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

13 THE NAVAJO NATION, a federally
14 recognized Indian tribe, and Agnes
Laughter,

15 Plaintiffs,

16 v.

17 JAN BREWER, individually and in her
18 official capacity as Secretary of State of
the State of Arizona; et al.

19 Defendants.

No.

**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

(Oral Argument and Hearing Requested)

20 Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs move the
21 Court to issue a preliminary injunction enjoining defendants, defendants' agents, servants,
22 employees, and attorneys, and all persons in active concert and participation with
23 defendants from implementing at polling places on the Navajo Reservation the voter
24 identification procedures enacted pursuant to Proposition 200, A.R.S. § 16-579, and the
25 "Procedure for Proof of Identification at the Polls" adopted by Defendant Secretary of
26 State. Unless the application of these procedures is enjoined, the right of Navajo Nation
27 members living on the Navajo Reservation to vote will be unduly burdened. Plaintiffs
28

1 respectfully request that the injunction be issued prior to the September 12, 2006 primary
2 elections.

3 It is essential that the Court issue the requested preliminary injunction to prevent
4 immediate and irreparable injury because:

5 1. As established by the verified complaint, unless restrained by this court, the
6 defendants will perform the acts sought to be enjoined.

7 2. As established by the verified complaint and the Declaration of Agnes Laughter,
8 if the defendants perform the acts sought to be enjoined, members of the Navajo Nation
9 will suffer immediate and irreparable harm in that Navajos living on the Navajo
10 Reservation will be denied their constitutional right to vote in federal and state elections.

11 3. As established by the Declaration of Agnes Laughter and the Memorandum of
12 Points and Authorities in support of this Motion, Plaintiffs have no adequate remedy at law
13 for the injuries sought to be prevented by the requested preliminary injunction.

14 4. As shown by the verified complaint, the Declaration of Agnes Laughter and the
15 Memorandum of Points and Authorities, Plaintiffs are likely to succeed on the merits of
16 this action.

17 5. As shown by the verified complaint, the Declaration of Agnes Laughter, and the
18 Memorandum of Points and Authorities, the issuance of a preliminary injunction will not
19 cause undue inconvenience or loss to defendants.

20 This Motion is supported by the accompanying Memorandum of Points and
21 Authorities, the papers and records on file in this action, including this document, the
22 verified complaint, and the supporting Declaration of Agnes Laughter.

1 RESPECTFULLY SUBMITTED this 20th day of June, 2006.

2 Sacks Tierney P.A.

3
4
5 By: s/ Marvin S. Cohen _____

6 Judith M. Dworkin
7 Marvin S. Cohen
8 Patricia Ferguson-Bohnee

9 Attorneys for Plaintiffs Navajo Nation and
10 Agnes Laughter

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 The new voter identification requirements of A.R.S. § 16-579 and the implementing
13 procedures impose an unauthorized, unnecessary and undue burden on the fundamental
14 right to vote of Navajo voters. Therefore, the new voter identification requirement is
15 unconstitutional both on its face and as applied in violation of the First and Fourteenth
16 Amendments to the United States Constitution; the Twenty-Fourth Amendment to the
17 United States Constitution; the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A) and
18 (a)(2)(B); and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a).

19 **FACTS**

20 **I. Voter Identification Requirements**

21 Prior to 2005, voters in Arizona did not have to prove their identity when voting at
22 the polls on Election Day. In 2004, Arizona voters approved Proposition 200, the "Arizona
23 Taxpayer and Citizen Protection Act." The Act amends A.R.S. § 16-579, the procedures
24 for obtaining a ballot by an elector, by requiring an elector voting in person to "present one
25 form of identification that bears the name, address and photograph of the elector or two
26 different forms of identification that bear the name and address of the elector." Neither
27 Proposition 200 nor A.R.S. § 16-579 defines "identification" nor does either limit the types
28 of identification that can be used to obtain a ballot. No similar imposition is placed on
electors participating in the early voting process.

