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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)

**STATE DEFENDANTS' MOTION
TO DISMISS THE FIRST, THIRD,
SIXTH, EIGHTH, NINTH, TENTH,
AND ELEVENTH CAUSES OF
ACTION OF THE GONZALEZ
PLAINTIFFS' FIRST AMENDED
COMPLAINT AND
MEMORANDUM IN SUPPORT
THEREOF**

(Assigned to the Honorable
Roslyn O. Silver)

(Oral Argument Requested)

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MOTION

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants State of Arizona and the Arizona Secretary of State (collectively, “Defendants”) move to dismiss portions of the Gonzalez Plaintiffs’ First Amended Complaint (“FAC”), which was filed on October 1, 2007. [See dkt. # 352] The FAC alleges eleven separate causes of action.

Defendants move to dismiss the sixth and eleventh causes of action because the FAC fails to state a claim upon which relief can be granted as to those causes of action, and because Plaintiffs lack standing to bring those claims. Defendants move to dismiss the first, third, eighth, ninth, and tenth causes of action because the Court already has granted summary judgment in Defendants’ favor on those claims. In addition, Defendants move to strike those allegations and requests for relief from the FAC that correspond to the claims that are the subject of Defendants’ motion. This motion is supported by the following memorandum of points and authorities.

MEMORANDUM

Preliminary Statement

Plaintiffs’ First Amended Complaint (“FAC”) asserts two new causes of action challenging Arizona’s proof of citizenship requirement that fail as a matter of law for two fundamental reasons— (1) Plaintiffs have not alleged any *facts* whatsoever in their amended complaint that *they* have been injured by the conduct they challenge in their new claims; and (2) even if Plaintiffs had standing to bring those claims, the claims fail as a matter of law under the applicable authorities. Federal law is well-established that plaintiffs may not assert claims based on government action that does not result in any injury that is personal to such plaintiffs. The FAC does not even attempt to connect Arizona’s proof of citizenship requirement with injury to any of the named plaintiffs based on new legal theories under the Civil Rights Act and the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”). Those claims should be dismissed for that reason alone.

Moreover, on the merits each of those claims fails as a matter of law and should be dismissed for that independent reason. Plaintiffs’ UOCAVA claim is nothing more

1 than an after-thought by Plaintiffs in their renewed attempt to argue that Arizona’s proof
2 of citizenship law is preempted by federal law. As explained below, the Court should
3 reject that argument as a matter of law based on the same reasoning previously
4 announced by the Ninth Circuit in this action in *Gonzalez v. Arizona*. 485 F.3d 1041 (9th
5 Cir. 2007). Plaintiffs’ Civil Rights Act claims similarly fail because they do not
6 challenge conduct that results in “standards, practices, or procedures” being applied
7 differently throughout Arizona’s voting jurisdictions.

8 Finally, five of the causes of action asserted in the FAC already have been heard
9 and adjudicated by this Court. Moreover, three of those claims with regard to the proof
10 of citizenship requirement were decided (either directly or implicitly) against Plaintiffs
11 in *Gonzalez*. Plaintiffs litigated those claims and lost. Such claims are no longer
12 properly part of this action.

13 **Procedural History and Relevant Allegations of the Amended Complaint**

14 Plaintiffs filed this action on May 9, 2006, challenging the voting requirements
15 enacted as part of Proposition 200, which was adapted by Arizona voters in November
16 2004. [Dkt. # 1] Their original complaint set forth ten causes of action and sought
17 several forms of injunctive and declaratory relief. That complaint asserted claims based
18 on the First and Fourteenth Amendments, Title VI of the Civil Rights Act, and section 2
19 of the Voting Rights Act. The complaint also asserted claims based on the Supremacy
20 Clause, Twenty-Fourth Amendment, section 5 of the Voting Rights Act, National Voter
21 Registration Act (“NVRA”), A.R.S. § 16-121.01, and A.R.S. § 16-151(B) (collectively,
22 “previous claims”). [Compl. ¶¶ 78-80, 84-86, 95-97, 101-109 (Dkt. # 1)]

23 On August 17, 2007, Plaintiffs moved for leave to file an amended complaint.
24 Their proposed amended complaint included all but one of the claims asserted in the
25 original complaint. [See Dkt. # 324 (including all but § 5 of the Voting Rights Act
26 claim)] In addition, the proposed amended complaint asserted two new claims based
27 respectively on the Uniformed and Overseas Citizens Absentee Voting Act and the Civil
28 Rights Act (42 U.S.C. § 1971(a)(2)(A)). [Dkt. # 324] The proposed amended complaint
also purported to add five new plaintiffs.

