

Appeal No. 08-17094

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ, *ET AL.*,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA, *ET AL.*,

Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona
Case No. CV 06-01268-PHX-ROS

**PLAINTIFFS-APPELLANTS' UNOPPOSED MOTION FOR EXTENSION
OF TIME TO FILE REPLY BRIEF**

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Come now Plaintiffs-Appellants, *Maria M. Gonzalez, et al.*, and file this Unopposed Motion for Extension of Time to File Reply Brief. In support, Plaintiffs-Appellants show the following:

1. Pursuant to the Court's Order (Docket # 6878895), Plaintiffs-Appellants' reply brief was due on Monday, April 13, 2009.
2. Plaintiffs-Appellants worked diligently and in good faith to prepare and file their reply brief.
3. On the evening of Monday, April 13, 2009, as Plaintiffs-Appellants made last edits and double-checked the word count of the brief in conformance with **FED. R. APP. P. 32(A)**, the electronic file of the brief was lost.
4. Plaintiffs-Appellants made every attempt to find and recover the document on both the computer on which the brief was being prepared as well as the law firm's computer server, but were ultimately unsuccessful in locating or retrieving the brief. Following these efforts, Plaintiffs-Appellants turned to reconstructing the document by scanning and reformatting the latest hardcopy version. As a result, the filing deadline passed before Plaintiffs-Appellants could finish reconstructing the brief.

5. Plaintiffs-Appellants immediately notified opposing counsel in the case that they required one extra day to submit the Reply to the Court and counsel's position on this Motion. The parties have responded and indicated that the Motion is unopposed.
6. This motion is sought for good cause and not solely for the purpose of delay.
7. For the reasons set forth above, Plaintiffs-Appellants respectfully request that the Court grant this unopposed motion and provide them with an extension of one day to file their Reply brief.

DATED: April 14, 2009

Respectfully submitted,

/s Nina Perales
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Certificate of Service

I hereby certify that on this 14th day of April, 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. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery.

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No. 08-17094

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

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

v.

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

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

v.

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

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

REPLY BRIEF OF APPELLANTS JESUS GONZALEZ, ET AL.

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I. INTRODUCTION

In their Responses, Defendants-Appellees State of Arizona, *et al.* and twelve of Arizona's counties¹ ("Defendants") do not deny the existence of over 35,000 individuals barred from registering or voting pursuant to Proposition 200. Nor do they deny the systematic and predictable ways in which Proposition 200 excludes individuals from voter registration and voting. Instead, Defendants' arguments focus on two issues ancillary to Proposition 200 itself: first, the claimed need to fight voter fraud, and second, the efforts by Defendants to alleviate some but not all of the negative effects of Proposition 200. Neither argument addresses the central question in the case: whether Proposition 200 violates the Constitution or federal statutes.

Defendants admit to the "confusion" and "challenges" (State Response at 13, 35) experienced by Arizona election officials when confronted with the mandate to implement Proposition 200. However, Defendants' struggle to implement Proposition 200, regardless of the good faith in which it was undertaken, has not cured the statute's inherent flaws.

Similarly, Defendants' claimed need to fight voter fraud, which might support other changes in Arizona election law, does not justify the negative effects

¹ Three Arizona counties, including Pinal, Navajo and Coconino do not participate in the defense mounted by the twelve counties.

of Proposition 200. Whatever the merit of laws seeking to reduce voter fraud, Proposition 200 is not the solution.²

Last year, the number of immigrants who became U.S. citizens nationwide rose by more than 50% to over 1 million.³ According to the U.S. Department of Homeland Security, in Arizona the number of people who naturalized in 2008 was double the number who naturalized in 2007.⁴ At the same time, Proposition 200 continues to single out and impose special burdens on this group of new Americans when they seek to register to vote.

II. ARGUMENT

A. **Proposition 200 Classifies Citizens on the Basis of their National Origin and Then Subjects them to Different and More Onerous Procedures in Voter Registration.**

Laws that discriminate against U.S. citizens based on their national origin, as well as laws that discriminate as to the fundamental right to vote are subjected to strict scrutiny and can only be justified when “the State can demonstrate that such laws are necessary to promote a compelling governmental interest.” *Dunn v.*

² *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972). “Statutes affecting constitutional rights must be drawn with precision ... and must be tailored to serve their legitimate objectives ... And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference.”)

³ “Almost 1 of 2 new Americans in 2008 was Latino,” Associated Press, April 7, 2009 found at <http://www.google.com/hostednews/ap/article/ALegM5g0KImUtzRTYIm7Mjs1LxEoz2zVgD97DFPIOI>.

⁴ “Naturalizations in the United States: 2008,” U.S. Department of Homeland Security, Office of Immigration Statistics, found at http://www.dhs.gov/xlibrary/assets/statistics/publications/natzJr_2008.pdf

Blumstein, 405 U.S. 330, 342 (1972). Defendants do not argue that Arizona has a compelling governmental interest in making voter registration more onerous for naturalized citizens when compared to native born citizens.

