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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 ITCA PLAINTIFFS
BY DEFENDANT 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), Defendant Arizona Secretary of State Janice
3 Brewer (“Defendant”) moves for summary judgment on all claims asserted in Case No.
4 CV 06-1362 by plaintiffs Hopi Tribe, Inter Tribal Council of Arizona, Inc., League of
5 Women Voters of Arizona, League of United Latin American Citizens Arizona, Arizona
6 Advocacy Network, and Rep. Steve M. Gallardo (collectively, “plaintiffs”), because
7 there is no evidence to support essential elements of those claims. Specifically, the
8 Court should enter judgment in favor of Defendant and against plaintiffs on their equal
9 protection claim (Count One) and section 2 of the Voting Rights Act claim (Count Five).

10 This motion is supported by the following memorandum of points and authorities,
11 the separate statement of undisputed facts, and the Declaration of Counsel in Support of
12 Motion for Summary Judgment Directed to ITCA Plaintiffs (“Counsel Decl. (ITCA)”) and
13 attachments thereto, which are filed herewith.

14 **MEMORANDUM**

15 **Preliminary Statement**

16 After two years of litigation, plaintiffs have not identified a single Latino or
17 Native American citizen who cannot register to vote because he or she lacks proof of
18 citizenship. Indeed, with less than one month until trial, plaintiffs have identified only
19 two individuals who lack proof of citizenship, one of whom they assert also lacks voting
20 identification. Neither of those individuals is a plaintiff and neither is alleged to be
21 Latino or Native American. Moreover, one of them is registered to vote in Maricopa
22 County. Because no reasonable fact finder could conclude that the proof of citizenship
23 or voting identification requirement results in discrimination based on race, and because
24 plaintiffs cannot demonstrate an undue burden on the right to vote, Defendant is entitled
25 to summary judgment on plaintiffs’ remaining equal protection and Voting Rights Act
26 claims.

27 **Procedural History**

28 Plaintiffs filed their complaint on May 24, 2006, against Arizona Secretary of
State Janice Brewer. [Dkt. 1 (in Case No. 06-1362)] The complaint challenges
Arizona’s requirements of proof of citizenship to register to vote and identification to

1 vote at the polls on Election Day. [Compl., at p. 2] Those requirements were
2 implemented as a result of Proposition 200 (“Prop 200”), which was adopted by ballot
3 initiative by Arizona voters in November 2004. Plaintiffs include several advocacy and
4 voter registration organizations, a state legislator, the Hopi Tribe and the Inter Tribal
5 Council of Arizona, Inc. (“ITCA”). This case was consolidated with two other federal
6 actions that challenge Prop 200’s voting requirements. [Dkt. 33, 142]

7 The complaint asserted six causes of action based on alleged violations of the
8 equal protection clause, section 2 of the Voting Rights Act, the Civil Rights Act, the
9 National Voter Registration Act, and Twenty-Fourth Amendment (“poll tax” claim).
10 Plaintiffs sought preliminary injunctive relief, which was denied by the Court in
11 September 2006 following an evidentiary hearing. [Dkt. 183, 219] The Ninth Circuit
12 affirmed this Court’s preliminary injunction ruling on all claims on which plaintiffs
13 appealed, which pertained only to the proof of citizenship requirement. *See Gonzalez v.*
Arizona, 485 F.3d 1041 (9th Cir. 2007).

14 In June 2007, Defendant moved for summary judgment on all claims except those
15 claims based on the equal protection clause and section 2 of the Voting Rights Act.
16 [Dkt. 282] The Court granted that motion in its entirety in August 2007. [Dkt. 330]
17 Since that time, the parties to these consolidated actions have actively litigated the
18 remaining claims and have completed discovery in accordance with the Court’s
19 Scheduling Order. [See dkt. 740] In addition, the Hopi and ITCA plaintiffs agreed to
20 dismiss their challenge to the voting identification requirement. [See dkt. 776] Those
21 Native American plaintiffs continue to challenge the proof of citizenship requirement,
22 however.¹

