Chris McClure
McClure and Hardy Prof. LLC
SD Bar No. 3962
101 S. Reid St. Ste. 307
Sioux Falls, SD 57103
605-496-9858
mcclurechris@gmail.com

Michael J. Novotny
Big Fire Law & Policy Group LLP
1404 Fort Crook Road South Bellevue, NE 68005
AZ State Bar No. 033792
Telephone: (531) 466-8725
Facsimile: (531) 466-8792
Email: mnovotny@bigfirelaw.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Plaintiffs,

v.

Katie Hobbs, in her official capacity as Secretary of State for the State of Arizona,

Defendant.

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs Darlene Yazzie, Caroline Begay, Irene Roy, Donna Williams, Leslie Begay and Alfred McRoye (collectively "Plaintiffs"), oppose Defendant's Motion to Dismiss, and same should be denied..

Defendant Katie Hobbs, in her official capacity as secretary of state, seeks dismissal under Fed.R.Civ.Pro. 12(b), and more specifically under 12(b)(1), 12(b)(6) and 12(b)(7). However, given that Defendants misapply the caselaw with regard to Section 2 of the Voting Rights Act of 1965 (VRA), and misstate the position asserted by Plaintiffs in general, and specifically with regard to their stated injury, Plaintiffs' complaint survives dismissal.

I. INTRODUCTION

Plaintiffs have asserted that the election system for the State of Arizona violates Section 2 of the Voting Rights Act of 1965 (hereafter VRA) in that it fails to provide to Plaintiffs the same opportunities to vote in the general election to be held on November 3, 2020, as other citizens of the county and state. Plaintiffs' action does not merely assert that their votes will not be counted.

Likewise, Defendant Secretary of State, misunderstands the fundamental requirements under the Voting Rights Act when she asserts that the availability of one means to vote precludes injury to Plaintiffs. Such assertion is contrary to law and a direct violation of Section 2 of the VRA. Defendant cannot seek dismissal of the complaint herein simply by asserting that the Secretary has met her burden as long as there is at least one way for a voter to be able to cast their November ballot despite the fact that every other citizen of Arizona has three distinct options by which to exercise their right to vote. To the contrary, every means of voting offered to the one segment of the electorate must be fundamentally and equally available to the entire electorate. Anything less than that is a violation of Section 2 on its face.

Finally, the State of Arizona offers three ballot systems to be utilized in the general election: Election Day In-Person Polling Place, In-Person Early Voting Polling Place and Vote By Mail. The reality is that Plaintiffs consider none of these voting systems equal pursuant to Section 2 of the VRA. However, given that polling locations and polling box locations have yet to be determined, set, or otherwise made public, it was only reasonable to institute this action based on an injury to Plaintiffs under the Arizona Vote By Mail system, short of filing an eleventh-hour Complaint.

II. UNITED STATES STATEMENT OF INTEREST FOR SECTION 2 CASES

In the case of *Sanchez, et al. v. Cegavske, et al.*, 214 F. Supp. 3d 361 (2016), the Civil Rights Division of the United States Department of Justice filed a Statement of Interest wherein the United States detailed the legal understanding of the requirements for a Section 2 vote denial/abridgement case as distinguished from a vote dilution case. A true and Correct copy of Document 43 filed on October 3, 2016, filed in *Sanchez et al.* which is the United Stated Statement of Interest which is filed as Document 53-2 in this matter and is fully incorporated herein (hereafter "US Statement"). This US Statement developed and specified the vote abridgment 'test' which has not been altered, over-ruled or otherwise amended. In Plaintiffs' Memorandum in Support of Injunctive Relief filed in this action, the analysis of a Section 2 violation was discussed in detail starting at the bottom of page 4 and continuing through the top of page 15. However, the specific requirement of a Section 2 vote abridgement case, as contained in the US Statement, bears further attention.