Instead, Defendants rest on the contention that “Proposition 200 does not classify between naturalized and non-naturalized citizens.” However, the district court made numerous findings to the contrary and Defendants are bound by those findings. *See, e.g.*, ER3 at 12, 30, and 36-37 (finding that under Proposition 200, naturalized citizens may have to apply twice to register to vote, or pay a fee to complete the second registration, or register in person at the county recorder’s office).⁵

1. In-Person Registration Requirement

The State’s current voter registration form announces that, unlike photocopies of a birth certificate or U.S. Passport, Proposition 200 requires “Presentation to the County Recorder of U.S. naturalization documents.” G-SER26, ER37. The Secretary of State’s procedures manual, which has the force of law, requires the same. ER30 at 48.

Although Defendants strive to identify county officials who say informally that they will accept a photocopied naturalization certificate, this practice is not

⁵ As demonstrated in Gonzalez Opening Brief at 40-43, the district court erred as a matter of law 1) by limiting its 14th Amendment disparate treatment analysis to the question whether Proposition 200 was the product of invidious racial intent and 2) by failing to apply strict scrutiny. ER 3 at 35-38.

consistent across the counties. State Response at 9 n.10. The district court found that only five of Arizona's fifteen counties accept a photocopy of a naturalization certificate. ER3 at 31.

One of those five counties simultaneously instructs voter applicants *not* to photocopy their naturalization certificates. G-SER4 at 43-44 9:21-95:14 (testifying for Yuma County that, "We don't want to waste anybody's time getting incomplete forms. And I certainly want them to know what they're not allowed to do, they're not allowed to, you know, make copies of their Naturalization."). Pima County's Recorder similarly warns voter registration applicants that "federal law prohibits making a photocopy of a Naturalization certificate." *See, e.g.*, G-SER29.

Furthermore, the counties announce on their websites that "presentation" of the naturalization certificate is required. *See, e.g.*, ER32-34 (Maricopa, Pinal and Santa Cruz counties).

The Pima County Recorder testified that although Proposition 200 didn't authorize her to accept a photocopy of the naturalization certificate, and she advised citizens not to photocopy their naturalization certificates, informally she would accept one because it was "inconvenient for a voter to have to drive downtown Tucson, pay to park just to show me their number . . . To actually show us physically, when we're able to accept photocopies of a passport and the --a birth certificate." G-SER10 at 67:25-69:6.

Thus, naturalized citizens are instructed by the State's official voter registration form, county staff, and county websites to present their naturalization certificates and may not learn of any informal alternative until after they are rejected for voter registration and forced to reapply. The contradictions between the announced requirements of an in person "presentation" of the naturalization certificate, and the unofficial acceptance of photocopies by some counties, exact a heavy price from naturalized citizens seeking to register to vote and do not erase the disparate treatment of the naturalization certificate by Proposition 200.

2. Proposition 200's Simultaneous Requirement and Rejection of Information From the Naturalization Certificate

Proposition 200 creates a bureaucratic Catch-22 for naturalized citizens. The statute requests that naturalized citizens provide their "number of the certificate of naturalization" and further provides that the registrant can't be added to the voter rolls until the certificate number is verified with the federal government. Because the federal government can't verify the number of the certificate of naturalization, the voter is automatically rejected for registration. ER3 at 4; ER12,698:3-16; ER13, 59:21-23.

Defendants try to circumvent this problem in two ways: first, by continuing to insist that the Alien Registration Number is the "number of the certificate of naturalization"; second, by obfuscating the issues through the use of terms that do

not exist in the law, such as “naturalization number” and “scroll number,” State Response at 10, 13; Counties’ Response at 31.⁶

Defendants mischaracterize the number of the certificate of naturalization, calling it instead by a fictional term -- “scroll number” -- to argue that there isn’t really a number of the certificate of naturalization. State Response at 13; Counties’ Response at 31. There is no such thing as a “scroll number” either in the Immigration and Nationality Act (INA) or its implementing regulations. 8 U.S.C. §1449.⁷

The district court’s findings were based on the uncontroverted testimony of the U.S. Citizenship and Immigration Services that the “A-number is a number that USCIS assigns to a person at certain steps, when they file applications for immigration benefits with us many years ahead of the stage of filing for naturalization [and] When you become naturalized, your certificate -- your naturalization certificate will have a number on it that is separate from your A-

⁶ The State’s Response wrongly claims that a “naturalization number” “can be verified by election officials.” State Response at 10. There is no dispute that the number of the certificate of naturalization cannot be verified by election officials. Furthermore, an Alien Registration Number is not a “naturalization number” because it is not related to the naturalization process. Gonzalez Opening Brief at 12-13.

