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25 UNITED STATES DISTRICT COURT
26 DISTRICT OF ARIZONA

27 Maria M. Gonzalez, et al.,
28 Plaintiffs,

vs.

State of Arizona, et al.,
Defendants.

) No. CV06-01268-PHX-ROS (Lead)
) CV06-01362-PHX-ROS (Cons)

) **ITCA PLAINTIFFS'**
) **POST-TRIAL BRIEF**

) **- AND -**

) **NOTICE OF FILING REVISED**
) **PROPOSED FINDINGS OF FACT**
) **AND CONCLUSIONS OF LAW**

1 Pursuant to this Court’s July 18, 2008 Order, the ITCA Plaintiffs submit their
2 Post-Trial Brief and proposed Findings of Fact and Conclusions of Law that reflect the
3 evidence admitted at trial, filed contemporaneously herewith.

4 **I. INTRODUCTION**

5 Proposition 200 on its face is fatally flawed. It lacks any safeguard against the
6 disenfranchisement of the impecunious. It contains no fallback mechanism for qualified
7 citizens for whom it is impossible to obtain the required “satisfactory evidence of
8 citizenship.” It demands that naturalized citizens provide identification that cannot be
9 used to verify their status. It allows registration by persons using MVD identification
10 that does *not* establish citizenship. It gives local officials discretion to determine
11 acceptable forms of identification and whether to provide them, such that the difference
12 between having one’s ballot counted or rejected – the most critical point in the exercise
13 of the franchise – may depend solely upon the county of a voter’s residence.

14 These flaws are too serious both in their extent and in the rights upon which they
15 intrude to be excused as the understandable byproduct of legislation by initiative, or as
16 harmless errors. The fact that the State has attempted to remediate these errors –
17 sometimes to the point of simply ignoring the law’s plain language – cannot save the
18 statute on its face. The Defendants have not provided evidence showing that the
19 registration and polling place ID requirements as enacted are needed to combat actual
20 problems. This Court therefore is left with the obligation of vindicating the fundamental
21 right to vote for the citizens of Arizona by enjoining Proposition 200.

22 **II. FUNDAMENTAL FLAWS IN PROPOSITION 200**

23 Neither Proposition 200, nor Arizona law generally, makes any provision for a
24 cost-free means of satisfying either the registration ID requirement or the polling place
25 ID requirement. Anyone seeking to register to vote, or to re-register after moving to
26 another county within the State, either must already possess a driver’s license or a non-
27 operator’s identification license, a birth certificate, a passport, a naturalization certificate
28 (collectively, “Registration ID”), or be prepared to pay the associated costs of obtaining

1 such documents. None of those forms of identification is free. Similarly, Proposition
2 200 makes no provision for any voter to be provided with “acceptable” polling place
3 identification (“Polling ID”) at no cost, regardless of the resulting hardship or burden.
4 Nearly every form of Polling ID has an associated monetary cost.¹ By invidiously
5 conditioning the right to vote upon the satisfaction of financial tests, the costs of
6 complying with Proposition 200 inevitably fall more heavily upon groups that are
7 economically deprived. *See Crawford v. Marion County Election Board*, 128 S. Ct.
8 1610, 1616 (2008) (citing *Harper v. Virginia Bd. Elections*, 383 U.S. 663 (1966)).

9 An equally glaring flaw in the statute’s Registration ID requirement is its reliance
10 on Arizona driver’s licenses or non-operator’s IDs with an issue date of October 1, 1996
11 or later as a proxy for “satisfactory evidence of citizenship.” A.R.S. § 16-166(F)(1).
12 The vast majority of applicants who have submitted voter registration forms since
13 January 2005 have relied on an Arizona driver’s license to satisfy that requirement.
14 [7/31/06 Osborne Dep., Ex. 3, ¶ 10] But such licenses do *not* prove citizenship.

15 The Arizona MVD does not verify citizenship when issuing driver’s licenses.
16 [Yanofsky Dep. at 12:24-13:25] Indeed, Anne Yanofsky, who testified on behalf of the
17 State, was emphatic that the review of documents that MVD performs before issuing a
18 driver’s license “*has nothing to do with citizenship. Absolutely nothing at all.*” [*Id.* at
19 13:7-8, 13:13, 13:17 (emphasis added)] Rather, MVD determines only authorized
20 presence in Arizona. [*Id.* at 13:10-13:13, 57:8-57:15] Hence, a non-citizen with
21 authorized presence can possess a regular type-D Arizona driver’s license. [*Id.* at 35:10-
22 35:16, 37:8-37:19, 63:19-64:9] If that individual’s alien registration card had no
23 expiration date, he would have a regular, extended license that does not expire until his
24 65th birthday. [*Id.* at 21:18-22:7]²

25
26 ¹ While some counties have issued voter identification cards and individually-addressed
27 sample ballots that – in combination – constituted “acceptable” Polling ID, the majority of
28 voters will not receive such free Polling ID for the 2008 elections. [*See* Ex. 1218]

² Moreover, Arizona issued driver’s licenses before 1996 without verifying citizenship or
authorized presence in the United States. [*Id.* at 23:7-23:25] Such licenses included extended

1 For naturalized citizens, Proposition 200 permits them to provide “the number of
2 the certificate of naturalization,” but bars their inclusion on the voter rolls until the
3 number is verified with federal immigration authorities. A.R.S. § 16-166(F)(4). That
4 number, commonly known as the “C” number, cannot be verified through the USCIS.
5 Instead, the USCIS only can verify the Alien Registration Number, commonly known as
6 the “A” number.³ As discussed below, the consequences of this fundamental flaw were
7 immediate and have not been cured.

