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14 IN THE UNITED STATES DISTRICT COURT
15 FOR THE DISTRICT OF ARIZONA

17 Maria M. Gonzalez, et al.,) No. CV-06-1268-PHX-ROS(Lead)
) No. CV-06-1362-PCT-JAT(Cons.)
18 Plaintiffs,) No. CV-06-1575-PHX-EHC(Cons.)
) GONZALEZ PLAINTIFFS'
19 vs.) RESPONSE TO DEFENDANTS'
) PARTIAL SUMMARY JUDGMENT
20 State of Arizona, et al,) MOTION
)
21 Defendants.)
22) (Assigned to the
Honorable Roslyn O. Silver)

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I. INTRODUCTION

The State and certain county Defendants have moved prematurely for partial summary judgment almost two months before the scheduling conference set in this case and before the Court has entered an order governing merits-phase discovery. Summary judgment is not appropriate because there remain issues of disputed material fact that are critical to resolving Plaintiffs' claims. More importantly, Defendant-Movants cannot carry their burden of demonstrating that they prevail as a matter of law on Plaintiffs' claims.

II. FACTUAL BACKGROUND

The Arizona Taxpayer and Citizen Protection Act ("Proposition 200") has significantly altered the landscape of registration and voting across the State. Voter registration applicants, who formerly proved their U.S. citizenship and eligibility to vote by completing and signing the registration application under penalty of perjury, must now also provide additional documentary proof of U.S. citizenship with their application.

Proposition 200's documentary proof of citizenship requirement has resulted in a registration disaster in the State, forcing counties to reject close to 30,000 registration applications submitted by voters since January 2005 solely because they did not include documentary proof of citizenship. *See Gonzalez Plaintiffs' Response to Separate Statement of Fact in Support of Motion for Partial Summary Judgment by Defendants State of Arizona and the Arizona Secretary of State 59 (hereinafter SMF).* In addition, voter registration organizations have been unable to conduct community registration

1 drives because many of the people they encounter wish to register but may not be
2 comfortable with strangers copying their citizenship documents. SMF 77. Voter
3 registration organizations themselves lack the ability to photocopy citizenship
4 documents where they register voters at community fairs, houses of worship and
5 shopping malls. *Id.*

7 In Arizona, a voter submitting the federal mail voter registration form (Federal
8 Form) authorized by the National Voter Registration Act (“NVRA”) will not be
9 registered unless the form is also accompanied by documentary proof of citizenship
10 pursuant to Proposition 200.¹ Thus, Arizona conditions its acceptance of the Federal
11 Form upon satisfaction of state-imposed documentation requirements.

12 The forms of identification Proposition 200 requires to register to vote require a
13 fee and are not universally held. Both the Maricopa and Pima County Recorders agree
14 that there are U.S. citizens who lack the necessary documents to register to vote in the
15 wake of Proposition 200.²

17 III. APPLICABLE LEGAL STANDARD

18 Fed. R. Civ. P. 56 provides that summary judgment shall be rendered only “if the
19 pleadings, depositions, answers to interrogatories, and admissions on file, together with
20 the affidavits, if any, show that there is no genuine issue as to any material fact and that
21 the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

23 ¹ SMF 75; 61.

24 ² SMF 68; 74. In fact, F. Ann Rodriguez, the Pima County Recorder, testified
25 that her own mother, who was born in the State of New Mexico, lacks the proof of
26 citizenship required by Proposition 200. SMF 74.

1 Upon reviewing a motion for summary judgment, courts do not weigh conflicting
2 evidence with respect to a disputed material fact. *See Anderson v. Liberty Lobby, Inc.*,
3 477 U.S. 242, 255 (1986). Courts also do not make credibility determinations with
4 respect to statements made in affidavits, answers to interrogatories, admissions, or
5 depositions. *See id.* These determinations are left for the trial. *See T.W. Electrical*
6 *Serv., Inc., v. Pac. Elec. Contractors Ass'n.*, 809 F.2d 626, 630-31 (9th Cir. 1987).
7 Therefore, at summary judgment, judges view the evidence in the light most favorable
8 to the nonmoving party. *See id.* at 630.³

