

Nos. 08-17094, 08-17115

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ, *et al.*,
Plaintiff-Appellants,

v.

STATE OF ARIZONA, *et al.*,
Defendant-Appellees.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
Plaintiff-Appellants,

v.

STATE OF ARIZONA, *et al.*,
Defendant-Appellees.

On Appeal from the United States District Court for the District of Arizona,
Case Nos. 06cv1268 and 06cv1362, The Honorable Roslyn O. Silver

**AMICUS CURIAE BRIEF OF
MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF
DEFENDANT-APPELLEES URGING AFFIRMANCE**

William Perry Pendley, Esq.
Joel M. Spector, Esq.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 32(c) and 26.1, the undersigned attorney for Amicus Curiae, Mountain States Legal Foundation (“MSLF”), certifies that MSLF has no parent companies and has never issued any stock.

DATED this 11th day of February, 2009.

Respectfully submitted by:

/s/ Joel M. Spector

Joel M. Spector, Esq.

MOUNTAIN STATES LEGAL FOUNDATION

2596 South Lewis Way

Lakewood, Colorado 80227

(303) 292-2021

Attorney for Amicus Curiae

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
ARGUMENT	2
I. THE STATE OF ARIZONA HAS A DUTY TO PROTECT VOTERS FROM VOTE DILUTION	2
II. NEITHER THE REGISTRATION REQUIREMENTS NOR THE VOTING REQUIREMENTS OF PROPOSITION 200 CONSTITUTE AN UNCONSTITUTIONAL POLL TAX	5
A. The Registration Requirement Of Proposition 200 Does Not Constitute An Unconstitutional Poll Tax	5
B. The Voting Requirement Of Proposition 200 Does Not Constitute An Unconstitutional Poll Tax.....	10
III. THE DISTRICT COURT CORRECTLY HELD THAT PROPOSITION 200 DOES NOT DISCRIMINATE AGAINST NATURALIZED CITIZENS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE	14
CONCLUSION.....	16
CERTIFICATE OF COMPLIANCE.....	17
CERTIFICATE OF SERVICE	18

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Adarand Constructors, Inc. v. Peña</i> , 15 U.S. 200 (1995).....	14
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	6
<i>Anderson v. Spear</i> , 356 F.3d 651 (6th Cir. 2004).....	2
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	6
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	2
<i>City of Mobile, Ala. v. Bolden</i> , 446 U.S. 55 (1980).....	15
<i>Cook v. Gralike</i> , 531 U.S. 510 (2001)	5
<i>Crawford v. Marion County Election Board</i> , 128 S.Ct. 1610 (2008)	1, 6, 8, 9, 10
<i>Eu v. San Francisco County Democratic Central Comm.</i> , 489 U.S. 214 (1989).....	9
<i>Gilmore v. Gonzales</i> , 435 F.3d 1125 (9th Cir. 2006)	11
<i>Gonzalez v. Arizona</i> , 485 F.3d 1041 (9th Cir. 2007).....	1, 7, 10
<i>Gonzalez v. Arizona</i> , Nos. 06cv1268, 06cv1362, Slip Op. (D.Ariz. Aug. 20, 2008)	3, 4, 14, 16
<i>Hadley v. Junior College Dist. of Metropolitan Kansas City, Mo.</i> , 397 U.S. 50 (1970).....	2, 4
<i>Harman v. Forssenius</i> , 380 U.S. 528 (1965).....	10, 12
<i>Harper v. Virginia State Bd. Of Elections</i> , 383 U.S. 663 (1966)	6, 7, 8
<i>Hussey v. City of Portland</i> , 64 F.3d 1260 (9th Cir. 1995).....	6

	<u>Page</u>
<i>Independent Living Center of Southern California, Inc. v. Shewry</i> , 543 F.3d 1050 (9th Cir. 2008)	16
<i>Lassiter v. Northampton County Board of Elections</i> , 360 U.S. 45 (1959).....	8
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987).....	15
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	3, 4, 9
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	3
<i>Rubin v. City of Santa Monica</i> , 308 F.3d 1008 (9th Cir. 2002).....	6
<i>Schirmer v. Edwards</i> , 2 F.3d 117 (5th Cir. 1993).....	2
<i>Sechrest v. Ignacio</i> , 549 F.3d 789 (9th Cir. 2008).....	7
<i>U.S. v. Cuddy</i> , 147 F.3d 1111 (9th Cir. 1998)	7
<i>Valeria v. Davis</i> , 307 F.3d 1036 (9th Cir. 2002)	14, 15
<i>Washington v. Davis</i> , 426 U.S. 229 (1975)	15
<i>Wright v. City of Albany</i> , 306 F.Supp.2d 1228 (M.D. Ga. 2003).....	11
 Constitutional Provisions	
U.S. Const. amend. XIV	2
U.S. Const. amend. XV.....	2
U.S. Const. amend. XIX	2
U.S. Const. amend. XXIV	2
U.S. Const. amend. XXVI	2
U.S. Const. art. I, § 4, cl. 1 (Elections Clause).....	5