8 In the case of qualified citizens like Shirley Preiss, who cannot obtain
9 Registration ID because no official record of her birth exists, Proposition 200 is an
10 insuperable barrier to their exercise of the franchise. There simply is no colorable
11 justification for Proposition 200 on its face to fail to provide a fallback mechanism to
12 allow Ms. Preiss and similarly situated citizens to register and vote. Such an absolute
13 bar to the fundamental right to vote based upon the vagaries of administrative
14 recordkeeping is constitutionally unsustainable.

15 **III. BURDENS RESULTING FROM APPLICATION OF PROPOSITION 200**

16 **A. Registration Identification**

17 Since the Registration ID requirement went into effect, over 31,500 individuals’
18 voter registration applications have been rejected for failure to include Registration ID.
19 [Trial Tr. at 243:3-7] Because not all counties produced these forms, the number of
20 rejected registrants is actually higher. [*Id.* at 246:1-247:5] Among the applicants whose
21 rejected forms were produced, only about one third eventually went on to register to

22 licenses that do not expire until the holder’s 65th birthday. [*See* Gage Dep. at 62:2-62:7 (MVD
23 began issuing extended licenses in 1993)] If MVD originally issued a license to an individual
24 before October 1, 1996, and the license holder replaced a lost license, or updated his photo or
25 address after October 1, 1996, the “issue date” of the new license would be the date that it was
26 provided. [Yanofsky Dep. at 48:11-49:10, 59:19-60:25] As such, it would serve as
27 “satisfactory evidence of citizenship” under Proposition 200. A.R.S. § 16-166(F). This is so,
28 even if the person never demonstrated to the MVD that he is a U.S. citizen or a non-citizen
lawfully present in the United States. [Yanofsky Dep. at 25:23-29:15]

³ Some naturalization certificates contain no “A” number that can be verified. [Sissons Dep. at 101:18-22]

1 vote as of September 2007. [*Id.* at 329:13-23]

2 The personal experiences of several witnesses illustrate the direct effects of
3 Proposition 200. Shirley Preiss is proud that she has voted at every opportunity since
4 1932. [*Id.* at 86:2-6] Ms. Preiss is a United States citizen, eligible to register to vote in
5 Arizona and would vote in the November 2008 election if she could register. [*Id.* at
6 86:7-87:2] However, her efforts to register in Arizona have failed. When she tried to
7 register, she was informed that she could not do so without proof of citizenship such as a
8 passport or birth certificate. [*Id.* at 87:7-15] But it is impossible for Ms. Preiss to
9 obtain any documentary proof of citizenship. [*Id.* at 87: 21-24.]

10 Ms. Preiss testified that she was born in Clinton, Kentucky in 1910, before
11 Kentucky issued birth certificates. [*Id.* at 82:9-19, 83:1-6] She has been unsuccessful in
12 her attempts to obtain a delayed birth certificate from Kentucky. [*Id.* at 82: 20-24]
13 Without a birth certificate or other documentation, she cannot obtain a passport. [*Id.* at
14 87:10-12; *id.* at 87:21-24; *see* http://travel.state.gov/passport/get/first/first_830.html]
15 Nor can she obtain the most common form of proof of citizenship used by Arizona
16 voters – identification from the Arizona MVD. MVD requires at least one form of
17 “primary” documentation, and Ms. Preiss has none. [Trial Tr. at 89:7-11; Ex. 1140]
18 The only forms of documentation she has are a social security card, a Medicare card and
19 expired Texas driver’s licenses. [*Id.*] The social security card and Medicare card
20 constitute “secondary” documentation. [Ex. 1140] And while a driver’s license from
21 many states will suffice, MVD will *not* accept as primary documentation driver’s
22 licenses from ten states – including Texas. [*Id.*]

23 Because Proposition 200 does not provide any avenue to obtain proof of
24 citizenship at no charge, even if Ms. Preiss could obtain a birth certificate or passport,
25 doing so would for her constitute a significant financial burden. Her only source of
26 income is social security. [Trial Tr. at 85:17-21] The cost of a birth certificate is at
27 least \$10, and a passport costs at least \$100. [Ex. 1142; *see*
28 <http://chfs.ky.gov/dph/vital/birthcert.htm>.]

