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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Navajo Nation, et al.,
10 Plaintiffs,

11 v.

12 Michele Reagan, et al.,
13 Defendants.
14

No. CV-18-08329-PCT-DWL

ORDER

15 Pending before the Court is an emergency motion for a temporary restraining
16 order (“TRO”) and motion to set hearing on preliminary injunction. (Doc. 2.) As
17 discussed below, the Court will set a hearing for **Monday, November 26, 2018, at 10:00**
18 **a.m.** to address certain threshold questions concerning the TRO request and, potentially,
19 to set a briefing and hearing schedule on that request.

20 A. The Complaint

21 On November 20, 2018, seven plaintiffs—(1) the Navajo Nation, (2) Joyce Nez,
22 (3) Denise Johnson, (4) Ashley Atene, Sr., (5) Irene Roy, (6) Bonnie Tsosie, and (7) Dale
23 Smith—filed a verified complaint against the Arizona Secretary of State and certain
24 election officials from Apache, Coconino, and Navajo Counties. (Doc. 1.) The
25 complaint alleges three categories of election-related misconduct. First, it alleges that, in
26 August 2018, the Navajo Nation asked election officials in Apache, Coconino, and
27 Navajo Counties to establish additional in-person voter registration sites and early voting
28 sites within the Navajo reservation, but the election officials rejected this request. (Doc.

1 ¶¶ 92-96, 107.) Second, it alleges that election officials in Apache, Coconino, and
2 Navajo Counties failed to provide sufficient Navajo-language translators to assist voters
3 during the November 2018 election. (Doc. 1 ¶¶ 14, 98.) Third, it alleges that election
4 officials in Apache, Coconino, and Navajo Counties failed to extend an opportunity to
5 “cure” ballot deficiencies to approximately 100 members of the Navajo Nation who
6 failed to sign the outside of their early-voting envelopes or who provided mismatched
7 signatures. (Doc. 1 ¶ 109. *See generally* Doc. 2 at 3 [“Defendants (i) refused the Navajo
8 Nation’s request to establish early voting sites on the Navajo Reservation . . . ; (ii) failed
9 to provide translators at early voting sites on the Reservation who are proficient in the
10 Navajo language; and (iii) refused to count the ballots cast by Navajo Nation Tribal
11 Members for the 2018 election because they failed to sign their envelopes or were
12 disqualified due to signature mismatch.”].)

13 Count One of the complaint alleges a claim under 18 U.S.C. § 1983, for violations
14 of Plaintiffs’ rights under the 14th Amendment and the Voting Rights Act. Count Two of
15 the complaint alleges unspecified violations of the Arizona Constitution. Count Three
16 alleges a claim under the Voting Rights Act. Count Four alleges a claim under the First
17 Amendment.

18 Much of the relief sought in the complaint is declaratory in nature—among other
19 things, it requests that the Court declare that Defendants’ “failure to provide in-person
20 voter registration on the Reservation,” “failure to provide additional early voting sites on
21 the Reservation,” “failure to provide translators for early voting Tribal Members,” and
22 “failure to count the early ballots cast by Tribal Members in the 2018 election” all
23 constitute violations of existing law. (Doc. 1 at 24-25.) The complaint also requests an
24 injunction requiring Defendants to establish new in-person voter registration sites and
25 early voting sites and provide translators in future elections. (Doc. 1 at 25.) Finally, the
26 complaint requests one category of immediate injunctive relief: “That this Court grant
27 preliminary and permanent injunctive relief by ordering Defendants to allow Tribal
28 Members whose ballots were excluded because of missing or mismatched signatures an

1 opportunity to remedy the inadequacy within five (5) business days of the issuance of a
2 Court Order.” (Doc. 1 at 26.)

3 B. The TRO Request

4 The complaint was accompanied by an “emergency motion for temporary
5 restraining order and motion to set hearing on preliminary injunction.” (Doc. 2.) The
6 first sentence of the motion, however, states it is only being filed by three of the seven
7 plaintiffs named in the complaint: (1) the Navajo Nation, (2) Joyce Nez, and (3) Ashley
8 Atene, Sr. (Doc. 2 at 2.) It asks the Court to “enjoin[] all Defendants from rejecting
9 ballots of voters in Navajo, Apache, and Coconino Counties who are otherwise qualified
10 to vote in order to allow Navajo voters an opportunity to cure deficiencies in the early
11 ballots cast in accordance with the rights of other Arizona voters” and to “toll the
12 deadline for certifying the election results under Arizona Revised Statutes §16-648 and
13 §16-650, until this matter can be heard, in order to ensure that all unsigned and
14 mismatched early ballot voters are given an opportunity to correct the ballot
15 discrepancies and their ballots are included in the submitted results.” (Doc. 2 at 2-3.) It
16 further requests that “[i]f any Defendants have already certified election results . . . that
17 the Court direct these Defendants to allow Navajo voters an opportunity to cure the
18 deficiencies and to certify and file corrected returns.” (*Id.* at 3.)

19 The motion was accompanied by a memorandum of points and authorities. (Doc.
20 2-1.) It contends that time is of the essence because “the State of Arizona is continuing to
21 count thousands of votes and Arizona law allows the canvassing or verifying of votes up
22 to twenty days past an election.” (Doc 2-1 at 13, citing A.R.S. § 16-642.) It further
23 contends that “the balance of equities tips strongly in [Plaintiffs’] favor . . . [because]
24 currently in Apache County, for Ganado School Board #20, there is only a three vote
25 difference between the potential candidates for school board.” (Doc. 2-1 at 15.)

