

No. 6A 375 and 6A 379

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA and ARIZONA SECRETARY OF STATE,
Applicants

v.

MARIA M. GONZALEZ, ET AL.
Respondents

**To the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of
the United States and Circuit Justice for the Ninth Circuit**

**ITCA RESPONDENTS' OPPOSITION TO APPLICATIONS FOR
EMERGENCY STAY OF THE ORDER OF THE NINTH CIRCUIT
Ninth Circuit Cause Nos. 06-16702 and 06-16706**

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The State of Arizona and Secretary of State (“**State**”) and five of Arizona’s fifteen counties (the “**Five Counties**”) (collectively “**Applicants**”) have filed applications asking the Court to stay an interim Order of the Ninth Circuit entered October 5, 2006 (the “**Order**”). Respondents, the Inter Tribal Council of Arizona, Inc. (comprised of 20 member Tribes), the Hopi Tribe, the League of Women Voters of Arizona, the League of United Latin American Citizens Arizona, the Arizona Advocacy Network, the People for the American Way Foundation, and Rep. Steve M. Gallardo (collectively “**ITCA**”), respectfully ask that the Court deny the Applications.¹

INTRODUCTION AND OVERVIEW

The undisputed record evidence below, largely ignored by Applicants’ papers, demonstrates that had the Court of Appeals not issued its Order, *thousands* of Arizona citizens – citizens everyone agrees *should* be able to vote – would have been unable to vote in the general election *before* the Ninth Circuit had the opportunity to more fully evaluate Proposition 200’s constitutionality.² The Court of Appeals correctly recognized that the certainty of these lost votes greatly outweighed the Defendants’ unsupported conjecture that fraud might occur. In fact, the undisputed record evidence below demonstrated that neither Arizona nor the Five Counties would suffer *any* harm from staying enforcement of Proposition 200’s registration and polling place regulations while

¹ The Navajo Nation Plaintiffs, although not parties to the appeal due to their ongoing proceedings in the district court, support ITCA’s opposition to the Applications.

² A copy of the Proposition 200 publicity pamphlet is included in ITCA’s Separate Appendix (“**App.**”) Tab B Ex. 51.

the underlying appeal proceeded, and that serious constitutional problems plague Proposition 200.

First, the State and Five Counties adduced no evidence of *any* fraud, *ever*, that would have been prevented by Proposition 200's polling place identification requirements – the principal issue remaining now that the October 9, 2006 registration deadline has passed. Importantly, the only kind of fraud potentially prevented by *polling place* identification is the impersonation of a registered voter at the polls, so-called “imposter” voting. Yet, the record contains no evidence that Arizona has ever experienced even a single incident of imposter voting, and the Applicants' papers to this Court (which include brand new allegations of voter fraud by “felons”) likewise fail to identify even a single instance of imposter voting.

Second, with respect to registration, for which the deadline has now passed (rendering this issue largely moot), Proposition 200's strict proof of United States citizenship requirement resulted in the rejection of over 20,000 voter registration applications. Yet, only 238 of the 2,706,223 registered voters in Arizona as of January 2005 were even alleged (*not* proven) to be non-citizens – a mere 0.0088% of the registered voters.

Third, the Applicants' claims of irreparable harm due to purchasing election materials that will now go to waste misconstrues the meaning of “irreparable harm.” Depriving citizens of their fundamental right to vote is irreparable harm; expending resources on unnecessary election materials is not.

Fourth, Applicants' concern with voter "confusion" tips sharply in favor of denying the Application. After the Court of Appeals issued its order, the media reported that voters would no longer need to bring ID to the polls on election day. If the Application is denied (and some voters nevertheless bring ID with them), no harm will occur. Yet if the Application is granted, even more citizens may be unable to participate in the election because the ID rules, once removed, were later reinstated. Far less harm and confusion will result by leaving the Order intact.