1 Defendant Secretary of State Brewer adopted a narrow list of acceptable forms of
2 identification found in the "Procedure for Proof of Identification at the Polls"
3 ("Procedures") for the stated purpose of implementing A.R.S. § 16-579(A). The
4 "Procedures" limit the type of identification that can be presented by electors before
5 receiving a ballot at the polls on Election Day. An elector must provide identification by
6 presenting:

7 One of the following forms of unexpired identification with the photograph, name,
8 and address of the elector:

- 9 • Valid Arizona driver license.
- 10 • Valid Arizona nonoperating identification license.
- 11 • Tribal enrollment card or other form of tribal identification.
- 12 • Valid United States federal, state, or local government issued
13 identification.

14 OR

15 Two of the following forms of unexpired identification without a photograph that
16 contains the name and address of the elector:

- 17 • Utility bill of the elector that is dated within ninety days of the date of
18 the election. A utility bill may be for electric, gas, water, solid waste,
19 sewer, telephone, cellular phone, or cable television.
- 20 • Bank or credit union statement that is dated within ninety days of the
21 date of the election.
- 22 • Valid Arizona Vehicle Registration.
- 23 • Indian census card.
- 24 • Property tax statement of the elector's residence.
- 25 • Tribal enrollment card or other form of tribal identification.
- 26 • Vehicle insurance card.
- 27 • Recorder's Certificate.

28 The Procedures also provide that "[o]ther forms of identification not on this list must be
deemed acceptable by the county election official in charge of elections and must establish
the identity of the elector in accordance with the requirements of A.R.S. § 16-579(A)."

II. Navajo Nation Members Are Less Likely Than Other Electors to Have Identification Deemed Acceptable by Defendants

1 The new voter identification requirements threaten to disenfranchise Navajo voters
2 who, by their culture and circumstances, are less likely than other voters to have
3 identification deemed acceptable by the defendants.

4 Nation members are less likely than other electors to have a photo identification
5 deemed acceptable by defendants for three reasons: (1) the Navajo Nation does not issue
6 photo identification cards; (2) at least 20% of homes located on the Arizona portion of the
7 Navajo Nation Reservation lack access to a vehicle so that a portion of the population has
8 no reason to obtain a driver license; and (3) there is no need for a member of the Navajo
9 Nation living on the Reservation to obtain an Arizona identification card. In the State of
10 Arizona, at least 390,000 residents lack a driver's license.¹

11 Because of the nature of the Navajo Reservation and the laws governing the Navajo
12 Reservation, Navajo electors living on the Reservation are less likely than other electors to
13 have the other forms of identification listed in the Procedures. First, Navajos living on the
14 reservation do not receive property tax statements. Property tax statements are not issued
15 to tribal members living on Indian reservations. Second, Navajos are less likely to have
16 utility bills than other Arizona electors. According to the 2000 Census, 33% of the housing
17 units lack complete plumbing, 62% lack telephone service; over 56% of Navajo households
18 are heated by wood, and traditional Navajos living in hogans do not have electricity and do
19 not receive utility bills. Even if a household has a utility bill, that bill will be issued in only
20 one person's name. Third, Navajos are less likely than other Arizona residents to have a
21 vehicle insurance card or an Arizona vehicle registration card. Fourth, Navajos with bank
22 accounts are unlikely to use their private banking information as a form of identification.
23 Fifth, tribal members do not have tribal identification cards or census cards that contain an
24

25
26 ¹ According to the 2000 Census, Arizona has a voting age population of 3,763,685. U.S.
27 Census Bureau, Table DP-4, Profile of Selected Demographic Characteristics: 2000. The
28 Federal Highway Administration reported that there were 3,373,959 Arizona residents with
driver's licenses in the year 2000. Federal Highway Administration: Licensed Total
Drivers, by Age 2000, Table DL-22, available at
<http://www.fhwa.dot.gov/ohim/hs00/pdf/dl22.pdf>.

