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10 **IN THE UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 MARIA M. GONZALEZ, et al.,

13 Plaintiffs,

14 v.

15 STATE OF ARIZONA, et al.

16 Defendants.

No. CV06-01268 PHX ROS
No. CV06-1362 PCT ROS (Cons)
No. CV06-1575 PCT ROS (Cons)

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

(Assigned to the Honorable
Roslyn O. Silver)

1 **I. PLAINTIFFS’ CLAIM BASED ON THE UNIFORMED AND OVERSEAS CITIZENS**
2 **ABSENTEE VOTING ACT SHOULD BE DISMISSED.**

3 **A. The FAC Does Not Allege Any Injury to Plaintiffs to Establish**
4 **Standing.**

5 Plaintiffs do not dispute that none of the individual Plaintiffs have standing under
6 the UOCAVA claim by virtue of unsuccessfully attempting to use the federal post card
7 application to register to vote as absent uniformed services voters or overseas voters.
8 [Response at 14] Plaintiffs instead argue that the organizational Plaintiffs have
9 established standing because the first amended complaint (“FAC”) “describe[s] how
10 Proposition 200 has impeded their efforts to engage in activities meant to increase voter
11 participation and registration in Arizona,” even though the FAC makes no mention of
12 how the alleged violation of UOCAVA has injured them. *Id.*

13 Contrary to Plaintiffs’ argument, standing under Article III requires more—it
14 requires a plaintiff to demonstrate at the pleading stage the following: (1) that he or she
15 has suffered an injury-in-fact; (2) that the injury is fairly traceable to the challenged
16 action of the defendant; and (3) that the injury is likely to be redressed by a favorable
17 decision. *See Loritz v. United States Court of Appeals for the Ninth Circuit*, 382 F.3d
18 990, 991-92 (9th Cir. 2004) (affirming district court’s dismissal of action because
19 plaintiff did not allege how he was actually injured by particular Circuit rule
20 challenged). In addition, the injury alleged must be concrete and particularized, rather
21 than abstract or speculative. *See Schmier v. United States Court of Appeals for the Ninth*
22 *Circuit*, 279 F.3d 817, 821 (9th Cir. 2002). The injury must be personal to that plaintiff.
23 *Id.* Moreover, to invoke organizational standing, an organization must allege that it has
24 had to divert resources to fulfill its organizational mission.¹ *See Fair Housing of Marin*
25 *v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).

24 ¹ An organization may also establish representational standing by demonstrating that
25 “(a) its members would otherwise have standing to sue in their own right; (b) the
26 interests it seeks to vindicate are germane to the organization’s purpose; and (c) neither
27 the claim asserted nor the relief requested requires the participation of individual
28 members in the lawsuit.” *Smith v. Pacific Properties and Development Corp.*, 358 F.3d
1097, 1101-02 (9th Cir. 2004). Plaintiffs have not asserted representational standing.

1 Here, however, Plaintiffs fail to state how the requirement of providing proof of
2 citizenship with the federal post card application has caused the organizational Plaintiffs
3 to divert resources to fulfill their organizational mission. Unfortunately for Plaintiffs,
4 what few allegations they do make in the FAC hurt, rather than help, their position. The
5 FAC asserts that Proposition 200 impedes the organizational Plaintiffs’ “ability to
6 conduct *community-based* voter registration” in that they are unable “to bring photocopy
7 equipment to *malls, school campuses and community gatherings.*” [FAC ¶¶ 73, 74
8 (emphasis added)] Thus, according to Plaintiffs, the organizational Plaintiffs are
9 engaged in community-based voter registration at gatherings *in Arizona*—they are not
10 engaged in the registration of overseas and absent uniformed services voters who use the
11 federal post card application. Because the organizational Plaintiffs do not utilize the
12 federal post card application in their Arizona community-based registration drives, they
13 cannot have been injured by the requirement that proof of citizenship accompany the
14 federal post card application.

