

1 VANITA GUPTA
 Principal Deputy Assistant Attorney General
 Civil Rights Division
 2 T. CHRISTIAN HERREN JR
 3 TIMOTHY F. MELLETT
 VICTOR J. WILLIAMSON
 4 GEORGE E. EPPSTEINER
 Attorneys, Voting Section
 Civil Rights Division
 5 United States Department of Justice
 6 950 Pennsylvania Avenue NW
 Room 7125 NWB
 7 Washington, D.C. 20530
 (202) 305-4044
 8 george.eppsteiner@usdoj.gov
 Counsel for the United States
 9

10 IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF NEVADA

11 BOBBY D. SANCHEZ, *et al.*,

12 Plaintiffs,

13 v.

14 BARBARA K. CEGAVSKE, in her official
 capacity of Secretary of State for the State of
 15 Nevada, *et al.*,

16 Defendants.

Case No. 3:16-CV-00523 (MMD-WGC)

**STATEMENT OF INTEREST
 OF THE UNITED STATES
 OF AMERICA**

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 18 The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C.
 19 § 517, which authorizes the Attorney General to attend to the interests of the United States in any
 20 pending lawsuit. This matter implicates the interpretation and application of Section 2 of the
 21 Voting Rights Act, 52 U.S.C. § 10301 (“Section 2”), a statute over which Congress accorded the
 22 Attorney General broad enforcement authority. *See* 52 U.S.C. § 10308(d). The United States has
 23 a substantial interest in ensuring Section 2’s proper interpretation and uniform enforcement around
 24 the country.
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1 The United States respectfully submits that Defendants' Responses in Opposition to
2 Plaintiffs' Emergency Motion for Preliminary Injunctive and Declaratory Relief misstate portions
3 of the established legal standard under Section 2.¹ Accordingly, the United States submits this
4 Statement for the limited purpose of articulating the appropriate legal standard.

5
6 **I. BACKGROUND**

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

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24 ¹ The Secretary of State, the Washoe County Defendants, and the Mineral County Defendants all filed briefs in
25 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).

1 **II. SECTION 2 OF THE VOTING RIGHTS ACT**

2 Section 2 of the Voting Rights Act prohibits any state or political subdivision from
3 imposing or applying a “voting qualification,” “prerequisite to voting,” or “standard, practice, or
4 procedure” that “results in a denial or abridgement of the right of any citizen of the United States
5 to vote on account of race or color” or membership in a language minority group. 52 U.S.C.
6 § 10301(a). In 1982, Congress amended Section 2 to make clear that a violation can be established
7 by showing a discriminatory purpose or a discriminatory result. *See Thornburg v. Gingles*, 478
8 U.S. 30, 34-37, 43-45 (1986); S. Rep. No. 97-417, at 27-28 (1982)(Senate Report). Section 2(b)
9 provides that a violation:
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11 is established if, based on the totality of circumstances, it is shown
12 that the political processes leading to nomination or election in the
13 State or political subdivision are not equally open to participation by
14 members of a [protected class] in that its members have less
15 opportunity than other members of the electorate to participate in
16 the political process and to elect representatives of their choice.

15 52 U.S.C. § 10301(b).

16 Courts have used a two-step analysis to determine whether the location of election sites or
17 limitations to early voting and voter registration result in denial or abridgment of the right to vote
18 under Section 2.² First, the reviewing court assesses whether the practices amount to material
19 limitations that bear more heavily on minority citizens than nonminority citizens. This assessment
20 incorporates both the likelihood that minority voters will face the burden and their relative ability
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23 ² Most Section 2 cases address vote dilution: election structures that render even eligible voters who are fully able to
24 cast valid ballots without the equitable opportunity to elect representatives of choice. *See, e.g., LULAC v. Perry*, 548
25 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.

1 to overcome that burden. *See, e.g., Veasey v. Abbott*, 830 F.3d 216, 2016 WL 3923868, at *17 (5th
 2 Cir. 2016) (en banc); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th
 3 Cir. 2014), *stay granted*, 135 S. Ct. 6 (2014), *cert. denied*, 135 S. Ct. 1735 (2015); *see generally*
 4 *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 550-51, 555-56 (6th Cir. 2014)
 5 (hereinafter “NAACP”), *stay granted*, 135 S. Ct. 42 (2014), *vacated on other grounds*, 2014 WL
 6 10384647, at *1 (6th Cir. Oct. 1, 2014); *Poor Bear v. Cnty. of Jackson*, No. 5:14-cv-5059, 2015
 7 WL 1969760, at *6 (D.S.D. May 1, 2015); *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095,
 8 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010).³ Second, if a disparity is established, the
 9 reviewing court engages in an “intensely local appraisal” of the “totality of the circumstances” in
 10 the jurisdiction at issue to determine whether the challenged practice works in concert with
 11 historical, social, and political conditions to produce a discriminatory result. *See League of*
 12 *Women Voters*, 769 F.3d at 240-41; *Smith v. Salt River Project Agric. Improvement. & Power*
 13 *Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (“[the Section 2] examination is intensely fact-based and
 14 localized”); *Veasey*, 2016 WL 3923868, at *17; *Poor Bear*, 2015 WL 1969760, at *7 n.9; *Spirit*
 15 *Lake Tribe*, 2010 WL 4226614, at *3.⁴