1 Ms. Preiss is not alone in having difficulty meeting the Registration ID
2 requirement.⁴ Plaintiff Jesus Gonzalez testified that his voter registration was twice
3 rejected. [Trial Tr. at 222:11-15, 224:7-9] On the day he became a U.S. citizen he
4 submitted a registration form with the number of his Certificate of Naturalization. [*Id.*
5 at 223:13-25] That application was rejected. [*Id.* at 225:1-8] He again failed to register
6 successfully when he sought to do so over the internet because his Arizona driver's
7 license was issued before October 1, 1996. [*Id.* at 225:19-21] Maria Gonzalez also had
8 her voter registration application rejected because she used the number from her
9 Certificate of Naturalization. [*Id.* at 211:12-20] Linda Brown, who has worked to
10 register voters, testified that she has encountered several people who lack the forms of
11 identification that satisfy the Registration ID requirement. [*Id.* at 583:8-584:13]

12 The harmful effect of the Registration ID provision goes beyond the individuals
13 who are unable to register to vote. Organizations and individuals that engage in voter
14 registration have been injured by the new hurdles registrants must clear to submit a
15 successful registration form. Some organizations, like the League of Women Voters
16 have essentially stopped their voter registration work. [8/30/06 Hr'g Tr. at 121:10-
17 123:3] Others, like the Inter Tribal Council of Arizona, Inc., Arizona Advocacy
18 Network ("AzAN"), Valle del Sol, Chicanos Por La Causa and Debbie Lopez have
19 found voter registration far more difficult and costly. [Trial Tr. at 497:13-498:7, 554:9-
20 555:5, 614:4-19, 585:23-586:10; Ex. 1340, at 3-5] Ms. Brown's testimony painted a
21 clear picture of the substantial additional cost to her organization, AzAN, which
22 contracts with a nationwide organization to register voters in Arizona. [*Id.* at 584:17-
23 24] Due to the Registration ID requirement, AzAN cannot register as many voters per
24 hour as its counterparts in other states, where registration organizations average 15 and
25 20 voters per four-hour shift. [*Id.* at 586:1-10] AzAN, however, averages only six

26 ⁴ Ms. Preiss likewise could not satisfy Proposition 200's polling place ID requirement. She
27 lives with her son and lacks utility bills, a vehicle registration, property tax statements, or bank
28 statements in her name. [Trial Tr. at 88:11-89: 9] Her social security card and Medicare card
do not contain her address and thus are not proper forms of Polling ID. [*See* Ex. 4, at 128].

1 registrations per four-hour shift. [*Id.* at 586:16-25] It will cost AzAN from \$11,000 to
2 \$22,000 dollars more than its counterparts in other states to meet the same registration
3 goals – which require successful registrations – due solely to the Registration ID
4 requirement. [*Id.* at 587:1-11; Ex. 1223]

5 B. Polling Place Identification

6 The burdens of Proposition 200’s Polling ID requirement are two-fold. First, like
7 registration ID, there is a cost associated with nearly every form of identification
8 deemed acceptable to establish identity at the polls. [*See* Ex. 4, at 128 (listing forms of
9 Polling ID); Ex. 1126, 1139, 1146, 1147] Second, the implementing regulations for the
10 Polling ID requirement are so complicated and confusing that elections officials have
11 not been able to apply them properly, and have denied voters regular or regular
12 provisional ballots even though they provided sufficient identification.

13 Unlike the requirements for Registration ID, Proposition 200 does not specify the
14 forms of identification acceptable as Polling ID. Instead, it requires voters to provide
15 one form of photo identification bearing name and current address or two forms of non-
16 photo identification bearing name and current address. A.R.S. § 16-579. To guide
17 county elections officials, the Secretary of State developed Procedures for Proof of
18 Identification at the Polls (the “Procedures”), which list the forms of acceptable
19 identification. [Trial Tr. at 670:22-671:7] Under the Procedures, depending on the
20 identification provided, a voter may receive one of three types of ballots on election day
21 – (1) a regular ballot that is tabulated on site, (2) a regular provisional ballot that is
22 counted if the signature on the ballot envelope matches the voter’s registration or (3) a
23 conditional provisional ballot, which is *not* counted unless the voter returns to an ID
24 verification site with sufficient identification within 3 or 5 days of the election. [*See id.*
25 at 675:12-677:25; Ex. 4, at 127-29] A voter who presents no identification or only one
26 form of non-photo identification on the Procedures’ list receives a conditional
27 provisional ballot. [Ex. 4, at 127-28] A voter who presents identification with an
28 address that does not match his address on the signature roster, but is otherwise

1 adequate, receives a regular provisional ballot. [*Id.* at 129]

2 At least 6,742 voters have been directed burdened due to the Polling ID
3 requirement. In the November 2006 general election, 2,548 voters left the polls without
4 voting any type of ballot after being asked to provide identification. [Ex. 1172-73] In
5 addition, the counties produced copies of 4,194 conditional provisional ballot envelopes
6 containing ballots left uncounted since the effective date of the Polling ID requirement.
7 [Trial Tr. at 249:24-25] But for Proposition 200, these voters either would have cast
8 regular ballots or provisional ballots subject only to a signature check.

