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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF ARIZONA**
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12 **MARIA M. GONZALEZ, et al.,**)

13 Plaintiffs,)

14 v.)

15 **STATE OF ARIZONA, et al.,**)

16 Defendants.)
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CV-06-1268-PHX-ROS
CV-06-1362-PHX-ROS (cons)
CV-06-1575-PHX-ROS (cons)

**BRIEF OF PROTECT ARIZONA
NOW AND WASHINGTON
LEGAL FOUNDATION
AS AMICI CURIAE IN
OPPOSITION TO MOTIONS FOR
PRELIMINARY INJUNCTION**

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INTERESTS OF AMICI CURIAE

The interests of *amici curiae* Protect Arizona NOW (PAN) and Washington Legal Foundation (WLF) are set forth in the accompanying motion for leave to file this brief. In brief, PAN is a non-partisan association of Arizonans from all walks of life, organized to promote adoption of Proposition 200 on the November 2004 ballot. PAN was the sponsoring organization for Proposition 200, and its officers intervened as defendants in prior judicial challenges to Proposition 200. PAN has been concerned by the threat to the integrity of Arizona elections posed by the increased number of illegal aliens coming into the State in violation of federal law, and the threat that those aliens will seek to vote. WLF is a public interest law and policy center that has appeared in courts across the country to ensure that governments at all levels possess the resources to combat illegal immigration and to prevent aliens from seeking to vote illegally. WLF represented PAN in its prior defense of Proposition 200.

STATEMENT OF THE CASE

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This case is a challenge to the voting-related provisions of Proposition 200, a public initiative adopted by Arizona voters by a large margin in November 2004. Proposition 200 amended Arizona law to add the “Arizona Taxpayer and Citizen Protection Act,” a law designed to prevent voting and access to certain public benefits by ineligible individuals, and to increase reporting by state and local government officials to federal immigration authorities when they become aware of violations of federal immigration law by those who have applied for public benefits from the state.

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Three separate complaints have been consolidated before this Court. In two of the suits, Nos. 06-1268 and 06-1362, the plaintiffs have filed preliminary injunction motions, seeking to enjoin Arizona officials from implementing: (1) Proposition 200’s requirement that individuals registering to vote provide documentary evidence to support citizenship claims; and (2) Proposition 200’s requirement that voters provide proof of identity before

1 casting ballots.¹

2 Plaintiffs' preliminary injunction motions make four principal legal claims in support
3 of their contention that they are likely to succeed on the merits of their suit. First, they
4 contend that the provisions of Proposition 200 that require those registering by mail to
5 submit documentary proof of citizenship violate the federal National Voter Registration Act
6 of 1993 ("NVRA"), 42 U.S.C. § 1973gg *et seq.* May 9, 2006 Memorandum of Maria M.
7 Gonzales, *et al.* ("Gonzalez Br.") at 7-20; August 4, 2006 Motion of Inter Tribal Council
8 of Arizona, *et al.* ("ITCA Br.") at 54-60. Second, they contend that the voting-related
9 provisions of Proposition 200 were not properly pre-cleared by the U.S. Department of
10 Justice under § 5 of the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* Gonzalez Br. 20-21.
11 Third, they contend that the requirement that voters provide proof of citizenship in order
12 to register and proof of identification to vote amounts to a poll tax in violation of the
13 Twenty-fourth Amendment and the Fourteenth Amendment's Equal Protection Clause.
14 ITCA Br. 30-36. Fourth, they contend that Proposition 200 constitutes an undue burden
15 on the fundamental right to vote, in violation of the Equal Protection Clause. *Id.* 36-54.

16 SUMMARY OF ARGUMENT

17 Because Plaintiffs have virtually no likelihood of success on the merits of their
18 claims, the motion for a preliminary injunction should be denied.

19 First, the NVRA does not restrict the power of States to verify the citizenship of
20 those seeking to register to vote by mail. As the Court cogently observed in its June 19
21 Opinion and Order denying a temporary restraining order, "the NVRA does not act as a
22 ceiling preventing states from enforcing their own laws regarding voter qualifications."
23 June 19 Opinion and Order ("Slip Op.") at 12. The NVRA prohibits States from
24 "includ[ing] any requirement for notarization or other formal authentication" in mail-in

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26 ¹ These complaints do not challenge the welfare-related provisions of Proposition 200.
27 A previous challenge to those provisions, spearheaded by some of the same groups bringing these
28 three complaints, was rejected by the federal courts. *Friendly House v. Napolitano*, 419 F.3d 930
(9th Cir. 2005).

1 registration forms for federal elections, 42 U.S.C. § 1973gg-7(b)(3), but it explicitly
2 *permits* States to otherwise require “such identifying information . . . as is necessary to
3 enable the appropriate State election official to assess the eligibility of the applicant.” 42
4 U.S.C. § 1973gg-7(b)(1). It is eminently reasonable for States to conclude (as has Arizona)
5 that some form of documentary proof is “necessary” to enable them to determine whether
6 a registration applicant really is a U.S. citizen, in light of aliens’ ineligibility for voting.