10 IV. ARGUMENT

11 A. Proposition 200 Violates the NVRA and Supremacy Clause

12 The hurdles imposed by Proposition 200 are precisely the type of restrictions that
13 Congress intended to prevent for registration for federal elections. SMF 32; 42; 43; 48;
14 49; 50; 51. Defendants' implementation of Proposition 200 not only violates the
15 explicit terms of the NVRA, but also renders meaningless the uniform mail registration
16 program. The plain meaning of the statute, as well as its legislative history and
17 subsequent agency interpretation, make clear that the NVRA prohibits Arizona from
18 conditioning acceptance of the Federal Form on Proposition 200's documentary proof
19 of citizenship requirements. Thus, Proposition 200 is preempted by the NVRA and it
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24 ³ "Put another way, if a rational trier of fact might resolve the issue in favor of
25 the nonmoving party, summary judgment must be denied." *Id.* at 631 (citing *Matsushita*
26 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

1 violates the Supremacy Clause.⁴ See *Foster v. Love*, 522 U.S. 67, 69 (1997) (finding
2 well-settled Congressional “power to override state regulations’ by establishing
3 uniform rules for federal elections, binding on the States”) (citation omitted).⁵

4 As an initial matter, Defendants’ argument that Plaintiffs have no cause of action
5 under the Supremacy Clause to assert federal preemption claims (Dkt. No. 282 at 5, n.
6 5) is utterly groundless.⁶

8 1. The NVRA Mandates that States “Accept and Use” the Federal Form

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10
11 ⁴ Furthermore, because Defendants’ motion for summary judgment on the
12 NVRA and Supremacy Clause claims is premature and relies upon disputed issues of
13 fact, summary judgment is not appropriate at this juncture. Importantly, the parties
14 dispute whether, as a factual matter, Defendants “accept and use” the federal voter
15 registration form. Compare Dkt. No. 282-8 ¶¶ 8-10 with Gonzalez Plaintiffs’ SMF 60,
16 62, 63, 64, 66, 75. This factual dispute must be resolved prior to any determination of
17 Plaintiffs’ NVRA and Supremacy Clause claims. See *Rule 56(f) Declaration of Nina Perales; Abdul-Jabbar v. Gen. Motors*, 85 F.3d 407, 412-413 (9th Cir. 1996) (holding that summary judgment was inappropriate because there was a material issue of fact regarding the likelihood of confusion under the Lanham Act over whether Plaintiff had endorsed a product).

18 ⁵ See also, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995);
19 *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coal. v. Wilson*, 60 F.3d
20 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996).

21 ⁶ See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14, (1983) (“A plaintiff who seeks
22 injunctive relief from state regulation, on the ground that such regulation is pre-empted
23 by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must
24 prevail, thus presents a federal question which the federal courts have jurisdiction under
25 28 U.S.C. § 1331 to resolve.”); *Sprint Telephony PCS, L.P. v. County of San Diego*,
26 F.3d _____, 2007 WL 1695330 (9th Cir. 2007) (“conclude[ing] that the availability of
injunctive relief is appropriate under *Shaw*”); *P. R. Tel. Co. v. Municipality of
Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d
1258, 1264 (10th Cir. 2004) ; *N.J. Payphone Ass’n, Inc. v. Town of West New York*, 299
F.3d 235, 241-42 (3d Cir. 2002).

1 The NVRA provides that “[e]ach State shall accept and use the mail voter
2 registration application form prescribed by the Federal Election Commission . . . for the
3 registration of voters in elections for Federal office.” 42 U.S.C. 1973gg-4 (a) (1).
4 (Attached as Exhibit A to Declaration of Nina Perales in Support of Brief in Response
5 to Defendants’ Motion for Summary Judgment (hereinafter “Perales Decl. Ex.”)).
6 When the Help America Vote Act (“HAVA”) was enacted, responsibility for the
7 Federal Form was transferred from the Federal Election Commission (“FEC”) to the
8 Election Assistance Commission (“EAC”). 42 U.S.C. § 15532.

10 The NVRA’s use of the term “shall”⁷ in section 4 (a)(1) means that the
11 requirement to “accept and use” the Federal Form is not optional for states.⁸ The
12 NVRA provides no exemption from its requirements that states accept and use the
13 Federal Form. Although the NVRA provides that a state may create its own voter
14 registration form that is similar to the Federal Form and use it in addition to the Federal
15 Form, the NVRA does not permit states to use their own form in lieu of the Federal

17 ⁷ Black’s Law Dictionary defines “shall” as: “*Has a duty to; more broadly, is*
18 *required to . . .*” Black’s Law Dictionary 8th Ed. (2004) (emphasis added).

