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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 RESPONSE BRIEF**

1 Pursuant to this Court’s July 18, 2008 Order, the Inter Tribal Council of Arizona,
2 Inc., the Arizona Advocacy Network, the Hopi Tribe, the League of Women Voters of
3 Arizona, the League of United Latin American Citizens and Representative Steve
4 Gallardo (collectively, the “ITCA Plaintiffs”) submit their consolidated Response to the
5 Closing Argument Briefs filed by the State of Arizona and the Arizona Secretary of
6 State (collectively, the “State Defendants”) and the Twelve County Defendants.

7 INTRODUCTION

8 In their Closing Argument, the State Defendants acknowledge that approximately
9 32,000 individuals’ voter registration forms have been rejected since the effective date
10 of Proposition 200’s amendment of A.R.S. § 16-166(F), which requires “satisfactory
11 evidence of citizenship” to register to vote. In addition, Defendants do not dispute that
12 more than 4,000 conditional provisional ballots have gone uncounted since 2005. To
13 discount this strong evidence of a substantial burden on the right to vote, however, they
14 attempt to hold the Plaintiffs to a standard of proof not required by controlling law –
15 impossibility. Under *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Crawford v. Marion*
16 *County Election Bd.*, 128 S. Ct. 1610 (2008), however, burdens on the right to vote
17 require heightened scrutiny even if they do not make voting impossible. Here, there is
18 ample evidence of the substantial burdens imposed on those whose voter registration
19 forms have been rejected or whose conditional provisional ballots have gone uncounted.

20 Proposition 200 does not hold up under the scrutiny required by *Burdick* and
21 *Crawford*. The trial record demonstrates that the voting-related provisions of
22 Proposition 200 do not have any role in advancing its stated purpose – discouraging
23 “illegal immigration.” Nor have Defendants offered anything more than supposition
24 to establish that Proposition 200 has increased voter confidence in the electoral
25 process – the state’s *post hoc* rationale for the law. The County Defendants improperly
26 have attempted to reach outside the record – a tacit admission of the minimal evidence
27 of voter fraud in the record. In any case, their effort to justify Proposition 200 remains
28 far short of offsetting the demonstrated flaws and burdens of Proposition 200.

1 ID law might place a “heavier *burden*” on individuals (1) who are elderly, born out of
2 state, and “have *difficulty*” (not impossibility) obtaining a birth certificate, (2) who
3 because of “economic or personal limitations” may find it “*difficult*” to secure a copy of
4 their birth certificate or assemble the other required documentations, and (3) with a
5 religious “*objection*” to being photographed. *Id.* at 1621 (emphasis added). Thus, the
6 Court did not restrict the issue to whether, for any of these classes of individuals, the
7 inability to obtain identification made voting impossible; rather, the Court left open the
8 question of whether the Indiana law in practice *burdened* their right to vote by making it
9 more difficult. The severity of that burden was “of course mitigated” by the indigency
10 exception and the free photo ID offered by Indiana’s BMV – *procedures and exceptions*
11 *not provided by Proposition 200* (or the implementing regulations promulgated by the
12 Secretary of State). *Id.* Only in the face of these safety nets – and in the context of a
13 facial attack on the voter ID law – did the Court uphold Indiana’s law.

14 Defendants suggest that the claims in this case must fail unless Plaintiffs produce
15 precise counts of the individuals unable to obtain Registration ID or Polling ID. [Doc.
16 1023, at 11-12] While this cannot be a *sine qua non* for an undue burden claim, such
17 information obviously would be relevant.² Indeed, at the preliminary stage of this
18 proceeding the ITCA Plaintiffs introduced the best available estimates of the number of
19 persons who lacked ready access to the required forms of identification. The
20 Defendants at first objected to this evidence being entered into the trial record, but then
21 later reversed themselves and attempted to designate it by deposition. [See *id.* (citing
22 *Sissons Dep.*); see also Doc. 885, Tab 2, at 1]³ The evidence at trial, however, was

23 ² To require plaintiffs to provide such precise counts would, from a practical standpoint, pose
24 an unreasonably high empirical hurdle, and, from a legal standpoint, go far beyond what is
25 necessary to establish an undue burden. The Court’s criticism of the record in *Crawford* must
26 be understood as having been in the context of a pre-enforcement challenge. *Id.* at 1621-22. In
this case the Court has had the benefit of evidence proving the actual disenfranchisement of
thousands of citizens.