7 Plaintiffs’ reliance on stray bits of NVRA legislative history is misplaced in light of
8 the clear statutory language supporting Arizona’s interpretation of the law. Moreover, the
9 legislative history is largely opaque; while portions of the legislative history (*e.g.*,
10 individual statements by *opponents* of the NVRA) provide some support for plaintiffs’ view,
11 other portions strongly support Arizona. *See, e.g.*, H.R. Rep. 103-9, at 5, 6 (1993).
12 Furthermore, in adopting in 2002 the Help America Vote Act (HAVA), 42 U.S.C. § 15301,
13 *et seq.*, Congress made clear that States had primary responsibility for taking steps to
14 ensure that prospective voters meet registration requirements. In light of HAVA, it makes
15 little sense to suggest that States are barred from efforts to verify the citizenship of
16 prospective voters and instead are bound to accept at face value an applicant’s claim of
17 citizenship.

18 Plaintiffs’ contention that Arizona failed to obtain adequate preclearance under the
19 Voting Rights Act is meritless. Plaintiffs concede that Arizona submitted Proposition 200
20 to the U.S. Department of Justice (DOJ) for preclearance, including the new statutory
21 language requiring those registering to vote to provide documentary proof of citizenship.
22 They also concede that DOJ granted preclearance on January 24, 2005. Their only
23 contention is that the preclearance should not be deemed binding because Arizona “never
24 revealed” to DOJ that it would apply its proof-of-citizenship requirements even to those
25 registering by mail pursuant to the NVRA. Gonzales Br. 21. But Arizona’s intent to apply
26 those requirements in all circumstances would have been evident from even a cursory
27 reading of Proposition 200’s proof-of-citizenship language, which includes no exceptions.
28 Plaintiffs’ Voting Rights Act claim is really an effort to seek judicial review of a DOJ

1 preclearance decision, but the Act does not permit such judicial review. *See* 28 C.F.R.
2 § 51.49.

3 Plaintiffs' poll tax claim is even less substantial. Proposition 200 imposes nothing
4 even remotely akin to a tax on the right to vote. Plaintiffs have misconstrued the case law
5 on which they rely.

6 Finally, Plaintiffs have not demonstrated that Proposition 200 constitutes an undue
7 burden on the right to vote. Arizona's interest in protecting the integrity of its elections
8 fully justifies the comparatively mild document-production burdens it has placed on
9 prospective voters. Plaintiffs' attempt to downplay the extent of the ineligible voter
10 problem is unconvincing. They suggest that the problem is minor because Arizona has only
11 uncovered several hundred ineligible voters. But given the State's limited fraud-detection
12 resources, it stands to reason that State officials will only discover a small fraction of those
13 voting illegally; accordingly, the evidence uncovered to date is cause for serious alarm.
14 Certainly, that was the view of the Arizona electorate when it adopted Proposition 200 by
15 a significant majority. Moreover, the evidence nationwide suggests that alien voting is a
16 serious problem. No rule of law suggests that Arizona is required to delay implementation
17 of effective enforcement techniques until after the integrity of local elections has been fully
18 compromised.

19 In contrast to the serious threat to electoral integrity facing Arizona, the evidentiary
20 burdens imposed on prospective voters are relatively mild. Arizona has well demonstrated
21 that Plaintiffs have significantly inflated the percentage of prospective voters who do not
22 currently possess the documentation necessary to register and to vote. For those few
23 citizens who lack an appropriate citizenship or identification document, taking the minor
24 steps necessary to obtain a required document does impose a small burden on their right to
25 vote. But those types of burdens have never been deemed constitutionally problematic. For
26 example, the Supreme Court has recognized that the Constitution protects the right to
27 travel, but no one suggests that that right is unconstitutionally burdened by requiring all
28 prospective airline travelers to display a photo ID before boarding an airplane.

1 F.3d 833 (6th Cir. 1997). In other words, the NVRA requires States to permit individuals
2 to use the mails to apply to become registered voters, but (except with respect to
3 notarization/authentication of signatures) it does not purport to overrule State voter
4 qualification requirements. If a properly completed mail-in voter registration application
5 form fails to attach identifying information that a State reasonably deems “necessary” to
6 determine whether the applicant is a U.S. citizen, or if the State determines (for example)
7 that the applicant is barred from voting under that State’s rules regarding convicted felons,
8 the NVRA does not nonetheless insist that the applicant be registered.

