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12 IN THE UNITED STATES DISTRICT COURT

13 FOR THE DISTRICT OF ARIZONA

14 Maria M. Gonzalez, et al.,

15 Plaintiffs,

16 v.

17 State of Arizona, et al.,

18 Defendants.

NO. CV06-1268-PHX-ROS (LEAD)
NO. CV06-1362-PCT-JAT
NO. CV06-1575-PHX-ROS
(Consolidated)

**TWELVE COUNTY
DEFENDANTS' RESPONSE TO
GONZALEZ PLAINTIFFS'
POST-TRIAL MEMORANDUM**

(Assigned to the Honorable
Roslyn O. Silver)

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Defendants Maricopa County Recorder Helen Purcell and Maricopa County Elections Director Karen Osborne; Apache County Recorder LeNora Johnson and Apache County Elections Director Penny L. Pew; Cochise County Recorder Christine Rhodes and Cochise County Elections Director Thomas Schelling; Gila County Recorder Linda Haught Ortega and Gila County Elections Director Dixie Mundy; Graham County Recorder Wendy John and Graham County Elections Director Judy Dickerson; Greenlee County Recorder Berta Manuz and Greenlee County Elections Director Yvonne Pearson; La Paz County Recorder Shelly Baker and La Paz County Elections Director Donna Hale; Mohave County Recorder Joan McCall and Mohave County Elections Director Allen Tempert; Pima County Recorder F. Ann Rodriguez and Pima County Elections Director Brad R. Nelson; Santa Cruz County Recorder Suzie Sainz and Santa Cruz County Elections Director Melinda Meek; Yavapai County Recorder Ana Wayman-Trujillo and Yavapai County Elections Director Lynn A. Constabile; and Yuma County Recorder Susan Hightower Marler and Yuma County Elections Director Patti Madrill (collectively “County Defendants”), by and through undersigned counsel, hereby Responds to Gonzalez Plaintiffs’ Post-Trial Memorandum.

These County Defendants have received and reviewed the July 30th Response filed by Defendants the State of Arizona and the Secretary of State (“State Defendant”). These County Defendants join in the State’s argument and in addition submit the following. The attached Memorandum of Points and Authorities is incorporated herein by reference.

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RESPECTFULLY SUBMITTED this 30th day of July, 2008.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The law enacted by Proposition 200 is a reasonable, non-discriminatory mechanism by which Arizona is able to secure its elections against voter fraud and maintain public confidence in the electoral system. Notably, Plaintiffs do not dispute that these are compelling interests that the State has a duty to advance. Plaintiffs' only allegation in this suit is that Arizona's voting laws place an undue burden on voters and that the burden falls disproportionately onto Latinos and naturalized citizens. As has been shown, in reality the law places little to no burden on voters. In fact, the vast majority of Arizona's voting age citizens, approximately 87.4%, can use their driver license or nonoperator ID to comply with both the proof of citizenship and identification at the polls requirements. [Sissons dep. 77:15-21 (testifying that "of the calculated number of voting age citizens eligible to register today, about 12.6 percent lack a

1 driver's license or nonoperator identification card"')] Even more detrimental for the
2 Gonzalez Plaintiffs' case is the fact that they have not produced a single Latino or
3 naturalized citizen who is unable to register or vote because of the laws enacted by
4 Proposition 200.

5 Nor have Plaintiffs produced droves of eligible individuals who are unable to
6 register or vote at the polls due to Arizona's law. Gonzalez Plaintiffs have produced the
7 untested declarations of only two individuals who allege that as a result of poll worker
8 error their ballots were improperly uncounted. As the State has correctly pointed out,
9 more than **3 million ballots** were cast in the last three statewide elections. Thus, even if
10 the declarations are taken as true, Plaintiffs have merely shown that **two** of three million
11 ballots improperly went uncounted. Collectively, Plaintiffs have been able to produce
12 evidence of only a single individual who alleges that she is unable to register to vote.
13 None of these three individuals are plaintiffs in this case. None of these three
14 individuals are Latino. And none of these three individuals are naturalized citizens.