9 Even though the Secretary of State's Office has taken steps to attempt to apply
10 Proposition 200 so as to disenfranchise fewer voters, the Procedures simply are too
11 confusing to be administered with reasonable consistency. [*See id.* at 755:3-5] When
12 quizzed about what type of ballot a voter should receive based on the identification
13 presented, even top-level county elections officials gave widely varying answers. [*See*
14 Ex. A (compiling deposition testimony, attached hereto)] In practice, voters like Brenda
15 Rogers and Donna Fulton, who presented identification to poll workers that should have
16 garnered them a regular provisional ballot, have received conditional provisional ballots
17 that have gone uncounted. [Ex. 967, ¶¶ 10-14; Ex. 968, ¶¶ 7-11; *see also* Trial Tr. at
18 602:2-15 (describing problems observed at polling places)]

19 The record shows that the Polling ID requirement also has unduly burdened
20 organizations whose mission includes assistance to voters. To counteract the
21 disenfranchising effect of the Polling ID requirement in 2006, AzAN diverted funds
22 from its other efforts and spent \$19,205 assisting voters outside polling places. [Trial
23 Tr. at 589:7-17, 590:1-5, 596:8-16; Ex. 1223] Because thousands of voters were
24 unsuccessful in casting ballots in 2006, AzAN plans to substantially expand its election-
25 day efforts. [*Id.* at 593:6-8] It plans to recruit 120 volunteers to work as poll workers
26 and provide them additional training on the Polling ID requirements. AzAN also plans
27 to recruit hundreds more volunteers to be at polling places on election day to interview
28 voters and help answer polling ID questions. [Trial Tr. at 593:10-595:12] The total

1 amount AzAN projects to spend for its 2008 election protection activities, attributable
2 directly to combating Proposition 200, is \$40,440. [*Id.* at 600:224-601:3; Ex. 1223]

3 C. Latinos and Indians are Disproportionately Harmed by Proposition 200

4 The record demonstrates that Hispanic and Native American citizens are
5 disproportionately vulnerable to disenfranchisement by Proposition 200. This disparity
6 results from the interaction between socioeconomic conditions, a history of official
7 discrimination reaching back before statehood and a general pattern of racially polarized
8 voting. Indeed, the record is clear that Native American and Latino citizens have lower
9 educational achievement, higher levels of unemployment and are far more likely to live
10 below the poverty line than White citizens. [Trial Tr. at 461:3-21; Ex. 1197, 1198]

11 Due to economic conditions, Native Americans are less likely to possess birth
12 certificates and driver's licenses than other Arizonans. [Trial Tr. at 457:25-460:8;
13 472:9-474:15; Laughter Dep. at 13:22-14:4] Though Proposition 200 seems to provide
14 additional forms of Registration ID for Native Americans, the record establishes that
15 Bureau of Indian Affairs card numbers and tribal treaty card numbers are not in use in
16 Arizona. [Trial Tr. at 474:21-475:11] Many Native Americans likewise do not have
17 tribal enrollment numbers. [*Id.* at 475:12-19]

18 Because of these socioeconomic disparities, Hispanic and Indian citizens begin
19 with less access to information about what is needed to comply with Proposition 200, or
20 avoid its requirements by voting early. [*See id.* at 185:11-187:18] Moreover, their
21 relative lack of financial resources means that, as groups, the attendant costs of
22 obtaining identification to comply with Proposition 200 bear more heavily upon them.

23 **IV. LACK OF JUSTIFICATION**

24 The ostensible justification for Proposition 200 is to prevent two types of voter
25 fraud – registration to vote by ineligible non-U.S. citizens and imposter voting at polling
26 places. The evidence in the trial record of such fraud, however, is nearly non-existent.

27 With respect to concerns of imposter voting at the polls, State Elections Director
28 Joseph Kanefield was unable to identify any substantiated incident of imposter voting,

1 even after establishing a hotline to receive reports of voter fraud. [Trial Tr. at 745:4-7;
2 7/25/06 Kanefield Dep. at 146:11-13] Likewise, none of the county elections officials
3 who testified in deposition identified any incident of imposter voting at the polls. [E.g.,
4 Justman Dep. at 12:22-13:4; Hansen Dep. at 87:13-87:20; 1/14/08 Osborne Dep. at
5 89:3-89:6; 8/30/06 Hr’g Tr. at 101:23-102:1; Dastrup Dep., at 29:5; Stallworth Dep., at
6 20:18-20:23; 1/23/08 Osborne Dep. at 6:10-6:24, 31:13-31:17; Hoyos Dep. at 40:3-41:1;
7 Wayman-Trujillo Dep. at 128:13-128:15] Election officials acknowledged that it is
8 possible to detect imposter voting at the polls, but *not a single instance of such fraud*
9 *has been reported in Arizona.* [*Id.*; Trial Tr. at 693:14-19, 744:20-25, Ex. 1105-17,
10 1123, 1167 (No. 1(d))]