⁷ Defendants similarly wrongly assert that there are “there are two numbers on a certificate of naturalization.” On the contrary, there are various numbers on a certificate of naturalization, depending on the date of naturalization; these numbers can include a certificate number, a “petition number;” an “application number;” a number of the form itself (*e.g.* form N-550 or N-570); the citizen’s date of birth, date of naturalization as well as the “Alien Registration Number” or “INS Registration Number.”

number.” G-SER8 at 72-73; *see also* ER3 at 4.⁸ The Alien Registration Number, used by the federal government to track non-citizen immigrants, is no longer used by the federal government after naturalization when the immigrant turns in her alien registration card and the immigrant’s alien file is closed. ER36 at 83 and 88.⁹

Arizona’s County Recorders know that certificates of naturalization have a specific “certificate number.” G-SER5 at 33:18-35:1 (Maricopa County Recorder discussing the differences between the “number of the certificate” and the “Alien Registration Number” on the certificate of naturalization). Recorders recognize that the number of the certificate is distinct from the Alien Registration Number and also know that they cannot carry out Proposition 200’s directive to verify the number of the certificate of naturalization with DHS. *Id.*; *see also* G-SER9 at 56:6-57:4, 59:17-24 (Pima County Recorder explaining “We cannot verify the certificate of naturalization number. We can only do what is called the alien registration number.”); G-SER12 at 38:12-40:21 (same).

⁸ *See also* 8 U.S.C. §1449 (“A person admitted to citizenship in conformity with the provisions of this subchapter shall be entitled upon such admission to receive from the Attorney General a certificate of naturalization, which shall contain substantially the following information ... number of certificate of naturalization; ...”).

⁹ County Defendants reveal a deep confusion regarding the Alien Registration Number (which is typically assigned to an immigrant before he arrives in the U.S. on a permanent or temporary basis) when they argue in their response that “part of the process of becoming a U.S. citizen involves being assigned an A - number ...” Counties’ Response at 33.

Ignoring the deference owed to the district court as the trier of fact, Defendants marshal their own version of the facts in order to overcome this systematic flaw in the statute that rejects eligible naturalized citizens. ER3 at 30.¹⁰

In addition to claiming that there is no real “number of the certificate of naturalization,” Defendants claim that Proposition 200 does not discriminate because Defendants are trying not to follow the statute. More than two years after implementing Proposition 200, and in the middle of a lawsuit charging them with discrimination, Defendants decided to depart from the statutory mandate of Proposition 200 and request, for the time being, that naturalized citizens provide their Alien Registration Numbers on the new voter registration forms. But the change in practice was never complete, some naturalized citizens don’t have access to their Alien Registration Numbers, the Alien Registration Number often cannot be confirmed close in time to the naturalization date, and there is no guarantee, without declaratory relief, that Defendants will continue to depart from the statute in an effort to avoid its discriminatory effects. Gonzalez Opening Brief at 13-14 and discussion *infra* at A.5. Defendants don’t deny they can change the policy at

¹⁰ Defendants further ignore the other inoperable portions of Proposition 200. For example, Proposition 200 contains a provision allowing voter applicants to prove citizenship with a document “established” by the Immigration Reform and Control Act (IRCA). A.R.S. § 16-166(F)(5). IRCA has no language establishing citizenship documents. IRCA was enacted in 1983 and its provisions have been fully incorporated into the INA. Contrary to Defendants’ suggestion, there is simply no reason to believe that IRCA will ever be amended, and certainly not to add provisions establishing citizenship documents. State Response at 10.

any time, but merely state they have no current plans to do so. State Response at 43.

Defendants concede that some naturalization certificates don't have an Alien Registration Number printed on them, suggesting instead that naturalized citizens have other, unspecified, means by which to obtain their alien registration numbers. State Response at 33. This assertion contradicts federal immigration policy, which includes the requirement that naturalized citizens turn in their permanent resident cards before they take the oath of U.S. citizenship. 8 C.F.R. § 338.3.

Ms. Herta Weber, a naturalized U.S. citizen from Germany who was rejected for voter registration under Proposition 200 and forced to register a second time in order to be added to the voter rolls, provided her naturalization certificate, which lacked her Alien Registration Number, to the district court at trial. ER41 at location "b2p10738" and ER39.

3. Naturalized Citizens Face Additional, Unanticipated Hurdles Using their Driver's Licenses to Register to Vote

Defendants concede that most people registering to vote in Arizona use their driver's license to prove U.S. citizenship pursuant to Proposition 200. State Response at 11; Counties' Response at 15. However, U.S. citizens with "foreign" coded driver's licenses are unable to register to vote because they are flagged as non-citizens.

The State's own representative testified that the Type F license means "foreign" and further that holders of this license cannot see on the face of the license that they possess a "foreign" coded license. G-SER13 at 32:25-33:01; ER25 at 67:9-12.

Contrary to Defendant's assertion (State Response at 11, Counties' Response at 35 n.100), Arizona MVD codes driver's licenses as "foreign" even when the non-citizen applicant is authorized to be in the U.S. permanently. G-SER13 at 35:25-36:5; 37:24-38:23; 72:18-73:22. Thus, even legal permanent resident immigrants, whose status does not expire, are issued Type F "foreign" licenses. *Id.* The fact that Type F licenses are valid for a period of up to ten years (as opposed to any other period of years) does nothing to inform naturalized citizens that they will not be able to register to vote.

The "foreign" designation, unknown to the license holder, remains part of the driver's license record even after naturalization because the MVD does not update its database to remove the Type F code unless that person comes in to change his license. ER26.