	<u>Page</u>
State Statutes	
Ariz. Rev. Stat. § 16-101	3
Ariz. Rev. Stat. § 16-152	5
Ariz. Rev. Stat. § 16-166	5, 9
Ariz. Rev. Stat. § 16-541	12
Ariz. Rev. Stat. § 16-542	12, 13
Ariz. Rev. Stat. § 16-542(E)	13
Ariz. Rev. Stat. § 16-547	13
Ariz. Rev. Stat. § 16-548	12, 13
Ariz. Rev. Stat. § 16-579	5
Other Authority	
<i>Amendments to Abolish Tax and Property Qualifications for Electors in Federal Elections: Hearings Before Subcomm. No. 5 of House Comm. on the Judiciary, 87th Cong., 2d Sess., 14-15</i>	12

IDENTITY AND INTEREST OF AMICUS CURIAE¹

MSLF is a nonprofit, public-interest law firm organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the Nation.

MSLF has been involved actively in both the *Gonzalez* and the *Inter-Tribal* cases throughout the duration of this litigation. On June 20, 2006, MSLF, on behalf of Randall Pullen and Yes on Proposition 200, sought to intervene in these cases at the United States District Court. After intervention was denied, MSLF, on behalf of Randall Pullen and Yes on Proposition 200, appealed the denial of intervention in this Court and also filed an amicus curiae brief in support of Defendants. *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).

More recently, MSLF has been involved in another voting-rights case in an attempt to protect the right to vote from illegal vote dilution. Specifically, in *Crawford v. Marion County Election Board*, 128 S.Ct. 1610 (2008), MSLF filed an

¹ Pursuant Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

amicus curiae brief on behalf of itself in support of an Indiana law that required identification as a prerequisite to voting to protect against voter fraud.

ARGUMENT

I. THE STATE OF ARIZONA HAS A DUTY TO PROTECT VOTERS FROM VOTE DILUTION.

The fundamental right to vote of all United States citizens over eighteen years of age is protected by the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments to the U.S. Constitution. This right extends beyond the ability to cast one's vote in any given election; the United States Supreme Court has held that the Constitution protects "the right to vote in an election . . . against dilution or debasement." *Hadley v. Junior College Dist. of Metropolitan Kansas City, Mo.*, 397 U.S. 50, 54 (1970).

As a result, a State has a duty to protect this right to vote. *Anderson v. Spear*, 356 F.3d 651, 656-57 (6th Cir. 2004) (citing *Burson v. Freeman*, 504 U.S. 191, 199 (1992)); *see also Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) (citing *Burson*, 504 U.S. at 199) ("Louisiana undoubtedly has a compelling interest to protect its citizens' right to vote. *Burson* reaffirmed that states have a compelling interest in protecting the right to vote – 'a right at the heart of our democracy'."). Earlier in the cases at bar, the Supreme Court explained this constitutional obligation thusly:

“A State indisputably has a compelling interest in preserving the integrity of its election process.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989). Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. “[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006).

Pursuant to Arizona statute, only citizens of the United States are eligible to vote in Arizona elections. Ariz. Rev. Stat. § 16-101. Thus, a vote by a non-citizen is fraudulent and dilutes and debases the votes of eligible voters. After a full trial on the merits, the District Court found numerous examples of voter fraud in Arizona prior to the enactment of Proposition 200. *Gonzalez v. Arizona*, Nos. 06cv1268, 06cv1362, Slip Op. at 16-17 (D.Ariz. Aug. 20, 2008). It may be presumed, however, that many more instances of vote dilution have occurred because, heretofore, no mechanism existed to identify such ineligible voters. Indeed, prior to enactment of Arizona Proposition 200, a prospective voter registrant need only check a box on a registration form to register to vote; the State had no ability to verify that the registrant was a U.S. citizen.