15 No one claims that every election is perfect. However, Arizona has gone to great
16 lengths to ensure that all of its election laws are reasonable requirements and are applied
17 in a non-discriminatory fashion. The evidence presented at trial tells the tale of a system
18 that has been soundly implemented to the detriment of very few people. In order to
19 prevail on their Voting Rights Act claims or Equal Protection claims Gonzalez Plaintiffs
20 must prove that Latinos or naturalized citizens have been disproportionately burdened or
21 impacted by Arizona's law. They have been utterly unable to do so.

22 Furthermore, in order to prevail on their Civil Rights Act claims, Gonzalez
Plaintiffs must prove that they were *intentionally* discriminated against based on race or
origin. There has clearly been no intentional discrimination in the implementation of the

1 laws enacted by Proposition 200. In fact, not a single Plaintiff is unable to register or
2 vote in Arizona’s elections. Nor, have Plaintiffs been able to produce any Latino or
3 naturalized citizen who claims to be unable to comply with Arizona’s laws. The sole
4 “support” for these claims are attorney-created hypotheticals. Despite doomsday
5 predictions that if all of the elements align just right, there will be a catastrophic effect
6 on Latino registration and voting, there is no real world evidence to support these claims.
7 Not one Latino or naturalized citizen has testified that they are unable to register or vote
8 based on the law enacted by Proposition 200. Thus, not only have Plaintiffs failed to
9 prove intentional discrimination, but they have failed to prove disparate impact as well.
10 Given the evidence presently before the Court, Plaintiffs cannot prevail on any of their
11 remaining claims.¹

11 **II. PROPOSITION 200 DOES NOT IMPOSE HIGHER BURDENS FOR NATURALIZED**
12 **CITIZENS**

13 In the face of a dearth of concrete evidence of discrimination or disparate impact,
14 Plaintiffs have resorted to loose correlations and speculation. Based on nothing more
15 than sheer conjecture, Plaintiffs have repeated the mantra that “thousands” of people are
16 being prevented from voting in Arizona. This assertion has simply not been supported
17 by any evidence at trial. Plaintiffs did not present any evidence that naturalized citizens
18 have been disparately impacted by the laws enacted by Proposition 200. In the absence

19
20 ¹ Even Plaintiffs seem to concede that they have not met their burden on their First Amendment claims.
21 Despite filing a twenty-two page brief, Plaintiffs included exactly one sentence about the organizational
22 plaintiffs, reiterating their bare allegations that the passage of Proposition 200 has somehow “forced”
them to spend additional resources. It has been shown, however, that these Plaintiffs were not forced to
do anything, that they have shown no evidence that they have spent any funds that would not have been
spent in the absence of Proposition 200, and that they are continuing to register voters and conduct the
other business of their organizations.

1 of expert testimony or other admissible evidence to support their claims, Plaintiffs
2 instead focus on red herring arguments designed to create the illusion of discrimination.

3 **a. APPLICANTS USING NATURALIZATION CERTIFICATES ARE NOT**
4 **DISCRIMINATED AGAINST**

5 Plaintiffs have incorrectly asserted that an applicant using their naturalization
6 documents to prove citizenship are discriminated against in three ways: (1) that their
7 documents cannot be presented by photocopy to the County Recorders; (2) that
8 naturalization certificates are not taken at face value, like birth certificates or tribal
9 documents; and (3) that “only naturalized citizens are subjected to third party
10 verification.” [Dkt. 1027 at 4.] Despite ample evidence in the record to the contrary,
11 Plaintiffs continue to assert this misinformation. In reality, naturalization documentation
12 – whether it is in the form of the naturalization certificate or the “A number” – is simply
13 one more **option** that individuals can utilize when registering to vote.

