

CA No. 08-17094

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARIA M. GONZALEZ, *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-PHX-ROS
(Honorable Roslyn O. Silver)**

**BRIEF OF PROTECT ARIZONA NOW,
WASHINGTON LEGAL FOUNDATION,
AND ALLIED EDUCATIONAL FOUNDATION
AS *AMICI CURIAE* IN SUPPORT OF APPELLEES,
URGING AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Washington Legal Foundation and the Allied Educational Foundation state that they are corporations organized under § 501(c)(3) of the Internal Revenue Code. They have no parent corporation and no stock owned by a publicly owned company.

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INTERESTS OF *AMICI CURIAE*

Protect Arizona NOW (“PAN”) is a non-partisan association of Arizonans from all walks of life, organized to promote adoption of Proposition 200 on the November 2004 ballot. PAN was the sponsoring organization for Prop 200, and its officers intervened as defendants in prior judicial challenges to Prop 200. PAN has been concerned by the threat to the integrity of Arizona elections posed by the increased number of illegal aliens coming into the State in violation of federal law, and the threat that those aliens will seek to vote.

The Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States, including many in Arizona. WLF has appeared in courts across the country to ensure that governments at all levels possess the resources to combat illegal immigration and to prevent aliens from seeking to vote illegally. WLF represented PAN in its prior defense of the welfare-related provisions of Prop 200. WLF also participated in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); and *Gonzalez v. State of Arizona* [“*Gonzalez P*”], 485 F.3d 1041 (9th Cir. 2007), an appeal from the district court’s denial of a preliminary injunction in this case.

The Allied Educational Foundation is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Arizona electorate approved Prop 200 by a wide margin in the November 2004 elections. Nonetheless, opponents of Prop 200 have made it clear that they are determined to ignore the election results and have launched multiple judicial assaults on the law. *Amici* are filing this brief to ensure that the voices of the majority of Arizonans who support Prop 200 are

heard.

This brief addresses two of the four issues raised by Plaintiffs-Appellants on appeal: (1) whether Arizona violates the National Voter Registration Act in the manner by which it handles federal voter registration forms submitted by mail; and (2) whether Prop 200 imposes a poll tax or constitutes an undue burden on the right to vote, in violation of the 14th and/or 24th Amendments. *Amici* do not address two other issues raised on appeal: (1) whether Prop 200 violates the 14th Amendment by imposing an undue burden on naturalized citizens in particular, or by discriminating against them on the basis of national origin; and (2) whether Prop 200 violates Section 2 of the Voting Rights Act of 1965. All parties have consented to the filing of this brief.

STATEMENT OF THE CASE

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

Challenges to Prop 200 were filed in U.S. District Court for the District of Arizona in May and June 2006. In each of the suits, the plaintiffs filed preliminary injunction motions, raising the same four issues raised in this appeal and seeking to enjoin Arizona officials from implementing: (1) Prop 200’s requirement that individuals registering to vote provide

documentary evidence to support citizenship claims; and (2) Prop 200's requirement that voters provide proof of identity before casting ballots.¹

The district court denied the preliminary injunction motions in the fall of 2006. The plaintiffs appealed the denial with respect to the voter registration requirements, and this Court affirmed that denial the following year in *Gonzalez I*. The Court held that: (1) the plaintiffs had “demonstrated little likelihood of success” on their poll tax claim; (2) they had “not raised serious questions” regarding their claim that Prop 200 imposed an undue burden on voting rights; (3) they had not “demonstrated a likelihood of success on their claim that Prop 200 imposed a disproportionate burden on naturalized citizens; and (4) Arizona did not violate the NVRA by requiring mail-in voter registration applicants to present evidence of citizenship. *Gonzalez I*, 485 F.3d at 1048-51.

Based in part on the legal conclusions drawn by this Court in *Gonzalez I*, the district court in August 2007 entered summary judgment against the plaintiffs on their NVRA and poll tax claims. Following trial, the district court in August 2008 issued its findings of fact and conclusions of law and entered judgment against the plaintiffs on all remaining issues. Two sets of plaintiffs appealed: Maria M. Gonzalez, *et al.* (No. 08-17094) and The Inter Tribal Council of Arizona, Inc., *et al.* (ITCA) (No. 08-17115). The appeals raise substantially similar issues and have been consolidated by the Court. Although *amici* are filing their brief in No. 08-17094, our arguments are applicable to claims raised in both appeals.