23 Thus, the remaining claims asserted by plaintiffs in this case are based on the
24 equal protection clause and section 2 of the Voting Rights Act. With regard to plaintiffs’
25 equal protection claim, plaintiffs assert that the proof of citizenship and voting
26 identification requirements impose undue burdens on the right to vote of Arizona

27 ¹ The Navajo Nation case, in which the plaintiffs there challenged only the voting
28 identification requirement, was dismissed on agreement of the parties on May 27, 2008.
[Dkt. 775]

1 residents who are eligible to vote. [Compl. ¶ 63] With regard to plaintiffs' Voting
2 Rights Act claim, they assert that Latino and Native American citizens of Arizona are
3 less likely to possess proof of citizenship and Latino citizens are less likely to possess
4 voting identification, and therefore those individuals are deprived or hindered from
5 participating in the political process. [See Compl. ¶¶ 77-79]

6 **Statement of Undisputed Facts**

7 On November 2, 2004, Arizona voters adopted Prop 200 by ballot initiative.
8 [SOF 1] Sections 3, 4 and 5 of Prop 200 amended Arizona's voting laws in two
9 substantive ways: (1) applicants to register to vote would be required to submit proof of
10 U.S. citizenship; and (2) voters who choose to vote in person at the polls on Election
11 Day (as opposed to early voters) would be required to present identification. [SOF 2]

12 ***1. Facts relevant to the Latino and non- Native American claims.***

13 With regard to proof of citizenship, plaintiffs have identified only two individuals
14 who allegedly lack proof of citizenship sufficient to register to vote. [SOF 7, 9] Neither
15 of those individuals is alleged to be Latino. When asked by interrogatory to identify the
16 facts upon which plaintiffs rely for their assertion that the proof of citizenship
17 requirement has a discriminatory impact on Latino citizens, plaintiffs point to: (1) the
18 "study and expert report by Bruce Hernandez"; and (2) the reports of Louis Lanier and
19 Rodolfo Espino filed on behalf of the Gonzalez and Navajo Nation plaintiffs. [SOF 3]
20 Plaintiffs never produced a report of any expert opinions from Mr. Hernandez. [SOF 11]
21 In addition, neither Dr. Espino nor Dr. Lanier was disclosed by plaintiffs as a testifying
22 expert in this case. [SOF 5]

23 The only individual plaintiff in this case, Rep. Steve Gallardo, does not allege that
24 he cannot vote or register to vote. Mr. Gallardo admits that he does not know of any
25 citizens who lack proof of citizenship to register to vote. [SOF 6] Similarly, all but one
26 of the organizational plaintiffs responded to interrogatories that they did not have
27 knowledge of the number or identities of individuals lacking proof of citizenship. [SOF
28 7] Plaintiff Arizona Advocacy Network identified only one individual, Eva Steele, who
lacks proof of citizenship. [SOF 7] Ms. Steele is in fact registered to vote in Maricopa
County, however. [SOF 8] In plaintiffs' collective supplemental disclosure statement,

1 which was served on the last day of fact discovery, they identified only one other person
2 who lacks proof of citizenship. [SOF 9] Neither of the two individuals identified by
3 plaintiffs is alleged to be Latino.

4 With regard to voting identification, all but one plaintiff failed to identify any
5 individual who lacks sufficient identification for voting at the polls on Election Day.
6 [SOF 10] Plaintiff Arizona Advocacy Network again identified only one person, Eva
7 Steele, who allegedly lacks voting identification. [SOF 10]

8 Apart from identifying only one individual who allegedly lacks voting
9 identification, the only other evidence identified by plaintiffs as support for their equal
10 protection claim is the expert report of Bruce Hernandez, which was never served. [SOF
11 11]

11 **2. *Facts relevant to the Native American claims.***

12 Plaintiffs were asked to identify any Native American citizen who lacks proof of
13 citizenship sufficient to comply with Prop 200, but did not identify any such individual.
14 [SOF 12] The only facts upon which plaintiffs rely for their assertion that the proof of
15 citizenship requirement has a discriminatory impact on Native Americans are (1) the
16 report of Bruce Hernandez; (2) the expert report of Dr. Espino filed on behalf of the
17 Navajo Nation plaintiffs; (3) the affidavit of John Lewis; (4) Mr. Lewis' testimony at the
18 preliminary injunction hearing; and (5) the testimony of Leonard Gorman at the
19 preliminary injunction hearing. [SOF 13]