9 This interpretation of the statute comports fully with the NVRA’s purpose. The
10 NVRA was adopted “to establish procedures that will increase the number of eligible
11 citizens who register to vote in elections for federal office,” as well as to “protect the
12 integrity of the electoral process.” 42 U.S.C. § 1973gg(b)(1) & (3). The NVRA sought
13 to increase voter registration by eliminating the need for prospective registrants to make an
14 extra (and often inconvenient) trip to the office of the electoral board. The NVRA
15 accomplished that purpose by mandating that those making a trip to their local motor
16 vehicle authority to seek a driver’s license must simultaneously be offered an opportunity
17 to register to vote – thus the frequent colloquial reference to the NVRA as the “motor-voter
18 law.” 42 U.S.C. § 1973gg-3. The NVRA also accomplishes that purpose by requiring
19 States to make mail-in registration forms available at a variety of locations. 42 U.S.C.
20 § 1973gg-4(b). Also, by prohibiting any requirement that the signature on the mail-in form
21 be notarized or otherwise formally authenticated, 42 U.S.C. § 1973gg-7(b)(3), the NVRA
22 ensures that applicants need not make an extra trip to a notary’s office.

23 Permitting States to require that citizenship documentation accompany the mail-in
24 registration form is fully consistent with the NVRA’s purpose of encouraging registration
25 by reducing such inconveniences as the need for prospective registrants to make a special
26 trip to the office of the electoral board. The vast majority of applicants who are, in fact,
27 citizens will have ready access within their own homes to the proof-of-citizenship
28 documents required by Arizona. Conversely, to interpret the NVRA as prohibiting States

1 from requiring applicants to attach citizenship documentation to mail-in registration forms
2 – even though, as Plaintiffs concede, such documentation can be required in all other
3 registration settings – would be inconsistent with the NVRA’s stated purpose of
4 “protect[ing] the integrity of the electoral process.” 42 U.S.C. § 1973gg(b)(3). Indeed,
5 the NVRA quite clearly contemplates imposition of documentation requirements whenever
6 voter registration occurs in conjunction with driver’s license applications, 42 U.S.C.
7 § 1973gg-3, because all States impose documentation requirements on driver’s license
8 applicants. It makes little sense to suggest that Congress endorsed documentation
9 requirements in the one context but absolutely prohibited them in the other.

10 In opposition to Arizona’s reliance on the NVRA’s statutory language and purpose
11 cited above, Plaintiffs rely on stray bits of NVRA legislative history to support their
12 argument that the NVRA prohibits States from requiring documentary evidence that a mail-
13 in applicant is a U.S. citizen. That reliance is misplaced. Plaintiffs quote congressional
14 *opponents* of the NVRA as warning that the NVRA would bar States from verifying the
15 citizenship of applicants. But the Supreme Court has repeatedly warned that the statement
16 of an opponent is never a reliable guide to a statute’s meaning:

17 Petitioner’s main support lies in statements made by opponents of the bill. As we
18 have stated, however, “[t]he fears and doubts of the opposition are no authoritative
19 guide to the construction of legislation.” *Schwegmann Brothers v. Calvert Distillers
Corp.*, 341 U.S. 384, 394 (1951). “In their zeal to defeat a bill, they understandably
tend to overstate its reach.” *NLRB v. Fruit Packers*, 377 U.S. 58 (1964).

20 *Bryan v. United States*, 524 U.S. 184, 196 (1998).

21 The legislative history of the NVRA on this issue is largely opaque. There are more
22 than a few statements appearing in committee reports that support Arizona’s position that
23 the NVRA does *not* curtail States’ authority to regulate and enforce the qualification of
24 voters. For example, the House Administration Committee, in its favorable report on what
25 would become the NVRA, stated unequivocally: “The Committee felt strongly that no
26 legislative provision should be considered that did not at least maintain the current level of
27 fraud prevention.” H.R. Rep. 103-9, at 5 (1993). In discussing mail-in applications, the
28 committee emphasized, “States are permitted to employ any other fraud protection

1 procedures which are not inconsistent with this bill.” *Id.* at 10. In the absence of any
2 language in the statute suggesting that Proposition 200’s anti-fraud provisions are
3 inconsistent with the NVRA, Plaintiffs’ contention to the contrary must be rejected.

4 Furthermore, Congress’s later adoption of the Help America Vote Act (“HAVA”),
5 42 U.S.C. § 15301 *et seq.*, is inconsistent with a claim that Congress sought by means of
6 the NVRA to bar states from employing anti-fraud measures. To the contrary, HAVA
7 *mandates* that States adopt several new anti-fraud measures in connection with all voter
8 registration, including: (1) collecting the driver’s license number and the last four digits
9 of the applicant’s Social Security number (if the applicant has such numbers); (2) checking
10 the accuracy of those numbers with motor vehicle authorities and the Commissioner of
11 Social Security; and (3) requiring all applicants to check one of two boxes explicitly
12 indicating whether they are U.S. citizens or not U.S. citizens. 42 U.S.C. §§ 15483(a)(5)
13 & (b)(4). Congress went on to provide that its new anti-fraud measures were “minimum
14 requirements,” and that States were free to establish “election technology and
15 administration requirements that are more strict” than those established under HAVA,
16 provided only that the additional requirements were “not inconsistent with,” *inter alia*, the
17 NVRA. 42 U.S.C. § 15485. It is impossible to square Plaintiffs’ contention that the
18 NVRA prohibits *all* State documentation requirements not explicitly provided for in the
19 NVRA, with HAVA’s provision authorizing such requirements except as explicitly
20 *prohibited* by the NVRA.

