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11 **IN THE UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**

13 MARIA M. GONZALEZ, et al.,
14 Plaintiffs,
15 v.
16 STATE OF ARIZONA, et al.
17 Defendants.

No. CV06-01268 PHX ROS
No. CV06-1362 PCT ROS (Cons)
No. CV06-1575 PCT ROS (Cons)

**POSITION OF DEFENDANTS
STATE OF ARIZONA AND
ARIZONA SECRETARY OF STATE
ON FACIAL VS. AS-APPLIED
CHALLENGES ASSERTED BY
GONZALEZ AND ITCA
PLAINTIFFS**

(Assigned to the Honorable
Roslyn O. Silver)

1 Pursuant to the Court’s Order dated June 30, 2008, dkt. 884, Defendants State of
2 Arizona and Arizona Secretary of State (“State Defendants”) respond to the briefs of
3 Gonzalez and ITCA plaintiffs regarding the nature of those plaintiffs’ remaining
4 challenges in these consolidated cases.

5 **Gonzalez Plaintiffs’ Remaining Claims**

6 Nowhere in Gonzalez plaintiffs’ First Amended Complaint (“FAC”) is there any
7 allegation either that the proof of citizenship and voting identification requirements of
8 Prop 200 are facially invalid or that those requirements are unconstitutional in all their
9 applications. *E.g.*, *Washington State Grange v. Washington State Republican Party*,
10 128 S. Ct. 1184, 1190 (2008) (“[A] plaintiff can only succeed in a facial challenge by
11 ‘establish[ing] that no set of circumstances exists under which the Act would be valid,’
12 i.e., that the law is unconstitutional in all its applications.”) (alteration in original);
13 *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1623 (2008) (“A facial
14 challenge must fail where the statute has a plainly legitimate sweep.”) (internal
15 quotations omitted).

16 In its request for relief, the FAC seeks a declaration that the voting provisions of
17 Prop 200 are “unconstitutional and illegal and of no force or effect.” [Dkt. 352, FAC at
18 25] In addition, the FAC seeks an order enjoining defendants from implementing the
19 voting requirements of Prop 200. [*Id.*] Those requested forms of relief, however, are
20 not supported by the allegations of the FAC, which assert injury to a few individuals’
21 voting rights, organizations’ First Amendment rights, and assert discrimination against
22 Latinos and naturalized citizens. [See FAC ¶¶ 5-6, 8, 10-17, 70-71, 73-74] Thus, the
23 FAC’s factual allegations do not assert any facial challenge to either the proof of
24 citizenship or voting identification requirements of Prop 200.

25 Under the factual allegation portion of the FAC, Gonzalez plaintiffs assert injury
26 on the part of all but one plaintiff. [See FAC ¶¶ 11-17, 73-74, 82 (organizational
27 plaintiffs) and ¶¶ 5-6, 10, 70-71, 80-81 (Gonzalez, Abeytia, Morrison-Flores) and ¶¶ 8,
28 73-74 (Lopez)] Plaintiff Common Cause does not allege any injury caused to them by

1 Prop 200. [See FAC ¶ 18; ¶¶ 73-74 (omitting reference to Common Cause)]¹ The
2 challenges of the remaining Gonzalez plaintiffs are discussed below.

3 Organizational Plaintiffs.²

4 As the Court stated in its June 30, 2008, Order, there are five causes of action in
5 the Gonzalez case: Equal Protection (based on undue burden and discrimination), First
6 Amendment, § 2 of the Voting Rights Act, and Title VI of the Civil Rights Act.
7 Because “facial” and “as-applied” describe the nature of constitutional challenges, those
8 terms apply only to plaintiffs’ equal protection and First Amendment claims.

9 *Statutory claims.*

10 Although Gonzalez plaintiffs argue in their submission that all of them are
11 asserting the statutory claims, it is unlikely that the organizational plaintiffs are
12 asserting any § 2 or Title VI claim. Section 2 prohibits states from implementing a
13 voting standard or procedure that “results in a denial or abridgement of the right of any
14 citizen” to vote “on account of race or color.” 42 U.S.C. § 1973(a). Title VI proscribes
15 discrimination based on race, color, or national origin in any program or activity
16 receiving federal financial assistance. 42 U.S.C. § 2000d.

