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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)

**REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT
DIRECTED TO THE ITCA
PLAINTIFFS BY DEFENDANT
ARIZONA SECRETARY OF STATE**

(Assigned to the Honorable
Roslyn O. Silver)

1 **Preliminary Statement**

2 Although ITCA plaintiffs submit more than 1,200 pages of attachments and
3 dozens of new “facts” in response to Defendant’s motion, the following material facts
4 remain undisputed and are dispositive of plaintiffs’ claims:

- 5 • After two years of litigation, ITCA plaintiffs collectively have identified
6 only one individual who cannot register to vote because she lacks proof of
7 citizenship. She is neither a member of a racial minority nor a plaintiff in
8 this lawsuit.
- 9 • Plaintiffs collectively have identified only one individual who allegedly
10 lacks voting identification. She is neither a member of a racial minority
11 nor a plaintiff in this lawsuit. Moreover, she could easily vote without
12 identification if she so chooses.
- 13 • Plaintiffs have offered no admissible evidence to support their claim that
14 large (but unknown) numbers of whites, Latinos or Native Americans
15 lack proof of citizenship altogether.
- 16 • There is no evidence to support plaintiffs’ claim that large (but unknown)
17 numbers of whites and Latinos lack voting identification altogether.
- 18 • There is no evidence that Latinos are less likely than non-Latinos to
19 possess proof of citizenship or voting identification.

20 According to plaintiffs, thousands of individuals cannot vote in Arizona because
21 of Prop 200’s identification requirements. Yet not a single one of those individuals is a
22 plaintiff in these consolidated lawsuits. One would reasonably conclude that after two
23 years of litigation, if there really were thousands of individuals who could not vote
24 because of Prop 200, at least *one* of them would be a plaintiff in this litigation. That is
25 especially so given the wide discovery that has been provided to plaintiffs regarding
26 each of those individuals. Plaintiffs have had every opportunity to show that Prop 200
27 actually abridges their rights. They have failed to make any such showing.

28 Election restrictions are not judged by whether the number of registrations or
votes cast subsequently increases or decreases. If that were the test, there would be no
end to litigation over the implementation of any restriction following which voter
turnout or registration numbers changed. The legal question is whether the challengers
have demonstrated a burden on them or classes of individuals imposed by the restriction.

Indeed, that is precisely what plaintiffs repeatedly represented to the Court that
they intended to do in the form of an expert survey of those individuals whose voter

1 registration forms were rejected or whose conditional provisional ballots were not
2 counted for failure to provide identification. Plaintiffs put fifteen counties to the burden
3 and expense of producing volumes of documents for the asserted purpose of conducting
4 expert surveys. Indeed, the Court even extended the case schedule so that plaintiffs
5 could complete their surveys.

6 When it came time to provide the results, however, plaintiffs' silence was
7 deafening. Plaintiffs have offered no explanation for their complete reversal of course,
8 but it is reasonable to conclude that their survey did not yield any results that would
9 support their claim that Prop 200 in fact creates any significant burden on Arizona's
10 voters. As explained below, neither plaintiffs' opposition nor their factual submission
11 presents any basis for denying summary judgment.

12 **I. SUMMARY JUDGMENT SHOULD BE GRANTED TO DEFENDANT ON
13 PLAINTIFFS' EQUAL PROTECTION CLAIM.**

14 **A. Under *Crawford*, Plaintiffs Must Demonstrate an Actual
15 Burden either on Plaintiffs' Voting Rights or the Rights of
16 Some Class of Voters.**

17 Plaintiffs are correct that the *Crawford* Court applied the Court's previously
18 established principles set out in *Burdick* in analyzing Indiana's voter identification law.
19 Plaintiffs do not adequately explain, however, why the outcome in this case should be
20 different from that in *Crawford*, which upheld the law. "Election laws will invariably
21 impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433
22 (1992). *Burdick* rejected the notion that voting regulations are automatically subjected
23 to strict scrutiny because they implicate a fundamental right. *Id.* The Court made it
24 clear that the relevant showing is "the character and magnitude of the asserted injury" to
25 voters' rights. *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).
26 The Court further held that "when a state election law provision imposes only
27 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment
28 rights of voters, 'the State's important regulatory interests are generally sufficient to
justify' the restrictions." *Id.* (quoting *Anderson*, 460 U.S. at 788).

