No. 20-16890

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARLENE YAZZIE, CAROLINE BEGAY, LESLIE BEGAY, IRENE ROY, DONNA WILLIAMS and ALFRED MCROYE,

Plaintiffs-Appellant,

v.

KATIE HOBBS, in her official capacity as Secretary of State for the State of Arizona

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. CV-20-08222-PCT-GMS
Hon. G. Murray Snow

APPELLANT'S REPLY FOR EXPEDITED BRIEFING

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INTRODUCTION

Appellants submit this reply to Appellee's brief in opposition to Appellant's request for an expedited briefing schedule and the Declaration of Steven D. Sandven with attached exhibits (hereafter "Sandven Declaration"). Appellant's action requires swift action by the Court. Appellant is moving with all due haste, including filing this Reply ahead of the briefing schedule provided by the Court. Additionally, should the Court grant this Request, Appellant is prepared to have its Opening Brief on Appeal electronically filed by mid-day on October 2, 2020.

ARGUMENT

1. APPELLANTS FILED THEIR REQUEST WITH ALL DUE SPEED

The District Court issued its Order denying preliminary injunction on the afternoon of Friday September 25, 2020. Over the weekend Plaintiffs' transferred the matter to new counsel. On Monday September 28, 2020 counsel ordered the transcript for appeal and filed the Notice of Appeal. Understanding the urgency of this matter and in compliance with Rule 27-3, on September 29, 2020, Appellant contacted counsel for Appellee via email, provided the Rule 27-3 motion, Court of Appeals Form 16 and requested a response. *Sandven Declaration* Exhibit 6. No response was provided. *Id*. Again, on September 30, 2020 a second email was sent asking for Appellee's position and transmitting a proposed briefing

schedule. *Id*. Only after this second request for a response, did counsel for Appellee then respond stating that Appellee will oppose the motion. *Id*. Thereafter the Court set a briefing schedule for Appellee's Opposition and Appellant's Reply. As stated above, Appellant is filing its Reply ahead of schedule and is prepared to file its Opening Brief mid-day on Friday October 2, 2020.

Appellant clearly understands the need for swift action in this matter. Appellant has not acted in any manner that contradicts the position that speed is of the essence. Appellee caused delay by its failure to respond to Appellants' request for a response in excess of 24 hours. Appellants' claims are proper for expedited briefing and again requests that this Court grant its motion.

2. THE *PURCELL* CASE DID NOT BAR THE 7TH CIRCUIT FROM ORDERING INJUNCTIVE RELIEF THIS WEEK.

The Seventh Circuit recently ruled that vote by mail ballots must be counted as long as they are post marked by election day. *DNC et. al. v. Bostlemann*, Nos. 20-2835 & 20-2844, Submitted September 26, 2020, Decided September 29, 2020. Preliminary Injunction was heard by the district court on September 21, 2020 and the order was issued on September 24, 2020. Not the district court or the Seventh Circuit felt that the Purcell case precluded or otherwise impacted that case. The holding in *Purcell* does not bar Appellant's action.

3. THE DISTRICT COURT JUDGE APPLIED THE INCORRECT LEGAL STANDARD FOR A VIOLATION OF SECTION 2.

Appellate review is necessary here because the district court completely misapplied the legal standard for a Section 2 abridgement claim under the Voting Rights Act of 1965. The district court not only ignored the fact that Plaintiffs, as Native Americans living on a reservation, comprise a special protected class of voter and instead compared these voters to other non-Indian rural voters as if that has any relevance in a Section 2 abridgement violation. *Sandven Declaration,* Exhibit4 and 5. Additionally, the district court accepted Appellee's argument that as long as Plaintiffs had some other option for voting, it was acceptable to ignore the statutory requirement for "equal opportunities" mandated under the VRA thereby utterly failing to recognize the fact that Navajo Nation Residents had less opportunities to exercise their right to vote. *Sandven Declaration* Exhibit 3. Had the district court properly applied the test for Section 2 Abridgement claims, this appeal would not be necessary so close to the general election. Attached as Exhibits 4 and 5, respectively, to the *Sandven Declaration* is the United States Department of Justice Statement of Interest and Amicus Brief which clearly sets forth in minute detail the test, application and legislative basis for analyzing a Section 2 Abridgement Claim. The Statement of Interest (Exhibit 4) was also provided to the district court during the preliminary injunction briefing.

4. APPELLEE HAS ALREADY MADE CHANGES TO THE VOTER RECOMMENDATIONS, ONE MORE CHANGE CREATES NO HARM.

Appellee has made several changes to the recommended ballot return schedule published by the State of Arizona. *See Sandven Declaration* Exhibits 1 and 2. It would not create any harm to make one additional change which would extend the receipt date for ballots mailed by voters living on the Navajo Nation Reservation. Truthfully, the Appellee can post a notice on the Secretary of State's website, can advertise the change on the Navajo Reservation and can easily communicate with the Navajo Nation Council to make sure the voters are informed. Absent that, the Appellee can just implement the requested remedy and permit ballots mailed from the Navajo Nation Reservation to continue to be counted until November 13, 2020 without any effective need to communicate same to the public. Instead, just do it.

AZVoteSafe Guide for Native American Voters was prepared and made public after the imposition of this action. This voter guide provides in part: "Tribal members historically participate in voting on Election Day as a civic and community event, and *many tribal members face challenges to voting by mail due to limited mail service* and language assistance needs. However, because of current public health concerns, it's more important than ever to plan ahead and have back-

up options available. *Sandven Declaration* Exhibit 2 (*Emphasis added)*. If you need to mail your voted ballot back, make sure you mail it early enough to arrive at the County Recorder's office by 7:00 p.m. on Election Day. The state's recommended last day to mail back a ballot is October 27, *but if you live in a rural area with slower mail service, you should build in more time. Id*. (*Emphasis Added*). Thus, Appellee has already recognized that certain voters are disadvantaged by the current vote by mail system. A need exists to fix this problem.

CONCLUSION

For all of the foregoing reasons, and most specifically because the district court erred its application of the Section 2 legal analysis and instead applied an incorrect legal standard to the undisputed facts, it is critical that the Appellate Court review and reverse the district court's order denying Appellant's motion for preliminary injunction prior to the start of voting in the State of Arizona.

Date: October 1, 2020.

STEVEN D. SANDVEN PC

/s/ Steven D. Sandven
Steven D. Sandven

Attorney for Appellants Darlene Yazzie, Caroline Begay, Leslie Begay, Irene Roy, Donna Williams and Alfred McRoye

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2020 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 1, 2020

STEVEN D. SANDVEN PC

/s/ Steven D. Sandven
Steven D. Sandven

Attorney for Appellants Darlene Yazzie, Caroline Begay, Leslie Begay, Irene Roy, Donna Williams and Alfred McRoye

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARLENE YAZZIE, CAROLINE BEGAY, LESLIE BEGAY, IRENE ROY, DONNA WILLIAMS and ALFRED MCROYE,

Appellant,

v.

KATIE HOBBS, in her official capacity as Secretary of State for the State of Arizona,

Appellee.

Case No. 20-16890

DECLARATION OF STEVEN SANDVEN

I declare under the penalty of perjury that the following is true and correct:

1. Attached as **Exhibit 1** to this Declaration is a true and correct copy of the "2020 AZ VoteSafe Guide for Native Americans Recommendations for Arizona Voters in Tribal Communities."
2. Attached as **Exhibit 2** to this Declaration is a true and correct copy of a search of the Appellee's website regarding the posting of the "AZVoteSafeGuide for Native American Voters."
3. Attached as **Exhibit 3** to this Declaration is a true and correct copy of excerpt 110:2-15 from the September 22, 2020 hearing.
4. Attached as **Exhibit 4** to this Declaration is a true and correct copy of the Statement of Interest of the United States of America in *Sanchez, et al. v. Cegavske, et al.*, 214 F. Supp. 3d 361 (2016).
5. Attached as **Exhibit 5** to this Declaration is a true and correct copy of the Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants in *Wandering Medicine, et al. v. McCulloch, et al*., No. 12-35926 (9th Cir. 2013).
6. Attached as **Exhibit 6** to this Declaration is a true and correct copy of an September 29-30, 2020 email string with opposing counsel with attached memorandums.

Dated: October 1, 2020

/s/Steven D. Sandven_____
Steven D. Sandven

2020 AZVoteSafe Guide for Native Americans

Recommendations for Arizona Voters in Tribal Communities

Due to COVID-19, the Secretary of State's Office is encouraging all voters to request a ballot-by-mail to ensure they have a safe and reliable option for voting. Tribal members historically participate in voting on Election Day as a civic and community event, and many tribal members face challenges to voting by mail due to limited mail service and language assistance needs. However, because of current public health concerns, it's more important than ever to plan ahead and have back-up options available. Use the steps below as a quick reference guide to making your plan for voting in 2020 and ensuring your voice is heard in our democracy.

STEP 1 – REGISTER TO VOTE

- Register to vote by filling out a voter registration form, which you can download at Arizona.Vote or call your County Recorder to request a mailed form. If you have an AZ Driver's License or ID, you can register to vote online at www.servicearizona.com.
- If you're already registered, confirm your registration status at Arizona.Vote and update your address or other information if needed.
- The deadline to register to vote or update your voter registration is October 5, 2020.

STEP 2 – REQUEST A BALLOT-BY-MAIL

- Getting a ballot-by-mail should be part of every tribal member's voting plan. It is your choice how you ultimately decide to vote. Even if you prefer or plan to vote in-person, requesting a ballot-by-mail will ensure you have a safe and secure back-up option for voting this year – an option that doesn't require waiting in line to get a ballot or needing to vote at a potentially crowded polling place.
- If you have a mailing address or P.O. Box and are not already on the Permanent Early Voting List (PEVL), request a one-time ballot-by-mail for the 2020 General Election or join the PEVL as soon as possible so you have enough time to receive the ballot, get language or other assistance if needed, vote it, and return the ballot on time.
- Call your County Recorder or go to Arizona.Vote to request a ballot-by-mail. The deadline to request a ballot-by-mail or join the PEVL is October 23, 2020.

STEP 3 – VOTE AND SIGN YOUR BALLOT-BY-MAIL

- If you need language assistance when you get your ballot-by-mail, contact your County Recorder's Office or Elections Department (listed below) to learn about available resources. Certain community organizations may also have language assistance resources.
- After voting your ballot, put your ballot in the return envelope and make sure you sign the affidavit envelope. You should also provide a phone number in the appropriate space on the envelope so elections officials can contact you if there are any issues with your ballot.