21 Finally, Plaintiff’s reliance on a March 2006 letter from the Election Assistance
22 Commission – in which the EAC opined that Arizona should not require proof of citizenship
23 from mail-in applicants – is misplaced. As set forth in 42 U.S.C. §§ 15322 & 15325, the
24 EAC is a federal advisory body that has no authority to enforce either the NVRA or HAVA
25 – that is the role of the U.S. Department of Justice. The EAC sole substantive authority
26 is to “develop” the federal registration form used for mail-in registrations mandated by the
27 NVRA. *See* 42 U.S.C. § 1973gg-7(a)(2). Congress made explicit that the EAC has *no*
28 authority to regulate the conduct of States with respect to voter registration: “The

1 Commission shall not have any authority to issue any rule, promulgate any regulation, or
2 take any other action which imposes any requirement on any State or unit of local
3 government, except to the extent permitted under” § 1973gg-7(a)(2), having to do with the
4 content of the federal mail-in registration form. 42 U.S.C. § 15329. Accordingly, contrary
5 to Plaintiffs’ contention, the EAC’s views regarding the propriety of Arizona’s proof-of-
6 citizenship requirement are not entitled to deference from this Court. Arizona accepts voter
7 registration applications from those using the precise form approved by the EAC. HAVA
8 makes clear that it is not the business of the EAC to opine on the voter qualification rules
9 of States that use the EAC-approved form.

10 **A. Proposition 200 Has Been Precleared Under Section 5 of the Voting**
11 **Rights Act**

12 Section 5 of the Voting Rights Act of 1965 prohibits covered jurisdictions (including
13 Arizona) from adopting any voting qualification or standard, practice, or procedure with
14 respect to voting without obtaining preclearance. 42 U.S.C. § 1973c. As the Court noted
15 in its June 19, 2006 Opinion and Order, Arizona submitted a complete copy of Proposition
16 200 to the U.S. Department of Justice (DOJ), and DOJ precleared Proposition 200 in a
17 letter dated January 24, 2005. Slip Op. 13-14. Plaintiffs nonetheless insist that Arizona
18 failed to obtain proper preclearance because “Defendants never revealed to the Justice
19 Department” that Arizona would require mail-in applicants to attach proof-of-citizenship
20 documents even when using “the federal mail voter registration form for federal elections
21 as required by the [NVRA].” Gonzalez Br. 21.

22 Plaintiffs’ contention is without merit. As the Court previously recognized, the
23 submission “adequately apprized” DOJ of Arizona’s intentions regarding proof of citizen-
24 ship; Arizona made clear in its submission that it intended that “every” applicant would be
25 required to present documentary evidence of his or her citizenship. Slip. Op. 14.
26 Accordingly, it is simply not credible for Plaintiffs to suggest that Arizona obtained
27 preclearance by means of deception.

28 Obtaining preclearance from the Justice Department requires covered jurisdictions

1 to submit: (1) a copy of the ordinance, regulation, etc. effecting a change; (2) a copy of
2 the ordinance, regulation, etc. being amended or repealed by the change; (3) a statement
3 explaining the change if it is not clear from the documents submitted; (4) the name of the
4 submitting authority and the name of the jurisdiction responsible for the change; and (5) a
5 statement of the reasons for the change and expected outcome of the change. 28 C.F.R.
6 § 51.27. Because Arizona’s submission included each of these features, Proposition 200
7 must be deemed precleared. *Clark v. Roemer*, 500 U.S. 646, 656-57 (1991) (“the
8 submission of legislation for administrative preclearance under § 5 determines the scope of
9 the preclearance request”). Indeed, Proposition 200 would have been deemed precleared
10 even if DOJ had not sent its January 24, 2005 letter, because a voting change is
11 automatically precleared unless the Attorney General affirmatively raises an objection
12 within 60 days of submission. *Id.* at 649; 28 C.F.R. § 51.41.

13 Plaintiffs’ Voting Rights Act claim is, in essence, an effort to seek judicial review
14 of a DOJ preclearance decision. The Supreme Court long ago decided that such decisions
15 are not subject to judicial review. *Morris v. Gressette*, 432 U.S. 491, 504 (1977). That
16 bar applies even if the Plaintiff alleges that the DOJ violated the terms of the Voting Rights
17 Act and its own regulations in failing to interpose an objection. *Harris v. Bell*, 562 F.2d
18 772, 773 (D.C. Cir. 1977). The Supreme Court explained:

19 Where the discriminatory character of an enactment is not detected upon review by
20 the Attorney General, it can be challenged in traditional constitutional litigation. But
21 it cannot be questioned in a suit seeking judicial review of the Attorney General’s
22 exercise of discretion under § 5.

