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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)

**MOTION FOR SUMMARY
JUDGMENT DIRECTED TO
THE GONZALEZ PLAINTIFFS
BY DEFENDANTS STATE OF
ARIZONA AND THE ARIZONA
SECRETARY OF STATE
--AND MEMORANDUM IN
SUPPORT THEREOF**

(Assigned to the Honorable
Roslyn O. Silver)

1 **MOTION**

2 Pursuant to Fed. R. Civ. P. 56(b), Defendants State of Arizona and the Arizona
3 Secretary of State Janice Brewer (“Defendants”) move for summary judgment on all
4 claims asserted in Case No. CV 06-1268 by all plaintiffs (“plaintiffs”), because there is
5 no evidence to support essential elements of those claims. Specifically, the Court should
6 enter judgment in favor of Defendants on plaintiffs’ First Amendment claim (second
7 cause), equal protection claim (fourth cause), section 2 of the Voting Rights Act claim
8 (fifth cause), and Title VI of the Civil Rights Act claim (seventh cause). This motion is
9 supported by the following memorandum of points and authorities, the separate
10 statement of undisputed facts, Declaration of Counsel (“Counsel Decl. (Gonzalez)”) and
11 attachments thereto, and the Declaration of Dr. Jeffrey Zax, which are filed herewith.

11 **MEMORANDUM**

12 **Preliminary Statement**

13 There is no plaintiff in this case who cannot vote or register to vote because he or
14 she lacks identification. Neither have plaintiffs identified any other such individuals,
15 although plaintiffs have been asked to do so during discovery in the case. After two
16 years of litigation, there is no evidence that Latinos among other groups in Arizona are
17 less likely to obtain or possess identification.

18 Instead, plaintiffs’ own expert data demonstrate that both Latino and non-Latino
19 registrations have increased in the post-Prop 200 period over the comparable pre-Prop
20 200 period. Those plaintiff experts’ data do not show any disparate impact on Latinos.
21 Moreover, even if the numbers supported some minimal difference, a bare statistical
22 showing would not establish plaintiffs’ claims in any event. Under either *Crawford*’s
23 equal protection analysis or Ninth Circuit § 2 authorities, plaintiffs cannot establish their
24 claims because they cannot show that having to provide identification to register or vote
25 has impacted them or Latinos in Arizona. Accordingly, summary judgment should be
26 granted to Defendants.

25 **Relevant Factual Background**

26 During discovery in this matter, Defendants sought to learn the evidence upon
27 which plaintiffs rely for essential elements of their claims. Plaintiffs challenge both the
28

1 proof of citizenship and voting identification requirements of Prop 200. When asked to
2 identify the facts that support plaintiffs’ allegation that Latinos are less likely than other
3 groups to possess either proof of citizenship or voting identification, plaintiffs pointed to
4 their expert reports and asserted that Latinos “have a lower socio-economic status when
5 compared to non-Latinos or Anglos and comprise a greater proportion of naturalized
6 citizens when compared to non-Latinos or Anglos in Arizona.” [SOF 1] Plaintiffs’
7 experts have offered no opinion that Latinos are less likely than other groups to possess
8 voting identification or proof of citizenship. Neither have plaintiffs’ experts offered any
9 opinion that Latinos are disproportionately unable to vote or register because they lack
10 voting identification or proof of citizenship.

11 ***1. Facts relevant to plaintiffs’ voting identification challenge.***

12 When asked to identify the facts upon which plaintiffs rely in support of their
13 claim that the voting identification disparately impacts Latinos, plaintiffs: (1) asserted
14 that “Latinos are less likely to be able to satisfy the voter identification requirement of
15 Prop 200 because, among other things, they have a lower socio-economic status when
16 compared to non-Latinos or Anglos”; (2) referred to the uncounted conditional
17 provisional ballots that the counties were ordered to produce; and (3) referred to
18 plaintiffs’ expert reports. [SOF 2]

19 Plaintiff expert Dr. Lanier concludes that Latino “uncounted conditional
20 provisional ballots come from areas of Arizona where the population: is less likely to
21 speak English well, possesses less schooling, and earns a lower household income than
22 the averages for the state” and that Latino uncounted ballots are “from areas where the
23 population is: more highly Hispanic in makeup; more likely to use public transportation
24 instead of driving a car or truck alone to work, and more urban (less rural) than
25 statewide averages.” [SOF 3] Dr. Lanier offers no opinions about the possession of
26 identification by those individuals who voted conditional provisional ballots that were
27 uncounted.

