

No. 08-17094

**In the United States Court of Appeals
for the Ninth Circuit**

MARIA M. GONZALEZ; et al.,
Plaintiffs-Appellants,

v.

STATE OF ARIZONA; et al.,
Defendants-Appellees,

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; et al.,
Plaintiffs-Appellants,

v.

STATE OF ARIZONA; et al.,
Defendants-Appellees,

*On Appeal from the United States District Court
for the District of Arizona
Nos. 06-cv-01268-PHX-ROS; 06-cv-01362-ROS*

OPENING BRIEF OF APPELLANTS MARIA GONZALEZ, ET AL.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellants Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Project Vote; ACORN; and Common Cause state they are non-profit corporations, that they have no parent corporations and there is no publicly held corporation that owns 10% or more of their stock. Appellant Arizona Hispanic Community Forum states that it is an unincorporated volunteer organization.

s/ Nina Perales

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STATEMENT OF JURISDICTION

This is an appeal from an entry of final judgment. The district court had federal question jurisdiction under 28 U.S.C. § 1331. The District Court entered summary judgment on Plaintiffs' NVRA, Supremacy Clause and 24th Amendment claims on August 28, 2007.¹ Following a trial, the district court entered final judgment against Plaintiffs on all remaining claims on August 20, 2008.² Plaintiffs-Appellees filed a timely notice of appeal on September 16, 2008.³ This Court has jurisdiction under 28 U.S.C. § 1291. *See, e.g., Mendez v. County of San Bernardino*, 540 F.3d 1109 (9th Cir. 2008).

STATEMENT OF THE ISSUES

Following implementation of Proposition 200, Arizona officials rejected over 31,000 applications for voter registration because the applicants failed to satisfy the additional paperwork requirements of the new law.⁴ Voter registration in community-based voter drives plummeted 44%.⁵ Also, Arizona county recorders now automatically reject all federal applications for voter registration, including overseas U.S. military applications on the federal form, unless the

¹ ER 5, CR 330.

² ER 3, CR 1041; ER 2, CR 1042.

³ ER 1, CR 1045.

⁴ ER 3, CR 1041 at 13.

⁵ ER 8, Tr. Ex. 966.

applicant also submits the additional information required by the State pursuant to Proposition 200.⁶

Of the tens of thousands of voter registration applicants who were rejected under Proposition 200, less than one-third successfully registered on a later date.⁷

Proposition 200 accomplishes little beyond imposing onerous paperwork requirements that have made voter registration much more difficult in Arizona. The text of the law does not ensure that successful voter registration applicants are U.S. citizens. Although Proposition 200 requires applicants to present “satisfactory evidence of citizenship,” a majority of the documents on its enumerated list of citizenship documents either do not exist or do not prove U.S. citizenship.⁸

The most difficult burdens of Proposition 200’s registration requirement are reserved for naturalized citizens. Proposition 200 also has resulted in a disproportionate negative impact on Latinos, both at the point of voter registration as well as at the polls on Election Day.

The voting restrictions imposed by Arizona’s Proposition 200, ostensibly to curb registration by immigrants who are not qualified to vote, come at a time when Latinos comprise Arizona’s fastest-growing citizen voting age population and

⁶ ER 3, CR 1041 at 4; ER 9 at 102-103.

⁷ ER 3, CR 1041 at 14.

⁸ See discussion, *infra* at 6.

Arizona is engulfed in an often heated debate about immigrants from Mexico living in the state. As Latinos strive to overcome the effects of past exclusion from the political process, Proposition 200 has operated to thwart Latino entry into the electorate.

The present appeal raises whether the district court erred in concluding that Proposition 200 violates neither the U.S. Constitution nor a number of civil rights statutes related to voting. In particular:

1. Whether Arizona's refusal to process federal mail voter registration forms (unless accompanied by the documentary evidence set out in Proposition 200) departs from the mandate that all states "accept and use" the federal form and violates the National Voter Registration Act and the Supremacy Clause of the U.S. Constitution;

2. Whether Proposition 200's treatment of naturalized citizens who apply to register to vote creates an undue burden and discriminates on the basis of national origin in violation of the Equal Protection Clause of the 14th Amendment;

3. Whether Proposition 200 violates Section 2 of the Voting Rights Act of 1965; and

4. Whether Proposition 200 imposes a poll tax in violation of the 24th Amendment.

STATEMENT OF THE CASE

Plaintiffs filed their challenge to Proposition 200 on May 9, 2006 and moved for a preliminary injunction.⁹ The district court denied the motion for preliminary injunction and Plaintiffs appealed and filed an Emergency and Urgent Motion for Injunction Pending Appeal. On October 5, 2005, this Court granted the emergency motion, and enjoined implementation of Proposition 200's voting provisions. The State and four counties appealed that ruling to the United States Supreme Court, which vacated the Ninth Circuit's interim order. *Purcell v. Gonzalez*, No. 06A375 (06-532) & 06A379 (06-533), 2006 WL 2988365, at *3 (U.S. Oct. 20, 2006). The Supreme Court, however, carefully noted that "we express no opinion here on the correct disposition" of these appeals "after full briefing and argument," and remanded to this Court for further proceedings. *Id.* This Court subsequently affirmed the District Court's order denying preliminary injunctive relief. *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

The district court granted summary judgment against Plaintiffs on their NVRA, Supremacy Clause and 24th Amendment claims on August 28, 2007.¹⁰

⁹ ER 7, CR 1; ER 4, CR 352.

¹⁰ ER 5, CR 330.

Following a trial on the merits, on August 20, 2008 the District Court ruled against Plaintiffs on their remaining claims.¹¹ Plaintiffs timely appealed.¹²

STATEMENT OF FACTS

I. Proposition 200, Enacted in November 2004, Imposes New Documentation Requirements for Voter Registration and Voting.

Proposition 200 provides that the County recorder shall reject any voter registration application that is not accompanied by “satisfactory evidence of citizenship.”¹³ The statute further provides that satisfactory proof of citizenship is comprised of the following:

1. The number of the applicant’s Arizona driver’s license or state; identification card, if the card is issued after October 1, 1996, or the number of a license or identification card from another state if the card states that the holder has provided satisfactory evidence of U.S. citizenship;
2. A photocopy of the applicant’s U.S. birth certificate;
3. A photocopy of the applicant’s U.S. Passport;
4. A presentation to the County recorder of the applicant’s U.S. naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate is verified with the United States Immigration and Naturalization Service by the County recorder;
5. “Other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986;”

¹¹ ER 3, CR 1041, ER 2, CR 1042.

¹² ER 1, CR 1045.

¹³ Proposition 200's documentary proof of citizenship requirement is prospective only and does not address any potential ineligibility of currently registered voters. Proposition 200 targets those who are entering the electorate for the first time or moving to a new county. ER 10; ER 11.

6. The applicant's Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number.¹⁴

When it updated the Elections Procedures Manual, the Secretary of State understood that certain portions of Proposition 200's requirement of documentary proof of citizenship are incapable of execution. For example, no U.S. state's driver's license shows the holder's citizenship status on its face, and thus only Arizona licenses or identification cards can satisfy Proposition 200's Section F1.¹⁵ Similarly, there is no provision of the Immigration Reform and Control Act of 1986 that establishes "other documents or methods of proof" of citizenship, rendering Proposition 200's section F5 inoperable.¹⁶ Because the federal government cannot verify the number of the certificate of naturalization, the second portion of F 4 is inoperable.¹⁷ There is no "Bureau of Indian Affairs card number [or] tribal treaty card number," and thus portions of Proposition 200's Section F6 are incapable of execution.¹⁸ Although Proposition 200's Section F6 permits tribal enrollment numbers, at least four Arizona tribes include enrolled members who were born on the Mexico side of the U.S.-Mexico border and who may not be U.S. citizens.¹⁹ Finally, Arizona driver's licenses and state voter

¹⁴ ER 3, CR 1041 at 4; ER 10.

¹⁵ ER 12, 732:19-733:24.

¹⁶ 8 U.S.C. 1324a.

¹⁷ ER 3, CR 1041 at 4; ER 12, 698:3-16; ER 13, 59:21-23.

¹⁸ ER 3, CR 1041 at 10; ER 14, 33:19-36:10.

¹⁹ ER 12, 476:15-478:3.

identification cards (hereafter “driver’s licenses”) issued after October 1, 1996 do not prove U.S. citizenship.²⁰

II. Proposition 200 Places Greater and More Difficult Burdens on Naturalized Citizens Seeking to Register to Vote.

The district court found that naturalized citizens will have difficulty registering with their drivers licenses²¹ and are subsequently faced with either purchasing a new license or registering with the naturalization certificate (often in person).²²

This different treatment makes voter registration more difficult for naturalized citizens when compared to native born citizens. The problems for naturalized citizens who try to register are predictable and systemic to Proposition 200 and its implementation by Arizona election officials.

A. Naturalized Citizens Encounter Unique Difficulties Registering to Vote With Their Arizona Driver’s Licenses.

Today, most people in Arizona register to vote by providing the number of their Arizona driver’s license, which under Proposition 200 constitutes “satisfactory evidence of citizenship” if it was issued after October 1, 1996.²³ However, because of flaws in the Arizona Motor Vehicles Division database,

²⁰ ER 15.

²¹ References to Arizona driver’s licenses are to driver’s licenses and state identification cards.

²² ER 3, CR 1041 at 12.

²³ ER 15; ER 16, CR 824-1 at 10.

naturalized citizens encounter unique problems when attempting to register to vote using their Arizona driver's licenses.