1 In the context of an election restriction that relates to qualification to vote,
2 *Crawford* clarifies the appropriate analysis in two important ways. First, *Crawford*
3 recognizes that states indeed have important regulatory interests in detecting and
4 deterring voter fraud and in ensuring public confidence in the electoral system. The
5 Court also recognized that such interests are furthered by reasonable and
6 nondiscriminatory restrictions relating to voter qualification. *Crawford v. Marion*
7 *County Election Bd.*, 128 S. Ct. 1610, 1617 (2008). Although plaintiffs continue to
8 minimize that aspect of the decision, *Crawford* expressly held that states do not have to
9 experience *any* voter fraud to implement measures such as an identification requirement
10 to achieve those important interests. *Id.* at 1619. Nothing in the *Crawford* decision
11 supports the notion that states are required to show such a history if there are one or two
individuals shown to lack identification.

12 Second, *Crawford* confirms that challengers of such identification requirements
13 must provide evidence of—not speculation or assumptions about—the magnitude of the
14 burden imposed on at least some class of voters. *Id.* at 1622. In *Crawford*, the district
15 court had found that as many as 43,000 individuals in the state lacked a state-issued
16 driver’s license or identification card at the time the identification requirement was
17 implemented. *Id.* at 1614-15. Under Indiana’s law, individuals need a government-
18 issued photo identification. Although Indiana issues such identification at no charge,
19 individuals must present both a “primary” document and two other types of
20 identification documents to obtain the voting identification. *Id.* at 1621 n.17; Ind.
21 Admin. Code § 7-4-2(c)-(e). A primary document includes a birth certificate, certificate
22 of naturalization, U.S. passport, and military identification—documents nearly identical
23 to Arizona’s forms of proof of citizenship. The Court acknowledged that individuals
24 have to pay a fee to obtain a copy of their birth certificate. *Id.* at 1621 n.17.

25 The Court specifically noted the absence, however, of any record evidence to
26 establish the distribution of voters who actually lacked photo identification. *Id.* at 1623
27 n.20. The Court stated:
28

1 While it is true that obtaining a birth certificate carries with it a financial
2 cost, the record does not provide even a rough estimate of how many
3 indigent voters lack copies of their birth certificates. Supposition based on
4 extensive Internet research is not an adequate substitute for admissible
evidence subject to cross-examination in constitutional adjudication.

5 *Id.*

6 The fact that some plaintiffs lacked a birth certificate and testified that they were
7 unable to obtain it was not sufficient to establish that the identification requirement was
8 unconstitutionally burdensome. “When we consider only the statute’s broad application
9 to all Indiana voters we conclude that it ‘imposes only a limited burden on voters’
10 rights.’” *Id.* at 1623 (quoting *Burdick*, 504 U.S. at 439). Thus, plaintiffs are mistaken
11 when they assert (at 2) that if Arizona’s identification requirements have “made voting
12 impossible” for some unknown number of individuals who are not before the Court, the
burden is severe as a matter of law.

13 That is not what *Crawford* says or holds. There is no dispute about the facts
14 before the Court here. The dispute is about the correct legal standard and the legal
15 conclusion when the standard is applied to the facts. That is a question of law that
16 should be decided by the Court.

17 **B. Summary Judgment Is Appropriate Because There Is No Dispute**
18 **About the Facts Pertaining to a Showing of Burden and Plaintiffs’**
Evidence Does Not Meet the Required Standard in *Crawford*.