EXHIBIT 1

KNOW YOUR OPTIONS — MAKE SURE YOU HAVE A VOTE PLAN

STEP 4 – RETURN YOUR BALLOT BY 7:00 P.M. ON ELECTION DAY

- If you voted a ballot-by-mail, your best option is to return your voted ballot to any voting location in your county on Election Day. You can also drop off your ballot at your County Recorder's office, any early voting location in your county, or any other designated drop-off location in your county. Contact your County Recorder or visit Arizona.Vote to find all available drop-off locations.
- Ballots must be received by county election officials by 7:00 p.m. on Election Day to be counted.
- If you cannot drop off your ballot yourself for any reason, a family member, household member, caregiver, or election worker can help return your voted, sealed, and signed ballot for you.
- If you need to mail your voted ballot back, make sure you mail it early enough to arrive at the County Recorder's office by 7:00 p.m. on Election Day. The state's recommended last day to mail back a ballot is October 27, but if you live in a rural area with slower mail service, you should build in more time.

STEP 5 – VOTING IN-PERSON

- If you did not receive a ballot-by-mail or otherwise choose to vote in-person, we encourage you to vote early. To learn about in-person early voting options, contact your County Recorder's office.
- If you choose to vote in-person on Election Day, confirm your correct voting location by contacting your county elections department (see below) or visiting Arizona.Vote. Curbside voting may be available.
- Whether you're voting early or on Election Day, remember to bring valid identification to vote in-person. For information on valid identification, visit Arizona.Vote.
- In-person voters should take precautions to help protect themselves, other voters, and poll workers:
  - **Come prepared.** Review and mark a sample ballot so you can vote quickly and minimize the time you need to spend at the voting location.
  - **Wear a face covering.** If it can be safely managed, wear a cloth face covering when you go to vote to help protect yourself and those around you.
  - **Bring your own pen.** Bring your own pen to the voting location to minimize contact with surfaces others may have touched. Some voting locations may have single-use pens available, but bringing your own pen will help keep you safe and minimize waste.
  - **Maintain physical distancing.** Stay at least 6 feet away from other voters and poll workers whenever possible (except for caregivers and members of the same household).
  - **Wash your hands.** Wash your hands with soap and water (for at least 20 seconds) before and after voting. If facilities are not readily available, use hand sanitizer with at least 60% alcohol.
  - **Don't touch your face.** Avoid touching your eyes, nose, and mouth with unwashed hands.

COUNTY RECORDERS AND ELECTIONS CONTACT INFORMATION

APACHE COUNTY
Recorder Phone: 928-337-7515
Recorder Email: voterreg@co.apache.az.us
Elections Phone: 928-337-7537
Elections Email: aromero@co.apache.az.us

COCHISE COUNTY
Recorder Phone: 520-432-8358 / 888-457-4513
Recorder Email: recorder@cochise.az.gov
Elections Phone: 520-432-8970 / 888-316-8065
Elections Email: lmarra@cochise.az.gov

COCONINO COUNTY
Recorder Phone: 928-679-7860
Toll Free: 800-793-6181
Email: ccelections@coconino.az.gov

GILA COUNTY
Recorder Phone: 928-402-8740
Recorder Email: sbingham@gilacountyaz.gov
Elections Phone: 928-402-8709
Elections Email: emariscal@gilacountyaz.gov

GRAHAM COUNTY
Recorder Phone: 928-428-3560
Recorder Email: recorder@graham.az.gov
Elections Phone: 928-792-5037
Elections Email: hudederstadt@graham.az.gov

GREENLEE COUNTY
Recorder Phone: 928-865-2632
Recorder Email: smilheiro@greenlee.az.gov
Elections Phone: 928-865-2072
Elections Email: bfigueroa@greenlee.az.gov

LA PAZ COUNTY
Recorder Phone: 928-669-6136 / 888-526-8685
Recorder Email: recorder@lapazcountyaz.org
Elections Phone: 928-669-6149
Elections Email: kscholl@lapazcountyaz.org

MARICOPA COUNTY
Recorder and Elections Phone: 602-506-1511
Email: voterinfo@risc.maricopa.gov

MOHAVE COUNTY
Recorder Phone: 928-753-0701 / 888-607-0733
Recorder Email: voterregistration@mohavecounty.us
Elections Phone: 928-753-0733
Elections Email: elections@mohavecounty.us

NAVAJO COUNTY
Recorder Phone: 928-524-4194
Email: VoterRegistration@navajocountyaz.gov
Elections Phone: 928-524-4062
Email: Rayleen.richards@navajocountyaz.gov

PIMA COUNTY
Recorder Phone: 520-724-4330
Email: PimaRequests@recorder.pima.gov
Elections Phone: 520-724-6830
Elections Email: elections@pima.gov

PINAL COUNTY
Recorder Phone: 520-866-6830
Recorder Email: recorder@pinal.gov
Elections Phone: 520-866-7550
Elections Email: michele.forney@pinal.gov

SANTA CRUZ COUNTY
Recorder Phone: 520-375-7990
Recorder Email: voter@santacruzcountyaz.gov
Elections Phone: 520-375-7808
Email: hampton@santacruzcountyaz.gov

YAVAPAI COUNTY
Recorder Phone: 928-771-3244
Email: web.voter.registration@yavapai.us
Elections Phone: 928-771-3250
Elections Email: web.elections@yavapai.us

YUMA COUNTY
Recorder Phone: 928-373-6034
Email: voterservices@yumacountyaz.gov
Elections Phone: 928-373-1014
Email: mary.fontes@yumacountyaz.gov

Questions? Visit Arizona.Vote or contact the Secretary of State's Office at 1-877-THE-VOTE.

Search

Native

Search results

Secretary of State's Office announces upgrade to ServiceArizona.com and new AZVoteSafe Guide for Native American voters

... Nov. 3 General Election. The AZVoteSafe Guide for **Native** American Voters is the latest guide developed as part of the ... the 2020 elections. "**Native** American communities have historically participated in voting in-person ...

ssolis - 09/21/2020 - 13:54

Documents

... AZVoteSafe Guide (pdf) 2020 AZ VoteSafe Guide for **Native** Americans (pdf) Amicus Curiae Brief Amicus Curiae ...

kjohnson - 09/21/2020 - 13:11

Ride off into the Cochise County sunset with the newest collection on the Arizona Memory Project

... is to foster and promote knowledge and understanding of the **Native** peoples of the Americas. While Rose continued to raise her horses, ...

ssolis - 10/31/2019 - 10:38

The 2020 Arizona Author Series Explores Frontier Women in Arizona

... discrimination, some laid down their lives. Learn about **Native** women warriors and peacemakers as well as women who rode into the ...

ssolis - 09/11/2020 - 10:14

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Darlene Yazzie, et al.,	)	
	)	
Plaintiffs,	)	3:20-cv-8222-GMS
	)	
vs.	)	Phoenix, Arizona
	)	September 22, 2020
Katie Hobbs, et al.,	)	9:05 a.m.
	)	
Defendants.	)	
	)	

BEFORE: THE HONORABLE G. MURRAY SNOW, CHIEF JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TELEPHONIC MOTION HEARING

Official Court Reporter:
Charlotte A. Powers, RMR, FCRR, CRR, CSR, CMRS
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, Spc. 40
Phoenix, Arizona 85003-2151
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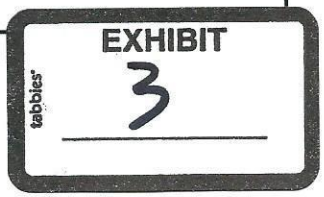
Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription



American voters.

Q. And in those two, have all -- the two documents have gone out, but the -- the third one hasn't gone out yet; is that accurate?

A. It's gone out. We've shared it with, you know, the Navajo Nation, with other tribal community members, with civic engagement organizations in an effort to distribute it as widely as possible.

Q. And so it's been printed and it's currently available to people?

A. It's been electronically distributed. It's being printed for our office for further distribution. We've talked to the Navajo Nation as well as other tribal community leaders about shipping printed copies to their offices, and those -- those arrangements are in process right now.

Q. And does -- do these -- any of these three documents refer to the new rules regarding the ability to cure a ballot that's unsigned?

A. They don't. But none of them refer to -- that -- the AZ Vote Safe Guide doesn't refer to the missing -- are you referring to the missing signatures --

Q. Yes --

A. -- cure, or are you --

Q. Correct. The missing signature cure. So that's not referenced in any of the documents?

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BOBBY D. SANCHEZ, *et al.*, Plaintiffs, v. BARBARA K. CEGAVSKE, in her official capacity of Secretary of State for the State of Nevada, *et al.*, Defendants.	Case No. 3:16-CV-00523 (MMD-WGC) **STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA**

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending lawsuit. This matter implicates the interpretation and application of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 ("Section 2"), a statute over which Congress accorded the Attorney General broad enforcement authority. *See* 52 U.S.C. § 10308(d). The United States has a substantial interest in ensuring Section 2's proper interpretation and uniform enforcement around the country.

The United States respectfully submits that Defendants' Responses in Opposition to Plaintiffs' Emergency Motion for Preliminary Injunctive and Declaratory Relief misstate portions of the established legal standard under Section 2.[1] Accordingly, the United States submits this Statement for the limited purpose of articulating the appropriate legal standard.

I. BACKGROUND

On September 7, 2016, Plaintiffs—members of the Pyramid Lake Paiute Tribe and the Walker River Paiute Tribe—sued the Nevada Secretary of State, Washoe and Mineral Counties, and their respective officials (collectively "Defendants"), alleging, among other claims, that the location of sites for in-person voter registration and in-person early voting in both Defendant counties, and election-day voting in Washoe County (collectively "election sites"), discriminates against Native Americans in violation of Section 2. Compl. ¶¶ 115-19 (ECF No. 1); Amend. Compl. ¶¶ 114-18 (ECF No. 10). On September 20th, Plaintiffs filed an emergency motion for preliminary injunctive relief and declaratory relief ("Motion"), seeking satellite election sites in Schurz and Nixon, located on their respective reservations. Pls.' Mot. 37 (ECF No. 26). Plaintiffs argue that absent relief, Native Americans living in Washoe and Mineral Counties will continue to have less opportunity to participate in the November 8, 2016 general election compared to other members of the electorate, in violation of the Voting Rights Act. Pls.' Mot. 2 (ECF No. 26). Defendants filed their briefs in opposition to the Motion on September 29, 2016. Defs.' Mem. (ECF Nos. 37, 38, 39).