Following passage of Proposition 200, the Secretary of State modified the statewide voter registration computer program (VRAZ) to flag as ineligible any registrant whose Arizona driver's license was coded "Type F" in the Motor Vehicles Division (MVD) computer database.²⁴

Those registrants flagged as "Type F" are understood by county recorders to be non-citizens who are ineligible to vote.²⁵ However, naturalized citizens can possess Type F licenses and when they do they are flagged as ineligible for voter registration.

The Arizona MVD codes driver's licenses as "Type F" when the applicant for a driver's license used an identity document showing that he or she has

²⁴ ER 17, ER 18, ER 19. Each night, the Secretary of State's VRAZ computer program compares voter registration information from the 15 counties against various databases, including the Ariz. MVD database, the Social Security Administration database, as well as Arizona death records and records of felony convictions. ER 20, ER 21, ER 22; ER 23 at 13:2-16:8; ER 12 at 702:1-703:8. VRAZ "flags" problems such as an inability to match a voter registrant's information to the MVD or Social Security databases.

²⁵ ER 23, 34:6-35:8; ER 12, 705:7-18; ER 9, 113:7-13, 114:5-9; ER 24, 82:14-24.

permission by the federal government to be present in the United States.²⁶ The MVD uses the letter “F” to signify “foreign.”²⁷

Because the Type F license does not show its designation on its face, naturalized citizens who obtained their licenses before they naturalized are unaware that they possess Type F licenses.²⁸ Instead, they provide their drivers license numbers when they register to vote and are rejected and required to apply to register again and provide different citizenship information.

In 2005 alone, 6,785 people in Arizona naturalized and became eligible to register to vote.²⁹ The Secretary of State does not know how many of these naturalized citizens hold licenses that are coded Type F in the MVD database but the Secretary of State does know that since January of 2005, Service Arizona, its online voter registration system, has rejected approximately 1,300 voter

²⁶ Driver’s licenses are not restricted to U.S. citizens. ER 15. A permanent legal resident immigrant who shows a valid driver’s license from California, for example, will receive a driver’s license that is not coded Type F in the MVD database. ER 25, 44:9-45:16; 47:25-48:10. Thus, in Arizona, non-citizens have regular licenses and naturalized citizens have Type F licenses.

²⁷ ER 25 at 32-33.

²⁸ ER 3, CR 1041 at 12; ER 25, 67:9-12; ER 26, 54:15-25, 90:7-22; ER 27 at 19:24-20:2. The MVD codes licenses this way for database purposes and the MVD does not use the Type F designation on its licenses to keep track of the citizenship of its license holders. ER 25, 32:13-19, 63:19-64:9, 73:15-22.

²⁹ ER 28-Table 5.

registration applicants who possess either Type F licenses or licenses issued before October 1, 1996.³⁰

The State of Arizona is aware that Type F licenses cannot serve as proxies for non-citizenship, and Proposition 200 does not provide for the use of Type F licenses to verify citizenship. Nevertheless, the Secretary of State has incorporated Type F licenses into its implementation system for Proposition 200, thereby forcing naturalized citizens whose licenses (unbeknownst to them) are coded Type F to be rejected and required to register to vote a second time.

B. Proposition 200 Mandates In-Person “Presentation” Requirements for Naturalized Citizens.

Although Proposition 200 permits native-born citizens to mail copies of their birth certificates to the County recorder, Proposition 200 states that individuals whose citizenship document is a naturalization certificate must present that certificate in person to the County recorder in order to register to vote.³¹

Following the passage of Proposition 200, the Secretary of State updated the Elections Procedures Manual to make clear that, when naturalized citizens use

³⁰ ER 3, CR 1041 at 11; ER 12, 711:4-712:17; ER 29, 30:15-31:3.

³¹ ER 10 (*compare* “photocopy of the applicant’s birth certificate,” *with* “a presentation to the county recorder of the applicant’s United States naturalization documents”).

their naturalization certificates to prove U.S. citizenship, the certificates must be presented in person to the County recorder.³²

C. Proposition 200 Asks Applicants who Provide the Certificate of Naturalization Number and Ensures the Automatic Rejection of All who do so.

Proposition 200 also provides that naturalized citizens may register to vote by supplying their “number of the certificate of naturalization” on the voter registration form. However, the law further states that the naturalized citizen will not be added to the voter rolls unless the county recorder can verify the certificate number with the federal government. There is no dispute that the number of the certificate of naturalization cannot be verified with the federal government.³³ Thus, no naturalized citizen can register by providing his or her naturalization certificate number on the voter registration form.

Nevertheless, following passage of Proposition 200, the Secretary of State updated the State’s voter registration form to add a new box 20 on the form that requested the “number of the certificate of naturalization.”³⁴ Asking registration applicants to provide the naturalization certificate number created a system under which county recorders automatically rejected the application of every naturalized citizen who attempted to register to vote by providing the requested number of the

³² ER 30 at 48; ER 12, 699:17-25; ER 12, 765:20-766:8.

³³ ER 3, CR 1041 at 4; ER 12, 698:3-16; ER 13, 59:21-23.

³⁴ ER 31.

certificate of naturalization.³⁵ After automatically rejecting the applicant, the county recorder then required the applicant, who had simply followed the voter registration form in the first place, to apply again and provide different citizenship information.³⁶

On the day they proudly took the oath of U.S. citizenship, Mr. and Mrs. Gonzalez properly completed voter registration forms and provided, as requested by the form, the numbers of their certificates of naturalization. After submitting the voter registration forms, they were both automatically rejected for voter registration by the county recorder and instructed to register again.³⁷

Two years after implementing Proposition 200 and while defending against Plaintiffs' claims of disparate treatment of naturalized citizens, Arizona sought and received permission from the U.S. Department of Justice to request that naturalized citizens provide a number *other* than that mandated by Proposition 200 in order to register to vote. However, the Secretary of State's decision to change the Arizona voter registration form to request the "Alien Registration Number" has not cured Proposition 200's disparate treatment of naturalized citizens.

³⁵ ER 3, CR 1041 at 4; ER 13, 60:18:22.

³⁶ ER 14, 98:13-99:15; ER 13, 64:19-66:20.

³⁷ ER 3, CR 1041 at 17-18, 25-26; ER 12, 208:1-209:25; ER 12, 224:4-9.

First, county recorders continue to request that applicants provide the number of certificate of naturalization when registering to vote.³⁸ The applicants who follow this information supplied by county recorders will be rejected automatically and forced through the double-registration process reserved only for naturalized citizens.

Second, the plain language of Proposition 200 requires that an applicant provide “the number of the certificate of naturalization,” not the Alien Registration Number or any other number that can be found on the naturalization certificate, such as the applicant’s date of birth or date of naturalization. The statute does not authorize the Secretary of State or county recorders to request an applicant’s Alien Registration Number.³⁹ No future Secretary of State is bound by the current practice of requesting the Alien Registration Number.

The certificate of naturalization number and the Alien Registration Number are not interchangeable.⁴⁰ Unlike the certificate of naturalization number required by Proposition 200, the Alien Registration Number is used by non-citizens to provide information to U.S. Citizenship and Immigration Services (USCIS) while they are under the supervision and control of the federal government. After naturalization, USCIS has no further business with an immigrant and an individual

³⁸ ER 32-34.

³⁹ ER 12, 713:5-9.

⁴⁰ ER 35, 74:3-6.

who naturalizes must turn in her Alien Registration Card to USCIS.⁴¹ The Alien Registration Number serves no purpose for naturalized citizens. At trial, Plaintiff Maria Gonzalez testified that she was confused by the request from the county recorder that Mrs. Gonzalez provide her Alien Registration Number on a subsequent voter registration form because she is a U.S. citizen.⁴² Although the district court found that the Secretary of State's decision to depart from the language of Proposition 200 to request the Alien Registration Number from naturalized citizens was reasonable, the district court did not inquire further whether this mid-litigation change was permanent, feasible or cured the discrimination in Proposition 200.⁴³

D. Naturalized Citizens Encounter difficulties registering to vote with their A numbers.

Because of delays in the data entry of citizenship information into the USCIS database following naturalization ceremonies, county recorders are unable to confirm citizenship of newly-naturalized citizens for two weeks or longer.⁴⁴

Recognizing that the federal database may not reflect the U.S. citizenship status of recently-naturalized citizens, the State's Elections Procedures Manual instructs county recorders to advise naturalized citizens that they may have to

⁴¹ ER 36, 83:4-6, 88:6-12; ER 35, 40:9-13, 45:7-12.

⁴² ER 12, 213:17-23.

⁴³ ER 3, CR 1041 at 30.

⁴⁴ ER 30 at 47; ER 9, 36:6-37:13; ER 37, 51:7-9; ER 38, 48:8-22.

provide *additional* documentary proof of citizenship when they register to vote if the federal database system cannot confirm their citizenship before the registration deadline for an upcoming election.⁴⁵

Furthermore, not all certificates of naturalization show the Alien Registration Number of the former non-citizen.⁴⁶ Nevertheless, the Secretary of State's Office states that it believes that all naturalization certificates show the Alien Registration Number and thus it is appropriate to ask voter registrants to provide it.⁴⁷

E. The Disparate Treatment of Naturalized Citizens Means That Some Cannot Successfully Register Before Registration Deadlines.

After rejecting a registration application for lack of proof of citizenship, county recorders do not “back date” the second voter registration application after receiving a new application with proof of citizenship from the applicant. Instead, the date of registration is the date the applicant submitted the new registration form, even if that date falls after the voter registration deadline for an upcoming election.⁴⁸

F. Proposition 200 Tightens Registration Requirements on Naturalized Citizens Because it is Directed at Voting by Foreign-Born Persons.

⁴⁵ *Id.*

⁴⁶ ER 39.