¹ These complaints did not challenge the welfare-related provisions of Prop 200. A previous challenge to those provisions, spearheaded by some of the same groups that brought the latest complaints, was rejected by the federal courts. *Friendly House v. Napolitano*, 419 F.3d 930 (9th Cir. 2005).

STATEMENT OF FACTS

The Gonzalez Appellants are various groups and individuals who allege that they have been harmed by adoption of Prop 200's voter registration and voter ID provisions. As implemented by Arizona election officials, Prop 200 provides numerous methods by which voter registration applicants can provide satisfactory evidence of citizenship, and numerous means by which voters can establish their identity. *See generally*, Answering Brief of Appellees Arizona, *et al.*, in No. 08-17084 ("Arizona Br.") at 7-14. In particular, the permissible means for establishing identity are far more extensive than in Indiana, whose voter ID requirements were upheld by the Supreme Court in *Crawford*. Whereas Indiana law provides that the only acceptable form of voter identification is a photo ID issued by the United States or the State of Indiana, 128 S. Ct. at 1620 n.16, Arizona accepts forms of identification (such as utility bills) that lack pictures and that are not issued by government entities. Arizona Br. 7-9.

The evidence at trial indicated that no individual Appellant is being prevented from registering to vote or from voting by Prop 200. Appellant Jesus Gonzalez apparently remains unregistered, but the evidence at trial indicated that he could register at any time (both by mail or in person) if he would provide one of several acceptable types of information he possesses that would establish citizenship, including either the "A-number" from his Certificate of Naturalization or his valid U.S. passport. Arizona Br. 26-27.

SUMMARY OF ARGUMENT

Appellants contend that by imposing evidence-of-citizenship requirements on mail voter registration applicants, even though the federal form prepared by the Electoral Assistance Commission does not call for such evidence, Arizona is violating the National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. § 1973gg *et seq.* That contention is barred by the law of the case doctrine. In rejecting Appellants’ appeal from the denial of their request for a preliminary injunction, this Court in *Gonzalez I* explicitly rejected Appellants’ interpretation of the NVRA. In any event, neither the NVRA statutory language nor the circumstances surrounding its adoption support an argument that Congress intended to prevent States from determining whether mail voter registration applicants are ineligible to vote because they are not U.S. citizens.

Appellants’ assertion that Prop 200 is a poll tax in violation of the 14th and/or 24th Amendments is without merit. Arizona has not imposed a “tax” as that term is regularly understood. While Prop 200’s evidence-of-citizenship and voter ID requirements may impose a slight burden on some would-be voters, that burden is more than outweighed by Arizona’s strong interest in maintaining the integrity of the electoral process – an interest that is advanced by Prop 200. Appellants’ contention that Arizona’s voter ID requirement is foreclosed by the Supreme Court’s recent decision in *Crawford* – which *upheld* Indiana’s photo ID requirement for all voters – is based on a misreading of *Crawford*.

ARGUMENT

I. THE NVRA DOES NOT BAR STATES FROM REQUIRING THOSE REGISTERING BY MAIL TO PROVIDE PROOF OF CITIZENSHIP

A. Appellees’ NVRA Claims Are Barred by the Law of the Case Doctrine

This Court held in *Gonzalez I* that the NVRA does not prohibit States from imposing evidence-of-citizenship requirements on mail voter registration applicants, even when the federal government has decided not to include such requirements as part of the federal mail-in registration form mandated by the NVRA. *Gonzalez I*, 485 F.3d at 1050-51. The Court explicitly held that the NVRA “allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote.” *Id.* at 1051. Accordingly, the law of the case doctrine bars Appellants’ contention that the NVRA prohibits Arizona from imposing its own evidence-of-citizenship requirements on mail voter registration applicants. *Leslie Salt Co. v. Cargill, Inc.*, 55 F.3d 1388 (9th Cir. 1995).