27 ³ On June 24, 2008, the State Defendants notified the ITCA Plaintiffs that they planned to
28 designate the following portions of the *Sissons* deposition: 5:11-14, 6:1-21, 15:13-23, 16:24-
17:3, 17:8-20 and 74:18-78:8. The ITCA Plaintiffs made their counter-designations on that

1 based upon the *subsequent compelled production* of rejected voter registration forms
2 (including the applicant's country of birth) and the State's voter registration database,
3 and it provided more precise – and damning – evidence of harm to citizens caused by
4 Proposition 200. This is because the evidence at trial went beyond just an estimate of
5 individuals who potentially could be burdened, but rather provided counts of citizens
6 whose right to vote was in fact denied as a direct consequence of Proposition 200.
7 These counts demonstrate the unconstitutional burden of Proposition 200.

8 Defendants have relied without qualification upon Dr. Lanier's tabulation of the
9 overall number of individuals whose registration applications were rejected for lack of
10 proof of citizenship (about 32,000), and the share of those rejected applicants who were
11 born in the United States (over 90 percent). Likewise, the State relies without
12 qualification upon Dr. Lanier's matching of those rejected applications with the 2007
13 statewide voter registration database, showing that one-third of those rejected applicants
14 later succeeded in registering to vote. [Doc. 1023, at 12]⁴

15 Using these data, the most conservative possible estimate is that 18,000 citizens
16 have been denied the right to register to vote as a direct and proximate result of
17 Proposition 200. The calculation is straightforward. First, because the pool of 32,000
18 individuals by definition were rejected for lack of Registration ID they would have been
19 registered but for Proposition 200. Of these 32,000, a third went on to register as of
20 September 2007 (about 10,560). Even if one assumes that: (1) none of the foreign-born

21 basis and delivered a highlighted copy of the Sissons deposition to Defendants. The Sissons
22 deposition submitted to the Court, however, included additional designations from Defendants
23 as follows: 10:21-11:5. 12:5-14, 20:2-10, 37:4-38:18, 41:19-42:4, 42:19-43:1, 43:23-44:8,
24 45:17-46:11, 57:8-58:9, 60:13-60:20, 82:14-84:22, 85:20-86:3, 87:17-21, 93:23-94:3, 99:2-6,
25 101:14-25, 104:4-105:9 and 106:15-107:5. The Plaintiffs never had notice of these
26 designations until after they were delivered to the Court and were not given an opportunity to
27 make counter-designations.

28 ⁴ The State Defendants question at several points whether the rejected foreign-born registration
applicants were citizens. [Doc. 1023 at 1, 12] On the other hand, Defendants have not proven
that any of those applicants was not in fact a citizen. Moreover, individuals complete and sign
registration forms under penalty of perjury. Even if the evidence on this particular point is in
equipoise, the balance still swings strongly against the State.

1 applicants went on to successfully register, (2) the pool of 21,440 applicants who were
2 ultimately unsuccessful therefore included all 3,200 foreign-born applicants, and (3)
3 none of the 3,200 foreign-born applicants was a citizen – that still leaves an absolute
4 minimum of 18,240 native-born citizens who were prevented from registering by
5 Proposition 200. This is a conservative estimate because the only reasonable conclusion
6 based upon the record is that few – if any – of the 3,200 foreign-born applicants may
7 have been non-citizens.⁵ Realistically, then, Proposition 200 has been proven to have
8 directly prevented 18,000 to 21,000 citizens from registering to vote.

9 II. DEFENDANTS OFFER NO JUSTIFICATION FOR THE LACK OF ANY
10 INDIGENCY EXCEPTION OR SIMILAR SAFEGUARD IN PROPOSITION
11 200.

12 In *Crawford* the Supreme Court repeatedly cited, and relied upon, the availability
13 of cost-free photo identification and other fallback procedures as critical reasons for
14 upholding Indiana’s law against a facial challenge. *E.g.*, 128 S. Ct. at 1621. The
15 Defendants’ briefs are conspicuously silent about the absence from Proposition 200 of
16 any comparable accommodation. This failure to accommodate is a fatal flaw.