⁴⁷ ER 3, CR 1041 at 4 n.5; ER 12, 719:18-23.

⁴⁸ *Compare* ER 12, 716:20-717:14 *with* ER 13, 23:16-22; ER 40, 14:7-25-22:14-23; ER 24, 37:8-38:10.

Proposition 200, titled the Arizona Citizen and Taxpayer Protection Act, focuses its findings and provisions on foreign-born persons living in Arizona. The “Findings and Declaration” of Proposition 200 repeatedly mentions “immigration status,” “federal immigration policy,” and invokes the “value of citizenship” “and “security of our borders” as requiring protection from fraudulent acts by immigrants.⁴⁹

The statements supporting Proposition 200's voting provisions, published in the Secretary of State's voter information pamphlet, invoke the specter of immigrants defrauding the election system by registering to vote without U.S. citizenship. *See, e.g.*, “The citizens of Arizona have spoken: they have had enough . . . [Proposition 200's] passage is vital to the security of this state and the sovereignty of our country, “it is not fair or lawful for non-citizens to reap the benefits of citizenship at the expense of law-abiding taxpayers,”“Proposition 200 [ensures] that illegal aliens who are not entitled to vote or obtain certain benefits cannot subvert the law to access them.”⁵⁰

Although there have been only a handful of documented incidents of non-citizen voter registration or voting in Arizona, and none established that the improper registration was intentional or fraudulent,⁵¹ Proposition 200's registration

⁴⁹ ER 10.

⁵⁰ *Id.*

⁵¹ ER 3, CR 1041 at 16-17.

provisions are focused exclusively on combating purported fraudulent registration by immigrants. This focus on registration fraud by immigrants drives the onerous procedures for registration by naturalized citizens.

III. Proposition 200 has a Disparate Impact on Latino Voter Registrants.

From January 2005 until September 2007 Arizona counties retained (and produced in this litigation) the voter registration forms of over 31,000 individuals that were rejected for failure to produce proof of citizenship pursuant to Proposition 200.⁵² Less than one third, or 11,000 of these rejected individuals ultimately successfully registered.⁵³

The effects of Proposition 200 have been felt across all ethnic groups in Arizona. Like the population of Arizona in general, the majority of rejected voter applicants were not Latino and over 90 percent of them reported having been born

⁵²ER 3, CR 1041 at 13; ER 12, 241:13-243:7. Santa Cruz County produced no rejected voter registration forms. Yuma County produce no rejected voter registration forms dated before 2007. ER 41 [Rejected voter registration forms. Filed under protective order].

⁵³ ER 3, CR 1041 at 14; ER 12, 329:13-23. Plaintiffs' expert Dr. Louis Lanier analyzed the rejected voter registration applications of 31,550 individuals.⁵³ His analysis, accepted by the district court, studied the characteristics of the rejected voter registrants themselves, not a statistical estimate of who was rejected. The study further tracked the rejected voters to observe whether they subsequently made a successful voter registration application and appeared on a later date on the state's rolls.

in the United States (as opposed to gaining their citizenship through naturalization).⁵⁴

However, under Proposition 200, Latinos are more likely to be rejected for voter registration when compared to Anglos. Latinos are also less likely than Anglos to successfully re-register after being rejected for voter registration pursuant to Proposition 200.⁵⁵ The district court found that Latinos comprised 20% of registration applicants who were ultimately unsuccessful.⁵⁶ By comparison, Latinos were 16% of all those attempting to register to vote during the same time period.⁵⁷ The rejected voter data also shows that in certain counties, the disparate impact on Latinos was much higher than the statewide average.⁵⁸

Thus, Latinos are overrepresented with respect to initial voter registration rejections. Furthermore, Latinos are over-represented among those ultimately unsuccessful in joining the voter rolls after having their registration forms rejected pursuant to Proposition 200.⁵⁹

⁵⁴ ER 3, CR 1041 at 14; ER 12, 242:25-243:7.

⁵⁵ ER 42-Table 2; ER 12, 243:8-244:7.

⁵⁶ ER 3, CR 1041 at 14.

⁵⁷ ER 42-Table 4.

⁵⁸For example, in Yuma County, Latinos comprised 34.9% of all registration applicants but 40.5% of applicants rejected because of Proposition 200 – a difference of 5.7%. Yuma County Latinos were similarly overrepresented among voter registration applicants who were rejected pursuant to Proposition 200 and never subsequently joined the voter rolls. ER 42-Table 5.

⁵⁹ ER 12, 262:10-263:1.

Looking beyond the rejected applications forms themselves at the overall voter registration in the months and years following Proposition 200, both Latinos and non-Latinos experienced a drop in their registration rates following the implementation of Proposition 200. However, Latinos showed a greater drop in their registration when compared to non-Latinos.⁶⁰ In certain counties, Latino voter registration dropped more than the statewide average, including Pima, Greenlee and Yuma counties.⁶¹

IV. Proposition 200's Voter Identification Requirement Has Prevented Thousands of Voters From Having Their Ballots Counted and has a Disparate Impact on Latinos.

Proposition 200 provides that voters who cast ballots at the polls on Election Day “shall present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector.”⁶² Following the passage of Proposition 200, the Secretary of State revised its Elections Procedures Manual to add the requirement

⁶⁰ ER 3, CR 1041 at 15; ER 43-Table 3; ER 12, 391:20-25.

⁶¹ ER 3, CR 1041 at 15; ER 12, 393:23-394:7. Although the district court speculated that factors other than Proposition 200 could have affected the flow of voter registrations, the district court accepted the separate analysis of voter registration forms as accurately describing the effect of Proposition 200 on Latino registrants. ER 3, CR 1041 at 41.

⁶² ER 44.

that the address on the identification presented by the voter must match the voter's address on the voter rolls at the poll.⁶³

In 2006, Proposition 200's polling place identification requirements resulted in over 4,000 voters being unable to cast ballots in either the Primary or General Election.⁶⁴

Most documents required by Proposition 200's voter identification require a fee for purchase. Although some counties accept "official election mail" as sufficient identification, not all counties send this mail to voters.⁶⁵

The State's stringent requirement that a voter's identification exactly match the address of the voter as it appears on the voter rolls further excludes legitimate voters and, even when they already have current and valid identification, forces them to pay a fee to change information on their driver's licenses solely in order to vote.⁶⁶

As a result, voters who possess valid identification are turned away or forced to vote conditional provisional ballots that are never counted.⁶⁷

Proposition 200's requirements for voting at the polls on Election Day have had a disproportionate negative impact on Latino voters. For example, Latinos

⁶³ ER 30 at 30-31; ER 12, 706:19-707:13.

⁶⁴ ER 3, CR 1041 at 15; ER 12, 249:18-251:8.

⁶⁵ ER 3, CR 1041 at 6-7.

⁶⁶ ER 3, CR 1041 at 26-27.

⁶⁷ ER 45, 43:14-45:23; ER 46; ER 47.

comprised between 2.6% and 4.2% of the voters who turned out to vote in the 2006 General Election race for Governor but they cast 10.3% of the uncounted conditional provisional ballots.⁶⁸ Similarly, a study by Maricopa County Election staff found that Proposition 200's voter ID provision had a disparate impact on Latinos in the 2008 Presidential Preference Election.⁶⁹

V. Proposition 200 Interacts with Social and Historical Conditions to Deny Equal Access to Latinos as They Struggle to Close the gap in Political Participation.

According to the 2000 Census, Latinos comprised 15% of Arizona's citizen voting age population.⁷⁰ The number of Arizona's Latino citizens is growing faster than that of Anglos. From 2004 to 2007, Latino citizen voting age population rose 17.2 percent.⁷¹ By comparison, Anglo citizen voting age population rose 10.5

⁶⁸ ER 3, CR 1041 at 15; ER 48.

⁶⁹ ER 3, CR 1041 at 15; CR 49.

⁷⁰ ER 28–Table 4.

⁷¹ ER 28– Table 9e; and U.S. Census, American Factfinder, 2007 American Community Survey 1-Year Estimates , *available at* [http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-ds_name=ACS_2007_1YR_G00_&-mt_name=ACS_2007_1YR_G2000_B05003H&-tree_id=307&-redoLog=true&-_caller=geoselect&-geo_id=04000US04&-search_results=01000US&-format=&-_lang=en,](http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-ds_name=ACS_2007_1YR_G00_&-t_name=ACS_2007_1YR_G2000_B05003&-tree_id=307&-_caller=geoselect&-geo_id=04000US04&-search_results=01000US&-format=&-_lang=en,) http://factfinder.census.gov/servlet/DTable?_bm=y&-state=dt&-context=dt&-ds_name=ACS_2007_1YR_G00_&-mt_name=ACS_2007_1YR_G2000_B05003I&-tree_id=307&-redoLog=true&-

percent in this same period. Although most Latino voting age citizens in Arizona were born in the United States, Latinos comprise the greatest proportion of immigrants naturalizing and becoming United States citizens in Arizona.⁷²

Proposition 200's new registration provisions, which apply only to first time registrants and "grandfather" existing voters in a county, have their greatest effect on those entering the electorate.

Arizona has a history of official voting-related discrimination against Latinos including constitutional codes prohibiting voting by non-white persons and a literacy test that explicitly targeted Mexican Americans.⁷³ The district court found that "discrimination against Latinos in Arizona has historically hindered their ability to fully participate in the political process."⁷⁴ The district court further found that today's Arizona Latinos have lower rates of registration and voting than Anglos and concluded "there are socio-economic disparities between Latinos and white, non-Latinos, which hinders Latinos' ability to participate effectively in the political process."⁷⁵

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⁷² ER 28–Table 4.

⁷³ ER 3, CR 1041 at 42-43.

