

No. 08-17094, 08-17115

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

JESUS 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

No. CV-06-01268-PHX-ROS
No. CV-06-01362-PHX-ROS

**ANSWERING BRIEF IN APPEAL NO. 08-17094
OF DEFENDANTS-APPELLEES STATE OF ARIZONA
AND ARIZONA SECRETARY OF STATE KEN BENNETT**

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JURISDICTIONAL STATEMENT

Defendants-Appellees agree with plaintiffs' statement of jurisdiction as set forth in their opening brief.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly hold that Arizona's evidence of citizenship requirement, which applies to every Arizona citizen, does not violate equal protection based on national origin where there was no showing of intentional discrimination, of discriminatory impact on naturalized citizens, or of any facial classification based on national origin?

2. Did the district court correctly determine that Arizona's identification requirements for voting and registering to vote do not discriminate against Hispanics on account of race in violation of the Voting Rights Act, where plaintiffs did not establish a discriminatory impact and where there was no evidence that historical or societal discrimination was causally connected to whether Hispanics possess or lack acceptable forms of such identification?

This appeal additionally raises identical issues raised in the consolidated appeal (no. 08-17115). Those issues regarding plaintiffs' poll tax and NVRA claims are addressed in Defendant-Appellee's answering brief in that appeal and therefore are not discussed here.

STATEMENT OF THE CASE

Because the statement of the case included in Defendant-Appellee's Answering Brief in the consolidated appeal (no. 08-17115) ("ITCA appeal") accurately sets forth the statement of the case for the present appeal (no. 08-17094), that statement is not repeated here. With specific regard to this appeal, Defendants-Appellees add the following.

Plaintiffs filed this action on May 9, 2006, in the district of Arizona to challenge the voting provisions of Proposition 200, which was adopted by a majority of Arizona's voters in the 2004 general election. [ER 7 ¶ 1]¹ Plaintiffs initially were comprised of six organizations and five individuals. [ER 7 ¶¶ 5-14]² Subsequently, plaintiffs amended their complaint to add two organizational plaintiffs and two individual plaintiffs.³

Plaintiffs asserted ten claims, which were based on: (1) the Supremacy Clause; (2) the First Amendment; (3) the Twenty-Fourth Amendment; (4) the federal equal protection clause; (5) section 2 of the Voting Rights Act; (6) section 5 of the Voting Rights Act; (7) Title VI of the Civil Rights Act; (8) the National

¹ "Dkt." refers to the district court's docket in case no. CV-06-1268-PHX-ROS.

² Those plaintiffs included: Maria Gonzalez, Jesus Gonzalez, Bernie Abeytia, Luciano Valencia, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Friendly House, Chicanos Por La Causa, Inc., and Arizona Hispanic Community Forum.

³ The newly added plaintiffs included: Georgia Morrison-Flores, Naeem Abdul-Kareem, Common Cause, and Association of Community Organizations for Reform Now ("ACORN"). [ER 4 ¶¶ 9-10, 17-18]

Voter Registration Act (“NVRA”); (9) Arizona Revised Statutes (“A.R.S.”) § 16-121.01; and (10) A.R.S. § 16-151(B). [ER 7 ¶¶ 78-109]⁴

Following the preliminary injunction proceedings and interlocutory appeals in these consolidated cases to the Ninth Circuit, Defendants moved for summary judgment on the claims based on the Twenty-Fourth Amendment, section 5 of the Voting Rights Act, the NVRA, and A.R.S. §§ 16-121.01, 16-151(B). [Dkt. 282] The district court granted that motion on August 28, 2007. [Dkt. 330] Plaintiffs’ remaining claims were tried to the court in July 2008. The district court entered judgment on those claims in favor of Defendants on August 20, 2008. [ER 3] Plaintiffs appealed on September 16, 2008. [Dkt. 1045]⁵

⁴ Plaintiffs’ amended complaint asserted new claims based on the Civil Rights Act, 42 U.S.C. § 1971(a)(2)(A), and the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff, *et seq.* [ER 4 at 22, 24] The district court dismissed those claims on February 5, 2008. [ER 4 at 22, 24-25; SER 253-254] Plaintiffs do not raise those claims on appeal.

⁵ Plaintiffs do not raise on appeal their claims based on the First Amendment, section 5 of the Voting Rights Act, Title VI of the Civil Rights Act, or A.R.S. §§ 16-121.01 and 16-151(B).

STATEMENT OF FACTS

A. Context and Provisions of Proposition 200.

In the ITCA appeal, the Secretary set forth in his answering brief the provisions of Proposition 200. Defendants set forth below additional facts as relevant to this appeal.

Proposition 200 was directed to eliminating certain public benefits for persons unlawfully present in the State and preventing ineligible persons, specifically non-U.S. citizens, from voting or registering to vote in the State's elections. [ER 10 at 1-3] There is no evidence that Proposition 200 was enacted with any racially discriminatory intent. The voting-related requirements of Proposition 200 were submitted to the Department of Justice for preclearance pursuant to the Voting Rights Act shortly after the measure had been proclaimed into law by Governor Napolitano. [SER 52]⁶ The Department precleared those voting requirements the following month. [*Id.*]

Proposition 200 did not change the requirements for voting early in Arizona. [ER 3 at 7] Thus, following Proposition 200 every voter continues to have the option of voting early in the State's elections. A.R.S. § 16-542(A), (E).⁷ To vote

⁶ "SER" refers to Defendants-Appellees' Supplemental Excerpts of Record, which is filed herewith.

⁷ Arizona law requires officials to establish a permanent early voting list, on which any Arizona voter may request to be placed. A.R.S. § 16-544(A). Voters whose names are on that list automatically receive early ballots for each election. *Id.*

an early ballot, a voter is not required to provide identification. Instead, once early ballots are received by election officials, the signature on the ballot envelope is matched to the signature on file for the respective registered voter before that ballot is counted. *Id.* § 16-550(A); SER 79.

Arizona, like other states, has experienced fraud in voting with regard to both registration and casting ballots. [ER 3 at 16, 34; SER 138-151, 154-159, 188-191, 194-195] For example, in 2005 alone the Maricopa County recorder referred 159 matters to the county attorney based on evidence that non-U.S. citizens had registered to vote. [ER 3 at 16; SER 188-189, 194-195] Pima County also has referred to the county attorney several instances of non-citizens attempting to register to vote or to cast votes in an election. [ER 3 at 16, SER 138-151]

Similarly, Pima and Maricopa Counties, the State's two largest counties, canceled the voter registrations of approximately 200 individuals who swore under oath to the jury commissioner that they were not U.S. citizens. [ER 3 at 16; SER 138-151, 154-159, 192-193, 201-202, 214-215] At least one non-citizen has attempted to register to vote in Yuma County. [ER 3 at 16; SER 180]

§ 16-544(D). Early voting begins approximately one month before an election. *Id.* § 16-545(B). [SER 77-78] Voters can vote an early ballot by mailing or taking it to the county recorder's office or to any polling place within the county by 7 p.m. on election day. *Id.* §§ 16-548(A), 16-551(C). Alternatively, voters may go to an early voting site in their county and cast a ballot in person. *Id.* § 16-542(A), (E).

Not all of those matters necessarily involved intentional wrongdoing by the registrant. Some non-citizens who are present lawfully in Arizona have been misled into registering to vote by individuals working for voter registration organizations that compensate such individuals on a per-registration-form basis. [ER 3 at 16; SER 209-210] As a result, those non-citizens who are lawfully part of Arizona communities may unwittingly jeopardize their ability ever to attain U.S. citizenship status by having submitted voter registration forms as non-citizens. [ER 3 at 16; SER 207-208, 210-211]

Whether or not such fraudulent registration is intentional on the part of a registrant, the registration potentially results in the dilution of votes of eligible citizens and may result in severe collateral consequences to non-citizens who submit such registrations. Under Proposition 200's evidence of citizenship requirement, such registrations are rendered less likely to occur than under Arizona's previous registration procedures, which required no verification of citizenship status.

Apart from actual and potential problems with fraudulent registration, individuals not eligible to vote have been charged with illegal voting in Arizona elections. Some have been convicted of that crime. [ER 3 at 16-17]

B. Implementation of Proposition 200.***1. The voting identification procedure.***

Following the passage of Proposition 200, Arizona's election officials undertook the substantial task of implementing the voting-related provisions of the measure. [SER 54-55] The voting identification provision required either one form of photo identification or two forms of non-photo identification for voting, but did not specify particular types of identification that would suffice. [SER 65] Nor did the new law provide guidance on how the requirement should be implemented.

In consultation with all Arizona counties, the Secretary developed a procedure for implementing the identification at the polls requirement. [SER 65-71, 168-169] The new procedure specified particular forms of identification that could be used for voting and set forth the procedure for poll workers to implement the identification requirement at the polls. [SER 64-67] The procedure was precleared by the Justice Department on October 7, 2005.⁸ That procedure is part of the Secretary of State's Election Procedures Manual, which is developed pursuant to state law. *See* A.R.S. § 16-452(A), (B); SER 52-53, 96.