Appellants contend that the law of the case doctrine should not apply to their NVRA claims because *Gonzalez I*’s interpretation of the NVRA constituted clear error. As the following sections of this brief demonstrate, *Gonzalez I* correctly interpreted the law. Even if this panel ultimately disagrees with the prior panel’s conclusion, that disagreement is not by itself sufficient cause to abandon the law of the case doctrine when there is substantial basis for the prior conclusion – and Appellants cannot point to conflicting authority from other federal appellate courts. This Court has cautioned against abandoning the law of the case doctrine unless the prior panel decision is so far outside the mainstream that it is not even “plausible” and is “clearly erroneous.” *Leslie Salt*, 55 F.3d at 1394.

The ITCA Appellants argue that the law of the case doctrine is inapplicable when, as here, the prior ruling arose in connection with an appeal from a ruling on a preliminary injunction. ITCA Br. at 22. The case law cited by ITCA does not support their argument. It is true that a decision to grant a preliminary injunction is “preliminary” in nature – it involves a

preliminary determination that the plaintiff is or is not entitled to preliminary injunctive relief based in part on a determination that the plaintiff has or has not demonstrated a likelihood of success on the merits. Thus, it is well settled that a finding at the preliminary injunction stage that the plaintiff is likely to succeed on the merits does not establish the law of the case at a subsequent trial. *See, e.g., So. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004). But when, during the course of ruling on an appeal from the grant or denial of a preliminary injunction, the appeals court rules on a disputed issue of law, there is no simply no authority for the proposition that the law of the case doctrine is inapplicable to that ruling. In the absence of evidence that the law governing NVRA issues has changed since *Gonzalez I* was issued, the law of the case doctrine bars Appellants' NVRA claims.

B. The NVRA Evidences a Congressional Intent to Impose Limits on State Authority to Oversee Federal Elections Only to the Extent Explicitly Set Forth in the NVRA

States historically have controlled voting eligibility requirements and the standards for determining eligibility, for both State and federal elections. State authority to oversee federal elections is set forth in Article I, § 4 of the Constitution, which provides: “The Times, Places, and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof.”

The NVRA evidences a congressional intent to limit that State authority only to the extent explicitly set forth in the NVRA. The NVRA prescribes that States must permit voter registration for federal elections to be conducted by mail, and that States may not include in the mail-in form “any requirement for notarization or other formal authentication.” 42 U.S.C. § 1973gg-7(b)(3). But the NVRA does not prohibit other State registration requirements

reasonably designed to ensure that applicants are eligible to vote.² To the contrary, the NVRA explicitly contemplates that mail voter registration forms devised by the federal government and/or by state governments may appropriately seek applicant information not explicitly set forth in the statute: it provides that mail voter registration forms may require “such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration.” 42 U.S.C. § 1973gg-7(b)(1). Voter registration applicants are ineligible to register unless they are U.S. citizens; accordingly, it is difficult to dispute that State election officials need at least some evidence that the applicant is a U.S. citizen to be able to assess his eligibility.

NVRA case law supports Arizona’s position. For example, following adoption of the NVRA in 1993, several States challenged the law as an unconstitutional infringement on their right to determine the qualification of voters. Those challenges were uniformly rejected on the grounds that the NVRA does not, in fact, regulate the qualification of voters. *See, e.g., ACORN v. Miller*, 912 F. Supp. 976, 986 (W.D. Mich. 1995), *aff’d*, 129 F.3d 833 (6th Cir. 1997). In other words, the NVRA requires States to permit individuals to use the mails to apply to become registered voters, but (except with respect to notarization/ authentication of signatures) it does not purport to overrule State voter qualification requirements. If a properly completed mail-in voter registration application form fails to attach identifying information that a State reasonably deems “necessary” to determine whether the applicant is a U.S. citizen, or if the State determines

² § 7(b)(3) is a strong indication that when the drafters of the NVRA wanted to prohibit election officials from imposing additional registration requirements, they did so explicitly. Thus, if Congress had really wanted to prevent election officials from determining whether mail voter registration applicants are U.S. citizens, one would have expected them to say so explicitly.