⁷⁴ ER 3, CR 1041 at 42.

⁷⁵ ER 3, CR 1041 at 44.

Latinos vote cohesively in Arizona elections.⁷⁶ Non-Latinos vote as a bloc against Latino-preferred candidates in statewide and other racially-contested elections.⁷⁷ In two Latino-majority congressional districts, which offer Latino voters the opportunity to elect their candidate of choice, Non-Latinos support the established Latino incumbent.⁷⁸

Latinos whose applications were rejected or whose ballots were not counted because of Proposition 200 lived in Census block groups where compared to both Anglos and the statewide average, the average median income is lower; a higher percentage of the people have no formal schooling; and a lower percentage of the people have a four-year bachelor's degree.⁷⁹

Arizona State Representative Steve Gallardo testified at trial that Proposition 200's voter registration requirements create an impediment for voter registration among the Latinos he represents.⁸⁰ Rep. Gallardo explained that many of the Latinos he represents are low income, have low political participation rates and suffer from a lack of information about voting. He testified that

⁷⁶ ER 3, CR 1041 at 44-45 and ER 50 - Table.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ ER 12, 261:5-20; ER 42-Tables 6, 7.

⁸⁰ ER 12, 176:2-7; 176:21-177:1, 22-23; 180:22-181:24; 205:17-21.

Representative Gallardo represents the majority-Latino State House District 13 and also represents the City of Phoenix, which contains one-fourth of the state's population, as a Governing Board member for Phoenix Union High School District.

communicating with his constituents about changes in election rules is difficult, because they often lack the means or knowledge to access the information themselves, for example a personal computer to search the internet or a phone to call county election officials.⁸¹ He testified that some of the residents of his district lack basic amenities such as a telephone, vehicle or a driver's license; some live in old homes with dirt floors.⁸²

Luz Sarmina, who directs a community based organization that works in the Latino community, testified that many of the people her organization serves would be reluctant to travel to a registrar's office to register to vote because it is a relatively foreign place compared to locations they know, such as schools, churches and community organizations.⁸³ Similarly, Debra Lopez, a community organizer and voter registration advocate testified that that when she is registering voters in Latino neighborhoods she helps them fill out the forms because she is concerned that they may not be able to complete the application by themselves. Ms. Lopez further testified that she has had to make photocopies of applicants' citizenship documents herself or the applicants would not register.⁸⁴

⁸¹ *Id.*, 182:8-183:7.

⁸² *Id.*, 186:23-188:18; 184:7-17; 185:10-25.

⁸³ ER 12, 490:20-24; 494:4-15.

⁸⁴ ER 12, 622:21-623:12.

Ms. Lopez testified that it is a challenge to turn out Latino voters because many are poor, first or second generation Americans, require more education on civic engagement and are largely unaware of Proposition 200's requirements.⁸⁵

Maria Gonzalez, who is Latina and a housewife, testified regarding the problems she encountered trying to register to vote.⁸⁶ She described that she was confused and offended by having been rejected for voter registration after properly completing the voter registration form and providing the certificate of naturalization number as requested by the form.⁸⁷ After receiving her rejected voter registration form with instructions to apply to register to vote again, Mrs. Gonzalez testified that she did not understand why she was asked for her Alien Registration Number because she is already a U.S. citizen and the Alien Registration Number is "irrelevant" to her now.⁸⁸ She further testified that she required her daughter's assistance to make a later successful attempt at voter registration using the internet.⁸⁹ Mrs. Gonzalez testified that she has experienced discrimination in Arizona based on her national origin and that she believed the

⁸⁵ ER 12, 607:16-608:2; 615:8-616:1.

⁸⁶ ER 12, 206:24-217:25.

⁸⁷ ER 12, 211:12-20; 212:7-12.

⁸⁸ ER 12, 213:17-23.

⁸⁹ ER 12, 214:4-7.

reason she was required to register to vote twice under Proposition 200 is because she is Mexican American.⁹⁰

Appellant Jesus Gonzalez, who is Latino and a maintenance worker, testified regarding his lack of success registering to vote.⁹¹ He described that he felt badly after properly completing a voter registration application and being rejected, and that he felt worse after being rejected for voter registration a second time.⁹² He further testified that he does not understand why he should provide his Alien Registration Number in response to the rejection letter from the county recorder because the certificate of naturalization number proves his citizenship.⁹³ He also testified that he connected the experience of being rejected for voter registration to the discrimination he faced after immigrating to the United States and working in the fields in racially segregated and inferior conditions.⁹⁴ Mr. Gonzalez testified that he felt he was not being allowed to vote because he is from Mexico and that although he believed it is important to register to vote, after being rejected twice he felt he would be rejected again if he tried to register for a third time.⁹⁵

⁹⁰ ER 12, 212:6-12; 214:8-18.

⁹¹ ER 12, 221:5-229:7.

⁹² ER 12, 224:4-9; 225:5-18.

⁹³ ER 12, 231:14-24.

⁹⁴ ER 12, 227:24-229:4.

⁹⁵ ER 12, 234:9-15; 228:17-25.

STANDARD OF REVIEW

The standard of review is de novo for the district court's conclusions of law and its ruling granting summary judgment on Plaintiffs' NVRA, Supremacy Clause and poll tax claims. *See League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 549 F.3d 1211 (9th Cir. 2008). The Court also reviews de novo the district court's findings on constitutional issues and the district court's findings based on mixed questions of law and fact. *See Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007). The Court reviews for clear error the district court's findings of facts on non-constitutional issues. *See Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010 (9th Cir. 2008).

ARGUMENT SUMMARY

The district court erred in concluding that the NVRA permits states to use their own voter registration forms to the exclusion of federal mail voter registration forms promulgated by the Election Assistance Commission. The plain language of the NVRA requires states to "accept and use" the federal mail voter registration form as an integral component of a uniform, national system of voter registration. 42 U.S.C. 1973gg-4. Arizona's refusal to "accept and use" the federal form violates the NVRA and is preempted by the Supremacy Clause.

The district court also erred in concluding that Proposition 200's treatment of naturalized citizens was neither burdensome nor disparate when compared to other registration applicants. Proposition 200 has created a system under which many naturalized citizens are rejected for voter registration and required to re-apply through no fault of their own. These systemic and predictable obstacles for naturalized citizens, which force them to spend additional time and money reapplying to register to vote, burden the fundamental right to vote of naturalized citizens and place registration burdens on them that are greater and different than those placed on native born citizens. Proposition 200 thus violates the 14th Amendment's Equal Protection Clause. *See Rice v. Cayetano*, 528 U.S. 495 (2000); *Burdick v. Takushi*, 504 U.S. 428 (1992); *League of Women Voters of Ohio v. Brunner*, 2008 WL 4999087, *11 (6th Cir. 2008).

The district court erred when it found that Proposition 200 does not abridge or deny the right to vote of Latinos in violation of Section 2 of the Voting Rights Act. 42 U.S.C. 1973 et seq. The district court found that Latinos are over-represented among those who: are rejected for voter registration because of Proposition 200; ultimately don't register after being rejected under Proposition 200; and are unable to cast a ballot on Election Day because of Proposition 200's identification requirement. However, the district court lost sight of Proposition 200's disparate impact on Latinos by erroneously including all voters, including

those never subject to Proposition 200, in its disparate impact analysis. The district court further erred by failing to conduct the appropriate inquiry under the totality of circumstances.

Finally, the district court erred in concluding that Proposition 200 does not impose a poll tax in violation of the 24th Amendment. The Supreme Court reiterated in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008) that laws that require voters to pay a fee for documents required to vote are unconstitutional. Because documents required by Proposition 200 to demonstrate citizenship for most people cost a fee, Proposition 200 is a poll tax prohibited by the 24th Amendment.

ARGUMENT

I. Arizona's Refusal to Accept and use the Federal Voter Registration Form Violates the National Voter Registration Act, 42 U.S.C. 1973gg, et seq. and the Supremacy Clause.

Following remand from this Court, the district court entered summary judgment against Appellants' NVRA and Supremacy Clause claims.⁹⁶ Because the NVRA requires states to "accept and use" federal mail voter registration forms, even when states have designed their own mail voter registration forms, Appellants urge this Court to reverse.

⁹⁶ ER 5, CR 330.

A. The NVRA Requires States to “accept and use” the federal mail voter registration form promulgated by the U.S. Election Assistance Commission.

The National Voter Registration Act of 1993 (“NVRA” or “Act”) establishes national standards and procedures to govern voter registration in federal elections. The statute includes findings that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation” and declares as its purpose to “establish procedures that will increase the number of eligible citizens who register to vote.” 42 U.S.C. § 1973gg (a), (b). Congress chose to fulfill its purpose by mandating use of a uniform mail registration application, when applying for a driver’s license (the so-called “motor-voter” rules), or when visiting certain public agencies. *Id.* § 1973gg-2(a).

In the NVRA, Congress specifically set forth the contents of a national voter registration form and required all states to accept and process the federal form for registration to vote in federal elections. Congress vested a federal agency with the authority to design a simple, universal form in a “postcard” format. *Id.* § 1973gg-7.

Congress instructed the Federal Election Commission (now the Election Assistance Commission) to follow specific requirements when the agency designs the national form:

The mail voter registration form developed [by the EAC] under subsection (a)(2) of this section—

(1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that—

(A) specifies each eligibility requirement (including citizenship);

(B) contains an attestation that the applicant meets each such requirement; and

(C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application—

(i) [voter eligibility requirements and the penalties provided by law for submitting false voter registration];

42 U.S.C. § 1973gg-7.

In the NVRA, neither the language instructing the EAC on the contents of the form nor the provision requiring its acceptance by states permit states to require additional information with the federal form. Although states are authorized to design and use their own mail voter registration form, nothing in the statute permits states to use their forms to the exclusion of the federal form. *See* 42 U.S.C. 1973gg-4 (2) (“*In addition to accepting and using the [federal] form . . . a state may develop and use a mail voter registration form . . .*”) (emphasis added).

