could have found the
17 requisite causal connection between the evidence of racial bias in the criminal justice
18 system and the challenged voting qualification of felon disenfranchisement. *Id.* at
19 1020. Essentially, the plaintiffs had presented evidence that official discrimination
20 (racial bias in the criminal justice system) resulted in disproportionate convictions of
21 minorities. Given that felon disenfranchisement was automatic upon conviction, there
22 exists an obvious causal connection.

23 Here, however, there is no evidence demonstrating a link between either (a) official
24 discrimination and the social and historical conditions (*i.e.*, higher rates of poverty,
25 lower levels of education, and poor healthcare), or (b) these social and historical
26 conditions and the alleged inability to comply with voter identification laws. In their
27 Post-Trial Brief, the Navajo Plaintiffs cite Plaintiffs’ Exhibits 111, 117, and 156 to
28 support their statement that many Navajos are not proficient in English. *See* Post-Trial
Brief at 6. The Navajo Plaintiffs then jump straight to the conclusion that the voter

1 identification laws deprive “many non-English speakers of the right to vote.” *Id.* at 7.
2 The Navajo Plaintiffs never cite to any documentary evidence explaining why the lack
3 of education allegedly results in an inability to comply with voter identification
4 requirements.

5 The Navajo Plaintiffs cite the testimony of Dr. Lewis and Mr. Jackson to the effect
6 that they believe that the lower levels of education impede the Navajos’ ability to
7 comply with the voter identification laws. *Id.*, at 7. However, Dr. Lewis’ testimony
8 was unclear and equivocal on this point. When asked whether some Navajos do not
9 have the education needed to understand that they need identification at the polls, he
10 testified that “I’m sure they understand but the whole education program for a very
11 long time did not explain the need to have identification,” and that “many times there’s
12 no need to use identification.” *See* Reporter’s Transcript of Proceedings: Preliminary
13 Inj. Hr’g—Day Three, at p. 56. On re-direct, Dr. Lewis stated that the lack of
14 education caused “older people” to be unable to “comprehend their rationale.” *Id.* at p.
15 61. Thus, Dr. Lewis conceded that Navajos understand that identification is required
16 at the polls; however, in his opinion, they lack the education to understand the
17 rationale behind the voter identification laws. But, understanding the rationale behind
18 the voter identification laws is not a prerequisite to complying with them. Regarding
19 Mr. Jackson’s testimony, when asked repeatedly whether he believed that Navajos
20 who did not have a formal education were unable to understand when informed that
21 they need to bring identification to the polls, Mr. Jackson simply answered that these
22 Navajos couldn’t get identification. *Id.* at 82-83.

23 Furthermore, neither of these men are experts qualified to opine on the subject of
24 whether a lack of education hampers the ability of some Navajos to comply with the
25 voter identification requirements. Certainly, both men have experience in the field of
26 education on the reservation. However, their testimony regarding the supposed link
27 between lower education levels and voter compliance was not based on any relevant
28 education, training, study, or experience, but rather was based on hearsay and
anecdotal evidence. Essentially, the Navajo Plaintiffs have offered these witnesses as

1 “experts” on the subject of the interaction between education and the voter
2 identification laws on the grounds that they are Navajo and know other Navajos. This
3 is not sufficient to support the imposition of a preliminary injunction.

4 Phil Harrison’s testimony is also unhelpful. Mr. Harrison testified that he has been
5 working with Navajos to help them obtain compensation for injured uranium workers
6 or for the families of deceased uranium workers. *Id.* at 85. Specifically in connection
7 with that experience, he testified that it is difficult for Navajos to find Social Security
8 cards, certified birth certificates, certified death certificates, and marital records. *Id.* at
9 96. However, none of these items are accepted as a form of identification at the polls,
10 and therefore his testimony is irrelevant.

11 Finally, the Navajo Plaintiffs admit that Plaintiff Agnes Laughter knew that she
12 needed identification to vote. *See* Post-Trial Brief at 7. She knew this despite the fact
13 that she has no formal education. Even assuming that Ms. Laughter cannot obtain the
14 necessary identification to vote—an allegation that State Defendants do not concede
15 and address in the section below—there is nothing in the record that supports the
16 notion that her lack of education is the cause.

17 Unlike *Farrakhan I*, the Navajo Plaintiffs have not presented evidence from
18 which this Court can conclude that there exists a causal connection between social and
19 historical conditions on the reservation and the alleged inability to comply with the
20 voter identification laws. Moreover, the concerns about the difficulty the Navajo
21 people will have complying with this law are simply not substantiated by the results of
22 the 2006 elections—the first elections at which this new law was implemented within
23 the Navajo Nation—because the vast majority of the voters within the Navajo Nation
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1 complied with the identification requirements.¹ *See* Navajo Plaintiffs’ Exs. 127, 137.