19 ⁸ See *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358 (N.D. Ga.
20 2004), *aff’d* 408 F.3d 1349 (11th Cir. 2005) (“Under the NVRA, Congress made it
21 mandatory upon the states to accept voter registration applications by mail. 42 U.S.C. §
22 1973gg-4(a)(1) (noting that each state “*shall accept and use the mail voter registration*
23 *application*”) (emphasis added). In outlining the procedures for administering that
24 requirement, Congress mandated that a state “*shall ensure that any eligible applicant is*
25 *registered to vote . . . if the valid voter registration form of the applicant is postmarked*”
26 *by the appropriate date. 42 U.S.C. § 1973gg-6(a)(1)(B) (emphasis added). By making*
acceptance of the voter registration application mandatory when postmarked by the
correct date, Congress simply did not allow the states to impose restrictions that would
permit denial of an application that otherwise satisfies the federal requirements. . .
Because the applications were received in accordance with the mandates of the NVRA,
the State of Georgia was not free to reject them.”).

1 Form. Perales Decl. Ex. A. 42 U.S.C. 1973gg-4 (a)(2) (“*In addition to accepting and*
2 *using the [Federal Form], a State may develop and use [its own form].*”) (emphasis
3 added). *See also Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1214 (S.D. Fla. 2006) (“The
4 [NVRA] Federal statutory scheme provides that states may design their own voter
5 registration forms, requiring information as may be relevant to the states' specific
6 qualification requirements. The statutes provide further, however, that in any event, all
7 states must accept the national registration form.”).

9 The term “accept and use” in the NVRA does not permit states to condition
10 acceptance of the Federal Form upon satisfaction of criteria that are outside the Federal
11 Form, particularly in light of the NVRA’s purpose to create a straightforward and
12 uniform system of voter registration in order to overcome registration barriers created
13 by states. SMF 33; 54; 2; 5; 6; 11; 20; 29. Defendants cannot claim to “accept and
14 use,” in compliance with the NVRA, Federal Forms that they categorically refuse to
15 process. *See Worden v. Suntrust Banks, Inc.*, 2007 WL 904524 (D.S.C. 2007) (“In this
16 case, the statute expressly uses the word “accept,” which has a plain meaning beyond
17 mere receipt. Moreover, the words of the statute surrounding “accept,” namely “use,”
18 “refer to,” and “inquire,” all connote active participation . . .”).

21 Similarly, with respect to the Federal Form, Arizona cannot substitute its own
22 proof of citizenship requirements for those in the NVRA because Arizona thinks
23 Proposition 200 better helps election officials assess the eligibility of voters. *See*
24 *ACORN v. Edgar*, 56 F.3d 791, 794-795 (7th Cir. 1995) (“[t]he law may, as the state
25 argues, make it more difficult to enforce some of the qualifications, for example those
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1 relating to residency, by making it difficult to strike non-residents from the rolls. But the
2 existence of such effects cannot by itself invalidate the law. Such effects are bound to
3 follow from any effort to make or alter state regulations of the times, places, and
4 manner of conducting elections, including the registration phase.”).

5
6 In this context, allowing Arizona to refuse properly-completed Federal Forms
7 because they do not satisfy additional state-imposed requirements nullifies the
8 requirement to “accept and use” the Federal Form. *See Republican Party of Minn. v.*
9 *White*, 456 F.3d 912, 919 (8th Cir. 2006) (declaring, in case involving state law
10 prohibiting judicial candidates from accepting or using political party endorsements,
11 that “if candidates could never *accept* or *use* an endorsement from a party, it would do
12 little good for the party to make the endorsement.”) (emphasis added).