Fifth, even a cursory review of Proposition 200 reveals that its drafters injected the statute with defects that render it highly constitutionally *suspect* – the appropriate inquiry at this interim stage pending a more thorough review. Among other constitutional problems, Proposition 200:

- implements an irrational and discriminatory scheme by exempting "early voters" – whose voting patterns show are far less likely to be members of racial or ethnic minorities – from Proposition 200's polling identification requirements;
- conditions the right to register and vote upon a citizen's affluence and ability to purchase satisfactory identification;
- provides no "catch all" provision (unlike other states' laws) allowing voters who lack the required form of identification an opportunity to cast a provisional ballot (subject to signature verification); and
- provides no mechanism (unlike other states' laws) for those who cannot afford the required identification to obtain it without cost.

Sixth, recognizing that serious questions exist concerning Proposition 200's constitutionality, the Court of Appeals appropriately entered an interim stay order *pending* the appeal, so that the November general election could proceed as have general elections in Arizona for decades – without disenfranchising thousands of Arizona citizens

before the Court of Appeals had an opportunity to more fully evaluate Proposition 200's constitutionality.

Thus, notwithstanding Applicants' hyperbole, the Order does not run "far afield" of "appropriate legal standards,"³ but rather represents a paradigm example of appropriate interim relief. Accordingly, this Court should promptly deny the Application, and leave the Court of Appeals' interim Order intact. Doing so cannot, either as a matter of law or logic, cause *any* constitutional harm or irreparable injury; it will simply mean that the general election will proceed as has *every* other general election in Arizona – without Proposition 200's radical changes implemented pending the underlying appeal. Granting the Application, however, will result in the disenfranchisement of thousands of voters in the general election *before* any appellate court has had an opportunity to determine whether the Constitution permits that disenfranchisement.

PERTINENT BACKGROUND

I. Arizona's Long-Standing Registration and Voting System

For decades, Arizona law required persons registering to vote to sign a statement (1) declaring that the person is a United States citizen, and (2) acknowledging that executing a false registration is a class 6 felony. A.R.S. § 16-152(A)(14), (18)-(19) (2004). On election day, a registered voter would announce his or her name and sign a signature roster. Poll workers would check the announced name against the registration rolls, and if the person had not already voted, provide the voter a ballot. A.R.S. § 16-579

³ State of Arizona's Application for Stay of Injunction at 2.

(2004). This system, which Applicants misname an “honor system,” included real protections against fraud, such as signing a signature roster, criminal penalties to help minimize imposter voting, and a voter “hotline” to which anyone could report suspicious voting activity.⁴ It served Arizona well by maximizing the opportunity for citizen involvement while protecting the integrity of the voting system.⁵

II. Proposition 200’s New Identification Requirements

Despite the proven success of Arizona’s voting system, in November 2004 – on the heels of a well-funded campaign that warned of “economic hardship” caused by “illegal immigrants” – Arizona voters enacted Proposition 200. Among other things, Proposition 200 imposed: (1) new documentary proof of citizenship requirements for voter registration; and (2) new identification requirements for in-person voting by registered voters.⁶

A. Proposition 200’s Unique Voter Registration Requirement

As enacted, Proposition 200, which amended A.R.S. §§ 16-152, 16-166, and 16-579, now prohibits county recorders from registering Arizona citizens to vote unless the citizen’s registration application is accompanied by specified kinds of “evidence of

⁴ For a further description of how such polling place measures protect against fraud, see *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1333 (N.D. Ga. 2005).

⁵ See App. Tab B. at 2-3.

⁶ App. Tab B at 3. Proposition 200 also amended Arizona law to require state employees to verify the immigration status of any applicant for certain public benefits. This lawsuit does not challenge these provisions.

United States citizenship,” such as a passport (“**Registration ID**”).⁷ No other state in the country imposes a documentary proof of citizenship requirement on voter registration.

B. Proposition 200’s Strict Polling Place Identification Requirements and the Confusing Three Ballot System

As amended by Proposition 200, A.R.S. § 16-579 also now requires registered voters to satisfy new polling place identification requirements when casting in-person ballots on election day (the “**Polling ID**” requirements). Those voters must present either: (1) one form of photo-identification that bears the name, current address, and photograph of the voter, or (2) two other forms of identification that bear the name and current address of the voter. A.R.S. § 16-579(A). The Secretary of State has promulgated a “Procedure for Proof of Identification at the Polls” implementing Proposition 200’s Polling ID requirement, which regulations identify the particular forms of photo identification that will be accepted, such as a driver’s license.⁸ The Secretary of