Also contrary to Defendant's assertion (State Response at 35), County Recorders believe that Type F driver's licenses indicate that a voter registrant is a noncitizen and should not be added to the voter rolls. As explained by Pima County Recorder Ann Rodriguez, a Type F flag on a voter registration "tells us that

they're not a United States citizen" and cannot be added to the voter rolls. G-SER10 at 113:7-13, 114:5-9; *see also* G-SER2 at 82:14-24 (Pinal County); G-SER4 at 72:1-15 (Yuma County).

Contrary to Defendants' assertion, Plaintiffs presented many voter applications of foreign born citizens who gave their driver's license numbers when they registered to vote, were rejected and ultimately were forced to re-apply before being allowed to join the voter rolls.¹¹ Defendants are well-aware that they never produced information showing which individuals were rejected for registration because their licenses were coded "foreign." ER29, 30:15-31; *see also* G-SER4 at 72:1-15 (Yuma County Recorder testifying that in her experience she has come across naturalized U.S citizens who were the holders of a type F license).

Finally, Defendants cannot deny that *every* legal permanent resident who shows her permanent resident card or other immigration document to obtain an Arizona driver's license will, after naturalization, be unable to register to vote when MVD matches her voter application to a Type-F license. Furthermore, this effect is systematic, predictable and unexpected for that naturalized citizen who registers to vote. G-SER 32 at 17:12-19:5 and ER 23 at 34:6-12.

¹¹ *See, e.g.*, ER 41 (Tr. Ex. 896, filed under seal) at locations "b5p10091," "b5p100113," "b11p10442," "b5p10028," "pima-part3013," "pima-part5019(b)," "pima-part 3034," "b11p20058," "b9p10343," "pima-part3043(b)," "b6p10192," "pima-part10100," "pima-part5050," "b6p20281," "b11p10598," "pima-part1063," "pima-part3054," "pima-part3047(b)."

4. Proposition 200's Classification and Disparate Treatment of Naturalized Citizens Satisfies Plaintiffs' Burden of Proof Under the 14th Amendment

Naturalized citizens, even when they possess citizenship documents such as naturalization certificates, are subject to different and more onerous procedures under Proposition 200 when compared to native born citizens. The injury to a prospective voter does not arise solely when that voter lacks the documents required to register. *See Harman v. Forssenius*, 380 U.S. 528, 541 (1965) (striking down poll tax statute because the equally burdensome alternative of securing a certificate of residence “is plainly a cumbersome procedure.”); *see also Lane v. Wilson*, 307 U.S. 268, 275 (1939) (“The [15th] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.”).

Defendants argue that Mr. Gonzalez could not have experienced disparate treatment under Proposition 200 because he possesses citizenship documents. State Response at 26-27. In Defendants' view, Mr. Gonzalez is unharmed because he “could” have registered to vote in person, “could” have registered a third time, or “could” have spent \$112.95 to purchase a U.S. Passport that he did not possess at the time he attempted to register to vote. G-SER20. The flaw in Defendants' logic is apparent. The harm that results from being classified and treated

differently because of national origin is not remedied by the theoretical ability to overcome every bureaucratic hurdle imposed by Proposition 200.

Neither Defendants nor the district court addressed the possibility that the unique problems experienced by naturalized citizens (such as the burden of double-registration found by the district court at ER3 at 12 and 31) constitute disparate treatment. Instead Defendants and the district court assumed that anyone who possesses citizenship documents cannot be harmed by Proposition 200. State Response at 44; ER3 at 31 (double-registration “[w]hile inconvenient ... is hardly a severe burden.”).

Additionally, Defendants cannot show that naturalized citizens are informed, before they register, of the pitfalls, exceptions and Catch-22s that apply to them. For example, Defendants argue that naturalized citizens can avoid the in-person “presentation” requirement of Proposition 200 because they “may easily register to vote . . . on the same day they become U.S. citizens.” State Opening Brief at 14. However, Defendants don’t advise naturalized citizens that registering on the day they naturalize will avoid future problems and the Maricopa County Recorder testified that only 25-30% of new citizens exiting the naturalization ceremonies stop to register to vote. G-SER6 at 24:1-9.

Thus, the theoretical ability to register to vote is thwarted when naturalized citizens follow the directions on the registration form or the County website and

never know, for example, that giving their naturalization certificate numbers will result in rejection, or that their driver's licenses are insufficient to prove U.S. citizenship because they are coded Type F.

Importantly, these adverse effects of Proposition 200 (recognized by the district court as ranging from having to register twice, to registering in person, to paying a fee for a new driver's license) are experienced *only* by naturalized citizens. Defendants' suggestion that Proposition 200 is even-handed because all registrants are required to show documentary proof of citizenship does not recognize that the burdens placed on naturalized citizens in the registration process are unique and of a different magnitude than those placed on native born citizens. State Response at 37. This separate treatment, within a requirement to provide documentary proof of citizenship, constitutes disparate treatment based on national origin. Gonzalez Opening Brief at 38-40.

In *Boustani v. Blackwell*, 460 F.Supp.2d 822, 825 (N.D. Ohio 2006) the court concluded that the challenged statute treated naturalized citizens differently because some of them would have to show their naturalization certificate in the polling place when native born citizens could attest to their eligibility. *Id* at 825-827. In the same way, Proposition 200 singles out naturalized citizens for different and more burdensome requirements in voter registration, including in-person registration and double-registration.