15 Plaintiffs cite to paragraph 75 of the FAC in support of their argument that they
16 have alleged sufficient injury to withstand a standing challenge. [Response at 14] That
17 paragraph alleges that Proposition 200 disparately affects Latinos, because they are less
18 likely than other ethnic groups to possess proof of citizenship. [FAC ¶ 75] However, a
19 plaintiff cannot establish standing by pleading an injury to others, rather than one
20 personal to himself or herself. *See Schmier*, 279 F.3d at 821; *Loritz*, 382 F.3d at 992.
21 Plaintiffs cannot establish standing by generally asserting an injury on behalf of all
22 Latinos who have been unable to register using the federal post card application, because
23 that would be an assertion of a third party’s rights.

24 Because the organizational Plaintiffs do not allege that they utilize the federal
25 post card application, they have failed to establish standing by sufficiently alleging an
26 injury-in-fact that could be redressed by a favorable decision..

27 **B. UOCAVA Does Not Conflict with Proposition 200’s Proof-of-**
28 **Citizenship Requirement.**

Plaintiffs mischaracterize Defendants’ argument. [Response at 11] Defendants
do not contend that because the Ninth Circuit declined to grant a preliminary injunction

1 under the NVRA, no federal law or statute, including UOCAVA, can preempt
2 Proposition 200. Rather, Defendants contend that Plaintiffs’ UOCAVA preemption
3 claim under UOCAVA fails for the same reason that their NVRA preemption claim
4 did—namely, that neither of these federal statutes prohibit documentation requirements
5 and do not conflict with Proposition 200’s requirement of proof of citizenship.

6 Plaintiffs argue that the Ninth Circuit’s ruling that the NVRA did not preempt
7 Proposition 200 turned on language in the NVRA that provides that States can “develop
8 and use their own [mail registration] form, as long as the latter conforms to the federal
9 guidelines.” [See Response at 12 (“According to the Ninth Circuit, that language
10 precluded a finding that Proposition 200 was in conflict, and therefore preempted by, the
11 NVRA.”)] According to Plaintiffs, because there is no such option in UOCAVA for
12 States to develop their own form, the rationale underlying the Ninth Circuit’s ruling on
13 the NVRA preemption issue is not applicable here. However, Plaintiffs are incorrect—
14 the Ninth Circuit’s reasoning had nothing to do with States’ option to create their own
15 forms. In actuality, the Ninth Circuit held that the NVRA did not preempt Proposition
16 200 because the language of the statute did not prohibit documentation requirements, the
17 statute clearly conditions eligibility to vote on United States citizenship, and the statute
18 permits States to require identifying information in order to assess eligibility to vote.
See Gonzalez v. Arizona, 485 F.3d 1041, 1050-51 (9th Cir. 2007).

19 UOCAVA does not preempt Proposition 200’s proof-of-citizenship requirement
20 for the same reasons. First, there is no language in UOCAVA prohibiting
21 documentation requirements by the States. Second, the statute states that the persons
22 using the federal post card application—absent uniformed services voters and overseas
23 voters—must be otherwise qualified to vote in their last place of residence despite their
24 absence from the United States on the date of the election. *See* 42 U.S.C. § 1973ff-6(1)
25 & (5). This means that everyone using the federal post card application to register in
26 Arizona must be a U.S. citizen. *See* A.R.S. § 16-101(A)(1) (stating that every resident
27 of Arizona is qualified to vote if he or she is, among other requirements, a citizen of the
28 United States). Third, UOCAVA contemplates that upon receiving the federal post card
application, States will assess the applicant’s eligibility to vote, because the statute

1 directs States to notify registrants of the “disposition” of their application if the
2 application is rejected. *See* 42 U.S.C. § 1973ff-1(b)(d). And, in order to assess
3 eligibility to vote, States must be permitted to require identifying information to
4 determine whether the applicant is a U.S. citizen, just as they are permitted to do when
5 they receive federal mail registration applications under the NVRA. Thus, the same
6 rationale applied by the Ninth Circuit to Plaintiffs’ NVRA claim applies with equal force
7 here.