⁷ Registration ID is limited to one of the following: the number of the applicant’s Arizona driver license or nonoperating identification license issued after October 1, 1996; a legible photocopy of the applicant’s birth certificate that verifies citizenship to the satisfaction of the county recorder; a legible photocopy of pertinent pages of the applicant’s United States passport identifying the applicant and the applicant’s passport number; a presentation to the county recorder of the applicant’s United States naturalization documents or the number of the certificate of naturalization; other documents established under the Immigration Reform and Control Act of 1986; or the applicant’s Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number. BIA and tribal treaty cards with numbers for identification of individual tribal members do not exist. App. Tab B, Ex. 58, ¶¶ 37, 38.

⁸ The Secretary of State has deemed “acceptable” the following forms of photo-identification that bear the name, current address, and photograph of the voter: (1) valid Arizona driver’s license, (2) valid Arizona nonoperating identification license, (3) Tribal

State has also deemed “acceptable” specific forms of identification without a photograph that bear the name and address of the elector (two are required), such as a utility bill and bank statement.⁹

To acquire the vast majority of “acceptable” forms of ID, voters must incur fees (*e.g.*, a driver’s license) or costs (*e.g.*, utility deposit).¹⁰ A voter lacking acceptable ID must acquire and pay for it at the voter’s own expense, thus placing a price tag on the right to vote. Although counties have made efforts to mail voters “free” Polling ID, Proposition 200 does not require them to do so.¹¹ Counties that accept election mail also require that it bear the voter’s name and address, but “*most* ‘Official Election Material’ do[es] not bear the name of the voter.”¹² Many Native Americans on reservations also

enrollment card or other form of Tribal identification, or (4) valid United States federal, state, or local government issued identification. App. Tab B at 5-6.

⁹ The full list of non-photo ID is: (1) utility bill of the elector dated within ninety days of the date of the election (for electric, gas, water, solid waste, sewer, telephone, cellular phone, or cable television); (2) bank or credit union statement that is dated within ninety days of the date of the election; (3) valid Arizona Vehicle Registration; (4) Indian Census Card; (5) property tax statement of the elector’s residence; (6) Tribal enrollment card or other form of Tribal identification; (7) vehicle insurance card; (8) Recorder’s Certificate; and (9) valid United States federal, state, or local government issued ID, including a voter registration card issued by the county recorder. App. Tab B at 5-6.

¹⁰ App. Tab E (summarizing the various forms of ID and their costs).

¹¹ Many Native Americans on reservations also do not have home mail delivery or individual P. O. boxes. App. Tab B, Ex. 58, ¶¶ 27, 28; App Tab H (Transcript Excerpts of Preliminary Injunction Hearing (“Tr.”) at 51:1 – 53:16). App. Tab B at 6, 34 (analyzing equal protection problem).

¹² See App. Tab B at 6, 34.

lack home mail delivery or individual P. O. boxes, and thus such election mail provides no assistance.¹³

Under Proposition 200, those who vote in person may receive one of three different kinds of ballots.

Regular Ballot: A voter who is able to present sufficient Polling ID with name and address information that matches the information available to the poll worker receives a regular ballot.

Regular Provisional Ballot: A voter who presents Polling ID recognized as sufficient “forms” of identification (such as an Arizona driver’s license or both a recent bank statement and a recent utility bill), and the name or address is *close* to, but does not match, the name and address on the signature roster, receives a “regular” provisional ballot. This ballot will be counted, with no further action by the voter, if the voter’s signature matches the county recorder’s records.

Conditional Provisional Ballot: Finally, a voter who is unable to present a form of Polling ID (or only one form of acceptable non-photo Polling ID) receives a “conditional” provisional ballot. A conditional provisional ballot will *not be counted* even if verified by matching signatures. For the ballot to count, the voter must return

¹³ See App. Tab B, Ex. 58, ¶¶ 27, 28; App Tab H (Transcript Excerpts of Preliminary Injunction Hearing (“Tr.”) at 51:1 – 53:16).

with Polling ID to the county recorder's office or other designated satellite location within three or five business days (depending on whether a state or federal election).¹⁴