Courts are to utilize a two-step analysis to determine whether any limitation to early voting result in denial or abridgment of the right to vote under Section 2 of the VRA. Document 53-2, page 3, lines 16-19. Step one is to assess "whether the practices amount to material limitations that bear more heavily on minority citizens than nonminority citizens." Document 53-

2, at page 3, lines 19-20. This analysis must evaluate the "likelihood that minority voters will face the burden and their relative ability to overcome that burden." Document 53-2, at page 3, line 21 -page 4, line 1. Once there has been a finding that there is a disparity for minority voters, the court must engage in a "totality of the circumstances" evaluation in the relevant jurisdiction in order to determine whether the challenged practice "works in concert with historical, social, and political conditions to produce a discriminatory result." Document 53-2, Page 4, lines 9-13. This is where the court is to consider and evaluate a variety of typical factors to be considered and which were discussed as part of the Legislative history for Section 2; these are generally known as the 'Senate Factors'. Document 53-2, page 4, line 18-page 5, line 21. However, it is important to understand that there is no requirement that any specific number of these be proven, nor is the list exhaustive. Document 53-2, at page 5, lines 1-4.

Therefore, 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) (emphasis added). On page 10, starting at line 5 of the US Statement, the Department of Justice states:

> Defendants several times suggest that Plaintiffs must show an outright denial of access to voting opportunities. (*citations to Sanchez et al. omitted*). 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")) (emphasis added). ***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").

Document 53-2, page 10, lines 5-23.

This bears repeating. Plaintiffs do not need to show that they have *no* opportunity to vote. Plaintiffs must *only* show that they have "less opportunities" to vote as compared to other voters, in this case in their county and state. The US Statement continues stating that not all voting systems are equivalent "and a court must consider the circumstances of each case and the impact a challenged practice has on opportunity to vote." (citations omitted) Document 53-2, page 11, lines 3-7. Furthermore, the US Statement clarifies the requirements for a complaint under Section 2 stating that "[t]he 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."" Document 53-2, page 12 lines 4-8 (citations omitted).

Furthermore, as included in the US Statement "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." Document 53-2, page 12, lines 11-13. Any Section 2 abridgement case must evaluate the totality of the circumstances. Document 53-2, page 13, lines 15-20; pages 14-15. As such, the Plaintiffs have clearly met their requirements to plead a violation under Section 2 of the VRA.

III. FACTS IN THIS CASE

Plaintiffs' lawsuit details at exacting levels, the disparities between the opportunities to vote in the general election that exist for Plaintiffs who are Members of the Navajo Nation and who have voiced their desire to participate in the general election, and who reside within the State of Arizona, and who, in comparison to the wealthy members of the state, such as those residing in the Scottsdale do not have the same opportunities to utilize all available voting methods.

Specifically, Plaintiffs have asserted that they are enrolled members of the Navajo Nation and reside in on the Reservation and within the Apache County of Arizona. Plaintiffs' Complaint paragraphs 1-7. Plaintiffs have asserted that they desire to participate in the election on the same terms as other voters in the general election. Complaint paragraph 8. Life for these voters who live on the Navajo Nation Reservation is not typical of other voters in the State of Arizona in general, and of Apache county in particular. Complaint paragraphs 54-79. Plaintiffs complaint details how the postal system and ability to access the postal system on the Reservation is exceedingly difficult and there is a distinct bias against anyone using a vote by mail ballot on the Reservation. Complaint paragraphs 20-28. Additionally, Plaintiffs details the historic patterns of discrimination and bias that has been experienced in the State of Arizona. Complaint paragraphs 80-100.

Plaintiffs action does not seek to attack the entire voting process in the state of Arizona. However, there exists an extreme bias against the Plaintiffs when compared to other voters in the State of Arizona. The election system rules currently in place for the 2020 general election, increase the disparity for Plaintiff voters. Complaint paragraphs 16-53. Under the existing election rules, Plaintiffs do not have the same right or opportunity to exercise their most

fundamental of all rights, that of the vote. Therefore, Plaintiffs lawsuit seeks to adjudicate how the existing election system in Arizona, directly violates Section 2 of the Voting Rights Act of 1965.

Recall that the Navajo Nation Reservation is over 27,425 square miles with more than two-thirds of it in the Arizona counties of Apache, Coconino, and Navajo. Complaint, paragraph 1. The accessibility to the vote by mail ballot for the typical Member of the Navajo Nation is hindered by the fact that they have fewer days in which to cast their mail-in ballot compared with voters in more affluent areas because it takes longer to get their ballots and longer for the ballots to be returned to the voting location.