As described in the Secretary's answering brief in the ITCA appeal, the procedure specifies many forms of identification that Arizona voters may use to

⁸ *See* <http://www.azag.gov/Preclearances/preclearance2005.pdf>, at 3.

vote at the polls on election day. [ER 30 at 128; SER 66-67] The vast majority of voters can use their Arizona driver's license to vote. [See SER 95-96] Those who do not have such a license, however, may use one or two of many different forms of identification, including a recent utility bill or bank statement or a voter registration card. [ER 30 at 128; SER 66-67] In addition, some voters may use election mail as a form of identification. [SER 93, 170] Indeed, some Arizona counties send election mail specifically for such purpose. [SER 170] There is no fee for any of the county-generated forms of identification. [SER 74]

Under no circumstances is an individual to be turned away from the polls. [SER 88-89] At a minimum, voters must be offered a provisional ballot which, depending upon the type of identification they provide, may or may not require them to do anything else to have their ballot counted. [ER 30 at 127-129, 135] If a voter provides an acceptable form of identification that voter must be given either a regular ballot or a provisional ballot if the name announced by the voter to the poll worker is the same as that on the identification. [ER 30 at 129; ER 3 at 8] Such a voter will not be required to return with additional identification.

Only if a person presents no identification or identification that does not contain the voter's name and address, or if the name on the identification is different from that announced by the voter, is a voter given a "conditional provisional ballot." [ER 30 at 129; ER 3 at 8; SER 72-74] In such case, the person

must return to a designated location within three to five days, depending on the election, to provide sufficient identification to have his ballot counted. [ER 30 at 135; SER 72]

2. *The evidence of citizenship requirement.*

Election officials set out to implement the evidence of citizenship requirement in 2005 by revising the state voter registration form to reflect the new requirement. [SER 54-55, 59-60] A new form was developed and submitted for preclearance to the Justice Department on March 16, 2005, and was precleared on May 6, 2005. [See ER 31]⁹ The new form informed potential applicants of the evidence of citizenship requirement and included spaces in which an applicant could provide a driver's license number, a tribal identification number or a "Certificate of Naturalization number" as evidence of citizenship. [ER 31]

Individuals could submit copies of their birth certificate or U.S. passport if they did not provide any of the above-described numbers on their registration form. A.R.S. § 16-166(F)(2), (3). Naturalized citizens also had the option of providing their certificate of naturalization as evidence of citizenship. *Id.* § 16-166(F)(4)¹⁰

⁹ See <http://www.azag.gov/Preclearances/preclearance2005.pdf>, at 1.

¹⁰ State election procedures do not forbid officials from accepting a copy (as opposed to original) of an individual's naturalization certificate. [ER 3 at 31-32] Maricopa County elections director Karen Osborn testified (by deposition) at trial that employees are instructed to accept copies of naturalization certificates. [SER 200, 202C] Yuma County also accepts photocopies of naturalization documents. [SER 120]

Because those documents on their face indicate U.S. citizenship, no additional verification by election officials is necessary. [See SER 91] Thus, persons presenting those documents, or copies of them, will be registered to vote if those persons otherwise meet registration criteria.

In addition, the evidence of citizenship requirement may be met by “[o]ther documents or methods of proof that are established pursuant to” the Immigration Reform and Control Act of 1986. A.R.S. § 16-166(F)(5). Thus, the drafters of Proposition 200 left open the possibility that additional citizenship documents could be developed in the future under that Act and thus could suffice as evidence of citizenship for registering to vote.

With regard to the forms of evidence of citizenship that permit an applicant to provide a number on the voter registration form, election officials attempt to verify citizenship status based on those numbers using available government databases. Two of those types of numbers, the driver’s license number and naturalization number, currently can be verified by election officials. [SER 90-92]

The tribal identification number cannot be verified at this time by election officials. Unlike the driver’s license and naturalization numbers, the tribal identification numbers correspond to individual tribes and are not tracked by any government database. [See SER 31-32] Accordingly, tribal identification numbers

are given a presumption of validity that may be rebutted if there is reason to believe the numbers are not valid. [SER 85]

Most individuals who are eligible to register to vote may use their Arizona driver's license or non-operating identification to do so. [SER 230] Those individuals may register either by completing and submitting a paper registration form, including their license number, or by registering online through a state website that can check their license number against the State's motor vehicle division database. [SER 57-58, 96-97]

Nearly ninety percent of Arizona's voting eligible population possesses a valid Arizona driver's license or non-operating identification. [ER 3 at 9; SER 96, 230] Although an Arizona license does not definitely establish U.S. citizenship, such a license is a reasonable indicator of citizenship status. [ER 3 at 11-12] Since 1996, Arizona has required individuals to provide documentation showing their lawful status as residents before issuing a driver's license or non-operating identification. [ER 3 at 11; ER 15 at 3]

In 2000, Arizona's motor vehicle division implemented an additional designation type on licenses issued to those individuals who provided documents that established lawful presence for a limited time only. [ER 3 at 11; ER 15 at 3; SER 116, 119, 233-234, 237-238] That designation is called "F-type" and indicates that the license is of limited duration, unlike licenses issued based on

documents that reflect U.S. citizenship, which are valid until the individual's sixty-fifth birthday. [SER 115-119, 235-236, 239-239B]

Although F-type licenses do not indicate such designation on their face, individuals obtaining such licenses necessarily are aware of the license's limited duration, which *is* apparent from the face of the license. [SER 236, 239-239B] Because the motor vehicle division designates licenses based upon whether the individual provided documentations that reflects U.S. citizenship, the type of license issued is reasonably related to a person's citizenship status. [ER 3 at 11-12] In addition, because Arizona has required proof of lawful presence to issue licenses since 1996, licenses issued after that date reasonably indicate citizenship status for purposes of registering to vote. [ER 3 at 12]

A naturalized citizen, like any other U.S. citizen, is not issued an F-type license designation if that person provided to the motor vehicle division documentation reflecting U.S. citizenship, as opposed to mere lawful presence. [SER 238] Indeed, there was no evidence at trial (or any finding by the district court) that any naturalized citizen possesses an F-type license. Although it is possible that a naturalized citizen would possess a license with an F-type designation, such citizens can easily register to vote by using their naturalization number or certificate. [ER 30 at 43]

Shortly after Proposition 200 was implemented, election officials learned that there are two numbers on a certificate of naturalization: a scroll number that follows the abbreviation “No.” and the “INS Registration No.,” which begins with an A (“A-number”). [SER 56, 125, 129, 173-174; ER 3 at 30] Officials also learned that the A-number (and not the scroll number) could be used to confirm citizenship status by checking that number through a federal database. [SER 56]

As a result of that information, the Secretary determined that the language of Proposition 200 that includes “the number of the certificate of naturalization” should be interpreted to mean the A-number on the certificate. An interpretation of that term to mean the scroll number, which could not be used to confirm citizenship, would be contrary to the evidence of citizenship requirement of Proposition 200. [SER 97-99]

Unfortunately, early in the implementation of Proposition 200, confusion existed with regard to the use of certificates of naturalization for purposes of registering to vote. Specifically, because the voter registration form called for the “certificate of naturalization number,” some registrants submitted the scroll number as evidence of citizenship. [SER 56, 197-198, 218-219] Election officials informed such applicants that the appropriate number was the A-number, not the scroll number. [SER 219] Election officials either telephoned or sent a letter to

the individual to obtain the A-number. [SER 175-176, 198-199, 202A-202B, 219, 221-222]

The Secretary amended the Election Procedures Manual to clarify that the Secretary interpreted the “number of the certificate of naturalization” to mean the A-number and to set forth the specific procedures to be followed by the counties in processing such forms. [SER 56]¹¹ The Procedures Manual has the force and effect of law in Arizona. [SER 53] That manual cannot be changed without the approval of both the Governor and Attorney General. [*Id.*] Moreover, any changes thereto cannot be implemented unless they are precleared by the Justice Department. [SER 53, 99-100]

The Secretary also amended the state voter registration form to specify the A-number instead of “certificate of naturalization number” for those individuals who wish to use naturalization information. [SER 61] That revised form was precleared by the Justice Department on December 4, 2007. [SER 62-63, 162-165]¹²

¹¹ See http://www.azsos.gov/election/Electronic_Voting_System/2006/2006_Electronic_Procedures_Manual.pdf.

¹² Arizona’s two largest counties post registration officials outside the federal buildings during weekly naturalization ceremonies to attempt to register as many newly-naturalized citizens as possible. [SER 205-206, 219-220, 224-227; ER 3 at 37] Thus, individuals may easily register to vote by using either their naturalization certificate or their A-number on the same day they become U.S. citizens. [ER 30 at 43]

C. Arizona’s Successful Elections and Registration With Proposition 200.

State and county election officials have interpreted and implemented the evidence of citizenship requirement so as to ensure that eligible citizens may vote and register to vote while also ensuring that the identification requirements of Proposition 200 are met. Although that effort has not been without challenges, it has been largely successful. The district court found that the State has taken significant efforts “to liberally construe questions raised regarding the right of an elector to vote in favor of allowing the elector to vote.” [ER 3 at 32 n.19] The court further found that there was “no evidence of a purposeful misapplication of Proposition 200’s requirements” or any intent to discriminate in its application. [ER 3 at 36 n.22]

1. There is no evidence that any person could not vote for lack of identification.

In the time period between the passage of Proposition 200 and the time of trial in July 2008 there were three statewide elections—the 2006 primary and general elections and the 2008 presidential preference election. There was a combined total of 3,235,951 votes cast in those elections. [SER 75-76, 121, 160-161] Of that number, 4,100 were conditional provisional ballots that were not counted because the voter did not provide sufficient identification either at the polls or within the specified time period after the election date. [SER 15-16] Thus, in the three statewide elections since Proposition 200 has been in effect,

approximately 0.13% of the ballots cast were not counted for failure to provide identification. [SER 84]

There was no evidence presented at trial regarding the reasons why those individuals who voted conditional provisional ballots did not present identification. During the litigation, plaintiffs urged the district court to order each of Arizona's fifteen county treasurers to produce from the treasury vaults copies of the envelopes containing uncounted conditional provisional ballots. [SER 250-252] Plaintiffs represented that they intended to discover the reasons why those individuals did not provide identification in casting their ballots. [SER 246-248]