[1] The Secretary of State, the Washoe County Defendants, and the Mineral County Defendants all filed briefs in opposition to the Motion. Hereinafter, collectively they will be cited as "Defs.' Mem." and individually cited as "Sec. Mem." (ECF No. 37), "Washoe Mem." (ECF No. 38), and "Mineral Mem." (ECF No. 39).

II. SECTION 2 OF THE VOTING RIGHTS ACT

Section 2 of the Voting Rights Act prohibits any state or political subdivision from imposing or applying a "voting qualification," "prerequisite to voting," or "standard, practice, or procedure" that "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 membership in a language minority group. 52 U.S.C. § 10301(a). In 1982, Congress amended Section 2 to make clear that a violation can be established by showing a discriminatory purpose or a discriminatory result. *See Thornburg v. Gingles*, 478 U.S. 30, 34-37, 43-45 (1986); S. Rep. No. 97-417, at 27-28 (1982)(Senate Report). Section 2(b) provides that a violation:

> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b).

Courts have used a two-step analysis to determine whether the location of election sites or limitations to early voting and voter registration result in denial or abridgment of the right to vote under Section 2.[2] First, the reviewing court assesses whether the practices amount to material limitations that bear more heavily on minority citizens than nonminority citizens. This assessment incorporates both the likelihood that minority voters will face the burden and their relative ability

[2] Most Section 2 cases address vote dilution: election structures that render even eligible voters who are fully able to cast valid ballots without the equitable opportunity to elect representatives of choice. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399 (2006). Nonetheless, "Section 2 prohibits all forms of voting discrimination, not just vote dilution." *Gingles*, 478 U.S. at 45 n.10 (citing S. Rep. No. 97-417, at 30). This case concerns vote denial or abridgement.

to overcome that burden. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 2016 WL 3923868, at *17 (5th Cir. 2016) (en banc); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014), *stay granted*, 135 S. Ct. 6 (2014), *cert. denied*, 135 S. Ct. 1735 (2015); *see generally Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 550-51, 555-56 (6th Cir. 2014) (hereinafter "*NAACP*"), *stay granted,* 135 S. Ct. 42 (2014), *vacated on other grounds*, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014); *Poor Bear v. Cnty. of Jackson*, No. 5:14-cv-5059, 2015 WL 1969760, at *6 (D.S.D. May 1, 2015); *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010).[3] Second, if a disparity is established, the reviewing court engages in an "intensely local appraisal" of the "totality of the circumstances" in the jurisdiction at issue to determine whether the challenged practice works in concert with historical, social, and political conditions to produce a discriminatory result. *See League of Women Voters*, 769 F.3d at 240-41; *Smith v. Salt River Project Agric. Improvement. & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) ("[the Section 2] examination is intensely fact-based and localized"); *Veasey*, 2016 WL 3923868, at *17; *Poor Bear*, 2015 WL 1969760, at *7 n.9; *Spirit Lake Tribe*, 2010 WL 4226614, at *3.[4]

The answer to this second question is informed in part by "the 'typical' factors that Congress noted in Section 2's legislative history," generally known as the Senate Factors,[5]

[3] *See also Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc), *aff'd on other grounds sub nom. Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013); *Miss. State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400, 413 (5th Cir. 1991).

[4] *See also NAACP*, 768 F.3d at 556-57; *Gonzalez*, 677 F.3d at 407; *Operation PUSH*, 932 F.2d at 405.

[5] These "Senate Factors" are distinct from the three threshold factors the Supreme Court and subsequent courts have used in vote dilution analyses – often called "*Gingles* factors": that the applicable minority group can constitute a single-member district, that the group is politically cohesive, and that bloc voting by the white majority usually defeats

(continued...)

although "'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.'" *League of Women Voters*, 769 F.3d at 245 (quoting *Gingles*, 478 U.S. at 45); *see also Veasey*, 2016 WL 3923868, at *17-19; *NAACP*, 768 F.3d at 554; *Gonzales*, 677 F.3d at 405. These factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction[;]

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and]

[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

(...continued)
the minority's preferred candidate. These *Gingles* factors are not required to be shown as part of the Section 2 vote denial analysis. *See Gingles*, 478 U.S. at 48-51; *Veasey*, 2016 WL 3923868, at *17-18.

Gingles, 478 U.S. at 36-37 (citing S. Rep. No. 97-417, at 28-29). The Senate Factors are "neither comprehensive nor exclusive," and "other factors may also be relevant and may be considered." *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 29); *see also Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1388 (E.D. Wash. 2014) (noting non-exclusivity). These factors are not limited to considering the relevant jurisdiction's conduct but also that of other governmental entities and private individuals. *See, e.g.*, *Gingles*, 478 U.S. at 80; *cf. White v. Regester*, 412 U.S. 755, 765-70 (1973). Examining the Senate Factors helps the court to determine whether the challenged practice, in light of current social and political conditions in the jurisdiction, results in a discriminatory denial or abridgement of the right to vote through less opportunity for the allegedly affected group to participate in the political process relative to other voters.

The existence of a "facially neutral" law, or the absence of a showing of animus, also does not alter the Section 2 inquiry. *See* Washoe Mem. 3, 18-19. Section 2 prohibits "facially neutral" voting practices that nonetheless lead to the discriminatory result of members of a minority group as a class having "less opportunity than other members of the electorate to participate in the political process." 52 U.S.C. § 10301(b). As the Supreme Court has explained, the "essence" of a Section 2 claim is that a challenged law, even when facially neutral, "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [nonminority] voters" to participate in the political process and elect their preferred representatives. *Gingles*, 478 U.S. at 47; *Veasey*, 2016 WL 3923868, at *19 ("We conclude that the two-part framework and *Gingles* factors together serve as a sufficient and familiar way to limit

courts' interference with "neutral" election laws to those that truly have a discriminatory impact under Section 2 of the Voting Rights Act.").

III. DEFENDANTS' ERRONEOUS LEGAL STANDARD

Defendants' briefs inaccurately state portions of the Section 2 standard. For example, Defendants argue that (1) certain types of voting are not protected under Section 2 (i.e., describing various voting methods as "convenience" voting); (2) Plaintiffs must show outright denial of the ability to vote or participate; (3) Plaintiffs must show inability to elect candidates of their choice; and (4) socioeconomic disparities are relevant to the totality-of-circumstances analysis only if those disparities result from official discrimination by the jurisdiction at issue. For the reasons that follow, these arguments are without merit and should be rejected.

A. Section 2 applies to the location of Election Day, late registration, and early voting sites.

Defendants suggest that access to in-person early voting and in-person voter registration opportunities are merely a "voting convenience" and therefore lack protection under Section 2 of the Voting Rights Act. Sec. Mem. 17; Washoe Mem. 3, 16, 19-20, 22-23; Mineral Mem. 15-16. Not so. Section 14(c)(1) of the Act defines the terms "vote" and "voting" to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to registration, . . . casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast." 52 U.S.C. § 10310(c)(1). Courts have found that access to polling places, to voter registration, and to opportunities for absentee and early voting are protected by Section 2. *See, e.g., NAACP*, 768 F.3d at 552-53 ("[T]he plain language of Section 2 does not exempt early-voting systems from its coverage . . . . Nor has any court held that the

Voting Rights Act does not apply to early-voting systems."); *League of Women Voters*, 769 F.3d at 238-39 (applying Section 2 to various practices including procedures for late registration and early voting, and noting that "courts have entertained vote-denial claims regarding a wide range of practices"); *Veasey*, 2016 WL 3923868, at *43 (registration and polling place locations covered by Section 2) (Higginson, J., concurring)); *Wandering Medicine v. McCulloch*, No. 12-cv-135, at *16 (D. Mont. Mar. 26, 2014) (order denying defendants' motion to dismiss in part because plaintiffs presented a viable Section 2 claim based on defendants' refusal to establish a satellite registration and absentee voting office); *Brooks v. Gant*, No. 12-cv-5003-KES, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012) (denying a defendant's motion to dismiss in part because plaintiffs' allegations of burdens accessing in-person absentee voting office suffice to show "less opportunity" under Section 2); *Spirit Lake Tribe*, 2010 WL 4226614, at *1-6 (granting preliminary injunction in Section 2 challenge alleging unequal access to polling place locations); *Miss. State Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom. Miss. State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982).

Defendants assert that even if minority voters are disproportionately burdened by the location of early voting, voter registration, and election-day voting sites, this Court should not entertain Plaintiffs' Section 2 claims because "'inconvenience does not result in a denial of "meaningful access" to the political process.'" Washoe Mem. 19-20 (quoting *Jacksonville Coal.*

for Voter Prot. v. Hood, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004)).[6] However, in *Jacksonville,* the court expressly declared that "polling places constitute a 'standard, practice, or procedure with respect to voting' under Section 2, and that placing voting sites in areas removed from African–American communities can have the effect of abridging the right to vote." 351 F. Supp. 2d at 1334 (citing *Perkins v. Matthews*, 400 U.S. 379, 387 (1971)). To be sure, plaintiffs in *Jacksonville* were unsuccessful, but not because Section 2 did not apply to their claims. Rather, they were unsuccessful because they had failed to establish a likelihood that the early-voting practices at issue would have the discriminatory effect that Section 2 requires plaintiffs to establish. *See Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *13 (6th Cir. 2016) (rejecting Section 2 claims on basis of no showing of disparate impact); *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1254-55 (M.D. Fla. 2012).[7] In sum, no court has held that any voter

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[6] Defendants also incorrectly claim that in the Section 2 analysis, a court must balance the burdens of the affected minority voters against the interests of the Defendants. Mineral Mem. 14-15, Sec. Mem. 7. This conflates two distinct legal claims. A constitutional claim assessing whether a challenged practice imposes an unjustified burden (whether or not that burden amounts to a discriminatory effect on a racial or language minority) requires evaluating the burden of the law against the precise interests put forward by the State as justification. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) (plurality opinion) (citing *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983)). Under Section 2 of the Voting Rights Act, by contrast, the touchstone comparison is "whether members of a protected class have 'less opportunity' to exercise their right to vote *than other groups of voters*," *NAACP*, 768 F.3d at 552 (emphasis added). *See also Veasey*, 2016 WL 3923868, at *20, *41 (distinguishing the Section 2 and *Anderson-Burdick* frameworks) (Higginson, J., concurring).