11 The same elections officials also testified that the signature matching process
12 used for early and regular provisional ballots is sufficient to guard against imposter
13 voting. [Trial Tr. at 746:12-20; 7/31/06 Osborne Dep. at 50:24-52:9, 75:7-76:15;
14 Justman Dep. at 35:10-35:23; Hansen Dep. at 70:11-70:14; 8/2/06 Rodriguez Dep. at
15 75:17-77:9; Marin Dep. at 109:1-109:9; 7/25/06 Kanefield Dep. at 56:14-56:20; Dastrup
16 Dep., at 28:23-29:1; Pew Dep., at 19:5-19:7; Hoyos Dep. at 42:21-44:20; Wayman-
17 Trujillo Dep. at 113:6-113:16] Conducting the same signature matching process for
18 conditional provisional ballots would *not* be a substantial burden to county elections
19 officials. [1/14/08 Osborne Dep. at 76:23-77:16; Marin Dep. at 108:7-108:12; Hoyos
20 Dep. at 49:9-49:15; Wayman-Trujillo Dep. at 124:22-126:1]

21 Similarly, Defendants have provided scant evidence of registration and voting by
22 ineligible non-U.S. citizens. Twelve of Arizona’s 15 counties reported no non-citizen
23 voter registrations for at least the past 12 years. [Ex. 1105-1107, 1109-14, 1117, 1123,
24 1167 (No. 1(a)); *see also* Justman Dep. at 11:15-11:25; Hansen Dep. at 86:13-87:12; Ex.
25 45, at 11:10-12:9; Ex. 46, at 31:22-34:9; Dean-Lytle Dep. at 87:17-88:12, 89:19-90:16;
26 Wayman-Trujillo Dep. at 29:15-29:17, 34:5-34:13] Yuma County elections officials
27 reported only one instance in which a non-citizen was alleged to have registered.
28 [Marin Dep. at 98:1-99:25, 101:17-102:19] That individual did not know that she had

1 completed a voter registration form. [*Id.*] Moreover, she never voted, and requested
2 that her voter registration be canceled when she learned of the error. [*Id.*]

3 The Court has admitted exhibits listing individuals residing in Pima and
4 Maricopa Counties who have had their voter registrations cancelled after attesting to the
5 Superior Court Jury Commissioner that they were not citizens, and therefore not eligible
6 to serve as jurors. [Ex. 1108, 1351] Those lists contain 208 names. [*Id.*] Among those
7 208 individuals, only 56 are alleged to have voted in any election. [*Id.*] Importantly, the
8 lists of persons who attested that they were not citizens on juror affidavits do *not*
9 establish that those individuals were non-citizens. [1/23/08 Osborne Dep. at 19:22-24,
10 22:4-6] Indeed, the Maricopa County Elections Director testified in deposition that “I
11 know that some of them are [citizens] and they want to get out of jury duty.” [1/24/08
12 Osborne Dep. at 91:4-9; 7/31/06 Osborne Dep. at 16:5-9; *see also* 1/23/08 Altaha Dep.
13 at 7:20-8:14]

14 Defendants have sought the admission of Maricopa County court records of nine
15 prosecutions for “Illegal Voting” and “Presentment of False Instrument for Filing.” [Ex.
16 1349a-g, 1349y-z] According to charging documents included with those exhibits, the
17 defendants had attested to the jury commissioner that they were non-citizens. [*Id.*] The
18 exhibits reflect that eight individuals have been convicted of misdemeanor Presentment
19 of False Instrument for Filing, but do not set forth the factual basis of those convictions.
20 [*Id.* (Minute Entries)] Moreover, in each case where the defendant was also charged
21 with Illegal Voting, that charge was dismissed. [*Id.*] Absent the facts that support the
22 convictions, the court documents simply do not establish that the defendants were non-
23 citizens. Indeed, it is possible if not equally likely that the “false instrument” they
24 presented was the juror affidavit on which they attested to be non-citizens. *See* A.R.S. §
25 39-161 (prohibiting “acknowledg[ing], certif[ying], notariz[ing], procur[ing] or
26 offer[ing] to be filed, registered or recorded in a public office in this state an instrument
27
28

1 which he knows to be false . . .”).⁵ In short, despite *allegations* of non-citizen
2 registration and voting, there is virtually no direct evidence in the record that those
3 allegations are true. Even if they were true, the 56 alleged non-citizens who have voted
4 represent only two-thousandths of one percent (0.002%) of the active registered voters
5 in Arizona as of March 2008.

6 Conversely, there is no question that Proposition 200 has barred U.S. citizens
7 from registering to vote. [Trial Tr. at 87:4-24] Indeed, approximately 90 percent of the
8 more than 31,550 individuals whose voter registration forms have been rejected for
9 failure to provide proof of citizenship reported a birthplace in the United States. [Trial
10 Tr. at 327:4-11; Ex. 883, Table 3; 7/31/06 Osborne Dep. at 22:11-22:24] Weighed
11 against the very small number of *alleged* instances of non-citizen registration and
12 voting, the thousands of citizens prevented or barred from registering plainly tip the
13 scales against Proposition 200.