The district court permitted that discovery in an endeavor "to give Plaintiffs access to all data in Defendants' possession to make their case." [ER 3 at 2] Plaintiffs presented no evidence at trial, however, about whether any of those individuals who cast conditional provisional ballots actually lacked or could not obtain identification. Neither did plaintiffs offer any evidence that the vast majority of those who cast such ballots were eligible to vote. The evidence revealed only two individuals among those who cast conditional provisional ballots that went uncounted and that should have been counted. [ER 46, 47] Neither of those individuals is a plaintiff in this litigation or a member of a racial minority. Neither of them lacked identification or evidence of citizenship. [ER 3 at 26-27; ER 46, 47]

Instead, the poll workers in the respective precincts for those individuals improperly gave those voters a conditional provisional ballot rather than a provisional ballot. The county defendants have acknowledged that, assuming the truth of the facts presented in the declarations of those individual voters, those poll workers failed to follow state procedures as set forth in the Election Procedures Manual. [ER 3 at 27]

Thus, the evidence at trial showed that out of the 4,100 uncounted conditional provisional ballots cast and more than three million ballots cast in the three elections combined, only two of those ballots were improperly not counted. [ER 3 at 15, 32-33; SER 15-16, 75-76] In addition, apart from the two voters who were improperly given a conditional provisional ballot, there was no evidence that any of the voters who cast such ballots were eligible to vote. [ER 3 at 32-33]

Arizona's election officials have worked diligently to develop procedures to implement the voting identification requirement and to ensure that those procedures are followed by all. The district court specifically found that officials quickly tried to remedy any problems that were brought to their attention. [ER 3 at 33 n.20; SER 89]

2. *There is no evidence of large-scale disenfranchisement of voting-eligible citizens for lack of evidence of citizenship.*

Defendants did not dispute at trial that in the period immediately following the adoption of Proposition 200 the number of Arizona voter registrations fell

compared to the number of voter registrations in the period immediately before Proposition 200's adoption. As the district court correctly recognized, however, such a drop in the registration numbers is not unexpected because the former period included a presidential election cycle. [ER 3 at 14; SER 135-136] The latter period did not include any presidential election cycle.

Plaintiff expert Dr. Lanier prepared an analysis in chart form that reflected the actual numbers of voter registrations for both Hispanic and non-Hispanic persons immediately before and after the adoption of Proposition 200. [SER 135-136] To the extent that analysis reflected actual numbers of registrations (as opposed to Dr. Lanier's predicted numbers of registrations that would have occurred in absence of Proposition 200), the district court found his charts reliable. [ER 3 at 14 n.14; SER 135-136] Those charts demonstrate on their face that, apart from the expected presidential election spike in voter registrations, such registrations actually have *increased* for both Hispanics and non-Hispanics in Arizona in the comparable period post-dating Proposition 200's adoption. [SER 109, 152-153]¹³

¹³ Plaintiffs' assertion (at 1) that "community-based voter drives plummeted 44%" after the implementation of Proposition 200 is both unsupported by the citation they provide and irrelevant for purposes of legal analysis. The document provided under plaintiffs' ER 8 does not reveal any such number. Moreover, the assertion is not placed in any meaningful context. For example, that figure (even if it existed in ER 8) cannot have accounted for the large spike in voter registrations associated

Moreover, Dr. Lanier, who analyzed voter registration in Arizona following the adoption of Proposition 200, admitted that he did not know whether any of the individuals whose registration form was rejected for lack of evidence of citizenship were actually U.S. citizens. [SER 17-19]

In addition, after two years of litigation and extensive discovery, the evidence at trial of individuals who lacked evidence of citizenship for registering to vote was limited to one person, Shirley Preiss. Ms. Preiss is a 98-year-old woman who testified that she was born at home in Kentucky in 1910, and was not issued a birth certificate. [SER 6-7] Ms. Preiss did not possess another form of evidence of citizenship. [ER 3 at 26] Ms. Preiss is neither a plaintiff in this litigation nor a member of a racial minority. [ER 3 at 26; SER 8-9, 243]

Most of the plaintiffs are organizations that participate in registering individuals to vote. Many of those organizations did not even appear at trial. Those organizations that did appear, however, could not identify any eligible citizen who cannot register to vote because the person lacks evidence of citizenship.

Although forms were rejected where individuals failed to provide evidence of citizenship, there was no reliable evidence presented at trial about the extent to which Arizona's voting-eligible citizens possess or lack either evidence of

with the 2004 presidential election because there *was* no comparable period in the period after Proposition 200 by the time of trial in this matter in July 2008.

citizenship or voting identification. [ER 3 at 13 n.11] Neither was there any evidence apart from Ms. Preiss' testimony that any individual who did not register for lack of evidence of citizenship was a U.S. citizen. [See SER 17-19]

D. No Evidence of Any Racial Discrimination Caused by Proposition 200.

The district court found that plaintiffs failed to prove any disparate impact on Hispanic voters caused by either the evidence of citizenship or voting identification requirements. [ER 3 at 41-42] Although plaintiff experts Drs. Lanier and Espino testified on that subject, their testimony did not support a finding of a statistically significant disparate impact on a racial minority. [ER 3 at 42]

1. *No evidence of any disparate impact on naturalized citizen registration.*

Plaintiffs offered no evidence that Proposition 200's evidence of citizenship requirement has resulted in a disparate impact on the voter registrations of naturalized citizens.

2. *No evidence of a discriminatory impact on Hispanic voter registrations.*

Drs. Espino and Lanier testified about the asserted impact on Proposition 200 on Hispanic voter registrations. Their data and conclusions, however, undermined their ultimate opinions of disparate impact. Dr. Espino testified that, following the implementation of Proposition 200, the percent drop in the number

of individuals registered to vote per week in Arizona was 36.67% for Hispanic persons and 35.75% for non-Hispanic persons. [ER 3 at 15; SER 166] Thus, Dr. Espino's conclusions yielded a result of a 0.92% difference in such registration decreases.¹⁴

Dr. Espino did not testify regarding the statistical significance of that difference. Defense expert Dr. Jeffrey Zax testified, however, that such a minute difference was not nearly large enough to be statistically significant. [ER 41-42; SER 112-113] That was especially true given the uncertainties associated with the estimator used by plaintiffs' experts to identify the number of Hispanic individuals. [ER 3 at 42; SER 106] The district court found Dr. Zax' testimony credible. [ER 3 at 42]

In addition, Dr. Espino testified that in ten of Arizona's fifteen counties Hispanic persons actually had fared better in registrations than non-Hispanic persons after the implementation of Proposition 200. [SER 26-30, 114; see ER 3 at 15] Those counties included Maricopa County, Arizona's largest county, which comprises 60% of Arizona's voting population. [SER 25, 29; ER 3 at 15]

Dr. Lanier testified that following the implementation of Proposition 200 Hispanic individuals comprised 16.8% of all rejected registration applicants but

¹⁴ The district court noted that such declines in registrations following the implementation of Proposition 200 were not unexpected because such implementation occurred immediately following a presidential election cycle, in which there was a large spike in voter registrations. [ER 3 at 14]

comprised only 13.8% of all overall registration applicants (*i.e.*, both successful and unsuccessful applicants). [ER 42, table 5] Dr. Lanier's analysis admittedly did not account for the extent to which those Hispanic persons were U.S. citizens. [SER 17-19] Indeed, neither Dr. Lanier nor Dr. Espino testified that they undertook any analysis whatsoever to determine whether any of the persons whose registration forms were rejected were U.S. citizens. [*Cf.* SER 17-19]

In addition, Dr. Lanier concluded that 13.8% of all registrants in Arizona following the adoption of Proposition 200 would have been Hispanic had all of the applications resulted in registration. [See ER 42, table 5 (first column)] Based on Dr. Lanier's data, however, Dr. Zax testified that with Proposition 200 in effect, the actual number of the portion of the electorate that is Hispanic is 13.7%. [SER 104-105; ER 3 at 41] Thus, based on Dr. Lanier's own data and conclusions, the Hispanic portion of Arizona's electorate was impacted by 0.1%. [SER 104; ER 3 at 41]¹⁵

Moreover, based on the available data on the 2006 general election relied upon by plaintiffs' experts, such a difference in Hispanic registrations could have

¹⁵ In addition, to the extent Dr. Lanier analyzed actual voter registration numbers in the period following the implementation of Proposition 200, he failed to account for the population data presented by plaintiff expert Dr. Chapa. Dr. Chapa's data showed that while the growth rate of Hispanic citizen voting age population ("CVAP") between 2000 and 2004 was greater than the growth rate of non-Hispanic CVAP in those years, the growth rate of Hispanic CVAP between 2005 and 2006 was less than the growth rate of non-Hispanic CVAP in those years. [ER 3 at 41, 43; SER 2-5, 101-103, 134]

resulted in a difference in voter turnout of only 0.06%. [SER 110] Stated another way, even assuming plaintiffs' expert analyses were correct, the difference in Hispanic voter registrations between pre- and post- Proposition 200 periods resulted in six additional Hispanic votes in that election for every 10,000 votes cast. [*Id.*]

3. *No evidence of a discriminatory impact on Hispanic voter turnout.*

The district court did not find a disparate impact on Hispanic voter turnout caused by Proposition 200. [ER 3 at 41-42] Although Dr. Lanier testified that he estimated that the number of Hispanic uncounted conditional provisional ballots cast in Arizona's 2006 general election was disproportionately higher than the Hispanic voter turnout in that election, the district court did not find that such testimony supported a conclusion of a statistically significant disparate impact caused by Proposition 200's voting identification requirement.