The NVRA provides that a signature on the registration form, which includes both the requirements of voter eligibility and the penalties for perjury by filing a false application, is sufficient to ensure that the information contained within is truthful. There are a variety of ways to give meaning to a signature and verify that the information to which it is attached is authentic, including notarization, and attaching supporting documentation. Congress, however, specifically prohibited states from requiring “notarization or other formal authentication.” 42 U.S.C. 1973gg-7(b)(3).

The Arizona requirement for supporting documentation of citizenship directly contradicts the statute. Rather than relying on the attestation signature, Arizona officials require official government documents in order to authenticate some applications.

The hurdles imposed by Proposition 200 are precisely the type of restrictions that Congress intended to prevent for registration in federal elections. To allow their implementation not only violates the language of the National Voter Registration Act, but also renders meaningless the entire uniform mail registration program.

B. Arizona’s Proof of Citizenship Requirement for Voter Registration is Conflicts with and Frustrates the Purpose of the NVRA.

Art. I Section. 4 cl. 1 of the United States Constitution, known as the “Elections Clause,” reserves to Congress the right to regulate the manner of holding congressional elections.⁹⁷ U.S. CONST., art I, s. 4 cl. 1. The Supreme Court has often interpreted the Election Clause and upheld Congressional authority to preempt contrary state laws.

The Supreme Court in *Ex Parte Siebold*, 100 U.S. 371 (1879), upheld Congressional authority to impose penalties for violating laws governing the election of congressional members. The Court stated that the Elections Clause conferred upon Congress authority to regulate congressional elections and that the “power of Congress over the subject is paramount.” *Id.* at 384. It also opined that “[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.” *Id.*

In what is known as the Ku Klux Klan Case, the Court held that, under the Election Clause, Congress has unfettered authority to act when it “finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting” *Ex Parte Yarbrough*, 110 U.S. 651, 662 (1884).

⁹⁷ The Election Clause provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

In *Foster v. Love*, 522 U.S. 67 (1997), the Supreme Court again reaffirmed Congressional power to regulate elections for congressional members by striking down a 1978 Louisiana law that set an open primary election in October. The Court noted that the Election Clause “is a default provision; it invests the States with responsibility for the mechanics of congressional elections, *see Storer v. Brown*, 415 U.S. 724, 730 (1974), but only so far as Congress declines to preempt state legislative choices, *see Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (‘Unless Congress acts, Art. I, § 4, empowers the States to regulate’).”⁹⁸ The Court found well-settled Congressional “‘power to override state regulations’ by establishing uniform rules for federal elections, binding on the States.” *See Foster*, 522 U.S. at 69 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)).

The text and legislative history of the NVRA make clear that Congress intended to act under the authority granted to it by the Elections Clause:

Congress has the power to regulate Federal elections, including the establishment of national voter registration procedures for Presidential and congressional elections. Congress’ power has been clearly

⁹⁸ Although states have been granted the authority to legislate the “time, place, and manner” of elections, under the Constitution, it is only “to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution ‘To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.’” *United States v. Classic*, 313 U.S. 299, 315 (1941).

established under the Times, Places and Manner Clause and the Necessary and Proper Clause of the Constitution. These provisions, as interpreted by the Supreme court, belie assertions by those who argue that the States have exclusive authority to regulate the manner in which Federal elections are conducted.

See S. Rep. 103-6, at 3-4; H.R. Rep 103-9, at 6.

After passage of the NVRA, Illinois, California, and Michigan challenged the NVRA as unconstitutional because it infringed on state power, “conscripting state agencies, personnel, and funds to further a federal purpose, thereby impinging upon basic principles of federalism and violating the Tenth Amendment.” *See Association of Comm. Organizations for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997). Each time, however, the challenges failed. *ACORN*, 129 F.3d at 836; *see also ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995) *cert. denied*, 516 U.S. 1093 (1996). And, in each case, the court relied on the Elections Clause to justify the extent and nature of Congressional regulation of various aspects of the election process. *See, e.g., ACORN*, 129 F.3d at 836 (holding passage of NVRA was proper exercise of Congressional power to regulate federal elections).

In addition to constitutional preemption, federal law may preempt state action in three additional ways: “[1] by express language in a congressional enactment (“express preemption”), [2] by implication from the depth and breadth of a congressional scheme that occupies the legislative field (“field preemption”),

or [3] by implication because of a conflict with a congressional enactment (“conflict preemption”).

As explained by the Supreme Court:

A fundamental principle of the Constitution is that Congress has the power to preempt state law. Even without an express provision for preemption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to “occupy the field,” state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.

Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000).

Even if the Court finds that Proposition 200 does not conflict with the NVRA, Proposition 200 still violates the Supremacy Clause of the U.S. Constitution because it impedes and frustrates the purposes of the NVRA. *See Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (it is necessary “to determine whether, under the circumstances of this particular case, [the State’s] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”); *accord De Canas v. Bica*, 424 U.S. 351, 363 (1976).

The purpose of the NVRA is to broaden registration opportunities by, among other things, establishing a uniform mail voter registration form that can be used by an applicant anywhere in the United States.⁹⁹ *See Welker v. Clarke*, 239 F.3d

⁹⁹ Congress similarly established a uniform registration form for overseas citizens and military personnel to register to vote and request an absentee ballot.

596, 598-599 (3rd Cir. 2001) (“One of the NVRA's central purposes was to dramatically expand opportunities for voter registration and to ensure that, once registered, voters could not be removed from the registration rolls by a failure to vote or because they had changed addresses. 42 U.S.C.A. § 1973gg(b).”); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 114 (2nd Cir. 2000). (“Congress enacted the NVRA to “establish procedures ... [to] increase the number of eligible citizens who register to vote in elections for Federal office” and to “enhance[] the participation of eligible citizens as voters in elections for Federal office.” 42 U.S.C. § 1973gg(b)(1), (2).).

Congress ensured that the NVRA *did not* permit states to ask for documentary proof of citizenship from applicants submitting the federal mail registration form. In fact, when the Senate passed an amendment to the NVRA bill that would have permitted states to require “presentation of documentary evidence of the citizenship of an applicant for voter registration,” the conference committee rejected the amendment, declaring “[i]t is not necessary or consistent with the purposes of this Act.” *See* 139 Cong. Rec. S2897, S2901 (daily ed. March 16,

See the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 42 U.S.C. 1973ff et seq. Arizona rejects federal post card applications submitted pursuant to UOCAVA in the same manner in which it rejects federal mail registration forms submitted pursuant to the NVRA. ER 9 at 102-103.

1993) and H.Rep. 103-66 at 23-24 (1993) (Conf. Rep.). The bill passed unmodified in both houses.

Because the NVRA is a comprehensive statute providing a uniform and national method of registration to vote in federal elections, states may not enact laws that frustrate the purpose of the NVRA or that impose burdens not contemplated by Congress when it enacted the NVRA. *See Project Vote v. Madison County Bd. of Elections*, 2008 WL 4445176 (N.D. Ohio 2008) (ruling that that defendants' interpretation of the VRA to permit restrictive absentee ballot procedures is "inconsistent with the purposes of the VRA, which intended to enlarge the group of enfranchised citizens. The VRA was not intended to serve as a limit on the electorate.").

Proposition 200 stands as an impediment to the NVRA. The federal mail voter registration form states on its cover: "Register to Vote in Your State by Using This Postcard Form and Guide." The first paragraph of the General Instructions to the federal mail application states: "If you are a U.S. citizen who lives or has an address within the United States, you can use the application in this booklet to: Register to vote in your state."¹⁰⁰ Nevertheless, a voter cannot exercise her right to use the federal mail voter registration form in Arizona because, unless

¹⁰⁰ ER 51 at Ex. 1-B.

she provides the information required by Proposition 200 the federal form will be rejected by Arizona election officials.

II. Proposition 200 Treats Naturalized Citizens Differently than Native Born Citizens, Thus Violating the Equal Protection Clause of the 14th Amendment of the U.S. Constitution.

The district court erred in its 14th Amendment analysis by requiring Plaintiffs to provide evidence of invidious racial intent in the passage of Proposition 200 and also by failing to give proper weight to Plaintiffs' evidence that Proposition 200 on its face and in its implementation singles out naturalized citizens for more onerous requirements in voter registration.

A. Statutes That Treat National Origin Groups Differently, or Burden a Fundamental Right, are Subject to Strict Scrutiny.

The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Moreover, the Supreme Court has consistently held that classifications based on national origin are inherently suspect and subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *In re Griffiths*, 413 U.S. 717, 721-722 (1973).

It is well-established that a state statute that treats differently a suspect class or burdens a fundamental right is subject to strict scrutiny. *See Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). As explained by this Court:

Statutes that treat individuals differently based on their race, alienage, or national origin “are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1986). Statutes infringing on fundamental rights are subject to the same searching review. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978) (right to marry); *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (right to interstate travel).

Silveira v. Lockyer, 312 F.3d 1052 ,1087-1088 (9th Cir. 2002).