Further, prior to enactment of Proposition 200, an in-person voter was allowed to vote simply by showing up at the polls and reciting the name of a registered voter on the voter list. Again, the State had no ability to verify that the voter was, in fact, legally registered. Worse yet, if it were somehow eventually discovered that an unregistered individual had cast a fraudulent vote, the anonymous vote could not be identified and nullified.

Although substantial evidence of prior voter fraud exists here, *Gonzalez*, Slip Op. at 16-17, no such evidence should be required to sustain Proposition 200. Contrary to Justice Stevens' assertion that Arizona should have to demonstrate "the prevalence and character of [] fraudulent practices [to] justify [Proposition 200's] requirements," *Purcell*, 549 U.S. at 6 (2006) (Stevens, J., concurring)—a burden the State of Arizona has satisfied easily—even in the absence of known, identifiable "fraudulent practices," Arizona must be able to adopt mechanisms to prevent voter "dilution or debasement." *Hadley*, 397 U.S. at 54. The mere threat of vote dilution—unchecked by the State—undermines and erodes confidence in the electoral process and inevitably deters eligible voters from voting at all.

Therefore, regardless of the amount of evidence of voter fraud that is required, one thing remains clear: Proposition 200 fulfills the State of Arizona's duty to protect the right of its citizens to vote without the threat of vote dilution or debasement. Specifically, individuals wishing to register to vote must present

identification at the time they register and individuals must present identification when they seek to cast their votes at a polling place on Election Day. Ariz. Rev. Stat. §§ 16-166, 16-152, 16-579. These restrictions ensure that only eligible U.S. citizens may cast votes in accordance with Arizona law, thereby protecting voters from vote dilution by ineligible voters and fulfilling Arizona’s constitutional obligation.

II. NEITHER THE REGISTRATION REQUIREMENTS NOR THE VOTING REQUIREMENTS OF PROPOSITION 200 CONSTITUTE AN UNCONSTITUTIONAL POLL TAX.

A. The Registration Requirement Of Proposition 200 Does Not Constitute An Unconstitutional Poll Tax.

The Elections Clause of the U.S. Constitution, U.S. Const. art. I, § 4, cl. 1, grants States “broad power” to prescribe the procedural mechanisms for elections, including:

[R]egistration, supervision of voting . . . [and other] requirements as to procedure and safeguards which experience shows are necessary to enforce the fundamental right involved, ensuring that elections are fair and honest, and that some sort of order, rather than chaos, is to accompany the democratic process.

Cook v. Gralike, 531 U.S. 510, 523-24 (2001) (internal citations omitted).

The Supreme Court has held:

Election laws will invariably impose some burden upon individual voters. Each provision of a code, “whether it governs the registration and qualifications of voters, the selection and eligibility of candidates,

or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.”

Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Not all regulations, however, implicate fundamental rights. *Id.*, 460 U.S. at 788 (“Although these rights of voters are fundamental, not all restrictions imposed by the States...impose constitutionally-suspect burdens on voters’ rights . . .”).

“A court evaluating a constitutional challenge to an election regulation [must] weigh the asserted injury to the right to vote against the ‘precise interest put forward by the State as justifications for the burden imposed by its rule.’”

Crawford, 128 S.Ct. at 1616 (opinion of the Court) (quoting *Burdick*, 504 U.S. at 434). Ultimately, “evenhanded restrictions that protect the integrity and reliability of the electoral process itself” are not invidious and satisfy the standard set forth in *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663, 788 n.9 (1966).

Crawford, 128 S. Ct. at 1616 (opinion of the Court); *Crawford*, 128 S.Ct. at 1625-26 (Scalia, J., concurring) (generally applicable voting requirements that merely have a disparate impact are not unconstitutional); *see also Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002); *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995).

As Inter Tribal Council of Arizona (“ITCA”) Plaintiffs note in their Opening Brief, at 22, this Court has already held in these cases that Plaintiffs have “little likelihood of success of proving that Arizona’s registration identification requirement is a poll tax.” *Gonzalez*, 485 F.3d 1041, 1049 (9th Cir. 2007). This holding was based on the fact that the proof of citizenship requirement is generally applicable to all new registrants and because it does not “make the affluence of the voter or payment of any fee an electoral standard.” *Id.* at 1049 (citing *Harper*, 383 U.S. at 666). Because these facts have never been contradicted, there is no justification for this Court to depart from its prior holding that the voter registration requirements of Proposition 200 do not constitute a poll tax.