(for example) that the applicant is barred from voting under that State's rules regarding convicted felons, the NVRA does not nonetheless insist that the applicant be registered.³

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

³ Appellants' contention to the contrary is untenable. Appellants insist that States are *required under all circumstances* to register mail-in applicants who provide all information mandated on the federal form and whose applications include nothing affirmatively demonstrating ineligibility. Under that interpretation of the NVRA, Arizona election officials will be required to register all such applicants even though they know, for example, that an applicant is a convicted felon or that he has listed an address at which they know he does not reside.

⁴ Appellants also argue that Congress adopted the NVRA for the further purpose of ensuring uniformity in the regulatory process. Appellants Br. 35. There is no evidence that Congress desired uniformity; when it set forth the purposes of the NVRA in S 1973gg(b), Congress made no mention of uniformity. A desire for nationwide uniformity sometimes animates federal regulation; for example, interstate commerce may benefit if companies know

Permitting States to require that evidence of citizenship be included as part of the mail-in registration process is fully consistent with the NVRA's purpose of encouraging registration by streamlining the registration process. The vast majority of applicants who are, in fact, citizens will have ready access within their own homes to the evidence of citizenship required by Arizona. Conversely, to interpret the NVRA as prohibiting States from requiring applicants to provide evidence of citizenship in connection with their mail-in registration forms – even though, as Plaintiffs concede, such evidence can be and is required in all other registration settings – would be inconsistent with the NVRA's stated purpose of “protect[ing] the integrity of the electoral process.” 42 U.S.C. § 1973gg(b)(3).⁵ Indeed, the NVRA quite clearly contemplates imposition of documentation requirements whenever voter registration occurs in conjunction with driver's license applications, 42 U.S.C. § 1973gg-3, because all States impose documentation requirements on driver's license applicants. It makes little sense to suggest that Congress endorsed evidence-of-citizenship requirements in the one context but absolutely prohibited them in the other.

C. The Legislative History of the NVRA Provides No Basis for Overriding the Statutory Language and its Commonsense Meaning

In opposition to Arizona's reliance on the NVRA's statutory language and purpose cited

that they will face a single, uniform set of regulations in every State in which they do business. But uniformity for its own sake has few, if any, benefits in the voter registration context. After all, no citizen needs to worry about dealing with multiple, inconsistent registration schemes, because no voter casts a ballot in more than one state.

⁵ The NVRA was intended to increase registration among eligible voters by reducing the burdensomeness of the registration process, 42 U.S.C. § 1973gg-(b)(1) & (2), not to create a mail-in loophole that provides surreptitious access to the electoral process to ineligible individuals who have no other means of gaining such access.

above, Appellees rely on stray bits of NVRA legislative history to support their argument that the NVRA prohibits States from requiring documentary evidence that a mail-in applicant is a U.S. citizen. That reliance is misplaced; the legislative history on this issue is largely opaque. There are more than a few statements appearing in committee reports that support Arizona's position that the NVRA does *not* curtail States' authority to regulate and enforce the qualification of voters. For example, the House Administration Committee, in its favorable report on what would become the NVRA, stated unequivocally: "The Committee felt strongly that no legislative provision should be considered that did not at least maintain the current level of fraud prevention." H.R. Rep. 103-9, at 5 (1993). In discussing mail-in applications, the committee emphasized, "States are permitted to employ any other fraud protection procedures which are not inconsistent with this bill." *Id.* at 10. In the absence of any language in the statute suggesting that Prop 200's anti-fraud provisions are inconsistent with the NVRA, Appellees' contention to the contrary must be rejected.

D. HAVA Undercuts Appellants' Claim That Federal Law Bars States from Employing Anti-Fraud Measures

Furthermore, Congress's later adoption of the Help America Vote Act ("HAVA"), 42 U.S.C. § 15301 *et seq.*, is inconsistent with a claim that Congress sought by means of the NVRA to bar states from employing anti-fraud measures. To the contrary, HAVA *mandates* that States adopt several new anti-fraud measures in connection with all voter registration, including: (1) collecting the driver's license number and the last four digits of the applicant's Social Security number (if the applicant has such numbers); (2) checking the accuracy of those numbers with motor vehicle authorities and the Commissioner of Social Security; and (3) requiring all applicants to check one of two boxes explicitly indicating whether they are U.S. citizens or not