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 18 The answer to this second question is informed in part by “the ‘typical’ factors that
 19 Congress noted in Section 2’s legislative history,” generally known as the Senate Factors,⁵
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21 ³ *See also Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (en banc), *aff’d on other grounds sub nom. Arizona*
 22 *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).

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

24 ⁵ These “Senate Factors” are distinct from the three threshold factors the Supreme Court and subsequent courts have
 25 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...)

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

- 5 1. the extent of any history of official discrimination in the state or political
6 subdivision that touched the right of the members of the minority group to register,
7 to vote, or otherwise to participate in the democratic process;
- 8 2. the extent to which voting in the elections of the state or political subdivision is
9 racially polarized;
- 10 3. the extent to which the state or political subdivision has used unusually large
11 election districts, majority vote requirements, anti-single shot provisions, or other
12 voting practices or procedures that may enhance the opportunity for discrimination
13 against the minority group;
- 14 4. if there is a candidate slating process, whether the members of the minority group
15 have been denied access to that process;
- 16 5. the extent to which members of the minority group in the state or political
17 subdivision bear the effects of discrimination in such areas as education,
18 employment and health, which hinder their ability to participate effectively in the
19 political process;
- 20 6. whether political campaigns have been characterized by overt or subtle racial
21 appeals;
- 22 7. the extent to which members of the minority group have been elected to public
23 office in the jurisdiction[;]
- 24 [8.] whether there is a significant lack of responsiveness on the part of elected officials
25 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.

1 *Gingles*, 478 U.S. at 36-37 (citing S. Rep. No. 97-417, at 28-29). The Senate Factors are “neither
2 comprehensive nor exclusive,” and “other factors may also be relevant and may be considered.”
3 *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 29); *see also Montes v. City of Yakima*, 40
4 F. Supp. 3d 1377, 1388 (E.D. Wash. 2014) (noting non-exclusivity). These factors are not limited
5 to considering the relevant jurisdiction’s conduct but also that of other governmental entities and
6 private individuals. *See, e.g., Gingles*, 478 U.S. at 80; *cf. White v. Regester*, 412 U.S. 755, 765-70
7 (1973). Examining the Senate Factors helps the court to determine whether the challenged
8 practice, in light of current social and political conditions in the jurisdiction, results in a
9 discriminatory denial or abridgement of the right to vote through less opportunity for the allegedly
10 affected group to participate in the political process relative to other voters.
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12 The existence of a “facially neutral” law, or the absence of a showing of animus, also does
13 not alter the Section 2 inquiry. *See Washoe Mem.* 3, 18-19. Section 2 prohibits “facially neutral”
14 voting practices that nonetheless lead to the discriminatory result of members of a minority group
15 as a class having “less opportunity than other members of the electorate to participate in the
16 political process.” 52 U.S.C. § 10301(b). As the Supreme Court has explained, the “essence” of a
17 Section 2 claim is that a challenged law, even when facially neutral, “interacts with social and
18 historical conditions to cause an inequality in the opportunities enjoyed by [minority] and
19 [nonminority] voters” to participate in the political process and elect their preferred
20 representatives. *Gingles*, 478 U.S. at 47; *Veasey*, 2016 WL 3923868, at *19 (“We conclude that
21 the two-part framework and *Gingles* factors together serve as a sufficient and familiar way to limit
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1 courts' interference with "neutral" election laws to those that truly have a discriminatory impact
2 under Section 2 of the Voting Rights Act.").