When analyzing the travel issues faced on the Reservation, the excessive distances Tribal Members must travel to obtain mail is compounded by socioeconomic factors faced by most Native Americans which include reduced access to public transportation and funds necessary to travel the distance required to obtain and return a ballot. Having access to a vehicle is extraordinarily important in order to have regular access to mail and traveling long distances to get mail is not only a burden in terms of travel distance and time, but also imposes a financial cost to pay for gasoline. This increased distance for mail heightens the potential for problems and slow return of the ballot.

It can be understood that voters, such as Plaintiffs, that live on the Navajo Nation Reservation, are discriminated against by their socioeconomic circumstances in addition to the extremely limited availability of access to the post office and to secure and timely mail delivery and transport. This discrimination is a direct result of the lack of post offices available on the Reservation, the reduced hours of service at those post offices and the fact that the majority of residents do not receive at home mail delivery; not one of these factors is a concern for any of the other voters in Arizona who do not live on the Reservation. Thus, it is clear that these Plaintiffs

are being discriminated against in comparison to the other voters in Arizona, most of which have at home mail service, or who would only have to drive a few miles at most to go to a post office.

The foregoing facts clearly demonstrate that Plaintiffs herein are in a discrete and differentiable situation in comparison to other and more generalized groups of citizens in the State of Arizona.

IV. LEGAL ANALYSIS

A. Plaintiffs Survive the Rule 12 Motion to Dismiss

Given that the Defendant has misstated Plaintiffs case and the legal test for a Section 2 abridgement challenge, Defendant's motion to dismiss fails. Based on the requirements for a Section 2 "abridgement" challenge, as defined by the United States Department of Justice (US Statement) and caselaw, it is undisputed that Plaintiffs have sufficiently pled their cause of action and therefore survive each of Defendant's Rule 12(b) assertions.

This Court may only grant a motion to dismiss under Rule 12(b) where the complaint fails to demonstrate that the plaintiff is entitled to relief. Defendant filed the instant motion asserting that Plaintiffs have lack of subject matter jurisdiction pursuant to Fed.R.Civ.Pro. 12(b)(1), fails to state sufficient facts under 12(b)(6), and fails to join an indispensable party pursuant to Rule 12(b)(7). Each of these allegations fail.

Plaintiffs seek redress for violations of the 1965 Voting Rights Act, 52 U.S.C. § 10301, therefore the Court has jurisdiction over this federal claim. The Plaintiffs have specifically alleged a violation of the "abridgement" portion of Section 2 of the VRA. Pursuant to the US Statement, in order to properly plead an "abridgement" violation of Section 2 of the VRA, Plaintiffs must *only* show that they have 'less opportunities' to vote as compared to other voters, (in this case) in their state as this matter involves statewide elections. The language of the statute is instructive and binding " 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) in that its members have less opportunity than other members of the electorate to participate in the political process." (emphasis added) 52 U.S.C. § 10301. Since this is a statewide election being discussed the comparison is between the protected class (the Navajo voters) and the voters in the rest of the state because this is a statewide election, not a local one. The comparison outlined in Section 2 of the VRA is to all other voters in the statewide election, not just locally. Plaintiffs have met this challenge.

Plaintiffs have asserted they are residents on the Navajo Nation, in Apache County in the State of Arizona, Plaintiffs have asserted they desire to participate in the general election, Plaintiffs have asserted they are enrolled members of the Navajo Nation. Additionally, Plaintiffs' Complaint provided the Court with vast amounts of evidence on the currently existing difficulties a voter residing on the Navajo Nation Reservation encounters dealing with the mail system and the historic racist tactics employed by the State of Arizona in an attempt to limit the votes of Native Americans. Given that Plaintiffs who decide to utilize the Vote By Mail option have on average 13 fewer days to return their ballot to the County Recorder than other, more affluent residents, they logically have 'less opportunity' to vote as defined under Section 2. Plaintiffs request that Defendant correct this disparity by merely permitting the inclusion and counting of ballots mailed on the Navajo Nation Reservation that are post marked on or before election day. All of this detailed information contained herein was contained in Plaintiffs' Complaint and meets the pleading requirements to survive a Rule 12(b) Motion to Dismiss.

