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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)

**DEFENDANTS STATE OF
ARIZONA AND ARIZONA
SECRETARY OF STATE'S
RESPONSE TO PLAINTIFFS'
CLOSING ARGUMENTS**

(Assigned to the Honorable
Roslyn O. Silver)

1 **Preliminary Statement**

2 As explained in Defendants’ closing argument and the previous briefing on the
3 motion for summary judgment, Plaintiffs’ evidence fails to establish that Arizona’s
4 laws requiring identification at the polls and evidence of citizenship from people
5 registering to vote impose an undue burden on the right to vote or disproportionately
6 burden Hispanics or Native American voters. After two years of litigation, Plaintiffs
7 have found not found a single Hispanic or Native American voter who cannot register
8 to vote because of a lack of proper evidence of citizenship. They have not found a
9 single Hispanic or Native American voter who cannot vote because of the identification
10 at the polls requirement. Nor have they found a single naturalized citizen who cannot
11 register to vote in this State.

12 Contrary to Plaintiffs’ arguments, the record in the case does not establish a
13 discriminatory impact on minority voters or an undue burden on the rights of voters
14 generally. Rather, it establishes that election officials at the State and local level have
15 worked to fairly implement these new laws that Arizona voters approved in 2004. It
16 also establishes that, for the most part, Arizonans have complied with the requirements
17 for ID at the polls and evidence of citizenship when registering to vote.

18 Plaintiffs’ discussion of the evidence in their closing statements ignores the
19 failure of their experts to establish that Proposition 200 imposes a disproportionate
20 burden on minority voters. Still, after extensive discovery and litigation, they rely
21 primarily on unproven fears regarding the potential impact of Proposition 200. There is
22 absolutely nothing in the record that supports Plaintiffs’ request that this Court enjoin
23 Arizona from continuing to implement these laws.

24 **I. Issues Raised by Gonzalez Plaintiffs¹**

25 **A. Rejected voter registration applications**

26 The Gonzales Plaintiffs wrongly assert that the testimony of their expert, Dr.
27 Lanier, supports their claim that requiring evidence of citizenship from people
28 registering to vote has a disproportionately affected Hispanic voter registration in

¹ State Defendants have attached as Exhibit A to this Response a chart setting forth record cites from the Gonzalez Plaintiffs’ Post-Trial Memorandum that are incorrect and do not support the statements made in connection therewith.

1 Arizona. Specifically, Gonzalez Plaintiffs state that Dr. Lanier found (1) that the
2 representation of Hispanics among the rejected voter registration applicants was 2.8%
3 higher than the representation of Hispanics among all registration applicants (citing to
4 Table 5 of Lanier's Fourth Supplemental Report); and (2) that fewer Hispanics
5 successfully registered after being rejected. [Gonzalez Brief at 14] This led Dr. Lanier
6 to conclude that Hispanics are disproportionately affected by Proposition 200.
7 [Gonzalez Brief at 14] Plaintiffs go on to say that Defendants do not dispute Dr.
8 Lanier's conclusion on this point [*id.*], but they are wrong. Defendants disagree with
9 Plaintiffs' arguments concerning Dr. Lanier's testimony.

10 As an initial matter, Dr. Lanier admitted on cross-examination that he did not
11 investigate whether the Hispanics whose voter registration applications were rejected
12 and did not later successfully register to vote were actually eligible to vote, *i.e.*, whether
13 they were in fact U.S. citizens. [Tr. 315:12-316:10] He admitted it was possible that
14 they were all ineligible to vote, as far as he knew, and stated positively that he was
15 offering no opinion on the subject. [*Id.*] Because Dr. Lanier does not know whether
16 these individuals were properly prevented from registering to vote, he cannot and does
17 not opine that Hispanics *who are citizens* are disproportionately affected by Prop 200.