14 Certificates of Naturalization do say that they should not be photocopied. So do
15 birth certificates. [07-31-06 K. Osborne dep. 39:1-5.] However, the Counties allow
16 people who choose to photocopy their own documents to present those legible
17 photocopies as proof of citizenship. [*Id.* at 23-25.] Mr. Kanefield acknowledged the
18 County Recorders’ independent statutory duty to register voters and confirmed that they
19 are not violating any law or procedure by accepting photocopies of the documents. [Tr.
20 755:23-756:9.]

21 When an original Certificate of Naturalization or a photocopy is presented to the
22 Counties as proof of citizenship, the County need not verify the “A number.” [07-31-06
K. Osborne dep. 37:11-15; 35:9-19.] The presentation of a Certificate of Naturalization
can be likened to the presentation of a birth certificate for individuals who were born in
the United States. In both cases the person either has to bring the original to the

1 Recorder's Office or send a photocopy, and in both cases, documents that reasonably
2 appear to be authentic are accepted on their face and no further verification is conducted.
3 [01-14-08 K. Osborne dep. 50:10-21; 07-31-06 K. Osborne dep. 35:9-19.] Since citizens
4 born in the United States will not have naturalization certificates and those who have
5 been naturalized will not have birth certificates that prove U.S. citizenship, it only makes
6 sense to permit each to provide the document that he has to prove his citizenship.
7 Contrived attacks on this common-sense policy are not convincing and do not advance
8 any of the claims being made by Plaintiffs.

9 Finally Plaintiffs claim that "only naturalized citizens are subjected to third party
10 verification." Dkt. 1027 at 4. This is patently untrue. Naturalized citizens who choose
11 to provide only their "A number" as proof of citizenship are registered after that number
12 has been verified with USCIS. This is no different than U.S. born citizens, or
13 naturalized citizens for that matter, who choose only to provide their Arizona driver
14 license number as proof of citizenship. Those applicants would be registered after the
15 number is verified through the Arizona MVD. This is not a function of discrimination –
16 it is simply a good faith security measure designed to ensure that applicants using
17 fictitious numbers are not being improperly added to the voter rolls. As Karen Osborne
18 has testified, such fictitious registration is a real problem facing election officials in
19 Arizona and the verification process, both through MVD and USCIS, assists in reducing
20 the number of fraudulent applications being processed. [01-14-08 K. Osborne dep. 28:
21 9-30: 1; 69: 6-70:24.]

22 None of these diversionary tactics can detract from the fact that Plaintiffs have
not presented any evidence that there has been a disparate impact on naturalized citizens.
The two naturalized citizens that testified at trial are able to register to vote and vote at

1 the polls on election day. Mrs. Gonzalez is in fact registered to vote in Yuma County.
2 Mr. Gonzalez has chosen to remain unregistered to vote despite the fact that he could
3 provide: (1) his “A number”; (2) a copy of his naturalization certificate; or (3) a copy of
4 his U.S. passport. [Ex. 697; Tr. 230:14-16; Tr. 232:4-5; ex. 709; Tr. 232:12-14;
5 232:21-25]

b. THE COUNTIES USE THE FEDERAL SAVE PROGRAM

6 Plaintiffs have claimed without support that some Arizona counties are unwilling
7 to pay the fees connected to having SAVE accounts. There is utterly no basis in the
8 record for that assertion. Rather, the evidence shows that those counties that do not
9 experience a high volume of applicants using their “A number” as proof of citizenship
10 have entered into an inter-governmental agreement with Maricopa County to perform
11 verifications through SAVE. [01-9-08 A. Wayman-Trujillo dep. 57:18-58:12; 01-14-08
12 J. Altaha dep. 30:17-31:6.] Plaintiffs have insinuated that this legitimate and practical
13 agreement between the counties is somehow harmful to naturalized citizens. [Dkt. 1027
14 at 7] There is no support for the implication that the counties are somehow being
15 careless or cavalier with applicants’ personal information. To the contrary, Mr. Altaha
16 testified about the fact that Maricopa County takes privacy very seriously and that he
17 and his staff are well aware of their duty to hold “A numbers” in confidence. [01-14-08
18 J. Altaha dep. 26:8-28:4.] Regardless of who is verifying an applicant’s information, the
19 use of the “A number” provides a convenient option for naturalized citizens attempting
20 to register, much like providing a driver license number. Thus, these arguments do not
21 support Plaintiffs’ claims that naturalized citizens have been unduly burdened or
22 disparately impacted.