Finally, Defendant's assertion that Plaintiffs suit fails without the inclusion of the County Recorder as party is patently false. As Secretary of State, Defendant is the chief elections officer in the State of Arizona. As the Chief Elections Officer, Defendant is responsible for supervising and issuing directives concerning the conduct of all elections in the state. A.R.S. § 16-

142. It is therefore her ultimate responsibility to manage and direct the conduct of the County Recorder's with regard to conducting the general election. Defendant's duties include certifying the results of the general election. A.R.S. §16-648. To move to dismiss Plaintiffs' complaint on the basis that the County Recorder should have been named a party is without merit and misrepresents Defendant's duties and responsibilities with regard to the election.

1. The Federal Rules Only Require that Sufficient Notice be Provided

Moreover, the Federal Rules of Civil Procedure only require a claimant to set out facts upon which it bases its claim. What is required by a Plaintiff is only a short, plain statement of the claim which will give a defendant fair notice of what the plaintiff is claiming and the grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41 (1957); *Dura Pharms, Inc. v. Broudo*, 544 U.S. 336 (2005). The Supreme Court has long held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would otherwise entitle him to relief. *Conley*, 355 U.S. at 45-46 . While clarity and precision are desirable in any pleading, the Federal Rules require little more than indication of the type of litigation that is involved and a generalized summary of claims sufficient to afford fair notice to parties. *Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076, 1086 (9th Cir. 2019); *Am. Timber & Trading Co. v. First Nat'l Bank of Oregon*, 690 F.2d 781, 786 (9th Cir. 1982). Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff's injury be fairly traceable to the defendant's conduct. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 137-138 (2014)

As described above, Plaintiffs' Complaint has alleged every required element for a VRA Section 2 challenge. Defendant is fully cognizant of the injury and other bases for Plaintiffs' claim. Defendant's decision to implement the Election Day return deadline is causally related to the injury alleged by Plaintiffs. Defendant, as the Chief Election Officer for the State of Arizona

has a duty to follow all election laws including the federal election laws. Thus, every state is required to conduct its election in a manner that does not violate Section 2 of the VRA. Plaintiffs have met their requirements under Rule 12 and Defendant's Motion to Dismiss should be denied.

2. The Court Must Consider Complaint as a Whole

Additionally, when faced with a Rule 12 motion to dismiss, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true. *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308 (2007); *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Courts must also consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12 motion to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *Tellabs* at 322-323. It is therefore reasonable, on this basis, that the Court consider and draw reasonable inferences and conclusion from the totality of Plaintiffs' complaint.

3. Plaintiffs Injury Is Not Speculative and Meets the Requirements for Section 2 Violation.

Plaintiffs' injury is not speculative. While Plaintiffs have a reasonable basis to be concerned that their votes will not be counted, the complained-of Injury is that Plaintiffs have less of an opportunity to vote in the general election than is available to the other residents in their county and in the state because the Vote by Mail system is biased against Members of the Navajo Nation living on the Reservation. This is a direct violation of the VRA.

Moreover, the primary injuries detailed in Plaintiffs' Complaint are not based on problems that are primarily related to the US Postal Service or COVID-19. These two factors complicate the situation, true. However, COVID-19 and the Postal Service problems are complications that are present in every state and should have been part of the deliberative process when establishing the election system for the State of Arizona. The Defendant cannot abdicate

responsibility for her actions by claiming these problems are outside of her control. COVID-19 and Post Office problems are a tired distraction and compensations should have been made. Defendant is not absolved form her responsibility to act.

Furthermore, Defendant's concerns regarding if the VBM ballots from the Navajo Reservation will be postmarked has been mooted by the ruling in *Mondare Jones, et. al. v. United States Postal Service, et. al.,* attached to this matter as Exhibit A. On page 83 fo the ruling on the preliminary injunction in that matter the Court ordered that "by not later than noon on September 25, 2020 the parties shall settle an Order providing Plaintiffs appropriate relief consistent with this opinion," No such order is on file with the Court at this time. The Court continues" In the event the parties fail to file such notice by that date the terms of the following Order shall take effect without further action by this Court: 1. The United States Postal Service ("USPS") shall, to the extent that excess capacity permits, treat all Election Mail as First-Class Mail or Priority Mail Express." This is significant as it is binding on the USPS nationwide and also because first class mail is required to be postmarked by the USPS. See Exhibit B.