5. Attempts by Election Officials to Minimize or “Work Around” a Fatally Flawed Statute Have not cured Proposition 200’s deficiencies

Defendants do not deny that over 2,563 foreign born applicants who swore they were U.S. citizens were rejected for failure to meet the Proposition 200 requirements.¹² Instead, Defendants devote considerable space in their Responses to arguing that they do not intentionally discriminate against naturalized citizens. Defendants also argue that there can be no discrimination if they struggled to implement Proposition 200 in a non-discriminatory fashion. Defendant’s good intentions are not at issue here.

Defendants concede that despite their best efforts to implement Proposition 200, the State was required by Proposition 200 to revise and circulate a statewide voter registration form that requested the “number of the certificate of naturalization” when such a number is incapable of verification with federal authorities. State Response at 9-10 and 13.

Defendants still do not treat naturalized citizens the same as those considered native born. For example, although tribal identification numbers, like the numbers of certificates of naturalization, cannot be verified by election officials (SER31-32), Defendants accept on their face any and all numbers presented as tribal identification numbers, even though not all Arizona tribal members are U.S. citizens. State Response at 11; *see also* G-SER2 at 51:5-7; G-SER6 at 36:1-37:6,

¹² G-SER 896, G-SER 30 at Tables 1 and 3.

51:19-22, 96:23-25, 97:1-12; G-SER14 at 20:6-21:3; G-SER4 at 46:20-23; G-SER15 at 20; 5-21; G-SER23 at 700:13-19, G-SER15 at 87:11-14.

By contrast, naturalized citizens who put their certificate numbers on voter registration forms are rejected and required to register again. Although Defendants claim that accepting the number of the certificate of naturalization on its face “would be contrary to the evidence of citizenship requirement of Proposition 200,” (State Response at 13), that’s exactly the approach taken by Defendants with respect to tribal identification numbers that are incapable of verification.

Even after Defendants revised the statewide voter registration form to address the inability to verify the number of the certificate of naturalization, the record reflects that the problem was never remedied and depended largely on the individual practices of county officials. The statewide registration form was amended to request the Alien Registration Number, but counties continued to announce the requirement that voter registration applicants provide the certificate of naturalization number. G-SER10 at 62:3-10. Counties posted on their websites the registration form requesting a “certificate of naturalization” number. *See, e.g.*, ER33, 34, 54. And counties still circulated paper registration forms requesting the certificate of naturalization number. G-SER6 at 39:20-40:12 (explaining in January 2008 that “all” of the paper voter registration forms in circulation in Maricopa County requested applicants to provide the “certificate of naturalization” number

because the county had not yet put any forms into circulation that requested the A-number).

Defendants have even instructed the U.S. Department of Defense to require military personnel to write their “Certificate of Naturalization Number” on the military voter registration forms, thereby guaranteeing that service members who follow this instruction will be automatically rejected for voter registration by Arizona County Recorders and required to re-apply with different information.¹³

B. The NVRA Does not Permit Arizona to Reject the Federal Mail Voter Registration Form on the Grounds That the Federal Form Does not Conform to Proposition 200

Defendants wrongly assert that this Court is barred from ruling in favor of Plaintiffs by a decision of the motions panel in an earlier stage of the case. However, the decision of the motions panel is not entitled to deference because it was made on a different record and was clearly erroneous.

1. The Motions Panel Limited its Analysis to State Registration Forms Promulgated Under the NVRA and Thus its Decision is not Controlling Here

The motions panel noted that its decision was based on a “limited record” and information that was “not extensive.”¹⁴ Perhaps for that reason, the motions panel addressed only the question whether the NVRA prohibited Arizona from

¹³ U.S. Department of Defense, Federal Voting Assistance Program, instructions to register to vote in Arizona, found at <http://www.fvap.gov/overseas-citizens/request-registration-absenteeballot/states/az/index.html>.

¹⁴ *Gonzalez v. Arizona*, 485 F.3d 1041, 1050 (2007).

incorporating Proposition 200 requirements into its own registration form. The motions panel appears to have assumed that acceptance and use of the federal form is optional for states, and that states can choose to rely exclusively on state voter registration forms in carrying out their obligations under NVRA. *Gonzalez*, 485 F.3d at 1050 (“The NVRA mandates that states *either* ‘accept and use the mail voter registration form . . . *or, in the alternative*, ‘develop and use [their own] form,’ as long as the latter conforms to the federal guidelines.”) (emphasis added).