[7] Defendants propose that Plaintiffs have not stated a valid Section 2 claim because they failed to provide quantitative statistical evidence of disparate impact. Washoe Mem. 17 (quoting *Feldman v. Arizona Sec'y of State's Office*, No. CV-16-01065-PHX-DLR, 2016 WL 5341180, at *5 (D. Ariz. 2016)). Although typical of Section 2 cases, statistical analyses are but one possible means to show disparate impact. For example, in *Veasey v. Perry*, 71 F. Supp. 3d 627, 633, 636-37 (S.D. Tex. 2014), the court also relied on lay testimony regarding the ability of African Americans to participate. In the context of a vote dilution claim under Section 2, courts have relied on both statistical and non-statistical proof to establish the *Gingles* preconditions regarding racial bloc voting. *See, e.g., Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118 n.12 (5th Cir. 1991) ("*Gingles* allows plaintiffs to prove cohesion even in the absence of statistical evidence of racial polarization."); *Monroe v. City of Woodville*, 897 F.2d 763, 764 (5th Cir. 1990) ("Statistical proof of political cohesion is likely to be the most persuasive form of evidence, although other evidence may also establish this phenomenon.").

registration procedure or ballot-casting issue is outside of Section 2's purview, and there is no basis for the Court to decide differently here.

B. Section 2 does not require proof that a jurisdiction has "denied" citizens the right to vote.

Defendants several times suggest that Plaintiffs must show an outright denial of access to voting opportunities. Sec. Mem. 13; Washoe Mem. 10, 21; Mineral Mem. 15, 17. This ignores the plain text of the Act. Section 2 prohibits the "abridgment" as well as the outright "denial" of the right to vote. 52 U.S.C. § 10301(a). This prohibition does not require that a challenged practice deprive minority voters completely of the ability to vote. *See, e.g.*, *Veasey*, 2016 WL 3923868, at *29 (quoting *Black's Law Dictionary* (10th ed. 2014) (defining "Abridgement" as the "reduction or diminution of something")). It requires only that Plaintiffs establish they have "less opportunity" to participate relative to other voters. 52 U.S.C. § 10301(b). All electoral practices with a material disparate "effect on a person's ability to exercise [the] franchise" implicate the Voting Rights Act. *Cf. Perkins*, 400 U.S. at 387 (addressing Section 5); *see also League of Women Voters,* 769 F.3d at 243 (holding that Section 2 is not limited to practices that render voting "completely foreclosed" to the minority community); *Poor Bear*, 2015 WL 1969760, at *7 (concluding that Section 2 protects equal opportunity to cast a ballot via in-person absentee voting); *Spirit Lake Tribe*, 2010 WL 4226614, at *3, *6 (enjoining polling place closures under Section 2); *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) (explaining that Section 2 would be violated if a county limited voter registration hours to one day a week, and "that made it more difficult for blacks to register than whites").

Defendants further assert that Plaintiffs' argument must fail because Native Americans in Defendant counties can still participate by mail. Sec. Mem. 13; Washoe Mem. 21. However, mail-in voting is not the equivalent of in-person voting, and a court must consider the circumstances of each case and the impact a challenged practice has on opportunity to vote. *See Veasey*, 2016 WL 3923868, at *26 (concluding that "mail-in voting for specific subsets of Texas voters does not sufficiently mitigate the burdens imposed [by the challenged law]"). Here, Plaintiffs have alleged a valid Section 2 "abridgment" claim—that Native Americans in Defendant counties, despite living in "mailing" precincts, make up a sizeable population of minority voters who have fewer opportunities and greater difficulty than nonminority voters in registering and reaching existing early voting sites, due to the travel distances involved, the socioeconomic disparities limiting the ability to travel, the lack of required identification documents, the lack of internet access, and the monetary and temporal costs involved in attempting to overcome such hurdles; and that these difficulties exacerbate and are exacerbated by discrimination and the lingering effects of discrimination. Pls.' Mot. 20, 25, 26; Amend. Compl. ¶ 94. Thus, according to Plaintiffs, the current location of registration and early voting sites interacts with social and historical conditions to cause an inequality in the opportunities for Native Americans to participate in the franchise. *See Veasey*, 2016 WL 3923868, at *17 (explaining the causal link required to prove discriminatory effect).

C. Section 2 does not require Plaintiffs to prove an inability to elect their preferred candidates.

Defendants also contend that Section 2 requires Plaintiffs to demonstrate an inability to elect their preferred representatives. Sec. Mem. 7, 9, 13; Mineral Mem. 8, 16-17. Defendants'

argument misconceives the nature of Plaintiffs' challenge to the Defendant counties' practices. Because Defendants' interpretation of Section 2 conflicts with the plain language of the statute as well as Supreme Court precedent, their argument fails as a matter of law.

The plain text of Section 2(b) requires Plaintiffs to show only that the political process is not equally open to Native Americans because the practice at issue results in their having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). Defendants, by contrast, would require Plaintiffs to show that they "have been unable to elect the candidates of their choice." Mineral Mem. 16. Defendants' formulation fundamentally alters the statutory test.

Section 2 contains a comparative standard: minority voters cannot be given "less opportunity" than other voters to participate and elect their preferred candidates. It does not, in this context, require proof that minority voters lack an opportunity to elect.[8] Justice Scalia explained this concept in dissent in *Chisom:*

> If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity *to participate* in the political process than whites and Section 2 would therefore be violated—even if the number of potential black voters was so small that they would on no hypothesis be able *to elect* their own candidate.

501 U.S. at 408 (emphasis in original) (internal quotation marks and citations omitted).

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[8] Section 2 vote dilution claims—for example, challenges to district lines—do not usually depend on allegations that a practice makes it more difficult to participate in the political process by casting a valid ballot. In that context, the district lines' imposition of an inability to elect candidates of choice becomes the more important touchstone in establishing injury. *See Gingles*, 478 U.S. at 51 (holding that plaintiffs must show, *inter alia*, that the majority group votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate). By contrast, in a Section 2 claim focused on an abridgment of the right to cast valid ballots, that abridgment alone amounts to injury necessarily impairing electoral opportunity.

In support of their argument, Defendants cite *Chisom*, 501 U.S. at 397, for the proposition that "to make out a § 2 VRA claim . . . Plaintiffs must prove *both* (1) that the members of the protected class have less opportunity to participate in the political process; *and* (2) the minority class members' inability to elect representatives of their choice." Mineral Mem. 16. But this is not a proper reading of *Chisom*. Rather, the Court held there that where a plaintiff shows that minority voters have less opportunity than other voters to participate in the political process, the plaintiff necessarily also establishes that members of that group have less opportunity to elect candidates of their choice. *Chisom*, 501 U.S. at 397 ("Any abridgement of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election."). *Chisom*, which itself concerned a vote dilution claim, thus stands neither for an "inability" standard nor for the proposition that Section 2 challenges to ballot-casting procedures require two separate showings.

Moreover, because Section 2 requires a totality-of-the-circumstances analysis, *see* 52 U.S.C. § 10301(b), the election of a few minority candidates is not dispositive of a plaintiff's opportunity, relative to other members of the electorate, to elect representatives of choice. *See Gingles*, 478 U.S. at 75 ("[T]he language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.").

A plain reading of the statutory language and Supreme Court precedent establishes that plaintiffs in a Section 2 lawsuit are not required to show an inability to elect candidates of choice. Accordingly, the Court should reject Defendants' argument.

D. Effects of past discrimination that hinder minority voters' ability to participate effectively in the political process are relevant to a Section 2 claim.

Defendants erroneously argue that the totality of circumstances inquiry requires Plaintiffs to allege that voter-related discrimination against Native Americans be "directly attributable to the defendants," Sec. Mem. 10, and that general prior history is not relevant in the totality of the circumstances analysis. *Id.* at 4, 10-11; Washoe Mem. 3, 9, 24 (citing *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2628 (2013)); Mineral Mem. 3, 19. Nothing in Section 2's text or legislative history limits the Senate Factor analysis of the relevant social and political conditions to official, state-sponsored discrimination by the jurisdiction in question.

Congress' intent to take the result of both public and private conduct into account is evident from several Senate Factors. Senate Factor one, which directs courts to consider "the extent of any history of *official* discrimination," *Gingles*, 478 U.S. at 36 (emphasis added), is not confined to discrimination by the defendant jurisdiction. *See United States v. Blaine Cty.*, 363 F.3d 897, 913 (9th Cir. 2004) (rejecting argument that the first Senate Factor "could only look at official discrimination by [the defendant jurisdiction], not the state or federal government"). Many other Senate Factors—the extent of racially polarized voting, the existence of a candidate slating process, and the use of overt or subtle racial appeals in political campaigns—all reflect Congress' intent for the totality-of-circumstances analysis to examine far more than official, state-sponsored discrimination. *See Gingles*, 478 U.S. at 36-37. And Senate Factor five directs courts to consider the extent to which members of a minority group "bear the effects of discrimination," from whatever source. *Gingles*, 478 U.S. at 69. "[T]he literal language of the fifth Senate factor does not even support the reading that only discrimination by [the defendant jurisdiction] may be

considered; the limiting language describes the people discriminated against, not the discriminator." *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988). Socioeconomic disparities that result from past discrimination may mean that current practices impede minority voters' ability to participate equally in the electoral process; those disparities need not be the direct product of particular public defendants' past action in order for the defendants' present practices to implicate the Act. *See, e.g.*, *Whitfield v. Democratic State Party of Ark.*, 890 F.2d 1423, 1430-31 (8th Cir. 1989).[9] Ultimately, it is the intensely local analysis of all factual circumstances existing within a jurisdiction, regardless of source, that will determine whether the jurisdiction's challenged standard, practice, or procedure results in a Section 2 violation.[10] Thus, this Court should follow well-established precedent in considering all past or present discrimination, public and private, when assessing whether a challenged voting practice violates Section 2.

IV. CONCLUSION

For the preceding reasons, this Court should apply the established legal standard under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, to resolve Plaintiffs' motion for

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[9] *See also Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5*, 804 F.2d 469, 474-75 (8th Cir. 1986) (holding that the district court erred by failing to address evidence of broad socioeconomic disparities, without reference to their sources); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1018-34, 37-41 (D.S.D. 2004) (recounting the history of official and unofficial discrimination and setting out socioeconomic disparities without concern for their cause); *but see Veasey*, 2016 WL 3923868, at *20 (declining to decide the question of whether plaintiff must show "state action caused the social and historical conditions begetting discrimination" because the district court found evidence of such state-sponsored discrimination).