Indeed, although Dr. Lanier testified that his analysis "suggest[s]" that Proposition 200 had a disproportionate effect on Hispanic voter turnout, he did not undertake any scientific analysis to isolate any effect of the voting identification requirement on such voter turnout.¹⁶ Moreover, Dr. Lanier made no attempt to determine whether any of those individuals were eligible to vote. [SER 19, 111]

¹⁶ Defendants object to the inclusion of trial exhibit 886 in unredacted form as ER 48. That exhibit was admitted at trial only in redacted form, which did not include paragraphs 1, 2 or 7 of that exhibit.

Thus, any conclusion of a disparate impact on voting-eligible Hispanics necessarily would have been based on a finding that the individuals who cast conditional provisional ballots were voting-eligible. There was no evidence to support any such finding.

4. *No evidence that Hispanics are less likely to possess or have access to identification.*

No plaintiff expert testified about the extent to which Hispanic citizens possess either evidence of citizenship or voting identification. With regard to the evidence of citizenship requirement, the district court specifically found that “Plaintiffs have not presented any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or unable to attain it.” [ER 3 at 32]¹⁷

Dr. Rosales testified about historical discrimination against Hispanic persons in Arizona and socioeconomic disparities between Hispanics and others. [ER 3 at 42-44] Dr. Chapa testified about economic disparities between Hispanics and non-Hispanics. [ER 3 at 43-44] Defendants did not dispute that historical

¹⁷ The ITCA plaintiffs offered testimony of their expert, Mr. Sissons, which they had offered at the preliminary injunction hearing, regarding the number of individuals who possessed various forms of evidence of citizenship or voting identification. [ER 3 at 13 n.11] The district court found that his testimony that two percent of Arizona’s non-registered, voting eligible population did not have proof of citizenship was not reliable. [*Id.*] In any event, Mr. Sissons did not offer any testimony about the extent to which Hispanic individuals possess evidence of citizenship or voting identification.

discrimination has occurred or that economic disparities exist between Hispanics and non-Hispanics. Neither Dr. Rosales nor Dr. Chapa, however, testified that either of Proposition 200's voting requirements interacts with discrimination or economic disparity to hinder Hispanic citizens' ability to participate in the political process.¹⁸ [See SER 1-2, 20-22]

E. No Plaintiff Is Unable to Vote or Register Due to Proposition 200's Voting Requirements.

Following the district court's dismissal of several of the plaintiffs, the plaintiffs remaining in this case for trial were comprised of eight organizations and four individuals.¹⁹ Of those plaintiffs, six of the organizations and one of the individuals did not appear at trial.²⁰ The three individual plaintiffs who appeared at trial, either in person or by deposition, were Jesus Gonzalez, Georgia Morrison-Flores and Debbie Lopez.

¹⁸ Plaintiffs' fifth expert Dr. Engstrom testified about the extent to which voting in Arizona is racially polarized. [ER 3 at 44-46] The district court found that to some degree there is racially polarized voting in Arizona. [ER 3 at 46] The district court did not find that such racially polarized voting was related to the evidence of citizenship or voting identification requirements of Proposition 200. [*Id.* (finding that plaintiffs "failed to demonstrate causation")]

¹⁹ Plaintiffs Maria Gonzalez, Luciano Valencia and Naeem Abdul-Kareem were dismissed before trial. [Dkt. 883]

²⁰ The following organization plaintiffs did not appear at trial: Arizona Hispanic Community Forum, ACORN, Common Cause, Friendly House, Project Vote, and Southwest Voter Registration Education Project. Bernie Abeytia also did not appear at trial.

1. No plaintiff is unable to vote or register due to Proposition 200.

None of the plaintiffs lacks identification sufficient to register or vote. Mr. Gonzalez attempted to register to vote following his naturalization in 2005, shortly after the implementation of Proposition 200, with the previous voter registration form that specified “Certificate of Naturalization number.” [SER 10-11, 125-127] Mr. Gonzalez submitted the scroll number on his naturalization certificate, rather than his A-number. [SER 125-127; ER 3 at 30-31]

As explained above, that scroll number could not be used to verify citizenship status. Accordingly, Yuma County sent a letter in Spanish and English to Mr. Gonzalez requesting his A-number or an alternative form of evidence of citizenship. [SER 126-127] Mr. Gonzalez testified at trial that he read and understood that correspondence. [SER 14] Mr. Gonzalez declined to provide his A-number.

Although Mr. Gonzalez testified that he subsequently attempted to register using his driver’s license, his license was issued before 1996 and therefore was not acceptable evidence of citizenship. Arizona’s voter registration form clearly states the date qualification for driver’s licenses as evidence of citizenship. That form is printed (in a single form) in both English and Spanish. [SER 162-165; ER 31] Mr.

Gonzalez testified that he possesses a valid U.S. passport. [SER 12-13, 124; ER 3 at 18]²¹

Ms. Morrison-Flores is a registered voter. [SER 132] She testified by deposition that she was unable to vote using her Arizona driver's license in the 2006 general election because her former name, and not her married name, was reflected on her license and did not match the signature roster at the polling place. [SER 183] Ms. Morrison-Flores testified, however, that for purposes unrelated to voting in April 2007 she updated her information with the motor vehicle division so that her license now reflects the same name as that on the voter registration rolls. [SER 133, 184-185, 243] She testified that she intended to vote in the 2008 fall elections using her Arizona driver's license. [SER 186]

Plaintiff Debbie Lopez has never contended that Proposition 200 prevents her from registering or voting. She testified that she helps register individuals to vote and must make greater efforts to register individuals following the adoption of Proposition 200. Those efforts include placing "the ID numbers on the forms and sometimes put[ting] check marks." [SER 47-48] She testified that she "thought

²¹ Maria Gonzalez similarly attempted to register to vote upon becoming naturalized and submitted the scroll number from her certificate. [SER 122-123, 129] Election officials sent her a letter requesting that she provide her A-number or other evidence of citizenship. [SER 122-123, 130-131] Ms. Gonzalez subsequently registered to vote on-line using her driver's license. [ER 12 at 213-214] She was dismissed as a plaintiff before trial. [Dkt. 883] Like Mr. Gonzalez, Ms. Gonzalez possesses a valid U.S. passport. [SER 128]

the laws [before Proposition 200] were fine” and that “[i]n the old days, you could pretty much go to any fiesta, any festival anywhere, anytime, anyplace, and register somebody to vote. They didn’t need any paperwork.” [SER 48, 49] She testified that she does not know whether the individuals she registered to vote before Proposition 200 was effective were U.S. citizens. [SER 50-51]

2. *No plaintiff organization identified any individual who could not vote or register due to Proposition 200.*

Neither of the two plaintiff organizations who appeared at trial—Chicanos Por La Causa (“CPLC”) and Valle Del Sol—knew of any individuals who could not register due to the evidence of citizenship requirement. Sal Martinez appeared on behalf of CPLC and testified that the only burden to CPLC due to Proposition 200 is educating people about the requirements of the law. [SER 44, 45]

On behalf of Valle Del Sol, Luz Sarmina testified that Proposition 200 makes it harder for naturalized citizens to register to vote because according to her they cannot copy their naturalization certificate and because their application would be “thrown out” if they did not write down their A-number, as opposed to the scroll number. [SER 33, 35] Ms. Sarmina admitted, however, that she was not personally aware of, and her organization had not encountered, any individual who has had any difficulty attempting to use their naturalization certificate to register to vote. [SER 34, 37-38]

Both Mr. Martinez and Ms. Sarmina testified that they did not know whether any of the individuals registered to vote by their organizations before Proposition 200 was effective were U.S. citizens. [SER 36-38, 46] No individual or organizational plaintiff identified or testified about any U.S. citizen who either possessed a driver's license that carried an F-type designation or attempted to use such a license to register to vote.

SUMMARY OF THE ARGUMENT

The primary arguments raised in this appeal and not raised in the ITCA appeal are that the voting requirements of Proposition 200 discriminate against naturalized citizens and Hispanic citizens. After more than two years of litigation and substantial discovery of their claims, however, not a single naturalized citizen or Hispanic citizen has been shown to be unable to register or vote because of the requirements of Proposition 200.

Arizona's evidence of citizenship law applies to every citizen in the State, not only to naturalized citizens. There is no singling out of naturalized citizens for special treatment. Moreover, under that evidence requirement, it may be *easier* for naturalized citizens than some other citizens to register to vote because the former necessarily possess evidence of citizenship. In any event, there is no additional burden imposed on naturalized citizens to register to vote.

With regard to plaintiffs' claim of discrimination against Hispanic citizens, plaintiffs did not prove that requiring such citizens to provide evidence of citizenship or voting identification discriminates on account of their race. Rather than make any attempt to show that discrimination reflects a diminished ability to obtain or possess identification, plaintiffs merely offered evidence of historical discrimination and economic disparity against Hispanics without a showing of any connection or interaction whatever with the possession of identification. It simply does not follow that the existence of historical or societal discrimination has resulted (or should result) in a lack of identification by Hispanic citizens.

In any event, plaintiffs made no such showing. By the end of trial, plaintiffs had presented evidence of only one citizen, of millions of Arizona citizens, who lacked a form of evidence of citizenship to register to vote. She was an elderly lady who was born at home nearly a century ago. She was neither a plaintiff in this litigation nor Hispanic.