28 The two named plaintiffs who challenge the voting identification requirement
each have valid Arizona driver’s licenses, and one of those plaintiffs has voted since the

1 implementation of Prop 200. [SOF 19] In addition, plaintiffs have not identified any
2 individuals who lack voting identification. [SOF 20]

3 **2. Facts relevant to plaintiffs' proof of citizenship challenge.**

4 When asked by interrogatory to identify the facts upon which plaintiffs rely to
5 claim a disparate impact on Latinos caused by the proof of citizenship requirement,
6 plaintiffs responded with the following assertions: (1) Latinos have a lower socio-
7 economic status and comprise a greater proportion of naturalized citizens; (2) Latinos
8 are "less likely" to cure rejected registration forms; (3) there is a disparate number of
9 Latino rejected voter registration forms; (4) there is a disparate impact on Latino
10 registration; (5) the registrations of plaintiffs Jesus and Maria Gonzalez were rejected;
11 (6) Latinos are unlikely to have proof of citizenship on their person during registration
12 drives; and (7) plaintiffs served expert reports. [SOF 4]

13 Although plaintiffs have served numerous reports from five experts, only Drs.
14 Lanier and Espino purport to opine about an effect of Prop 200 on Latino registrants.
15 Although both Drs. Lanier and Espino conclude that Latino voting registrations have
16 been reduced as a result of Prop 200, their own disclosures directly contradict those
17 claims. [SOF 5-18] The "pre" and "post" Prop 200 comparisons of both Drs. Lanier
18 and Espino ignore the dramatic increase in voter registrations that precede each
19 presidential election—one of which occurred immediately before Prop 200 was
20 implemented. [SOF 7, 10, 13] When the correct comparison is made, those experts'
21 own data demonstrate unmistakably that both Latino and non-Latino registrations
22 actually have *increased* in the comparable "post" Prop 200 period. [SOF 8, 9, 14]¹ (See
23 attached Lanier charts 1 and 2 and Zax modified charts 1 and 2.)

24 Moreover, Dr. Lanier's own data demonstrate that in the "post" Prop 200 period,
25 the number of both Latino and non-Latino registrations increased by very similar
26 magnitudes. [SOF 9] For example, the increase in the number of both Latino and non-
27 Latino registrations at the "post" Prop 200 peak in September 2006 was approximately

28 ¹ For the Court's convenience, the demonstrative charts of Drs. Lanier and Espino and
defense expert Dr. Jeffrey Zax are attached hereto. Those charts also are attached to and
discussed in more detail to the Declaration of Dr. Zax, which is filed herewith.

1 60% over the number of such respective registrations for September 2002. [SOF 9] To
2 conclude that Prop 200 had a negative impact on Latinos in the face of undisputed
3 evidence that registration levels actually have increased since the implementation of
4 Prop 200, Dr. Lanier asserts that in the absence of Prop 200, registration levels would
5 have been even higher than they are. [SOF 6, 10] His predicted registration levels,
6 however, are based on both misspecified regressions and his failure to account for
7 increases in registration levels occurring in the pre-presidential election period. [SOF
8 10-12]

9 Dr. Espino similarly offers no evidence of any disparate impact on Latinos. Like
10 Dr. Lanier, Dr. Espino prepared a chart (figure 1) that purports to show the percentage of
11 Latino registrations (among all registrations) for each month in the “pre” and “post”
12 Prop 200 periods. [SOF 13] Dr. Espino’s chart, however, includes registration data for
13 the 2004 presidential election in the “pre” Prop 200 period, which data is not available
14 for the “post” Prop 200 period. [SOF 13] A review of the comparable “pre” and “post”
15 Prop 200 periods of Dr. Espino’s chart demonstrates that average monthly Latino
16 registrations increased following the implementation of Prop 200. [SOF 14] (See
17 attached Espino figure 1 and Zax modified figure 1.)

18 Even apart from Dr. Espino’s failure to adjust for the 2004 presidential election
19 year, another of Dr. Espino’s charts (figure 3) demonstrates that in 14 of 15 Arizona
20 counties the percentage of Latino registrants among all Arizona registrants is the same or
21 higher in the “post” Prop 200 period. [SOF 15] (See attached Espino figure 3 and Zax
22 modified figure 3.) Dr. Espino also concluded that there was a decline in both Latino
23 and non-Latino registrations in the “post” Prop 200 period, and that the difference
24 between Latino and non-Latino registration reductions was 0.93%. [SOF 16] He failed
25 to perform any statistical significance test of his numbers, however, rendering his 0.93%
26 calculated difference meaningless. [SOF 17] Moreover, his estimate does not account
27 for a different plaintiff expert’s data, which show that Latino citizen voting age
28 population (“CVAP”) in Arizona experienced a smaller growth rate than non-Latino
CVAP following the implementation of Prop 200. [SOF 18]