Although not required by Proposition 200, in an effort to overcome some of its facial defects, counties have implemented special procedures for Native Americans. Native Americans who lack acceptable Polling ID *and* identify themselves as members of a federally-recognized Indian tribe, should receive a "regular" provisional ballot upon presenting one form of Tribal identification merely bearing the voter's name (without address).¹⁵

Under this system, a voter who has two forms of ID, neither of which has both the voter's correct name and address, may cast a regular provisional ballot (if the poll worker deems the information "close enough"), while a voter with a single completely accurate ID (such as a utility bill or U.S. Passport) may not (unless the voter announces, or is asked, if he is Native American and has any form of Tribal ID). Not surprisingly, this unusual three ballot system has caused much confusion. Maricopa County Elections Director Karen Osborne acknowledged that she has a "zero level of confidence" that poll workers will apply the Polling ID requirements consistently.¹⁶ Elections officials in other counties likewise gave widely varying deposition answers to the same questions about

¹⁴ App. Tab B, Ex. 3 at 4-5.

¹⁵ Not all Indian tribes issue enrollment or other identification cards. App. Tab E.

¹⁶ App. Tab B at 33-34.

whether a voter with certain forms of identification would receive a regular, provisional or conditional ballot.¹⁷

C. Proposition 200's Unique Requirements and Lack of a "Catch All" for Voters Without ID

In combination, Proposition 200's provisions are among the strictest in the nation, and include some provisions that put Arizona in a league of its own:

- Only Arizona requires proof of citizenship to register, and only Arizona rejects all registration applications, without exception, that are not accompanied by certain specified forms of ID;
- For Polling ID, Arizona allows only certain forms of photo ID, or *two* forms of non-photo ID, but all must include the voter's *current address*;
- Arizona does not permit an "affidavit" exception for voters who lack Polling ID, as is allowed in many states (Delaware, Hawaii, New Mexico, North Dakota, Ohio, South Dakota); and
- Arizona does not permit a "personal knowledge" exception for voters whose identity is known to polling officials, as is allowed in many states (Alabama, Alaska, Kentucky, North Dakota, Virginia).¹⁸

Unlike many states' laws, Proposition 200 thus contains no meaningful "safety net" for citizens who lack adequate ID, and who cannot afford to purchase it, for the right

¹⁷ *Id.*

¹⁸ Approximately half of the states have enacted identification requirements that go no further than the Help America Vote Act ("HAVA"), which, in contrast to Arizona: (a) does *not* require proof of citizenship; (b) applies only *once* to a discrete, limited group of first-time voters who registered by mail and for whom the registrar has not yet seen identification; (c) permits *any* type of photo identification, and does not require the photo identification to include address; and (d) permits the use of government checks, paychecks or *any* government document containing address. See 42 U.S.C. § 15483(b); see also website of the National Conference of State Legislatures <http://www.ncsl.org/programs/legman/elect/taskfc/voteridreq.htm>.

to vote.¹⁹ It also fails to allow those who lack, cannot afford, or could not locate acceptable Polling ID, the option of casting a regular provisional ballot subject to signature verification – a system the State agrees would adequately protect against voter fraud.²⁰

D. The Complete Exemption for Early Voters

Although designed to target fraud, Proposition 200 completely exempts from the burdensome Polling ID requirements the voting method in Arizona that is most susceptible to fraud – “early” voting that allows voters to vote by mail. An early voter may even drop off his or her ballot at the polls on election day without showing any Polling ID, while a person attempting to cast an in-person ballot without ID will be turned away. The record evidence is undisputed, that minorities – and Native Americans in particular, for whom voting in-person carries special significance due to cultural, language, and historical reasons – use early voting far less than Caucasians.²¹

Proposition 200 also applies its registration requirements unevenly. Under a “grandfather” clause, persons registered before the Act’s effective date are deemed to have provided satisfactory evidence of citizenship. Thus, unless a voter changes

¹⁹ App. Tab D at 14-16 (analyzing states’ voter ID laws containing true “fail safes” for voters who lack acceptable forms of ID, in contrast to Proposition 200).

²⁰ See App. Tab B at 8 and citations therein.