14 **V. LIMITED AND UNSUCCESSFUL EFFORTS AT REMEDIATION**

15 Defendants recognize that, on its face, Proposition 200 disenfranchises otherwise
16 eligible voters. They have taken steps to guard against unconstitutional results, but their
17 attempts to do so have been insufficient. [See Trial Tr. at 755:3-5] Moreover, because
18 the procedures devised by the State are not part of Proposition 200 (and in some cases
19 are inconsistent with the plain language of the law), they are subject to change at the
20 whim of the Secretary of State or her successor. [*Id.* at 718:14-18, 755:6-11]

21 With respect to Registration ID, the Secretary has revised the voter registration
22 form to request the Alien Registration Number instead of the number of the Certificate
23 of Naturalization called for in A.R.S. § 16-166(F)(4). The new form, however was not
24 available for distribution until December 2007. [Trial Tr. at 715:11-14] Even once the

25
26 ⁵ Tellingly, these defendants were *not* charged with false registration under A.R.S. § 16-182(A),
27 which makes it a class 6 felony to “knowingly” cause, procure or allow himself to be registered
28 as an elector, “knowing that he is not entitled to such registration.” Ms. Osborne testified that
those to whom she spoke, who she believed were non-citizens, had registered *inadvertently*, not
knowingly. [7/31/06 Osborne Dep. at 95:4-23; 1/23/08 Osborne Dep. at 15:13-16:10]

1 it became available, the new form was not distributed immediately, and an unknown
2 number of old registration forms remain in circulation. [*Id.* at 715:15-716:12] In
3 addition, elections officials treat naturalized citizens differently from other similarly
4 situated registrants. Proposition 200 prohibits registration of naturalized citizens until
5 their alien registration number is verified with the federal government. A.R.S. § 16-
6 166(F)(4). Yet elections officials take no steps to verify birth certificates, passports,
7 Bureau of Indian Affairs card, tribal treaty card or tribal enrollment numbers. [1/14/08
8 Osborne Dep. at 50:10-51:25; Marin Dep. at 45:18-46:23; Johnson Dep. at 20:22-22:4;
9 Dean-Lytle Dep. at 49:21-51:19; Wayman-Trujillo Dep. at 63:8-66:9]

10 The Secretary also has expanded the list of acceptable forms of proof of
11 citizenship for members of Native American Tribes beyond those listed in Proposition
12 200. [*Compare* A.R.S. § 16-166(F)(6), *with* Ex. 4, at 43-44] Before doing so, however,
13 she did not determine whether or to what extent Native Americans possessed the added
14 forms of Registration ID. [Trial Tr. at 743:8-13]

15 In drafting the Polling Place Procedures, the Secretary of State's Office claims to
16 have tried to include forms of identification that would enable everyone who is
17 registered to vote to do so, but the Procedures omit some forms of identification
18 suggested by county elections officials. [*Id.* at 747:1-748:8] Indeed, even though pre-
19 printed checks contain name and address, the Secretary declined to include them in the
20 Procedures because they lack an expiration date. [*Id.*] Proposition 200, however, says
21 nothing about expiration dates on identification. [*Id.* at 748:9-11] Moreover, even
22 though county elections officials recommended the use of regular provisional ballots for
23 all voters with insufficient Polling ID, the Secretary balked at that suggestion, too.
24 [7/25/06 Kanefield Dep. at 71:9-72:1]

25 Despite a goal of "uniformity," the Procedures allow similarly situated voters to
26 be treated inconsistently. [*Id.* at 748:12-15] Recognizing that certain voters lack
27 Polling ID, the Secretary determined that the "intent" of the law is met by providing
28 regular provisional ballots to Native American voters who provide one form of non-

1 photo tribal identification, with only the voter’s name. [7/25/06 Kanefield Dep. at
2 50:10-11] For other voters, however, the Secretary decided that they would *not* receive
3 a regular provisional ballot with only one form of non-photo identification. [Trial Tr. at
4 752:7-753:1] Moreover, the Procedures leave to each county’s election officials
5 whether to accept “official election mail” as Polling ID. [*Id.* at 748:19-749:5] Some
6 counties – but not all – have done so. [*Id.*; *see also* Ex. 530] Accordingly, similarly
7 situated voters in different counties are treated differently at the polls. [Trial Tr. at
8 751:13-752:1] Even if a county accepts “official election mail,” there is no guarantee
9 that it will *provide* this form of identification to its voters. [*See* 7/31/06 Osborne Dep. at
10 59:21-60:18; Hansen Dep. at 50:2-50:4, 57:2-57:9; 8/30/06 Hr’g Tr. at 111:12-111:20]
11 Indeed, Maricopa County, where nearly 60 percent of Arizona voters reside, will *not*
12 provide official election mail, addressed to individual voters in 2008. [Ex. 1218]

13 **VI. CONSTITUTIONAL AND STATUTORY VIOLATIONS**

14 A. Fourteenth Amendment

15 The ITCA Plaintiffs have stated both facial and as applied claims against the
16 Registration and Polling ID requirements of Proposition 200 under the Fourteenth
17 Amendment. The decision of the Supreme Court in *Crawford* reaffirmed *Burdick v.*
18 *Takushi* as the leading case concerning challenges to election practices based upon the
19 fundamental right to vote under the Fourteenth Amendment.⁶