On August 28, 2007, while Plaintiffs’ motion for leave to file an amended

1 complaint was pending, the Court granted summary judgment in favor of Defendants on
2 each of the previous claims. [Dkt. # 330] The Court’s decision thus left only the equal
3 protection, First Amendment, Title VI, and section 2 of the Voting Rights Act claims in
4 the Gonzalez Plaintiffs’ action.

5 At the case management conference in these consolidated cases on September 27,
6 2007, the Court stated that it would grant Plaintiffs’ motion for leave to file the proposed
7 amended complaint. The Court made clear, however, that, barring some intervening
8 change in the law, Plaintiffs would not be permitted to pursue those claims that
9 previously had been decided on summary judgment. On October 1, 2007, Plaintiffs’
10 proposed amended complaint was filed as the First Amended Complaint (“FAC”). [Dkt.
11 # 352]

12 **Argument**

13 **I. THE APPLICABLE LEGAL STANDARD.**

14 In deciding a motion to dismiss, courts accept all material allegations in the
15 complaint as true. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).
16 Conclusory allegations of law and unwarranted inferences, however, are insufficient to
17 defeat a motion to dismiss for failure to state a claim. *E.g., Fields v. Legacy Health*
18 *Sys.*, 413 F.3d 943, 951 n.5 (9th Cir. 2005) (citing *Nat’l Ass’n for the Advancement of*
19 *Psychoanalysis v. Cal. Bd.*, 228 F.3d 1043, 1049 (9th Cir. 2000)); *McGlinchy*, 845 F.2d
20 at 810 (“[C]onclusory allegations without more are insufficient to defeat a motion to
21 dismiss for failure to state a claim.”). Moreover, dismissal is warranted if the complaint
22 lacks a cognizable legal theory or insufficient facts under a cognizable legal claim.
23 *SmileCare Dental Group v. Delta Dental Plan of Cal., Inc.*, 88 F.3d 780, 783 (9th Cir.
24 1996).

25 **II. PLAINTIFFS’ CLAIM BASED ON THE UNIFORMED AND OVERSEAS 26 CITIZENS ABSENTEE VOTING ACT SHOULD BE DISMISSED.**

27 Plaintiffs’ claim that the proof of citizenship requirement of Proposition 200
28 violates the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42
U.S.C. § 1973ff, should be dismissed for the following reasons: (1) Plaintiffs have
failed to allege facts establishing standing; and (2) Proposition 200 does not conflict

1 with the provisions of UOCAVA, and, therefore, is not preempted by UOCAVA.

2 **A. The Relevant Provisions of UOCAVA.**

3 UOCAVA allows uniformed services voters and overseas voters to submit an
4 official federal post card form containing an absentee voter registration application and
5 an absentee ballot application. *See* 42 U.S.C. § 1973ff-1(a)(1)-(4). UOCAVA directs
6 that a presidential designee shall “prescribe an official post card form, containing both
7 an absentee voter registration application and an absentee ballot application, for use by
8 the States as required under section 1973ff-1(4) of this title.” 42 U.S.C. § 1973ff(b)(2).
9 The Secretary of Defense is the presidential designee charged with promulgating the
10 federal post card application. *See* 53 F.R. 21975, Exec. Order No. 12642, 1988 WL
11 1099345 (designating the Secretary of Defense as the “presidential designee” pursuant
12 to 42 U.S.C. § 1973ff). UOCAVA directs the States to “accept and process, with
13 respect to any election for Federal office, any otherwise valid voter registration
14 application and absentee ballot application from an absent uniformed services voter or
15 overseas voter,” and to “use the official post card form . . . for simultaneous voter
16 registration application and absentee ballot application.” 42 U.S.C. § 1973ff-1(a)(2) &
17 (a)(4). UOCAVA defines “absent uniformed services voter” as

18 (A) a member of a uniformed service on active duty who, by reason of such
19 active duty, is absent from the place of residence where the member is otherwise
qualified to vote;

20 (B) a member of the merchant marine who, by reason of service in the
21 merchant marine, is absent from the place of residence where the member is
otherwise qualified to vote; and

22 (C) a spouse or dependent of a member referred to in subparagraph (A) or (B)
23 who, by reason of the active duty or service of the member, is absent from the
24 place of residence where the spouse or dependent is otherwise qualified to vote.