18 Second, and equally important, Dr. Lanier's own numbers demonstrate that,
19 even assuming all of the rejected voter registration applicants were indeed U.S. citizens,
20 the difference is *de minimis*. In Table 5 of Exhibit 884, Dr. Lanier shows that, had Prop
21 200 not been in effect, 13.8% of the registrants would have been Hispanic. [Ex. 884,
22 Table 5; Tr. 317:1-4] However, the same table shows that the percentage of Hispanics
23 who were actually successfully registered is 13.7%. [Tr. 799:6-800:3] Thus, according
24 to Dr. Lanier, the difference made by Prop 200 in Hispanic registrations is a mere one-
25 tenth of a percent. Moreover, as Defendants' expert Dr. Zax testified, Dr. Lanier fails
26 to establish the statistical significance of that one-tenth of a percent; Dr. Zax testified
27 affirmatively that it was not. [Tr. 800:4-801:20; 802:5-803:9] Because of these
28 deficiencies, Dr. Lanier's testimony does not establish a that Proposition 200's proof of
citizenship requirement disproportionately burdened Hispanics who were eligible to
vote.

1 Regarding the testimony of their other expert, Dr. Espino, Gonzalez Plaintiffs
2 neatly sidestep the fact that his “corrected” numbers show that the decline in weekly
3 registration in the post-Prop 200 period for Hispanics was 36.67% and for non-
4 Hispanics was 35.75%—a mere .92% difference, less than one-tenth of a percent—
5 saying only that the Hispanic drop was “greater.” [Gonzalez Brief at 14-15]² Then,
6 they try to re-write his testimony regarding the fact that in 10 out of 15 counties,
7 Hispanics fared better in registrations than non-Hispanics after the implementation of
8 Prop 200, including Maricopa County, by arguing that his table showed only “slopes”
9 and not registrations. [Gonzalez Brief at 15 n.7] However, Dr. Espino was quite clear
10 that Table 1 of his May 22 report showed that actual registrations of Hispanics
11 increased relative to non-Hispanic registrations in those ten counties. [Tr. 420:10-
12 424:18] The Court queried him specifically on this point. [Tr. 440:5-442:10]

12 **B. Hispanic voter turnout**

13 In support of their argument that Prop 200’s ID-at-the-polls requirement has had
14 a disparate impact on Hispanics and prevented “thousands” of registered voters from
15 voting, Gonzalez Plaintiffs point to (1) Dr. Lanier’s testimony that a disproportionately
16 higher number of Hispanics cast uncounted conditional provisional ballots in the 2006
17 General Election, and (2) a power point presentation by Maricopa County regarding the
18 2008 Presidential Preference Election. [Gonzalez Brief at 16-17] Taking the last
19 contention first, the power point presentation referenced by Gonzalez Plaintiffs [Tr. Ex.
20 954] specifically states in underlined text that “[t]his was by no means a scientific
21 study,” that an older (1980) census list of Hispanic surnames was used, and that not all
22 voters could be definitively categorized. The document states that, while 12% of
23 registered voters had Hispanic surnames, 16% of the uncounted conditional provisional
24 ballots were cast by voters with Hispanic surnames. [Tr. Ex. 954] However, the
25 document also states that historically, the rate of uncounted conditional provisional
26 ballots cast by Hispanics was **11%**, one percent less than the 12% of Hispanic-
27 surnamed registered voters. [*Id.*] Thus, while this study, albeit unscientific, found

28 ² See also Closing Argument by Defendants State of Arizona and Arizona Secretary of State, p. 6-7 (setting forth Dr. Espino’s serious misstatements to the Court regarding the nonexistent “March 9” report and his “corrected” numbers).

1 Hispanic-surnamed voters overrepresented in the 2008 Presidential Preference Election,
2 it also states that Hispanic-surnamed voters have historically been *underrepresented* in
3 the percentage of uncounted conditional provisional ballots in elections held since Prop
4 200 was implemented. Thus, this evidence does not support the finding the Gonzalez
5 Plaintiffs wish this Court to make.³

6 As to Dr. Lanier's conclusion, he admitted he had no basis upon which to
7 conclude that any difference in Hispanic voter turnout was caused by Prop 200.
8 [Closing Argument by Defendants State of Arizona and Secretary of State, dkt. #1023,
9 at 10] Dr. Lanier made no attempt to determine whether any of the individuals who
10 voted conditional provisional ballots that were not counted were eligible to cast votes.
11 [Tr. 319:2-6; 838:6-18] He also did not attempt to determine whether they actually had
12 identification and did not return with that identification for reasons unrelated to Prop
13 200's requirements.