1 Only two of the plaintiffs, Jesus and Maria Gonzalez, claim that they were unable
2 to register due to the proof of citizenship requirement, but both admit that they possess
3 proof of citizenship sufficient to comply with Prop 200, and Ms. Gonzalez is registered
4 to vote. [SOF 21] The plaintiffs who challenge the proof of citizenship requirement
5 could identify no individuals who lack proof of citizenship. [SOF 22] Naturalized
6 citizens may simply provide their alien registration number to comply with the proof of
7 citizenship requirement. [SOF 23] Based on the testimony of ITCA plaintiff expert
8 Ronald Sissons, 87.4% of Arizona’s voting eligible citizens possess a valid Arizona
9 driver’s license or non-operating license. [SOF 24]

Legal Argument

II. THE APPLICABLE LEGAL STANDARD.

11 Summary judgment is appropriate upon a showing that “there is no genuine issue
12 as to any material fact and that the moving party is entitled to judgment as a matter of
13 law.” Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).
14 “Only disputes over facts that might affect the outcome of the suit under the governing
15 law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*,
16 477 U.S. 242, 248 (1986). Once a defendant has identified those parts of the record
17 that indicate an absence of an issue of material fact, the nonmoving party must identify
18 specific facts to show that there is a genuine issue for trial. *Brinson v. Linda Rose Joint*
19 *Venture*, 53 F.3d 1044, 1048 (9th Cir. 1995) (quoting *Celotex*, 477 U.S. at 324).
20 Summary judgment should be granted if the evidence is merely colorable or if it is not
21 significantly probative. *Id.*

II. SUMMARY JUDGMENT IS WARRANTED ON PLAINTIFFS’ VOTING RIGHTS ACT CLAIMS.

23 Section 2 of the Voting Rights Act provides in relevant part:

24 (a) No voting qualification or prerequisite to voting or standard, practice,
25 or procedure shall be imposed or applied by any State or political
26 subdivision in a manner which results in a denial or abridgement of the
27 right of any citizen of the United States to vote on account of race or color,
28 or in contravention of the guarantees set forth in section 1973b(f)(2) of this
title, as provided in subsection (b) of this section.

1 42 U.S.C. § 1973(a).

2 As explained below, plaintiffs cannot establish either that Latinos are disparately
3 impacted by the requirements of Prop 200 or that there is any causal connection between
4 the identification and proof requirements and any voting discrimination against Latinos.

5 **A. There is No Evidence of a Disparate Impact or Causal**
6 **Connection to Discrimination With Regard to Arizona’s**
7 **Voting Identification Requirement.**

8 **1. *There is no evidence that historical discrimination is***
9 ***connected to possession of voting identification.***

10 To establish a § 2 claim, a plaintiff must establish that the challenged voting
11 practice results in discrimination on the basis of race. *Smith v. Salt River Project Agric.*
12 *Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (“Only a voting practice
13 that results in discrimination gives rise to § 2 liability.”). A showing of bare statistical
14 disparity is insufficient to establish a § 2 claim. *Id.*; *see also Farrakhan v. Wash.*, 338
15 F.3d 1009, 1018 (9th Cir. 2003). Instead, plaintiffs must show that the voting practice at
16 issue “denies or abridges their right to vote on account of race.” *Farrakhan*, 338 F.3d at
17 1019.

18 Although plaintiffs may show that social and historical factors interact with the
19 challenged voting practice to result in a disparate impact, plaintiffs must prove that the
20 voting practice is itself connected to the prohibited result, *i.e.*, voting discrimination.
21 *Smith*, 109 F.3d at 595 (quoting *Ortiz v. City of Philadelphia Office of the City Comm’rs*,
22 28 F.3d 306, 315 (3d Cir. 1994)); *Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir.
23 1992) (“[T]he challenged device must be shown actually to impair the ability of minority
24 voters to elect representatives of their choice.”); *cf. Farrakhan*, 338 F.3d at 1019 (noting
25 that “factors outside the election system *can contribute to a particular voting practice’s*
26 *disparate impact* when those factors involve race discrimination”) (emphasis added).

27 Defendants do not dispute that there is evidence of historical discrimination
28 against Latinos in Arizona, but do not concede *all* of plaintiffs’ proffered assertions
regarding discrimination against Latinos. Any disagreement, however, is irrelevant for
purposes of summary judgment because there is no evidence whatever to support the

1 notion that any historical or social discrimination against Latinos has resulted in a lower
2 likelihood that Latinos among other groups in Arizona possess voting identification.

3 When asked by interrogatory to identify the facts upon which plaintiffs assert that
4 Latinos in Arizona are less likely among other groups to possess voting identification,
5 plaintiffs responded with the conclusory assertion that Latinos “have a lower socio-
6 economic status” and comprise a greater proportion of naturalized citizens than non-
7 Latinos. [SOF 1] Neither plaintiffs nor their experts, however, offer any evidence for
8 plaintiffs’ assertion that Latinos disproportionately lack identification. Although one of
9 plaintiffs’ experts has opined that Latinos lag behind non-Latinos in education,
10 employment and other areas, such an opinion is not evidence that Latinos
11 disproportionately lack voting identification. Without such evidence, plaintiffs cannot
12 establish any causal connection between historical discrimination and an inability by
Latinos to vote because of Prop 200’s requirements.