25 42 U.S.C. § 1973ff-6(1). UOCAVA defines “overseas voter” as

26 (A) an absent uniformed services voter who, by reason of active duty or
service is absent from the United States on the date of the election involved;

27 (B) a person who resides outside the United States and is qualified to vote in
the last place in which the person was domiciled before leaving the United
28 States; or

(C) a person who resides outside the United States and (but for such
residence) would be qualified to vote in the last place in which the person was

1 domiciled before leaving the United States.

2 42 U.S.C. § 1973ff-6(5).

3 The Secretary of Defense, through the Federal Voting Assistance Program and
4 pursuant to UOCAVA, provides to military and overseas voters the federal post card
5 application form along with specific instructions for all U.S. states and territories. *See*
6 <http://www.fvap.gov/pubs/vag.html#ch3>. The Secretary of Defense instructs Arizona
7 military and overseas voters using the federal post card application to provide
8 satisfactory evidence of citizenship with the form as required by A.R.S. § 16-166(F).
9 *See* <http://www.fvap.gov/pubs/vag/pdfvag/az.pdf>; Arizona Absentee Voting Guide for
10 Uniformed Services and U.S. Citizens Overseas, attached hereto as Exhibit A.¹

11 **B. Plaintiffs Do Not Allege Any Injury to Establish Standing for**
12 **Their UOCAVA Claim.**

13 Plaintiffs assert in the FAC that “Proposition 200 violates the Uniformed and
14 Overseas Citizens Absentee Voting Act, 42 U.S.C. 1973 FF [sic], which requires states
15 to accept and use the federal post card application for voter registration by uniformed
16 services voters and overseas voters.” [FAC ¶ 118] That legal conclusion is the only
17 allegation relating to Plaintiffs’ UOCAVA claim; Plaintiffs do not allege any facts with
18 regard to that claim.

19 Because Plaintiffs do not allege any injury suffered by the alleged violation of
20 UOCAVA, they have not established standing to assert that claim.

21 A plaintiff seeking to invoke federal jurisdiction has the burden of alleging

22 ¹ A court may properly consider documents “referred to or ‘whose contents are alleged
23 in a complaint and whose authenticity no party questions’” without converting a motion
24 to dismiss to one for summary judgment. *Mason v. Arizona*, 260 F. Supp.2d 807, 814
25 (D. Ariz. 2003) (quoting *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)). “In
26 addition, ‘even if the plaintiff’s complaint does not explicitly refer to’ a document, ‘a
27 district court ruling on a motion to dismiss may consider a document the authenticity of
28 which is not contested, and upon which the plaintiff’s complaint necessarily relies’
because this prevents ‘plaintiffs from surviving a Rule 12(b)(6) motion by deliberately
omitting references to documents upon which their claims are based[.]’” *Id.* (quoting
Parrino v. FHP, Inc., 146 F.3d 699, 705-06 (9th Cir. 2998), *superseded by statute on*
other grounds as stated in Abrego Abrego v. The Dow Chem. Co., 443 F.3d 676, 681 (9th
Cir. 2006)).

1 specific facts to satisfy the three core elements of standing: (1) legally recognized
2 injury, (2) caused by the named defendant that is (3) capable of legal or equitable
3 redress. *See Schmier v. United States Court of Appeals for the Ninth Circuit*, 279 F.3d
4 817, 820-21 (9th Cir. 2002) (affirming the dismissal of a complaint under Rule 12(b)(6)
5 because the plaintiff failed to allege injury personal to the plaintiff). Moreover, the
6 injury alleged must be unique to the plaintiff, must be concrete as opposed to merely
7 abstract, and must have actually occurred or will occur imminently—it may not be
8 speculative. *Id.*

9 The FAC does not assert that any of the plaintiffs have unsuccessfully attempted
10 to use, much less are eligible to use, the federal post card application to register to vote
11 as absent uniformed services voters or overseas voters. Because the FAC fails to allege
12 any facts demonstrating an injury to any of the Plaintiffs as a result of the alleged
13 violation of UOCAVA, Plaintiffs lack standing to bring this claim. Accordingly the
14 Court should dismiss Plaintiff’s UOCAVA claim.