17 In *Crawford* the Supreme Court discussed two distinct accommodations that
18 Indiana’s law specifically provided for persons of limited means. First, the Indiana
19 Bureau of Motor Vehicles issues free photo identification. *Id.* at 1613-14. In addition,
20 an indigent voter is permitted to validate a provisional ballot that he or she cast on
21 election day by executing an affidavit within 10 days of the election attesting that (1) the
22 person is indigent, and (2) the person executing the affidavit is the same person who cast
23 the ballot on election day. *Id.* The ballot then can be counted, without any requirement
24 that the individual show photo ID.⁶ *Id.* at 1614, n.2. The same procedure for indigent

25 ⁵ This was an incomplete pool of rejected applications due to some counties’ data being
26 missing. Production of the forms also was cut off with the close of discovery. Therefore, the
27 actual number of rejected citizens to date is likely to be significantly greater.

28 ⁶ The “conditional” provisional ballot employed in Arizona differs significantly from the
Indiana provisional ballot because it provides no alternative means of validating an election-day

1 voters is available to those with a religious objection to being photographed. *Id.* In
2 addition, Indiana’s law provides an exception for “persons living and voting in a state-
3 licensed facility such as a nursing home.” *Id.* at 1613.

4 Proposition 200, in contrast, contains no safety net or alternative procedure for
5 individuals who cannot afford to pay for Registration or Polling ID. This crucial
6 omission is not mitigated by the fact that most potential registrants and in-person voters
7 possess Registration and/or Polling ID. Indeed, as the Supreme Court noted, “[t]he fact
8 that most voters already possess . . . some form of acceptable identification would not
9 save the statute under . . . *Harper*, if the State required voters to pay . . . a fee to obtain a
10 new photo identification. *But . . . the photo identification cards issued by Indiana’s*
11 *BMV are also free.” Id.* at 1620-21 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S.
12 663 (1966) (emphasis added)). Only in the face of such exceptions did the court find
13 that the inconvenience of having to make the trip to BMV and pose for a photograph
14 was not a “substantial burden” on the right to vote. *Id.* at 1621. In this crucial respect
15 Proposition 200, which makes no effort to provide a safety net for voters who cannot
16 afford Registration or Polling ID, fails badly in comparison to the law upheld in
17 *Crawford*.

18 III. DEFENDANTS MISAPPREHEND WHAT PLAINTIFFS MUST SHOW TO
19 SUCCEED ON THEIR SECTION 2 CLAIM.

20 During cross-examination of the Gonzalez Plaintiffs’ experts, Defendants’
21 counsel asked the experts to agree with the following statement: “disparity in market
22 outcomes does not necessarily prove discrimination in the market.” [Trial Tr. at 46:3-7,
23 291:8-16, 412:21-413:18] This question neither developed nor illustrated a relevant
24 legal principle. In literal terms, of course, none of the experts testified about markets,
25 market outcomes or disparities in market outcomes. Nor does this truism provide a
26 useful metaphor for the Section 2 analysis. No metaphor is needed. There is no

27 ballot; Arizona merely provides an additional opportunity to present the same forms of
28 identification required at the polls.

1 contention in this case that a disparate impact alone establishes a violation of Section 2
2 of the Voting Rights Act. Section 2 requires courts to consider the totality of the
3 circumstances. Defendants’ abstract references to “market outcomes” are a straw man,
4 and in no way do they rebut the evidence showing causation under Section 2 – the
5 history of official discrimination, racially polarized voting and the depressed
6 socioeconomic status of Latinos and Indians in Arizona. [See Doc. 1023, at 9]
7 Plaintiffs’ Section 2 claim is not based upon economic theory, and it must be analyzed
8 under the relevant legal standards.

9 “The essence of a Section 2 claim is that a certain electoral law, practice or
10 structure interacts with social and historical conditions to cause an inequality in the
11 opportunities enjoyed by black and white voters to elect their preferred representatives.”
12 *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Rather than being a separate factor from
13 the totality of the circumstances inquiry, the “causation” inquiry is integral to the totality
14 of the circumstances.⁷ Therefore, a causal connection may be shown where the
15 discriminatory impact of a challenged voting practice is attributable to racial
16 discrimination in the surrounding social and historical circumstances. *Farrakhan v.*
17 *Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003).