When faced with statutes that distinguish between native-born citizens and naturalized citizens federal courts have routinely, applying strict scrutiny, found them unconstitutional. For example, in the voting rights context, a court found unconstitutional an Ohio statute that required naturalized citizens, but not native-born citizens, to provide documentary proof of citizenship when their eligibility to vote was challenged at the polling place. *Boustani v. Blackwell*, 460 F.Supp.2d 822 (N.D.Ohio 2006); *see also Fernandez v. Ga.*, 716 F. Supp. 1475, 1479 (M.D. Ga. 1989) (striking down a Georgia law that did not allow naturalized citizens to become state troopers); *Huynh v. Carlucci*, 679 F. Supp. 61, 66 (D.D.C. 1988) (applying strict scrutiny and striking down a regulation that imposed stricter requirements on naturalized citizens to gain Department of Defense security clearance); *Faruki v. Rogers*, 349 F. Supp. 723, 725 (D.C. Cir. 1972) (striking down several portions of a statute that required foreign service officers to be U.S. citizens for a minimum of ten years).

B. Plaintiffs Demonstrated that Proposition 200 Imposes Greater Burdens on Naturalized Citizens And Need Not Show Invidious Intent in the Passage of Proposition 200.

When a statute classifies voter registrants on the basis of national origin, Plaintiffs are not required to prove invidious motive in the passage and implementation of the statute. *See Valeria v. Davis*, 307 F.3d 1036, 1039 (9th Cir. 2002) (“governmental actions that classify persons by race, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995), or that are facially neutral but motivated by discriminatory racial purpose, *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), are subject to strict judicial scrutiny.); *see also Boustani*, 460 F.Supp.2d at 826 (striking portion of statute even though “[i]n the instant matter, neither Plaintiffs nor the Court has been able to discern the legislative intent behind [the statute].”)

Nevertheless, the district court in this case focused exclusively on the question of invidious intent, concluding that “because Gonzalez Plaintiffs have failed to establish intentional discrimination, they have not proved that Proposition 200’s proof of citizenship requirement violates the Equal Protection Clause by discriminating against naturalized citizens.”¹⁰¹

C. The District Court Improperly Evaluated the Burdens Placed on Naturalized Citizens.

¹⁰¹ ER 3, CR 1041at 38.

The district court's legal error led to a failure to weigh properly Plaintiffs' evidence that naturalized citizens are singled out for greater obstacles in the voter registration process.

Although the district court correctly found that under Proposition 200, naturalized citizens may have to apply twice to register to vote, or pay a fee to complete the second registration, or register in person at the county recorder's office, the district court erred in concluding that these systemic and foreseeable obstacles do not constitute discrimination.

The district court recognized that on its face, Proposition 200 treats naturalization documents uniquely from all other citizenship documents, requiring an in-person "presentation" to the county recorder.¹⁰² By its terms, Proposition 200 requires every citizen who relies on her naturalization document to prove citizenship to travel to the county recorder's office to register to vote in person.

Instead of considering a requirement of in-person registration to be a burden on applicants, the district court repeatedly relied on in-person registration as proof that Proposition 200 is not discriminatory or burdensome: "An applicant need only present the certificate of naturalization *in person* if the applicant chooses not to write down the A-number on the voter registration form In fact, federal law criminalizes the photocopying of certificates of naturalization without lawful

¹⁰² ER 3, CR 1041 at 36-37.

authority . . . if they present their naturalization certificate *in person*, verification is not required.”¹⁰³

The district court also found that the portion of Proposition 200 permitting a naturalized citizen to register using “the number of the certificate of naturalization” is inoperable because the federal government cannot verify the certificate number from a naturalization certificate.¹⁰⁴

The district court further found that naturalized citizens who attempt to register to vote using their Arizona driver’s license numbers may be rejected because, unbeknownst to them, the Motor Vehicles Division has coded them as non-citizens in its computer database.¹⁰⁵ The district court concluded that applicants who are rejected because they have a Type F license are required to reapply for voter registration if they want to vote.¹⁰⁶

The district court concluded improperly that being forced to register twice is not a severe burden: “if a newly naturalized citizen uses a Type F license to register to vote and is required to provide additional proof of citizenship, the

¹⁰³ ER 3, CR 1041 at 37 (emphasis added).

¹⁰⁴ ER 3, CR 1041 at 30 (“As a result, some applicants, such as Maria and Jesus Gonzalez, who correctly filled out their voter registration form by providing the number beginning with ‘No.’ were denied registration, and they had to try to register a second time”). ER 3, CR 1041 at 4.

¹⁰⁵ ER 3, CR 1041 at 12.

¹⁰⁶ *Id* at 31.

applicant merely has to file a new form to register . . . While inconvenient, this is hardly a severe burden.”¹⁰⁷

Thus, the district court concluded that all of these obstacles, which are unique to naturalized citizens, did not constitute discrimination because naturalized citizens can attempt to register again, either in person or after updating their citizenship information at the MVD and purchasing a new driver’s license: “In such circumstances, a naturalized citizen has the option of obtaining an updated license by presenting a naturalization certificate to the MVD and paying a fee of \$4, or registering to vote without incurring additional cost using a naturalization certificate . . .”¹⁰⁸

D. The State’s Mid-Litigation Change in Some Procedures Does not Cure the Discrimination Against Naturalized Citizens.

The district court reasoned that, because State Appellees created new procedures, two years after implementing Proposition 200 and in the middle of the litigation, to permit mail registration using a naturalized citizen’s former Alien Registration Number, naturalized citizens are treated equally under Proposition 200.¹⁰⁹

This conclusion was in error for a number of reasons. First it contradicts the evidence at trial and the district court’s fact findings. Not every naturalized citizen

¹⁰⁷ *Id.*

¹⁰⁸ ER 3, CR 1041 at 12.

¹⁰⁹ *Id.* at 5, 31.

has an Alien Registration Number printed on the naturalization certificate.¹¹⁰ County recorders cannot use the Alien Registration Number of newly-naturalized citizens to confirm their citizenship for two weeks or longer because of delays in data-entry at the USCIS.¹¹¹ The record at trial demonstrated that some counties still provide registration forms on their websites that request the number of the certificate of naturalization, and not the Alien Registration Number.¹¹² Likewise, many counties inform the public that they may prove citizenship with the number of the certificate of naturalization, not the Alien Registration Number.¹¹³

Mrs. Gonzalez testified at trial that she was confused by the rejection of her voter registration application and the county recorder's request for her Alien

¹¹⁰ *Id* at 4 n.5 (“Before approximately 1975, certificates of naturalization did not have A-numbers printed on them.”).

¹¹¹ ER 30 at 47.

¹¹² *See, e.g.*, ER 32-34.

¹¹³ *See, e.g.*, ER 52-57. Although some county recorders suggested that they might informally accept photo copies of naturalization certificate, the Secretary of State's Procedures Manual instructs county recorders to require that applicants “present” their naturalization certificates (ER 30 at 48). The district court itself noted that “persons with a certificate of naturalization are allowed to prove citizenship by either: (1) presenting the actual certificate of naturalization, or (2) submitting the number on the naturalization certificate, subject to verification.” CR 1041 at 38. The district court again found that applicants “need only present the certificate of naturalization in person . . .” because “federal law criminalizes the photocopying of certificates of naturalization without lawful authority.” ER 3, CR 1041 at 37.

Registration Number because as a naturalized citizen she no longer used that number.¹¹⁴

Most importantly, naturalized citizens who use their driver's licenses to register to vote still face the rejection of their applications because their licenses are coded as Type F ("foreign") in the MVD database. The State continues to instruct recorders to reject applicants with Type F flags even though officials know that the license holder could have naturalized after obtaining the license and that the Type F code does not mean the applicant lacks U.S. citizenship today.¹¹⁵ As a result, many naturalized citizens are still burdened with a double-registration requirement and faced with having to pay a fee to update their driver's licenses or present their naturalization certificates in person to the county recorder in order to complete a second registration.

Second, it was error for the district court to conclude that the recent rules change, without any change in the underlying statute, cures Proposition 200's discrimination. *See Forest Guardians v. Johanns*, 450 F.3d 455, 462 (9th Cir. 2006) (ruling that even when defendant agency had changed course during litigation, a declaratory judgment that the agency's actions violated the law would provide effective relief by prohibiting the agency from continuing to violate the

¹¹⁴ ER 12, 213:17-23.

¹¹⁵ ER 25, 32:13-19, 63:19-64:9, 73:15-22.

law and explaining “[w]e have repeatedly held that where, like here, both injunctive and declaratory relief are sought but the request for an injunction is rendered moot during litigation, if a declaratory judgment would nevertheless provide effective relief the action is not moot.”).

State officials’ mid-litigation change in their procedures manual does not change the language of the challenged statute and does not guarantee that the incoming Secretary of State of Arizona will maintain the changed procedures. On its face Proposition 200 still requests and then forces the automatic rejection of applicants who provide the number of the certificate of naturalization. Proposition 200 still contains an in-person registration requirement for those relying on their naturalization certificates to register to vote. Mr. Gonzalez, who has not yet successfully registered to vote, and other Appellees have sought declaratory relief as well as injunctive relief in this action to make clear that Proposition 200 is discriminatory and to ensure that Proposition 200’s terms are not followed by future election officials.

E. The District Court Failed to Apply Strict Scrutiny to Proposition 200.

Because the district court erred in concluding that naturalized citizens are not subject to more onerous registration requirements under Proposition 200, the district court also erred by failing to apply strict scrutiny to Proposition 200 and Appellees’ implementation of the law. *Rice v. Cayetano*, 528 U.S. 495, (2000).

Defendants presented no compelling state interest for treating naturalized citizens differently from native born citizens in the registration process. The record is devoid of any evidence demonstrating that naturalized citizens have committed or are likely to commit registration fraud. The district court's finding that "The purpose of Proposition 200 – preventing voter fraud and enhancing voter confidence – would be frustrated if naturalization numbers submitted without documentary proof were not subject to verification"¹¹⁶ is flawed in several respects. First, the district court's finding ignores the fact that Proposition 200 does not require verification of a number of documents, including tribal identification numbers, U.S. passports and U.S. birth certificates and thus the statute is not focused on verifying citizenship documents. Second, the district court's finding does not address the question whether the disparate treatment of naturalized citizens within the overall registration system is narrowly tailored to further compelling governmental interests.