1 individuals name and address. Tribal and federal Certificates of Indian Blood contain only
2 the individual's name and census number. Some census numbers are provided only on
3 coins and do not include an individual's name. Finally, an individual's "address" on a
4 reservation is not specifically described by a street number, rural route number, lot and
5 block or metes and bounds. Addresses typically describe the location of a residence by
6 distance from a landmark, such as a Chapter House. The same address can appear in
7 several different formats that may make comparison difficult. *See* Compl., Exh. 8.
8 Because of the rural nature of the Reservation, in most areas, mail is not delivered to an
9 individual's home address but to a post office box. If the individual cancels or does not
10 renew his/her post office box, then the individual will not receive election mail sent by the
11 counties.

12 The voter identification requirements are scheduled to be implemented for the first
13 time on the Reservation precincts on September 12, 2006.

14 **III. The Voter Identification Requirement Imposes An Undue And Unnecessary**
15 **Burden On The Right To Vote**

16 Many Navajos, such as Plaintiff Laughter, are not proficient in English. Navajo
17 electors with limited English proficiency must vote at the polls to obtain official language
18 assistance. Navajos who are unable to read English or who have cancelled their post office
19 addresses will not be able to read any election mail notifying voters of the new voter
20 identification requirements. As a result, many Navajos may not even know of the voter
21 identification requirements before Election Day.

22 Under the Procedures, Navajos will be required to expend funds to obtain
23 identification deemed acceptable by the defendants before casting a regular ballot.
24 Plaintiff Agnes Laughter and other members of the Navajo Nation lack the required
25 documents to obtain an Arizona nonoperator's license. Plaintiff Laughter does not have a
26 birth certificate and has been unsuccessful in her efforts to obtain an Arizona nonoperator's
27 license. Navajos who have the required documentation to obtain a state identification card
28 must travel to a Motor Vehicle Division ("MVD") Office. There are four locations on the

1 Reservation where an individual can obtain an Arizona driver's license or Arizona
2 nonoperator's license. These offices are located in Tuba City, Chinle, Window Rock, or
3 Tec Nos Pos. If she had the proper identification, Plaintiff Agnes Laughter would have to
4 expend valuable resources to travel one hundred miles roundtrip to obtain this
5 identification. Other members of the Nation would also be required to expend resources to
6 travel to one of the four MVD offices to obtain an identification card. A Navajo member
7 can also travel to Window Rock, close to the Arizona/New Mexico border, to obtain an
8 identification card issued by the Navajo Nation Department of Safety. An individual
9 Navajo would have to pay a \$5.00 fee to obtain this identification and would have to
10 expend funds to travel to Window Rock to obtain this identification card.

11 Because of the high poverty rates, lack of transportation, and limited locations in
12 which to obtain identification cards, many Navajos will be unable to obtain the required
13 identification before the September 12, 2006 elections. Further, the MVD offices located
14 on the Reservation are open only from 8:00 a.m. to 5:00 p.m. during the week. The offices
15 are not open evenings or on weekends. The Navajo Nation Department of Highway Safety
16 is only open during the day during the week. The limited times that the offices are open
17 will prevent people who live and work on other parts of the Reservation from obtaining the
18 identification cards without expending resources by traveling to these locations during the
19 week. In some cases, the individuals will lose valuable income by taking off from work to
20 obtain the identification.

21 **IV. The New Voter Identification Requirement Will Have A Disparate Impact On**
22 **Navajo Voters**

23 As outlined in Plaintiffs' Complaint, Navajo voters are less likely than other voters
24 to have the forms of identification outlined in the new voter identification procedures.
25 Because many Navajos are not English proficient, the information regarding the new voter
26 identification requirements that they may receive in the mail will not be read. Further,
27 Navajos will be less likely to return to County offices with identification to perfect a ballot
28 if they have identification and fail to bring it to the polls. *See Comp., Exh. 6.* Plaintiff

1 Agnes Laughter and other Navajos lacking proper identification will be denied their
2 fundamental right to cast a ballot in the upcoming state and federal elections.