U.S. citizens. 42 U.S.C. §§ 15483(a)(5) & (b)(4). Congress went on to provide that its new anti-fraud measures were “minimum requirements,” and that States were free to establish “election technology and administration requirements that are more strict” than those established under HAVA, provided only that the additional requirements were “not inconsistent with,” *inter alia*, the NVRA. 42 U.S.C. § 15485. It is impossible to square Plaintiffs’ contention that the NVRA prohibits *all* State documentation requirements not explicitly provided for in the NVRA, with HAVA’s provision authorizing such requirements except as explicitly *prohibited* by the NVRA.

E. The Views of the Electoral Assistance Commission Are Not Relevant in Interpreting the NVRA

Appellees’ reliance on a March 2006 letter from the Election Assistance Commission – in which the EAC opined that Arizona should not require proof of citizenship from mail-in applicants – is misplaced. As set forth in 42 U.S.C. §§ 15322 & 15325, the EAC is a federal *advisory* body that has no authority to enforce either the NVRA or HAVA – that is the role of the U.S. Department of Justice. The EAC sole substantive authority is to “develop” the federal registration form used for mail-in registrations mandated by the NVRA. *See* 42 U.S.C. § 1973gg-7(a)(2). Congress made explicit that the EAC has *no* authority to regulate the conduct of States with respect to voter registration: “The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under” § 1973gg-7(a)(2), having to do with the content of the federal mail-in registration form. 42 U.S.C. § 15329.

Accordingly, contrary to Appellees’ contention, the EAC’s views regarding the propriety

of Arizona's evidence-of-citizenship requirement are not entitled to deference from this Court.⁶ Arizona accepts voter registration applications from those using the precise form approved by the EAC. HAVA makes clear that it is not the business of the EAC to opine on the voter qualification rules of States that use the EAC-approved form.

II. PROPOSITION 200 DOES NOT CONSTITUTE A PROHIBITED POLL TAX

Appellants contend that Prop 200 constitutes a prohibited poll tax. Although conceding that Prop 200 does not in terms require prospective voters to pay a fee to register to vote, Appellants insist that Proposition 200 amounts to a poll tax because those prospective voters who lack evidence sufficient (under Prop 200) to establish citizenship will have to pay for the right to vote by paying for the necessary documentation. Appellants Br. 60-62. They assert that this "poll tax" violates the 24th Amendment. *Id.*

That contention cannot withstand analysis. The 24th Amendment provides that the right to vote in a federal election "shall not be denied or abridged" by reason of "failure to pay any poll tax or other tax." That amendment quite explicitly limits its scope to "taxes," which are commonly understood to be limited to assessments imposed by governments. *See Black's Law Dictionary* (4th ed. 1968) ("Tax" defined as "any contribution imposed by government upon individuals, for the use and service of the state."). In the absence of an allegation that Prop 200 imposes anything remotely resembling such a "tax," the 24th Amendment is wholly inapplicable.

Appellants' reliance in this regard on *Harman v. Forssenius*, 380 U.S. 528, 539 (1965), is

⁶ Moreover, even if it were true that a formal regulation issued by the EAC would be entitled to some degree of deference, the highly informal manner in which the EAC has acted in this matter – a letter sent to Arizona officials – deprives that body's views of any claims to judicial deference to which they would otherwise be entitled. *See, e.g., Wyeth v. Levine*, ___ U.S. ___, 173 L. Ed. 2d 51, 66-69 (2009).

misplaced. *Harman* involved a challenge to a Virginia statutory scheme that explicitly imposed a “poll tax” on all who wished to vote in federal or state elections. *Id.* at 529. In 1963, in anticipation of adoption of the 24th Amendment, Virginia amended its poll tax statute to provide that a resident could vote in a federal election even without paying the tax, provided that six months before the election he or she file a notarized “certificate of residence” that stated the voter’s residence and his/her intent to remain at that residence through the next election. *Id.* at 530. The Court ruled that the amended law “abridged” the right to vote by reason of failure to pay a poll tax because those who failed to pay the tax were required annually to complete a cumbersome certification process in order to vote, while those who paid the tax were not required to do so. *Id.* at 540-42.