1 **c. THE COUNTIES USE THE NUMBER THAT CAN BE VERIFIED**

2 Plaintiffs continue to argue that the State does not have authority to request an
3 applicant’s “A number” during the registration process. This argument is as unavailing
4 now as it has been for the last two years. The simple fact is that Proposition 200, like
5 many other laws, contained an ambiguous term – “certificate of naturalization number.”
6 A.R.S. § 16-166(F)(4), requires satisfactory evidence of United States citizenship and
7 allows the “presentation to the county recorder of the applicant's United States
8 naturalization documents or the number of the certificate of naturalization.” There are
9 two different series of numbers in the upper right hand corner of a certificate of
10 naturalization. [Tr. Ex. 697] The first set of numbers is preceded only by the
11 abbreviation for the word number, “No.” The second set of numbers is identified as the
12 “INS Registration No.” and begins with the letter A.

13 This creates an ambiguity that must be resolved by elections officials. A.R.S. § 1-
14 221(B) (“Statutes shall be liberally construed to effect their objects and to promote
15 justice.”) It is clear from the legislative history that the drafters of the term meant for the
16 State and counties to request a number that could be verified with the federal
17 government. [Tr. Ex. 1] As such, rather than taking the rigid approach that arbitrarily
18 designates only one of the two sets of numbers as the “number of the certificate of
19 naturalization,” the county election officials interpret the statute to mean that only the set
20 of numbers that actually verifies the registrant’s citizenship is required. This reasonable
21 resolution to the law’s ambiguity has been memorialized in the State’s Procedures
22 Manual, which has the operation and effect of law.

 Plaintiffs’ new twist on this argument is that the State should not be requesting
this information because every Naturalization Certificate does not list an “A number.”
[Dkt. 1027 at 11] This is completely irrelevant. Plaintiffs do not allege that each
naturalized citizen does not have a Certificate of Naturalization. Nor do they allege that
each naturalized citizen does not have and “A number” that was assigned to them. They
merely allege that for some people the number may not appear on the certificate. Since

1 either the Naturalization Certificate *or* the “A number” are alone sufficient to prove
2 citizenship, they need not appear together and Plaintiffs new argument is futile.

3 With all of these arguments failing, Plaintiffs try once again to create the illusion
4 of discrimination where none exists by alleging that it is demeaning and confusing to ask
5 for a naturalized citizens “A number.” *Id.* This argument is preposterous, however,
6 when one considers the process that is being engaged. Arizona is attempting to verify
7 citizenship. For naturalized citizens, part of the process of becoming a U.S. citizen
8 involves being assigned an “A number” and indeed this is the only number by which the
9 federal government can provide verification of citizenship status. Therefore, it is no
10 more demeaning or confusing to ask a naturalized citizen for his “A number” than it
11 would be to ask a married woman for her maiden name. Neither piece of information
12 would be in current use for the individual, but both are vital pieces of the puzzle when
13 establishing citizenship or identity.

14 The reality is simple. No evidence has been presented at all to show that there is
15 a disparate impact on naturalized citizens as a result of the laws enacted by Proposition
16 200. Plaintiffs presented the testimony of five experts live at trial and there is deposition
17 testimony from a sixth Plaintiffs’ expert in the record. However, not one of these
18 experts testified about a disparate impact on naturalized citizens. Indeed, it is difficult to
19 see how a disparate impact could exist for naturalized citizens, since they have multiple
20 options to choose from when registering to vote. They can bring their Naturalization
21 Certificate to the Recorder’s office. They can copy their certificate and send it in with
22 their registration form. They can write their “A number” on their registration form.
They may be able to use their driver license or non-operating ID number, like Mrs.
Gonzalez did. They may be able to use their U.S. passport, as Mr. Gonzalez could. All
in all, naturalized citizens have even more options when proving citizenship than many
people born in the United States. It is insulting to claim that these people, who have
worked hard and have taken the time to become citizens of the United States, are unable
to comply with the straightforward provisions of the laws enacted by Proposition 200.
Furthermore, the reality is that there is no evidence to support such a gross