19 With a few immaterial exceptions, plaintiffs do not dispute Defendant’s statement
20 of facts. They do not dispute that when they were asked to respond under oath to
21 interrogatories served by Defendant, only one plaintiff identified any individual who
22 lacks proof of citizenship or voting identification. That one plaintiff, Arizona Advocacy
23 Network, identified only one individual who allegedly lacks such proof or identification.
24 That individual (Eva Steele) is not a plaintiff, is not a member of a racial minority, and is
25 registered to vote in Maricopa County. Plaintiffs subsequently identified only one other
26 individual, Shirley Preiss, who purportedly lacks proof of citizenship. Ms. Preiss is not a
27 plaintiff in this litigation and is not a member of a racial minority.¹

28 ¹ Plaintiffs dispute that Eva Steele and Shirley Preiss were the only individuals

1 Plaintiffs did not identify either the number or identities of any other individuals
2 lacking proof of citizenship or voting identification. Plaintiffs do not dispute that in
3 their opposition. In plaintiffs' responsive factual submission, they interject numerous
4 assertions about the percentages of individuals who lack certain forms of proof of
5 citizenship or certain forms of voting identification. In addition, they cite to a hearsay
6 report purporting to conclude that a certain number of individuals lack proof of
7 citizenship. That report is inadmissible and is the subject of Defendant's motion to
8 strike, filed herewith, but it is insufficient for several reasons. First, the report on its face
9 states that its author did not know how many individuals lack a birth certificate. Second,
10 the document on its face lacks any explanation about whether any of those individuals
11 who supposedly lack proof of citizenship could obtain it. Third, that same expert
12 testified before the Court during the preliminary injunction hearings and the Court
13 necessarily concluded that the testimony was insufficient to warrant a preliminary
injunction.

14 Plaintiffs have offered no admissible evidence of the number of individuals who
15 lack proof of citizenship *altogether* or who lack voting identification *altogether* or the
16 number of individuals who would be unable to obtain such proof or identification.
17 Moreover, with regard to voting identification, plaintiffs do not dispute that any and
18 every Arizona elector may vote early in person or by mail if they so choose. The fact
19 that some groups vote by mail "at much lower rates" than others, even if it were true,
20 does not show that any individual in Arizona cannot vote early if he or she chooses.

21
22 identified by plaintiffs as persons lacking proof of citizenship or voting identification.
23 Defendant's statement of facts (7, 10) on that point, however, is supported by plaintiffs'
24 own verified interrogatory responses. [See dkt. 791, SOF 7, 10 (and citations therein to
25 the record)] Although plaintiffs submitted affidavits of four other individuals in
26 connection with the 2006 preliminary injunction proceedings, plaintiffs' failure to
27 include those individuals in their 2007 interrogatory responses can only lead to the
28 conclusion that plaintiffs no longer rely on those facts for their claim or that the
circumstances regarding those individuals have since changed. In any event, the
affidavits of those individuals were an insufficient basis upon which to enter a
preliminary injunction. Those affidavits therefore are necessarily insufficient to support
entry of a permanent injunction.

1 Because plaintiffs have no evidence of any actual burden to any voters other than
2 Mses. Steele and Preiss, plaintiffs urge the Court to deny summary judgment based on
3 the numbers of rejected voter registration forms and uncounted conditional provisional
4 ballots. There is no dispute about those numbers, however. Again, the relevant question
5 is what does that evidence *mean* as a legal matter? Under plaintiffs’ argument, the very
6 fact of rejected voter registration forms or uncounted conditional provisional ballots is a
7 sufficient basis upon which to find that the proof of citizenship and voting identification
8 requirements are an excessive burden, though plaintiffs offer no guidance about the
9 particular number of rejected forms or uncounted ballots that would or would not
10 establish such a burden.