13 **2. *There is no evidence of any disparate impact on Latino***
14 ***voting.***

15 Neither can plaintiffs show that there has been any disparate impact in voting on
16 Latinos since the voting identification requirement was implemented. When asked to
17 identify the facts upon which plaintiffs rely to claim that the voting identification
18 disparately impacts Latinos, plaintiffs: (1) asserted that “Latinos are less likely to be
19 able to satisfy the voter identification requirement of Proposition 200 because, among
20 other things, they have a lower socio-economic status when compared to non-Latinos or
21 Anglos”; (2) referred to the uncounted conditional provisional ballots that the counties
were ordered to produce; and (3) referred to plaintiffs’ expert reports. [SOF 2]

22 None of those items, however, supports any finding that Latinos are disparately
23 impacted by the voting identification requirement. A lower economic status on the part
24 of Latinos does not equate to any disparate impact on Latino voting. Neither is
25 plaintiffs’ reference to uncounted conditional provisional ballots evidence that the voting
26 identification requirement has disparately impacted Latinos.

27 Finally, plaintiffs’ experts do not offer any evidence that Latinos are disparately
28 impacted by the identification requirement. Only one plaintiff expert, Dr. Lanier,

1 alludes to the voting identification requirement. Dr. Lanier concludes that Latino
2 “uncounted conditional provisional ballots come from areas of Arizona where the
3 population: is less likely to speak English well, possesses less schooling, and earns a
4 lower household income than the averages for the state” and that Latino uncounted
5 ballots are “from areas where the population is: more highly Hispanic in makeup; more
6 likely to use public transportation instead of driving a car or truck alone to work, and
7 more urban (less rural) than statewide averages.” [SOF 3] Dr. Lanier offers no opinion
8 that Latino uncounted conditional provisional ballots were disproportionately higher
9 than non-Latino uncounted conditional provisional ballots.²

10 Because no reasonable fact finder could conclude that the voting identification
11 requirement causes a disparate impact on Latinos, summary judgment is appropriate on
12 plaintiffs’ § 2 claim based on that requirement.

13 **B. Arizona’s Proof of Citizenship Requirement Does Not
14 Discriminate Against Latinos.**

15 **1. *There is no evidence that historical discrimination is
16 connected to possession of proof of citizenship.***

17 As with the voting identification requirement, Prop 200’s proof of registration
18 requirement bears no connection whatever with any historical or social discrimination
19 against Latinos in Arizona. When asked to identify the facts that support plaintiffs’
20 allegation that Latinos are less likely than other groups to possess proof of citizenship to
21 comply with Prop 200, plaintiffs pointed to their expert reports and asserted that Latinos
22 “have a lower socio-economic status when compared to non-Latinos or Anglos and
23 comprise a greater proportion of naturalized citizens.” [SOF 1]³ As explained above,

24 ² On June 4, 2008, long after the deadline for disclosure of expert opinions, Dr. Lanier
25 offered a new opinion which he asserted “suggest[s] the effect of the Prop 200 ID
26 requirement fell disproportionately on Hispanic voters.” To the extent plaintiffs attempt
27 to rely on such an untimely disclosed opinion, Defendants will object. In any event, Dr.
28 Lanier’s new “suggestion” does not provide a basis to defeat summary judgment because
neither he nor any other plaintiff expert has offered any opinion that Latinos in Arizona
disproportionately lack identification.

³ Plaintiffs also asserted that Jesus Gonzalez does not possess a driver’s license dated
after October 1, 1996. Plaintiffs admit, however, that Mr. Gonzalez possesses proof of

1 evidence of a lower economic status or higher naturalization proportion is not evidence
2 of a lack of proof of citizenship. Moreover, to the extent there *is* evidence in the record,
3 it suggests that the large majority of voting eligible Arizonans possess sufficient proof of
4 citizenship in the form of an Arizona driver’s or non-operating license. [SOF 24] In
5 addition, naturalized citizens receive a certificate of naturalization, which necessarily
6 provides them proof of citizenship. *See* 8 U.S.C. 1449 (stating that naturalized citizens
7 are entitled to receive a certificate of naturalization); SOF 23. In any event, plaintiffs
8 have offered no evidence about the number of individuals—Latinos or otherwise—who
9 lack sufficient proof of citizenship and cannot obtain it.

10 Plaintiffs cannot establish a § 2 claim if they cannot show that the proof of
11 citizenship requirement actually results in Latinos’ failure to register to vote on account
12 of their race. Any showing of historical or social discrimination against Latinos must be
13 causally connected to Latinos’ inability to obtain or possess proof of citizenship.
14 Because plaintiffs have offered no evidence of such a causal connection, summary
15 judgment should be granted to Defendants on plaintiffs’ § 2 claim.