From there, the motions panel presented, in two paragraphs, its conclusion that NVRA does not prohibit Arizona from modifying its state registration form pursuant to Proposition 200. *Id.* at 1050-1051. In that discussion, the motions panel only addressed those portions of the NVRA that proscribe the contents of the mail registration form and described them as what NVRA “allows states” to do and “prohibits states” from doing. *Id.* Notably, the panel did not address any obligation of Arizona to accept and use the Federal Form. *Id.*

In light of this omission, at the summary judgment stage of the case, and following the decision of the motions panel, Plaintiffs asked the district court to focus on Arizona’s failure to “accept and use” the Federal Form. *Gonzalez* Plaintiffs’ Response to Partial Summary Judgment Motion, Dkt. No. 297 at 5-13. Plaintiffs argued in their summary judgment brief:

The NVRA’s use of the term “shall” in section 4 (a)(1) means that the requirement to “accept and use” the Federal Form is not optional for

states. The NVRA provides no exemption from its requirements that states accept and use the Federal Form. Although the NVRA provides that a state may create its own voter registration form that is similar to the Federal Form and use it in addition to the Federal Form, the NVRA does not permit states to use their own form in lieu of the Federal Form.

Id. at 6-7.

The district court's rejection of this argument, ostensibly because it had already been addressed by the motions panel, was in error. Appellants urge the Court to correct the error and clarify that the NVRA requires Arizona to accept and use the Federal Form regardless of the requirements the state chooses to include in its own voter registration form.

2. This Court is not Barred by law of the Case Doctrine From Reviewing the Holding of the Motions Panel With Regard to Plaintiffs' NVRA claims

In their Response, Defendants acknowledge that “the law of the case doctrine is not an absolute bar to reconsideration of matters previously decided.” *Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1393 (9th Cir. 1995); *see also* Appellees Answering Brief in ITCA Appeal at 28. Additionally, merits panels “do not apply the law of the case doctrine as strictly in [reconsiderations of a motions panel's decision] as [they] do when a second merits panel is asked to reconsider a decision reached by the first merits panel on an earlier appeal.” *U.S. v. Houser*, 804 F.2d 565, 568 (9th Cir. 1986).

In fact, “court[s] may reconsider previously decided questions in cases in which there has been an intervening change of controlling authority, new evidence has surfaced, or the previous disposition was clearly erroneous and would work a manifest injustice.” *Leslie Salt Co.*, 55 F.3d at 1393 (citing *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991)). Courts determine clear error in light of the reasonableness of a prior panel’s interpretation in the context of the statutory language, policies, and legislative and judicial history. *Leslie Salt Co.*, 55 F.3d at 1394-95. Where a previous panel’s holding is clearly incorrect a subsequent panel is justified in refusing to regard it as the law of the case. *Merritt*, 932 F.2d at 1321 (citing *United States*, 804 F.2d at 568).

3. NVRA Requires Use and Acceptance of the Federal Form, Regardless of What Arizona Does With Its Own Mail Voter Registration Form

Contrary to the motions panel’s characterization, the NVRA does not offer states the option creating a state mail voter registration form as an alternative to accepting the Federal Form. *Compare Gonzalez*, 485 F.3d at 1050-51 (“The NVRA mandates that states *either* ‘accept and use the mail voter registration form ... *or, in the alternative*, “develop and use [their own] form,’ as long as the latter conforms to the federal guidelines”) (emphasis added) *with* 42 U.S.C. §1973gg-4(a)(2) (“*In addition to* accepting and using” the Federal Form, “a State *may* develop and use” its own mail registration form.”) (emphasis added).

The NVRA's mandate to "accept and use" the Federal Form overrides any state practice that would reject the Federal Form, including on the grounds that the Federal Form does not conform with the state form's requirements.¹⁵

Pursuant to Proposition 200, County Recorders "reject any application for registration that is not accompanied by" documentary proof of citizenship. Ariz. Rev. Stat. § 16-166(F). Defendants' argument that rejecting Federal Forms complies with the NVRA mandate to "accept and use" the Federal Form stretches the meaning of "accept and use" beyond recognition. Appellant's Response to ITCA Opening Brief at 36. Under Proposition 200, it is impossible for County Recorders to "accept and use" the Federal Form when that form does not also contain the additional documentary proof of citizenship required by Proposition 200.¹⁶

Similarly, Defendants struggle under the weight of legislative history and the Election Assistance Commission's unequivocal interpretation that Arizona "may not mandate additional registration procedures that condition the acceptance of the Federal Form" on the applicant's production of additional documentary proof of

¹⁵ See *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358 (N.D. Ga. 2004), *aff'd* 408 F.3d 1349 (11th Cir. 2005) ("Under the NVRA, Congress made it mandatory upon the states to accept voter registration applications by mail. 42 U.S.C. § 1973gg-4(a)(1) (noting that each state "shall accept and use the mail voter registration application") (emphasis added).

¹⁶ Defendants' contention that conflict preemption only exists when *the registrant* cannot fulfill the requirements of both the federal and state law entirely misses the point that the conflict in this case arises from the fact that the County Recorders, who are charged with carrying out the NVRA and Proposition 200, cannot simultaneously fulfill their duties under both laws. Appellants' Response to ITCA Opening Brief at 38.

citizenship. G-SER16. *See also* Amicus Brief of League of Women Voters (League Amicus) at 28-31. Defendants' suggestion that the Court ignore this interpretation, by the very agency charged by Congress with "develop[ing] a mail voter registration application form for elections for Federal office" is unavailing. §42 USC 1973gg-7(a). Similarly, Defendants cannot credibly argue that the Help America Vote Act (HAVA) changed Arizona's obligation to "accept and use" the Federal Form. On the contrary, HAVA added to the Federal Form a new question ("Are you a citizen of the United States of America?") and check-boxes for the applicant to answer that question, 42 U.S.C. § 15483(b)(4)(A)(i), while also providing that, with the exception of the changes to the Federal Form, none of its provisions are to be construed as inconsistent with the NVRA's other mandates. *Id.* § 15485.