11 In any event, the conclusion plaintiffs ask the Court to draw requires the Court to
12 assume—without any evidentiary basis—that *all* of those individuals lack proof of
13 citizenship or voting identification. That assumption, in turn, requires the Court to
14 assume that all of those individuals who lack such proof of citizenship or voting
15 identification are unable to obtain it. The Court must also assume that each and every
16 person whose registration form was rejected or whose ballot was rejected was in fact
17 eligible to register as a U.S. citizen or to vote as a qualified elector. Making such
18 assumptions, however, is directly contrary to the holding of *Crawford*, which expressly
19 requires evidence—not speculation—about the number of qualified individuals who lack
20 identification and cannot get it.² 128 S. Ct. at 1623 n.20 (“Supposition based on
21 extensive Internet research is not an adequate substitute for admissible evidence subject
22 to cross-examination in constitutional adjudication.”).

23
24 ² Plaintiffs’ argument that they are asserting an as-applied challenge in addition to a
25 facial challenge is irrelevant to the summary judgment analysis in light of the record
26 before the Court. Plaintiffs do not dispute that none of the individuals identified as
27 lacking proof of citizenship or voting identification is before the Court as a plaintiff. As-
28 applied challenges are claims of unconstitutional action with regard to parties before the
Court—not to some third party individuals who are not plaintiffs. *E.g., U.S. v. Kafka*,
222 F.3d 1129, 1130 n.1 (9th Cir. 2000) (noting that as-applied challenges contend that a
law is unconstitutional as applied to the litigant’s activity).

1 **C. Plaintiffs’ Arguments About Voter Registration Efforts and**
2 **Rep. Gallardo’s “Harm” Do Not Establish Any Genuine Issue of**
3 **Material Fact.**

4 Because they cannot show any excessive burden on the voting rights of any class
5 of voters or any plaintiff, plaintiffs assert (at 5-6) that the proof of citizenship and voting
6 identification requirements harm some other, unspecified right of plaintiff Gallardo and
7 the plaintiff organizations. Rep. Gallardo, however, admitted under oath that he could
8 identify no supporters who lack proof of citizenship or voting identification. [SOF 6]
9 As discussed above, neither he nor the other plaintiffs have offered any evidence of who
10 or how many lack such identification. [SOF 7, 10] Rep. Gallardo was reelected to his
11 House of Representatives position in 2006—after the implementation of Prop 200. [See
12 <http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf>, p.8] He has provided
13 no evidence that he has been harmed in any way by the proof of citizenship or voting
14 identification requirements.

15 Neither have the plaintiff organizations established any basis for striking down a
16 state law because their registration efforts purportedly have become more difficult.
17 Plaintiffs offer no legal authority for such a contention. Prop 200 does not impose any
18 First Amendment restrictions whatever on organizations to register individuals to vote.
19 The proof of citizenship requirement is “generally applicable, even-handed, politically
20 neutral,” and protects “the reliability and integrity of the election process.” *See Rubin v.*
21 *City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002) (upholding an election
22 restriction on candidate ballot designations because they were neutral, non-
23 discriminatory restrictions that furthered the state’s electoral regulatory interests). As
24 such, plaintiffs have established no unconstitutional restriction on their rights.³

24 ³ Plaintiffs submitted 74 additional facts in their opposition. None of those
25 representations of fact, however, provides any basis for denying summary judgment.
26 Facts 35-53 address Defendant’s showing of voter fraud, which is immaterial under
27 *Crawford*. Facts 54-58 and 67-71 address social and historical discrimination factors,
28 which (as explained below) are immaterial because there is no evidence to show that
such discrimination has resulted in Latinos or Native Americans being less likely to
possess proof of citizenship or voting identification. Facts 2-3, 5-6, 10, and 17 merely
recite the numbers of rejected registration forms and uncounted conditional provisional

1 **II. SUMMARY JUDGMENT SHOULD BE GRANTED TO DEFENDANT ON**
2 **PLAINTIFFS' SECTION 2 CLAIM.**

3 **A. Plaintiffs Concede They Have Not Offered Any Evidence of**
4 **a Discriminatory Impact on Native Americans with Regard**
5 **to Voter Registration.**