Nothing in *Harman* remotely supports Appellants’ contention that Prop 200 violates the 24th Amendment. In support of their contention that it is irrelevant that Prop 200 does not impose anything that anyone would ordinarily denominate a “tax,” Appellants cite *Harman*’s statements that the 24th Amendment is fully applicable even when the challenged legislative scheme is “somewhat less onerous than the poll tax” or is “a milder substitute.” Appellants Br. 61. But those statements were made in connection with a legislative scheme in which those declining to pay a poll tax, and *only* such individuals, were required to comply with the “milder substitute.” The Court stated explicitly that it was *not* holding that a generally applicable “certificate of residence” requirement was constitutionally problematic, only that such a requirement could not be imposed solely on those who declined to pay a poll tax. *Id.* at 538.

Appellants’ alternative contention – that Prop 200 imposes a fee that amounts to a voter qualification based on “wealth” and thus violates the Equal Protection Clause – is even less

substantial. Appellants base this contention on *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), which held that conditioning the right to vote in *State* elections on the payment of a poll tax violates equal protection. *Harper* held that poll taxes establish wealth as a qualification for voting, and that “[t]o introduce wealth or payment of a fee as a measure of a voter’s qualification is to introduce a capricious or irrelevant factor.” *Id.* at 668. But *Harper* makes no suggestion that its holding is applicable to situations, as here, in which a State concededly has not imposed any fee. Plaintiffs assert that the voter qualifications mandated by Prop 200 impose costs on some voters, but the same could be said of virtually any voter qualification. For example, requiring voters to vote at designated polling places entails transportation costs, but no court has suggested that a desire to avoid those costs creates a constitutional right to vote by absentee ballot. “Election laws will inevitably impose some burdens on individual voters.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The imposition of tangential burdens does not transform a voter qualification into an unconstitutional “wealth” qualification.

III. THE DISTRICT COURT’S DETERMINATION THAT PROP 200 DOES NOT CONSTITUTE AN UNDUE BURDEN ON THE RIGHT TO VOTE WAS AMPLY SUPPORTED BY THE RECORD

Voting is among the rights most strongly protected by the U.S. Constitution. Nonetheless, Courts have long recognized that States have broad authority under Article I, § 4 of the Constitution to regulate the “Times, Places, and Manner” of conducting elections, and that the burdens inevitably imposed on prospective voters by those regulations do not thereby render the regulations constitutionally suspect. The Supreme Court has categorically rejected the notion that “a law that imposes any burden upon the right to vote must be subject to strict scrutiny.”

Burdick, 504 U.S. at 432. Rather, any challenge to an election regulation must be adjudicated under a “flexible standard” that weighs the State’s justification for its regulation against the burden the regulation imposes on voting rights. *Id.* at 434; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997) (“Lesser burdens [on voting rights] trigger less exacting review, and a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.”) (internal quotations omitted). The district court articulated that standard for adjudicating equal protection challenges to election regulations, and Appellants do not challenge the court’s conclusions of law in this regard.

The briefs filed by the two sets of Appellees explain in great detail why the district court’s principal findings – that Prop 200 imposes non-severe burdens on voting rights and that those burdens are outweighed by the State interests served by Prop 200 – are amply supported by the record before that court. Accordingly, *amici* will not repeat that explanation here. Rather, we limit our discussion to a response to several erroneous legal arguments raised by Appellants.

Appellants focus much of their argument on *dicta* that appeared in one sentence of one of the opinions in the Supreme Court’s recent *Crawford* decision. *Crawford* rejected a 14th Amendment challenge to Indiana’s voter ID law, which requires *every* voter in the State to possess a government-issued photo ID. Writing for three members of the Court, Justice Stevens stated that the Indiana requirement was constitutionally unobjectionable because, among other things, Indiana offered photo IDs for free – and thus the only costs borne by prospective voters was the cost of procuring foundation documents necessary to obtain a photo ID and the cost of traveling to a government office to obtain the photo ID. *Crawford*, 128 S. Ct. at 1616-21 (plurality opinion). During the course of explaining why the photo ID requirement was

permissible, Justice Stevens opined in *dictum*, “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.” *Id.* at 1620-21. Appellants seek to elevate this dictum in a three-judge opinion into a sea-change in the law that should cause the Court to reconsider its decision in *Gonzalez I* and determine that Arizona’s voter ID requirement is constitutionally impermissible.