26 C. Threshold Questions

27 The TRO request raises several threshold issues that should be addressed before
28 turning to the merits. First, although the complaint alleges the Navajo Nation has

1 standing to bring claims on behalf of its members (*see* Doc. 1 ¶ 25), the Court “has an
2 independent obligation to assure that standing exists.” *Summers v. Earth Island Inst.*, 555
3 U.S. 488, 499 (2009). Here, the TRO request is for an order requiring election officials
4 to allow a small subset of Navajo Nation members to cure deficiencies in their ballots.
5 Courts have suggested tribes may lack standing to advance analogous claims. *See, e.g.,*
6 *United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 734 (8th Cir. 2001)
7 (citations omitted) (“The doctrine of *parens patriae* allows a sovereign to bring an action
8 on behalf of the interest of all of its citizens. However, this doctrine is reserved for
9 actions which are asserted on behalf of all of the sovereign’s citizens. The *parens patriae*
10 doctrine cannot be used to confer standing on the Tribe to assert the rights of a dozen or
11 so members of the Tribe.”); *Navajo Nation v. Wells Fargo & Co.*, 2018 WL 4608245,
12 *13 (D.N.M. 2018) (concluding that Navajo Nation “does not have standing in its *parens*
13 *patriae* capacity to bring claims that involve injuries to purely private interests”); *Navajo*
14 *Nation v. Superior Court of State of Wash. for Yakima Cty.*, 47 F. Supp. 2d 1233, 1240-
15 41 (E.D. Wash. 1999) (citations omitted) (“The governmental entity must raise claims
16 which affect all its members, not just a select few. Nothing in the pleadings and little in
17 the Nation’s briefing support the claim the Navajo Nation is acting in its *parens patriae*
18 capacity. The Navajo Nation has failed to prove it is acting on behalf of all of its
19 members in order to litigate as *parens patriae*. Therefore, the Navajo Nation does not
20 have standing . . .”).

21 Second, Plaintiffs’ pleadings only identify one electoral race in which the
22 requested relief could possibly change the outcome—the Ganado School Board race in
23 Apache County, which is alleged to currently have a three-vote difference. (Doc. 2-1 at
24 15.) This raises the question whether Plaintiffs have adequately alleged irreparable harm
25 against the election officials of Coconino and Navajo Counties. If not, those election
26 officials shouldn’t be swept into the TRO request—the other categories of injunctive and
27 declaratory relief sought by Plaintiffs simply pertain to how *future* elections should be
28 conducted and, thus, need not be resolved on an emergency basis.

1 Third, it is notable that many of Plaintiffs’ criticisms are directed toward actions
 2 (and inaction) by county election officials that occurred weeks or months before the
 3 November 2018 election. (*See, e.g.*, Doc. 2-1 at 3-4.) Plaintiffs’ pleadings do not explain
 4 why they waited until two weeks after the election to file an emergency federal lawsuit
 5 challenging that conduct, and “[i]t is well established that in election-related matters,
 6 extreme diligence and promptness are required.’ When a party fails to exercise diligence
 7 in seeking extraordinary relief in an election-related matter, laches may bar the claim.”
 8 *McClafferty v. Portage Cty. Bd. of Elections*, 661 F. Supp. 2d 826, 839 (N.D. Ohio 2009)
 9 (citations omitted). Determining which (if any) of Plaintiffs’ theories of liability are
 10 barred by laches¹ may be crucial in evaluating Plaintiffs’ likelihood of success on the
 11 merits.

12 Fourth, Plaintiffs’ pleadings fail to identify, with precision, the true deadline by
 13 which a TRO would need to be entered in order to be effective. Although Plaintiffs refer
 14 at one point to a statutory 20-day post-election deadline for election officials to complete
 15 their canvassing activities (*see* Doc 2-1 at 13, citing A.R.S. § 16-642)—which suggests
 16 any TRO would need to be entered by November 26 in order to be effective—Plaintiffs
 17 also contend that, even if some of the election officials have already certified their
 18 election results, the Court would have the power to order them to “file corrected returns”
 19 after considering the disputed ballots (*see* Doc 2 at 5). Furthermore, it has been
 20 suggested that the Arizona Secretary of State will not certify the final election results
 21 until December 3. Clarification on this issue will be helpful in determining the duration
 22 of any briefing and hearing schedule that may be set on the TRO request.

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 27 ¹ Specifically, it appears that most of Plaintiffs’ claims under the Voting Rights Act
 28 (*i.e.*, claims about the provision of translators and early-voting sites) arise from pre-
 election conduct, whereas Plaintiffs’ Fourteenth Amendment claim (*i.e.*, county election
 officials employed disparate post-election methods for allowing voters to cure ballots
 with mismatched or missing signatures) seems to arise from post-election conduct.

1 Accordingly, the Court will set a hearing for **Monday, November 26, 2018, at**
2 **10:00 a.m.** The parties should be prepared the address the issues identified above.
3 Counsel for Plaintiffs shall provide notice of this hearing to all parties and their counsel
4 and shall also complete service of the complaint, TRO request, and all attachments
5 thereto by the close of business on **Wednesday, November 21, 2018.**

6 Dated this 21st day of November, 2018.

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11 Dominic W. Lanza
12 United States District Judge
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