²¹ Minorities are three and a half times more likely than Anglo voters to vote at the polls. App. Tab B, Ex. 21 at 8; App. Tab H (Tr. at 26-28); see also App. Tab B, Ex. 58, ¶ 36 (percentages of Native Americans who require language assistance at the polls), Ex. 28 (Pew depo.) at 14; App Tab H (Tr. at 57:3-58:3).

registration from one county to another, those already registered need never provide documentary evidence of citizenship. A.R.S. § 16-166(G).

III. Proposition 200's Impact on Several Small Arizona Elections and the May 2006 Lawsuits

During the spring of this year, several small elections took place under Proposition 200's regulations, and confirmed the critics' worst fears about Proposition 200. In May 2006, after Proposition 200's effects on these small elections became known, ITCA filed this action and moved for preliminary injunctive relief, contending that Proposition 200: (1) constitutes an undue burden on the right to vote in violation of the Fourteenth Amendment; (2) constitutes a poll tax in violation of the Twenty-Fourth Amendment; and (3) violates the National Voter Registration Act ("NVRA").²² The action was ultimately consolidated with separate lawsuits filed by the two other groups of plaintiffs, including the Navajo Nation, the State's largest Indian Tribe, and another coalition of plaintiffs.²³

In June 2006, the district court set a preliminary injunction schedule that would have precluded Plaintiffs from conducting even limited discovery. Understanding the need to develop the record concerning Proposition 200's effects on the upcoming November 2006 general election (the first statewide general election under Proposition 200), Plaintiffs asked the district court to schedule the hearing for mid-August so as to allow a few weeks of accelerated discovery to develop facts concerning: (1) the nature

²² App. Tab A.

²³ See Dkt. 33, 142.

and extent of voter fraud in Arizona; (2) whether Proposition 200 was crafted to address it; and (3) the number of citizens who would be prevented from voting by Proposition 200. The Defendants opposed the request to allow discovery, but insisted that if any discovery occurred, the evidentiary hearing would need to occur after Plaintiffs' proposed date. The district court ultimately set the hearing later than Plaintiffs had requested. Plaintiffs then conducted limited discovery, and the key facts are now not in dispute.

IV. The Evidence Concerning the Harm That Proposition 200 Would Have Caused If Implemented in the General Election

The record evidence concerning the harm Proposition 200 would have caused in the November general election is undisputed: *it would have deprived tens of thousands of Arizona citizens of their right to vote on November 7, 2006.*

A. Thousands of Already-Registered Arizona Voters Would Have Been Unable to Vote in the November 2006 Election Unless the Ninth Circuit Stayed Implementation of the Polling ID Requirements

The record shows that many citizens lack any form of acceptable Registration or Polling ID. The poor, the elderly, Native Americans and other minority populations have disproportionately felt Proposition 200's impact because they are less likely to drive or own homes or cars, are more likely to live in group housing or apartments, and thus often lack the licenses or utility bills necessary to vote. But Proposition 200's effects went well beyond these groups. For example, Proposition 200 impacts women who have recently married and changed their names, citizens who use a P.O. box on their ID to avoid identity theft, and citizens who have moved but not obtained, at their own expense, a re-issued driver's license showing their new addresses. In many households, utility bills and

bank statements are in only one person's name, which precludes others in the household (for example a spouse, adult children, and grandparents) from using these forms of ID to vote. The ITCA submitted declarations from citizens affected by Proposition 200, such as Eva Steele, Tara Hernandez, Kenneth Totten, Tammy Pattison and Nicholas Fisher, Arizonans eligible to vote, but who do not have access to Registration ID, and thus cannot register. Mr. Totten, Mr. Fisher, Ms. Pattison and Ms. Steele all live on limited incomes and face a substantial financial burden if required to purchase proof of citizenship to vote.

The small elections held in the spring and the September primary confirmed that many Arizona citizens lack the ID required by Proposition 200. Thus, in the small Maricopa County elections held earlier this year, *over half of all conditional provisional ballots cast were not counted* because voters did not or could not produce proper Polling ID. In Pima County, where Tucson is located, *over 91% of conditional provisional ballots cast in the May election were not counted*. During the September 12, 2006 primary, of the nearly 520 conditional provisional ballots in Maricopa County alone, 73% were not counted.²⁴ In Coconino County, 74% of conditional provisional ballots cast in the primary were not counted. The numbers are much worse for Native Americans – 82% to 100% of conditional ballots cast on reservation precincts in three counties were

²⁴ Affidavit of Helen Purcell ("Purcell Aff."), App. Tab G, ¶ 3.

not counted.²⁵ If this percentage did *not* increase in the general election (even though an increase is likely because the previous elections involved “high efficacy voters”),²⁶ *nearly 4,400 conditional provisional ballots would likely not have been counted – in Maricopa County alone.*²⁷ Thus, Proposition 200’s impact on the small elections in which it was implemented confirmed that Arizona was headed for disaster in the upcoming general election.