8 Plaintiffs argue that Congress intended that States accept the federal post card
9 application without any further requirements added or assessment of eligibility to vote
10 made by the States. [Response at 13] However, Plaintiffs fail to cite to any case law or
11 legislative history to support this assertion. Given that UOCAVA itself does not prohibit
12 documentation requirements, that persons using the federal post card application to
13 register in Arizona must be U.S. citizens, and that UOCAVA clearly contemplates that
14 States will independently assess eligibility to vote, the provisions of UOCAVA do not
15 conflict with Proposition 200’s requirement of proof of citizenship.

16 **II. PLAINTIFFS’ CLAIM BASED ON THE CIVIL RIGHTS ACT SHOULD BE
17 DISMISSED.**

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

20 Plaintiffs assert that Arizona’s proof of citizenship requirement “impede[s] their
21 ability to conduct community-based voter registration and voter education” and that
22 “Latinos are less likely to possess the forms of identification required under Proposition
23 200 to register to vote and cast a ballot.” [Response at 8-9 (citing FAC ¶¶ 73-75)]
24 Plaintiffs are required, however, to allege that their asserted injury is caused by the
25 defendant’s unlawful conduct. *E.g., Schmier*, 279 F.3d at 820-21 (affirming the district
26 court’s dismissal of a complaint for lack of standing; stating that the elements of
27 standing include a legally recognized injury that is caused by the defendant). Moreover,
28 Plaintiffs must allege “specific facts sufficient to satisfy the standing elements.” *Loritz*,
382 F.3d at 991-92 (affirming dismissal of action where the plaintiff failed to allege
actual injury to the plaintiff caused by the defendant).

1 Plaintiffs do not identify any allegations in the FAC that connect Arizona's
2 conduct with any injury actually suffered by the Plaintiffs for purposes of their Civil
3 Rights Act claims. The FAC does not allege any facts that the acceptance of an Arizona
4 license issued after October 1, 1996, or the de facto result that licenses issued before that
5 date do not suffice as proof of citizenship, harms any plaintiff.² Plaintiffs claim that
6 Latinos as a group are less likely to possess sufficient forms of identification—not that
7 they are more likely to possess licenses issued before October 1, 1996. Neither do
8 Plaintiffs allege that they have attempted to register voters who possess Arizona licenses
9 issued before October 1, 1996, and who otherwise lack proof of citizenship. Stated
10 another way, Plaintiffs do not allege that the supposed difference in treatment actually
11 harms *them*. See *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1104 (9th Cir.
12 2006) (“A plaintiff seeking to invoke federal court jurisdiction must plead that *he* has
13 suffered some cognizable injury to make the threshold showing of a case or
14 controversy.”) (emphasis in original).

15 Neither does the FAC allege harm to any plaintiff based on Arizona's county-
16 based registration system. Plaintiffs do not allege that any of the voters they attempt or
17 have attempted to register are individuals who previously were registered in one Arizona
18 county and moved to another Arizona county and who lack proof of citizenship. Indeed,
19 there is no allegation that any plaintiff has attempted to register even a single such
20 individual.

21 Although pleading standards are not more stringent with regard to standing than
22 other elements of jurisdiction, they do require a plaintiff to allege a sufficient factual
23 basis to support their standing to raise the claims they are asserting. *E.g., Sacks v. Office*
24 *of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006) (“To survive a Rule
25 12(b)(6) motion to dismiss, [the plaintiffs] *must allege facts* in his Amended Complaint
26 that, if proven, would confer standing upon him.”) (emphasis added). The FAC does not

27 ² Plaintiffs do not dispute that Maria Gonzalez, Jesus Gonzalez, Bernie Abeytia,
28 Luciano Valencia, Georgia Morrison Flores, or Naeem Abdul-Kareem lack standing to
bring their new Civil Rights Act claims. Thus, the only plaintiffs at issue with regard to
standing are the organizational plaintiffs and Debbie Lopez.