20 As noted above, plaintiffs subsequently declined to serve any study or report by
21 Bruce Hernandez, however. [SOF 11] The report prepared by Dr. Espino on behalf of
22 the Navajo Nation purports to address only issues pertaining to the Navajo voters in
23 three northern Arizona counties. [SOF 4]

24 Each of the Arizona tribes represented by the ITCA, and for which discovery was
25 provided, issues tribal enrollment or identification cards to their respective members,
26 and all but one of those tribes issue such cards without charge. [SOF 14]
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1 **Legal Argument**

2 **I. THE APPLICABLE LEGAL STANDARD.**

3 Summary judgment is appropriate upon a showing that “there is no genuine issue
4 as to any material fact and that the moving party is entitled to judgment as a matter of
5 law.” Fed. R. Civ. P. 56(c); see *Jesinger v. Nev. Fed. Credit Union*, 24 F.3d 1127, 1130
6 (9th Cir. 1994); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Substantive law
7 determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
8 (1986). “Only disputes over facts that might affect the outcome of the suit under the
9 governing law will properly preclude the entry of summary judgment.” *Id.*

10 Once a defendant has identified those parts of the record that indicate an absence
11 of an issue of material fact, “the nonmoving party must ‘designate specific facts showing
12 that there is a genuine issue for trial.’” *Brinson v. Linda Rose Joint Venture*, 53 F.3d
13 1044, 1048 (9th Cir. 1995) (quoting *Celotex*, 477 U.S. at 324) (internal quotations
14 omitted). Moreover, “[w]hen the moving party has carried its burden under Rule 56(c),
15 its opponent must do more than simply show that there is some metaphysical doubt as to
16 the material facts.” *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
17 U.S. 574, 586 (1986)). Summary judgment should be granted if the evidence is merely
colorable or if it is not significantly probative. *Id.*

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

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

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

25 42 U.S.C. § 1973(a).

26 To establish a § 2 claim, a plaintiff must establish that the challenged voting
27 practice or procedure results in discrimination *on account of race or color*. *Smith v. Salt
28 River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)

1 (“Only a voting practice that results in discrimination gives rise to § 2 liability.”)
2 (emphasis added). Stated another way, “the challenged device must be shown actually
3 to impair the ability of minority voters to elect representatives of their choice.” *Badillo*
4 *v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992) (affirming the district court’s ruling
5 that plaintiff minorities failed to establish that the challenged electoral system
6 diminished plaintiffs’ opportunity to elect legislators of their choice); *Farrakhan v.*
7 *Washington*, 338 F.3d 1009, 1017 (9th Cir. 2003) (stating that the essence of a § 2 claim
8 is that the challenged voting practice interacts with social and historical conditions to
9 cause inequality in opportunities to elect preferred representatives). In addition, “a bare
10 statistical showing of disproportionate *impact* on a racial minority does not satisfy the
11 § 2 ‘results’ inquiry.” *Smith*, 109 F.3d at 596 (emphasis in original) (affirming district
12 court judgment, in a challenge to land ownership as a prerequisite to district voting
13 rights, that statistical disparity in African-American and white home ownership did not
14 prove a § 2 claim).