3 Navajos can easily identify other tribal members through the use of language,
4 kinship relations, and personal identification. The Navajo Nation is divided into one
5 hundred ten Chapters, local governments units. According to the 2000 Census, Chapter
6 sizes range from 0 to 9,279 persons. *See Comp., Exh. 7.* Most Chapters have fewer than
7 2,000 members. Often, Navajo Nation Elections, including Chapter Elections, are
8 scheduled simultaneously with federal and state elections to encourage voter turnout for
9 state and federal elections. Chapter Elections and State and Federal Elections are often
10 held at the same location, at a Chapter House. The new voter identification requirements
11 will result in Navajo poll workers turning away tribal members even when they can
12 personally verify the identity of the individual.

13 **V. The State And Counties Will Not Be Burdened By Not Requiring Voter**
14 **Identification**

15 Defendants will not have to complete additional work or be burdened with additional
16 costs if the voter identification requirements are enjoined.

17 **ARGUMENT**

18 **I. Standard for Injunctive Relief**

19 The Ninth Circuit recognizes two sets of standards for granting injunctive relief, a
20 traditional test and an alternative test. *See American Motorcyclist Ass'n v. Watt*, 714 F.2d
21 962, 965 (9th Cir. 1983); *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 501 (9th Cir.
22 1980). Under the "traditional" test, the equitable criteria for determining whether an
23 injunction should issue are: "(1) a strong likelihood of success on the merits, (2) the
24 possibility of irreparable injury to plaintiffs if preliminary relief is not granted, (3) a
25 balance of hardships favoring the plaintiffs, and (4) advancement of the public interest (in
26 certain cases)." *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir.
27 1995) (internal quotation marks omitted). The "alternative" test allows the moving party to
28 meet its burden by demonstrating "either a combination of probable success on the merits

1 and the possibility of irreparable injury or that serious questions are raised and the balance
2 of hardships tips sharply in his favor." *Id.* (quoting *William Inglis & Sons Baking Co. v. ITT*
3 *Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975)). The Court does not view these
4 tests as distinct but "opposite ends of a single continuum in which the required showing of
5 harm varies inversely with the required showing of meritoriousness." *Rodeo Collection,*
6 *Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (9th Cir. 1987) (quoting *San Diego Comm.*
7 *against Registration & Draft v. Governing Bd. of Grossmont Union High School Dist.*, 790
8 F.2d 1471, 1473 n.3 (9th Cir. 1986)). If the balance of harm tips decidedly towards the
9 moving party, the moving party need not show as strong a likelihood of success on the
10 merits as when the balance tips less decidedly. *Alaska v. Native Village of Venetie*, 856
11 F.2d 1384, 1389 (1988). The Court's task is to "balance the equities in the exercise of its
12 discretion." *Int'l Jensen, Inc. v. Metrosound USA, Inc.*, 4 F.3d 819, 821 (9th Cir. 1993).

13 **II. The New Voter Identification Requirements Impede Navajos' Fundamental**
14 **Right to Vote And Cause Irreparable Harm to Navajo voters**

15 "Voting is one of the most fundamental and cherished liberties in our democratic
16 system of government." *Burson v. Freeman*, 504 U.S. 191, 214 (1992) (Kennedy, J.,
17 concurring). The right to vote is "of the most fundamental significance under our
18 constitutional structure." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (internal quotation
19 marks omitted). The Supreme Court recognizes the right to vote is guarded by special
20 constitutional protections. The Supreme Court explained the reasons for this protection in
21 *Reynolds v. Sims*, 377 U.S. 533 (1964):

22 The right to vote freely for the candidate of one's choice is of the essence
23 of a democratic society, and any restrictions on that right strike at the heart
24 of representative government. . . .

25 [T]he right to exercise the franchise in a free and unimpaired manner is
26 preservative of other basic civil rights.

27 *Id.* at 555, 562; accord, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("[o]ther rights, even
28 the most basic, are illusory if the right to vote is undermined"). Because of the preferred
place it occupies in our constitutional scheme, "any illegal impediment to the right to vote,
as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable

1 injury." *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984); accord, *Foster v.*
2 *Kusper*, 587 F. Supp. 1191, 1193 (N.D. Ill. 1984) (denial of the right to vote for candidate
3 of choice constitutes "irreparable harm"); see also *Elrod v. Burns*, 427 U.S. 347, 373
4 (1976) (the loss of constitutionally protected freedoms "for even minimal periods of time,
5 unquestionably constitutes irreparable injury").