III. Proposition 200 violates Section 2 of the Voting Rights Act, 42 U.S.C. 1973 et seq.

Section 2 of the Voting Rights Act of 1965 prohibits race discrimination in voting and provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political

¹¹⁶ ER 3, CR 1041 at 38.

subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .

42 U.S.C. 1973.

Congress amended Section 2 in 1982 to mandate a ‘results test.’

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. See also, *Chisom v. Roemer*, 501 U.S. 380, 394 (1991).

Section 2 prohibits electoral practices that prevent minority voters from voting as well as practices that result in the dilution of minority voting strength. See *Johnson v. Governor of State of Florida*, 405 F.3d 1214, 1227 fn. 26 (11th Cir. 2005) (“Two types of discriminatory practices and procedures are covered by section 2: those that result in “vote denial” and those that result in “vote dilution.”).

Section 2 requires the district court “to consider the ‘totality of the circumstances’ and to determine, based ‘upon a searching practical evaluation of the past and present reality whether the political process is equally open to minority voters.’” *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (citing the Senate Judiciary Report to the 1982 amendments to the Voting Rights Act at 30, U.S.Code Cong. & Admin.News 1982 at 208); see also *U.S. v. Blaine County, Montana*, 363 F.3d 897, 903 (9th Cir. 2004).

When evaluating the ‘totality of circumstances’ surrounding a potential Section 2 violation, the court must conduct “an intensely local appraisal of the design and impact of the [challenged practice].” *Rogers v. Lodge*, 458 U.S. 613 (1982) (quoting *White v. Regester*, 412 U.S. 755, 769-770 (1973)).

The Senate Judiciary Committee, in a report accompanying the 1982 amendments to the Voting Rights Act, provided a non-exclusive list of factors that a court should consider in determining whether the challenged practice denies minority voters equal access to the political process.³

³ These factors include, but are not limited to:

- (1) the extent of any history of official discrimination in the state or political subdivision affecting the right of a member of a minority group to register, vote, or participate in the democratic process;
- (2) the extent to which voting in government elections is racially polarized;
- (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group (for example, unusually large election districts, majority vote requirements, prohibitions against bullet voting);
- (4) exclusion of minorities from a candidate slating process;
- (5) the extent to which minority group members in the state or political subdivision bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
- (6) the use of overt or subtle racial appeals in political campaigns;
- (7) the extent to which minorities have been elected to public office in the jurisdiction.

Additional factors are: “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs” of the minority group and “whether the policy underlying the . . . use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.” S. Rep. No.

In order to combat the potentially wide variety of racially discriminatory voting practices, “[t]he Supreme Court established that the Voting Rights Act “should be interpreted in a manner that provides ‘the broadest possible scope’ in combating racial discrimination.” *Arakaki v. Hawaii*, 314 F.3d 1091, 1096 (9th Cir. 2002) (quoting *Chisom*, 501 U.S. at 403).

The court’s ultimate inquiry is whether the challenged practice interacts with social and historical conditions to abridge the ability of Latinos to vote or dilute Latino voting strength. See *Thornburg* 478 U.S. at 47; *Mississippi State Chapter, Operation Push v. Allain*, 674 F.Supp. 1245, 1253 (N.D.Miss.1987) *aff’d sub nom Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991) (striking down Mississippi’s dual registration requirement and prohibition on removing the voter registration books from the circuit clerk’s office).

A. The District Court Erred in Evaluating Proposition 200’s Disparate Impact on Latinos.

The district court made subsidiary fact findings that compel the conclusion that Proposition 200 has a discriminatory impact on Latinos. The district court found that Latinos are more likely than non-Latinos to be rejected for voter

97-417, at 28-29, reprinted in 1982 U.S.C.C.A.N. 177, 206-07; *Gingles*, 478 U.S. at 48 n.15.

registration under Proposition 200.¹¹⁷ The district court also credited Appellants' expert testimony that Latinos are over-represented among voter registration applicants rejected under Proposition 200 and those "ultimately unable to register to vote."¹¹⁸ Finally, with respect to Proposition 200's voter identification provision, the district court found that "the percent of Latino votes that go uncounted is higher than their representation in the number of voters casting ballots."¹¹⁹ All of the district court's findings of fact support the legal conclusion that Proposition 200 has a negative disparate impact on Latino voters and registrants.¹²⁰

However, the district court erred by comparing the number of Latinos negatively affected by Proposition 200 to all of the Latinos registered in Arizona, including voters who were never subject to the requirements of Proposition 200. In essence, the district court used the total of number of Latinos on the state's voter roll to negate the effect of Proposition 200 on those Latinos who have been unable

¹¹⁷ See, e.g. ER 3, CR 1041 at 41 ("it is true that the percent of Latino voter registration applicants rejected was 2.8% higher than their representation in total number of registration applicants [and] 19.8% of those ultimately unable to register to vote were Latino"); ER 42-Table 4.

¹¹⁸ ER 3, CR 1041 at 41.

¹¹⁹ *Id.*

¹²⁰ The district court's observation that "the drop in Latino registration rates was .92% more than the drop in non-Latino registration rates following Proposition 200" was based on a separate analysis of the flow of voter registrations by Appellants and was not related to Appellants' study of rejected voter registration forms which the district court also credited.

to register since Proposition 200 was implemented in January 2005. As a result of subsuming Latinos negatively affected by Proposition 200 into the overall Latino voter pool, the district court concluded erroneously that “Proposition 200 does not have a statistically significant disparate impact on Latino voters.”¹²¹

The question of disparate impact turns on a comparison between similarly-situated Latinos and non-Latinos – in this case those who attempted to register under Proposition 200. *See Hazelwood School District v. U.S.*, 433 U.S. 299, 308 (1977) (trial court’s comparison of the racial composition of the teaching staff to the racial composition of the student body “fundamentally misconceived the role of statistics in employment discrimination cases.”).

Section 2 does not require that Appellants demonstrate that Proposition 200’s registration requirements have a negative effect on Latinos who are already registered. Similarly, with respect to Proposition 200’s voter identification provision, Section 2 does not require Appellants to demonstrate that Proposition 200 has a negative effect on those who possess sufficient identification. The relevant question, whether a disproportionate number of Latinos were prevented from registering or casting a ballot because of Proposition 200’s requirements was answered by the district court in the affirmative.

¹²¹ ER 3, CR 1041 at 42.

Whether or not Arizona's Latino electorate is substantially reduced by Proposition 200 is not relevant to Appellants' claims. Because Proposition 200 operates to prevent a disproportionate number of Latinos from registering and voting, Proposition 200 denies them the opportunity to participate in the political process. This vote denial exists whether or not the overall Latino electorate is substantially reduced. Similarly, with respect to Appellant's vote dilution claim, the exclusion of any number of Latino voters from the electorate operates to dilute the voting strength of Latinos. *See, e.g. Bush v. Gore*, 531 U.S. 98, 107, (2000) (the "idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.") (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)).

B. The District Court Erred to the Extent that it Considered the Success of Latino Candidates in Majority-Latino Districts When Examining Racially Polarized Voting.

The district court found that Latinos vote cohesively in Arizona elections and non-Latinos vote as a bloc against Latino candidates except in two Latino-majority congressional districts.¹²² The district court found that in majority-Latino

¹²² ER 3, CR 1041 at 44-45. The district court properly analyzed the presence of racially polarized voting as part of its examination of the Senate Factors. Unlike a Section 2 case in the districting context, where racially polarized voting is a required element of the plaintiff's case, in a non-districting Section 2 case the court may consider the presence or absence of racially polarized voting as one of a number of Senate factors. *Compare Thornburg* 478 U.S. 30, *with*

congressional district 4, long-time incumbent Ed Pastor is preferred by both Latino and non-Latino voters. The district court also found that in 2006, two-term incumbent Raul Grijalva garnered the majority of Latino and non-Latino votes in the majority-Latino district 7.

The district court properly focused its racially polarized voting inquiry on elections in which Latinos do not comprise the majority of voters and recognized that incumbency can be a “special circumstance” leading to the election of a minority-preferred candidate in an environment otherwise characterized by racially polarized voting.¹²³ See *Thornburg*, 478 U.S. at 57; see also *Rodriguez v. Bexar County, Tex.*, 385 F.3d 853, 864 (5th Cir. 2004) (“[T]he special circumstances analysis was designed to prevent defendant jurisdictions from arguing that a minority candidate's occasional victory in an otherwise racially polarized electorate defeats a vote dilution claim.”) (citing *Thornburg*).

To the extent that the district court relied on non-Latino voting within two majority-Latino electoral districts to conclude that “to some degree there continues to be some racially polarized voting in Arizona,”¹²⁴ the district court erred as a

Mississippi State Chapter, Operation Push v. Allain, 674 F.Supp. 1245, 1264 (N.D.Miss. 1987) (“whereas instances of racially polarized voting are pertinent in challenges to electoral processes, voting behavior is not germane to the challenged voter registration procedures at issue here.”).

¹²³ ER 3, CR 1041 at 45-46.

¹²⁴ ER 3, CR 1041 at 46.

matter of law. The inquiry under Section 2, whether “in general, a white bloc vote [] normally will defeat the combined strength of minority support plus white ‘crossover’ votes” (*Thornburg* at 56), is not answered by looking at non-Latino voting in majority-Latino districts that are designed to afford Latino voters the opportunity to elect their candidate of choice. *See Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000)(“The third *Gingles* factor directs the court's inquiry to those jurisdictions where there is a ‘white majority.’”) (citing *Thornburg*, 478 U.S. at 50).