15 **C. UOCAVA Does Not Conflict with, and, Therefore, Does Not**
16 **Preempt the Provisions of Proposition 200.**

17 The Gonzalez Plaintiffs claim that Proposition 200 violates UOCAVA, because
18 UOCAVA “requires states to accept and use the federal post card application for voter
19 registration by uniformed services voters and overseas voters.” [FAC ¶ 118] The
20 Gonzalez Plaintiffs’ UOCAVA claim seems to echo their now-dismissed claim that the
21 National Voter Registration Act (“NVRA”) preempts Proposition 200’s proof of
22 citizenship requirement. However, like the NVRA, there is no conflict between a state
23 law requiring evidence of citizenship and the requirements of UOCAVA. *See Gonzalez*
24 *v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (holding that the NVRA does not
25 prohibit documentation requirements by states). Citizenship is a fundamental
26 requirement for registering to vote, and requiring evidence of citizenship simply
27 verifies information that is already required on the form.

28 The U.S. Constitution authorizes States to prescribe “[t]he Times, Places and
Manner of holding elections for Senators and Representatives.” U.S. Const. art. 1, § 4,
cl. 1. These words confer upon States the authority to develop complete election codes

1 for both federal and state elections that regulate not just the time, place, and manner of
2 elections, but the registration of voters, and the prevention of fraud and corrupt
3 practices. *See Roudebush v. Hartke*, 405 U.S. 15, 24 (1972); *see also Cal. Democratic*
4 *Party v. Jones*, 530 U.S. 567, 572 (2000) (“States have a major role to play in
5 structuring and monitoring the election process.”); *Griffin v. Roupas*, 385 F.3d 1128,
6 1130 (7th Cir. 2004) (“because . . . an unregulated election system would be chaos, state
7 legislatures may without transgressing the Constitution impose extensive restrictions on
8 voting.”). Indeed, “as a practical matter, there must be a substantial regulation of
9 elections if they are to be fair and honest, and if some sort of order, rather than chaos, is
10 to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974).
11 To that end, States have an undeniable interest in preventing voter fraud and protecting
12 the overall integrity of the election process. *See Burson v. Freeman*, 504 U.S. 191, 199
13 (1992) (a State “indisputably has a compelling interest in preserving the integrity of its
14 election process”).

15 The fact that Congress may also assume a role in our nation’s elections does not
16 mean that the federal law bars state laws that also govern elections. In fact, given the
17 independent powers of States within our federal system, courts start with the
18 presumption that Congress does not lightly displace state law. *See Medtronic, Inc. v.*
19 *Lohr*, 518 U.S. 470, 485 (1996) (stating that a court must start with the assumption that
20 states’ historic police powers are not to be superseded by a federal act unless Congress’
21 intent to do so is clearly manifested); *see also Malabed v. North Slope Borough*, 335
22 F.3d 864, 869 (9th Cir. 2003) (“the states are independent sovereigns in our federal
23 system, and preemption will not be easily found”).

24 Courts typically recognize three ways in which federal law may preempt state
25 action by way of the Supremacy Clause, U.S. Const., art. VI, cl. 2. These are: (1)
26 “express” preemption; (2) “field” preemption; and (3) “conflict” preemption. *See*
27 *English v. General Election Co.*, 496 U.S. 72, 78-79 (1990). Express preemption exists
28 if a federal law or regulation contains a specific command by Congress that any action
by States is preempted. *See id.* at 79. Congress has not inserted explicit language in
UOCAVA that preempts state action.

1 Field preemption arises when federal law so completely occupies a legislative
2 field as to leave no room for States to act. *See id.* (“[I]n the absence of explicit
3 statutory language, state law is pre-empted where it regulates conduct in a field that
4 Congress intended the Federal Government to occupy exclusively.”). This is not a field
5 preemption case. Federal law not only leaves room for States in setting policy
6 regarding voting but permits States to lead the way.