With respect to the legislative history of the NVRA, it is clearly erroneous for the district court to read into the statute language that Congress rejected twice (in committee and in a vote of the full House of Representatives) particularly when there was a heated debate over whether to include in the NVRA language authorizing states to require documentary proof of citizenship. League Amicus Brief at 24-28.

Defendants' Response confuses those portions of the NVRA guiding states in their promulgation of a mail voter registration form with the portions of the

NVRA *mandating* that states accept and use the Federal Form, regardless of how it might differ from the state's own form. In essence, Defendants argue that the NVRA permits Arizona to reject any Federal Form that does not also contain the information required by the state's voter registration form. Such an interpretation turns the NVRA on its head and defeats the statute's purpose of creating a uniform, national method of mail voter registration for federal elections. *See Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1214 (S.D. Fla. 2006) ("The Federal statutory scheme provides that states may design their own voter registration forms, requiring information as may be relevant to the states' specific qualification requirements. The statutes provide further, however, that in any event, all states must accept the national registration form.").

Finally, the state mischaracterizes Plaintiffs' position as saying that the NVRA requires the State to "automatically" process all federal mail voter registration forms. Appellants' Response to ITCA Opening Brief at 37. Plaintiffs have never taken that position. States retain the right to reject federal forms that are incomplete (e.g. missing addresses, signatures, affirmation of citizenship) or show that the applicant is ineligible (e.g. shows an address outside the jurisdiction, or date of birth under the age of 18).

C. The District Court Erred in Applying Section 2 of the Voting Rights Act

As explained in Gonzalez Plaintiffs' Opening Brief, the district court erred, after finding that Proposition 200 had a disparate impact on Latinos registering to vote, when it concluded that if you immerse those affected by Proposition 200 into the statewide voter pool, there is no disparate impact in violation of Section 2 of the Voting Rights Act. Gonzalez Plaintiffs' Opening Brief at 47-60.

Defendants cite no cases that would justify the district court's "immersion" approach to liability. Defendants also cite no cases rebutting the rule that in order to measure the discriminatory impact of a voter registration law which operates to exclude voters from the electorate, the court must measure the effects of the law on those to whom it has been applied.

In this case, the discriminatory impact of Proposition 200 must be measured by examining its effect on those who registered to vote after January 2005 -- the effective date of Proposition 200. By including in its analysis voters who registered under a different set of rules and before Proposition 200, the district court 'washed away' any impact of Proposition 200 on those to whom it applied.¹⁷ For similar reasons, when courts evaluate the potential discriminatory effects of an election scheme, they emphasize evidence of voting patterns in the challenged

¹⁷ To hold otherwise would require Plaintiffs to wait to bring their challenge until all voters registered before Proposition 200 either moved away or died.

jurisdiction, not voting patterns of those who live elsewhere. *See Cottier v. City of Martin*, 445 F.3d 1113 (8th Cir. 2006).

The correct legal analysis, which examines the effects of Proposition 200 on those who were subjected to its requirements, combined with the district court's findings that Latinos were disproportionately affected by Proposition 200, dictates the conclusion that Proposition 200 has a disparate impact on Latino registrants.¹⁸ The district court credited the testimony of Gonzalez Plaintiffs' expert, Dr. Louis Lanier, and found that "it is true that the percent of Latino voter registration applicants rejected was 2.8% higher than their representation in total number of registration applicants [and] 19.8% of those ultimately unable to register to vote were Latino." ER3 at 41; ER42-Table 4. Based on this finding of fact, the district court's legal conclusion that Proposition 200 has no statistically significant disparate impact was the result of erroneously evaluating Proposition 200's adverse impact on 31,000 voters in the context of Arizona's voter pool of close to 3 million persons.

Instead of addressing whether the district court erred in its legal analysis, Defendants' Responses attack the facts found by the district court and try to re-argue the evidence. These red herrings, rejected by the district court at trial, should not be credited here. For example, State Defendants argue that Gonzalez Plaintiffs'

¹⁸ The same is true for Latino voters subjected to Proposition 200's voter identification requirements.

expert Dr. Espino testified that Latino voters fared better in voter registration following Proposition 200. State Response at 21; Counties' Response at 19 and 37. The Court made no such finding because Dr. Espino did not offer that conclusion.¹⁹ Similarly, regardless of the rate at which Latino and non-Latino population grows in AZ, the district court accepted Gonzalez Plaintiffs' evidence that, *among those who attempted to register to vote after Proposition 200*, Latinos were more adversely affected by the proof of citizenship requirements. *Compare* State Response at 22 n.15 *with* ER3 at 41.