6 Nowhere in plaintiffs' factual submission or brief do they assert, much less offer
7 evidence, that there is any disparate impact on Native American voter registrations since
8 the implementation of the proof of citizenship requirement. Accordingly, summary
9 judgment should be entered on plaintiffs' § 2 claim challenging the proof of citizenship
10 requirement as pertaining to Native Americans. *E.g., Smith v. Salt River Project Agric.*
11 *Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) ("Only a voting practice
12 that results in discrimination gives rise to § 2 liability."⁴)

13
14 ballots. They are immaterial because there is no evidence of the number of those
15 individuals who lack proof of citizenship or identification and cannot obtain it.
16 Similarly, facts 8, 10-16, 59-66, and 74 merely recite plaintiffs' assertions about the
17 percentage of persons who lack individual forms of proof of citizenship or voting
18 identification and the fees for such documents. They are immaterial because there is no
19 evidence about the number of individuals who lack proof or identification altogether.
20 Although fact 9 purports to provide such evidence, that fact is based on inadmissible
21 hearsay and, as explained in section I(B), it does not provide any information about the
22 number of individuals who could not obtain such proof. Facts 22-34 are plaintiffs'
23 assertions about early voting and the types of identification provided by the counties.
24 Those facts are immaterial in light of the absence of any evidence of the number of
25 individuals lacking proof or identification. Facts 2, 4, 7, 20-21, 38, 54-55, and 69-73 are
26 based on inadmissible evidence and are the subject of Defendant's motion to strike.
27 Facts 20-21 assert that registration organizations must work harder to register
28 individuals because of the proof of citizenship requirement. Those "facts" are
immaterial, however, for the reasons explained in Section I(C) above. Facts 18-19
pertain to those few individuals who previously provided affidavits in the preliminary
injunction proceedings. For the reasons discussed in the text, those facts do not defeat
summary judgment. Finally, fact 72 is based on inadmissible evidence but even if the
evidence was admissible the report on which fact 72 is based addresses the voting
identification requirement with regard only to *Navajo* Native Americans, who have since
dismissed their lawsuit.

⁴ The Native American plaintiffs in this case previously dismissed their claims based on
the voting identification requirement. [See dkt. 776]

1 **B. There Is No Dispute About the Material Facts Regarding the**
2 **Causation Element of Plaintiffs’ Section 2 Claim.**

3 Although plaintiffs would like the Court to delve into factual issues regarding a
4 § 2 “totality of the circumstances” inquiry, such an extensive inquiry is neither
5 warranted nor appropriate under the controlling authorities in light of the undisputed
6 record before the Court. Thus, for purposes of summary judgment any disagreement
7 about historical discrimination or racially polarized voting is not material. Again, the
8 relevant question before the Court is about the correct legal standard to be applied to the
9 undisputed evidence.

10 Under plaintiffs’ argument, the Court should rule for plaintiffs at trial on their § 2
11 claim if they prove a disparate impact on Latinos and establish the existence of the § 2
12 “totality of the circumstances” factors without any regard to whether those factors have
13 been shown to cause Latinos to lack proof of citizenship or voting identification more so
14 than non-Latinos. That is not the correct legal standard, however, under Ninth Circuit
15 authorities.

16 Although the challenged electoral requirement does not have to be the *sole* cause
17 of voting discrimination, the cases hold that there must be a showing that the electoral
18 requirement itself interacts with the external discrimination factors to result in voting
19 discrimination. *E.g., Smith*, 109 F.3d at 595 (“plaintiffs must show a causal connection
20 *between the challenged voting practice and a prohibited discriminatory result*”) (alteration omitted) (emphasis added); *Farrakhan v. Washington*, 338 F.3d 1009, 1017
21 (9th Cir. 2003) (the challenged voting requirement must “interact[] with social and
22 historical conditions to cause an inequality” in voting opportunities) (quoting *Thornburg*
23 *v. Gingles*, 478 U.S. 30, 47 (1986)).

24 The *Farrakhan* court explained how that causation principle was appropriately
25 applied in the *Smith* case: “Because *the land ownership rates did not reflect racial*
26 *discrimination*, we concluded that the land ownership requirement did not violate
27 Section 2.” *Farrakhan*, 338 F.3d at 1017-18 (emphasis added). Thus, *Farrakhan*
28 demonstrates that the relevant legal inquiry is whether there is any evidence to show that

1 the failure to meet the electoral requirement (*e.g.*, the non-ownership of real property) is
2 the result of historical or other discrimination.