[10] Of course, Plaintiffs have also alleged a history of official discrimination against Nevadan Native Americans generally, and with respect to voting in particular. *See* Pls.' Motion 20-22; Amended Compl. ¶¶ 80-93; *see also, e.g.*, Decree and Permanent Injunction, *Mickel v. Wolff*, No. CIV-R-79-239 (D. Nev. Dec. 23, 1980) (permanently enjoining the Nevada State Prison from continuing to deny access to certain Native American religious activities).

preliminary injunction, particularly with regard to the detailed findings of fact necessary in a Section 2 analysis.

Date: October 3, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Statement of Interest of the United States of America was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to all attorneys of record.

Dated: October 3, 2016.

By: */s/George E. Eppsteiner*
George E. Eppsteiner

No. 12-35926

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK WANDERING MEDICINE, *et al.*,

Plaintiffs-Appellants

v.

LINDA McCULLOCH, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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INTEREST OF THE UNITED STATES

The United States has a direct interest in this appeal, which concerns the proper interpretation and application of Section 2 of the Voting Rights Act (VRA), 42 U.S.C. 1973. Specifically, this appeal concerns whether a plaintiff alleging a vote denial or abridgement claim under the VRA based upon unequal access to voting opportunities must establish that a state voting practice results in the affected group being unable to elect candidates of its choice. The Department of

Justice is charged with enforcing the VRA, 42 U.S.C. 1973j(d), and therefore has a strong interest in how courts construe and apply the statute.

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether a claim of unequal access to voting opportunities under Section 2 of the Voting Rights Act (VRA), 42 U.S.C. 1973, always requires proof of plaintiffs' inability to elect candidates of their choice.

STATEMENT OF FACTS

1. Statutory Background

Section 2 of the Voting Rights Act prohibits voting procedures that deny or abridge the right to vote on account of race. 42 U.S.C. 1973. Paragraph (a) states, in pertinent part, that

> [n]o voting qualification or prerequisite to voting or standard, practice, or 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.

42 U.S.C. 1973(a). Under Paragraph (b), a plaintiff may establish a violation of this provision if,

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate

> to participate in the political process and to elect representatives of their choice.

42 U.S.C. 1973(b). Paragraph (b) goes on to state that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered," but specifically states that its protections do not create "a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b).

Claims brought under Section 2 are generally categorized as either "vote denial" or "vote dilution" claims, although Section 2's text makes no distinction between such claims. "Vote denial" includes claims alleging unequal access to voting opportunities, and often refers to practices or procedures that interfere with or impair the ability of would-be voters to register and cast a vote or have that vote counted.[1] *Farrakhan* v. *Gregoire*, 590 F.3d 989, 998 n.13 (9th Cir.) (*Farrakhan II*), rev'd on other grounds, 623 F.3d 990 (9th Cir. 2010) (en banc) (*Farrakhan III*); see also 42 U.S.C. 1973*l*(c). Historically, these types of claims challenged practices such as literacy tests, poll taxes, white primaries, and English-only ballots. *Ibid.* More recent claims have challenged a group's unequal access to

[1] For purposes of this brief, the United States will use the term "vote denial" to refer collectively to all claims which could result from either the outright denial of the right to vote, or merely its abridgement. Under this use, the term "vote denial" includes the type of claim brought by plaintiffs in this case.

voting practices and procedures, such as exclusionary candidate qualifications, *Arakaki* v. *Hawaii*, 314 F.3d 1091, 1096 (9th Cir. 2002), unequal access to voter-registration opportunities, see *Mississippi State Chapter Operation Push, Inc.* v. *Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), aff'd, 932 F.2d 400 (5th Cir. 1991), and unequal access to polling places, see *Spirit Lake Tribe* v. *Benson County*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010); *Brown* v. *Dean*, 555 F. Supp. 502 (D.R.I. 1982). See also *Jacksonville Coal. for Voter Prot.* v. *Hood*, 351 F. Supp. 2d 1326 (M.D. Fla. 2004) (unequal access to early voting sites); *Brown* v. *Post*, 279 F. Supp. 60 (W.D. La. 1968) (unequal access to absentee voting opportunities). "Vote dilution," in contrast, often results from at-large elections and similar practices that dilute the value of votes cast by minority voters in places where they are able to cast a ballot. *Farrakhan II*, 590 F.3d at 998 n.13; see also *Burton* v. *City of Belle Glade*, 178 F.3d 1175, 1198 (11th Cir. 1999) (explaining that vote dilution "occurs when an election practice results in the dilution of minority voting strength and, thus, impairs a minority's ability to elect the representative of its choice").

Section 2(a) explicitly establishes a "results" test, such that a plaintiff need not prove that a voting practice was adopted or maintained with discriminatory intent. As originally passed, Section 2 stated:

> No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political

> subdivision to deny or abridge the right of any citizen of the United States to vote on account of race of color.

Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965). Lower courts had interpreted that provision to mean that plaintiffs did not have to show discriminatory intent, and could instead prove a vote dilution claim by establishing that, under the totality of the circumstances, a voting practice results in discrimination. See, *e.g.*, *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1304-1307 (5th Cir. 1973) (en banc), aff'd, *sub nom. East Carroll Parish Sch. Bd.* v. *Marshall*, 424 U.S. 636 (1976). In *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980), however, a plurality of the Supreme Court held that Section 2 required a plaintiff bringing a vote dilution challenge to an at-large election scheme to establish intentional discrimination. Congress responded in 1982 by amending Section 2 to restore the evidentiary standard developed in earlier vote dilution cases that did not require proof of discriminatory intent, and that instead focused on the totality of the circumstances operating in the given jurisdiction. See S. Rep. No. 417, 97th Cong., 2d Sess. 27-28 (1982) (Senate Report). The Senate Judiciary Committee (Senate Committee) explained that "[a]n examination of the vote dilution cases before *Bolden* reveals that *Bolden* was in fact a marked departure from prior law" (Senate Report 19), and that amending the statute to include a "results test" was "meant to restore the pre-[*Bolden*] legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote" (Senate Report 27). Thus, by adding the

language "in a manner which results" to Paragraph (a) and by adding Paragraph (b), Congress made it a violation to have a voting standard, practice, or procedure that results in the denial, on the basis of race, of equal access to any phase of the electoral process and deprives voters of an equal opportunity to elect a candidate of their choice, on the basis of race. *Id.* at 30; see also *Chisom* v. *Roemer*, 501 U.S. 380, 394 (1991).

In its report on the amendments, the Senate Committee identified several factors that may inform a court's evaluation of the totality of circumstances to determine whether a challenged practice or procedure denies minority voters the same opportunity to participate in the political process as other citizens. These "Senate Factors" were derived from the Fifth Circuit's en banc decision in *Zimmer*, interpreting Supreme Court precedent. Senate Report 28 n.113. They include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; and
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Senate Report 28-29. The Senate Committee identified two additional factors that may have probative value to a plaintiff's Section 2 claim:

> [8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group

and

> [9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29. The Senate Committee indicated that this list was non-exhaustive, and that no particular factor, number of factors, or any particular combination of factors need be proved to sustain a Section 2 claim. *Ibid.*

2. Factual Background

State law permits Montanans to cast an in-person ballot on election day, vote by mailing an absentee ballot before election day, or cast an in-person absentee ballot within 30 days of an election. "Late registration" permits would-be voters to

register to vote (or to update their registration) by appearing in-person at the county election office or any other location designated by the county election administrator. See Mont. Code Ann. § 13-2-304 (2012). "Early voting" permits registered voters to receive, mark, and submit an absentee ballot in-person at the county election office or any other location designated by the county election administrator as soon as absentee ballots become available, until noon on the day before the election. See Mont. Code Ann. §§ 13-13-205, -211, -222 (2012). Maintaining late registration and early voting sites permits Montanans both to register to vote and cast a ballot with a single visit to a designated site or, for those persons already registered to vote, to cast an in-person absentee ballot before election day.

Montana law permits a county to create satellite election offices so that late registration and early in-person absentee voting is offered at more than one location. Rosebud, Blaine, and Big Horn counties currently offer late registration and early in-person absentee voting only in each county's courthouse, located in the county seat. These three counties are each geographically large and sparsely populated. Each of these counties also has a substantial Native-American population, most of whom live on or near Indian reservations within those counties. The reservations are located a considerable distance from the county seat. For example, Lame Deer, the largest community and tribal headquarters of

the Northern Cheyenne, is located over 100 miles, round trip, from Rosebud's county seat (Forsyth). R. 4-1, Exh. 1.[2] Fort Belknap, the main community of the Fort Belknap Indian Reservation, is located 43 miles, round trip, from Blaine's county seat (Chinook). R. 4-1, Exh. 1. Crow Agency, the tribal headquarters and main city of the Crow Indian Reservation, is located over 27 miles, round trip, from Big Horn's county seat (Hardin). R. 4-1, Exh. 1.

3. District Court Proceedings

Plaintiffs are Native-American registered voters who live in Montana's Northern Cheyenne, Fort Belknap, and Crow Indian Reservations. They filed suit against Montana's Secretary of State and the commissioners and clerks/county recorders of Rosebud, Blaine, and Big Horn counties on October 10, 2012, alleging in part that the single late registration and early in-person absentee voting locations for each of the three counties violated Section 2 of the Voting Rights Act. See generally R. 1. Using information obtained from the Secretary of State's Office, plaintiffs asserted that participation in absentee voting opportunities by Native-American voters in the three counties is far below that of the State average. R. 1 at 13. Plaintiffs sought a preliminary injunction ordering defendants to open satellite election offices for late registration and early in-person absentee voting in Lame

[2] Citations to "R.__" refer to documents filed in the district court.

Deer, Fort Belknap, and Crow Agency for the 2012 general election, and all future elections. R. 1 at 39.

The United States filed a Statement of Interest supporting plaintiffs, arguing that the plaintiffs were likely to succeed on their Section 2 claim. R. 45. The statement included an analysis from an expert demographer showing that Native Americans in the three counties have to travel much greater distances than their white counterparts to access the late registration and early in-person absentee voting sites in their respective counties. R. 45-1 at 1. For example, the average round trip distance that Native-American voters living in Rosebud county must travel to access the single late registration and early in-person absentee voting site is over 89 miles; for white voters, it is under 34 miles. R. 45-1 at 9. For Native-American voters living in Blaine county, the average round trip distance is over 62 miles; for white voters, it is under 20 miles. R. 45-1 at 9. And for Native-American voters living in Big Horn county, the average round trip distance is over 44 miles; for white voters, it is under 24 miles. R. 45-1 at 9. The difference between the average distances Native-American voters must travel and the average distances white voters must travel to access the single late registration and early in-person absentee voting location in each county is statistically significant. R. 45-1 at 9.