Additionally, Plaintiffs take issue with Defendant's assertion that the *Purcell* case is a bar to this action. *Purcell v. Gonzalez*, 549 US 1 (2006) (*per curiam).* While the US Supreme Court in *Purcell* indicated that it clearly disfavored last-minute election Complaints, its holding in no way did precludes the instant action from proceeding. Plaintiffs' Complaint was filed approximately 10 weeks before the General Election, not mere weeks as discussed in *Purcell*, but again was not part of the holding in that case. The Preliminary Injunction hearing in this matter was heard 42 days prior to election day and 15 days from the beginning of early voting. In *Brakebill v. Jager*, 139 S.Ct. 10 2018, similar arguments were made and the Eighth Circuit overturned significant voting requirements on Sept 24, 2018, 43 days from election and 3 from early voting beginning. That matter was significantly more disruptive to the election process and

likely to lead to voter confusion than simply counting ballots that are mailed in on time, but that do not arrive due to slow mail times. *Brakebill*, is binding in this matter when it comes to the *Purcell* argument and shows that the Defendant's position is off base. Moreover, the Ruling on the *Arizona Democratic Party et al. v. Hobbs et al., Case* # 2:20-cv-01143-DLR (Attached as Exhibit C) was just granted a preliminary injunction on September 10, 2020 that would equally impact the election and the Secretary of State attempted to stay enforcement of that decision pending appeal and that was denied September 18, 2020. The Secretary is going to have to change the election procedure there, but she is unwilling to do so when it comes to counting the votes of Native Americans.

From the *Purcell* "timing" issue flows the assertion that Plaintiffs are barred under the theory of laches, as asserted by Defendant. At the time of writing this opposition, the State of Arizona and its counties are still in the process of determining polling locations, polling box locations and other critical election system decisions. Plaintiffs can hardly be barred from asserting its Section 2 claim based on laches, when Defendant has still not yet finalized or made available to the voters, such vital information on polling accessibility. Plaintiffs' filing, while clearly time sensitive, was necessitated by Defendant's failure to adequately prepare for the general election.

B. Arizona Vote By Mail Violates Section 2 of the VRA.

As more fully detailed *supra*, this action is brought by the Plaintiffs pursuant to Sections 2 of the VRA. Section 14(c)(1) of the VRA 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., Ohio State Conference of NAACP v. Husted*, 768 F.3d , 524, 552-53 (6th Cir. 2014), *stay granted*, 135 S. Ct. 42 (2014), *vacated on other grounds*, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 238-39 (4th Cir. 2014), *stay granted*, 135 S. Ct. 6 (2014), *cert. denied*, 135 S. Ct. 1735 (2015) . Therefore, the process of Voting By Mail is covered by Section 2 of the VRA.

1. The Test is not having One Opportunity, All Opportunities Must be Equal

As more fully discussed supra, the US Statement describes a violation of Section 2 of the VRA as the imposition or application of a "voting qualification," "prerequisite to voting," or "standard, practice, or procedure" which "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group." 52 U.S.C. § 10301(a). A violation of Section 2 does not require that minority voters be *completely* deprived of the ability to vote. *See, e.g., Veasey*, 2016 WL 3923868, at *29 (emphasis added). Instead, a plaintiff must only establish it has *"less opportunity"* to participate in the electoral process relative to other voters. 52 U.S.C. § 10301(b). The existence of alternative voting means or accessibility does not otherwise absolve the Defendant of the requirement to make all "opportunities" available.

In the State of Arizona, Plaintiffs assert that even in-person voting on election day is not equally available. From the data available at this time, all available information indicates that on an equal area basis, election day polling locations available to a voter in St. Johns or Scottsdale are at least 11 times less available than for a voter on the Navajo Nation Reservation. As it is understood, the polling locations and numbers have not been definitively set, but all information indicates that this option is not equal either.