The district court found that plaintiffs had established neither a disparate impact nor the required causal connection between the requirement for identification and a hindered ability to vote. Those factual findings are well-supported by the evidentiary record. Plaintiffs do not meaningfully challenge those findings and instead attempt to recast the district court's factual findings as a misapplication of law. The district court applied the correct legal principles and

found facts based on the record. Accordingly, the court's judgment should be affirmed in all respects.

ARGUMENT

I. PROPOSITION 200 DISCRIMINATES NEITHER ON ITS FACE NOR IN EFFECT AGAINST NATURALIZED CITIZENS.

A. Standard of Review.

The Court reviews constitutional issues de novo. *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1152 (9th Cir. 2007). The Court further reviews de novo a district court's determinations on mixed questions of law and fact that implicate constitutional issues. *Id.* A district court's factual findings are reviewed for clear error. Fed. R. Civ. P. 52(a)(6). Moreover, where "the application of the law to the facts requires any inquiry that is 'essentially factual,' [this Court] review[s] for clear error." *Rosenbaum*, 484 F.3d at 1152 (*quoting Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002)).

To establish an equal protection claim based on national origin, plaintiffs must show either that the challenged law classifies persons based on national origin or that a facially neutral law was motivated by a racially discriminatory purpose. *Valeria v. Davis*, 307 F.3d 1036, 1039 (9th Cir. 2002) (affirming the dismissal of an equal protection claim based on a California initiative to require English language immersion in public education) (*citing Adarand Constructors*,

Inc. v. Pena, 515 U.S. 200, 230 (1995), and *Washington v. Davis*, 426 U.S. 229 (1976)). Plaintiffs made neither showing at trial.

B. Proposition 200 Does Not Classify Between Naturalized and Non-Naturalized Citizens.

The district court implicitly held that the evidence of citizenship requirement of Proposition 200 does not draw any classification based upon national origin or, more specifically, based on whether a person is a naturalized citizen. Proposition 200 neither distinguishes between naturalized citizens and non-naturalized citizens nor singles out naturalized citizens for different treatment.

To the contrary, the evidence of citizenship requirement applies to *every* citizen, whether naturalized or non-naturalized. That law provides that the “county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship.” A.R.S. § 16-166(F). The statute then sets forth forms of evidence of citizenship that are deemed acceptable for registration purposes. *Id.* § 16-166(F)(1)-(6).

The statute’s inclusion of naturalization documents or a naturalization number as one form of such evidence does not create any classification between naturalized and non-naturalized citizens. *All* citizens are subject to the *same* requirement—they must provide evidence of U.S. citizenship. Inclusion of naturalization information merely creates additional options for some citizens to comply with the evidence requirement. [See ER 3 at 38]

Even though only naturalized citizens possess such naturalization information, plaintiffs neither argued nor demonstrated with evidence how such fact harms naturalized citizens or makes it more difficult for those citizens to register to vote. Apart from the initial problem that the Gonzalezes experienced when attempting to register to vote immediately following Proposition 200's implementation, there was no evidence whatever at trial that naturalized citizens have a greater burden to meet in registering to vote.

Indeed, the district court appropriately found that the opposite is true. The court found that “applicants who wish to use their certificate of naturalization have *more* options than applicants who use birth certificates or passports.” [ER 3 at 38 (emphasis added)] The court found that naturalized citizens, who necessarily have an A-number and a certificate of naturalization, may register to vote simply by submitting their A-number or by providing their certificate of naturalization. [ER 3 at 31]

Plaintiffs attempt to “fight the facts” found by the district court by relying on sheer speculation. For example, plaintiffs assert (at 43-44) that Proposition 200 unduly burdens naturalized citizens because some naturalization certificates issued more than three decades ago did not contain an individual's A-number. Notably, plaintiffs do not assert that any individual possessing such a certificate *actually lacks* an A-number, only that old certificates may not contain that number.

Moreover, no plaintiff (or any other individual) was identified as being burdened in registering to vote in such circumstances.

Similarly, plaintiffs attempt to create an appearance of discrimination by asserting that Proposition 200 requires only that naturalization numbers, and not other forms of evidence of citizenship, be verified. As the district court correctly found, however, election officials also verify the submitted numbers of individuals who use an Arizona driver's license or non-operating identification to register to vote. [ER 3 at 37-38; SER 57-58]²²

In addition, Proposition 200 does not restrict a naturalized citizen to using only naturalization information to register to vote. If such individual does not wish to provide her A-number to be verified or her naturalization certificate (or copy thereof), which is accepted on its face, that person may use a valid Arizona driver's license or a U.S. passport. Plaintiffs attempt to minimize that fact by asserting (at 45) that "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."

²² U.S. passports, birth certificates and naturalization certificates reflect on their face a person's citizenship. [See SER 91] There currently is no available database for verifying tribal identification numbers for purposes of citizenship. [SER 57-58]

The record, however, did not reveal a single naturalized citizen who either possessed an F-type license or attempted to register to vote using such license.²³

Moreover, notwithstanding plaintiffs' assertion (at 7) to the contrary, any naturalized citizen who possesses an F-type designated license is never "flagged as ineligible for voter registration." Although such licenses cannot be used as a form of evidence of citizenship, any such individuals are not deemed "ineligible." Instead, they simply must provide evidence of citizenship, which an F-type license is not. It is undisputed that *every* naturalized citizen has at least two forms of evidence of citizenship that may be used to register to vote. One of those forms requires such citizens merely to write down a number on the voter registration form.

Plaintiffs' assertions about the burdens imposed on naturalized citizens simply do not exist based on the trial record. Although challenges arose in the period immediately following the adoption of Proposition 200 with regard to the processing of naturalization information of registration applicants, plaintiffs made

²³ Plaintiffs presented no evidence regarding the citizenship status of those individuals who attempted to register to vote by submitting an F-type license. Plaintiffs merely assert that some unidentified individuals did so and were not registered as a result. Plaintiffs have no basis to conclude that any of those individuals actually were citizens. Based on the record, however, it is equally as possible that those individuals were not citizens and therefore appropriately precluded from registering to vote. [SER 102]

no showing of any effort to discriminate against Arizona's naturalized citizens. To the contrary, the district court found that:

Although the admitted exhibits showed that, as anticipated problems[] surfaced regarding Proposition 200's implementation, the response by the State and County Defendants was consistent and immediate. There is no evidence of a purposeful misapplication of Proposition 200's requirements or [any] intent to discriminate in its application.

[ER 3 at 36 n.22] The district court also specifically found that the Secretary of State's office has undertaken "significant efforts" to "liberally construe questions raised regarding the right of an elector to vote in favor of allowing the elector to vote." [ER 3 at 32 n.19] That finding was included as part of the court's discussion of the official procedures for processing naturalization information for purposes of registration. [ER 3 at 31-32]²⁴

Plaintiffs have not demonstrated that Proposition 200 classifies on the basis of national origin. Rather than supporting plaintiffs' argument, the authorities cited in their equal protection argument (at 38-39) demonstrate why plaintiffs did not establish any violation in this case. Each of the national origin cases cited by

²⁴ That finding is supported by another finding of the district court that election officials of Maricopa and Pima Counties proactively attempt to register newly-naturalized citizens at the time and place of their naturalization, in which circumstances the only conceivable "burden" to such persons would be their time spent in registering. [ER 3 at 37 n.24] Such action on the part of the election officials of Arizona's largest counties plainly is not consistent with a discriminatory motive *or* effect against naturalized citizens.

plaintiffs involved government restrictions that specifically singled out either non-citizens or naturalized citizens.

For example, the law struck down in *Boustani v. Blackwell*, 460 F. Supp. 2d 822 (N.D. Ohio 2006), provided that only naturalized voters, and not non-naturalized voters, must provide citizenship documentation if challenged at the polls. Under that law, if a voter was challenged at the polls and responded that he was a “native” citizen, no further information and no documentation needed to be provided. *Boustani*, 460 F. Supp. 2d at 826. Those who responded that they were not born in the U.S. were required to provide naturalization documents within ten days. *Id.*

In *Fernandez v. Georgia*, 716 F. Supp. 1475, 1477 (M.D. Ga. 1989), the challenged law specifically excluded naturalized citizens from employment as an officer or trooper. *See also Faruki v. Rogers*, 349 F. Supp. 723, 725 (D.D.C. 1972) (the challenged statute applied only to naturalized citizens, who had to be citizens for ten years to be eligible for Foreign Service appointment); *Huynh v. Carlucci*, 679 F. Supp. 61, 63 (D.D.C. 1988) (the challenged regulation applied only to certain newly-naturalized citizens, who were excluded from federal security clearance).²⁵

²⁵ Plaintiffs’ remaining authorities further demonstrate that the laws that violate equal protection are objectionable because they specifically single out persons for special treatment on the basis of race or national origin. *See, e.g., In re Griffiths*,

In each of those cases, the objectionable laws on their face drew classifications based on national origin. By contrast, Proposition 200 draws no such classification.

C. The District Court Properly Upheld Proposition 200 Because Any Burden Imposed by It Is Not Severe.

Because Proposition 200 does not classify based on any suspect class, that law must be reviewed under the traditional judicial review applied to election restrictions. [See ER 3 at 28-29] The district court correctly applied the appropriate standard of review of election restrictions, which is the flexible balancing approach repeatedly set forth in Supreme Court case law. *E.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (holding that only severe restrictions on the First and Fourteenth Amendment rights of individuals are subject to strict scrutiny); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (balancing the state interests and the burden on plaintiffs' constitutional rights in reviewing ballot access restrictions); *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610,

413 U.S. 717, 718 (1973) (holding that a state court rule restricting attorney bar admission to U.S. citizens violated the equal protection clause); *Rice v. Cayetano*, 528 U.S. 495, 498-99 (2000) (holding that a state law that barred persons lacking particular Hawaiian ancestry from voting in certain elections violated the equal protection clause); *Graham v. Richardson*, 403 U.S. 365, 366, 376 (1971) (holding that a law that specifically excluded non-citizens or those lawfully present for fewer than ten years from obtaining certain public benefits violated the equal protection clause).