2 **II. The Navajo Plaintiffs Have Failed to Present Evidence of Any One**
3 **Person Who Cannot Vote Because of the Voter Identification Laws,**
4 **Including Agnes Laughter.**

5 The Navajo Plaintiffs assert that Agnes Laughter is not able to obtain the necessary
6 identification to vote. *See* Post-Trial Brief at 7-8. However, the Navajo Plaintiffs
7 admit that Ms. Laughter had one form of acceptable identification—a banking
8 statement—that she “chose not to show.” *Id.* at 7. Ms. Laughter could also have used
9 a voter registration card as acceptable non-photo identification; if she had misplaced
10 her voter registration card, she could have obtained a new one. *See*
11 <http://www.co.az.us/recorder/voterfaq.aspx?Menu=recVoterFAQRecRootVote#9>
12 (noting that replacement card may be obtained by visiting or calling the Navajo
13 County Recorder’s Office).² There is no evidence that she made any effort to do so.
14 In addition, election officials in counties statewide sent election mail to registered
15 voters that the counties accepted as a form of identification on election day. The
16 record confirms that this practice of sending election mail included the voters of
17 Apache, Navajo, and Coconino counties. *See* Penny Pew Depo. Annot. At 21:13-22:1,
18 Patty Hansen Depo. Annot. At 53:10-56:11, Kelly Dastrup Depo. Annot. At 11:7-14:1,
19 Prel. Inj. Tr. Ex. 403.

20 Native Americans only need to show one form of tribal identification that bears the
21 name of the elector in order to satisfy the voter identification requirements. *See* Ex.
22 301, Secretary of State Procedures Manual, at 120. Dr. Lewis testified that he had
23 used his tribal certificate of Indian blood to obtain a tribal scholarship and that elderly

24 ¹ The cases cited by the Navajo Plaintiffs to support their argument that the approximately 0.6%
25 difference in compliance of voters off the reservation versus on the reservation is a disparate impact
26 significant enough to support their Section 2 claim—*Bush v. Gore*, 531 U.S. 98 (2000), and *ACLU v.*
27 *Santillanes*, No. 05-1136, slip op. at 53 (D N.M. Feb. 12, 2007)—simply do not stand for the
28 proposition, and the argument is directly at odds with the U.S. Supreme Court’s acknowledgement in
Burdick v. Takushi, 504 U.S. 428, 433 (1992).

² Coconino County offers free replacement voter registration cards as well. Patty Hansen Depo. Annot at 57:1-10.

1 Navajos would use it to obtain access to federal subsidy programs. *See* Reporter’s
2 Transcript of Proceedings: Preliminary Inj. Hr’g—Day Three, at p. 64.

3 Assuming *arguendo* that Ms. Laughter could not have obtained identification to
4 vote at the polls on election day, she could have voted early. Ms. Laughter testified
5 that she and her husband have transportation and travel by truck to Chilchinbeto and
6 Kayenta on a regular basis. *See* Ex. 158 at p. 13, 22, 25. Since voter identification is
7 not needed for early voting, Ms. Laughter could have voted and avoided the need for
8 identification entirely. Ms. Laughter could have traveled to an early voting site or to
9 the Navajo County Recorder’s Office to vote early. *See* Plaintiffs’ Ex. 140, Affidavit
10 of Laurette Justman. Language assistance is available at early voting sites. *See*
11 Exhibit 2 to Responsive Brief by the Arizona Secretary of State Regarding Navajo
12 Plaintiffs’ Claims, filed October 4, 2006, Affidavit of Kelly Dastrup, on file herein.³
13 She also could have requested an early ballot by mail; she testified in her deposition
14 that she has mail service and goes to Chilchinbeto to pick up her mail on a regular
15 basis. *Id.* at 13. In short, Ms. Laughter could have voted in both the primary and
16 general elections of 2006, and the Navajo Plaintiffs have not identified one member of
17 the Navajo Nation who could not have voted.

18 **III. The Totality of Circumstances Factors Do Not Support the Imposition of**
19 **an Injunction Enjoining the Application of Voter Identification Laws at**
20 **On-Reservation Precincts.**

21 **A. Evidence of Racially Polarized Voting.**

22 In support of this factor, the Navajo Plaintiffs cite *Clark v. Holbrook Unified*
23 *School District*, 703 F. Supp. 56, 57-58 (D. Ariz. 1989), and claim that the plaintiff in
24 that case presented evidence of racially polarized voting. *See* Post-Trial Brief at 4.
25 However, in *Clark*, the court merely acknowledged that the plaintiff had alleged
26 racially polarized voting and held that the plaintiff would be allowed to present

27 ³ Candace Owens testified that Coconino County had several early voting sites, including the county
28 elections office and the Tuba City branch office, and that language assistance was available to early
voters. *See* Reporter’s Transcript of Proceedings: Preliminary Inj. Hr’g—Day One, at pp. 106-108.