18 The totality of the circumstances test provides no fixed numerical threshold that
19 must be satisfied before a racially disparate impact is cognizable under Section 2.
20 Instead, Section 2 uses the relative terms “less open” and “equal opportunity.”
21 Furthermore, the overall totality of the circumstances test by nature is not mathematical
22 or rigidly structured; it necessarily must vary from case to case.⁸

23 _____
24 ⁷ This inquiry is clearly distinct from any requirement for proof of intentional discrimination.
25 “Section 2 requires proof only of a discriminatory result, not of discriminatory intent.” *Smith v.*
26 *Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997).
“Causation” in this context simply reflects the disparities resulting from the challenged practice
interacting with other relevant circumstances.

27 ⁸ “[T]here is no requirement that any particular number of factors be proved, or that a majority
28 of them point one way or the other [T]he question whether the political processes are
‘equally open’ depends upon a searching, practical evaluation of the ‘past and present reality’

1 Defendants argue that the evidence of the disproportionately higher number of
2 Latinos whose conditional provisional ballots were not counted does not constitute
3 evidence of a disparate impact because Dr. Lanier “did not offer any basis . . . upon
4 which to conclude that the difference was caused by Prop 200.” [Doc. 1023, at 9]
5 Conditional provisional ballots, however, are wholly a creature of Proposition 200.
6 Moreover, the evidence in the trial record clearly establishes that the Latino and Native
7 American populations have faced a long history of official discrimination, and that
8 today they are worse off than the White population in educational achievement, annual
9 income and other socio-economic factors. [See, e.g., Trial Tr. at 461:3-21; Ex. 1197,
10 1198] The interplay of the disproportionate impact of Proposition 200 with these social
11 and historical circumstances demonstrates that Proposition 200 violates Section 2.

12 IV. PLAINTIFFS HAVE BEEN INJURED BY PROPOSITION 200, AND
13 THEREFORE HAVE STANDING TO ASSERT THEIR CLAIMS.

14 In their Closing Argument Brief, the State Defendants assert that Proposition 200
15 has not deprived Plaintiffs of their voting rights. [Doc. 1023, at 2] Defendants’
16 argument, however, takes far too narrow a view of what constitutes injury to an
17 organizational plaintiff. The trial record demonstrates that the organizational plaintiffs
18 have reallocated resources to counteract the disenfranchising effects of Proposition 200.
19 In *Florida State Conf. of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), the
20 Eleventh Circuit recently upheld the standing of organizations to challenge a state
21 procedure which could result in the removal of persons from the voter registration list
22 for failure of the state to match information in another data base. That court held “that
23 an organization has standing to sue on its own behalf if the defendant’s illegal acts
24 impair its ability to engage in its projects by forcing the organization to divert resources
25 to counteract those illegal acts.” *Id.* at 1165-66 (citing *Crawford v. Marion County*
26 *Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *affirmed* 128 S. Ct. 1610 (2008), and

27 . . . and on a ‘functional’ view of the political process.” *Gingles*, 478 U.S. at 45 (citing S. Rep.
28 No. 97-417, at 29).

1 *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The court further held that
2 the plaintiffs had shown they would suffer “a concrete injury The organizations
3 reasonably anticipate that they will have to divert personnel and time to educating
4 volunteers and voters on compliance with [the challenged law].” *Id.*

5 Here, Linda Brown testified that the Arizona Advocacy Network (“AzAN”) will
6 spend \$59,465 (\$19,025 in 2006 and \$40,440 in 2008) to educate and assist voters in
7 complying with the Polling ID requirement, all of which is attributable to Proposition
8 200. [Trial Tr. at 590:1-5, 600:22-601:3; Ex. 1223] In addition, AzAN will expend
9 between \$11,000 and \$22,000 more for its voter registration activities than it would
10 need to spend if there were no Registration ID requirement. [Trial Tr. at 586:1-587:11;
11 Ex. 1223] Dedication of AzAN’s resources to these efforts affects AzAN’s other
12 activities. [Trial Tr. at 599:12-16] The ITCA has likewise diverted resources from its
13 other projects to educate its members about the requirements of Proposition 200. [Ex.
14 1340, at 5-6 and Ex. A] Representative Gallardo testified that one of his biggest
15 struggles as a candidate for office is the work it takes to inform his constituents and
16 supporters what they must do to comply with Proposition 200. [Trial Tr. at 185:11-
17 186:19] The League of Women Voters of Arizona (“LWV”) has essentially stopped its
18 voter registration activities because it does not have the additional resources necessary
19 to assist voters in complying with the Registration ID requirements. [8/30/06 Hr’g Tr. at
20 122:7-124:9]⁹ LWV has also expended a portion of its limited resources to educate its
21 members about compliance with the Polling ID requirement. [*Id.* at 130:12-131:1] As
22 such, each of these parties has standing to challenge the voting related provisions of
23 Proposition 200.