13
14 In the NVRA, Congress vested the EAC with the exclusive authority to develop
15 the Federal Form. 42 U.S.C. 1973gg-7 (a) and (b) (“The Election Assistance
16 Commission . . . shall develop a mail voter registration application form for elections
17 for Federal office.”). The NVRA directed the EAC to consult with states to ensure that
18 the form required information necessary to assess the eligibility of the applicant but did
19 not authorize states to override the requirements of the Federal Form once they were
20 established by the EAC.⁹

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22 The text of the NVRA reflects the Congressional decision to address the
23 eligibility requirement of U.S. citizenship by: requiring a signature under penalty of

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25 ⁹ *See id.* (“The mail voter registration form developed [by the EAC] may only
26 require such [information] as is necessary to enable the appropriate State election
official to assess the eligibility of the applicant . . .”).

1 perjury attesting to U.S. citizenship; requiring the applicant to check the citizenship
2 'checkbox' on the registration form; and instructing applicants not to complete the form
3 if they are not U.S. citizens.¹⁰

4 To interpret the NVRA to permit states to condition acceptance of the Federal
5 Form upon satisfaction of additional state-imposed documentation requirements
6 contradicts not only subsection 4 (a)(1) which mandates that states accept and use the
7 Federal Form. It also contradicts 7 (b)(1) and (2) which vests the EAC with the sole
8 authority to determine the contents of the Federal Form and subsection 6 (a)(1)(B)
9 which requires states to register any applicant who mails a valid Federal Form at least
10 30 days before an election. Finally, such an interpretation would nullify the mandate of
11 subsection 7 (b)(3), which strictly forbids "requirements for notarization or other formal
12 authentication" in the Federal Form. See 42 U.S.C. § 1973gg-7(b)(3).¹¹

15 2. Congress Declined to Permit States to Require Documentary Proof of Citizenship

18 ¹⁰ (HAVA) amended the NVRA to require voter registration applicants to make
19 an affirmative statement of "yes" to the specific question, "Are you a United States
20 citizen?" with a yes/no check box. The post-HAVA Federal Form also has a place for
21 the applicant to sign, attesting under penalty of perjury that he/she is a United States
citizen and eligible to vote and includes instructions not to complete the form if the
answer to the citizenship question is 'no.' See 42 U.S.C. § 15483(b)(4)(A).

22 ¹¹The extent to which "formal authentication" is required under Prop. 200 is
23 highlighted by A.R.S. § 16-166(F)(4) which even includes provisions that require the
24 registrar to authenticate an applicant's citizenship status with federal agencies: "If only
25 the number of the certificate of naturalization is provided [on the voter application], the
applicant shall not be included in the registration rolls until the number of the certificate
26 of naturalization is verified with the United States Immigration and Naturalization
Service by the county recorder." See A.R.S. 16-166(F)(23).

1 To the extent that the Court finds ambiguity in the NVRA's text requiring states
2 to accept and use the federal form without requiring further documentation, it is
3 appropriate to turn to the legislative history of the Act. *See United Steel Workers v.*
4 *Weber* 443 U.S. 193, 201 (1979); *Heppner v. Alyeska Pipeline Service Co.*, 665 F.2d
5 868, 870 (9th Cir. 1981); *In re Bankr. Estate of Markair*, 308 F. 3d 1038 (9th Cir. 2002)
6 (referring to legislative history to uphold agency interpretation of statute).
7

8 The Congressional Record underlying the NVRA demonstrates that Congress
9 intended the NVRA's uniform mail registration provisions to reduce state-imposed
10 obstacles faced by voters. *See* SMF 6; Perales Decl. Ex. C, D.

11 The legislative history of the NVRA further demonstrates that Congress debated
12 whether to allow states to impose documentary proof of citizenship requirements on
13 NVRA mail voter registration and ultimately decided that a documentary proof of
14 citizenship requirement was unnecessary and would thwart the purpose of the Act.
15 SMF 31; 45; 50; 51; Perales Decl. Ex. B.

17 A bill similar to the NVRA, passed by Congress in 1991 after a heated debate
18 over proof of citizenship, was vetoed by President George Bush who had wanted to see
19 a documentary proof of citizenship requirement in the Federal Form. *See* Perales Decl.
20 Ex. D; SMF 46. When the bill that would become the NVRA was reintroduced in 1993,
21 the debate over citizenship documentation continued.¹² The Senate passed an
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24 ¹² *See, e.g.*, SMF 47; 48. (Amendments eliminating the mail registration
25 component, demanding states to certify they have fraud prevention measures in place,
26 and the addition of statements discouraging non-citizens from registering were
ultimately defeated.)