1 allege facts sufficient to support any plaintiff’s standing to bring their new Civil Rights
2 Act claims.

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

5 Plaintiffs assert that their Civil Rights Act claim “concerns the different
6 requirements imposed on registered voters, based on no rationale *other than whether*
7 *they relocated across a county line* before registering to vote.” [Response at 5
8 (emphasis added)] A person who relocates from outside a given county, however, is *not*
9 *registered* to vote in that county. *E.g.*, A.R.S. § 16-120 (providing that an elector may
10 not vote “unless the elector has been registered to vote as a resident within the
11 boundaries or the proposed boundaries of the election district for which the election is
12 being conducted and the registration has been received by the county recorder or his
13 designee”). Registration in Arizona is conducted at the county level. Thus, the fact that
14 such person may have been registered in some other county does not confer registration
15 status on that person when they move to a different county.

16 Plaintiffs concede that the Civil Rights Act prohibits governments from applying
17 “standards, practices or procedures to determine whether an individual is qualified to
18 vote that are different from those standards, practices, or procedures applied *to others*
19 *within the same county* who have been found qualified to vote.” [Response at 4
20 (emphasis added)] All first-time registrants within any given county are required to
21 provide proof of citizenship. Accordingly, Plaintiffs’ claim based on supposedly
22 different treatment applied to individuals relocating among Arizona counties fails
23 because *similarly-situated* individuals (*i.e.*, non-registered individuals) within the same
24 county are indeed treated the same.

25 Plaintiffs’ assertion that Arizona violates § 1971(a)(2)(A) by “grandfathering in”
26 individuals registered at the time Proposition 200 became law is misplaced for a similar
27 reason. Individuals who have *not* registered in a particular county are not similarly
28 situated to those individuals who *were* registered at the time Arizona’s proof of
citizenship requirement took effect. Under Plaintiffs’ legal theory, there would be a
Civil Rights Act violation virtually any time a county changed any procedure affecting

1 the registration of any individual without requiring every other registered voter in that
2 county to re-register under the new procedure. Plaintiffs’ “grandfather clause” argument
3 lacks support in both the law and common sense.

4 At bottom, Plaintiffs’ claim is that Arizona may not lawfully require persons who
5 are registered in one county to register anew in another county after relocating to the
6 latter county. Not surprisingly, Plaintiffs cite no authority for such a proposition. If
7 Arizona may properly require individuals who are registered to vote in one county to
8 register in their new county of residence, then Arizona may also require those
9 individuals to provide proof of citizenship for such new registration. Indeed, that is the
10 procedure applied to *every* first-time registrant within any particular county.

11 **C. Arizona’s Acceptance of an Arizona License Issued After**
12 **October 1, 1996, as Proof of Citizenship Does Not Violate**
13 **the Civil Rights Act.**

14 Plaintiffs’ response that Proposition 200 “imposes different standards and
15 procedures” among individuals with Arizona licenses issued at different dates is
16 fundamentally flawed. [Response at 5-6] Arizona requires proof of citizenship from *all*
17 individuals registering to vote for the first time in a given county. That proof may be
18 provided in the form of a birth certificate, a valid Arizona driver’s license or
19 nonoperating license issued after October 1, 1996, a valid U.S. passport, a tribal treaty
20 card or similar tribal identification, a certificate of naturalization, or other methods of
21 proof that are established pursuant to federal immigration law. A.R.S. § 16-166(F).