14 **A. Arizona’s Proof of Citizenship and Voting Identification**
15 **Requirements Do Not Discriminate Against Latinos.**

16 ***1. There is no showing either of any discriminatory impact or***
17 ***causation with regard to the proof of citizenship***
18 ***requirement.***

18 The Court should grant summary judgment on plaintiffs’ § 2 challenge to the
19 proof of citizenship requirement for two reasons. First, plaintiffs cannot show that the
20 proof of citizenship requirement results in discrimination against Latinos on the basis of
21 race. No Latino individual has been identified in this case who cannot register because
22 he or she lacks proof of citizenship as defined by Prop 200. [SOF 7] Indeed, after two
23 years of litigation, plaintiffs have identified only two individuals who allegedly lack
24 proof of citizenship sufficient to register to vote. [SOF 7, 9] Neither of them is a
25 plaintiff in this action and neither is alleged to be Latino. One of those individuals is
26 registered to vote in Maricopa County. [SOF 8]

27 When asked by interrogatory to identify the facts upon which plaintiffs rely for
28 their assertion that the proof of citizenship requirement has a discriminatory impact on

1 Latinos, plaintiffs pointed to the following: (1) the expected “study and expert report by
2 Bruce Hernandez”; and (2) the reports of Drs. Lanier and Espino served on behalf of the
3 Gonzalez and Navajo Nation plaintiffs. [SOF 3]

4 Plaintiffs did not serve any report by Mr. Hernandez, however. [SOF 11] In
5 addition, the ITCA plaintiffs did not disclose Drs. Espino and Lanier as testifying
6 experts in this case. [SOF 5] In any event, neither Dr. Espino nor Dr. Lanier has
7 demonstrated any discriminatory impact on Latinos caused by Prop 200.² Defendant
8 concedes neither the methodology nor the reliability of the reports of Drs. Espino and
9 Lanier. Even if their reports were reliable, however, at most they conclude only that
10 Latinos in Arizona are registered in disproportionately lower numbers than non-Latinos
11 since Prop 200 was implemented. A bare statistical showing of disparate impact is
12 insufficient as a matter of law to establish a § 2 claim. *E.g.*, *Smith*, 109 F.3d at 595;
13 *Farrakhan*, 338 F.3d at 1019 (noting that “causation cannot be inferred from impact
alone”).

14 Second, there is no evidence that any historical or social discrimination against
15 Latinos in Arizona has resulted in their being less likely to obtain or possess proof of
16 citizenship. Plaintiffs must be able to show a causal connection between any historical
17 or social discrimination and the inability of Latinos to register to vote due to lack of
18 proof of citizenship. *E.g.*, *Badillo*, 956 F.2d at 890. Neither plaintiffs nor their experts,
19 however, have offered any evidence of causation.

20 **2. *There is no showing either of any discriminatory impact or***
21 ***causation with regard to the voting identification***
22 ***requirement.***

23 As with the proof of citizenship requirement, plaintiffs have offered no evidence
24 that Arizona’s voting identification requirement has any discriminatory impact on
25 Latinos or that there is any causal connection between any discrimination and the
26 inability to vote due to the identification requirement. In their interrogatory responses,
all but one plaintiff failed to identify any individual who lacks sufficient identification

27 ² The reports of Drs. Lanier and Espino are addressed more fully in State Defendants’
28 motion for summary judgment in the Gonzalez case, which is filed today.

1 for voting at the polls on Election Day. [SOF 10] Plaintiff Arizona Advocacy Network
2 identified only one person who allegedly lacks voting identification. [SOF 10] There is
3 no suggestion, however, that such individual is Latino.

4 Moreover, even if she were Latino, evidence of a single Latino individual
5 negatively impacted by the identification requirement would not be sufficient to show
6 any discriminatory impact. [See Order dated May 3, 2007, at 2-3 (suggesting that one-
7 percent differential in turnout among Native Americans and non-Native Americans
8 likely is insufficient for a showing of a disparate impact) (citing *Farrakhan v. Gregoire*,
9 No. CV-96-076-RHW, 2006 WL 1889273, at *9 (E.D. Wash. July 7, 2006))] Plaintiffs
10 have offered no other evidence of any discriminatory impact on Latinos caused by the
11 voting identification requirement.

12 Moreover, plaintiffs have offered no evidence that Latinos are less likely to
13 obtain or possess voting identification as a result of any historical or social
14 discrimination. As with their proof of citizenship challenge, plaintiffs' voting
15 identification claim lacks any causal connection between discrimination and any
16 inability to vote due to the requirement. Accordingly, plaintiffs cannot establish a § 2
17 claim based on the identification requirement.