Morris, 432 U.S. at 506-07.

23 C. Proposition 200 Does Not Constitute a Prohibited Poll Tax

24 Plaintiffs contend that Proposition 200 constitutes a prohibited poll tax. Although
25 conceding that Proposition 200 does not in terms require prospective voters to pay a fee
26 either to register or to vote, Plaintiffs insist that Proposition 200 amounts to a poll tax
27 because those prospective voters who lack identification sufficient (under Proposition 200)
28 to establish citizenship and/or identity “will have to pay for the right to vote by purchasing

1 ‘acceptable’ documentation.” ITCA Br. 31. Plaintiffs assert that this “poll tax” violates
2 both the Twenty-fourth Amendment and the Equal Protection Clause’s prohibition against
3 making wealth a voting qualification. *Id.* 30-36.

4 Neither contention can withstand analysis. The Twenty-fourth Amendment provides
5 that the right to vote in a federal election “shall not be denied or abridged” by reason of
6 “failure to pay any poll tax or other tax.” That amendment quite explicitly limits its scope
7 to “taxes,” which are commonly understood to be limited to assessments imposed by
8 governments. *See Black’s Law Dictionary* (4th ed. 1968) (“Tax” defined as “any
9 contribution imposed by government upon individuals, for the use and service of the
10 state.”). In the absence of an allegation that Proposition 200 imposes anything remotely
11 resembling such a “tax,” the Twenty-fourth Amendment is wholly inapplicable.

12 Plaintiffs’ reliance in this regard on *Harman v. Forssenius*, 380 U.S. 528, 539
13 (1965), is inexplicable. *Harman* involved a challenge to a Virginia statutory scheme that
14 explicitly imposed a “poll tax” on all who wished to vote in federal or state elections. *Id.*
15 at 529. In 1963, in anticipation of adoption of the Twenty-fourth Amendment, Virginia
16 amended its poll tax statute to provide that a resident could vote in a federal election even
17 without paying the tax, provided that six months before the election he or she file a
18 notarized “certificate of residence” that stated the voter’s residence and his/her intent to
19 remain at that residence through the next election. *Id.* at 530. The Court ruled that the
20 amended law “abridged” the right to vote by reason of failure to pay a poll tax because
21 those who failed to pay the tax were required annually to complete a cumbersome
22 certification process in order to vote, while those who paid the tax were not required to do
23 so. *Id.* at 540-42.

24 Nothing in *Harman* remotely supports Plaintiffs’ contention that Proposition 200
25 violates the Twenty-fourth Amendment. In support of their contention that it is irrelevant
26 that Proposition 200 does not impose anything that anyone would ordinarily denominate a
27 “tax,” Plaintiffs cite *Harman*’s statements that the Twenty-fourth Amendment is fully
28 applicable even when the challenged legislative scheme is “somewhat less onerous than the

1 poll tax” or is “a milder substitute.” ITCA Br. 33 (citing *Harman*, 380 U.S. at 542). But
2 those statements were made in connection with a legislative scheme in which those declining
3 to pay a poll tax, and *only* such individuals, were required to comply with the “milder
4 substitute.” The Court stated explicitly that it was *not* holding that a generally applicable
5 “certificate of residence” requirement was constitutionally problematic, only that such a
6 requirement could not be imposed solely on those who declined to pay a poll tax. *Id.* at
7 538.

8 Plaintiffs’ alternative contention – that the Proposition 200 imposes a fee that
9 amounts to a voter qualification based on “wealth” and thus violates the Equal Protection
10 Clause – is even less substantial. ITCA Br. 35-36. Plaintiffs base this contention on
11 *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), which held that
12 conditioning the right to vote in *State* elections on the payment of a poll tax violates the
13 Fourteenth Amendment’s Equal Protection Clause. *Harper* held that poll taxes establish
14 wealth as a qualification for voting, and that “[t]o introduce wealth or payment of a fee as
15 a measure of a voter’s qualification is to introduce a capricious or irrelevant factor.” *Id.*
16 at 668. But *Harper* makes no suggestion that its holding is applicable to situations, as here,
17 in which a State concededly has not imposed any fee. Plaintiffs assert that the voter
18 qualifications mandated by Proposition 200 impose costs on some voters, but the same
19 could be said of virtually any voter qualification. For example, requiring voters to vote at
20 designated polling places entails transportation costs, but no court has suggested that a
21 desire to avoid those costs creates a constitutional right to vote by absentee ballot.
22 “Election laws will inevitably impose some burdens on individual voters.” *Burdick v.*
23 *Takushi*, 504 U.S. 428, 433 (1992). The imposition of tangential burdens does not
24 transform a voter qualification into an unconstitutional “wealth” qualification.