1 amendment to the bill which read, “Nothing in this Act shall be construed to preclude a
2 State from requiring presentation of documentary evidence of the citizenship of an
3 applicant for voter registration.” SMF 49. The conference committee rejected the
4 Senate amendment, stating, “[i]t is not necessary or consistent with the purposes of [the
5 NVRA].” SMF 50.¹³
6

7 By refusing to allow states to condition acceptance of the Federal Form upon the
8 production of documentary proof of citizenship, Congress was confident the NVRA’s
9 requirements that the registrant produce proof of her date of birth and attest to her age
10 and citizenship, “together with the criminal sections of the bill...provides sufficient
11 safeguards to prevent noncitizens from registering to vote.” SMF 12.
12

13 Consistent with the plain language of the statute and its legislative history, the
14 EAC has interpreted the NVRA not to require documentation of eligibility in addition to
15 the statements made on the Federal Form.¹⁴
16

17
18 ¹³ The Senate amendment allowing States to require documentary proof of
19 citizenship was the only amendment completely rejected in conference committee.
SMF 51.

20 ¹⁴ See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-
21 844 (1984) (citations omitted) (courts should defer to agency interpretation if statute is
22 within agency’s jurisdiction and the interpretation by agency is reasonable; Congress
23 intends that any ambiguity in a statute should be resolved by agency and not courts);
24 *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs, Inc.*, 545 U.S. 967 (2005)
25 (deferring to Federal Communications Commission’s interpretation of Communications
26 Act in defining “telecommunications service” citing *Chevron, supra*, 467 U.S. at 843-
844); *Coronado-Durazo v. Immigration and Naturalization Serv.*, 123 F.3d 1322, 1324
(9th Cir. 1997) (deference to Immigration and Naturalization Service interpretation of
immigration law); *Lopez v. Davis*, 531 U.S. 230 (2001) (deference to Bureau of Prison’s
regulations of early release of prisoners with felonies involving a firearm).

1 Under the NVRA, the EAC is the federal agency responsible for creating and
2 maintaining the Federal Form and providing information to states on their
3 responsibilities under the NVRA. 42 U.S.C. 1973gg-7; Perales Decl. Ex. E, ¶¶ 6, 8;
4 SMF 24. The EAC has interpreted the NVRA to require that the Federal Form be a
5 postage paid card that requires the applicant to attest, by signing under penalty of
6 perjury, that he or she meets the eligibility requirements (including age, citizenship,
7 residence in the county and, in certain states, lack of encumbrance by a felony
8 conviction or court finding of mental incompetence). The EAC has interpreted the
9 NVRA not to permit the Federal Form to require the applicant to attach any additional
10 papers or require documentary proof of citizenship. SMF 54; 57. Perales Decl. Ex. E, ¶
11 22; Ex. H; Ex. I.

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14 The EAC has interpreted the NVRA to prohibit Arizona from conditioning
15 acceptance of the Federal Form on a showing of documentary proof of citizenship
16 pursuant to Proposition 200. On March 6, 2006, in response to Arizona's request that
17 the EAC change its instructions accompanying the Federal Form, the EAC's Executive
18 Director wrote Secretary of State Jan Brewer to explain that Proposition 200's
19 documentary proof of citizenship requirements "deal with the manner in which
20 registration is conducted and are, therefore, preempted by Federal law." SMF 53
21

22 The EAC's letter explained that, consistent with the NVRA, Arizona "may not
23 mandate additional registration procedures that condition the acceptance of the Federal
24 Form" on the applicant's production of additional documentary proof of citizenship. *Id.*
25 It further explained that the Federal Form's "checkbox" for citizenship, along with the
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1 applicant's attestation and signature under penalty of perjury, is the verification method
2 Congress has chosen to register voters for federal elections, and a state is preempted
3 from imposing additional requirements for acceptance of the Federal Form.¹⁵ *Id.*

4 B. Poll Tax

5
6 Gonzalez Plaintiffs hereby incorporate the arguments and authorities presented
7 by the ITCA Plaintiffs in response to Defendants' motion for partial summary judgment
8 on the poll tax claim, including the argument that summary judgment is premature at
9 this stage of the litigation.