The analysis also showed that the poverty rate among Native Americans is much greater than for white residents in each of the three counties, and Native Americans in the three counties are less likely to have access to motor vehicles than their white neighbors. R. 45-1 at 5-8. The expert report concluded that adding a single satellite office for late registration and early in-person absentee voting on the reservations in each of the three counties would significantly reduce the average distance Native-American *and* white voters would have to travel to access late registration and early in-person absentee voting sites, and would significantly decrease the disparities between Native-American and white voters in their access to late registration and early in-person absentee voting. R. 45-1 at 6, 9-11.

The district court denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs were not likely to succeed on the merits of their Section 2 claim. R. 79. Specifically, the district court explained that Section 2 requires plaintiffs "to prove both unequal access *and* an inability to elect representatives of their choice[,]" and that the electoral success of numerous Native-American and Native-American-preferred candidates proved fatal to plaintiffs' case. R. 79 at 7. The district court observed that plaintiffs "did not argue or attempt to prove that the failure to have satellite election offices rendered them unable to elect

representatives of their choice," and that "[t]he United States also ignored this element in its statement supporting" plaintiffs. R. 79 at 7 n.2.

The district court also held that plaintiffs were required to prove causation by showing that the failure to have satellite late registration and early in-person absentee voting locations has a discriminatory impact on Native Americans. R. 79 at 7. It then identified six Senate Factors it considered relevant to plaintiffs' Section 2 claim: the extent of any history of racial discrimination in the state affecting the right to vote (Senate Factor 1); the extent to which the jurisdiction has used voting practices that may enhance the opportunity for discrimination against minority groups (Senate Factor 3); the extent to which members of the minority group in the jurisdiction bear the effects of discrimination (Senate Factor 5); a lack of responsiveness on the part of elected officials to the particularized needs of the minority group (Senate Factor 8); whether the policy underlying the challenged voting practice is tenuous (Senate Factor 9); and the extent to which members of the minority group have been elected to public office in the jurisdiction (Senate Factor 7). R. 79 at 8-9. The court held that it was "well-established that there has been a history of official discrimination in Montana that has touched the right of Native Americans to participate in the democratic process" (Senate Factor 1). R. 79 at 9 (footnote omitted). The court found that all three counties previously employed voting practices that enhanced the opportunity for discrimination against

Native Americans (Senate Factor 2), but that recent litigation had remedied that problem. R. 79 at 10. The court also held that "it was well-established * * * that poverty, unemployment, and limited access to vehicles render it difficult for residents of the three reservations to travel to the county seats to register late and cast in-person absentee ballots" (Senate Factor 5). R. 79 at 10-11. "Defendants," the court observed, "did not even attempt to argue otherwise." R. 79 at 11.

The court found no evidence of political unresponsiveness by defendants to plaintiffs' requests for satellite voting locations and concluded that defendants' reasons for denying the requests were based on practical concerns (Senate Factors 8 and 9). R. 79 at 11-12. Rather, the court observed that it was a late request by the plaintiffs for additional satellite voting locations that contributed to the denial of their requests. R. 79 at 11-12. Finally, "and most importantly," according to the district court, the court found that plaintiffs failed to prove "the explicit requirement" that the challenged voting practice results in plaintiffs' "inability to elect representatives of their choice" (Senate Factor 7). R. 79 at 12. The court concluded that testimony establishing that Native Americans were able to elect representatives of their choice "mandates a conclusion" that the plaintiffs were unlikely to succeed on the merits of their Section 2 claim. R. 79 at 12.

ARGUMENT

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN EVALUATING PLAINTIFFS' SECTION 2 VOTE DENIAL CLAIM

A. Plaintiffs Alleging Vote Denial Claims Need Not Establish An Inability To Elect Candidates Of Choice

The district court erred as a matter of law when it held that all plaintiffs bringing a Section 2 claim must establish an inability to elect candidates of their choice to succeed on their claim. R. 79 at 12. Such a requirement ignores the differences between "vote denial" cases on the one hand, and "vote dilution" cases on other. This Court has never required Section 2 plaintiffs bringing a vote denial claim to prove an inability to elect candidates of their choice; rather, this Court has recognized that the specific circumstances relevant to a court's Section 2 inquiry depends on the type of Section 2 violation alleged and the type of voting practice that is challenged. Moreover, by requiring that plaintiffs bringing a vote denial claim establish an inability to elect candidates of their choice (R. 79 at 12), the district court has unnecessarily and erroneously divided 42 U.S.C. 1973(b) into two, independent requirements for establishing a vote denial claim, rather than giving the statutory text its natural and logical meaning.

1. The District Court's Reasoning Ignores The Qualitative Differences Between "Vote Dilution" And "Vote Denial" Claims

The district court's reasoning fails to appreciate the obvious differences between "vote dilution" and "vote denial" claims brought under Section 2.

Plaintiffs bringing vote dilution claims allege that a particular voting scheme, such as at-large elections, "operate[s] to minimize or cancel out the voting strength of racial [minorities in] the voting population" who are placed among a numerical majority of white voters. *Thornburg* v. *Gingles*, 478 U.S. 30, 47-48 & n.13 (1986) (citation omitted). The essence of a vote dilution claim, therefore, is that, even though members of a protected population are able to cast ballots without interference, the strength of those votes is diluted by the challenged voting practice. *Id.* at 45. Vote dilution claims focus on the aggregate strength of the votes cast by minority voters, and, thus, a critical factor for courts to consider in adjudicating such claims is whether minority-preferred candidates have been elected to office under the challenged electoral practice.

Plaintiffs bringing vote denial claims, on the other hand, do not allege that their cast ballots have less value or force than those cast by white voters. Rather, plaintiffs bringing vote denial claims allege that their equal opportunity to participate in the political process has been denied or abridged *in the first instance*. See, *e.g.*, *Farrakhan* v. *Gregoire*, 590 F.3d 989, 1006 (9th Cir.) (*Farrakhan II*) ("Whereas vote dilution claims implicate the value of aggregation, vote denial claims implicate the value of participation.") (citation and internal quotation marks omitted), rev'd on other grounds, 623 F.3d 990 (9th Cir. 2010) (en banc) (*Farrakhan III*); cf. *Perkins* v. *Matthews*, 400 U.S. 379, 387 (1971) (noting in a

Section 5 case that "[t]he accessibility, prominence, facilities, and prior notice of the polling place's location all have an effect on a person's ability to exercise his franchise"). Of course, the inability to elect candidates of choice may result from an electoral practice that denies or abridges an equal opportunity to cast a ballot, but it cannot be dispositive of, nor is it necessary to (much less an "explicit requirement" of (R. 79 at 12)), a vote denial claim. The harm from an electoral practice that denies or abridges the equal opportunity to cast a ballot is the loss *of the franchise itself*, not the dilution of the votes cast in an election. Thus, even in situations where minority-preferred candidates are elected, the presence of electoral practices that deny or abridge the franchise for members of a protected class may still violate Section 2. This is because each individual would-be voter whose equal opportunity to cast a ballot is denied or abridged on the basis of race is consequently a victim of a discriminatory voting practice.

This Court agrees. In *Gonzalez* v. *Arizona*, 677 F.3d 382, 405-406 (9th Cir.), cert. granted, *sub nom*. *Arizona* v. *The Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 476 (2012) (No. 12-71),[3] this Court, sitting en banc, considered a

[3] The issue in the present case is unrelated to the issue under consideration by the Supreme Court: "Did the court of appeals err 1) in creating a new, heightened preemption test under Article 1, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the

(continued…)

Section 2 vote dilution and vote denial challenge to a requirement that all voters present a particular form of identification before casting a ballot. In considering plaintiffs' particular claim, this Court identified the only Senate Factors that were "[r]elevant here" as the history of official discrimination against minorities with respect to voting (Senate Factor 1), the extent of racially polarized voting (Senate Factor 2),[4] and the extent to which members of the minority group bear the effects of discrimination (Senate Factor 5). *Gonzalez*, 677 F.3d at 405-406. This Court did not identify the inability of minority voters to elect candidates of choice as a relevant factor in the case, much less an explicitly required one.

In *Farrakhan II*, this Court considered a challenge to Washington's felon disenfranchisement law.[5] The district court had granted the State's motion for

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(…continued)
National Voter Registration Act preempts Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote."

[4] This particular Senate Factor would be most relevant to the *Gonzalez* plaintiffs' vote dilution claim, not its vote denial claim.

[5] This Court, sitting en banc, ultimately held that plaintiffs could not challenge voter disenfranchisement laws through Section 2 of the VRA unless they could "show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent." *Farrakhan III*, 623 F.3d at 993. This Court limited its ruling, however, "to this narrow issue," and expressed "no view as to any of the other issues" presented. *Ibid.* Thus, the panel's approach to vote denial claims in *Farrakhan II* should remain relevant and applicable to vote denial claims challenging other electoral practices.

summary judgment after concluding that the totality of circumstances did not support a finding that the felon disenfranchisement law resulted in discrimination on account of race. The district court based its conclusion on the fact that plaintiffs had not presented substantial evidence with respect to some of the Senate Factors. This Court reversed, and criticized the district court for "requiring [plaintiffs] to prove Factors that had little if any relevance to their particular vote denial claim." *Farrakhan II*, 590 F.3d at 1004. This Court explained that the district court must consider the totality of circumstances in any Section 2 case, but noted that "not all of the Senate Factors were equally relevant, or even necessary, to that analysis." *Ibid.*; see also *id.* at 1005 (explaining that the enumerated factors are "particularly [pertinent] to vote dilution claims, * * * and, it follows, not as pertinent, generally, in vote denial cases") (citation and internal quotation marks omitted); see also *Gomez* v. *City of Watsonville*, 863 F.2d 1407, 1412 (9th Cir. 1988) ("While the basic 'totality of the circumstances' test remains the same, the range of factors that [are] relevant in any given case will vary depending upon the nature of the claim and the facts of the case."), cert. denied, 489 U.S. 1080 (1989).