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**B. Arizona's Proof of Citizenship Requirement Does Not
Discriminate Against Native Americans.**

There is no evidence from which a reasonable fact finder could conclude that
Arizona's proof of citizenship has any negative impact on Arizona's Native American
population. Similarly, plaintiffs have not shown that Native Americans in Arizona are
less likely than other members of the electorate to possess proof of citizenship to enable
them to register. Plaintiffs have not identified a single Native American individual who
is unregistered and who lacks proof of citizenship to register to vote. [SOF 12]

Instead, the only evidence that plaintiffs point to in support of their claim of a
discriminatory impact is (1) the report of Bruce Hernandez; (2) the testimony of John
Lewis and Leonard Gorman at the preliminary injunction hearing; and (3) the report of
Dr. Espino served in the Navajo Nation case. [SOF 13]

1 As stated above, plaintiffs never served a report of Mr. Hernandez. [SOF 11]
2 With regard to the testimony of Messrs. Lewis and Gorman, the Court already
3 considered that testimony and found that it did not warrant entry of a temporary
4 injunction. [Dkt. 279 (order denying preliminary injunction in Navajo Nation case)] In
5 any event, the testimony does not provide a basis for concluding that Native Americans
6 have been disparately impacted by the proof of citizenship requirement. Although Mr.
7 Lewis' affidavit makes factual assertions regarding among other things tribal culture, the
8 forms of tribal documents that are in use or are distributed to respective tribal members,
9 and the efforts necessary to obtain certain documents, his affidavit does not identify any
10 Native American who does not have proof of citizenship and cannot register to vote as a
11 result. Neither does Mr. Lewis' affidavit specify the number of Native Americans who
12 lack proof of citizenship and are unable to obtain it.³

13 Mr. Gorman did not identify any tribal members who lack proof of citizenship or
14 specify the number of tribal members who lack such proof and who cannot obtain it.
15 Moreover, Mr. Gorman's testimony was limited to his knowledge of facts relating to the
16 Navajo Nation, not to Arizona's remaining tribal populations.⁴ The Navajo Nation
17 action was dismissed recently and the Navajo tribe is not a member of the Inter Tribal
18 Council of Arizona. Thus, Mr. Gorman's testimony does not address any issues
19 pertaining to plaintiffs in *this* case.

20 The report of Dr. Rodolfo Espino, which was served in the Navajo Nation case,
21 does not support plaintiffs' claims in *this* case. Dr. Espino's report purports to address
22 only issues pertaining to *Navajo* voters in three northern Arizona counties. [SOF 4] As
23 stated above, the tribal plaintiffs in this suit do not represent or consist of members of
24 the Navajo Nation. Dr. Espino's report does not provide any evidence that non-Navajo
25 Native Americans have experienced any disparate impact caused by Prop 200.

26 ³ Mr. Lewis' affidavit was offered by plaintiffs as exhibit 58 in the preliminary
27 injunction proceedings.

28 ⁴ The transcript of the preliminary injunction hearing is filed at dkt. 263. *See, e.g.*,
testimony of August 30, 2006, at 43:11-12, 44:6-15, 64:3-65:1.

1 Plaintiffs cannot show either that Native Americans are less likely to possess
2 proof of citizenship or that the requirement disparately impacts Native Americans for
3 purposes of their § 2 claim. Moreover, there is no evidence that Arizona’s proof of
4 citizenship requirement has in any way hindered tribal plaintiffs from having equal
5 opportunity to participate in the political process and to elect representatives of their
6 choice. Accordingly, the Court should enter judgment in favor of Defendant on that
7 claim. *E.g.*, *Smith*, 109 F.3d at 595 (affirming judgment in favor of the defendants on a
8 § 2 claim based on a statistical racial disparity in eligibility to vote in special district
9 elections); *Salas v. Southwest Texas Junior College Dist.*, 964 F.2d 1542, 1556 (5th Cir.
10 1992) (affirming the district court’s ruling that the minority challengers’ lack of electoral
11 success was caused by a failure to take advantage of political opportunity rather than a
12 violation of § 2), *cited with approval by Farrakhan*, 338 F.3d at 1018.