ITCA Plaintiffs concede, as they must, that the “law of the case” doctrine precludes a court from reconsidering an issue that has already been decided by the same court in the identical case. ITCA Br. at 24-25; *Sechrest v. Ignacio*, 549 F.3d 789, 802 (9th Cir. 2008) (citing *U.S. v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998)). They identify, however, an exception to this doctrine, which exists when intervening controlling authority requires reconsideration of a previously decided issue. ITCA Br. at 24-25. In an attempt to satisfy this exception, both ITCA and Gonzalez Plaintiffs point to one sentence in Justice Stevens’ opinion as conflicting with this Court’s prior holding in these cases. Specifically, Justice Stevens wrote, “The fact that most voters 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.”² *Crawford*, 128 S. Ct. at 1616 (opinion of the Court). ITCA Br. at 24-25; Gonzalez Br. at 61-62.

In effect, ITCA and Gonzalez Plaintiffs’ entire argument supporting reconsideration of this issue hinges upon this sentence. They place an unwarranted amount of weight, however, on this sentence, which they have not so artfully taken out of context.

² In *Harper* the Supreme Court held that, when the right to vote is conditioned on wealth or the ability to pay a fee that bears “no relation to voting qualifications,” the poll tax is unconstitutional. *Harper*, 383 U.S. at 670. Specifically, the Court explained:

[T]he right of suffrage “is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed.” *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51, 79 S.Ct. 985, 990, 3 L.Ed.2d 1072 [1959]. We were speaking there of a state literacy test which we sustained, warning that the result would be different if a literacy test, fair on its face, were used to discriminate against a class. *Id.*, at 53, 79 S.Ct. at 990. But the *Lassiter* case does not govern the result here, because, unlike a poll tax, the “ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot.” *Id.*, at 51, 79 S.Ct. at 990.

Harper, 383 U.S. at 665-66. In contrast, it would be hard to envision any regulation that bears a more direct “relation to voting qualifications” than a one requiring proof of citizenship as a prerequisite to voter registration.

In the Indiana law at issue in *Crawford*, photo identification was a prerequisite to in-person voting. *Crawford*, 128 S. Ct. at 1613. Individuals who lacked such photo identification could acquire one free of charge. *Id.* at 1614. In order to obtain that free photo identification, however, a birth certificate, certificate of naturalization, U.S. passport, or other form of proof of citizenship, had to be shown. *Id.* at 1631 (Souter, J., dissenting). Those documents, if not already possessed by the applicant, came for a fee. *Id.* Nonetheless, the Supreme Court ultimately upheld this generally applicable, nondiscriminatory law designed to protect the integrity and reliability of the electoral process. *Id.* at 1624 (opinion of the Court); *id.* at 1627 (Scalia, J., concurring).

In summary, then, to protect the integrity and reliability of the electoral process, it is constitutionally permissible to require prospective voters who lack the requisite documents, to pay a fee to acquire such documents as a birth certificate, certificate of naturalization, or U.S. passport.

In Arizona, Proposition 200 unquestionably “sought to combat voter fraud” to protect the integrity and reliability of the electoral process in Arizona. *Purcell*, 549 U.S. at 2. Moreover, Proposition 200 requires voter registration applicants who lack a birth certificate, certificate of naturalization, U.S. passport, or other proof of citizenship to pay a nominal fee to acquire one of those documents. Ariz. Rev. Stat. § 16-166. Thus, there is little constitutional difference between the

nondiscriminatory, evenhanded statute that was upheld by the Supreme Court in *Crawford* and the registration requirement of Proposition 200.

Gonzalez Plaintiffs also argue that, pursuant to *Harman v. Forssenius*, 380 U.S. 528 (1965), Proposition 200 constitutes a poll tax. Gonzalez Br. at 61. This Court has already distinguished the law in *Harman* from Proposition 200 and held that, unlike in *Harman*, “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.” *Gonzalez*, 485 F.3d at 1049. Gonzalez Plaintiffs provide no intervening case law and no new facts that might necessitate this Court to abandon its previous holding; they just re-state the same argument that they have made already and that has been rejected soundly by both this Court and the District Court.

Ultimately, there is no intervening controlling authority that requires reconsideration of a previously decided issue. Pursuant to the law of the case doctrine, this Court’s rightly decided conclusion that the voter registration component of Proposition 200 does not constitute a poll tax should not be disturbed.

B. The Voting Requirement Of Proposition 200 Does Not Constitute An Unconstitutional Poll Tax.

Although individuals indisputably have a fundamental right to vote, they do not necessarily have a right to vote at the time and place most convenient to them.