17 None of the organizational plaintiffs alleges (or could allege) that they are
18 denied their right to vote or are themselves discriminated against on the basis of race or
19 national origin by the voting requirements of Prop 200. To the extent the organizational
20 plaintiffs claim any injury, they allege that the proof of citizenship requirement of Prop
21 200 has impaired their ability to register other individuals to vote. [See FAC ¶¶ 11-17,
22 73-74, 82] They do not allege any injury caused by the voting identification at the polls
23 requirement of Prop 200.³

23 ¹ Accordingly, it appears that Common Cause does not have standing to maintain its
24 claims.

25 ² The organizations include: Association of Community Organizations for Reform
26 Now, Arizona Hispanic Community Forum, Chicanos Por La Causa, Friendly House,
27 Project Vote, Southwest Voter Registration Education Project, and Valle Del Sol, in
28 addition to plaintiff Common Cause.

³ Neither do the organizational plaintiffs allege anywhere in the FAC that they are
asserting any claims on behalf of any individuals not before the Court. The
organizational plaintiffs were asked by interrogatory to identify any members who the

1 *Equal protection claims.*

2 The organizational plaintiffs’ equal protection claims (both undue burden and
3 discrimination)—to the extent those plaintiffs assert such claims—are as-applied
4 challenges to the proof of citizenship and voting identification requirements. There are
5 no factual allegations in the FAC to support a claim that the Prop 200 requirements are
6 unconstitutional in all their applications. Instead, the FAC asserts that those
7 requirements impose an undue burden and discriminate against Latinos and naturalized
8 citizens. [See FAC ¶¶ 69, 75, 94-95]

9 It is difficult to see, however, how the organizational plaintiffs are asserting an
10 equal protection challenge. The organizations do not allege that they are discriminated
11 against by Prop 200 or that their right to vote is unduly burdened by the proof of
12 citizenship or voting identification requirements. Neither do they allege that their
13 conduct in registering individuals to vote is somehow singled out by the requirements
14 of Prop 200. Instead, the only injury they allege is that Prop 200 makes it more difficult
15 for them to register voters because some voters allegedly lack proof of citizenship.
16 [FAC ¶¶ 11-17, 73-74, 82] Thus, to the extent they allege injury, it is to their First
17 Amendment rights of speech and association—not their right to vote. Accordingly, the
18 FAC does not support any “as-applied” challenge based on equal protection on the part
19 of the organizational plaintiffs.

20 *First Amendment claims.*

21 As with plaintiffs’ other claims, the FAC does not allege any facts (or even
22 conclusions) that the voting requirements of Prop 200 are unconstitutional in all their
23 applications. Presumably, therefore, the organizational plaintiffs’ First Amendment
24 claim is an as-applied challenge.⁴

25 organizations contend would have standing to maintain this action based on either the
26 proof of citizenship or voting identification requirements. They identified no such
27 individuals. [See dkt. 801, Tab 9 (response nos. 3-4)] It is unclear whether plaintiff
28 organizations even have members. In any event, the FAC provides no basis upon
which to assert plaintiffs’ representational standing to maintain claims on behalf of
some other, unidentified individuals.

⁴ For the reasons stated in Defendants’ motion for summary judgment and reply in

1 Debbie Lopez.

2 Plaintiff Debbie Lopez has no arguable claim in this case other than her asserted
3 First Amendment claim. The FAC alleges that Ms. Lopez “formerly worked” for a
4 non-profit voter registration organization and that she “volunteers to register voters” in
5 Maricopa County. [FAC ¶ 8]

6 The FAC alleges only that Ms. Lopez is “impeded” in her ability to register
7 voters by the proof of citizenship requirement of Prop 200. [FAC ¶¶ 73-74] Thus, Ms.
8 Lopez does not allege that her right to vote is denied or abridged in any way on account
9 of race or national origin. Neither does the FAC allege that Ms. Lopez’ right to vote is
10 unduly burdened by the voting requirements of Prop 200. Nor does she allege that Prop
11 200 violates her equal protection rights by discriminating on the basis of national
12 origin. Thus, the FAC sets forth no as-applied claim based on equal protection, or any
13 claims based on § 2 or Title VI, on the part of plaintiff Lopez.

14 The only claim the FAC appears to assert on behalf of Ms. Lopez is the same as-
15 applied First Amendment claim as that of the organizational plaintiffs.