1 generalization. Thus, Plaintiffs cannot prevail on their claims as they relate to
2 naturalized citizens.

3 **III. PROPOSITION 200 DOES NOT PREVENT LATINOS OR NATURALIZED CITIZENS**
4 **FROM VOTING**

5 Plaintiffs have offered **no** evidence to show how many individuals, otherwise
6 eligible to vote, do not have and cannot get proof of citizenship and proof of identity.
7 The little credible evidence that was presented by Plaintiffs' experts actually shows that
8 Hispanic registration and voter turn out has **not** been disproportionately affected by the
9 law enacted by Proposition 200.

10 **Dr. Lanier**

11 Even if Plaintiffs experts are to be believed, Dr. Lanier's testimony is essentially
12 that there is only a 0.1% difference between what the Hispanic representation in the
13 Arizona electorate would be if Proposition 200 had not gone into effect and what it is
14 now. His prediction was that, if not for Proposition 200, Hispanics would make up
15 13.8% of the voter registrations in Arizona in the post-Prop 200 period. [Tr. 317:1-4]
16 Dr. Lanier's calculated percentage of actual Hispanic registrants among all registrants
17 since Prop 200, however, is 13.7%. [Tr. 799:6-800:3] Furthermore, Dr. Lanier makes
18 no effort to determine whether this difference is a result of ineligible applicants being
19 denied registration. In fact, notably, none of Plaintiffs experts make an attempt to
20 discern this important fact.

21 Similarly, Plaintiffs supplied no expert testimony that provides any basis on
22 which to find that Latinos have been disparately impacted by the voting identification
requirements. The only expert who offered *any* opinions on this issue was Dr. Lanier,
but this opinion was withdrawn from the record. Regardless, even he does not offer any
evidence that Latinos in Arizona disproportionately lack identification. In reality he
could not offer that opinion because each County offers at least two forms of non-photo

1 ID, free of charge – the Voter Registration Card and a Recorder’s Certificate. Many
2 send out official election mail that can be used as non-photo ID as well.

3 **Dr. Espino**

4 To the extent that his testimony can carry any weight at all,² Dr. Espino’s
5 numbers show that Hispanics are actually faring **better** in two-thirds of Arizona’s
6 counties after Proposition 200. [Tr. 420:10-423:24; 868:18-25] Furthermore, if one
7 looks at Dr. Espino’s corrected numbers – the ones that he should have testified about on
8 direct examination at trial – the difference between the impact on Hispanic and non-
9 Hispanic voter registration is only 0.92%.

9 **Dr. Chapa**

10 Dr. Chapa’s data demonstrated that while the growth rate of Hispanic citizen
11 voting age population (“CVAP”) between 2000 and 2004 was *greater* than the growth
12 rate of non-Hispanic CVAP in those years, the growth rate of Hispanic CVAP between
13 2005 and 2006 was *less* than the growth rate of non-Hispanic CVAP in those years. [Tr.
14 48:22-24; 50:24-51:7; 56:4-14]. Thus, Dr. Lanier and Dr. Espino’s numbers
15 demonstrating the continuing strength of Hispanic participation are even more telling
16 and Plaintiffs’ own experts’ data undermines their claims of undue burden and disparate
17 impact.