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

14 Plaintiffs’ complaint sets forth a single substantive paragraph under their equal
15 protection claim, which alleges that the proof of citizenship and voting identification
16 requirements “impose undue burdens on the fundamental right of Arizona residents”
17 and are not justified by the State’s interests, which could have been accomplished by
18 less restrictive means. [Compl. ¶ 63] Notably, however, none of the plaintiffs in this
19 action are individuals claiming that they cannot register to vote or cannot vote in person
20 at the polls because of Prop 200’s requirements. Indeed, only one of the plaintiffs is an
21 individual; that plaintiff (Rep. Gallardo) does not claim that he cannot vote or register
22 to vote.

23 Instead, plaintiffs attempt to assert a claim based on an undue burden on the right
24 to vote of other, unidentified individuals. Although plaintiffs arguably may have
25 standing to raise such claims, they nonetheless must prove that the requirements of Prop
26 200 actually burden individuals’ right to vote. *E.g.*, *Crawford v. Marion County*
27 *Election Bd.*, 128 S. Ct. 1610, 1615 n.7, 1623 (2008) (holding that the Democratic party
28 could assert an equal protection challenge to a voting identification requirement but that
the party failed to prove that the requirement burdened the state’s voters; rejecting a

1 facial challenge to Indiana’s voter identification law where the plaintiffs did not show
2 that the law imposed “excessively burdensome requirements” on any class of voters).

3 In this case, plaintiffs assert both facial and as-applied challenges to Arizona’s
4 proof of citizenship and voting identification requirements. [Compl. at p. 2] Under
5 *Crawford*, a facial challenge to an election law fails if the statute has a “plainly
6 legitimate sweep.” *Id.* at 1623. The burden is on the plaintiff to establish that “no set of
7 circumstances exists under which the Act would be valid.” *Washington State Grange v.*
8 *Washington State Republican Party*, 128 S. Ct. 1184, 1190 (2008) (upholding a state
9 primary system against a facial challenge where the law could be applied
10 constitutionally in some circumstances).

11 Although a facial challenge imposes a particularly heavy burden of proof
12 regarding the magnitude of the burden imposed by the restriction, even as-applied
13 challenges require a showing of the burden imposed on the challengers’ rights. *E.g.*,
14 *Burdick v. Takushi*, 504 U.S. 428, 438-39 (1992) (holding that the prohibition on write-
15 in voting imposed only a limited burden on voters’ rights, which was justified by the
16 state’s interest in promoting the integrity of its primary election system). Laws that
17 impose only reasonable, non-discriminatory restrictions on voting rights generally are
18 justified by a state’s important regulatory interests. *E.g.*, *Burdick*, 504 U.S. at 434.

19 Moreover, courts should distinguish between restrictions that are relevant to an
20 individual’s qualification to vote and those that are not. The *Crawford* Court gave great
21 deference to Indiana’s voting identification requirement because the restriction was
22 related to an individual’s qualification to vote. *E.g.*, *Crawford*, 128 S. Ct. at 1616
23 (“evenhanded restrictions that protect the integrity and reliability of the electoral process
24 itself are not invidious and satisfy the standard set forth in *Harper*”) (internal quotations
25 omitted).

26 In addition, the *Crawford* Court recognized states’ important interests of
27 deterring and detecting voter fraud and of public confidence in the integrity of the
28 electoral process, which are furthered by restrictions intended to ensure qualification to
vote. *Id.* at 1617. The Court recognized those interests even in the absence of any
evidentiary showing of fraud in the state’s electoral process. *Id.* at 1619. Indeed, such

1 restrictions are reasonable measures to prevent such fraud from occurring and to ensure
2 voter confidence in the integrity of elections. *Id.* at 1624 (rejecting plaintiffs’ challenge
3 and stating that the “application of the statute to the vast majority of Indiana voters is
4 amply justified by the valid interest in protecting ‘the integrity and reliability of the
5 electoral process’”).