Even if Justice Stevens’ *dicta* in a three-judge opinion represented binding authority (which it does not), it would still not support Appellants’ position. Elsewhere in his opinion, Justice Stevens made clear his view that *Harper* does not represent a separate category of 14th Amendment restrictions on state voting regulations. Rather, he made clear that *Harper* is part of a continuum of Equal Protection case law that balances the state interests served by a voting restriction against the burden on voting rights imposed by that restriction. *Crawford*, 128 S. Ct. at 1615-17 (plurality)(citing *Burdick* and *Anderson v. Celebrezze*, 460 U.S. 70 (1983)). When, as with the poll tax in *Harper*, the voter restriction serves no legitimate state interest because “it [is] irrelevant to the voter’s qualifications,” then the restriction (no matter how minor) violates the 14th Amendment because there is no state interest to balance against the burden placed on voters. *Id.* at 1616. Justice Stevens’s subsequent statement about *Harper* (the one relied on by Appellants) must be understood with this earlier analysis in mind. Any costs imposed on voters by Arizona’s voter ID requirement must, in Justice Stevens’s view, be balanced against the State interests served by that requirement and, as explained below, Arizona’s interests in imposing the requirement as a means of preventing fraud are substantial.

Second, the voter ID requirement at issue here is substantially less onerous than the one

upheld in Indiana. Indiana required voters to obtain from the State or federal government a photo ID; Justice Stevens was rightly concerned that any such requirement could be deemed a government tax or fee if Indiana were to charge voters to obtain the required photo ID. In contrast, Arizona permits voters to bring a wide variety of documents to the polls to prove their identity; many of the permissible documents do not include photos and, more importantly, many of them (*e.g.* utility bills) are not issued by the government. Thus, Justice Stevens's concern that the Indiana photo ID requirement could be deemed a requirement to pay a fee to the government (if Indiana had charged for the required photo ID) are simply inapplicable to Prop 200.

Prop 200 addresses an issue of utmost importance in any democracy: maintaining the integrity of the electoral process. If our recent history of hotly contested presidential elections has taught us anything, it is that the common bonds that hold us together as a society cannot long endure unless the fairness of elections is not subject to question. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 7 (2006) (“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.”).

Appellants seek to minimize the importance of Prop 200's anti-fraud provisions. But as Justice Stevens recognized in *Crawford*, Arizona and other States have good reason to be concerned about the voter fraud problem. Arizona has uncovered several hundred instances in which noncitizens were illegally registered to vote. *Amici* strenuously disagree with any contention that those numbers suggest that the voting fraud problem is manageable under existing law. Given the State's limited fraud detection resources, it stands to reason that State officials will only discover a small fraction of those voting illegally – far more than the number

necessary to alter the outcome of most tight elections.

In addition to Justice Stevens, numerous respected commentators have studied the issue on a nationwide basis and determined both that voter fraud is rampant and that it is extremely difficult to detect. *See, e.g.*, Larry J. Sabato & Glenn R. Simpson, *Dirty Little Secrets* 292 (1996); John Fund, *Stealing Elections* (2004). Voting and registration by aliens has been a particular problem. *See, e.g.*, Publius, “Securing the Integrity of American Elections: The Need for Change,” 9 TEX. REV. OF LAW & POLITICS 277, 292-296 (2005). That article noted: (1) the INS has estimated that 25,000 to 40,000 aliens are registered to vote in Chicago; (2) a random check of Dallas voters revealed that 2.5% of all registered voters were aliens; and (3) a review undertaken in the aftermath of a disputed California congressional race revealed that 784 aliens listed on INS databases (databases that generally include resident aliens but *not* aliens illegally in this country) had registered to vote in that single congressional district. *Id.* at 294. Indeed, congressional concern over voting by aliens was a major factor leading to the 2002 enactment of the Help America Vote Act (HAVA), 42 U.S.C. § 15301 *et seq.*, and its adoption of several provisions designed to reduce alien voting. *See, e.g.*, 42 U.S.C. § 15483(b)(4). U.S. Department of Justice records reveal that the federal government has been bringing an increasing number of criminal cases nationwide against aliens alleged to have voted illegally. *See* U.S. Dep’t of Justice, Criminal Division, Public Integrity Section, *Election Fraud Prosecutions & Convictions; Ballot Access & Voting Integrity Initiative, Oct. 2002- Sept. 2005*.