25 **D. Proposition 200 Does Not Constitute an Undue Burden on the Right to**
26 **Vote**

27 Voting is among the rights most strongly protected by the U.S. Constitution.
28 Nonetheless, Courts have long recognized that States have broad authority under Article I,

1 § 4 of the Constitution to regulate the “Times, Places, and Manner” of conducting
2 elections, and that the burdens inevitably imposed on prospective voters by those
3 regulations do not thereby render the regulations constitutionally suspect. The Supreme
4 Court has categorically rejected the notion that “a law that imposes any burden upon the
5 right to vote must be subject to strict scrutiny.” *Burdick*, 504 U.S. at 432. Rather, any
6 challenge to an election regulation must be adjudicated under a “flexible standard” that
7 weighs the State’s justification for its regulation against the burden the regulation imposes
8 on voting rights. *Id.* at 434; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-
9 59 (1997) (“Lesser burdens [on voting rights] trigger less exacting review, and a State’s
10 important regulatory interests will usually be enough to justify reasonable,
11 nondiscriminatory restrictions.”) (internal quotations omitted).

12 When judged under that flexible standard, Proposition 200 raises no serious
13 constitutional concerns. First, Proposition 200 addresses an issue of utmost importance in
14 any democracy: maintaining the integrity of the electoral process. If our recent history of
15 hotly contested presidential elections has taught us anything, it is that the common bonds
16 that hold us together as a society cannot long endure unless the fairness of elections is not
17 subject to question.

18 Plaintiffs seek to minimize the importance of Proposition 200’s anti-fraud provisions,
19 asserting that pre-existing voting regulations were more than sufficient to address Arizona’s
20 “*de minimus*” voter fraud problem. ITCA Br. 43-45. That contention is belied by the
21 evidence. As Plaintiffs concede, Arizona has uncovered several hundred instances in which
22 noncitizens were fraudulently registered to vote. *Id.* at 28. Plaintiffs contend that those
23 numbers suggest that the voting fraud problem is manageable under existing law. *Amici*
24 strenuously disagree. Given the State’s limited fraud detection resources, it stands to reason
25 that State officials will only discover a small fraction of those voting illegally. If State
26 officials have discovered that several hundred registered voters are not U.S. citizens, one
27 can safely assume that the true number is in the thousands – far more than the number
28 necessary to alter the outcome of most tight elections.

1 Numerous respected commentators have studied the issue on a nationwide basis and
2 determined both that voter fraud is rampant and that it is extremely difficult to detect. *See,*
3 *e.g.*, Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* 292 (1996) (in-person voter
4 fraud usually cannot be detected unless the actual voter happens to be in the polling place
5 when the fraudulent voter attempts to use his or her name); John Fund, *Stealing Elections*
6 (2004) (citing numerous instances involving fraudulent voting using the names of deceased
7 individuals still on the voting list). Voting and registration by aliens has been a particular
8 problem. *See, e.g.*, Publius, “Securing the Integrity of American Elections: The Need for
9 Change,” 9 TEX. REV. OF LAW & POLITICS 277, 292-296 (2005). That article noted, for
10 example, that: (1) the INS has estimated that 25,000 to 40,000 aliens are registered to vote
11 in Chicago; (2) a random check of Dallas voters revealed that 2.5% of all registered voters
12 were aliens; and (3) a review undertaken in the aftermath of a disputed California
13 congressional race revealed that 784 aliens listed on INS databases (databases that generally
14 include resident aliens but *not* aliens illegally in this country) had registered to vote in that
15 single congressional district. *Id.* at 294. Indeed, congressional concern over voting by
16 aliens was a major factor leading to the 2002 enactment of HAVA and its adoption of
17 several provisions designed to reduce alien voting. *See, e.g.*, 42 U.S.C. § 15483(b)(4).
18 U.S. Department of Justice records reveal that the federal government has been bringing
19 an increasing number of criminal cases nationwide against aliens alleged to have voted
20 illegally. *See* U.S. Dep’t of Justice, Criminal Division, Public Integrity Section, *Election*
21 *Fraud Prosecutions & Convictions; Ballot Access & Voting Integrity Initiative, Oct. 2002-*
22 *Sept. 2005.*

23 Moreover, Plaintiffs and other opponents of Proposition 200 waged a vigorous
24 campaign against the initiative in the fall of 2004, arguing that the citizenship/ identification
25 documentation requirements were unnecessary precisely because, in their view, illegal
26 voting by aliens was not a major concern. They lost that argument: a significant majority
27 of Arizonans thought that election fraud was a sufficiently serious concern to warrant
28 adoption of Proposition 200. Having lost the argument in the democratic process, Plaintiffs

1 should not now be permitted to re-argue before the courts their view that alien voting is not
2 a major cause for concern.