6 **III. The Voter Identification Requirements Constitute A Poll Tax Prohibited by the**
7 **Twenty-Fourth Amendment to the United States Constitution**

8 Forty-two percent of Navajos residing on the Reservation live in poverty. Those
9 living in poverty cannot afford to purchase all the resources one requires to live. Those
10 who live below the poverty line have no discretionary disposable income. Thus, at least
11 42% of the Navajo Nation lacks resources to expend to obtain identification for voting.

12 Under A.R.S. § 16-579 and the "Procedure for Proof of Identification at the Polls"
13 an elector must have identification in order to cast a regular ballot at the polls. To meet the
14 voter identification requirements, many Navajo Nation members living on the Reservation
15 must travel long distances to obtain identification from either a state, federal, or tribal
16 agency. Navajos living on the Reservation lacking identification will have to expend funds
17 in order to vote. Requiring voters to spend funds, whether it is copying fees, gas costs, or
18 identification fees is an unconstitutional poll tax in violation of the Twenty-Fourth
19 Amendment of the United States Constitution:

20 The right of citizens of the United States to vote in any primary or other
21 election for President or Vice President, for electors for President or Vice
22 President, or for Senator or Representative in Congress, shall not be denied or
23 abridged by the United States or any State by reason of failure to pay a poll
24 tax or other tax.

25 U.S. CONST., AMEND. XXIV, SEC. 1.

26 The Supreme Court has held that a poll tax of \$1.50 is a violation of the Twenty-
27 Fourth Amendment. *Harman v. Forsenius*, 380 U.S. 528 (1965); *Harper v. Virginia Bd.*
28 *of Elections*, 383 U.S. 663 (1966). In *Harman*, the Court invalidated a Virginia statute
requiring either a \$1.50 poll tax or the filing a certificate of residence six months before
the election. To invalidate the statute, the Court stated that "it need only be shown that [the

1 statute] imposes a material requirement solely upon those who refuse to surrender their
2 constitutional right to vote in federal elections without paying a poll tax." *Harman*, 380
3 U.S. at 541. States cannot "impose a penalty upon those who exercise a right guaranteed
4 by the Constitution." *Id.* at 540 (citing *Frost & Frost Trucking Co. v. Railroad Comm'n of*
5 *California*, 271 U.S. 583 (1926)). In invalidating Virginia's statute, the Harman Court held

6 Constitutional rights would be of little value if they could be . . . indirectly
7 denied or manipulated out of existence. Significantly, the Twenty-fourth
8 Amendment does not merely insure that the franchise shall not be denied by
9 reason of failure to pay the poll tax; it expressly guarantees that the right to
10 vote shall not be denied or abridged for that reason. Thus, like the Fifteenth
11 Amendment, the Twenty-fourth nullifies sophisticated as well as simple-
minded modes of impairing the right guaranteed. It hits onerous procedural
requirements which effectively handicap exercise of the franchise by those
claiming the constitutional immunity.

12 *Id.* at 540-541 (internal citations and quotation marks omitted).

13 The material requirement that, in order to vote at the polls, an individual must obtain
14 and present identification deemed acceptable by defendants abridges the right to vote and
15 constitutes a poll tax.

16 **IV. The New Voter Identification Requirements Violate the Equal Protection**
17 **Clause of the Fourteenth Amendment of the United States Constitution**

18 The Equal Protection Clause provides that "[n]o state shall make or enforce any law
19 which shall abridge the privileges or immunities of citizens of the United States; nor shall
20 any state deprive any person of life, liberty, or property, without due process of law; nor
21 deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST.
22 AMEND. XIV, SEC. 1. The voter identification requirements violate the Equal Protection
23 Clause because (1) the requirements make the affluence of the voter—ability to pay a fee in
24 order to obtain voter identification—an electoral standard; and (2) they create two classes
25 of voters, imposing the voter identification requirements only on electors who vote at the
26 polls.