B. Thousands of Arizonans Would Have Been Unable to Register for the General Election Absent the Ninth Circuit’s Order

Although the registration deadline has now passed, the evidence demonstrated that Proposition 200 had prevented tens of thousands of otherwise eligible citizens from registering. Plaintiffs’ expert, using a conservative methodology, estimated that at least 28,540 eligible Arizona residents lacked *any* form of Registration ID.²⁸ The State, although quibbling with this precise number, introduced no evidence supporting any lesser number, and there is no basis for believing that the margin of error in Plaintiffs’ estimate is large. To the contrary, *the Counties’ own hard data statistics showed that*

²⁵ Affidavit of Candace Owens (“Owens Aff.”), App. Tab F, ¶¶ 7, 10; (Dkt. 205) and Exs. 125, 126 attached thereto (statistics re Navajo and Apache counties).

²⁶ App. Tab B, Ex. 27 at 68 (Osborne depo.).

²⁷ Maricopa County Elections Director Karen Osborne testified that approximately 6,000 Maricopa County voters would vote a conditional provisional ballot during the general election. *Id.* Applying the rate of voters who did not return with acceptable ID in the primary election – 73 percent – means that 4,380 conditional ballots cast would not have been counted in the general election.

²⁸ App. B Tab B at 9-10 (and citations therein); App. Tab H (Tr. at 137:23-25); *see also* App. Tab H (Tr. at 138:11-141:3) (explaining the conservative nature of the methodology).

*nearly 21,000 voter registrations were rejected for lack of proof of citizenship.*²⁹ After the Ninth Circuit issued its order enjoining Proposition 200, nearly 11,000 registration applications were processed before the deadline.³⁰

C. Obtaining Registration ID and Polling ID Disproportionately Affects Certain Populations

The evidence of Proposition 200's impact on voting is both uncontested in the record below, and hardly surprising. If one does not travel internationally or drive, one likely will not have a passport or driver's license. Moreover, many citizens do not have copies of their birth certificates, and still others – such as those not born in a hospital – simply never obtained a birth certificate (which occurs with far more frequency among Native Americans and in rural parts of Arizona than in Eastern states). And, obtaining the most common forms of identification is an interdependent process – procuring one document (*e.g.*, a driver's license) usually depends on having another document (*e.g.*, a birth certificate or passport). In short, the statute is far less generous than its promoters led voters to believe. Plaintiffs' evidence, which was uncontested, also showed that Proposition 200 impacts certain groups of citizens – including minorities, poor and elderly citizens – more than others.³¹

²⁹ App. Tab B at 27 (and citations therein).

³⁰ *Almost 11,000 register to vote by Monday's deadline*, The Arizona Republic, October 11, 2006 at B11. However, many Counties are refusing to process the tens of thousands of voter registration applications rejected for lack of proof of citizenship before the Ninth Circuit entered its Order.

³¹ App. Tab B at 26-29 (setting forth in detail the impact on these groups); *see also* App. Tab B, Ex. 22, 32-36 (individual declarants).

V. The Record Evidence Concerning Alleged Voter Fraud

The critical issue concerning the absence of evidence of voter fraud is likewise undisputed.

Polling ID: As established by Defendants' discovery responses, there is *no evidence* of a single person attempting to vote in Arizona in the name of another during the past ten years (let alone a case involving an "illegal immigrant" pretending to be someone else).³² This is the only kind of fraud the Polling ID requirement would prevent. Thus, although Applicants have now invoked new information concerning alleged voting fraud by "felons," they have still never identified any "imposter" voting fraud in Arizona that the Polling ID requirement would prevent.