The district court’s finding that voting is racially polarized in statewide races and other electoral districts, including two state representative districts in which Latinos are in the majority, establishes that voting is racially polarized in Arizona.

C. The District Court Erred in its Evaluation of Causality.

Appellants demonstrated that social and historical conditions in Arizona interact with Proposition 200’s voting requirements to cause the disparate impact on Latinos. *See Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 591 (9th Cir.1997) (“some causal nexus must exist between the challenged voting practice and the claimed indicator of racial discrimination.”).

However, the Court found that plaintiffs “have failed to demonstrate causation.”¹²⁵ Citing *Salt River*, the court concluded that “because Plaintiffs have not established that the statistically disproportionate impact suffered by Latinos is on account of race or color, Proposition 200 does not violate Section 2 of the Voting Rights Act.”¹²⁶

The district court’s conclusion was based on a mis-application of the *Salt River* decision. *Salt River* is very different from the case at hand. First, the *Salt River* plaintiffs alleged that a racial disparity in home ownership – a characteristic outside the realm of voting -- caused a Section 2 violation. In this case, Plaintiffs have demonstrated a racial disparity in registration and voting. This Court further observed in *Salt River* that “[a]ppellants effectively stipulated to the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination.” *Id.* at 595. The Court noted in *Salt River* that there was “no history of racial politics and [the District’s] operations do not involve racially-differentiated interests,” “no known history or incident of racial discrimination in District elections,” and “no history or incident of racially polarized voting in District elections” *Id.* at 590, 595-596. The Court affirmed the district court’s close adherence to the factors listed in the Senate Report to the Voting Rights Act of 1965 and the ultimate conclusion that, in “the absence of

¹²⁵ ER 3, CR 1041 at 46.

¹²⁶ ER 3, CR 1041 at 47.

circumstances which might indicate discrimination under virtually [any] of those factors,” the challenged land ownership requirement did not deny African-Americans the opportunity to vote in District elections. *Id.* at 596.

By contrast, in the case at hand, plaintiffs have demonstrated that Proposition 200’s disparate impact is caused by the interaction of Proposition 200’s requirements with the social and historical conditions confronting Latinos. *See Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), *reh’g en banc denied*, 359 F.3d 1116 (9th Cir.), *cert. denied*, 125 S. Ct. 477 (2004); *Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992).

Relying on *Salt River*, the district court employed an incorrect test which would require no less than a showing of discriminatory racial intent in order to create the causal connection between a challenged practice and its effect on minority voters.

The district court found that “discrimination against Latinos in Arizona has historically hindered their ability to fully participate in the political process,”¹²⁷ “there are socio-economic disparities between Latinos and white, non-Latinos, which hinder Latinos’ ability to participate effectively in the political process,”¹²⁸ and that Latino registration and voting lags behind that of Anglos.¹²⁹

¹²⁷ ER 3, CR 1041 at 42.

¹²⁸ ER 3, CR 1041 at 44.

¹²⁹ ER 3, CR 1041 at 44.

Appellants further demonstrated at trial that the Latinos rejected for voter registration under Proposition 200 and Latinos unable to cast ballots because they lacked sufficient identification under Proposition 200 are from Census block groups characterized by lower income and educational levels.¹³⁰ Plaintiffs provided additional expert testimony that in light of the racially polarized voting in Arizona, “if the new election rules [Proposition 200] contain a racial disparity in impact, this would contribute to the dilution of the minority voting strength in the state.”¹³¹ Finally, Appellants presented lay witnesses whose testimony further directly connected Proposition 200’s negative impact on Latinos to Latino poverty, social isolation, lack of access to telephones, computers and transportation, as well as alienation from the political system because of past discrimination. The district court addressed none of its fact findings and addressed none of Appellants’ evidence when concluding improperly that Plaintiffs would have to introduce further proof in order to establish that “Proposition 200 results in discrimination ‘on account of race or color.’”¹³²

Section 2 unequivocally prohibits election practices, such as those in Proposition 200, that interact with present day conditions facing minority voters to deny or dilute the right to vote.

¹³⁰ ER 12, 259:10-262:9; ER 42-Tables 6 and 7.

¹³¹ ER 12, 128: 25-129:7.

¹³² ER 3, CR 1041 at 46.

For example, Section 2 was enacted in 1965 in the same bill and at the same time that Congress enacted a ban on literacy tests in certain covered jurisdictions, including in Yuma, Arizona. *See* 42 U.S.C. § 1973b.

The Supreme Court later upheld, against a challenge by Arizona, a nationwide ban on literacy tests explaining:

In enacting the literacy test ban of Title II, Congress had before it a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race. . . . Congress also had evidence to show that voter registration in areas with large Spanish-American populations was consistently below the state and national averages. In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average.

Oregon v. Mitchell, 400 U. S. 112, 132 (1970).

Similarly, in 1965 Congress also found that “the requirement of the payment of a poll tax as a precondition to voting . . . in some areas has the purpose or effect of denying persons the right to vote because of race or color.” *See* 42 U.S.C. § 1973h (a).

Congress has recognized since the passage of Section 2 that certain voting practices, although not race-conscious on their face, can interact with social and historical factors to deny or abridge the right to vote. Congress has subsequently continued to recognize and prohibit such measures. *See, e.g.* 42 U.S.C. 1973b (f) (finding that in certain jurisdictions the practice of administering English-only elections had an illegal discriminatory impact). Under the district court’s erroneous

legal analysis, poll taxes, literacy tests or English-only elections cannot violate Section 2 because there is no “causal” connection between the challenged practice and racial discrimination.

Unlike the *Salt River* case, Proposition 200’s disparate negative effect on Latinos is *not* “better explained by other factors independent of race” that might “adequately rebu[t] any inference of racial bias that the [disparate impact] statistics might suggest.” *Salt River* at 591. The errors of law made by the district court in evaluating the totality of circumstances are not entitled to deference by this Court. *See Thornburg*, 478 U.S. at 79, 106 S.Ct. 2752 (recognizing appellate courts’ power to correct errors of law infecting mixed questions of law and fact); *U.S. v. Blaine County, Montana*, 363 F.3d 897, 909 (9th Cir. 2004); *Old Person v. Cooney*, 230 F.3d 1113, 1119 (9th Cir. 2000) (“We retain the power, however, “ ‘to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.’ ” (internal citations omitted); *Smith v. Salt River Project*, 109 F.3d 586 (9th Cir.1997); *Cousin v. Sundquist*, 145 F.3d 818, 831-832 (6th Cir. 1998) (reviewing de novo the district court’s finding under the totality of circumstances); *Jenkins v. Manning*, 116 F.3d 685, 688 (3rd Cir 1997) (“Section 2 cases present mixed questions of law . . .”).

IV. Defendants’ Implementation of the Challenged Statute Violates the 24th Amendment to the U.S. Constitution.

The district court erred in concluding that “voters do not have to choose between paying a poll tax and providing proof of citizenship when they register to vote. They have only to provide the proof of citizenship.”¹³³ This statement assumes that providing proof of citizenship is free and it is not. It is precisely the proof of citizenship document which costs a fee and imposes the poll tax. *Harman v. Forssenius*, 380 U.S. 528, 539, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965).

Unlike *Harman*, in which voters could file a certificate of residency in lieu of paying the poll tax, Proposition 200 excepts only certain Native Americans, senior citizens and those receiving federal disability payments from the rule that voter registration applicants possess a document that costs a fee in order to register to vote.¹³⁴ Documents that satisfy Proposition 200’s proof of citizenship requirement for voter registration range in cost from \$4.00 (for a replacement driver’s license) to \$380.00 (for a replacement naturalization certificate).¹³⁵

The U.S. Supreme Court decision in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008) reiterated the principle that requiring payment of a fee, even to acquire a document that is required to vote, can violate the 24th Amendment. *See Crawford*, 128 S.Ct. at 1620-21 (“The fact that most voters

¹³³ ER 5, CR 330 at 3, quoting this Court’s previous ruling in *Gonzalez v. Arizona*, 485 F.3d 1041, 1049 (9th Cir. 2007).

¹³⁴ ER 3, CR 1041 at 4, 8 and 10.

¹³⁵ ER 3, CR 1041 at 8-11.

already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification.”) (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)).

For this reason, Proposition 200's requirement that, with few exceptions, voter registration applicants must pay a fee to obtain a document proving citizenship creates an unconstitutional poll tax.

CONCLUSION

For the forgoing reasons, Appellants respectfully request that this Court reverse the decision of the district court and grant Appellants declaratory and injunctive relief.

Respectfully submitted this 20th day of January, 2009.

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STATEMENT OF RELATED CASES

Pursuant to this Court's November 5, 2008 Order, this appeal has been consolidated with Ninth Circuit Cause No. 08-17115 for purposes of calendaring.

**CERTIFICATION OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(A) FOR CASE NO. 08-17094**

I hereby certify that the Opening Brief of Appellants the Gonzalez, et al. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using MS Word in 14-point Times New Roman.

Dated this 20th day of January, 2009.

s/ Nina Perales
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2009, I electronically filed the Opening Brief of Appellants the Gonzalez, et al. with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed a copy of the Opening Brief and one copy of the Excerpts of Record of Appellants the Gonzalez, et al. by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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In Addition, I certify that pursuant to Fed. R. App. P. 25(d) and Rule 4(a)(2) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases (11/10/08), on the 20th day of January, 2009 four copies of the Excerpts of Record via First-Class Mail Postage prepaid to:

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