1616, n.8 (2008) (affirming the “flexible standard” of review in election restriction cases as set forth in *Burdick* and *Anderson*).

Under that standard, courts weigh “the character and magnitude of the asserted injury to the rights protected” against the interests put forward by the State as justifications for the burden imposed by the rule. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). Only election restrictions that severely burden constitutional rights are subject to strict scrutiny. *Id.* When an election law “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters,” the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.* (quoting *Anderson*, 760 U.S. at 788).

The district court applied that flexible balancing approach by considering the extent of the burden imposed on persons’ voting rights as well as the State’s asserted interests served by the evidence of citizenship requirement. [ER 3 at 30-35] With regard to the ways in which naturalized citizens can register to vote, the district court found that such persons are not severely burdened by Proposition 200. [*Id.* at 30-32] The district court noted the many ways in which a naturalized citizen can comply with the evidence of citizenship, including providing an A-number, providing a certificate of naturalization, providing a copy of such

certificate, using a valid Arizona driver's license, and providing a copy of a U.S. passport. [*Id.*]

Although plaintiffs disagree with the district court's finding of no severe burden, that finding is supported by the evidence. Indeed, plaintiffs showed no systemic or undue burden in the registration of naturalized (or any other) citizens. Although plaintiffs presented evidence of persons (whether or not naturalized) whose application was rejected and who did not ultimately register, the district court correctly found that no evidence was presented as to the extent to which those individuals lacked evidence of citizenship or are unable to obtain it. [*Id.* at 32]

In addition to the district court's finding that the burden imposed by the evidence of citizenship requirement is not severe, the district court found that the State had important governmental interests further by the requirement. [*Id.* at 34-35] Specifically, the court found that the State has an important interest in preventing voter fraud. [*Id.* at 34] The court further found that the State has an important interest in ensuring voter confidence in the State's elections. [*Id.* at 34-35] Those findings are supported by the evidence. [SER 79-83, 94] The Supreme Court recently affirmed those state interests in *Crawford*. Moreover, the Court did so without requiring the state to prove specific instances or a history of fraud in the

state's electoral process. *Crawford*, 128 S. Ct. at 1617, 1619-20; *see also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

Plaintiffs have not shown clear (or other) error in the district court's findings. The district court's legal analysis was correct and its findings were supported by the evidence. Accordingly, the district court's equal protection ruling should be affirmed. *E.g.*, *Crawford*, 128 S. Ct. at 1623 n.20 (noting that the challengers to Indiana's voter identification law failed to show the extent to which voters lacked the requisite identification or could not obtain such identification).

D. Plaintiffs Did Not Show Any Discriminatory Effect on Naturalized Citizens or Discriminatory Motive of Proposition 200.

Because Proposition 200 does not classify based on national origin and plaintiffs did not establish any severe burden caused by the evidence of citizenship requirement, plaintiffs were required to prove discriminatory intent and effect to establish their equal protection claim. *E.g.*, *Washington v. Davis*, 426 U.S. 229, 239, 241 (1976) (holding that an equal protection plaintiff could not successfully challenge a facially neutral law merely by showing disparate impact; a racially discriminatory purpose must also be shown). They failed to show either.

Plaintiffs presented no evidence of a discriminatory impact on naturalized citizens in registering to vote in Arizona since Proposition 200 has been in effect.

The disparate impact that plaintiffs did attempt to prove was an impact on Latino voters and registrants, not on naturalized citizens.

Neither did plaintiffs show that Proposition 200 was drafted or enacted with any motive to discriminate against naturalized citizens. Indeed, the district court found that the evidence did not establish intentional discrimination. [ER 3 at 36] Plaintiffs do not dispute that finding on appeal. Accordingly, the district court correctly held that plaintiffs did not prove their equal protection claim.

E. The State Properly Interprets Proposition 200 to Effect the Statute's Intent and to Ensure that Eligible Citizens Can Register to Vote.

Plaintiffs' criticism of Arizona's interpretation of the evidence of citizenship statute, which *favors* registration, undermines their argument that the requirement unduly burdens naturalized citizens. Arizona's interpretation of the registration provision pertaining to naturalization information makes it *easier* for naturalized citizens to register while still complying with the language and intent of the statute.

Such interpretation was not conjured in response to this litigation. Instead, election officials implemented the current procedure in response to their learning of the existence of two numbers on a certificate of naturalization and that only one of those numbers could be used to verify citizenship. [SER 56-57; ER 3 at 30] Plaintiffs do not assert that such an interpretation is unreasonable. That interpretation is entitled to deference. *Berger v. City of Seattle*, 512 F.3d 582, 597

(9th Cir. 2008) (giving consideration to the government's interpretation and application of its rule).

Because it is difficult for plaintiffs to argue that writing down a number that a person necessarily possesses creates more than a de minimus burden, plaintiffs assert (at 43-46) that Arizona's interpretation of the evidence of citizenship statute might change some day. The procedures requiring county recorders to accept and verify A-numbers for purposes of registration, however, have the force and effect of *law*. [See A.R.S. § 16-452(C); SER 86-87] Although those procedures initially were promulgated by the Secretary of State, they are themselves the result of a statutory process and can be altered only pursuant to that process. *See id.* § 16-452(A), (B).

Under that process, the Secretary is required to promulgate election procedures and to consult with every Arizona county in so doing. *Id.* § 16-452(A). Once that process is completed, the procedures do not gain the force of law until they are approved by both the Governor and Attorney General of the State. *Id.* § 16-452(B). Moreover, those procedures cannot be implemented unless they are precleared by either the federal judiciary or the Department of Justice. *See* 42 U.S.C § 1973c. Thus, plaintiffs' implication that a new Secretary may on a whim change the registration procedures regarding naturalization information is simply unfounded.

In addition to plaintiffs' speculation that Arizona may some day interpret A.R.S. § 16-166(F) differently, the remainder of plaintiffs' arguments about burdens on naturalized citizens lack an evidentiary basis. Not a single naturalized citizen has been shown to have been burdened by a requirement that he or she provide an A-number for voter registration. Not a single naturalized citizen has been identified in this litigation who cannot register to vote in Arizona due to the evidence of citizenship requirement.

Every naturalized citizen necessarily has at least two different forms of evidence of citizenship—a naturalization certificate (a copy of which may be accepted) and an A-number. *Every* naturalized citizen may register to vote simply by including her A-number on the voter registration form. Although Mr. Gonzalez remained unregistered through the date of trial, he did so by his personal choice. It is difficult to know what relief he hopes to obtain as a plaintiff in this case.

Ms. Gonzalez is registered to vote. None of the remaining plaintiffs could identify any naturalized citizen who is unable to register or is impeded in registering to vote. Indeed, it would be difficult to do so given that all those individuals must do to register to vote is provide a number that they necessarily possess.

Plaintiffs seek to invalidate an entire statute based on a showing that *two* individuals had problems registering to vote immediately following the adoption of

Proposition 200 in 2005. Such an evidentiary basis is plainly insufficient for awarding the relief sought by plaintiffs here. *E.g.*, *Crawford*, 128 S. Ct. at 1623 (rejecting plaintiffs’ challenge to Indiana’s voting identification law where the plaintiffs failed to offer evidence of the extent of the burden to any class of voters).

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO ESTABLISH ESSENTIAL ELEMENTS OF THEIR SECTION 2 CLAIM.

A. Standard of Review.

In reviewing claims under section 2 of the Voting Rights Act, the Court reviews de novo legal determinations and mixed findings of law and fact. *Smith v. Salt River Project Agricultural Improvement & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (“*Salt River*”). With regard to the district court’s ultimate finding of no section 2 violation, this Court reviews only for clear error and defers to “the district court’s superior fact-finding capabilities” in analyzing the relevant factors pertaining to such claim. *Id.*; *see also Old Person v. Brown*, 312 F.3d 1036, 1050 (9th Cir. 2002) (stating that district courts resolve the “inherently factual issues” of vote dilution claims and such decisions should be given “particular deference”).

B. The District Court Applied the Correct Legal Standards to Plaintiffs’ Section 2 Claim.

To establish a section 2 claim, a plaintiff must show that a voting practice abridges or denies the right of a citizen to vote on account of race. 42 U.S.C.

§ 1973(a). Specifically, under the Act a plaintiff must show that based on the “totality of circumstances,” the political processes leading to nomination or election “are not equally open to participation by members of a [protected] class of citizens” 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* § 1973(b).

To establish their section 2 claim, plaintiffs were required to show “a causal connection between the challenged voting practice and [a] prohibited discriminatory result.” *Salt River*, 109 F.3d at 595 (quoting *Ortiz v. City of Philadelphia Office of the City Commr’s Voter Registration*, 28 F.3d 306, 312 (3d Cir. 1994)). Stated another way, plaintiffs were required to show that the challenged election restrictions have resulted in discrimination *on account of race or color*. *Salt River*, 109 F.3d at 594.

Moreover, a plaintiff cannot establish a section 2 violation merely by showing a disparate impact on a racial minority. *E.g., id.*, 109 F.3d at 595 (explaining that the jurisprudence on section 2 stands “for the principle that a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 ‘results’ inquiry”) (emphasis in original); *Farrakhan v. Washington*, 338 F.3d 1009, 1019 (9th Cir. 2003) (quoting *Smith*, 109 F.3d at 595).