Registration ID: The evidence of voter fraud in the registration process – the fraud targeted by Proposition 200's Registration ID requirements – is scant. All but three Arizona counties reported *not a single* instance of non-citizens registering to vote in their counties.³³ The State, notwithstanding a concerted effort to identify voter fraud (including a fraud "hotline"), has identified only 238 cases of "alleged" non-U.S. citizens registering *over a ten year period*.³⁴ Of those 238 allegations, only ten resulted in

³² As for *allegations* of non-citizens voting (as opposed to charges), the numbers are similarly miniscule – just 38 instances, total, in which a non-citizen was initially alleged to have voted at a polling place in the last decade. Importantly, however, the Polling ID requirement only helps to ensure that the person voting is a registered voter, and would not have prevented this from occurring.

³³ App. Tab B at 21-22 (and citations therein).

³⁴ *Id.*

criminal charges.³⁵ And of the ten charged with a crime, only four were alleged to have actually voted – just 0.0014 percent of registered voters.³⁶

VI. The District Court’s Ruling, the Emergency Motion, and the Ninth Circuit’s Order Granting Interim Relief Pending the Appeal

The district court denied the request for preliminary injunction, even though the district court agreed that “hundreds, possibly thousands of individuals will not be able to secure the requisite identification to enable them to vote.”³⁷ Plaintiffs promptly filed a notice of appeal, a motion for injunction pending appeal, and further asked the district court to expedite the issuance of its findings of fact and conclusion of law. (Dkt. 189, 194, 203, 209.) After the district court failed promptly to act, Plaintiffs asked the Ninth Circuit for emergency relief pending the Ninth Circuit appeal.

The State opposed the emergency motion, and defended (as it does here) its general right to regulate elections, maintaining it has an interest in preventing fraud – propositions neither disputed nor pertinent to whether the specific manner in which *Proposition 200* purports to advance the State’s interests survives constitutional scrutiny in light of the protections afforded to the fundamental right to vote.³⁸ On this decisive

³⁵ *Id.*; see also App. Tab B, Ex. 30, ¶ 11. At least two of those cases have since been dismissed. See App. Tab B, Exs. 53, 54 (minute entries). The Secretary of State and Counties have no other information regarding actual prosecutions or convictions of non-citizens alleged to have registered or voted. Thus, the figures described above capture, for the most part, mere allegations.

³⁶ App. Tab B, Ex. 30 ¶ 11 (Ex. 3 to Osborne dep.).

³⁷ State App. Tab 5 (Dist. Ct. Order) at 13.

³⁸ The parties’ briefing to the Ninth Circuit is included in ITCA’s Separate Supplemental Appendix (“**Supp. App.**”) at Tabs 1-5.

point, the State could not and did not defend Proposition 200's most glaring constitutional defects, including its disenfranchising effect on Arizona's citizens, its irrational approach to the problem it purports to address, and its discriminatory impact on minority voters. Moreover, although the State sought to downplay Proposition 200's impact on the November election, it did not (and could not) dispute the disturbing reality of the situation: absent an interim order from the Ninth Circuit, *thousands of Arizona citizens would have been deprived of their fundamental right to vote* before the Court of Appeals had the opportunity to more fully evaluate Proposition 200's constitutionality.

Fourteen of Arizona's fifteen counties initially opposed the request for emergency relief, but in doing so did not defend Proposition 200's glaring constitutional defects. Instead, they argued that changing course would cause "confusion." But the record indicated that "it is a simple matter to delete the [Polling ID] requirement" in connection with the upcoming election.³⁹ Moreover, there was no evidence to suggest that any harm would occur from the supposed "confusion" cited by the Five Counties. The Counties' other arguments ignored that granting the Motion would merely mean that they *need not use* the Proposition 200-specific materials they had prepared, but imposed no other requirements other than that they conduct the November general election like every other general election in Arizona – without requiring those casting ballots on election day to

³⁹ App. Tab C (Response of Coconino County) at 6.

present Polling ID. As Coconino County confirmed, “[n]o harm will result to the county elections process” from the interim Order.⁴⁰

The evidence and arguments presented to the Court of Appeals thus confirmed that if it denied the Motion, thousands of Arizona citizens were certain to be disenfranchised before that court had fully evaluated whether the Constitution permitted the disenfranchisement. If the Ninth Circuit granted the Motion, it would merely allow the general election to proceed like general elections had for decades. Given the lack of *any* evidence whatsoever that granting the Motion would result in a “fraud” problem on election day or otherwise cause “confusion” of a kind that would cause any harm, the Court of Appeals properly granted the Motion, and entered an interim order staying implementation of Proposition 200, while leaving the issue whether Proposition 200 passes constitutional scrutiny for another day.