7 Plaintiffs thus are left with a conflict preemption claim. Their burden is high.
8 Congress does not supplant States’ authority unless state law “actually conflicts” with
9 federal law. *English*, 496 U.S. at 79. Whenever possible, courts are to “reconcile the
10 operation of both statutory schemes with one another rather than holding [that state law
11 has been] completely ousted.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*,
12 414 U.S. 117, 127 (1973); *see also Malabed*, 335 F.3d at 869 (“If we have any doubt
13 about Congressional intent, we are to err on the side of caution, finding no
14 preemption.”). The issue here is whether Congress intended to prevent States from
15 requiring voters to verify information that they are required to provide on the federal
16 post card application in the first place.

17 UOCAVA provides that States must “accept and process, with respect to any
18 election for Federal office, any *otherwise valid* voter registration application and
19 absentee ballot application from an absent uniformed services voter or overseas voter,”
20 42 U.S.C. § 1973ff-1(a)(2) (emphasis added), and to use the federal post card
21 application, *see* 42 U.S.C. § 1973ff-1(a)(4). Thus, Arizona must accept and process
22 voter registration applications from absent uniformed services voters and overseas
23 voters, including federal post card applications, as long as they are “otherwise valid”—
24 that is, so long as they comply with Arizona law, which includes providing proof of
25 citizenship.

26 UOCAVA does not require States to register any applicant who submits a
27 federal post card application. UOCAVA directs States to notify registrants of the
28 “disposition” of their application if the application is rejected. 42 U.S.C. § 1973ff-
1(b)(d). Congress did not specify what form the notice should take, leaving that
decision to the States.

1 As noted above, the federal agency charged with promulgating the federal post
2 card application form, the Department of Defense, specifically instructs Arizona
3 military and overseas voters using the federal post card application to provide
4 satisfactory evidence of citizenship with the form as required by A.R.S. § 16-166(F).²
5 See <http://www.fvap.gov/pubs/vag/pdfvag/az.pdf>; Exhibit A. Thus, the federal agency
6 charged with carrying out UOCAVA interprets that law as requiring applicants to
7 comply with state voter registration law.

8 In short, as with the NVRA, there is no language in UOCAVA that indicates
9 Congressional intent to prevent States from requiring verification of citizenship when
10 registering to vote. Accordingly, Plaintiffs have not stated a claim for relief under
11 UOCAVA.

12 **III. PLAINTIFFS' CLAIM BASED ON THE CIVIL RIGHTS ACT SHOULD BE**
13 **DISMISSED.**

14 The Court should dismiss each of Plaintiffs' Civil Rights Act claims under 42
15 U.S.C. § 1971(a)(2)(A), because the FAC's allegations do not establish Plaintiffs'
16 standing to bring those claims and because the claims fail as a matter of law.

17 The relevant subsection of the Civil Rights Act provides:

18 No person acting under color of law shall - (A) in determining
19 whether any individual is qualified under State law or laws to
20 vote in any election, apply any standard, practice, or
21 procedure different from the standards, practices, or
22 procedures applied under such law or laws to other
individuals within the same county, parish, or similar political
subdivision who have been found by State officials to be
qualified to vote

23 42 U.S.C. § 1973(a)(2).

24 Plaintiffs' allegations in support of their new Civil Rights Act cause of action
25 consist of only two paragraphs:

26 Proposition 200 violates Subsection (a)(2)(a) [sic] of Section
27 1971 of the Civil Rights Act which requires states use [sic]
28 the same procedures in determining voter eligibility for all

² For most, that step involves nothing more than placing a driver's license number on the post card application.

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individuals within the same county. Proposition 200 requires registrants who are new to a county to provide proof of citizenship while exempting intra-county registrants from this requirement.

Proposition 200 also violates Subsection (a)(2)(A) of Section 1971 of the Civil Rights Act because it exempts residents with an Arizona driver or nonoperating licenses [sic] issued after October 1, 1996 from providing evidence of citizenship prior to registering to vote.

[FAC ¶¶ 102-103]

As explained more fully below, Plaintiffs allege no facts as to how *they* are injured under the statute. Neither do their new allegations support their Civil Rights Act claims on the merits.

A. The FAC Does Not Allege Injury to Any Plaintiff to Support Their Civil Rights Act Claims.

To establish standing to bring their Civil Rights Act claims, Plaintiffs must allege that *they* have suffered an “injury in fact”—an invasion of a legally protected interest, which is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The asserted injury thus must affect the plaintiff in a “personal and individual way.” *Id.* at 560 n.1; *see also Schmier*, 279 F.3d at 821 (affirming dismissal of the complaint where the plaintiff did not allege how the alleged constitutional violation caused any injury that was personal to the plaintiff). The FAC alleges no such injury on the part of *any* plaintiff.