6 **A. Proof of Citizenship.**

7 Plaintiffs’ equal protection claim fails because there is no evidence of any burden
8 on individuals’ right to vote caused by Arizona’s proof of citizenship requirement.⁵ In
9 responding to Defendant’s interrogatories, all but one plaintiff answered that they knew
10 of no individual who lacks proof of citizenship to register to vote. [SOF 6, 7] Plaintiff
11 Arizona Advocacy Network identified only one such individual, Eva Steele. [SOF 7]
12 As stated above, however, Ms. Steele is in fact registered to vote in Maricopa County.
13 [SOF 8]

14 In plaintiffs’ collective supplemental disclosure statement, which was served on
15 the last day of fact discovery, they identified only one other person, Shirley Preiss, who
16 lacks proof of citizenship. [SOF 9] Defendants did not have the opportunity to take
17 discovery about Ms. Preiss’ circumstances. A single individual, however, who is not
18 even a plaintiff in one of these consolidated cases does not demonstrate that Arizona’s
19 proof of citizenship requirement is unconstitutional on its face. Plaintiffs here seek to
20 invalidate the proof of citizenship requirement in all its applications. Under *Crawford*,
21 such evidence is plainly insufficient to obtain the broad relief plaintiffs are seeking here.

22 Indeed, the *Crawford* Court acknowledged that the evidence indicated that “a
23 somewhat heavier burden may be placed on a limited number of persons” by Indiana’s

24 ⁵ Proof of citizenship includes any of the following: (1) the number of the person’s
25 valid Arizona driver’s license or non-operating license issued after October 1, 1996; (2)
26 a copy of the person’s birth certificate; (3) a copy of the pertinent pages of the person’s
27 U.S. passport; (4) U.S. naturalization documents or the number of the certificate of
28 naturalization (the Alien Registration Number); and (5) the person’s Bureau of Indian
Affairs card number, tribal treaty card number, tribal enrollment number, or census
number, tribal Certificate of Indian Blood, or Bureau of Indian Affairs affidavit of birth.
[See Arizona Secretary of State Elections Procedures Manual (October 2007),
http://www.azsos.gov/election/Electronic_Voting_System/2007/Manual.pdf, at p. 43-44]

1 identification law. *Crawford*, 128 S. Ct. at 1621. The Court noted that the burden may
2 be heavier for elderly or poor persons born out of state who have difficulty obtaining
3 birth certificates or other documentation. *Id.* The Court concluded, however, that “even
4 assuming that the burden may not be justified as to a few voters, that conclusion is by no
5 means sufficient to establish petitioners’ right to the relief they seek in this litigation.”
6 *Id.*

7 Moreover, the evidence of a relatively few persons who had difficulty complying
8 with the identification requirement was insufficient to prove the magnitude of any
9 impact on the state’s voters overall. *Id.* at 1622-23, n.20 (“While it is true that obtaining
10 a birth certificate carries with it a financial cost, the record does not provide even a
11 rough estimate of how many indigent voters lack copies of their birth certificates.”).

12 With regard to the proof of citizenship requirement as applied to Native American
13 individuals, the evidence undermines plaintiffs’ claim of a burden. Each of the tribes
14 represented by plaintiff ITCA and for which discovery was provided, including plaintiff
15 Hopi tribe, issues tribal enrollment or identification cards to their respective members.
16 [SOF 14] All but one of those tribes issues the cards without charge. [SOF 14] The
17 number on a tribal enrollment card may be used to comply with Arizona’s proof of
18 citizenship requirement when registering to vote. A.R.S. § 16-166(F)(6). Moreover,
19 although the Hopi plaintiffs have asserted that many of that tribe’s members lack a tribal
20 enrollment card, such an assertion speaks only to the lack of *one* form of acceptable
21 proof of citizenship. Such an assertion does not demonstrate anything about the number
22 of tribal members who lack proof of citizenship altogether.