Wright v. City of Albany, 306 F.Supp.2d 1228, 1239 (M.D. Ga. 2003) (“While it might be more convenient, less troublesome and less expensive to hold the election then, the citizens’ right to vote neither rests on nor is subordinate to such conveniences.”). If it were otherwise, the fundamental right to vote would be implicated whenever an individual did not have the ability to dictate the time and place of his choice to cast his vote. Indeed, an individual could claim his right to vote was impaired because he had to leave his home to go to the polls.

Likewise, a fundamental right is not impaired if one method of exercising that right is disallowed while another method of exercising the right remains available. In *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), this Court examined whether identification requirements at an airport unconstitutionally impair the fundamental right to engage in interstate travel. This Court ultimately held that an individual “does not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him” because “burdens on a single mode of transportation do not implicate the right to interstate travel.” *Id.* at 1137 (internal citations omitted).

For these reasons, the fundamental right to vote is not unconstitutionally burdened if a person’s preferred or most convenient method of voting is impaired, so long as there is an adequate alternative. A poll tax does more than merely prevent a person from voting in the most convenient manner; a poll tax imposes a

“material requirement” that causes individuals either to pay a fee or to “surrender their constitutional right to vote.” *Harman*, 380 U.S. at 541 (emphasis added).

In these cases, ITCA Plaintiffs unnecessarily complicate this relatively easy legal doctrine. They argue that, because Proposition 200 likely requires some people to pay a fee to acquire a “Polling Place ID” required to vote in-person on Election Day, the requirement somehow constitutes an unconstitutional poll tax. ITCA Br. at 27-28. Further, they speculate that this purported problem could be rectified only if Arizona provided the requisite ID for free, thereby allowing people to vote at the polls on Election Day free of charge. *Id.* at 28.

ITCA Plaintiffs apparently fail to recognize the legal significance of Arizona’s early voting. Arizona statute mandates early voting for which every registered voter is eligible and which may be accomplished either by requesting an early ballot or by going to an early voting polling place. Ariz. Rev. Stat. §§ 16-541, 16-542. Those who request an early ballot may return that ballot either by mail or at a polling place on Election Day.³ Ariz. Rev. Stat. § 16-548.

³ An “objection to the poll tax raised in the congressional hearings was that the tax usually had to be paid long before the election—at a time when political campaigns were still quiescent—which tended to eliminate from the franchise a substantial number of voters who did not plan so far ahead.” *Harman*, 380 U.S. at 540 (citing *Amendments to Abolish Tax and Property Qualifications for Electors in Federal Elections: Hearings Before Subcomm. No. 5 of House Comm. on the Judiciary*, 87th Cong., 2d Sess., 14-

Importantly, no identification is required of those who vote early.⁴ Ariz. Rev. Stat. §§ 16-542, 16-547.

Thus, prospective voters who do not wish to present identification to vote may simply vote early, free of charge. Although this may not be the preferred or most convenient method of voting, limiting voters who do not wish to present a valid form of identification to the early voting process does not at all impair their fundamental right to vote or to express their political opinion through the electoral process. The identification requirement for in-person voting certainly is not a “material requirement” that requires anyone to “surrender [his or her] constitutional right to vote.” As a result, there is no doubt that the in-person, Election Day ID requirement of Proposition 200 does not constitute an unconstitutional poll tax.

15). In Arizona, however, a voter can request an early ballot until the eleventh day prior to the election. Ariz. Rev. Stat. § 16-542(E). That ballot can be returned at any time prior to 7:00 P.M. on Election Day. Ariz. Rev. Stat. § 16-548. Additionally, an Arizona voter is permitted to vote in-person at an early voting location until 5:00 P.M. on the Friday preceding the election. Ariz. Rev. Stat. § 16-542(E). As a result, an Arizona voter desiring to avoid the in-person Election Day identification requirement would not have to make plans far in advance of Election Day in order to preserve their right to vote.

⁴ Early ballots are subject to signature verification to protect against voter fraud.

III. THE DISTRICT COURT CORRECTLY HELD THAT PROPOSITION 200 DOES NOT DISCRIMINATE AGAINST NATURALIZED CITIZENS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE.

The District Court held that, “regardless of the standard of scrutiny, 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.” *Gonzalez*, Slip Op. at 38. Gonzalez Plaintiffs appeal that holding, contending that a discriminatory impact against naturalized citizens, even absent any discriminatory purpose, violates the Equal Protection Clause and that the government’s justification for the discriminatory impact is subject to strict scrutiny. *Gonzalez Br.* at 38-47.