None of the Plaintiffs is alleged to have moved from one Arizona county to another and to have been unable to register to vote as a result of Arizona’s proof of citizenship requirement. The relevant paragraphs allege merely that some of the individual plaintiffs are residents of certain Arizona counties and were denied voter registration in those counties because they failed to provide sufficient evidence of citizenship as required by Arizona law. [See FAC ¶¶ 4-5, 7, 9] Nor do any of the organizational plaintiffs allege that they are injured by Arizona’s requirement that individuals registering for the first time within a given county provide proof of

1 citizenship. To the extent those organizations allege injury, they do not assert any
2 separate injury resulting from the county-based registration system requiring first-time
3 registrants to provide proof of citizenship. [See FAC ¶¶ 11-17, 73-74, 82]

4 Neither do Plaintiffs allege any injury caused by Arizona’s acceptance of an
5 Arizona driver’s license or nonoperating license issued after October 1, 1996, as a form
6 of proof of citizenship. None of the individual plaintiffs who allege that they were
7 denied voter registration assert that they lack an Arizona driver’s license or nonoperating
8 license issued after October 1, 1996. Indeed, none of those plaintiffs even alleges that he
9 or she lacks sufficient proof of citizenship; they merely allege that they did not provide
10 such proof when they attempted to register to vote. The organizational plaintiffs
11 similarly fail to allege any facts to establish that they have been injured by Arizona’s
12 acceptance of such licenses as proof of citizenship. Accordingly, the Court should
13 dismiss Plaintiffs claims based on the Civil Rights Act.

14 **B. Arizona Does Not Treat Similarly-Situated Individuals**
15 **Differently Within the Same County.**

16 Apart from Plaintiffs’ lack of standing, their Civil Rights Act claims are
17 insufficient as a matter of law. With regard to their claim that Arizona affords special
18 treatment to “intra-county” voting registrants, it is unclear precisely what conduct
19 Plaintiffs are challenging. It appears, however, that Plaintiffs’ claim may be based on
20 Arizona Revised Statutes (“A.R.S.”) § 16-166(G). That subsection provides that
21 notwithstanding the proof of citizenship requirement, “any person who is registered in
22 this state on the effective date of this amendment to this section is deemed to have
23 provided satisfactory evidence of citizenship and shall not be required to resubmit
24 evidence of citizenship *unless the person is changing voter registration from one county*
25 *to another.*” A.R.S. § 16-166(G) (emphasis added).

26 Section 1971(a)(2)(A) prohibits governments from applying standards, practices,
27 or procedures to determine whether an individual is qualified to vote that are different
28 from those standards, practices, or procedures applied to others within the same county
who have been found qualified to vote. *See* 42 U.S.C. § 1971(a)(2)(A). Arizona does
not apply standards or procedures differently, however, with regard to requiring proof of

1 citizenship for registering to vote. Since the effective date of Prop 200, *every* person
2 who is not already registered and who wishes to register to vote must provide proof of
3 citizenship. A.R.S. § 16-166(F) (Requiring that the county recorder reject registration
4 applications that are not accompanied by satisfactory evidence of U.S. citizenship).
5 Individuals who were *not* registered to vote in a given county at the time the proof of
6 citizenship requirement became effective are not similarly situated to those who *were*
7 registered at that time in that same county.

8 By contrast, those individuals who are not registered to vote—whether they never
9 registered in their county of residence or whether they moved into a new county and
10 therefore must register anew in that county—are similarly situated. Such individuals
11 indeed are treated the same under Arizona’s proof of citizenship law. Thus, for
12 example, a person residing in Maricopa County and registering for the first time is
13 required to provide proof of citizenship to register just as is a person who has been
14 registered in a different county who relocates to Maricopa County and seeks to register
15 to vote. The requirement applies to every first-time registrant within a particular county.
16 The FAC’s conclusory assertion that Proposition 200 “exempt[s] intra-county
17 registrants” from the proof of citizenship requirement is plainly contrary to the express
18 statutory provision requiring such evidence from *every* first-time registrant. As such,
19 that allegation does not sufficiently set forth any claim for relief.