In particular, this Court explained that the "factors that examine the political strength of minority voters in the jurisdiction are of lesser relevance" in vote denial claims. *Farrakhan II*, 590 F.3d at 1006. Citing the obvious differences between vote denial claims on the one hand, and vote dilution claims on the other, this

Court explained that Senate Factor 7 (*i.e.*, the extent to which members of the minority group have been elected to public office in the jurisdiction)

> simply has no bearing on the question whether minorities are being denied the right to vote 'on account of race.' Even if a majority of elected officials in the jurisdiction were members of the minority group, it would still violate [Section] 2 to deny minority citizens the right to vote on discriminatory grounds. The fact that minority candidates have had success in the state does not cure the discriminatory denial of the franchise to minority voters.

Farrakhan II, 590 F.3d at 1006. This Court came to a similar conclusion with respect to Senate Factor 8 (*i.e.*, whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group). *Id.* at 1006-1007.

Here, the district court's application of Section 2's results test cannot be reconciled with this Court's decisions in *Gonzalez* and *Farrakhan II*. Rather than focus on the totality of the circumstances that are relevant to "the nature of the claim and the facts of the case," *Farrakhan II*, 590 F.3d at 1005 (citation omitted), the district court considered numerous factors that this Court has previously identified as irrelevant in similar vote denial claims. Even more problematic, the district court concluded that one of these irrelevant factors – a showing that the challenged practice results in minority voters' inability to elect candidates of choice – was, in fact, an "explicit requirement" of a successful Section 2 claim. R. 79 at 12. Doing so was directly contrary to this Court's case law.

2. The District Court's Reasoning Conflicts With Section 2's Natural And Logical Meaning

The district court's reasoning unnecessarily and erroneously divides 42 U.S.C. 1973(b) into two, independent requirements for establishing a claim under the Voting Rights Act, rather than giving the statutory text its natural and logical meaning. In effect, the district court held that plaintiffs bringing a vote denial claim must prove that members of their class have less opportunity than other members of the electorate: (1) to participate in the political process, and (2) then *separately* demonstrate an inability to elect representatives of their choice. This was error.

Amended Section 2(b)'s explicit reference to electing candidates is a natural result of the context in which the statute developed. Congress amended Section 2 in response to the Supreme Court's decision in a vote *dilution* case, and was intent on restoring the evidentiary standard for dilution claims that existed before that decision. See *Farrakhan II*, 590 F.3d at 998 (noting that "the debate surrounding the [1982] amendment focused almost exclusively on vote dilution"); see also Senate Report 19 (noting that "[a]n examination of the *vote dilution cases* before [*City of Mobile* v. *Bolden*, 446 U.S. 55 (1980),] reveals that *Bolden* was in fact a marked departure from prior law") (emphasis added); see also Senate Report 19-24 (examining the evidentiary standard in numerous vote dilution cases prior to *Bolden*). Moreover, the Senate Committee explained that the amended statute was

"meant to restore the pre-[*Bolden*] legal standard which governed cases challenging election systems or practices as an illegal *dilution of the minority vote*." Senate Report 27 (emphasis added). In a dilution case, the diminished "opportunity * * * to participate in the political process" is the dilution of the value of the minority voters' ballots, which results in a diminished opportunity "to elect candidates of their choice." 42 U.S.C. 1973(b). Given Congress's focus on vote dilution cases when it amended the statute, Section 2's explicit reference to minority members' opportunity to elect candidates of their choice is a predictable, and unremarkable, reflection of that context. Nothing in the statute's legislative history, however, suggests that Congress intended to *narrow* Section 2's application to just vote dilution claims. On the contrary, the amendments were designed to "broaden the protection afforded by the Voting Rights Act." *Chisom* v. *Roemer*, 501 U.S. 380, 404 (1991). Amended Section 2 thus retained protections for vote denial claims, while restoring the pre-*Bolden* standard that applied to vote dilution claims.

Moreover, proving an inability to elect candidates of choice is not even an "explicit requirement" (R. 79 at 12) for vote *dilution* claims. While that proof may certainly be probative of a Section 2 violation in the majority of vote dilution claims, the Senate Committee recognized that a failure to provide such proof would not be fatal to a Section 2 claim. Senate Report 29 n.115. The Senate

Committee explained that "the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote, in violation of the Section." *Ibid.* (internal quotation marks and citation omitted). If that were the case, the Senate Committee noted, then "the possibility exists that the majority citizens might evade" violation of the statute "by manipulating the election of a 'safe' minority candidate." *Ibid.* If courts were to interpret the statute to equate a minority group's equal access to the political process with any successful election of a minority candidate, then courts "would merely be inviting attempts to circumvent the Constitution." *Ibid.* (citation omitted). Thus, when evaluating any Section 2 claim, the Senate Committee urged courts to make "an independent consideration of the record," rather than focus on any particular factor – such as inability to elect candidates of choice. *Ibid.* (citation omitted). The Supreme Court agrees. See *Gingles*, 478 U.S. at 75 ("[T]he language of [Section] 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a [Section] 2 claim.").

The more appropriate reading of the statute recognizes that the language "to participate in the political process and elect representatives of their choice" is a single phrase adopted from the vote dilution cases, but one which readily applies to vote denial claims when those claims are viewed in their proper context. When applied to vote denial claims, the single phrase is most naturally understood to

emphasize the showing of less opportunity for minority voters to participate in the political process than other members of the electorate because their opportunity to register or to cast a ballot is denied, impaired, or diminished (on account of race or color). But, by establishing that minority voters have less opportunity to participate in the political process itself, those voters also necessarily establish that they have less opportunity, as individual voters, "to elect representatives of their choice." 42 U.S.C. 1973(b). As the Supreme Court explained, "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election." *Chisom*, 501 U.S. at 397. The fact that other members of the protected class have access to the political process and success in electing representatives of their choice (or even that minority-preferred candidates are also preferred and elected by non-minority members of the electorate), cannot invalidate a vote denial claim brought by other members of that protected class who are denied equal access to the political process itself. *Farrakhan II*, 590 F.3d at 1006. For example, a policy of appointing only white poll workers violates Section 2 irrespective of its impact on election outcomes. *Harris* v. *Siegelman*, 695 F. Supp. 517, 528-529 (M.D. Ala. 1988).

Section 2 is intended to identify challenged electoral practices that "result[] in minorities being denied equal access to the *political process*" generally. Senate

Report 27 ("The Operation of Amended Section 2") (emphasis added); see also *id.* at 28 ("Section 2 protects the right of minority voters to be free from election practices, procedures, or methods, that deny them the same opportunity to participate in the *political process* as other citizens enjoy.") (emphasis added). This determination is to be made by considering a range of objective factors, made relevant by "the kind of rule, practice, or procedure called into question," rather than dependence upon a single factor. *Id.* at 28. Congress ultimately identified "the extent to which members of a protected class have been elected to office in the State or political subdivision" as "*one circumstance* which *may* be considered" when evaluating an alleged violation. 42 U.S.C. 1973(b) (emphasis added). The Senate Committee identified other relevant factors to consider, of course, and both the Senate Committee and the Supreme Court made clear that the list "is neither comprehensive nor exclusive." *Gingles*, 478 U.S. at 45; see also Senate Report 29. The Court, in fact, explained that although "the enumerated factors will often be pertinent to certain types of [Section] 2 violations, *particularly to vote dilution claims*, other factors may also be relevant and may be considered." *Gingles*, 478 U.S. at 45 (footnote omitted; emphasis added); see *Farrakhan II*, 590 F.3d at 1004 ("[T]he district court erred in requiring [plaintiffs] to prove Factors that had little if any relevance to their particular vote denial claim."); *Gonzalez*, 677 F.3d at 405-406. "The question whether the political processes are 'equally open,'" the

Supreme Court recognized, "depends upon a searching practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process." *Gingles*, 478 U.S. at 45 (quoting Senate Report 30 & n.120). The district court's insistence that Section 2 plaintiffs who bring a vote denial claim establish an inability to elect candidates of their choice ignores the "functional" aspects of vote denial claims, and conflicts with the natural meaning of the statute, Congress's intent, this Court's prior case law, and the Supreme Court's reasoning.

B. District Courts Evaluating Vote Denial Claims Must Consider Those Circumstances And Facts Relevant To The Type Of Claim Brought

Plaintiffs who bring a Section 2 claim must establish that a challenged practice or procedure "results" in discrimination "on account of race or color." 42 U.S.C. 1973(a). Whether a plaintiff asserts a "vote denial" or "vote dilution" claim, that determination is made by considering the totality of circumstances operating in the jurisdiction. *Smith* v. *Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 596 n.8 (9th Cir. 1997); *Gonzalez*, 677 F.3d at 405 n.32. As explained above, however, the circumstances relevant to the Section 2 analysis often depend on the type of claim brought and the evidence presented in support of that claim.

It is clear from this Court's previous decisions that a plaintiff alleging a violation of Section 2 based on vote denial must show a causal relationship between the challenged voting practice and the alleged discriminatory result. *Salt*

River, 109 F.3d at 595; *Gonzalez*, 677 F.3d at 405. In *Gonzalez*, this Court explained that a challenge "based purely on a showing of some relevant statistical disparity between minorities and whites, without any evidence that the challenged voting qualification causes that disparity, will be rejected." 677 F.3d at 405 (internal quotation marks and citation omitted); see also *Salt River*, 109 F.3d at 595 (holding in a vote denial case that a "bare statistical showing of disproportionate impact on a racial minority does not satisfy the Section 2 results inquiry"). Relying on *Salt River*, this Court held in *Gonzalez* that a plaintiff must instead show a "causal connection between the challenged voting practice and a prohibited discriminatory result." *Gonzalez*, 677 F.3d at 405 (citation omitted). Applying this test, this Court held that, on the record before it, the plaintiffs in *Gonzalez* failed to establish that the requirement to provide identification at polling place locations caused a prohibited discriminatory result. Specifically, this Court noted that the plaintiffs alleged that Latinos were less likely to possess the necessary identification, but produced no evidence to support the allegation. *Id.* at 407. This Court also recognized evidence of general discrimination in Arizona against Latinos and the existence of racially polarized voting, but noted that plaintiffs produced "no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes * * * resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice."

Ibid. Thus, on the record presented, this Court upheld the district court's finding that plaintiffs failed to prove causation as not clearly erroneous. *Ibid.*

Plaintiffs in a vote denial case like the one here, then, must show there is a causal connection between the challenged voting practice (*i.e.*, the limited locations for late registration and early in-person absentee voting) and a prohibited discriminatory result (*i.e.*, unequal access to late registration and early in-person absentee voting on the basis of race). *Gonzalez*, 677 F.3d at 405-406. Here, the district court recognized that a Section 2 plaintiff must establish causation, but failed to perform a causation analysis that was focused on appropriate and relevant factors. R. 79 at 7.