3 Finally, even if Plaintiffs were correct that the massive number of illegal aliens in
4 Arizona has not yet been translated into illegal voting, no rule of law suggests that Arizona
5 is required to delay implementation of effective enforcement techniques until after the
6 integrity of local elections has been fully compromised. The U.S. Supreme Court has
7 rejected such arguments in analogous circumstances. For example, in *Board of Education*
8 *v. Earls*, 536 U.S. 822 (2002), the plaintiffs challenged a school district's random drug
9 testing program as a violation of their Fourth Amendment protections against unreasonable
10 searches and seizures. In upholding the testing program, the Court explicitly rejected the
11 plaintiffs' contention that suspicionless testing was unreasonable in the absence of evidence
12 that the Oklahoma school district already had a serious drug use problem, explaining:

13 [T]he need to prevent and deter the substantial harm of childhood drug use provides
14 the necessary immediacy for a school testing program. Indeed, it would make little
15 sense to require a school district to wait for a substantial portion of its students to
begin using drugs before it was allowed to institute a drug testing program designed
to detect drug use.

16 *Id.* at 836. Similarly, Arizona should not be required to wait until after a major election
17 scandal erupts to take effective action to prevent illegal voting by aliens. Arizona is fully
18 justified in taking preventive action in light of evidence that: (1) substantial numbers of
19 aliens have registered to vote, both in Arizona and elsewhere in the United States; (2) there
20 are few means of policing fraudulent voting by aliens if voting officials are required to
21 accept at face value an applicant's written statement that he or she is a citizen; and (3)
22 Arizona has a large and growing illegal alien population whose demonstrated willingness
23 to violate the law by coming to this country suggests a similar willingness to flout election
24 laws. The Constitution itself plainly "compels the conclusion that government must play
25 an active role in structuring elections," since "as a practical matter, there must be a
26 substantial regulation of elections if they are to be fair and honest and if some sort of order,
27 rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. at 433.

28 Plaintiffs contend that Proposition 200 establishes irrational voting and registration

1 requirements, because it leaves exploitable loopholes. ITCA Br. 46-50. They note, for
2 example, that acceptance of driver's licenses as proof of citizenship does not weed out
3 permanent resident aliens, many of whom legally hold Arizona driver's licenses. But a
4 regulation is not rendered invalid simply because it does not provide a 100% solution to the
5 problem it seeks to address. Aliens who are not legally present in the United States
6 generally are unable to obtain Arizona driver's licenses legally; thus, requiring those
7 claiming citizenship to provide a driver's license to substantiate their claim provides a
8 significant degree of protection against voter fraud, even if it is not 100% protection.

9 In contrast to the serious threat to electoral integrity facing Arizona, the evidentiary
10 burdens imposed on prospective voters are relatively mild. Arizona has well demonstrated
11 that Plaintiffs have significantly inflated the percentage of prospective voters who do not
12 currently possess the documents necessary to register and to vote. The vast majority of
13 adults possess driver's licenses (or the alternative non-driver identification cards offered by
14 virtually all States), so Arizona's acceptance of driver's licenses both as proof of citizenship
15 and proof of identity means that very few prospective voters would even have to think about
16 producing one of the numerous other forms of identification accepted by Arizona. As of
17 2000, the Federal Highway Administration (FHA) reported that the number of licensed
18 drivers age 18 and over was 186,797,586 – or 89.32% of the voting-age population.
19 Federal Highway Administration, *Distribution of Licensed Drivers by Sex and Percent in*
20 *Each Age Group and Relation to Population: 2000* (Oct. 2001), available at
21 <http://www.fhwa.dot.gov/ohim/hsoo/d120htm>. The FHA reported that another 3% to 4%
22 of the adult population possesses a State-issued non-driver identification card, bringing to
23 between 93% and 94% of the total adult population that possesses this type of identification.
24 Those figures alone indicate that Plaintiffs are way off the mark in suggesting that tens of
25 thousands of unregistered Arizonans currently lack documentation necessary to demonstrate
26 citizenship (and thus would have to expend some degree of resources to obtain that

1 documentation). Moreover, Plaintiffs' estimate of the pool of eligible, potential registrants²
2 makes no effort to determine what percentage of those individuals (many of whom have
3 remained unregistered for many years) have an actual desire to register to vote; Arizona's
4 documentation requirements obviously cannot be deemed to be deterring those with no
5 desire to register.

6 *Amici* are willing to concede that there exist *some* Arizonans who are U.S. citizens
7 and wish to register and/or vote but who currently lack any of the documentation accepted
8 under Proposition 200 as proof of citizenship and/or proof of identity. Nonetheless, the
9 minor burdens imposed on those prospective voters are far outweighed by Arizona's
10 interests in maintaining the integrity of its elections. As the Seventh Circuit observed:
11 "Any [election] is going to exclude, either de jure or de facto, some people from voting;
12 the constitutional question is whether the restriction and resulting exclusion are reasonable
13 given the interest the restriction serves." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir.
14 2004). Moreover, the Court should be particularly reluctant to second-guess the judgment
15 of Arizona voters that Proposition 200's fraud-prevention measures are necessary, because
16 "the striking of the balance between discouraging fraud and other abuses and encouraging
17 turnout is quintessentially a legislative judgment with which [] judges should not interfere
18 unless strongly convinced that the legislative judgment is grossly awry." *Id.* at 1131. *See*
19 *also Indiana Democratic Party v. Rokita*, 2006 U.S. Dist. LEXIS 20321 (Apr. 14, 2006)
20 (rejecting constitutional challenge to Indiana law requiring prospective voters to provide
21 photo IDs before voting; those lacking an ID may vote provisionally but *must* return later
22 to supply the missing ID).