20 Ultimately, Plaintiffs seem to be challenging the county-based registration system
21 that Arizona uses to conduct registration and elections. Arizona is not required to
22 register voters under a statewide registration scheme, however. Arizona may lawfully
23 require registrations to be completed on a county level (as many states do), and
24 accordingly may require that individuals relocating to a different Arizona county re-
25 register to vote and provide proof citizenship when they do so. *E.g., Sandusky County*
26 *Democratic Party v. Blackwell*, 387 F.3d 565, 577-78 (6th Cir. 2004) (rejecting challenge
27 under Help America Vote Act based on Ohio’s requirement that ballots be cast in the
28 precinct in which a voter resides; recognizing the state’s longstanding practice of
administering elections on a precinct, as opposed to county, level).

1 **C. Different Treatment Based on the Failure to Provide an Arizona**
2 **Driver’s or Nonoperating License Issued After**
3 **October 1, 1996, Does Not Violate the Civil Rights Act.**

4 Plaintiffs’ Civil Right Act claim based on their allegation that Arizona provides
5 special treatment to residents with an Arizona driver’s or nonoperating license issued
6 after October 1, 1996, fares no better than their “intra-county” resident claim. [See FAC
7 ¶ 103]

8 Section 1971 was enacted as part of the Voting Rights Act to eliminate racial
9 discrimination in voting requirements. *E.g., Indiana Democratic Party v. Rokita*, 458 F.
10 Supp. 2d 775, 839 (S.D. Ind. 2006) (rejecting claims under § 1971(a)(2)(A) & (B) based
11 on a state photo identification requirement for voting at the polls). Plaintiffs do not
12 allege that any individuals or group of individuals in Arizona are treated differently with
13 regard to the voter registration “standards, practices, or procedures” applicable to them.
14 Instead, Plaintiffs’ claim amounts to a complaint that some individuals do not have an
15 Arizona driver’s or nonoperating license issued after October 1, 1996, as one form of
16 proof of citizenship.

17 Contrary to Plaintiffs’ mischaracterization of state law, Arizona does not
18 “exempt” *any* individual with an Arizona driver’s or nonoperating license issued after
19 October 1, 1996, from the proof of citizenship requirement. Instead, *every* person
20 desiring to register for the first time in any Arizona county is required to provide proof
21 of their U.S. citizenship. *See* A.R.S. § 16-166(F). Such individuals can do so by
22 providing any one of several different forms of proof, including (but not limited to) an
23 Arizona driver’s or nonoperating license issued after October 1, 1996. A person who
24 provides such a license number on his or her voter registration form is not “exempted”
25 from the proof of citizenship requirement. Such person simply *has met that requirement*
26 by providing that particular form of proof.

27 Under Plaintiffs’ legal theory, a new class of §1971(a)(2)(A) plaintiffs would be
28 created whenever such persons were either unable or unwilling to comply with a
particular voting requirement. None of the authorities interpreting or applying §
1971(a)(2)(A), however, stands for such sweeping application of that statute. *E.g.,*

1 *Rokita*, 458 F. Supp. 2d at 840 (recognizing and rejecting plaintiffs’ implicit legal theory
2 that “§ 1971(a)(2)(A) requires abolishing all requirements which uniquely apply to only
3 one set of voters”).

4 **D. Plaintiffs Do Not Allege Any Racial Discrimination for**
5 **Purposes of Their Voting Rights Act Claims.**

6 The Court should dismiss Plaintiffs’ Civil Rights Act claims on the independent
7 ground that the FAC does not allege any racial discrimination in Arizona’s proof of
8 citizenship requirement as that requirement pertains either to individuals moving from
9 county to county or to individuals who lack an Arizona driver’s or nonoperating license
10 issued after October 1, 1996. As noted above, § 1971 was enacted as part of the Civil
11 Rights Act, which was intended to eliminate discrimination in voting on the basis of race
12 or color. *E.g.*, *Ramey v. Rockefeller*, 348 F. Supp. 780, 786 (E.D.N.Y. 1972) (discussing
13 the legislative history of § 1971(a)(2)(A) and rejecting a claim under that provision
14 based on a voting registration restriction governing the residency of individuals enrolled
15 in learning institutions).