10 Gonzalez Plaintiffs further wish to note that, with respect to the requirement to
11 show documentary proof of citizenship for voter registration, that hundreds of thousands
12 of Arizonans cannot use their driver's license or state ID card because they were issued
13 before 1996 and are thus forced to obtain costly citizenship documents as a prerequisite
14 to voting.
15

16 According to the Arizona Department of Transportation, as of August 3, 2006,
17 576,040 Arizonans held driver's licenses or state identification cards that were issued
18 before 1996. None of these more than one-half million people can use their driver's
19 licenses or state identification cards to register to vote because Proposition 200 excludes
20 them from the list of acceptable forms of proof of citizenship. By making registration
21 contingent on the payment of fees necessary to obtain citizenship documents such as a
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24 ¹⁵ In response to a second request by the Arizona Secretary of State that the EAC
25 change its interpretation of the NVRA as well as the instructions on the Federal Form,
26 the EAC held a tally vote on July 11, 2006. The measure failed. SMF 57; Perales Decl.
Ex. J; Ex. E, ¶ 28.

1 passport or birth certificate, Arizona has impermissibly burdened the right to vote by
2 basing it on individual financial resources.¹⁶

3 C. Section 5

4 In its preclearance submission for Proposition 200, the State of Arizona did not
5 comply with the federal requirement to describe its proposed election changes with
6 “sufficient particularity” to allow the Department of Justice (DOJ) to evaluate their
7 impact on minority voters. *See* 28 C.F.R. §§ 51.26(d), 51.27(c) (1996) (requiring
8 preclearance submissions to explain changes clearly and in detail). *See* Dkt. No. 282 at
9 Attach. 1; SMF 58.

11 Federal regulations required the State to present the DOJ with “a clear statement
12 of the change explaining the difference between the submitted change and the prior law
13 or practice, or explanatory materials adequate to disclose to the Attorney General the
14 difference between the prior and proposed situation with respect to voting.” 28 C.F.R. §
15 51.27(c). Instead, the State did not describe anywhere in its submission that it would
16 condition acceptance of the Federal Form upon the registrant’s submission of
17 citizenship documents and made no mention of the NVRA or changing its
18 implementation of the Act. Instead, the State only described its planned amendments to
19 state voter registration law.
20

21
22 The State also failed to comply with federal preclearance requirements by
23 excluding from its submission a copy of A.R.S. § 16-121.01. Federal regulations

24 ¹⁶ Gonzalez Plaintiffs wish to note finally that Proposition 200 provides no
25 exceptions or waivers from its documentary proof of citizenship requirements, and
26 mandates the rejection of any application that does not meet them.

1 require states to include in their preclearance submission a copy of the statutes that are
2 being changed or will no longer be enforced. 28 C.F.R. § 51.27(b).

3 A.R.S. § 16-121.01 sets out the “requirements for proper registration” in Arizona
4 prior to the passage of Proposition 200. The provision parallels the voter registration
5 requirements of the NVRA, thus enabling Arizona to use its own state form to register
6 voters in federal elections pursuant to the NVRA. *See* 42 U.S.C. 1973gg-7. A.R.S. §
7 16-151(B), like the NVRA, provides that a voter registration application is sufficient
8 without documentary proof of citizenship if it includes, among other things, a signature
9 under penalty of perjury and “a checkmark or other appropriate indicator that the person
10 answered ‘yes’ to the question regarding citizenship.”
11

12 Defendants admit that Proposition 200 changes the practice under A.R.S. § 16-
13 121.01 to require documentary proof of citizenship in addition to the criteria set out in
14 that provision. *See* Motion for Partial Summary Judgment at 13 (arguing that A.R.S. §
15 16-121.01 must now be interpreted to require documentary proof of citizenship pursuant
16 to Proposition 200). Nevertheless, the State failed to include a copy of A.R.S. § 16-
17 121.01 in its preclearance submission or explain to the DOJ that it was materially
18 changing the state statute that brought Arizona’s voter registration forms into
19 compliance with the NVRA.
20
21

22 Arizona’s preclearance submission was insufficient to meet the requirements of
23 Section 5. *See Young v. Fordice*, 520 U.S. 273 (1997) (rejecting Mississippi’s
24 contention that its Section 5 submission gave sufficient notice to DOJ to have
25 precleared a dual voter registration system).
26