16 **2. *There is no evidence of any disparate impact on Latino
17 voter registration.***

18 When asked to identify the facts upon which plaintiffs rely to claim a disparate
19 impact on Latinos caused by the proof of citizenship requirement, plaintiffs responded
20 with the following conclusory (and non-responsive) assertions: (1) Latinos have a lower
21 socio-economic status and comprise a greater proportion of naturalized citizens; (2)
22 Latinos are “less likely” to cure rejected registration forms; (3) there is a disparate
23 number of Latino rejected voter registration forms; (4) there is a disparate impact on
24 Latino registration; (5) the registrations of Jesus and Maria Gonzalez were rejected; (6)
25 Latinos are unlikely to have proof of citizenship on their person during registration
26 drives; and (7) plaintiffs served expert reports. [SOF 4]

27 None of those items, however, establishes any disparate impact on Latinos caused
28 by the proof of citizenship requirement. All but the last two “facts” identified by
plaintiffs are conclusory statements without any evidentiary basis in the record. Jesus
citizenship, which would permit him to register to vote if he so chooses. [SOF 21]

1 and Maria Gonzalez admit that they possess proof of citizenship. [SOF 22] In any
2 event, the fact that their registration forms initially were rejected based on the proof of
3 citizenship requirement does not establish any disparate impact on Latino citizens at
4 large.

5 Finally, plaintiffs' expert opinions do not establish a disparate impact on Latino
6 voter registration in Arizona caused by Prop 200. Three of plaintiffs' five experts offer
7 no opinions of any disparate impact on Latino registration. Drs. Lanier and Espino
8 purport to offer such an opinion, but based on their own analyses, they have
9 demonstrated the opposite.

10 *i.) Dr. Lanier confirms that both Latino and non-Latino*
11 *registrations have increased since the implementation*
12 *of Prop 200.*

13 Dr. Lanier has submitted numerous reports, most of which purport to add to or
14 "clarify" his original report. The conclusions in Dr. Lanier's reports, however, remain
15 essentially the same. He asserts that both Latino and non-Latino voter registrations were
16 reduced by Prop 200's proof of citizenship requirement and that Latino registrations
17 were disproportionately reduced by Prop 200. [SOF 5] An examination of his data,
18 however, demonstrates that the opposite is true.

19 Dr. Lanier prepared two charts, which he says show a reduction in voter
20 registrations caused by Prop 200 on Latinos and non-Latinos, respectively. [SOF 6]
21 The solid line on Chart 1 purports to show the number of Latino registrations in the
22 period from January 2000 through January 2005 (the month in which Prop 200 became
23 effective) and the period January 2005 through July 2007. The solid line on Chart 2
24 purports to show the same information, except with regard to non-Latino voters, for
25 those same time periods. [SOF 6]

26 Both Charts 1 and 2 include registration data for two presidential elections. [SOF
27 7] Dr. Lanier's "pre" and "post" Prop 200 periods in Charts 1 and 2, however, do not
28 reflect comparable periods of registration activity before and after Prop 200.
Specifically, the "pre" Prop 200 period in Dr. Lanier's charts reflects dramatic increases
in registration activity immediately preceding two presidential election periods—that are

1 not reflected in the “post” Prop 200 period (because there has not yet been a presidential
2 election in the post Prop 200 period). [SOF 7] When the comparable “pre” and “post”
3 Prop 200 periods are compared, based on Dr. Lanier’s own charts, it is easy to see that
4 the number of Latino and non-Latino registrations has *increased* in the post Prop 200
5 period. [SOF 8]

6 In addition, according to Dr. Lanier’s own data, the number of Latino
7 registrations increased by very similar magnitudes. [SOF 9] Indeed, at the September
8 2006 peak of “post” Prop 200 registrations, both Latino and non-Latino registrations
9 increased by approximately 60% over the number of such registrations in the
10 comparable (September 2002) period. [SOF 9]

11 Although Dr. Lanier opines that the post-Prop 200 registrations should be even
12 higher than they are, his conclusion improperly relies on the higher level of pre-Prop 200
13 registrations that occurred during the two presidential election cycles for that period.
14 [SOF 10] In addition, Dr. Lanier’s estimate of the predicted levels of registration is
15 based on a statistical analysis that does not account for the possibility of variations in
16 levels of registrations based on time trends. [SOF 11] Because Dr. Lanier omitted from
17 his analysis appropriate variables, there is no statistically reliable basis for his
18 “predicted” numbers of registrations. [SOF 12] It is clear from Dr. Lanier’s report that
19 neither Latinos nor non-Latinos experienced any reduction in registrations following the
20 implementation of Prop 200 and instead both groups experienced a significant increase.