Moreover, Appellants and other opponents of Prop 200 waged a vigorous campaign against the initiative in the fall of 2004, arguing that the documentation requirements were unnecessary precisely because, in their view, illegal voting by aliens was not a major concern.

They lost that argument: a significant majority of Arizonans thought that election fraud was a sufficiently serious concern to warrant adoption of Prop 200. Having lost the argument in the democratic process, Appellants should not now be permitted to re-argue before the courts their view that alien voting is not a major cause for concern.

Finally, even if Appellants were correct that the massive number of illegal aliens in Arizona has not yet been translated into illegal voting, no rule of law suggests that Arizona is required to delay implementation of effective enforcement techniques until after the integrity of local elections has been fully compromised. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986); *cf. Board of Education v. Earls*, 536 U.S. 822, 836 (2002) (“it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to detect drug use.”). The district court’s determination that Arizona has a substantial interest in taking new steps to prevent alien voting is well supported by evidence that: (1) substantial numbers of aliens have registered to vote, both in Arizona and elsewhere in the United States; (2) there are few means of policing fraudulent voting by aliens if voting officials are required to accept at face value an applicant’s written statement that he or she is a citizen; and (3) Arizona has a large and growing illegal alien population whose demonstrated willingness to violate the law by coming to this country suggests a similar willingness to flout election laws. The Constitution itself plainly “compels the conclusion that government must play an active role in structuring elections,” since “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick*, 504 U.S. at 433.

Even if one concedes that there exist *some* Arizonans who are U.S. citizens and wish to register vote but who currently lack any evidence accepted under Prop 200 as proof of citizenship, the non-severe burdens imposed on those prospective voters are far outweighed by Arizona's interests in maintaining the integrity of its elections. As the Seventh Circuit observed: "Any [election] is going to exclude, either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). Moreover, the Court should be particularly reluctant to second-guess the judgment of Arizona voters that Prop 200's fraud-prevention measures are necessary, because "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which [] judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Id.* at 1131.

One compelling reason to believe that Arizona has not gone "grossly awry" is that similar identification requirements are imposed in all walks of life, in situations involving important individual rights. For example, Congress has adopted legislation requiring all States to impose very strict documentation requirements on those applying for driver's licenses, with the result that illegal aliens nationwide will be unable to obtain licenses legally. REAL ID Act of 2005, P.L. 109-13, § 202(c). It has also adopted a law imposing strict documentary proof-of-citizenship requirements on those applying for Medicaid. Deficit Reduction Act of 2005, § 6036, 42 U.S.C. § 1396b. Anyone seeking to fly on a commercial airline must display a photo ID. The Supreme Court has recognized repeatedly that the Constitution protects the right to travel. *See, e.g., Saenz v. Roe*, 526 U.S. 489 (1999). Yet no one seriously suggests that the

photo ID requirement unconstitutionally burdens the right to travel by imposing a small financial burden on those forced to expend funds to procure the photo ID needed to board an aircraft. Similarly, the district court did not abuse its discretion in concluding that the small financial burden imposed by Prop 200 on prospective voters did not amount to an unconstitutional burden on the right to vote, particularly when weighed against the significant interests served by Prop 200's requirements.

CONCLUSION

Amici curiae respectfully request that the Court affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amici curiae* Protect Arizona NOW, *et al.* Pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the foregoing brief of *amici curiae* is in 14-point, proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 12.0), the word count of the brief is 6,610, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of April, 2009, I electronically filed the brief of *amici curiae* Protect Arizona NOW, et al., with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using 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 foregoing document by first-class U.S. Mail, postage prepaid, to the following participants on the 2nd day of April, 2009, to:

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