1 evidence of discriminatory voting patterns in support of his claim. *Id.* at 59. The
2 Navajo Plaintiffs also cite to a brief filed by the United States in a 1994 case, *see* Post-
3 Trial Brief at 4, but that brief is not attached. There is no evidence of racially
4 polarized voting in this record.

5 **B. Unusually Large Election Districts.**

6 In support of this factor, the Navajo Plaintiffs cite a 35-year-old case, *Goodluck*
7 *v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975), in which the court invalidated
8 redistricting by Apache County that resulted in “malapportionment.” *Id.* at 16. The
9 Navajo Plaintiffs also cite to a 23-year-old rejection by the Department of Justice of a
10 proposed redistricting in Navajo County. *See* Plaintiffs’ Exhibit 153. The Navajo
11 Plaintiffs have presented no other or more recent evidence under this factor.

12 **C. Political Campaigns with Racial Appeals.**

13 The Navajo Plaintiffs cite to Plaintiffs’ Ex. 160, a case in which the court found
14 that the Apache County School District failed to adequately inform the Navajo
15 population about a bond election held on August 31, 1976. *See* Post-Trial Brief at 5.
16 The Navajo Plaintiffs present no recent or other evidence in support of this factor.

17 **D. Lack of Responsiveness on the Part of the Elected Officials to the Needs**
18 **of the Minority Group.**

19 Although the Navajo Plaintiffs assert that there is evidence of a lack of
20 responsiveness, there is also evidence in the record of the responsiveness of elected
21 officials. As noted in State Defendants’ Post-Hearing Brief, Mr. Jackson, who is a
22 former State legislator and now assistant to the president of Diné College, testified that
23 he served for nearly 20 years in the State Legislature and described his work with
24 former Governor Hull regarding legislation to establish the School Facilities Board.
25 *See* Reporter’s Transcript of Proceedings: Preliminary Inj. Hr’g—Day Three, at pp.
26 66, 71-72. Senator Jackson emphasized Governor Hull’s personal experience in
27 teaching on the Navajo Nation and her concern regarding educational issues on the
28 reservation. *Id.* at p. 72. Both Senator Jackson and Dr. Tommy Lewis testified

1 concerning the support that the State has provided to the Diné College, which is
2 operated by the Navajo Nation. *Id.* at pp. 51, 78-79. Dr. Lewis testified regarding
3 several recent new school facilities and rebuilding projects funded by the School
4 Facilities Board on the reservation. *Id.* at pp. 48-50. Senator Jackson also described
5 his work with the State School Facilities Board to have additional schools on the
6 Navajo Nation to reduce the travel time for students. *Id.* at pp. 72-74. In addition,
7 members of the Navajo Nation have been elected to the Arizona State Legislature,
8 school boards and county offices. *Id.* at 83; Reporter’s Transcript of Proceedings:
9 Preliminary Inj. Hr’g—Day Three, at p. 106; *Shirley v. Apache County Superior*
10 *Court*, 109 Ariz. 510, 513 P.2d 939 (1973). The record does not establish a lack of
11 responsiveness by Arizona’s State government or an inability to elect candidates of the
12 Navajo people’s choice.

13 **E. Whether the Policy Underlying the Challenged Voting Practice Is**
14 **Tenuous.**

15 The Navajo Plaintiffs assert that the policy underlying the voter identification
16 requirements is tenuous because election officials from Coconino, Apache, and Navajo
17 counties stated that there was no record of voter fraud in those counties and “on the
18 Navajo Reservation the election officials at each polling place were familiar with the
19 voters in their precinct.” *See* Post-Trial Brief at 6. As described in the State’s
20 Response in opposition to the Motions for Preliminary Injunction [dkt. 159], voter
21 fraud is a legitimate public policy concern in Arizona and nationally. *See also*
22 *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007)
23 (describing legitimate anti-fraud purpose served by Indiana photo identification at the
24 polls requirement). Even if there were no history of fraudulent voting, states may act
25 with foresight in promoting fair and honest elections. *See Munro v. Socialist Workers*
26 *Party*, 479 U.S. 189, 196-97 (1986); *see also Griffin v. Roufas*, 385 F.3d 1128, 1131
27 97th Cir. 2004 (“the striking of the balance between discouraging voter fraud and other
28 abuse and encouraging turnout is quintessentially a legislative judgment with which
we judges should not interfere unless strongly convinced that the legislature judgment