14 **C. Racially polarized voting**

15 Despite the fact that Dr. Engstrom admitted on cross-examination that the
16 Hispanic-preferred candidate won in 66% of the elections he analyzed from 2004 and
17 2006, the Gonzalez Plaintiffs continue to push the racially polarized voting Senate
18 factor. Yet there is no logical (or factual) basis to conclude that the existence of racially
19 polarized voting somehow results in fewer Latinos being able to register or vote due to
20 a lack of identification. Indeed, plaintiffs have never argued otherwise. Racially
21 polarized voting is a factor in vote dilution cases, which typically involve redistricting
22 challenges. Nowhere in the Gonzalez Plaintiffs' discussion of Dr. Engstrom's findings
23 do they explain why racial polarization, assuming that it exists, is relevant to the
24 specific facts in this case.

25 Moreover, it is important to note that Dr. Engstrom did not have any opinion
26 concerning Prop 200's voting requirements and their effect on Hispanic participation in
27 the political process, and did not even know when Prop 200 was enacted. [Tr. 162:19-

28 ³ The Gonzalez Plaintiffs do not reference any testimony at trial or in deposition regarding this "study," so this Court has no information against which to weigh its reliability—not who conducted it, how it was conducted, or how many voters were not classified. It is interesting to note, however, that the Gonzalez Plaintiffs feel the need to resort to relying on it rather than their experts, who themselves demonstrate that Hispanics have registered in higher numbers since the implementation of Prop 200.

1 23] In other words, Dr. Engstrom draws no causal connection between this Senate
2 factor and the precise subject at issue in this case.

3 **D. Slowing rate of Hispanic population growth**

4 The Gonzalez Plaintiffs argue that the slowing of Hispanic population growth is
5 a “red herring.” [Gonzalez Brief at 21] However, the fact that there has been a
6 significant slowing of Hispanic population growth since the implementation of Prop
7 200 is highly relevant to any analysis of the rate of Hispanic voter registrations in that
8 same time period. Common sense tells us that, if the Hispanic citizen voting age
9 population growth rate is decreasing, then the rate of Hispanic voter registrations would
10 decrease as well. Furthermore, the evidence of this slowing population growth is
11 established by plaintiffs’ own expert, Dr. Chapa. As he admitted on cross-examination,
12 while the Hispanic citizen voting age population was growing faster than non-Hispanic
13 citizen voting age population before the implementation of Prop 200, it was growing at
14 a significantly slower rate than non-Hispanic citizen voting age population afterward.
15 [Tr. 50:24-65:3] And, Dr. Chapa also admitted to the Court that the 2005-2006 data
16 was collected over those two entire years, from January 1, 2005, to December 31, 2006.
17 [Tr. 56:16-57:18] January 1, 2005, is when Prop 200 became effective.

18 **E. Naturalized citizens**

19 The Gonzalez Plaintiffs argue that naturalized citizens face greater burdens with
20 respect to Prop 200’s evidence-of-citizenship requirement. [Gonzalez Brief at 4] As an
21 initial matter, it is important to note that there is exactly one plaintiff in this case, Jesus
22 Gonzalez, who is an unregistered naturalized citizen. And, it is undisputed that Mr.
23 Gonzalez could register if he wished, either by using his U.S. passport or his “A”
24 number. He chooses not to. Plaintiffs have not provided evidence of any other
25 naturalized citizen who cannot register because of Prop 200’s requirements. The
26 Gonzalez Plaintiffs inveigh against Prop 200’s requirements as an impermissible
27 burden on naturalized citizens, but can point to no individual who has been unable to
28 register as a result.