24
25 _____
26 ⁹ Contrary to the Defendants’ contention, LWV provided trial testimony, though no
27 representative testified in person during the July 2008 trial. [See Doc. 1023, at 2, n.1] This
28 Court granted the ITCA Plaintiffs’ Motion to submit the testimony of LWV President Bonnie
Saunders through the transcript of the August 30, 2006 preliminary injunction hearing. [Doc.
928, granting Doc. 925]

1 Under the doctrine of “associational” or “representational” standing, an
2 organization may sue on behalf of its members whether or not the organization itself has
3 suffered an injury from the challenged action. *Hunt v. Wash. State Apple Adver.*
4 *Comm’n*, 432 U.S. 333, 342-44 (1977). The record shows that AzAN members have
5 been unable to register to vote due to the Registration ID requirement. [Trial Tr. at
6 583:16-584:13]

7 Moreover, organizations are not required to show specific instances of injury to
8 their members where it is otherwise clear that their members would be adversely
9 affected. *California Rural Legal Assistance, Inc. v. Legal Servs. Corp.*, 917 F.2d 1171,
10 1174-75 (9th Cir. 1990); see *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (“The
11 likelihood of enforcement, with the concomitant probability that a landlord’s rent will be
12 reduced below what he or she would otherwise be able to obtain in the absence of the
13 Ordinance, is a sufficient threat of actual injury”); *Sandusky County Democratic*
14 *Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (“Appellees have not identified
15 specific voters who will seek to vote at a polling place that will be deemed wrong by
16 election workers, but this is understandable; by their nature, mistakes cannot be
17 specifically identified in advance. . . . It is inevitable, however, that there will be such
18 mistakes. The issues Appellees raise are not speculative or remote; they are real and
19 imminent.”). In a large organization like the ITCA, whose member tribes have
20 approximately 112,790 individual members, it is highly likely that a member of an
21 ITCA member tribe has had or will have a voter registration form rejected for failure to
22 comply with the Registration ID requirement. See *Browning*, 522 F.3d at 1163
23 (upholding organizational standing to challenge voter registration data matching plan
24 because “[g]iven that the NAACP and SVREP collectively claim around 20,000
25 members state-wide, it is highly unlikely . . . that not a single member will have his or
26 her application rejected due to a mismatch”). The same is true for the Hopi Tribe, which
27
28

1 has more than 9,200 adult members.¹⁰ As such, the record is clear that AzAN, ITCA
2 and the Hopi Tribe have members who are affected by Proposition 200 and, like the
3 Democratic Party in *Crawford*, have standing to challenge Proposition 200’s voting-
4 related provisions.

5 V. THE REGISTRATION ID AND POLLING ID REQUIREMENTS DO NOT
6 SERVE THE STATED INTEREST OF PROPOSITION 200 IN
7 DISCOURAGING “ILLEGAL IMMIGRATION,” NOR DO THEY INCREASE
8 VOTER CONFIDENCE IN THE ELECTORAL PROCESS.

8 As the Supreme Court recognized in *Crawford*, Proposition 200’s burden on
9 individuals’ right to vote “must be justified by relevant and legitimate state interests.”
10 128 S. Ct. at 1616. The stated purpose of Proposition 200 was to “discourage illegal
11 immigration,” based upon findings and declarations that “illegal immigration is causing
12 economic hardship,” and “illegal immigrants have been given a safe haven in this state
13 with the aid of identification cards that are issued without verifying immigration status.”
14 [Ex. 1, § 2 (“Findings and declaration”)] There is absolutely no evidence in the record
15 that any undocumented immigrant has registered to vote, voted or attempted to do so.
16 Indeed, even the slim evidence of *alleged* non-citizens registering to vote involves legal
17 residents. [See Ex. 1349a-g]¹¹ As such, there is no connection between the “economic
18 hardship” caused by “illegal immigration” and the voting related provisions of
19 Proposition 200.