22 Although a policy decision was made about the particular form of proof of one’s
23 citizenship for purposes of registering to vote, Proposition 200 does not “exempt”
24 anyone from the proof requirement, including those who have an Arizona license issued
25 after October 1, 1996. Instead, those individuals are subject to the same proof of
26 citizenship requirement as any other Arizona citizen desiring to register to vote. The
27 fact that some individuals have certain forms of proof and others do not does not convert
28

1 a non-discriminatory, evenly-applied requirement into a violation of the Civil Rights
2 Act. Indeed, Plaintiffs cite no authority whatever for such a proposition.³

3 Plaintiffs' theory would result in a new class of Civil Rights Act plaintiffs
4 anytime they alleged that they, unlike some individuals, were unable to comply with a
5 particular voting requirement. Arizona lawfully may require individuals to provide
6 specified proof of citizenship, however, before registering them to vote. *E.g., Gonzalez*,
7 485 F.3d at 1050-51 (noting that the National Voter Registration Act permits states to
8 require such identifying information, including proof of citizenship, as necessary to
9 enable election officials to confirm an applicant's eligibility to register to vote).

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

12 Plaintiffs do not dispute that the Voting Rights Act was enacted to eliminate
13 *racial* discrimination in the area of voting. *E.g., South Carolina v. Katzenbach*, 383 U.S.
14 301, 308 (1966) (“The Voting Rights Act was designed by Congress to banish the blight
15 of racial discrimination in voting”; noting that “Congress assumed the power to
16 prescribe these [statutory] remedies from § 2 of the Fifteenth Amendment, which
17 authorizes the National Legislature to effectuate by ‘appropriate’ measures the
18 constitutional prohibition against racial discrimination in voting”); *Farrakhan v.*
19 *Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003) (“Congress enacted the VRA for the
20 broad remedial purpose of ridding the country of racial discrimination in voting”)
21 (quoting *Katzenbach*, 383 U.S. at 315)); *see also* H.R. Rep. No. 914 at 2394 (1964),
22 *reprinted in* 1964 U.S.C.C.A.N. 1291, 2394 (explaining that Title I of the Voting Rights
23 Act of 1964, which amended § 1971(a), was intended to promote the right to vote to all
24 citizens “without discrimination as to race or color”).

24 ³ Plaintiffs do not argue that the decision to include Arizona licenses issued after
25 October 1, 1996, but not licenses issued before that date, as sufficient proof of
26 citizenship lacks a rational basis. It is unclear why that particular form of identification
27 was chosen as sufficient proof. The drafters of Proposition 200 may have chosen that
28 date, however, because it is in close proximity to the effective date of Arizona's
authorized presence law, which took effect August 1, 1996. *See* Att’y Gen. Op. I05-001
at 4 n.2. In any event, Plaintiffs do not assert that the license date specification was
targeted at any particular or identifiable group of eligible registrants.

1 Although some courts have allowed non-race-based claims under § 1971(a),
2 Plaintiffs are mistaken when they assert (at 7) that *Rokita* “stands alone” for the
3 proposition that a plaintiff must allege and prove racial discrimination to establish a
4 Civil Rights Act claim under § 1971. *E.g.*, *Brooks v. Nacrelli*, 331 F. Supp. 1350, 1352
5 (E.D. Pa. 1971) (rejecting a § 1971(b) claim and stating that “[b]ecause the purpose of
6 § 1971 is to prevent racial discrimination at the polls, the Courts have held that the
7 Section is applicable only where voter intimidation is racially motivated”); *O’Neal v.*
8 *Gresham*, 519 F.2d 803, 805 (4th Cir. 1975) (rejecting a § 1971(b) claim where the
9 plaintiff did not allege or prove racial discrimination because § 1971 applies only to
10 racially discriminatory conduct); *Gremillion v. Rinaudo*, 325 F. Supp. 375, 378 (E.D. La.
11 1971) (noting that “an examination of the jurisprudence in this area reveals that the
12 federal courts have protected voters from an actual or potential denial or abridgement of
13 their right to vote only where the basis for the infringement was racial discrimination”);
14 *Blank v. Heineman*, 771 F. Supp. 1013, 1015 (D. Neb. 1991) (noting that the “Voting
15 Rights Act governs racial discrimination” and dismissing a § 1971 claim because the
16 plaintiff did not allege that the defendants acted based on racial considerations).