21 *ii.) Dr. Espino’s disclosures demonstrate that Latino
22 registrations have not been disproportionately
23 impacted since the implementation of Prop 200.*

24 Dr. Espino offers two reports, which purport to conclude that Latinos have been
25 disparately impacted by the proof of citizenship requirement.⁴ In his first report, Dr.
26 Espino included a chart that purports to show the percentage of Latino registrations

27 ⁴ Dr. Espino offered a third report, which was untimely served on Defendants on May
28 23, 2008. The deadline for the disclosure of plaintiffs’ expert rebuttal testimony was
March 7, 2008, except for the limited supplemental disclosures based on any additional
registration forms produced from Yuma County and the conditional provisional ballots
produced. [See dkt. 740 (Final Amended Scheduling Order) at 2] Dr. Espino’s third
report did not purport to supplement opinions regarding those limited areas of discovery.

1 (among all registrations) for each month in the “pre” and “post” Prop 200 periods. [SOF
2 13] Like Dr. Lanier, however, Dr. Espino’s chart includes registration data for a
3 presidential election period in the “pre” Prop 200 period but not for any presidential
4 election in the “post” Prop 200 period. [SOF 13] Thus, Dr. Espino’s “pre” Prop 200
5 period reflects the huge surge in registrations in the fall 2004, which immediately
6 preceded the implementation of Prop 200. A review of the *comparable* portions of Dr.
7 Espino’s chart demonstrates that average monthly Latino registrations *increased*
8 following the implementation of Prop 200. [SOF 14]

9 Even apart from his failure to adjust for the 2004 presidential election year, Dr.
10 Espino’s own data shows no change in registration levels following the implementation
11 of Prop 200. In his report, Dr. Espino included a separate chart that purports to set out in
12 graphical form the monthly average percentage of Latino voter registrations (among all
13 registrations) for each of Arizona’s fifteen counties. [SOF 15] When those graphs are
14 reduced to straight lines, one observes that in 14 of 15 counties the percentage of Latinos
15 among all registrants either is the same or higher in the “post” Prop 200 period. [SOF
16 15] Only in one county (Greenlee) is there any indication that the percentage of Latinos
17 may have been lower after the implementation of Prop 200. [SOF 15]

18 In Dr. Espino’s second report, he concludes that there was a **0.93%** difference in
19 percentage declines in weekly Latino versus non-Latino registrations after Prop 200,
20 with Latino registrations experiencing a greater decline. [SOF 16]⁵ Thus, Dr. Espino
21 concludes that the difference between Latinos and non-Latinos in such percentage
22 reductions is less than 1%--unlikely a sufficient showing of disparate impact. Even if
23 the 0.93% difference between reductions in Latino and non-Latino registration
24 percentages were sufficient for a showing of a disparate impact, however, Dr. Espino’s
25 calculated difference lacks any scientific meaning because he did not test for statistical
26 significance of his calculated numbers. [SOF 17] Without testing for statistical

27 ⁵ Dr. Espino concluded that “the percent of Hispanic individuals registered to vote each
28 week in Arizona declined 6.29 percent following the implementation of Proposition 200,
while the corresponding decline for non-Hispanic surnamed individuals declined just
5.36 percent.” [SOF 16]

1 significance, his 0.93% reported difference does not demonstrate *any* difference between
2 the percentage decline in Latino and non-Latino registrations following Prop 200. [SOF
3 17]

4 Moreover, not only does Dr. Espino’s 0.93% calculated differential lack
5 statistical significance, his estimate does not account for (plaintiff expert) Jorge Chapa’s
6 data, which demonstrate that Latino citizen voting age population (“CVAP”) in Arizona
7 experienced a smaller growth rate than non-Latino CVAP following the implementation
8 of Prop 200. [SOF 18]

9 Dr. Espino has not offered any evidence that Latinos have experienced any
10 negative disparate impact in voting registrations since Prop 200. No reasonable fact
11 finder could conclude otherwise.

12 **III. SUMMARY JUDGMENT IS WARRANTED ON PLAINTIFFS’ EQUAL
13 PROTECTION CLAIMS.**

14 Plaintiffs claim that the voting identification requirement imposes an
15 unconstitutional burden on their right to vote. They also claim that Latinos and
16 naturalized citizens are impermissibly burdened by the proof of citizenship requirement.
17 Plaintiffs must prove, however, that the requirements of Prop 200 actually burden their
18 right to vote. *E.g., Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1615 n.7,
19 1623 (2008) (rejecting a facial challenge to Indiana’s voter identification law where the
20 plaintiffs did not show that the law imposed “‘excessively burdensome requirements’ on
21 any class of voters”).