1 Under Section 5, the State bears the burden of explaining the election changes it
2 seeks to preclear and any ambiguity in the preclearance submission must be construed
3 against the State. *See McCain v. Lybrand*, 465 U.S. 236, 249, 255-257 (1984) (burden
4 is on the State to submit a complete and unambiguous description of proposed changes);
5 *Clark v. Roemer*, 500 U.S. 646, 658-659 (1991) (relying on “presumption that any
6 ambiguity in the scope of the preclearance request must be construed against the
7 [S]tat[e]” (internal quotation marks and citations omitted)). The DOJ processes
8 thousands of preclearance submissions annually with limited resources and relies upon
9 submissions to present all the changes for which preclearance is sought. *See Clark*,
10 *supra*, at 658-659 (The Attorney General is under no duty to investigate voting
11 changes). In the case at hand, the State cannot submit an incomplete submission and
12 then later claim that DOJ precleared changes to the State’s NVRA procedures of which
13 it was unaware.

14
15
16 D. Summary Judgment is not Appropriate for Plaintiffs’ Claims Under ARS 16-151 (B)

17 A.R.S. § 16-151(B) provides that: “[t]he secretary of state shall make available
18 for distribution through governmental and private entities the voter registration forms
19 that are prescribed by the federal election commission.” Defendants do not make
20 available the voter registration forms prescribed by the FEC, now the EAC, and thus are
21 in violation of A.R.S. § 16-151(B).¹⁷ Because there remains, at the very least, a fact
22 issue regarding whether Defendants are in compliance with A.R.S. § 16-151(B),
23 summary judgment is inappropriate.
24

25
26 ¹⁷ SMF 62; 66; 73.

1 E. Summary Judgment is not Appropriate for Plaintiffs' Claims Under ARS 16-121.01

2 A.R.S. § 16-121.01 establishes the “requirements for proper registration” in
3 Arizona and its requirements parallel the voter registration requirements of the NVRA.
4 This statute enables Arizona to comply with the NVRA by complementing the federal
5 form with its own state form pursuant to 42 U.S.C. 1973gg-7.¹⁸ Like the Federal Form
6 promulgated by the EAC, the requirements of A.R.S. § 16-121.01 include completing
7 the citizenship checkbox and signing the application but do not include additional
8 documentary proof of citizenship.
9

10 By imposing a requirement of documentary proof of citizenship for voter
11 registration, Defendants have changed the standards for voter registration and violated
12 A.R.S. § 16-121.01. The State’s contention that summary judgment is appropriate is
13 unavailing because ARS §16-121.01 cannot be read harmoniously with Proposition 200
14 without rendering one of the statutes superfluous.¹⁹
15

16 V. CONCLUSION

17 For the reasons stated above, Gonzalez Plaintiffs’ respectfully request that the
18 Court deny Defendants’ Motion for Partial Summary Judgment.
19

20 ¹⁸ The provision states: “A person is presumed to be properly registered to vote
21 on completion of a registration form as prescribed by section 16-152 that contains at
22 least the name, the residence address or the location, the date of birth and the signature
23 or other statement of the registrant as prescribed by section 16-152, subsection A,
paragraph 20 *and a checkmark or other appropriate indicator that the person answered*
“yes” to the question regarding citizenship.” (emphasis added).

24 ¹⁹ See *Yarbrough v. Montoya-Paez*, 147 P.3d 755 (Ariz.Ct. App. Div. 2 2006)
25 (“Whenever possible, we do not interpret statutes in such a manner as to render a clause
26 superfluous.”) (quoting *City of Tucson v. Clear Channel Outdoor, Inc.*, 105 P.3d 1163,
1171 (2005)).

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DATED this 12th day of July, 2007. Respectfully submitted,

By: s/Nina Perales
Nina Perales

Counsel for Plaintiffs
Gonzalez, et al.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2007, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to CM/ECF registrants.

COPY of the foregoing filed electronically this 12th day of July, 2007.

COPY of the foregoing mailed with Notice of Electronic Filing this 12th day of July, 2007 to:

The Honorable Roslyn O. Silver
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 624
401 West Washington Street, SPC 59
Phoenix, AZ 85003-2158

s/Carlos Becerra
Carlos Becerra