17 Moreover, Plaintiffs’ authorities do not support their argument under the Civil
18 Rights Act because to the extent those cases did not involve race-based claims, they did
19 involve different treatment against some identifiable group (*e.g.*, women or students)
20 that resulted from the voting restriction at issue.⁴ Here, Plaintiffs do not allege that any

21 ⁴ *E.g.*, In *Frazier v. Callicutt*, the election officials applied different standards for
22 registering students to vote than those standards applied to non-students. 383 F. Supp.
23 15, 18-29 (N.D. Miss. 1974). In addition, the discriminatory registration restrictions in
24 practice applied only to members of a racial minority community. *Id.* at 20 (permitting a
25 § 1971(a)(2)(A) claim for injunctive relief “if for no other reason than the fact that all
26 discriminatees here have been shown to be members of a minority community, and
27 precisely the minority community which the Fifteenth Amendment and the Civil Rights
28 Act of 1964 were primarily designed to protect.”). The voting restriction challenged in
Ball v. Brown involved a registration restriction that facially applied to all voters, but in
practice discriminated against women based on a change in marital status. 450 F. Supp.
4, 10 (N.D. Ohio 1977). Although the court allowed the claim, the court noted that not
all courts have permitted non race-based claims under § 1971. *Id.* at 7 n.3. The claim
asserted (and rejected) in *Brier v. Luger*, 351 F. Supp. 313, 316 (M.D. Pa. 1972), was

1 procedure is applied differently to any particular group. They merely allege that any
2 individual who cannot comply with the proof of citizenship requirement is automatically
3 and unfairly discriminated against. If the very fact, by itself, that an individual cannot
4 comply with a particular voting restriction could give rise to a § 1971 claim, it is
5 difficult to conceive of many (or any) voting restrictions that could ever pass muster
6 under that statute.

7 Despite Plaintiffs' assertions to the contrary, the FAC does not allege any racial
8 discrimination caused either by Arizona's designation of a post October 1996 Arizona
9 license or by the county-based voter registration system. Plaintiffs merely allege that
10 Latinos "are less likely to possess the forms of identification required under Proposition
11 200." [FAC ¶ 75] The FAC does not allege that Latinos as a group are more likely to
12 possess Arizona licenses issued before October 1, 1996, and therefore are negatively
13 impacted by the specification of that date for purposes of the proof of citizenship
14 requirement.

15 Neither does the FAC allege that Latinos move in larger numbers between
16 counties and therefore must register and provide proof of citizenship more so than non-
17 Latinos. The FAC does not allege that any of the plaintiffs themselves was
18 discriminated against after moving from one Arizona county to another and
19 subsequently attempting to register to vote. The FAC simply does not offer *any* factual
20 basis (and Plaintiffs' response points to none) that connects Plaintiffs' new legal theories
21 with any racial discrimination on the part of the Defendants.

22 based on an allegation that election officials unfairly purged more Democrats than
23 Republicans from voter registration rolls. Plaintiffs' two remaining cases involved
24 alleged voting discrimination against college students. *E.g., Shivelhood v. Davis*, 336 F.
25 Supp. 1111, 1115 (D. Vt. 1971) (citing § 1971 and concluding that the government may
26 not apply different registration application questions to student applicants than those
27 applied to non-student applicants); *Sloane v. Smith*, 351 F. Supp. 1299, 1303-05 (M.D.
28 Pa. 1972) (enjoining election officials from applying different voter registration
standards to students than those applied to non-students). Although the *Sloane* court
based its jurisdiction in part on § 1971, the court did not even discuss or analyze that
section and instead based its decision on equal protection grounds.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 9th day of November, 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 the following business day, the 13th day of November,
7 2007, by U.S. Mail with Notice of Electronic Filing, on the following, who may not be
8 a registered participant of the ECF System:

9 The Honorable Roslyn O. Silver
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14 /s/ Erica Martinez

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