3 **III. DEFENDANTS' ERRONEOUS LEGAL STANDARD**

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

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

12 Defendants suggest that access to in-person early voting and in-person voter registration
13 opportunities are merely a "voting convenience" and therefore lack protection under Section 2 of
14 the Voting Rights Act. Sec. Mem. 17; Washoe Mem. 3, 16, 19-20, 22-23; Mineral Mem. 15-16.
15 Not so. Section 14(c)(1) of the Act defines the terms "vote" and "voting" to include "all action
16 necessary to make a vote effective in any primary, special, or general election, including, but not
17 limited to registration, . . . casting a ballot, and having such ballot counted properly and included in
18 the appropriate totals of votes cast." 52 U.S.C. § 10310(c)(1). Courts have found that access to
19 polling places, to voter registration, and to opportunities for absentee and early voting are
20 protected by Section 2. *See, e.g., NAACP*, 768 F.3d at 552-53 ("[T]he plain language of Section 2
21 does not exempt early-voting systems from its coverage Nor has any court held that the
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1 Voting Rights Act does not apply to early-voting systems.”); *League of Women Voters*, 769 F.3d at
2 238-39 (applying Section 2 to various practices including procedures for late registration and early
3 voting, and noting that “courts have entertained vote-denial claims regarding a wide range of
4 practices”); *Veasey*, 2016 WL 3923868, at *43 (registration and polling place locations covered by
5 Section 2) (Higginson, J., concurring)); *Wandering Medicine v. McCulloch*, No. 12-cv-135, at *16
6 (D. Mont. Mar. 26, 2014) (order denying defendants’ motion to dismiss in part because plaintiffs
7 presented a viable Section 2 claim based on defendants’ refusal to establish a satellite registration
8 and absentee voting office); *Brooks v. Gant*, No. 12-cv-5003-KES, 2012 WL 4482984, at *7
9 (D.S.D. Sept. 27, 2012) (denying a defendant’s motion to dismiss in part because plaintiffs’
10 allegations of burdens accessing in-person absentee voting office suffice to show “less
11 opportunity” under Section 2); *Spirit Lake Tribe*, 2010 WL 4226614, at *1-6 (granting preliminary
12 injunction in Section 2 challenge alleging unequal access to polling place locations); *Miss. State*
13 *Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff’d sub nom. Miss.*
14 *State Chapter, Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *Brown v. Dean*, 555 F.
15 Supp. 502 (D.R.I. 1982).

18 Defendants assert that even if minority voters are disproportionately burdened by the
19 location of early voting, voter registration, and election-day voting sites, this Court should not
20 entertain Plaintiffs’ Section 2 claims because ““inconvenience does not result in a denial of
21 “meaningful access” to the political process.”” Washoe Mem. 19-20 (quoting *Jacksonville Coal.*
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1 for *Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004)).⁶ However, in
 2 *Jacksonville*, the court expressly declared that “polling places constitute a ‘standard, practice, or
 3 procedure with respect to voting’ under Section 2, and that placing voting sites in areas removed
 4 from African–American communities can have the effect of abridging the right to vote.” 351 F.
 5 Supp. 2d at 1334 (citing *Perkins v. Matthews*, 400 U.S. 379, 387 (1971)). To be sure, plaintiffs in
 6 *Jacksonville* were unsuccessful, but not because Section 2 did not apply to their claims. Rather,
 7 they were unsuccessful because they had failed to establish a likelihood that the early-voting
 8 practices at issue would have the discriminatory effect that Section 2 requires plaintiffs to
 9 establish. See *Ohio Democratic Party v. Husted*, No. 16-3561, 2016 WL 4437605, at *13 (6th Cir.
 10 2016) (rejecting Section 2 claims on basis of no showing of disparate impact); *Brown v. Detzner*,
 11 895 F. Supp. 2d 1236, 1254-55 (M.D. Fla. 2012).⁷ In sum, no court has held that any voter
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 15 ⁶ Defendants also incorrectly claim that in the Section 2 analysis, a court must balance the burdens of the affected
 16 minority voters against the interests of the Defendants. Mineral Mem. 14-15, Sec. Mem. 7. This conflates two distinct
 17 legal claims. A constitutional claim assessing whether a challenged practice imposes an unjustified burden (whether
 18 or not that burden amounts to a discriminatory effect on a racial or language minority) requires evaluating the burden
 19 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).

20 ⁷ Defendants propose that Plaintiffs have not stated a valid Section 2 claim because they failed to provide quantitative
 21 statistical evidence of disparate impact. Washoe Mem. 17 (quoting *Feldman v. Arizona Sec’y of State’s Office*, No.
 22 CV-16-01065-PHX-DLR, 2016 WL 5341180, at *5 (D. Ariz. 2016)). Although typical of Section 2 cases, statistical
 23 analyses are but one possible means to show disparate impact. For example, in *Veasey v. Perry*, 71 F. Supp. 3d 627,
 24 633, 636-37 (S.D. Tex. 2014), the court also relied on lay testimony regarding the ability of African Americans to
 25 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.”).