27 **A. The Voter Identification Requirements Are Discriminatory**

28 States are restrained from imposing voting standards that invidiously discriminate.

1 *Harper*, 383 U.S. at 666. In *Harper*, the Supreme Court held that Virginia's \$1.50 poll tax
2 requirement for state elections violated the Equal Protection Clause of the United States
3 Constitution. *Id.* "Voter qualifications have no relation to wealth nor to paying or not
4 paying this or any other tax." *Id.* at 666. Presenting voter identification acceptable to
5 defendants is a condition for voting at the polls. This condition is discriminatory in that it
6 requires an individual to expend funds in order to obtain identification for voting. *Id.* at
7 668 ("as a condition of obtaining a ballot—the requirement of fee paying causes an
8 'invidious' discrimination that runs afoul of the Equal Protection Clause"); *see also Skinner*
9 *v. Oklahoma*, 316 U.S. 535, 541 (1942). To require an elector to obtain identification as a
10 condition to voting is to "introduce a capricious or irrelevant factor." *Harper*, 383 U.S. at
11 668.

12 The voter identification requirements relate to an individual's wealth or the financial
13 ability to obtain an identification form acceptable for voting. The documents deemed
14 acceptable by defendants require that voters own a car, have electricity, own a home off the
15 reservation, or have a bank account. These requirements are directly related to wealth and
16 property ownership. The Supreme Court has held that neither wealth nor property
17 ownership can be used as a condition for voting. *Harman*, 380 U.S. 528 (poll tax payment
18 or certificate of residence filing); *Harper*, 383 U.S. 663 (poll tax payment).

19 Many Navajos have no expendable income to use to obtain identification for voting;
20 Navajos living on the Reservation do not receive property tax statements; and 75% of those
21 homes in the United States that lack electricity are located on the Navajo Reservation. The
22 wealth and state property ownership requirements imposed by the voter identification
23 requirements unduly burden qualified Navajo electors in the exercise of their fundamental
24 right to vote.

25 **B. The Voter Identification Requirements Discriminate Against Electors**
26 **Voting At The Polls**

27 Arizona has two classes of voters, early voters and electors who vote at the polls on
28 Election Day. Prior to the adoption of Proposition 200, early voters and electors voting at

1 the polls provided the same form of identification for voting, their signature. Each early
2 voter can still vote by providing a signature, but electors voting at the polls must provide, in
3 addition to their signatures, identification deemed acceptable by defendants.

4 Applying stringent voter identification requirements to electors voting at the polls,
5 but not to electors voting by mail is discriminatory. "[W]here fundamental rights and
6 liberties are asserted under the Equal Protection Clause, classifications which might invade
7 or restrain them must be closely scrutinized and carefully confined." *Harper* at 670. The
8 voter identification requirement cannot survive "exacting scrutiny." *Buckley v. Valeo*, 424
9 U.S. 1, 94 (1976). Navajos vote at the polls at a higher rate than other electors. The voter
10 identification requirements will deprive Navajo members from voting in state and federal
11 elections.

12 **V. The New Voter Identification Requirements Deprive Navajos Of The Right To**
13 **Vote On Account Of Race Or Color In Violation Of Section 2 Of The Voting**
14 **Rights Act**

15 Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a), provides that:

16 No voting qualification or prerequisite to voting or standard, practice, or procedure
17 shall be imposed or applied by any State or political subdivision in a manner which
18 results in a denial or abridgement of the right of any citizen of the United States to
19 vote on account of race or color, or in contravention of the guarantees set forth in
20 [42 U.S.C. §] 1973b(f)(2), as provided in subsection (b).

21 42 U.S.C. § 1973(a). Section 1973(b) sets forth the requirements for establishing a
22 violation of § 1973(a):

23 A violation of subsection (a) of this section is established if, based on the
24 totality of circumstances, it is shown that the political processes leading to
25 nomination or election in the State or political subdivision are not equally
26 open to participation by members of a class of citizens protected by
27 subsection (a) of this section in that its members have less opportunity than
28 other members of the electorate to participate in the political process and to
elect representatives of their choice.