20 As described above, the facial infirmities of the registration ID requirement
21 include the lack of any waiver for the indigent, the absence of any waiver to those for
22 whom obtaining identification is impossible, the demand for the useless “C” number

23
24 ⁶ The ITCA Plaintiffs incorporate by reference their brief concerning the impact of *Crawford*
25 [Doc. 763] and their opposition to the Defendants’ Motion for Summary Judgment [Doc. 812],
26 as well as their Proposed Findings of Fact and Conclusions of Law. The ITCA Plaintiffs join
27 with the Gonzalez Plaintiffs with regard to the evidence and claims under Section 2 of the
28 Voting Rights Act. The ITCA Plaintiffs also presented a claim under the NVRA, 42 U.S.C.
1973gg-4(a)(1), on which this Court granted summary judgment following the Court of
Appeals’ decision in *Gonzalez v. Arizona*, 485 F.3d 1041 1050 (9th Cir. 2007). [Doc. 330]
Plaintiffs do not waive this claim, but recognize that the issue is not open before this Court.

1 from naturalized citizens, and the unreasonable and therefore invidious use of drivers'
2 licenses as proxies for proof of citizenship. Beyond this, Proposition 200 caused the
3 rejection of at least 31,500 individuals' registration applications. Because the vast
4 majority of those individuals were born in the United States (and the Defendants did not
5 challenge the accuracy of that self-reporting), the registration ID requirement directly
6 caused the rejection of nine citizen applicants for every *potential* non-citizen applicant
7 that was rejected. In order to be constitutional Proposition 200 need not be so exactly
8 tailored to its stated purpose of preventing non-citizen registration that it never burdens
9 a qualified citizen. In practice, however, the Registration ID requirement is grossly
10 misfit to the problem it purports to address. This misfit, in tandem with the other
11 identified facial infirmities, far outweighs the asserted justifications for the Registration
12 ID requirement, and compels the Court to find that provision unconstitutional on its
13 face, and to enjoin its enforcement.

14 With respect to the Polling ID requirement, the facial infirmities of Proposition
15 200 include the fact that (1) no free identification is required to be issued, (2) county
16 election officials are permitted to devise inconsistent standards for "acceptable"
17 identification, and (3) county election officials are permitted to provide or withhold free
18 identification to registered voters at their discretion. The counties produced over 4,000
19 uncounted conditional provisional ballots during discovery. Thousands of other hopeful
20 voters left the polling place without casting a ballot due to the ID requirement. These
21 numbers do not include the additional voters who were inconvenienced by having to
22 take a follow-up trip after the election to provide acceptable identification, nor do they
23 show how many voters were mistakenly required to cast conditional provisional ballots
24 due to poll worker confusion. The documented need for this additional burden could not
25 be slighter. No evidence of in-person voter impersonation in Arizona was introduced.
26 Moreover, the number of absentee, early and regular provisional ballots that were
27 visually inspected for signature matching during the same time period was many times
28 greater than the number of conditional provisional ballots, and the testimony of election

1 officials was consistent that the signature inspection procedure was sufficient to guard
2 against fraud. Under these circumstances, the burdens of the Polling ID requirement
3 outweigh the justification and make that requirement unconstitutional on its face.⁷

4 *Crawford* of course also contemplated post-enforcement as-applied challenges.
5 The way in which it did so, however, focused primarily upon the ultimate remedy,
6 viewing a facial challenge as one seeking that a statute be stricken across the board
7 (either in a pre-enforcement posture without reliance on evidence of actual impact or in
8 post-enforcement posture with the benefit of such evidence), versus an as-applied
9 challenge that would carve out an exception to a general rule so as to vindicate the rights
10 of a particular class upon whom an undue burden has been shown to fall.

11 Where Proposition 200 has made voting *impossible* for qualified individuals, it is
12 axiomatic that the burden is severe. Shirley Preiss is one such individual. To satisfy
13 Proposition 200 is literally impossible for Ms. Preiss, a United States citizen who has
14 voted since 1932 but whose right to vote is denied by the registration ID requirement of
15 Proposition 200. Ms. Preiss testified adamantly, several times, that she “want[s] the
16 right to vote under the Constitution . . .” but that Proposition 200 has “left [her] no way”
17 to do that. [*Id.* at 84:2-3, 87:24, 88:9-10] Indeed, it is persons precisely like Ms. Preiss
18 with whom the Supreme Court in *Crawford* was concerned – as persons bearing a
19 “heavier burden” under the voter ID law than most voters. *See Crawford*, 128 S. Ct. at
20 1621 (taking judicial notice of facts that “indicate a heavier burden may be placed on . . .
21 elderly persons born out-of-state, who may have difficulty obtaining a birth certificate,”
22 and on “persons who because of economic or other personal limitations may find it
23 difficult either to secure a copy of their birth certificate or assemble the other required
24 documentation to obtain a state-issued identification.”); *see also Burdick*, 504 U.S. at
25 434, 439-440 (regulations imposing a severe burden subject to strict scrutiny, but

26 ⁷ *See Dunn v. Blumstein*, 405 U.S. 330, 345-46, 353 (1972) (rejecting argument that durational
27 residency laws were “necessary to prevent fraud” because “total statutory scheme for regulating
28 the franchise” and various criminal provisions were “more than adequate to detect and deter
whatever fraud may be feared”).