16 Plaintiffs Gonzalez, Abeytia, and Morrison-Flores.

17 Plaintiffs Gonzalez, Abeytia and Morrison-Flores each allege injury caused by
18 either the proof of citizenship or voting identification requirements. [FAC ¶¶ 5-6, 10,
19 70-71, 80-81]

20 Ms. Morrison-Flores apparently asserts only an equal protection claim based on
21 undue burden imposed by the voting identification requirement (not proof of
22 citizenship). [See FAC ¶ 10, 81] She is not a naturalized citizen, and therefore does
23 not assert any equal protection claim of discrimination based on national origin. In
24 addition, Ms. Morrison-Flores is African-American, and therefore she has alleged no
25 § 2 claim. The FAC’s § 2 allegations assert only that Prop 200 discriminates against
26 Latinos. [FAC ¶¶ 98-99] The FAC does not assert that Prop 200 discriminates against
27 African-American individuals or that African-Americans, among other racial groups,

28 support thereof, organizational plaintiffs’ as-applied First Amendment claim must fail
because they cannot establish that the proof of citizenship requirement is a severe
burden on their free speech rights. [See dkt. 856, at 13]

1 are less likely to possess voting identification or proof of citizenship. [See FAC ¶ 75]

2 Neither are there any allegations in the FAC to support a claim under Title VI by
3 Ms. Morrison-Flores, because she is not a naturalized citizen. [See ¶ 106 (Title VI
4 claim of discrimination based on national origin)] Finally, nothing in the FAC supports
5 a First Amendment claim on the part of Ms. Morrison-Flores. [See FAC ¶ 88 (First
6 Amendment claim is based on alleged impediment to register voters)] Thus, Ms.
7 Morrison-Flores' only claim is an as-applied equal protection (undue burden) claim.

8 Plaintiff Bernie Abeytia asserts an as-applied equal protection challenge based
9 on undue burden on the right to vote imposed by the voting identification requirement
10 (not the proof of citizenship requirement). [FAC ¶ 6, 80] He does not assert any equal
11 protection claim based on national origin discrimination because he is not a naturalized
12 citizen. [See FAC ¶ 95] For the same reason, he does not assert any Title VI claim.
13 [See FAC ¶ 106] Neither does Mr. Abeytia assert any First Amendment claim. [See
14 FAC ¶ 88] It is unclear from the FAC whether Mr. Abeytia is asserting a § 2 claim.

15 Based on the FAC, plaintiff Jesus Gonzalez is asserting an as-applied equal
16 protection challenge of discrimination based on national origin. [See FAC ¶¶ 69-71]
17 There are no allegations to indicate that Mr. Gonzalez is asserting an equal protection
18 claim based on undue burden. He does not claim that he cannot comply with the proof
19 of citizenship requirement but that the requirement discriminates against naturalized
20 citizens. [See FAC ¶¶ 69-71] Mr. Gonzalez may be asserting a § 2 claim and Title VI
21 claim based on national origin, although the FAC does not expressly state which claims
22 he is asserting. Nothing in the FAC supports any First Amendment claim by Mr.
23 Gonzalez. [See FAC ¶ 88 (First Amendment claim based on alleged deprivation of
24 right to register other individuals to vote)]

25 **ITCA Plaintiffs' Remaining Claims**

26 There are five organizational plaintiffs and one individual plaintiff remaining in
27 the ITCA case. They each assert equal protection (undue burden) and § 2 claims. The
28 individual plaintiff is Rep. Steve Gallardo. Mr. Gallardo does not claim that Prop 200
imposes an undue burden on his right to vote. Instead, he alleges that is injured by Prop
200 because others may not be able to register and vote for him as an elected official.

1 [See Complaint, dkt. 1 in Case No. CV 06-1362-PCT-JAT (“Compl.”) ¶ 7]

2 Based on the first paragraph in the Complaint, the ITCA plaintiffs apparently
3 assert both facial and as-applied equal protection challenges. [See Compl., p. 2]
4 Plaintiffs do not claim that their right to vote has been denied or abridged by Prop 200
5 in violation of the Equal Protection Clause. Instead, they apparently assert that claim
6 on behalf of other, unidentified individuals. [See Compl. ¶¶ 1, 3, 7, 8]

7 None of the ITCA plaintiffs alleges (or could allege) that they are denied their
8 right to vote or are themselves discriminated against on the basis of race or national
9 origin by the voting requirements of Prop 200. Thus, it is unclear what allegations in
10 the Complaint support any claim under § 2 on behalf of any ITCA plaintiff.

11 RESPECTFULLY SUBMITTED this 3rd day of July, 2008.

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1 **CERTIFICATE OF SERVICE**

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4 transmittal of a Notice of Electronic Filing to the following ECF registrants:
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