Plaintiffs live on three reservations. These reservations are located a considerable distance from the single late registration and early in-person absentee voting site in plaintiffs' respective counties. The discriminatory impact of the challenged voting practice was uncontested in this case. The statistical evidence showed a significant disparity between the distance Native-American voters and non-minority voters must travel to reach the late registration and early in-person absentee voting locations. See R. 79 at 2 ("It is undisputed that [] Native Americans living on the three Indian Reservations face greater hardships to in-person absentee voting than residents of the three counties who do not live on the reservations."). Moreover, the evidence here showed that Native Americans are

less likely to be able to overcome the impact of the voting practice. Many Native Americans in those counties lack the resources necessary to travel long distances, thus making it more difficult for Native-American voters to participate in late registration and early in-person absentee voting than non-minority voters. The district court credited this evidence, finding that the history of official discrimination against Native Americans in Montana was "well-established" (R. 79 at 9), as was the fact that "poverty, unemployment, and limited access to vehicles render it difficult for residents of the three reservations to travel to the county seats to register late and cast in-person absentee ballots" (R. 79 at 10-11). Indeed, the district court noted that "[d]efendants did not even attempt to argue otherwise." R. 79 at 11. The district court should have considered whether these circumstances supported plaintiffs' allegation that the challenged voting practice caused a prohibited discriminatory result, in that it resulted in Native-American voters living in the three counties having less opportunity than white voters to participate in the political process. *Gonzalez*, 677 F.3d at 405-406 (identifying Senate Factors 1 and 5 as relevant circumstances to consider in a vote denial case).

The district court's focus on non-relevant factors in its analysis was error. In particular, the district court considered defendants' responsiveness to the plaintiffs' requests for additional satellite voting locations and their policy reasons for denying the requests. R. 79 at 11-12. It did so, however, in the context of

plaintiffs' timing in making their requests for additional locations. R. 79 at 11-12. The timing of plaintiffs' requests, and its bearing on defendants' ability to comply with such requests, may relate to *some* of the factors a court must consider when deciding whether to grant a preliminary injunction (*e.g.*, balancing the equities). But it is less relevant, if at all, to whether the absence of accessible late registration and early in-person absentee voting locations for Native-American voters violates Section 2 of the Voting Rights Act. Most importantly, however, the district court erred in its Section 2 analysis by reasoning that plaintiffs' ability to elect candidates of choice – a factor which has no relevance to plaintiffs' particular vote denial claim – "mandate[d] a conclusion that Plaintiffs [were] not likely to succeed on the merits of their [Section] 2 VRA claim." R. 79 at 12.

CONCLUSION

For the reasons stated, this Court should hold that the district court applied an incorrect legal standard when evaluating plaintiffs' Section 2 vote denial claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure, that the attached BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 6950 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

s/Angela M. Miller
ANGELA M. MILLER
Attorney

Dated: March 26, 2013

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS with the Clerk of the Court using the appellate CM/ECF system on March 26, 2013.

I certify that all participants who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that counsel of record identified below will receive the foregoing brief by first class U.S. mail, postage prepaid, which was posted on March 26, 2013:

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1019K

Steven Sandven <sdsandven@gmail.com> 30 September 2020 at 08:03
To: rdesai@cblawyers.com, agaona@cblawyers.com, kyost@cblawyers.com, marty.harper@asulawgroup.org
Bcc: Bret healy <brethealysd@gmail.com>, JoAnne Ybaben <jybaben@gmail.com>

Please provide your response to the attached proposed briefing schedule.

Please also reply to your position on our emergency motion (Second Request).

Steven D. Sandven
Steven D. Sandven Law Office PC
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Licensed in Minnesota, South Dakota and Washington DC - www.sandvenlaw.com

[Quoted text hidden]

OpposingCounsel 30September20.pdf
87K

Marty Harper <Marty.Harper@asulawgroup.org> 30 September 2020 at 08:58
To: Steven Sandven <sdsandven@gmail.com>

Cc: Roopali Desai <rdesai@cblawyers.com>

Mr. Sandven. We will be filing a responsive pleading to your motion in the 9th Circuit today. We will be opposing your request for an accelerated briefing schedule. Also, we will not stipulate to the schedule suggested in your most recent letter. Thank you.

Sent from my iPad

> On Sep 30, 2020, at 7:03 AM, Steven Sandven <sdsandven@gmail.com> wrote:
>
> [Quoted text hidden]
> <OpposingCounsel 30September20.pdf>

Roopali Desai <rdesai@cblawyers.com> 30 September 2020 at 09:06
To: Marty Harper <Marty.Harper@asulawgroup.org>
Cc: Steven Sandven <sdsandven@gmail.com>

Sorry for the multiple emails, but I need to clarify Marty's email below. We will be filing a response to your request to expedite tomorrow, Thursday October 1. We have informed the court that we will be filing an opposition to your request and that we oppose your request to expedite the appeal.

Regards,
Roopali

Sent from my iPhone

> On Sep 30, 2020, at 7:58 AM, Marty Harper <Marty.Harper@asulawgroup.org> wrote:
>
> **-External Sender-**
>
> [Quoted text hidden]

STEVEN D. SANDVEN
LAW OFFICE PC

PRINCIPAL
STEVEN D. SANDVEN

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VIA EMAIL

September 29, 2020

Roopali H. Desai rdesai@cblawyers.com
D. Andrew Gaona agaona@cblawyers.com
Dristen Yost kyost@cblawyers.com
Coopersmith Brockelman, P.C.
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Phoenix AZ 85004
602 381-5478

Marty Harper, ASU Law Group
111 E. Taylor Street, Suite 120
Phoenix AZ 85004-4407
marty.harper@asulawgroup.org

Re: *Yazzie, et. v. Hobbs* Appeal
Circuit Rule 27-3

Dear Counsel:

Plainitffs are seeking review of the District Court's Denial of injunctive relief from the Ninth Circuit Court of Appeals. Pursuant to the Circuit Court rules, we are providing you with the Motion and hereby request your position regarding same. Please advise.

Please contact me if there are any questions.

Sincerely,

Steven D. Sandven
Attorney for Appellants

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Attorney for Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARLENE YAZZIE, CAROLINE BEGAY, LESLIE BEGAY, IRENE ROY, DONNA WILLIAMS and ALFRED MCROYE,

Appellant,

v.

KATIE HOBBS, in her official capacity as Secretary of State for the State of Arizona,

Appellee.

Case No. 3:20-cv-08222-GMS

APPELLANT'S MOTION FOR EXPEDITED REVIEW ON APPEAL BY OCTOBER 7, 2020 PURSUANT TO RULE 27-3 AND ATTACHED FORM 16 CERTIFICATION

Appellants, DARLENE YAZZIE, CAROLINE BEGAY, LESLIE BEGAY, IRENE ROY, DONNA WILLIAMS AND ALFRED MCROYE, by and through THEIR attorney, hereby move for an expedited hearing of the appeal of the District Court's Order denying preliminary injunction against Defendant

KATIE HOBBS in her official capacity as Secretary of State on the following grounds:

1) Appellants are all enrolled members of the Navajo Nation and each is a resident of the Navajo Nation Reservation, in the County of Apache, State of Arizona.

2) Appellants, as Members of the Navajo Nation, are part of a constitutionally protected class and the State of Arizona has a history of discrimination against and attempts to limit their voting rights.

3) Under the State of Arizona's current election system, absent the injunctive relief requested herein, Navajo Nation Tribal Member Plaintiffs will not have equal opportunity, as compared to other Arizona voters, to Vote By Mail (VBM) at the November 3, 2020 general election because of disparate mail delivery times.

4) Section 2 of the Voting Rights Act of 1965 guarantees that every eligible voter have the same opportunities to vote as other voters in their County and State.

5) Tribal Members on Arizona's Permanent Early Voting List, will have ballots mailed on October 7th along with a "Publicity Pamphlet" stating "ballots must be received by 7:00 pm on Election Day to be Counted." (Doc. 42-1 paragraph

5). Further, the "AZVoteSafe Guide for Native American Voters" (Doc. 42-1 paragraph 6) references slower mail service in rural areas. Hence, Appellants will not know the deadline for mailing back their ballot without the Court clarifying same.

6) The "AZVoteSafe Guide for Native American Voters" further provides that "Tribal members historically participate in voting on Election Day as a civic and community event, and **many tribal members face challenges to voting by mail due to limited mail service** and language assistance needs. However, because of current public health concerns, it's more important than ever to plan ahead and have back-up options available." (*emphasis added*).

7) Finally, the "AZVoteSafe Guide for Native American Voters" states on the last line of Step 4: "[i]f you need to mail your voted ballot back, make sure you mail it early enough to arrive at the County Recorder's office by 7:00 p.m. on Election Day. The state's recommended last day to mail back a ballot is October 27, **but if you live in a rural area with slower mail service, you should build in more time."** (*emphasis added*).

8) The typical voter residing on the Navajo Nation Reservation has fewer days and thus less opportunities to consider their vote by mail ballot, mark their selections and return the ballot in a timely manner as compared with other voters in their county and state.

9) Appellants will be irreparably harmed in that their vote by mail

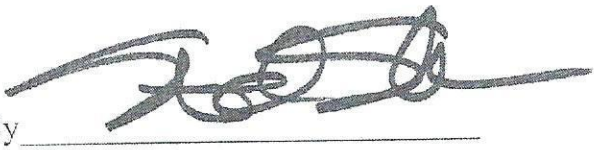
ballots have a high probability that it will not arrive in time to be counted and they will be disenfranchised.

10) There remains and urgent need for the Court of Appeals to hear the instant Appeal and render its decision so that Appellants may obtain the requested relief and have the same opportunity to vote by mail in the November 3, 2020 election.

Thus, there is a definite need for the Court of Appeals to hear Appellant's appeal with considered urgency.

Dated: September 29, 2020

STEVEN D. SANDVEN LAW OFFICE PC



By_____

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VIA EMAIL

September 29, 2020

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Re: *Yazzie, et. v. Hobbs*, 20-16890

Dear Counsel:

Will stipulate to the following briefing schedule:

1. Appellant Opening Brief - October 2nd at noon;
2. Appellee Brief – October 5th at noon; and
3. Appellant Reply Brief – October 6th at noon.

Please contact me if there are any questions.

Sincerely,

Steven D. Sandven
Attorney for Appellants