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

3 **B. Section 2 does not require proof that a jurisdiction has “denied” citizens the right to**
4 **vote.**

5 Defendants several times suggest that Plaintiffs must show an outright denial of access to
6 voting opportunities. Sec. Mem. 13; Washoe Mem. 10, 21; Mineral Mem. 15, 17. This ignores the
7 plain text of the Act. Section 2 prohibits the “abridgment” as well as the outright “denial” of the
8 right to vote. 52 U.S.C. § 10301(a). This prohibition does not require that a challenged practice
9 deprive minority voters completely of the ability to vote. *See, e.g., Veasey*, 2016 WL 3923868, at
10 *29 (quoting *Black’s Law Dictionary* (10th ed. 2014) (defining “Abridgement” as the “reduction
11 or diminution of something”). It requires only that Plaintiffs establish they have “less
12 opportunity” to participate relative to other voters. 52 U.S.C. § 10301(b). All electoral practices
13 with a material disparate “effect on a person’s ability to exercise [the] franchise” implicate the
14 Voting Rights Act. *Cf. Perkins*, 400 U.S. at 387 (addressing Section 5); *see also League of Women*
15 *Voters*, 769 F.3d at 243 (holding that Section 2 is not limited to practices that render voting
16 “completely foreclosed” to the minority community); *Poor Bear*, 2015 WL 1969760, at *7
17 (concluding that Section 2 protects equal opportunity to cast a ballot via in-person absentee
18 voting); *Spirit Lake Tribe*, 2010 WL 4226614, at *3, *6 (enjoining polling place closures under
19 Section 2); *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) (explaining that
20 Section 2 would be violated if a county limited voter registration hours to one day a week, and
21 “that made it more difficult for blacks to register than whites”).
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1 Defendants further assert that Plaintiffs’ argument must fail because Native Americans in
2 Defendant counties can still participate by mail. Sec. Mem. 13; Washoe Mem. 21. However,
3 mail-in voting is not the equivalent of in-person voting, and a court must consider the
4 circumstances of each case and the impact a challenged practice has on opportunity to vote. *See*
5 *Veasey*, 2016 WL 3923868, at *26 (concluding that “mail-in voting for specific subsets of Texas
6 voters does not sufficiently mitigate the burdens imposed [by the challenged law]”). Here,
7 Plaintiffs have alleged a valid Section 2 “abridgment” claim—that Native Americans in Defendant
8 counties, despite living in “mailing” precincts, make up a sizeable population of minority voters
9 who have fewer opportunities and greater difficulty than nonminority voters in registering and
10 reaching existing early voting sites, due to the travel distances involved, the socioeconomic
11 disparities limiting the ability to travel, the lack of required identification documents, the lack of
12 internet access, and the monetary and temporal costs involved in attempting to overcome such
13 hurdles; and that these difficulties exacerbate and are exacerbated by discrimination and the
14 lingering effects of discrimination. Pls.’ Mot. 20, 25, 26; Amend. Compl. ¶ 94. Thus, according to
15 Plaintiffs, the current location of registration and early voting sites interacts with social and
16 historical conditions to cause an inequality in the opportunities for Native Americans to participate
17 in the franchise. *See Veasey*, 2016 WL 3923868, at *17 (explaining the causal link required to
18 prove discriminatory effect).
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22 **C. Section 2 does not require Plaintiffs to prove an inability to elect their preferred**
23 **candidates.**

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

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

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

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

16 If, for example, a county permitted voter registration for only three hours one day a
17 week, and that made it more difficult for blacks to register than whites, blacks
18 would have less opportunity *to participate* in the political process than whites and
19 Section 2 would therefore be violated—even if the number of potential black voters
20 was so small that they would on no hypothesis be able *to elect* their own candidate.
21 501 U.S. at 408 (emphasis in original) (internal quotation marks and citations omitted).

22 ⁸ Section 2 vote dilution claims—for example, challenges to district lines—do not usually depend on allegations that a
23 practice makes it more difficult to participate in the political process by casting a valid ballot. In that context, the
24 district lines’ imposition of an inability to elect candidates of choice becomes the more important touchstone in
25 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.