23 Without any evidence of the impact caused by Arizona’s proof of citizenship
24 requirement on Arizona citizens, plaintiffs cannot meet their “heavy burden of
25 persuasion” in this case. Accordingly, summary judgment is both warranted and
26 appropriate on plaintiffs’ equal protection claim challenging the proof of citizenship
27 requirement.

28 **B. Voting identification.**

As with their proof of citizenship challenge, plaintiffs’ voting identification
requirement lacks any evidentiary basis. The only individual identified by any of the

1 plaintiffs who lacks sufficient voting identification is Eva Steele. Ms. Steele is not a
2 plaintiff in this case. In any event, under *Crawford*, such a “showing” is insufficient as a
3 matter of law to establish plaintiffs’ equal protection claim which seeks to invalidate
4 Arizona’s voting identification requirement in all its applications. *E.g.*, *Crawford*, 128
5 S. Ct. at 1623 (“petitioners have not demonstrated that the proper remedy—even
6 assuming an unjustified burden on some voters—would be to invalidate the entire
7 statute”).⁶

8 Apart from identifying only one individual who allegedly lacks voting
9 identification, the only other evidence identified by plaintiffs as support for their equal
10 protection claim is the expert report of Bruce Hernandez. [SOF 11] Plaintiffs never
11 produced any such report, however. [SOF 11]

12 It is not surprising that plaintiffs have offered little evidence of any burden
13 imposed by the voting identification requirement. It is easy to comply with Arizona’s
14 law. Most electors have a valid driver’s license or non-operating license. In addition,
15 Arizona counties provide non-photo voting identification to registered voters (at no
16 charge) in the form of voter registration cards, recorder certificates and official election
17 mail. [See Arizona Secretary of State Elections Procedures Manual (October 2007),
18 http://www.azsos.gov/election/Electronic_Voting_System/2007/Manual.pdf, at p. 49-50
(requiring county recorder to issue a voter identification card to registrants)]

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20 ⁶ For in-person voting on Election Day, Arizona’s law requires an elector to present
21 either “one form of identification that bears the name, address and photograph of the
22 elector or two different forms of identification that bear the name and address of the
23 elector.” A.R.S. § 16-579(A). Valid forms of photo identification include: valid
24 Arizona driver license; valid Arizona non-operating identification license; tribal
25 enrollment card or other form of tribal identification; and valid United States federal,
26 state, or local government issued identification. Valid forms of non-photo identification
27 include: Utility bill of the elector that is dated within 90 days of the date of the election
28 (electric, gas, water, solid waste, sewer, telephone, cellular phone, or cable television);
Bank or credit union statement that is dated within 90 days of the date of the election;
Valid Arizona vehicle registration; Indian census card; Property tax statement of the
elector’s residence; Tribal enrollment card or other form of tribal identification; Vehicle
insurance card; Recorder’s certificate; and Valid United States federal, state, or local
government issued identification, including a voter registration card issued by the
County Recorder.

1 Plaintiffs have not met their burden of proving that Arizona's voting
2 identification requirement actually burdens Arizona voters. Accordingly, summary
3 judgment should be granted on that claim.

4 **Relief Requested**

5 For the foregoing reasons, the Court should enter judgment in favor of Defendant
6 Arizona Secretary of State Janice Brewer on all claims asserted by plaintiffs Hopi Tribe,
7 Inter Tribal Council of Arizona, Inc., League of Women Voters of Arizona, League of
8 United Latin American Citizens Arizona, Arizona Advocacy Network, and Rep. Steve
9 M. Gallardo, in Case no. CV 06-1362.

10 RESPECTFULLY SUBMITTED this 6th day of June, 2008.

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12 Arizona Attorney General

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15 Solicitor General
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17 Senior Litigation Counsel
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 6th day of June, 2008, I electronically transmitted
3 the attached document to the Clerk's Office using the ECF System for filing, and
4 transmittal of a Notice of Electronic Filing to the following ECF registrants:
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6 **COPY** served the 6th day of June, 2008, via U.S. mail, with Notice of Electronic
7 Filing, on:

8 The Honorable Roslyn O. Silver
9 United States District Court
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13 /s Elizabeth Stark

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