20 In effect conceding that Proposition 200’s voting-related provisions have no role
21 in its stated purpose of discouraging unlawful immigration, Defendants offer a different

22 ¹⁰ Defendants attempt to show that Proposition 200 does not prevent Native Americans from
23 registering to vote because all but one of the ITCA member tribes issues tribal enrollment cards.
24 [Doc. 1023, at 6] A.R.S. § 16-166(F)(6), however, calls for a tribal enrollment *number*, and the
25 record does not establish that every ITCA member tribe’s identification cards contain such a
26 number. [See Ex. 1325, at 15-18 (cards issued by the Hopi Tribe, Yavapai-Apache Nation and
27 Tonto Apache Tribe do not include enrollment numbers)] Moreover, the evidence is
28 undisputed that some tribes do *not* issue tribal enrollment cards for free. [*Id.* (Hopi, Yavapai-
Apache and Colorado River Indian Tribes charge fees for original or replacement cards)]

¹¹ Exhibits 1349a-g are the subject of Defendants’ pending Motion to Admit Trial Exhibits, but
are not presently part of the trial record.

1 *post hoc* rationale. Throughout this litigation, Defendants have asserted that by
2 preventing ineligible individuals from registering and voting, Proposition 200 serves the
3 state’s interest in promoting public confidence in the electoral process, which in turn
4 encourages citizen participation. [See Doc. 1022, at 10; Doc. 1023, at 17] There is no
5 evidence, however, that Proposition 200 has had any effect on public confidence in the
6 electoral system or citizen participation in the process.

7 State Elections Director Joseph Kanefield testified that voter confidence is
8 improved when counties conduct elections in a “uniform” manner and “are not counting
9 ballots differently.” [Trial Tr. at 691:1-19] Conversely, according to Mr. Kanefield, if
10 an ineligible voter casts a ballot, it “undermines voter confidence.” [*Id.* at 691:20-24]
11 Proposition 200, however does *not* insure uniformity. [*Id.* at 751:13-752:1] Nor is Mr.
12 Kanefield’s supposition that voter confidence and willingness to participate in the
13 political process will be harmed in the absence of the Registration ID requirement or
14 Polling ID requirement borne out by actual evidence. Defendants presented no proof
15 that Arizona voters lacked confidence, or refused to participate in Arizona elections, due
16 to concerns about non-citizen registration or imposter voting prior to Proposition 200.
17 While unfounded fears and rumors of vote fraud frequently circulate, there is no reason
18 to accord them constitutional deference. Furthermore, the hit-or-miss nature of the
19 Registration ID requirement – for example, allowing “grandfathered” voters to bypass it
20 entirely – is quite inconsistent with the notion that a pre-existing crisis of voter
21 confidence required its adoption. LWV President Bonnie Saunders testified that voters’
22 perceptions of the integrity of the election system were not enhanced by Proposition
23 200. [8/30/06 Hr’g Tr. at 131:2-10] Defendants have not presented any evidence that
24 the enforcement of Proposition 200 has had any impact on electoral participation due to
25 increased voter confidence.¹²

26 ¹² Indeed, the authors of a study cited by Defendants concluded that “there is little or no
27 relationship between beliefs about the frequency of fraud and electoral participation
28 Nor does it appear to be the case that universal voter identification requirements will
raise levels of trust in the electoral process.” Ansolabehere, Stephen and Nathaniel

1 VI. THE DEFENDANTS IMPROPERLY ARGUE OUTSIDE TRIAL RECORD.

2 A. Defendants Cannot Rely on Non-Record Factual Assertions Excluded by
3 This Court's Order on the Parties' Motions *in Limine*.

4 The record evidence of voter registration by non-U.S. citizens is meager at best.
5 Defendants have attempted to augment their case by referring to non-record instances of
6 purportedly fraudulent registration. In addition to being outside the record, the Court
7 held these factual claims inadmissible, and the County Defendants' reliance on them in
8 their Closing Argument Brief is therefore doubly improper.