3 *Farrakhan's* description of the decision in *Salas v. S.W. Tex. Junior Coll. Dist.*,
4 964 F.2d 1542 (5th Cir. 1992), further demonstrates the point. *Farrakhan* noted that in
5 *Salas*, there was “no credible evidence that the effects of prior discrimination—including
6 unemployment, illiteracy, and low income—had contributed to the lower voter turnout
7 that caused Hispanics’ lack of electoral success.” Instead, the *Salas* court “held that the
8 real cause of this lack of success was not the challenged voting practice.” *Farrakhan*,
9 338 F.3d at 1018 (citing *Salas*, 964 F.2d at 1555-56).⁵

10 Although plaintiffs might introduce evidence on one or even all of the § 2 factors,
11 and although there may be some dispute about that evidence, plaintiffs do not dispute
12 that they have submitted no evidence that any historical or other racial discrimination
13 has resulted in Latinos being less likely to possess proof of citizenship or voting
14 identification. At some point, plaintiffs must prove that social discrimination has
15 prevented Latinos, more than non-Latinos, from obtaining or possessing proof of
16 citizenship or voting identification. Plaintiffs have not offered any such evidence in
17 response to Defendant’s motion. Accordingly, the Court should enter judgment on
18 plaintiffs’ § 2 claim.

19 **C. Plaintiffs Have Offered No Admissible Evidence of Disparate
20 Impact on Latino Voter Registration or Voter Turnout Caused
21 by Prop 200’s Voting Requirements.**

22 Plaintiffs’ entire argument regarding a disparate impact on Latino registration and
23 turnout is based on inadmissible hearsay evidence. Plaintiffs attached to their factual
24 submission what purport to be numerous unsworn reports of Gonzalez plaintiff experts
25 Louis Lanier and Rodolfo Espino. Each of those reports, however, is hearsay and
26 therefore inadmissible for purposes of summary judgment. *E.g.*, *Orr v. Bank of*

27 ⁵ *Miss. State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991),
28 does not support plaintiffs’ argument. Although *Mabus* affirmed a finding of a § 2
violation where there was a disparity in voter registration rates, the plaintiffs had shown
a connection between the registration restrictions at issue and the inability of African
Americans to register *because of* those restrictions. *See* 932 F.2d at 403. Plaintiffs in
this case have made no such showing.

1 *America*, 285 F.3d 764, 773 (9th Cir. 2002) (“A trial court can only consider admissible
2 evidence when ruling on a motion for summary judgment.”). Accordingly, those
3 submissions, as well as other inadmissible materials in plaintiffs’ submission, are the
4 subject of a separate motion to strike, which is filed by Defendant herewith.

5 To the extent the Court considers the opinions of Drs. Lanier and Espino,
6 Defendant refers the Court to Defendant’s motion for summary judgment directed to the
7 Gonzalez plaintiffs (dkt. 799) which fully addresses the opinions of those experts and
8 explains that their own data demonstrates that there has been no disparate impact on
9 Latino individuals in Arizona with regard to registration or voter turnout.

10 **Relief Requested**

11 For the reasons stated in Defendant’s motion and this reply, the Court should
12 enter judgment in favor of Defendant Arizona Secretary of State Janice Brewer on all
13 claims asserted by plaintiffs Hopi Tribe, Inter Tribal Council of Arizona, Inc., League of
14 Women Voters of Arizona, League of United Latin American Citizens Arizona, Arizona
15 Advocacy Network, and Rep. Steve M. Gallardo, in Case no. CV 06-1362.

16 RESPECTFULLY SUBMITTED this 20th day of June, 2008.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 20th day of June, 2008, I electronically transmitted
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4 transmittal of a Notice of Electronic Filing to the following ECF registrants:
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