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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

[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).

[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

[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