42 U.S.C. § 1973(b).

Native Americans are a protected class under the Voting Rights Act, and Navajos
will have less of an opportunity than other electors to participate in the electoral process

1 due to the factors set forth in the Complaint and in this Motion. "Section 2 prohibits all
2 forms of voting discrimination." *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986).
3 Because Navajos are less likely than other electors to have the forms of acceptable
4 identification required by defendants, Navajos "do not have an equal opportunity to
5 participate in the political processes and to elect candidates of their choice." *Id.* at 44.²
6 Whether the political processes are equally open requires an evaluation of the past and
7 present reality. "The essence of a § 2 claim is that a certain electoral law, practice, or
8 structure interacts with social and historical conditions to cause an inequality in the
9 opportunities enjoyed by [Native American] and white voters to elect their preferred
10 representatives." *Id.* at 47.

11 Native Americans have been discriminated against in the electoral process in
12 Arizona. *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975); *Harrison v.*
13 *Laveen*, 196 P.2d 456 (Ariz. 1948). Although Native Americans were granted citizenship
14 in 1924 under the Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (codified at 8
15 U.S.C. § 1401(b)), the right to vote was not extended to Native Americans until 1948.
16 *Harrison*, 196 P.2d 456. Because of the voting impediments for Navajos, a Consent
17 Decree was entered into between the State and the federal governments to ensure that
18 election practices and procedures provide Navajo members with an equal opportunity to
19 participate in the electoral process. *See* Compl., Exh. 5. Despite efforts by the counties,
20 _____

21 ² To determine whether Navajos will be adversely affected, the Supreme Court directs that
22 the following factors may be relevant: (1) the history of voting-related discrimination in the
23 State or political subdivision; (2) the extent to which voting in the elections of the State or
24 political subdivision is racially polarized; (3) the extent to which the State or political
25 subdivision has used voting practices or procedures that tend to enhance the opportunity for
26 discrimination against the minority group, such as unusually large election districts,
27 majority vote requirements, and prohibitions against bullet voting; (4) the exclusion of
28 members of the minority group from candidate slating processes; (5) the extent to which
minority group members bear the effects of past discrimination in areas such as education,
employment, and health, which hinder their ability to participate effectively in the political
process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the
extent to which members of the minority group have been elected to public office in the
jurisdiction. This list not conclusive, and there is "no requirement that any particular
number of factors be proved, or that a majority of them point one way or the other." *Id.* at
44-45 (citations omitted; footnote omitted).

1 voter intimidation occurred on reservation precincts in Apache County in 2002. *See*
2 *Compl.*, Exh. 11.

3 Requiring certain forms of identification at the polls is a "standard, practice, or
4 procedure" that will result in the denial of the right to vote on account of race. If the voter
5 identification requirements are implemented at polling places located on the Navajo
6 Reservation, Navajo members will have less "less opportunity than other members of the
7 electorate to participate in the political process and to elect representatives of their choice."
8 *Thornburg*, 478 U.S. at 44.

9 **VI. The Voter Identification Requirements Violate the Civil Rights Act**

10 The Civil Rights Act prohibits the treatment of voters within the same county or
11 political subdivision differently. Section 1971(a)(2)(A) provides that "[n]o person acting
12 under color of state law shall," when

13 determining whether any individual is qualified under State law or laws to
14 vote in any election, apply any standard, practice, or procedure different from
15 the standards, practices, or procedures applied under such law or laws to
16 other individuals within the same county, parish, or similar political
subdivision who have been found by State officials to be qualified to vote.

17 42 U.S.C. § 1971(a)(2)(A). Within Apache, Navajo, and Coconino counties, Navajos cast
18 their ballots at the polls at a significantly higher rate than non-natives. Persons who can
19 and do participate in the electoral process by early ballot must provide only their signature.
20 Persons voting at the polls, must provide a signature and either one form of identification or
21 two forms of identification in order to vote. Therefore, the voter identification
22 requirements violate Section 1971(a)(2)(A) of the Civil Rights Act.