1 finding restriction on voting at issue was “slight” and a “limited burden”). For Ms.
2 Preiss and those in her position the Court is obliged to fashion a remedy on an as-
3 applied basis.

4 Impossibility, however, is not a precondition for an as applied challenge.
5 Proposition 200 also imposes significant burdens on other Plaintiffs that outweigh the
6 offered justifications. For example, Proposition 200 seriously hampers the work of
7 organizations that conduct voter registration, so that the Arizona Advocacy Network
8 (AzAN), must at least double its efforts to register the same number of voters it could
9 before Proposition 200. AzAN showed similar burdens with regard to the need for
10 election-day assistance due to Proposition 200.

11 B. Twenty-Fourth Amendment

12 This Court granted summary judgment on plaintiffs’ claims that Proposition 200
13 imposes a poll tax. [Doc. 330, at 3]⁸ ITCA Plaintiffs respectfully suggest that because
14 some voters will need to pay for documents, including payments directly to the State of
15 Arizona or its agencies, in order to register or vote in person, *Crawford* materially
16 clarified the governing law since this Court’s order rejecting the poll tax claims.

17 The availability of free photo ID cards in Indiana was a determining fact in
18 *Crawford*. In assessing the burdens, Justice Stevens emphasized the lack of direct
19 financial burden under the Indiana law:

20 The burdens that are relevant to the issue before us are those imposed on
21 persons who are eligible to vote but do not possess a current photo
22 identification that complies with the requirements of SEA 483. The fact
23 that most voters already possess a valid driver’s license, or some other
24 form of acceptable identification, would not save the statute under our
25 reasoning in *Harper*, if the State required voters to pay a tax or a fee to
26 obtain a new photo identification. But just as other States provide free

26 ⁸ The Court’s opinion referenced only the registration identification requirement. However,
27 because the Court granted the motion for summary judgment without noting any exceptions
28 regarding the poll tax issue. [See Doc. 330, at 7 (granting Doc. 282)]

1 voter registration cards, the photo identification cards issued by Indiana's
2 BMV are also free.

3 *Crawford*, 128 S. Ct. at 1620-21. In short, for the Justices who joined the lead opinion,
4 having to pay for the photo ID card would have violated *Harper*.⁹ That it was free also
5 informed their assessment of the burden imposed by making a trip to the courthouse and
6 gathering underlying documents.

7 Justice Stevens' discussion of *Harper* also informs the weighing of the State's
8 asserted interests. The justifications in *Harper* included "(1) the state's desire to collect
9 its revenue, and (2) its belief that voters who pay a poll tax will be interested in
10 furthering the state's welfare when they vote." 383 U.S. at 674. "Although the State's
11 justification [in *Harper*] for the tax was rational, it was invidious because it was
12 irrelevant to the voter's qualifications." *Crawford*, 128 S. Ct. at 1616. Similarly,
13 though Arizona's interest in assuring the qualifications of voters is a valid interest,
14 including a fee as part of the structure to implement that state interest is irrelevant to
15 voters' qualifications. *Cf. Dunn*, 405 U.S. at 345-46 (recognizing that assuring voters
16 were state residents was a valid interest, but a durational residency requirement was
17 unconstitutional because it excluded bona fide residents from voting).¹⁰

18 VI. CONCLUSION

19 For the foregoing reasons, the ITCA Plaintiffs respectfully request that the Court
20 enter the Proposed Findings of Fact and Conclusions of Law filed herewith and
21 permanently enjoin enforcement of the voting related provisions of Proposition 200.

22
23 ⁹ Indeed, whatever distinction the Court of Appeals saw between Arizona's law and *Harper*
24 does not survive Justice Stevens' opinion that requiring a fee for a photo ID card would violate
25 *Harper* even if most voters already possessed the required documents and ID. *See Gonzalez*,
485 F.3d at 1049 (holding that "Arizona's new law [does not] 'make[] the affluence of the voter
or payment of any fee an electoral standard'" (quoting *Harper*, 383 U.S. at 666)).

26 ¹⁰ Defendants argued that requiring forms of ID is not an "express" poll tax, especially
27 considering that most voters have the needed documents. [Doc. 282 at 6] The lead opinion in
28 *Crawford* expressly rejected those arguments, reaffirming that a state may not do indirectly
what the Constitution forbids it to do directly. *Harman v. Forssenius*, 389 U.S. 528, 540 (1965).

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RESPECTFULLY SUBMITTED this 25th day of July, 2008.

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I further certify that I caused a copy of the attached document to be mailed
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