Defendants once again argue that unless Latinos are entirely lacking citizenship or voter identification documents, as a matter of law there can be no harm to their voting rights. *See, e.g.* State Response at 53. However, minority voters are harmed by burdensome voter registration requirements even if, theoretically, they can take all the steps necessary to overcome the barriers. *See Mississippi State Chapter, Operation Push v. Allain*, 674 F.Supp. 1245, 1253 (N.D.Miss. 1987) *aff'd sub nom Operation Push v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

¹⁹ Defendants resort to characterizing Dr. Espino's testimony regarding the angle of a regression slope that fits voter registrations as saying Latinos were "doing better" in their number of voter registrations. On the contrary, Dr. Espino testified that *fewer* Latinos registered following Proposition 200 when compared to the period before Proposition 200 in 12 of Arizona's 15 counties. ER 43; G-SER 31 at 429:21-430:7, 432:2-433:7. Defendants' admitted inability to understand statistical analysis provides no basis for the Court to adopt their argument.

Finally, contrary to Defendants' assertion, Plaintiffs provided substantial evidence that Proposition 200 interacts with the effects of past discrimination to hinder Latino ability to participate in the political process. *Compare* State Response at 50-51 *with* Gonzalez Plaintiffs' Opening Brief at 20-25; 55-60. The district court found, in addition to Proposition 200's adverse impact on Latinos registering to vote, that "discrimination against Latinos in Arizona has historically hindered their ability to fully participate in the political process," "there are socio-economic disparities between Latinos and white, non-Latinos, which hinder Latinos' ability to participate effectively in the political process," and that Latino registration and voting lags behind that of Anglos. ER3 at 42, 44. In light of these findings, and Plaintiffs' expert and lay testimony regarding causality, the district court's conclusion that there is no causal connection between Proposition 200 and the disparate impact on Latinos, constitutes reversible error.

Defendants' reliance on *Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992) is misplaced. State Response at 53. *Badillo* was neither a voter registration nor voter identification case and thus did not challenge the exclusion of minorities from the electorate. Furthermore, the *Badillo* court held that because minority voters were not politically cohesive, their vote dilution claim failed. By contrast, in the case at hand the district court credited the testimony of Plaintiffs'

expert Dr. Richard Engstrom who testified that Latinos in Arizona are politically cohesive. ER3 at 45.

As pointed out by the Counties in their Response at 3, every single excluded voter can potentially affect the outcome of an election. This is particularly true in Arizona where voting is racially polarized. Thus, a statute that operates to exclude a disproportionately large number of Latinos from the electorate necessarily reduces statewide Latino voting strength and denies the right to vote as well as dilutes minority votes in violation of Section 2.

D. The Voter Registration and Voter ID Provisions of Proposition 200 Impose an Undue Burden on Voters by Forcing Them to Pay a fee to Vote and in Some Cases to Register to Vote Twice

The district court's findings regarding the burdens imposed by Proposition 200, and a correct application of the law, dictate a conclusion in Appellant's favor.

The 35,000 rejected voter registration applications and conditional provisional ballots, all accompanied by sworn statements regarding the voter's eligibility, speak for themselves. ER41, G-SER22. With respect to voter identification, just as in the area of voter registration, Proposition 200 systematically and predictably prevents voters, even those with valid identification, from casting a ballot on Election Day. In addition to the number of copies of envelopes containing uncounted Conditional/Provisional ballots, the envelopes themselves reveal that election officials rejected valid identification pursuant to

Proposition 200 because the address on the identification did not match the voter's registration address. G-SER22. Furthermore, Plaintiffs presented testimony from individuals who were prevented from voting by Proposition 200 because of their married names or address mismatch problems. ER45, 4647.

Defendants downplay the sworn statements of 35,000 voter applicants and voters regarding their eligibility to vote by claiming none of the affected individuals was in fact eligible to vote. Defendants' position, that Plaintiffs have to demonstrate large-scale disenfranchisement (State Response at 17), and at the same time present the testimony of the 35,000 affected individuals regarding their eligibility (State Response at 18-19), creates an impossible burden of proof. The district court was entitled to conclude, based on the sworn statements on both voter registration forms and conditional provisional ballot envelopes, that the affected individuals were eligible to vote.²⁰ In addition, the close to 10,000 rejected voter registrants who later successfully re-applied to register to vote demonstrates that large numbers of eligible voters were denied registration as a result of Proposition 200.

²⁰ Furthermore, contrary to Defendants' suggestion that there was no evidence these voters were eligible to vote, the fact that they were given "conditional" provisional ballots means they were found on the voter roll for that precinct and but for the ID requirement, they would have been allowed to cast a regular ballot that day.

IV. CONCLUSION

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

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

I hereby certify that the Reply Brief of Appellants the Gonzalez, et al. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,938 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using MS Word in 14-point Times New Roman.

Dated this 14th day of April, 2009.

s/ Nina Perales
Nina Perales
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of April, 2009, I electronically filed the Reply Brief of Appellants the Gonzalez, et al. with the Clerk of the Court for the United State Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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

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In Addition, I certify that pursuant to Fed. R. App. P. 25(d) and Rule 4(a)(2) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases (11/10/08), on the 14th day of April, 2009 four copies of the Supplemental Excerpts of Record via First-Class Mail Postage prepaid to:

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