As discussed supra, the test for a Section 2 abridgement violation is a two-step analysis. 1) does the practice create material limitations which bear more heavily on minority

citizens in comparison to nonminority citizens, and 2) if the answer is "yes" the court is to review the "totality of the circumstances" in said jurisdiction in order to evaluate whether the discriminatory result is based on other issues such as the Senate Factors. *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, 240-241, 245 (4th Cir. 2014), *stay granted*, 135 S. Ct. 6 (2014), *cert. denied*, 135 S. Ct. 1735 (2015); *Smith v. Salt River Project Agric. Improvement. & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997).

2. Senate Factors/History of Discrimination

Defendant's Motion to Dismiss mistakenly asserts that Plaintiff must address each of the "Senate Factors" in its analysis. This is contrary to the caselaw as well as the US Statement. The Senate Factors are guidelines to utilize when evaluating the second prong of the Section 2 test. Both Plaintiffs' Complaint and Memorandum in Support of Injunctive Relief, contain detailed analysis of three of the Senate Factors which combine to evidence the discriminatory result which is rooted in historic restrictions and discriminations against the Native Americans living in Arizona.

Defendant assert in her Motion to Dismiss, that while Arizona officials have a long history of restricting the rights of Tribal Members to register to vote, vote or otherwise participate in the democratic process, these practices are old and not relevant to this action. Regardless of alleged current practices, the Court is directed to evaluate the historic practices of the State. Plaintiffs' complaint and Memorandum in Support of Injunctive Relief both detail the extensive historical practices of the State of Arizona which have limited Tribal Members' ability to exercise their right to Vote. However, it is also instructive that as recently as 2018, the Navajo Nation was forced to file a lawsuit against the State when Arizona refused its request for In-Person voter registration site and In-Person early voting sites. In addition, the Defendant was made aware that Native American VBM were being rejected at a rate eight times that of white Arizona voters back

in February and has not resolved the issue. See Exhibit D at pg 18-25 and 32- 34. In addition, it is clear from the *Chavez Thesis* that there is unequal access to postal locations on the reservations in Arizona when compared to areas off the reservation and that this leads to reduced voter turnout. Document 53-7 pg 56-58. The *Chavez Thesis* further shows only 15.2% of reservation voters in Navajo, Apache and Coconino counties cast early votes (mail and in-person) in the 2012 and 2016 elections combined while 50.9% of non-reservation voters cast early ballots. Document 53-7, pg 74. The Secretary of State cannot claim to be unaware of these figures as the author of the thesis is now an employee of hers.

While it is nice that the Defendant has had talks to try and remedy this issue, there simply has not be any policy put in place at this time that will do so. It is therefore disingenuous for the Defendant to claim that Arizona's discriminatory tactics are no longer in practice. The evidence is strong that current and past voting practices utilized in Arizona discriminate against Tribal Members.

C. Plaintiffs' Equal Protection Claim Survives

As detailed infra, Plaintiffs have provided Defendant and this Court with sufficient notice and information that it has a valid Equal Protection Claim. As such, it should survive Defendant's Motion to Dismiss.

D. Plaintiffs Have A Valid Claim Under Arizona's Constitution

Similarly, Plaintiffs Complaint includes sufficient facts and information to provide Defendant and this Court with proper notice and information supporting its claims under the Arizona Constitution. As such, it should survive Defendant's Motion to Dismiss.

III. CONCLUSION

For all of the forgoing reasons, the caselaw and facts as plead by Plaintiffs meet the requirements under Rule 12(b) and support a denial of Defendant's Motion to Dismiss.

Dated this 24th day of September 2020.

/s/ Chris McClure
Chris McClure
McClure and Hardy Prof. LLC
SD Bar No. 3962
101 S. Reid St. Ste. 307
Sioux Falls, SD 57103
605-496-9858
mcclurechris@gmail.com

/s/ Michael J. Novotny
Michael J. Novotny
Big Fire Law & Policy Group LLP
1404 Fort Crook Road South
Bellevue, NE 68005
AZ State Bar No. 033792
Telephone: (531) 466-8725
Facsimile: (531) 466-8792
Email: mnovotny@bigfirelaw.com

ATTORNEYS FOR PLAINTIFFS