Curiously, to support their contention, Gonzalez Plaintiffs cite *Valeria v. Davis*, 307 F.3d 1036, 1039 (9th Cir. 2002). *Gonzalez Br.* at 40. In that case, this Court held that a law designed to teach students in English only *does not* violate the Equal Protection Clause because the law was not motivated by an intent to discriminate on the basis of race. *Valeria v. Davis*, 307 F.3d at 1042.

Not only do Gonzalez Plaintiffs cite *Valeria*, a case that contradicts their very argument, but they specifically quote a statement in *Valeria* that quotes two more cases that belie their argument. The first case, *Adarand Constructors, Inc. v. Peña*, 15 U.S. 200 (1995), stands for the proposition that strict scrutiny, rather than

intermediate scrutiny, must be used whenever there is intentional race-based discrimination. It certainly does not stand for the proposition that a discriminatory effect triggers an Equal Protection inquiry.

The second case cited in the quote from *Valeria, Washington v. Davis*, 426 U.S. 229, 239 (1975), is the seminal case in which the Supreme Court held that discriminatory impact, without a discriminatory purpose, does not violate the Equal Protection Clause (“[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”). This holding has been upheld repeatedly by the Supreme Court. *See City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 67 (1980) (“an illicit purpose must be proved before [an Equal Protection] violation can be found”); *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (“to prevail under the Equal Protection Clause, [plaintiff] must prove that the decisionmakers in *his* case acted with discriminatory purpose.”).

Because a discriminatory purpose is necessary before Proposition 200 could be found to violate the Equal Protection Clause, Gonzalez Plaintiffs’ entire argument is moot if they fail to prove such a discriminatory purpose. The District Court reviewed Gonzalez Plaintiffs’ evidence of a discriminatory purpose and concluded that it “do[es] not establish intentional discrimination by a

preponderance of the evidence.” *Gonzalez*, Slip Op. at 36. This factual finding is reviewed by this Court only for clear error. *See Independent Living Center of Southern California, Inc. v. Shewry*, 543 F.3d 1050, 1055 (9th Cir. 2008).

On appeal, Gonzalez Plaintiffs do not allege that the District Court finding was clear error. Gonzalez Br. at 40-43. Instead, they argue that the District Court wrongly concluded that the Proposition 200 requirements “did not constitute discrimination.” *Id.* at 43. Absent a finding that the discrimination was *intentional*, the presence of a discriminatory effect is irrelevant in an Equal Protection inquiry. Because the District Court found no intentional discrimination, Gonzalez Plaintiffs’ Equal Protection argument must fail.

CONCLUSION

The District Court’s findings of fact and its conclusions of law should be affirmed.

DATED this 11th day of February, 2009.

Respectfully submitted by:

/s/ Joel M. Spector
Joel M. Spector, Esq.
William Perry Pendley, Esq.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEES URGING AFFIRMANCE is in compliance with Fed. R. App. P. 32(a)(7)(B) because it contains 3,797 words. 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.

/s/ Joel M. Spector
Joel M. Spector, Esq.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of February, 2009, I electronically filed the foregoing AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEES URGING AFFIRMANCE with the Clerk of the Court for the United States 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 foregoing document by First Class Mail, postage prepaid, to the following non-CM/ECF participants:

Dennis Ira Wilenchik
Kathleen Rapp
Wilenchik & Bartness PC
2810 North 3rd Street, Suite 103
Phoenix, Arizona 85004

Andrew P. Thomas
Maricopa County Attorney
M. Colleen Connor
MCAO Division of County Counsel
222 North Central Avenue, Suite 1100
Phoenix, Arizona 85003

Attorneys for Apache, Cochise, Gila, Graham, Greenlee, La Paz, Maricopa, Mohave, Pima, Santa Cruz, Yavapai, and Yuma County Defendant-Appellees

Terence C. Hance
Coconino County Attorney
Jean E. Wilcox
Deputy County Attorney
110 East Cherry Street
Flagstaff, Arizona 86001

Attorneys for Coconino County Defendant-Appellees

James P. Walsh
Pima County Attorney
Chris M. Roll
Nicole Weber
30 North Florence Street, Building D
Florence, Arizona 85232

Attorneys for Pinal County Defendant-Appellees

/s/ Joel M. Spector
Joel M. Spector, Esq.
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorney for Amicus Curiae