Naturalized citizens have at least four ways to register: they can present their
certificates of naturalization; they can provide their “A” (alien registration) numbers;

1 they can provide photocopies of the pertinent pages of their passports; and they can
2 provide valid Arizona driver's license or non-operator card numbers. Although it is
3 undisputed that the voter registration form asks for the alien registration number, which
4 is verifiable through the SAVE system, the Gonzalez Plaintiffs complain that there may
5 possibly be old forms floating around that ask for the certificate of naturalization
6 number, and that a person who uses one will have to apply again to register. [Gonzalez
7 Brief at 7] This is not, strictly speaking, true. First, the individual may have provided
8 other evidence of citizenship—such as a driver's license number or a photocopy of a
9 passport—that will suffice for registration. But even more importantly, it is not correct
10 that, even if that person did not provide other evidence, he or she must apply to register
11 a second time. The Secretary of State Election Procedures Manual mandates that, in the
12 event

13 a registrant provides a number that cannot be validated by the SAVE
14 system, the County Recorder shall take all reasonable steps necessary to
15 obtain the alien registration number from the registrant, including, but not
16 limited to, contacting the voter by phone and sending correspondence. . . .If
17 the County Recorder obtains the alien registration number from the
18 registrant, the Recorder may enter the alien registration number on the form
19 and validate the number through the SAVE system. *If the number is
20 validated, the Recorder may use the date the original form was signed as
21 the registration date.*

22 [Tr. Ex. 4, at 47 (emphasis added)] Thus, it is not the case, as the Gonzalez Plaintiffs
23 imply, that a naturalized citizen will have to apply to register a second time and
24 potentially miss the registration cutoff deadline. Only after 120 days, if the County
25 Recorder cannot reach the individual, does the Election Procedures Manual direct the
26 Recorder to send the registrant correspondence stating that the form has been rejected,
27 along with the reason why, and enclosing a new voter registration form. [*Id.*; Tr.
28 716:20-717:17] The Election Procedures Manual has the force and effect of law. [Tr.
759:15-20]

The Gonzalez Plaintiffs argue that a future Secretary of State could change the
“A” number procedure. However, State Election Director Joe Kanefield testified about
the process that would have to be followed to change the procedure, and that would

1 include preclearance by the Department of Justice, which looks specifically for
2 retrogressive effect on minority groups. [Tr. 762:21-763:11

3 As regards the VRAZ matching for driver's licenses, it is not true that persons
4 who provide numbers from Type F licenses are "flagged as ineligible for voter
5 registration" and rejected, as the Gonzalez Plaintiffs argue. It only means that the
6 person cannot use their license as evidence of citizenship. If they do not wish to pay \$4
7 to get an updated class D extended license, which they can get after they are naturalized
8 by presenting their naturalization certificate to the MVD [Anne Yanofsky dep. 65:21-
9 66:3], they can always utilize another option—presentation of the certificate, photocopy
10 of the passport, or providing the "A" number.⁴

11 **II. Issues Raised by ITCA Plaintiffs**

12 **A. Arizona Driver's License or Non-Operator's Card**

13 The ITCA Plaintiffs argue that Arizona driver's licenses do not constitute proof
14 of citizenship. However, there is a reasonable relationship between the type of license
15 issued by MVD and a person's citizenship status. Even though MVD is not charged
16 with monitoring citizenship, the type of license issued is generally indicative of
17 citizenship status, as is demonstrated in the deposition testimony of Anne Yanofsky and
18 Donna Collins. The ITCA Plaintiffs state incorrectly that non-citizens with authorized
19 presence can get regular Type D licenses. [ITCA Brief at 2] In fact, since 2000, MVD
20 has issued Type F licenses to non-U.S. citizens who establish lawful presence. [Anne
21 Yanofsky dep. 34:9-24; Donna Collins dep. 22:15-23:22;] The ITCA Plaintiffs also
22 state incorrectly that if an individual presents an alien registration card (thus
23 establishing lawful presence but not citizenship) without an expiration date, that MVD
24 issues a Class D extended license. [ITCA Brief at 2] This is patently false. If an
25 individual presents an alien registration card (otherwise known as a legal permanent
26 resident card) without an expiration date, he or she is issued a Type F license with an

26 ⁴ The Gonzalez Plaintiffs complain that the Secretary of State rejected 1300 voter registration applications by
27 persons who had either Type F licenses or who possessed licenses issued before January 1, 1996. [Gonzalez Brief at
28 10] However, the fact that these individuals had Type F licenses necessarily means that they were not citizens at
some point—indeed, plaintiffs have presented no evidence that any of the people whose applications were rejected
were in fact U.S. citizens. And if they were naturalized citizens, then presumably they can register because they
possess a naturalization certificate and an "A" number. No one is being prevented from registering, and, once again,
there is no plaintiff in this case who has asserted such an injury.