23 The voter identification requirements also violate Section 1971(a)(2)(B) of the Civil
24 Rights Act. Section 1971(a)(2)(B) prohibits the denial of the right to vote for an act or
25 omission that is not material to determining whether a voter is qualified to vote under state
26 law. Requiring voter identification from Navajo voters is not material to determining
27 whether or not the individual is qualified to vote under Arizona law. A.R.S. § 16-101 sets
28 forth the qualifications for voters in Arizona. The law provides that every resident that is a

1 citizen of the United States, is eighteen, has resided in the State twenty-nine days preceding
2 the election, is able to write his name or make his mark, has not been convicted of treason
3 or a felony, and has not been adjudicated an incapacitated person is qualified to register to
4 vote. A.R.S. § 16-101.

5 It is well-established that Native Americans, over the age of eighteen, living on
6 reservations are eligible to vote in Arizona elections. *Harrison*, 196 P.2d 456; *Shirley v.*
7 *Superior Court*, 513 P.2d 939, 942 (Ariz. 1973). Navajo voters who are duly registered
8 will not be able to vote because they lack the identification required by defendants, whether
9 or not the poll workers can personally verify the voter's identity. Persons voting by mail
10 will not be subject to the voter identification requirements.

11 **VII. The State Does Not Have A Compelling State Interest In Implementing The**
12 **Voter Identification Requirements On The Navajo Reservation**

13 The voter identification requirements are not necessary to establish voter
14 identification on the Navajo Reservation. *Harman*, 380 U.S. at 543. Identification by
15 personal knowledge would be sufficient for confirming the identification of a significant
16 number of Navajo members. Because of the rural nature of the Reservation, the local
17 government units on the Reservation, the extensive kinship system, and the stability of
18 Navajo society, Navajo poll workers are likely to confirm the personal identity of an
19 elector. Moreover, only 0.1% of the Reservation population are not United States' citizens.
20 *See Compl., Exh. 9.* Further, there is little doubt that Navajo members living on the
21 Arizona portion of the Reservation are citizens and residents of Arizona. *See Harrison*, 196
22 P.2d 456; *Shirley*, 513 P.2d at 942; *Goodluck*, 417 F. Supp. at 15.

23 The State of Arizona has no compelling state interest to require identification at
24 polling places on the Navajo Reservation to prevent voter fraud. The proponents of
25 Proposition 200 did not claim that there existed widespread voter fraud in the State of
26 Arizona, nor were there any claims of voter fraud at the precincts located on the Navajo
27 Reservation. *See Compl., Exh. 1* at 44-47. The proponents claim that the influx of
28 immigrants causes a fear of voter fraud. When the right to vote is implicated, the statute

1 "must be drawn with precision, and must be tailored to serve [the State's] legitimate
2 objectives. And if there are other, reasonable ways to achieve those goals with a lesser
3 burden on a constitutionally protected activity, a State may not choose the way of greater
4 interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405
5 U.S. 330, 343 (1972) (internal citations and quotation marks omitted). The State's interest
6 in preventing voter fraud is not narrowly tailored to achieve that interest. *Dunn*, 405 U.S.
7 at 343. The State already has criminal deterrents to prevent voter fraud. There is no reason
8 why signatures and personal identification by official poll workers cannot suffice for
9 identification at the polls.

10 The State's voter identification requirements are not applied to early voters, and thus
11 the new voter identification requirements fail to address the potential of fraud by early
12 voting.

13 CONCLUSION

14 For the reasons stated above, Plaintiffs respectfully request that the Court enjoin
15 defendants from implementing at polling places located on the Navajo Reservation the
16 voter identification requirements outlined in Proposition 200 and the Procedures.

17 RESPECTFULLY SUBMITTED this 20th day of June, 2006.

18 Sacks Tierney P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2006, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing.

s/ Marvin S. Cohen