22 The *Crawford* Court affirmed the district court’s grant of summary judgment for
23 Indiana where the plaintiffs did not demonstrate either the magnitude of the burden
24 imposed by Indiana’s voting identification requirement or who was burdened. *See id.* at
25 1622-23 (noting the lack of evidence regarding the magnitude of the impact the
26 identification requirement would have on indigent voters). The Court required a
27 showing that the identification requirement imposed an excessive burden on at least
28 some class of voters. *Id.* at 1623.

Although the *Crawford* plaintiffs asserted a facial challenge, which requires a
showing that a statute is unconstitutional in all its applications, even as-applied

1 challenges require a showing of the burden imposed on the challengers' rights. *E.g.*,
2 *Burdick v. Takushi*, 504 U.S. 428, 438-39 (1992) (holding that the prohibition on write-
3 in voting imposed only a limited burden on voters' rights, which burden was justified by
4 the state's interest in promoting the integrity of its primary election system). Laws that
5 impose only reasonable, non-discriminatory restrictions on voting rights generally are
6 justified by a state's important regulatory interests. *E.g.*, *Burdick*, 504 U.S. at 434.

7 Moreover, courts should distinguish between restrictions that are relevant to an
8 individual's qualification to vote and those that are not. The *Crawford* Court gave great
9 deference to Indiana's voter identification requirement because the restriction was
10 related to an individual's qualification to vote. *E.g.*, *Crawford*, 128 S. Ct. at 1616
11 ("evenhanded restrictions that protect the integrity and reliability of the electoral process
12 itself are not invidious and satisfy the standard set forth in *Harper*") (internal quotations
omitted).

13 In addition, the *Crawford* Court recognized states' interests of deterring and
14 detecting voter fraud and of public confidence in the integrity of the electoral process,
15 which interests are furthered by restrictions intended to ensure qualification to vote. *Id.*
16 at 1617. The Court recognized such interests even in the absence of any evidentiary
17 showing of fraud in the state's electoral process. *Id.* at 1619. Instead, such restrictions
18 are reasonable measures to prevent such fraud from occurring and to ensure voter
19 confidence in the integrity of elections. *Id.* at 1624 ("The application of the statute to
20 the vast majority of Indiana voters is amply justified by the valid interest in protecting
21 'the integrity and reliability of the electoral process.'").

22 **A. Voting Identification.**

23 There is no evidence that Arizona's voting identification requirement burdens
24 anyone, including Latinos. None of the plaintiffs is unable to vote in person at the polls
25 on Election Day due to the voting identification requirement. The two plaintiffs who
26 challenge the voting identification requirement each have valid Arizona driver's
27 licenses. Indeed, one of those plaintiffs has voted since the implementation of Prop 200.
28

1 [SOF 19] Plaintiffs have not identified any individuals who lack sufficient identification
2 for voting in person at the polls on Election Day. [SOF 20]

3 To the extent plaintiffs intend to rely on the opinions of Dr. Lanier, as explained
4 above in section II(A)(2), Dr. Lanier's conclusions regarding the uncounted conditional
5 provisional ballots provide no evidence that Latinos lack voting identification.
6 Accordingly, Defendants are entitled to summary judgment on plaintiffs' equal
7 protection challenge to Arizona's voting identification requirement.

8 **B. Proof of Citizenship.**

9 There is no evidence that any eligible Arizona citizen cannot register to vote
10 because he or she lacks proof of citizenship and cannot obtain such proof. Only two
11 plaintiffs, Jesus and Maria Gonzalez, claim in the FAC that they were unable to register
12 due to the proof of citizenship requirement. Ms. Gonzalez has since registered. Mr.
13 Gonzalez admits that he possesses proof of citizenship. [SOF 21] The organizational
14 plaintiffs who challenge the proof of citizenship requirement could identify no
15 individuals who lack proof of citizenship. [SOF 22]

16 Neither do plaintiffs' experts demonstrate any burden caused by the proof of
17 citizenship requirement. Although Drs. Lanier and Espino purport to opine that Prop 200
18 has caused a disparate impact in Latino voter registrations, neither of those experts
19 opines that Latinos lack proof of citizenship sufficient to comply with Prop 200. There
20 is no evidence to support such a conclusion in any event.

21 Moreover, plaintiffs have not shown that Prop 200 imposes a greater burden on
22 naturalized citizens. As stated above, every naturalized citizen is issued a certificate of
23 naturalization, which contains an alien registration number. Accordingly, every
24 naturalized citizen necessarily possesses proof of citizenship for purposes of registering
25 to vote in Arizona. Such citizens may simply provide their alien registration number to
26 comply with the proof of citizenship requirement. [SOF 23] Although it is true that
27 naturalized citizens may not use a birth certificate, neither may natural born citizens use
28 a certificate of naturalization. There is no evidence that Arizona's alternative forms of
proof of citizenship discriminate against one group or another.