16 Plaintiffs allege racial disparate impact claims under the equal protection clause
17 and § 2 of the Voting Rights Act based on Proposition 200’s requirements of proof of
18 citizenship and voter identification. The only paragraph in the FAC that alleges facts
19 unique to Latinos asserts merely that Latinos “are less likely to possess the forms of
20 identification required under Proposition 200 to register to vote and cast a ballot,” and
21 that the proof of citizenship requirement has a disparate negative effect on voter
22 registration by Latinos. [FAC ¶ 75]

23 Plaintiffs do not allege that their new Civil Rights Act claims, however, are based
24 on any racial discrimination. The FAC does not allege any racial discrimination that
25 results from the requirement that individuals moving from one county to another provide
26 proof of citizenship to register to vote. Neither does the FAC allege any such
27 discrimination based on Arizona’s designation of a driver’s license or nonoperating
28 license as sufficient evidence of citizenship for purposes of registering to vote.

Accordingly, the Court should dismiss Plaintiffs’ new Civil Rights Act claims
(Sixth Cause of Action). *E.g.*, *Rokita*, 458 F. Supp. 2d at 839, 839 n.106 (rejecting

1 claims under § 1971(a) because the plaintiffs did not allege or prove any discrimination
2 based on race; noting that § 1971 was enacted pursuant to the Fifteenth Amendment to
3 eliminate racial discrimination in voting requirements); *Blank v. Heineman*, 771 F. Supp.
4 1013, 1015 (D. Neb. 1991) (granting motion to dismiss claim under § 1971(a) based on a
5 political party’s removal of the plaintiff from a party leadership position in part because
6 the plaintiff did not allege that “any of the defendants’ activities were due to racial
7 considerations”; noting that the “Voting Rights Act governs racial discrimination”).

8 **IV. THE COURT SHOULD DISMISS EACH OF THOSE CLAIMS ASSERTED IN**
9 **THE FAC THAT ALREADY WERE ADJUDICATED IN THIS ACTION.**

10 The FAC asserts the following claims, which previously were asserted in
11 Plaintiffs’ original complaint filed in May 2006: Supremacy Clause (First Cause),
12 Twenty-Fourth Amendment (Third Cause), National Voter Registration Act (Eighth
13 Cause), A.R.S. § 16-121.01 (Ninth Cause), and A.R.S. § 16-151(B) (Tenth Cause). The
14 Court has adjudicated each of those claims in favor of Defendants. Plaintiffs have not
15 pointed to any change in the law that would make reconsideration of those claims
16 appropriate. Moreover, several of those claims were definitively decided by the Ninth
17 Circuit in affirming this Court’s denial of a preliminary injunction. *See Gonzalez*, 485
18 F.3d at 1049-51 (rejecting Plaintiffs’ arguments that Arizona’s proof of citizenship
19 requirement violates the NVRA (and, by implication, the Supremacy Clause) or the
20 Twenty-Fourth Amendment).

21 Under the law of the case doctrine, courts generally are “precluded from
22 reconsidering an issue previously decided by the same court or a higher court in the
23 identical case.” *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005) (affirming the
24 district court’s refusal to reconsider its ruling on a motion to compel arbitration, which
25 ruling already had been appealed and affirmed) (citing *U.S. v. Lummi Indian Tribe*, 235
26 F.3d 443, 452 (9th Cir. 2000)). Defendants should not be required to continue litigating
27 those claims which the Court already has decided. Given that the Court has adjudicated
28 identical claims asserted in the original complaint, the Court should dismiss each of
those claims from the FAC.

1 **Relief Requested**

2 For the foregoing reasons, the Court should dismiss with prejudice the First,
3 Third, Sixth, Eighth, Ninth, Tenth, and Eleventh Causes of Action asserted in the First
4 Amended Complaint. In addition, the Court should order stricken from the FAC the
5 following paragraphs and text, which portions correspond solely to the above-stated
6 causes of action: Paragraphs 62-65, 72, 76-77, 84-86, 90-92, 101-104, 108-119; Page
7 25, lines 12-26; and Page 26, lines 9-14.

8 RESPECTFULLY SUBMITTED this 16th day of October, 2007.

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10 Arizona Attorney General

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 16th day of October, 2007, I electronically
3 transmitted the attached document to the Clerk's Office using the ECF System for
4 filing, and transmittal of a Notice of Electronic Filing to the following ECF registrants:
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6 **COPY** also served same day by U.S. Mail with Notice of Electronic Filing, on
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