In determining whether a voting requirement violates section 2, the district court should consider those factors recognized by the Senate and the judiciary that are relevant in a particular case. *E.g., Old Person*, 312 F.3d at 1041-42 (identifying nine factors that should guide the district court in determining whether a voting practice violates section 2, to the extent such factors are relevant in the particular case). Courts are not required, however, to find any particular number of factors for or against a party to determine whether a section 2 violation exists. *Farrakhan*, 338 F.3d at 1015.

Instead, based on all the evidence, the district court should “consider how *the challenged practice* ‘interacts with social and historical conditions to cause an inequality in the opportunities’” of respective voters to elect their preferred candidates. *Id.* at 1016 (emphasis added); *see also Old Person*, 312 F.3d at 1050, 1050 n.15 (upholding the district court’s determination that no section 2 violation was shown, although the court of appeals disagreed with the district court’s analysis of one of the factors).

The district court correctly identified and applied the legal standards to plaintiffs’ section 2 claim. Specifically, the district court recognized that while a plaintiff need not prove discriminatory intent, the plaintiff nonetheless must prove that the challenged voting practice *results in discrimination on account of race*.

[ER 3 at 40] In addition, the district court properly weighed each of the section 2 factors on which evidence was presented. [See ER 3 at 42-46]

The district court concluded that plaintiffs failed to prove that any disparity in voter registration or turnout of Hispanics in Arizona was caused by either of the Proposition 200's voting requirements. [ER 3 at 46-47] The district court also concluded that plaintiffs did not prove a discriminatory impact on Hispanics in registration or turnout. [ER 3 at 42] As explained below, both of the district court's conclusions, each of which provides an independent ground upon which to affirm, was correct.

C. Plaintiffs Failed to Show that Proposition 200 Was Causally Related to Lower Hispanic Registration or Voter Turnout.

There was no evidence at trial that any historical or societal discrimination against Hispanics has impacted their ability to obtain or possess identification for voting or registration purposes. Plaintiffs never offered any evidence that links the evidence of citizenship or voting identification requirement with Hispanic individuals' inability to vote. Instead, plaintiffs merely attempted to show a disparity in registration and turnout numbers between Hispanic and non-Hispanic individuals after Proposition 200 was adopted.

1. Plaintiffs failed to show that any section 2 factor interacts with either the evidence of citizenship or voting identification requirement.

Plaintiffs offered evidence of historical and societal discrimination against Hispanics and evidence of racially polarized voting. Plaintiffs never showed, however, that any of those factors interacts with the evidence of citizenship or voting identification requirement to hinder Hispanics' ability to participate in the political process and to elect representatives of their choice.

For example, although Dr. Rosales testified that Hispanics in Arizona historically have experienced discrimination in areas of employment, education and the political process, neither Dr. Rosales nor any other witness testified that such past discrimination makes it more difficult for Hispanic citizens to comply with Arizona's evidence of citizenship or voting identification requirement. [See SER 20-22]

There was no evidence of the extent to which Hispanics, as opposed to other racial groups, either possess or lack acceptable forms of evidence of citizenship or voting identification. Neither Dr. Rosales nor any other witness testified that either of Proposition 200's identification requirements interacts with past discrimination to hinder Hispanic citizens' voting rights.

Similarly, Dr. Chapa testified about the recent education and income levels and political participation of Hispanics. [ER 3 at 44] The district court considered

that testimony and found that disparities between Hispanics and non-Hispanics in those categories hinder Hispanic citizens' ability to participate in the political process. [*Id.*] There was no evidentiary showing (or finding by the district court), however, that such disparities interacted with the evidence of citizenship or voting identification to hinder Hispanics' right to vote. Neither did plaintiffs offer evidence that disparities in income, education or political participation have rendered Hispanics less likely or able to obtain or possess identification or evidence of citizenship.²⁶

The same is true of plaintiffs' evidence of racially polarized voting. The district court found that plaintiffs showed some degree of racially polarized voting in Arizona. [ER 3 at 46] Plaintiffs suggest (at 55) that the district court's finding did not go far enough. Plaintiffs fail to explain, however, how *any* racially polarized voting (whether highly or moderately polarized) interacts with Proposition 200's voting requirements to hinder Hispanics' ability to participate in the political process and elect the representatives of their choice.

Thus, although plaintiffs offered evidence on a few of the section 2 factors, plaintiffs did not show that the challenged voting practices interacted with any of those factors to hinder the voting rights of Hispanic individuals. Because plaintiffs

²⁶ Notably, plaintiffs alleged in their amended complaint that Hispanics, "among other ethnic groups, are less likely to possess the forms of identification required under Proposition 200 to register to vote and cast a ballot." [ER 4 ¶ 75] Plaintiffs never offered any evidence to prove that allegation, however.

did not make such a showing, the district court correctly found that they did not establish any section 2 violation. *E.g.*, *Farrakhan*, 338 F.3d at 1016 (explaining that the relevant determination for purposes of a section 2 claim is whether *the challenged practice* interacts with social and historical conditions to discriminate on the basis of race); *Salt River*, 109 F.3d at 595 (holding that a bare statistical showing of disproportionate impact on a racial minority did not satisfy the causation requirement of section 2); *Ortiz*, 28 F.3d at 312, 315 (affirming the district court’s finding that plaintiffs failed to show that the challenged practice relating to purging of voter records “interacts with social and historical conditions to deny minority voters equal access to the political process and to elect their preferred representatives”).²⁷

2. Ninth Circuit authority demonstrates why plaintiffs failed to establish causation here.

This Court’s jurisprudence on section 2 claims further supports the district court’s determination that plaintiffs failed to establish a section 2 violation here.

²⁷ In addition, with regard to the voting identification requirement, the evidence undermines any notion that such requirement hinders Hispanics’ right to vote. Arizona provides that every voter may vote early in the State’s elections and may do so without providing identification. A.R.S. § 16-542(A), (E). Moreover, such voters may cast their ballots up until the time the polls close on election day. *Id.* §§ 16-548(A), 16-551(C). Plaintiffs (not surprisingly) offered no evidence that Hispanic voters are less likely than other voters to be able to vote through the early voting process. Thus, it is difficult to conceive, based on the record before the district court, how the voting identification requirement could impede Hispanic (or any other) voters from participating in the political process and electing their preferred representatives.

The voting practice challenged in *Salt River* was a requirement of land ownership to vote in a water district's elections. *Salt River* 109 F.3d at 589. The court stated that the relevant legal question was "whether the land ownership requirement denies African-Americans the right and opportunity to vote in the District elections." *Id.* at 596. Although plaintiffs showed that a disproportionately low number of African-Americans owned land in the district, plaintiffs did not prove that discrimination led to lower land ownership rates. *Id.* at 595. Their section 2 claim accordingly failed.

The court in *Farrakhan* subsequently explained that in *Salt River*, "[b]ecause the land ownership rates did not reflect racial discrimination, we concluded that the land ownership requirement did not violate Section 2." *Farrakhan*, 338 F.3d at 1017-18 (emphasis added). The relevant legal standard was whether the voting requirement (*i.e.*, land ownership) was causally connected to racial discrimination. Because there was no showing of racial discrimination, there necessarily could be no causal connection. Such a result, however, does not support the notion that a showing of historical or social discrimination, by itself, is sufficient without establishing that such discrimination is causally related to the voting requirement. Thus, plaintiffs were required to show that the few section 2 factors on which they offered evidence had some causal connection to the challenged voting practices here (*i.e.*, providing identification or evidence of citizenship).

Plaintiffs' argument necessarily requires the Court to hold that any showing of historical or societal discrimination or racially polarized voting is sufficient to establish *per se* a section 2 violation here, even where such evidence has not been shown to have any bearing on whether an individual possesses evidence of citizenship or voting identification. Even had plaintiffs shown a statistically significant disparate impact on Hispanic registration or voter turnout, the analysis would not change because there is no connection of either the section 2 factor evidence or disparate impact evidence to the possession by Hispanics of voting identification or evidence of citizenship. *E.g.*, *Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992) (stating that "the challenged device must be shown actually to impair the ability of minority voters to elect representatives of their choice").

The court's decision in *Farrakhan* further illustrates that plaintiffs' legal causation argument is incorrect. The challenged voting practice in *Farrakhan* was disenfranchisement based on felony conviction. *Farrakhan*, 338 F.3d at 1012. Plaintiffs alleged that the practice resulted in discrimination based on race. On motions for summary judgment, plaintiffs offered evidence of disparities in "arrest, bail and pre-trial release rates, charging decisions, and sentencing outcomes" in the state's criminal justice system. *Id.* at 1013. Plaintiffs also presented evidence that such disparities were the result of racial discrimination. *Id.* at 1013-14. Thus, if

discrimination resulted in a disproportionate number of felony convictions of racial minorities, then the facially-neutral practice of disenfranchising convicted felons necessarily could result in discrimination in voting based on race.

The Ninth Circuit found that where the plaintiffs showed surrounding racial discrimination in the criminal justice system, which conceivably interacted with the felon disenfranchisement laws to result in a disproportionately low number of minorities being able to vote, summary judgment for defendants was improper. *Id.* at 1020 (“To the extent that racial bias and discrimination in the criminal justice system contribute to the conviction of minorities for ‘infamous crimes,’ such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic.”). The Court remanded for further consideration.