1 In support of their argument, Defendants cite *Chisom*, 501 U.S. at 397, for the proposition
2 that “to make out a § 2 VRA claim . . . Plaintiffs must prove *both* (1) that the members of the
3 protected class have less opportunity to participate in the political process; *and* (2) the minority
4 class members’ inability to elect representatives of their choice.” Mineral Mem. 16. But this is
5 not a proper reading of *Chisom*. Rather, the Court held there that where a plaintiff shows that
6 minority voters have less opportunity than other voters to participate in the political process, the
7 plaintiff necessarily also establishes that members of that group have less opportunity to elect
8 candidates of their choice. *Chisom*, 501 U.S. at 397 (“Any abridgement of the opportunity of
9 members of a protected class to participate in the political process inevitably impairs their ability
10 to influence the outcome of an election.”). *Chisom*, which itself concerned a vote dilution claim,
11 thus stands neither for an “inability” standard nor for the proposition that Section 2 challenges to
12 ballot-casting procedures require two separate showings.
13

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

20
21 A plain reading of the statutory language and Supreme Court precedent establishes that
22 plaintiffs in a Section 2 lawsuit are not required to show an inability to elect candidates of choice.
23 Accordingly, the Court should reject Defendants’ argument.
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1 **D. Effects of past discrimination that hinder minority voters’ ability to participate**
2 **effectively in the political process are relevant to a Section 2 claim.**

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

11 Congress’ intent to take the result of both public and private conduct into account is
12 evident from several Senate Factors. Senate Factor one, which directs courts to consider “the
13 extent of any history of *official* discrimination,” *Gingles*, 478 U.S. at 36 (emphasis added), is not
14 confined to discrimination by the defendant jurisdiction. *See United States v. Blaine Cty.*, 363
15 F.3d 897, 913 (9th Cir. 2004) (rejecting argument that the first Senate Factor “could only look at
16 official discrimination by [the defendant jurisdiction], not the state or federal government”). Many
17 other Senate Factors—the extent of racially polarized voting, the existence of a candidate slating
18 process, and the use of overt or subtle racial appeals in political campaigns—all reflect Congress’
19 intent for the totality-of-circumstances analysis to examine far more than official, state-sponsored
20 discrimination. *See Gingles*, 478 U.S. at 36-37. And Senate Factor five directs courts to consider
21 the extent to which members of a minority group “bear the effects of discrimination,” from
22 whatever source. *Gingles*, 478 U.S. at 69. “[T]he literal language of the fifth Senate factor does
23 not even support the reading that only discrimination by [the defendant jurisdiction] may be
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1 considered; the limiting language describes the people discriminated against, not the
2 discriminator.” *Gomez v. City of Watsonville*, 863 F.2d 1407, 1418 (9th Cir. 1988).
3 Socioeconomic disparities that result from past discrimination may mean that current practices
4 impede minority voters’ ability to participate equally in the electoral process; those disparities need
5 not be the direct product of particular public defendants’ past action in order for the defendants’
6 present practices to implicate the Act. *See, e.g., Whitfield v. Democratic State Party of Ark.*, 890
7 F.2d 1423, 1430-31 (8th Cir. 1989).⁹ Ultimately, it is the intensely local analysis of all factual
8 circumstances existing within a jurisdiction, regardless of source, that will determine whether the
9 jurisdiction’s challenged standard, practice, or procedure results in a Section 2 violation.¹⁰ Thus,
10 this Court should follow well-established precedent in considering all past or present
11 discrimination, public and private, when assessing whether a challenged voting practice violates
12 Section 2.
13

14 IV. CONCLUSION

15 For the preceding reasons, this Court should apply the established legal standard under
16 Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, to resolve Plaintiffs’ motion for
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19 ⁹ *See also Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5*, 804 F.2d 469, 474-75 (8th Cir. 1986) (holding that the
20 district court erred by failing to address evidence of broad socioeconomic disparities, without reference to their
21 sources); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1018-34, 37-41 (D.S.D. 2004) (recounting the history of
22 official and unofficial discrimination and setting out socioeconomic disparities without concern for their cause); *but*
23 *see Veasey*, 2016 WL 3923868, at *20 (declining to decide the question of whether plaintiff must show “state action
24 caused the social and historical conditions begetting discrimination” because the district court found evidence of such
25 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).

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

3 Date: October 3, 2016

4 Respectfully submitted,

5 VANITA GUPTA
6 Principal Deputy Assistant Attorney General
7 Civil Rights Division

8 */s/ George E. Eppsteiner*
9 T. CHRISTIAN HERREN JR
10 TIMOTHY F. MELLETT
11 VICTOR J. WILLIAMSON
12 GEORGE E. EPPSTEINER
13 Attorneys, Voting Section
14 Civil Rights Division
15 United States Department of Justice
16 950 Pennsylvania Avenue NW
17 Room 7125 NWB
18 Washington, D.C. 20530
19 (202) 305-4044
20 george.eppsteiner@usdoj.gov
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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