23 One compelling reason to believe that Arizona has not gone "grossly awry" is that
24 similar identification requirements are imposed in all walks of life, in situations involving
25 important individual rights. For example, Congress has adopted legislation requiring all
26 States to impose very strict documentation requirements on those applying for driver's

27
28 ² Plaintiffs estimate that 1,427,000 Arizonans fit into this category. ITCA Br. 12 n.27.

1 licenses, with the result that illegal aliens nationwide will be unable to obtain licenses
2 legally. REAL ID Act of 2005, P.L. 109-13, § 202(c). It has also adopted a law imposing
3 strict documentary proof-of-citizenship requirements on those applying for Medicaid.
4 Deficit Reduction Act of 2005, § 6036, 42 U.S.C. § 1396b. Anyone seeking to fly on a
5 commercial airline must display a photo ID. The Supreme Court has recognized repeatedly
6 that the Constitution protects the right to travel. *See, e.g., Saenz v. Roe*, 526 U.S. 489
7 (1999). Yet no one seriously suggests that the photo ID requirement unconstitutionally
8 burdens the right to travel by imposing a small financial burden on those forced to expend
9 funds to procure the photo ID needed to board an aircraft. Similarly, the small financial
10 burden imposed by Proposition 200 on prospective voters who lack the requisite citizenship
11 and identification documents does not amount to an unconstitutional burden on the right to
12 vote, particularly when weighed against the significant interests served by those
13 documentation requirements.

14 **II. THE BALANCE OF HARMS TILTS STRONGLY IN FAVOR OF ARIZONA**

15 Granting a preliminary injunction in this case would be particularly inappropriate
16 because the harm that Arizona would suffer if an injunction were issued would far exceed
17 any harm to Plaintiffs if an injunction is denied.

18 In adopting Proposition 200, the people of Arizona determined that “illegal
19 immigrants have been given a safe haven in this state” and that “this conduct contradicts
20 federal immigration policy, undermines the security of our borders and demeans the value
21 of citizenship.” Proposition 200, Sec. 2. One reason that the safe haven for illegal aliens
22 within the State “demean[ed] the value of citizenship” was that it called into question the
23 integrity of the electoral process – given the ease with which illegal aliens could register
24 and vote prior to adoption of Proposition 200.

25 In light of that finding, the harms that Arizona would suffer if an injunction were
26 granted are both self-evident and significant. The people have determined that the
27 Proposition 200 reforms are needed to prevent further undermining of the nation’s borders
28 and further demeaning of the value of citizenship. Thus, the harms to Arizona if a

1 preliminary injunction is granted would be immense, and they are not the kinds of harm that
2 can be compensated by the payment of money. No bond that Plaintiffs could post could
3 compensate Arizonans for loss in the value of their citizenship and the integrity of their
4 elections.

5 In contrast, any harm that Plaintiffs might suffer if no injunction is issued is wholly
6 speculative and relatively minor in comparison. In particular, Plaintiffs have not shown that
7 even a single person will be unable to vote if an injunction is not issued. At most, they
8 have demonstrated that a small number of people will be forced to expend a small amount
9 of time and resources to obtain documents they currently lack.

10 Moreover, an NVRA-based injunction against the application of Proposition 200's
11 requirements to federal elections would cause chaos this fall. The NVRA applies only to
12 registration for federal elections, so an NVRA-based injunction would not affect State
13 elections, for which Proposition 200 mandates strict documentation requirements. Thus,
14 a preliminary injunction would require Arizona to maintain two sets of voter registration
15 lists, one of which would be for voters who registered by mail under the NVRA and who
16 failed to submit the documentation necessary to permit them to vote in State elections.
17 Mandating creation of separate lists is a sure-fire recipe for administrative breakdowns, and
18 the inevitable errors might well result in voters being wrongly denied the right to vote.
19 Furthermore, many federal-election-only voters might not understand the limited nature of
20 their registration and would be understandably upset if told when they arrived at the polls
21 that they could not vote in State races in which they had planned to vote. These potential
22 administrative problems weigh strongly against granting a preliminary injunction on the
23 NVRA claims.

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CONCLUSION

Amici curiae Protect Arizona NOW and Washington Legal Foundation respectfully request that the motions for a preliminary injunction be denied.

Respectfully submitted,

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Dated: August 14, 2006

1 **Certificate of Service**

2 I hereby certify that on August 14, 2006, I electronically transmitted the attached
3 document to the Clerk's Office using the CM/ECF System for filing and transmittal of
4 Notice of Electronic Filing to the following CM/ECF registrants:

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