Unlike the plaintiffs in *Farrakhan*, plaintiffs here made no showing that historical or societal discrimination against Hispanics interacts with either of Proposition 200’s voting requirements to hinder Hispanic persons’ ability to participate in the political process. There was no showing whatever that Hispanic persons are less likely to possess evidence of citizenship or voting identification, much less that they are less likely to possess such items because of discrimination.

Accordingly, the district court applied the relevant legal principles of causation and correctly found that plaintiffs failed to establish such causation.²⁸

Plaintiffs may disagree with the district court's weighing of the evidence regarding the section 2 factors and causation, but they have not shown on appeal that the district court's determination of causation was clearly erroneous. *Salt River*, 109 F.3d at 591 (stating that the section 2 analysis "is intensely fact-based and localized" and that "[d]eferring to the district court's superior fact-finding capabilities, we review only for clear error its ultimate finding of no § 2 violation"); *Old Person*, 312 F.3d at 1050 n.15 (stating that "[t]he clearly erroneous standard requires us to view the evidence in its entirety, and does not allow us to reverse the district court simply because we would have weighed the evidence differently if we had been sitting as the trier of fact").

²⁸ Plaintiffs repeatedly assert that they proved causation and that they "demonstrated that social and historical conditions in Arizona interact with Proposition 200's voting requirements to cause the disparate impact on Latinos." [See, e.g., Pls.' Br. at 55] Asserting such a conclusion and offering evidence to support it, however, are different things. Indeed, plaintiffs mischaracterize (at 58) the evidence regarding Hispanic voters whose ballots were not counted because those voters did not provide sufficient identification. Plaintiffs assert that such voters "lacked sufficient identification." There is no evidence, however, that any Hispanic citizen lacks either evidence of citizenship or voting identification. Plaintiffs admitted that they did not know whether any individual whose ballot was not counted was eligible to vote. [SER 17-19] In any event, as explained above, there was no evidence that connected any discrimination, economic disparities, or racially polarized voting with the availability or possession by Hispanics of evidence of citizenship or voting identification.

D. Plaintiffs Did Not Establish by a Preponderance of Evidence a Disparate Impact on Hispanics.

The district court considered the testimony Drs. Espino, Lanier and Zax regarding any disparate impact on Hispanic citizens by Proposition 200. [ER 3 at 13-15, 41-42] As an initial matter, the district court found that registration levels in Arizona declined for both Hispanics and non-Hispanics in the period following the adoption of Proposition 200. [ER 3 at 14] The court found, however, that such a drop was “not unexpected because the period before Proposition 200 included the 2004 Presidential election, which was accompanied by a drastic increase in the number of voter registrations.” [ER 3 at 14]

With respect to disparities between Hispanic and non-Hispanic voter registration, the district court found based on plaintiff expert testimony that the decline in Hispanics becoming registered was greater than the decline in non-Hispanics becoming registered in only five of Arizona’s fifteen counties. [ER 3 at 15; *see* SER 26-30] Thus, in ten of fifteen counties, Hispanics fared better in registration than did non-Hispanics in the period following the adoption of Proposition 200. [*See* SER 26-30]

With regard to the overall impact on Hispanic registrations the district court found that the percent drop in the number of individuals who registered to vote per week was 36.67% for Hispanics and 35.75% for non-Hispanics in the period following the adoption of Proposition 200. [ER 3 at 15; *see* SER 23-24, 166] The

court found that the resulting difference of 0.92% was too small to be statistically significant. [ER 3 at 42] That conclusion was based on the evidence. [See SER 105-108]

Plaintiffs do not assert that the district court erred in that finding. Instead, plaintiffs suggest (at 51) that the court should have afforded more weight to the testimony of plaintiff's other expert, Dr. Lanier. Dr. Lanier concluded that the percent of Hispanic voter registration applicants whose applications were rejected was less than three percent higher than their representation in the total number of such applicants and that the percent of Hispanic votes that went uncounted in the election he considered was higher than their representation in the number of voters casting ballots. [ER 3 at 41]

The district court considered that evidence, however, along with the testimony of plaintiff expert Dr. Espino and defense expert Dr. Zax. Plaintiffs have not demonstrated any error in the district court's weighing of the evidence. Moreover, Dr. Lanier's entire analysis was qualified by his admission that he never undertook to determine whether any of the individuals whose registration forms or ballot envelopes he analyzed actually were *eligible* either to register or to vote. [SER 17-19]

Plaintiffs also argue (at 51-52) that the district court erred by relying on its finding that, based upon Dr. Lanier's analysis, the difference in the composition of

the Hispanic portion of the Arizona electorate “with” and “without” Proposition 200 in effect was only 0.1%. [ER 3 at 14] That difference equates to an increase in the Hispanic electorate of one for every 1,000 voters. [SER 104-105]

Plaintiffs assert (at 51-52) that the district court should not have considered that showing of negligible impact. Plaintiffs’ section 2 claim, however, necessarily implicates the overall voting strength of Hispanics in Arizona. *E.g., Badillo v. City of Stockton*, 956 F.2d 884, 890 (“the challenged device must be shown actually to impair the ability of minority voters to elect representatives of their choice” to establish a section 2 claim); *Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (holding that a section 2 claim is a single claim that implicates the ability of minorities “to participate in the political process *and* to elect representatives of their choice”) (emphasis in original).²⁹

Plaintiffs expressly alleged in their complaint a vote dilution claim. [ER 4 at ¶¶ 98-99] Indeed, plaintiffs expressly state (at 48) that section 2 prohibits practices that “result in the dilution of minority voting strength.” Accordingly, the fact that Proposition 200 may have altered the Hispanic composition of the Arizona

²⁹ *Hazelwood School District v. United States*, 433 U.S. 299 (1977) (“*Hazelwood*”), does not support plaintiffs’ argument that the district court erred by considering the negligible impact of Proposition 200 on minority voting strength. *Hazelwood* involved an employment discrimination claim. Thus, unlike this case, the discrimination claim in *Hazelwood* did not require consideration of whether a racial minority group was hindered from electing the representatives of its choice.

electorate at most by 0.1% is indeed appropriate for the district court's consideration of plaintiffs' section 2 claim.³⁰

With regard to voter turnout, the district court found only that in one statewide race Hispanic-surnamed voters comprised 10.3% of the uncounted ballots even though Dr. Lanier estimated that Hispanics comprised between 2.6% and 4.2% of the voters who turned out for that election. [ER 3 at 15] The district court did not find that bare showing sufficient to prove a disparate impact caused by the voting identification requirement of Proposition 200. [ER 3 at 42]

Dr. Lanier's analysis represented his attempt to estimate Hispanic representation in one statewide race in 2006. [ER 48 ¶ 2] He admittedly omitted from his analysis any determination (or attempt to determine) whether any of the individuals whose ballot was not counted actually was eligible to cast a ballot. [SER 19] The district court was not required to find that plaintiffs established a disparate impact on Hispanics caused by Proposition 200's voting requirement.

III. PROPOSITION 200 DOES NOT VIOLATE THE NVRA.

Like the ITCA plaintiffs, the Gonzalez plaintiffs raise for the second time on appeal their claim based on the NVRA. The Court already decided that claim, however, and held that Arizona's evidence of citizenship requirement does not

³⁰ Indeed, plaintiffs do not explain why racially polarized voting would be relevant in absence of a claim that Proposition 200 dilutes their voting strength as a minority bloc of voters.

violate the NVRA. *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (9th Cir. 2007) (holding that the NVRA “does not prohibit documentation requirements,” including Arizona’s requirement of evidence of citizenship).

Defendants’ arguments regarding plaintiffs’ NVRA claim are set out in detail in Defendant-Appellee’s brief in the consolidated appeal (at 27-43). Accordingly, Defendants do not repeat those arguments here and refer the Court to Defendant’s brief in the consolidated appeal.³¹

IV. PROPOSITION 200 DOES NOT IMPOSE A POLL TAX.

Plaintiffs’ argument that Proposition 200 constitutes a poll tax prohibited by the Twenty-Fourth Amendment is one of the same arguments made by the ITCA plaintiffs in the consolidated appeal. Defendants fully addressed those arguments in Defendant’s answering brief in that appeal (at pages 15-26). Accordingly, Defendants do not repeat those arguments here and refer the Court to Defendant’s brief in the consolidated appeal.

³¹ In connection with their NVRA argument, plaintiffs argue (at 35) that Arizona’s evidence of citizenship requirement violates the Supremacy Clause of the Constitution. The Supremacy Clause, however, does not provide a basis for an independent cause of action separate from plaintiffs’ NVRA preemption claim. The Supremacy Clause is not by itself a source of any federal rights. *E.g.*, *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107-08 (1989) (stating that the Supremacy Clause is not a source of any federal rights but instead secures federal rights by according them priority whenever they conflict with state law); *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1985) (stating that “the Supremacy Clause, standing alone, ‘secures’ federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it ‘secure’ such rights within the meaning of § 1983”).

CONCLUSION

For the reasons stated above, the Court should affirm the district court's judgment in favor of Defendants.

Respectfully submitted this 23rd day of March, 2009.

TERRY GODDARD

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees respectfully advise the Court that, apart from the case with which this appeal was consolidated (No. 08-17115), which case is identified in Appellants' opening brief, Defendants-Appellees are not aware of any related cases pending in the Ninth Circuit.

/s/ Barbara A. Bailey
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,994 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. This 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 proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 23rd day of March, 2009.

/s/ Barbara A. Bailey

Barbara A. Bailey
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of March, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States 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 Mail, postage prepaid, to the following participants on the 23rd day of March, 2009 to:

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I further 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 (11/10/2008), on the 23rd day of March, 2009, four copies of the Excerpts of Record were sent via Federal Express to:

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