1 expiration date 10 years after the issuance date on the alien registration card. [Anne
2 Yanofsky dep. 35:11-24; Donna Collins dep. 26:23-28:17; 32:20-33:1] Simply because
3 in the past some non-U.S. citizens were able to obtain Class D extended licenses does
4 not make the law somehow unreasonable. The ITCA Plaintiffs’ argument is illogical; it
5 does not follow that, because allowing driver’s licenses and non-operator cards as
6 evidence of citizenship to register may allow some non-U.S. citizens to slip onto the
7 voter rolls, the law imposes a severe burden on the right to vote of a class of U.S.
8 citizens.⁵

9 **B. Voter ID at the polls**

10 The ITCA Plaintiffs argue that “but for” Prop 200’s identification at the polls
11 requirements, 4,194 conditional provisional ballots would have been counted. [ITCA
12 Brief at 7] What we know about those 4,194 uncounted conditional provisional ballots
13 is that they reflect the ballots of persons who did not provide the required identification.
14 However, we do not know whether any of those individuals were eligible to vote,
15 whether any of them had identification and just did not return for some other reason, or
16 whether any of those individuals who did not have identification could have obtained it.
17 As noted above, Dr. Lanier testified that he did not investigate into whether any of these
18 individuals were eligible to vote or had the means at their disposal to present
19 identification.

20 The ITCA Plaintiffs also decry the fact that the Secretary of State has not
21 allowed counties to accept preprinted checks as a form of identification, and that not all
22 counties provide free election mail that can be used as a form of identification. [ITCA
23 Brief at 12-13] According to ITCA Plaintiffs, the fact that there is no “guarantee” that
24 counties will provide this documentation to voters in the future underscores a “lack of
25 uniformity.” [*Id.*] However, as Mr. Kanefield testified, the Secretary of State spent
26 many months evaluating suggestions from people, including county officials who are
27 knowledgeable about their constituencies, in developing a list of acceptable forms of

28 ⁵ The ITCA Plaintiffs also argue [at 11-12] that naturalized citizens are treated differently because only “A” numbers are verified. This is factually incorrect. Arizona driver’s licenses are also verified through the Arizona Motor Vehicles Division, as required by the Help America Vote Act (“HAVA”). [Tr. 655:5-656:3] This was required by HAVA before Prop 200 was passed by the voters in 2004. [*Id.*]

1 identification and working to ensure that the procedure implemented would not
2 disenfranchise any voter. [Tr. 670:11-672:6; 755:3-5] The counties are all required to
3 accept the forms of identification listed in the Election Procedures Manual, and if some
4 of them have the means to go above and beyond and allow election related mailing to
5 be used, then that does not imply a lack of uniformity. [Tr. 749:6-14] And, simply
6 because the ITCA Plaintiffs themselves would have included different forms of
7 identification that they deem acceptable, such as preprinted checks, does not somehow
8 invalidate the Secretary of State’s discretion in excluding such forms as unacceptable.

9 **C. Organizational plaintiffs**

10 The ITCA Plaintiffs complain that the plaintiff organizations have had to spend
11 money to “counteract” Prop 200 and register the same number of people they registered
12 before Prop 200 went into effect. [ITCA Brief at 7] However, at trial the organizations
13 made it clear that they do not know whether any of the people they registered before
14 Prop 200 was enacted were U.S. citizens. [Tr. 505:18-20; 505:25-506:10; 574:18-22;
15 604:16-19] These organizations had no way of knowing registrants’ citizenship status
16 apart from the registrants told them. But there is a larger problem with the claims of the
17 organizations—they do not have standing to assert the voting rights of unidentified
18 persons who are not before this Court. Apart from Shirley Preiss, the plaintiff
19 organizations could identify no one who could not vote. In *Crawford v. Marion County*
20 *Election Board*, 128 S. Ct. 1610 (2008), the Democratic Party had standing to sue on
21 behalf of its members. But here, the organizations themselves do not have voting
22 rights, and they have not established that they have any members whose right to vote
23 has been affected, and thus cannot assert a claim based on representational standing.