1 Plaintiffs have not met their burden of demonstrating that individuals are
2 burdened by Arizona’s proof of citizenship requirement. Accordingly, summary
3 judgment should be granted to Defendants on plaintiffs’ equal protection claim.

4 **III. SUMMARY JUDGMENT IS WARRANTED ON PLAINTIFFS’ CIVIL RIGHTS**
5 **ACT CLAIMS.**

6 The Civil Rights Act, Title VI, § 601, provides in relevant part: “No person in
7 the United States shall, on the ground of race, color, or national origin, be excluded from
8 participation in, be denied the benefits of, or be subjected to discrimination under any
9 program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. To
10 establish a claim under Title VI, a plaintiff must prove that the challenged law
11 *intentionally* discriminates on the basis of race or national origin. *Alexander v.*
12 *Sandoval*, 532 U.S. 275, 280 (2001) (it is “beyond dispute” that “§ 601 prohibits only
13 intentional discrimination”). As explained above, plaintiffs have not shown *any*
14 discrimination against Latinos or naturalized citizens by the proof of citizenship or
15 voting identification requirements of Prop 200. On that basis alone, the Court should
16 grant summary judgment to Defendants on plaintiffs’ Title VI claim.

17 Even if the plaintiffs could establish some disparate impact on Latinos or
18 naturalized citizens, however, plaintiffs cannot show that Prop 200 intentionally
19 discriminates against any individual on the basis of race or national origin. Prop 200
20 applies to every Arizona citizen and does not classify on the basis of race or national
21 origin. To the extent the voting requirements of Prop 200 create a classification, they do
22 so on the basis of an individual’s eligibility to vote—not an individual’s race or national
23 origin.

24 There is no evidence that Prop 200 was enacted for the purpose of discriminating
25 against individuals on the basis of their race or national origin. Accordingly, summary
26 judgment should be entered on plaintiffs’ Title VI claim. *E.g., Chance v. Reed*, 538 F.
27 Supp. 2d 500, 510-11 (D. Conn. 2008) (granting summary judgment in favor of the
28 defendants on Title VI claim where the plaintiff did not offer direct evidence of
discriminatory intent for the defendants’ conduct); *Thomas v. City of Saint Paul*, 526 F.
Supp. 2d 959, 967-68 (D. Minn. 2007) (granting summary judgment in favor of the

1 defendant where the evidence was insufficient as a matter of law to show that the
2 defendant had intentionally discriminated against the plaintiffs).

3 **IV. SUMMARY JUDGMENT IS WARRANTED ON PLAINTIFFS' FIRST AMENDMENT**
4 **CLAIM.**

5 The organizational plaintiffs claim that “forcing” plaintiffs “to comply with
6 Proposition 200’s documentary proof of citizenship” to register voters violates plaintiffs’
7 “free speech and associational right to conduct voter registration.” [FAC ¶ 88]
8 Arizona’s proof of citizenship requirement, however, applies to individuals registering to
9 vote, not to any organizations or individuals engaging in the registration of others.
10 Arizona’s proof of citizenship requirement imposes no First Amendment restriction
11 whatsoever on plaintiffs. They remain free to engage in the same voter registration
12 activities as before the implementation of Prop 200. Plaintiffs have not shown any
13 restriction upon their right to register individuals to vote.

14 Plaintiffs’ assertion that they have been forced to divert resources and expend
15 extra effort to educate their constituents about the proof of citizenship requirement and
16 to register voters does not render an otherwise constitutional election restriction
17 unconstitutional. States are not required to calibrate election laws to eliminate all
18 expense on those potentially impacted by such laws. *Cf. Crawford*, 128 S. Ct. at 1626
19 footnote (“we have never held that legislatures must calibrate *all* election laws, even
20 those totally unrelated to money, for their impacts on poor voters or must otherwise
21 accommodate wealth disparities”) (Scalia, J., concurring); *Burdick*, 504 U.S. at 433-34
22 (stating that “[e]lection laws will invariably impose some burden upon individual
23 voters,” but reasonable and nondiscriminatory restrictions are generally upheld to justify
24 a state’s important regulatory interests).

25 **Relief Requested**

26 For the foregoing reasons, the Court should enter judgment in favor of
27 Defendants State of Arizona and Arizona Secretary of State Janice Brewer on all claims
28 asserted by plaintiffs in Case No. CV 06-1268.

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RESPECTFULLY SUBMITTED this 6th day of June, 2008.

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1 **CERTIFICATE OF SERVICE**

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3 the attached document to the Clerk's Office using the ECF System for filing, and
4 transmittal of a Notice of Electronic Filing to the following ECF registrants:
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6 **COPY** also served this 6th day of June, 2008, by U.S. Mail with Notice of
7 Electronic Filing, on the following, who may not be a registered participant of the ECF
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14 /s Elizabeth Stark

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