1 CERTIFICATE OF SERVICE

2 I hereby certify that on the 23rd day of February, 2007, I caused the foregoing
3 document to be electronically transmitted to the Clerk's Office using the CM/ECF
4 System for filing and transmittal of a Notice of Electronic Filing to the following

5 CM/ECF Registrants:

6 David J. Bodney
7 Karen J. Hartman-Tellez
8 Steptoe & Johnson LLP
9 201 East Washington St., Ste. 1600
10 Phoenix, Arizona 85004-2382
11 dbodney@steptoe.com
12 khartman@steptoe.com

13 David B. Rosenbaum
14 Thomas L. Hudson
15 Sara S. Greene
16 Osborn Maledon, P.A.
17 2929 N. Central, 21st Floor
18 Phoenix, Arizona 85012-2793
19 drosenbaum@omlaw.com
20 thudson@omlaw.com
21 sgreene@omlaw.com

22 Jon Greenbaum
23 Benjamin Blustein
24 Lawyers' Committee For
25 Civil Rights Under Law
26 1401 New York Avenue, Ste. 400
27 Washington, D.C. 20005
28 jgreenbaum@lawyerscommittee.org

Neil Bradley
ACLU Southern Regional Office
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, Georgia 30303
nbradley@aclu.org
Elliot M. Mincberg

1 People for the American
2 Way Foundation
3 2600 M Street, NW, Ste. 400
4 Washington, DC 20036
eminberg@pfaw.org

5 Luis Roberto Vera, Jr.
6 League of United Latin
7 American Citizens
8 111 Soledad, Ste. 1325
9 San Antonio, Texas 78205-2260
Irvlaw@sbcglobal.net

10 Daniel B. Kohrman
11 AARP Foundation Litigation
12 601 E Street, N.W., Ste. A4-240
13 Washington, DC 20049
dkohrman@aarp.org

14 Joe P. Sparks
15 Susan B. Montgomery
16 Sparks, Tehan & Ryley PC
17 The Inter Tribal Council of Arizona, Inc.
18 7503 First Street
19 Scottsdale, Arizona 85251
joe-sparks@qwest.net

20 David J. Becker
21 People for the American Way Foundation
22 2000 M Street, NW, Suite 400
23 Washington, D.C. 20036
dbecker@pfaw.org

24 Daniel R. Ortega, Jr.
25 Roush McCracken Guerrero
26 Miller & Ortega
27 650 N. 3rd Avenue
28 Phoenix, Arizona 85003
danny@rmgmoinjurylaw.com

Nina Perales

1 Mexican American Legal Defense and Education Fund
2 110 Broadway, Ste. 300
3 San Antonio, Texas 78205
4 nperales@maldef.org

5 M. Colleen Connor
6 MCAO Division of County Counsel
7 222 N. Central Avenue, Ste. 1100
8 Phoenix, Arizona 85003
9 connorc@mcao.maricopa.gov

10 Dennis I. Wilenchik
11 Kathleen Rapp
12 Wilenchik and Bartness, P.C.
13 2810 N. Third Street
14 Phoenix, Arizona 85004
15 diw@wb-law.com
16 kathleenr@wb-law.com

17 Judith M. Dworkin
18 Marvin S. Cohen
19 Patricia Ferguson-Bohnee
20 SACKS TIERNEY P.A.
21 4250 N. Drinkwater Blvd. 4th
22 Scottsdale, Arizona 85251-3693
23 Judith.Dworkin@sackstierney.com

24 Criss E. Candelaria
25 Bradley Carlyon
26 Apache County Attorneys Office
27 PO Box 637
28 St. Johns, Arizona 86025
bcarlyon@apachelaw.net

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2
3
4
5
6
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18
19
20
21
22
23
24
25
26
27
28

Melvin R. Bowers, Jr.
Lance B. Payette
Navajo County Attorneys Office
PO Box 668
Holbrook, Arizona 86025
lance.payette@co.navajo.az.us

Brenna L. Clani
Navajo County Department of Justice
PO Box 2010
Window Rock, Arizona 86515
brennalclani@navajo.org

Jean E. Wilcox
Coconino County Attorney's Office
110 East Cherry Ave.
Flagstaff, Arizona 86001
jwilcox@coconino.az.gov

COPY of the foregoing filed electronically
this 23rd day of February, 2007.

COPY of the foregoing mailed with Notice of
Electronic Filing this 23rd day of February, 2007 to:

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

/s Carrie J. Brennan

491663