24 The ITCA Plaintiffs argue that the U.S. Supreme Court in *Crawford*
25 contemplated allowing as-applied challenges “to vindicate the rights of a particular
26 class upon whom an undue burden has been shown to fall.” [ITCA Brief at 15] And
27 that is precisely why their claim fails—they have not shown a burden on any class of
28 voters or individuals. Shirley Preiss is one person, not a “class,” and she’s not a party
to the lawsuit. If Shirley Preiss is entitled to relief, then it would have to be in the
context of an as-applied challenge where she was a plaintiff.

1 **D. Native Americans**

2 The ITCA Plaintiffs continue to ignore the direct testimony of John Lewis, who
3 testified that all but one of the tribes represented in the ITCA issue tribal identification
4 or enrollment cards. [Tr. 483:8-484:16; 486:5-13; 701:2-5] The only tribe that does
5 not is the Havasupai tribe, which has approximately 500 members. [Tr. 486:14-19]
6 Moreover, the undisputed evidence is that 90% of Arizona’s on-reservation Native
7 American population is already registered to vote. [Sissons dep. 57:8-58:9] And,
8 again, plaintiffs have presented no evidence of even one particular Native American
9 who cannot register to vote. There is no evidence of disparate impact with regard to
10 Native Americans. For that reason alone, their claim fails.

11 **E. Voter fraud**

12 The ITCA Plaintiffs argue that, since “only” 56 individuals are known to have
13 engaged in voter fraud, that there is no justification for Prop 200. [ITCA Brief at 10]
14 They seem to contend that it’s a small amount of fraud and that the State and the voters
15 should therefore disregard it. This is nonsense. If 56 is not enough, what would be
16 enough for the ITCA Plaintiffs? One hundred? Two hundred? Of course, States are
17 not bound to wait for any voter fraud to happen before they take preventative steps.
18 The U.S. Supreme Court in *Crawford* established in no uncertain terms that States have
19 an interest in preventing voter fraud and do not have to first establish that voter fraud
20 has occurred. 128 S. Ct. at 1619.

21 **F. Poll tax**

22 Based on language from *Crawford*, the ITCA Plaintiffs attempt to revive their
23 poll tax claim that this Court and the Ninth Circuit previously rejected. [ITCA Brief at
24 16] But *Crawford* does not support Plaintiffs’ argument that Arizona’s law is a poll
25 tax. Arizona’s law imposes no fee, and it imposes no requirement that voters purchase
26 a specific document for a fee. Arizona’s law merely requires that voters present
27 identification at the polls and that they provide evidence of citizenship when registering
28 to vote. In contrast to the poll tax invalidated in *Harper v. Virginia Bd. of Elections*,
383 U.S. 663 (1966), Arizona’s requirements are undeniably related to voter
qualifications. See *Crawford*, 128 S.Ct. at 1616 (noting that *Harper* addressed

1 requirements “irrelevant to the voter’s qualifications”). In addition, the Court in
2 *Crawford* acknowledged that even though the photo-ID in Indiana was free, the
3 documentation required to obtain the ID was not. *Id.* at n.17. The fact that some voters
4 in Indiana may have to spend money to get an acceptable did not trouble the Court.
5 The impact of Arizona’s law on voters is no different. As the Ninth Circuit and this
6 Court previously concluded, Arizona’s law does not impose a poll tax.

7 **Conclusion**

8 For the reasons set forth above, and in the Closing Argument by Defendants
9 State of Arizona and Arizona Secretary of State (dkt. #1023), Defendants respectfully
10 request that judgment be entered in favor of Defendants on all claims.

11 RESPECTFULLY SUBMITTED this 30th day of July, 2008.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 30th day of July, 2008, I electronically transmitted
3 the attached document to the Clerk's Office using the ECF System for filing, and
4 transmittal of a Notice of Electronic Filing to the following ECF registrants:
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