17 **Maricopa County**

18 As a last ditch effort to prove what their highly paid experts could not, Plaintiffs
19 claim in one a one-sentence paragraph that Maricopa County’s election staff has found a

20 ² Despite having corrected errors in his tables to reflect the true declines in weekly registration post-Prop
21 200 as 36.67% for Hispanics and 35.75% for non-Hispanics, Dr. Espino nevertheless testified that he
22 calculated a decline in weekly registrations in the post Prop 200 period for Hispanics of 42.86% and for
non-Hispanics of 29.84%. [Tr. 399:7-21] It is incredible to believe that an expert would not recognize
that he was testifying about the wrong numbers, especially when the error skews the calculations so
much.

1 disparate impact on Latinos following the passage of Proposition 200. [Dkt. 1027 at 17].
2 This is laughable. Plaintiffs engaged six experts during the course of this litigation who
3 could not point to any evidence to show a disparate impact on Latinos. As a last resort,
4 Plaintiffs have turned to a PowerPoint presentation prepared by Maricopa County. [Tr.
5 Ex. 954] As if it even needed to be said, the presentation includes a disclaimer that this
6 was not conducted as a scientific study, that Maricopa County is using an old Hispanic
7 surname list at the direction of the Department of Justice, and it was merely an
8 “elementary effort” to gauge where they were as a county. [*Id.* at 6.] Any effort by the
9 Plaintiffs to use this presentation as a substitute for bona fide expert testimony is
10 disingenuous. The facts are simple – neither Plaintiffs nor their experts have produced
11 evidence to support the claims of undue burden or disparate impact. As such, Plaintiffs
12 cannot prevail on these claims.

12 **IV. PLAINTIFFS HAVE PRESENTED NO EVIDENCE OF A CAUSAL CONNECTION**
13 **BETWEEN PAST DISCRIMINATION AND AN ALLEGED DISPARATE IMPACT**

13 Notably, Plaintiffs do not even claim that they have offered evidence of a causal
14 connection between the past discrimination toward Latinos and the alleged impact of
15 Proposition 200. Clearly, no impact has even been shown. However, neither Plaintiffs
16 nor their experts offered any evidence of a causal connection between the alleged
17 historical and social discriminations and Proposition 200 itself. As such, Plaintiffs
18 cannot, and have not, prevailed on their Voting Rights Act claims.

19 **V. CONCLUSION**

20 States are given wide latitude to regulate the order and security of the election
21 process. Arizona’s proof of citizenship requirement for voter registration and voter
22 identification laws are essential in protecting the integrity and reliability of the electoral
process. Plaintiffs do not dispute that the State has a compelling interest in preventing

1 fraudulent voter registration and fraud at the polls in order to insure the security of its
2 elections and to increase public confidence in the electoral process.

3 Moreover, Plaintiffs have wholly failed to prove that anyone is unduly burdened
4 by Arizona's laws or that the laws disproportionately affect Latinos or naturalized
5 citizens. The citizens of Arizona have prudently enacted reasonable, non-discriminatory
6 laws to advance the compelling state interests of deterring and detecting voter fraud and
7 of promoting public confidence in the electoral system reserved for citizens. Plaintiffs,
8 as the extent of their challenge, have offered only three people who claim not to be able
9 to register or vote as a result of the law enacted by Proposition 200. The Supreme Court
10 made clear in *Crawford* that striking down a law duly enacted through the democratic
11 process requires more than a showing that a handful of individuals are or may be
12 adversely affected by that law. The County Defendants respectfully request that the
13 Court uphold the ideals of *Crawford*, by granting the State and Counties' Motions for
14 Summary Judgment, now before it. In the alternative, the County Defendants
15 respectfully request that the Court deny Plaintiffs relief on all counts and affirm the will
16 of Arizona's voters by upholding Proposition 200.

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RESPECTFULLY SUBMITTED this 30th day of July 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2008, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following

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1 COPY of the foregoing filed electronically
this 30th day of July, 2008.

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3 COPY of the foregoing mailed with Notice of
4 Electronic Filing and MAILED
5 this 30th day of July, 2008 to:

6 The Honorable Roslyn O. Silver
7 United States District Court
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