9 Specifically, before trial, the Defendants and the Gonzalez Plaintiffs separately
10 sought to exclude from the trial record evidence related to allegedly fraudulent voter
11 registration activity. [Doc. 818, 825] On July 8, 2008, the Court granted Defendants'
12 Motion *in Limine* which sought exclusion of "any testimony regarding on-going
13 investigations of voter fraud, for any purpose at all." [Doc. 818, at 4; Doc. 928, at 2]
14 The Court also granted the Gonzalez Plaintiffs' request to exclude exhibits and related
15 testimony concerning: (1) "individuals about whom USCIS requested information
16 regarding voter registration and voting history," (2) "the number of voter registration
17 forms submitted by Petition Partners and rate of acceptability," and (3) court records of
18 cases "involving election-related crimes" concerning Allen Dale Rouse and convicted
19 felons. [Doc. 928, at 203; *see also* Doc. 825, at 1]

20 Despite this Court's exclusion rulings, the County Defendants' Closing
21 Argument Brief repeatedly discusses and cites such purported non-record facts. [Doc.
22 1022, at 7-8 (discussing list of individuals about whom USCIS requested voting
23 information); *id.* at 9 (discussing Petition Partners voter registration forms)] Under this
24 Court's prior order, these non-record facts should not be considered. In addition,
25 because the record is properly closed, Defendants' attempt to use excluded evidence by

26 Persily, *Vote Fraud in the Eye of the Beholder: the Role of Public Opinion in the*
27 *Challenge to Voter Identification Requirements*, 121 Harv. L. Rev. 1737, 1759 (May
28 2008).

1 setting it out in their brief is highly prejudicial to Plaintiffs. The County Defendants
2 should be granted leave to file a corrected brief, or, if necessary, ordered to do so.

3 B. Existing Systems, Unrelated to Proposition 200, Prevent the Fraudulent
4 Registrations Defendants Cited.

5 Without waiving any objection to the Defendants' improper citation of non-
6 record evidence, the record shows that Proposition 200 is not required to address the
7 purported risk of fraudulent voter registrations.

8 Relying on evidence excluded by the Court, Defendants argue that Proposition
9 200 serves their asserted interest in preventing fraud because unscrupulous paid
10 registrars have submitted fraudulent voter registration forms for non-existent people,
11 who will not be placed on the voter rolls because of Proposition 200's Registration ID
12 requirement. [Doc. 1022, at 8] In fact, the system that prevents such fraudulent
13 inflation of the voter rolls is required by federal law, and already was in place when
14 Proposition 200 went into effect. As Mr. Kanefield testified, the statewide voter
15 registration system ("VRAZ") communicates with databases maintained by MVD, the
16 Social Security Administration, the Department of Health Services vital records and the
17 courts to determine whether voter registration forms submitted are for real, living people
18 who are eligible to register to vote. [Trial Tr. at 702:19-703:12] VRAZ was
19 implemented to comply with the Help America Vote Act, which went into effect in
20 January 2003. [*Id.* at 703:13-21] It is *not* a creature of Proposition 200.

21 Defendants also argue that "[c]ertainly the full extent of the potential or real
22 [fraudulent registration and voting] occurring cannot be known without a system, such
23 as the one being challenged here." [Doc. 1022, at 7] Yet the only evidence of
24 registration by those alleged not to be citizens comes from reports from the superior
25 court commissioners to county elections officials. [*See* Ex. 1108, 1351]

26 As for imposter voting at the polls – the only kind of fraud the Polling ID
27 requirement is meant to prevent – the evidence is even weaker. There is no evidence
28 whatsoever of even a single instance of imposter voting at the polls, nor have

1 Defendants identified any evidence of attempted imposter voting at the polls. [E.g.,
2 Trial Tr. at 693:14-19, 744:20-25]

3 In the more than three years since Proposition 200 went into effect Defendants
4 have not identified any registration by non-citizens or imposter voting that it has
5 stopped. The record lacks any evidence of fraud stopped by Proposition 200, even
6 though Defendants have the names of the approximately 32,000 individuals whose voter
7 registration forms were rejected because they did not provide “satisfactory evidence of
8 citizenship” as defined by Proposition 200. Tellingly, they have provided no evidence
9 that any of those individuals were not citizens. Indeed, they do not dispute that
10 approximately 90 percent of those rejected registrants were U.S. born. [See Doc. 1023,
11 at 12]

12 CONCLUSION

13 For the foregoing reasons, the ITCA Plaintiffs respectfully request that the Court
14 enter the Proposed Findings of Fact and Conclusions of Law filed on July 25, 2008 and
15 permanently enjoin enforcement of the voting related provisions of Proposition 200.

16 RESPECTFULLY SUBMITTED this 30th 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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