Not surprisingly, the Order received widespread media attention. The front page headline in the State’s largest newspaper, announced that voters would not need to bring ID to the polls on election day:⁴¹

⁴⁰ *Id.*; see also App. Tab H (Tr. at 100:21–102:1) (testimony of Coconino County Recorder); App. Tab B, Ex. 23, ¶¶ 7-13.

⁴¹ See <http://www.azcentral.com/help/articles/circ-facts.html>; see also <http://www.gannett.com/map/ataglance/phoenixnews.htm> (website of Gannett Co., Inc., which owns *The Arizona Republic*’s publisher, Phoenix Newspapers, Inc.; noting the paper’s weekday circulation of nearly one-half a million), last visited October 15, 2006.

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THE ARIZONA REPUBLIC

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TODAY'S QUICK READ



Moving a symbol of hope

A cross made of steel from the World Trade Center, which became a symbol of hope after the Sept. 11 attacks, is moved to a nearby church. As hundreds follow behind the fluted track that carries the cross, ironworkers sing God Bless America. The cross will have a temporary home at St. Peter's Church, three blocks from the site of the towers, during rebuilding at Ground Zero, A34

Voter-ID rules suspended

9th Circuit blocks Prop. 200 provision

By Amanda J. Crawford
THE ARIZONA REPUBLIC

Arizona won't have to prove citizenship to register to vote or show identification at the polls in November, a federal appeals court ruled Thursday.

The 9th U.S. Circuit Court of Appeals blocked the controversial new voting requirements passed in 2004 as part of Proposition 200. Opponents argued the provisions were unconstitutional, amounting to a poll tax that

could keep legal voters from casting ballots.

The ruling is likely to be appealed by the state. But, as of now, those who had problems registering because of the new requirements have until Monday to sign up to vote on Nov. 7.

More on the ruling's impact, A18

What it means

■ Arizona has until Monday to register to vote in the Nov. 7 general election. No proof of citizenship will be required.

■ On Nov. 7, the polls will be run the old way: No photo identification or proof of address will be required unless the courts overturn Thursday's order.

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Although the “fine print” in some stories explained that the State may appeal the ruling, other newspapers, television and radio similarly reported that voters would not need Polling ID for the November general election.⁴² Additionally, after the Circuit Court issued its Order, Maricopa County stopped including the ID requirement in its “public presentations,” and the “ID requirement information [was] . . . removed from all outreach materials and is not being distributed.”⁴³ *The Arizona Republic*'s headline is now the “status quo” in Arizona as understood by voters.

⁴² See Declaration of Sara S. Greene, attached hereto. Exhibit A to Ms. Greene's declarations contains the newspaper articles. The Court may take judicial notice of the fact that these publications occurred. See Fed. R. Evid. 201.

⁴³ Declaration of Linda S. Brown, attached hereto. Exhibit A to Ms. Brown's affidavit is an email dated October 6, 2006 from Tammy Patrick, Federal Compliance Officer for Maricopa County Elections Department, to members of the “Community Network.”

STANDARD FOR REVIEWING THE STAY REQUEST

A Court of Appeals' stay "is entitled to great weight." *Holtzman v. Schlesinger*, 414 U.S. 1304, 1314 (1973) (Marshall, J., in chambers). Accordingly, a stay application should ordinarily be denied except in "rare and exceptional cases." *Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013 (1993) (O'Connor, J., concurring in denial of stay application). To succeed, a stay applicant must show: (1) "there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction," (2) "there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous," (3) "irreparable harm is likely to result from the denial of a stay," and (4) the "balance of equities" (*i.e.* the "relative harms" to defendants, plaintiffs and the "public at large") tips in favor of defendants. *Bellotti v. Latino Political Action Comm.*, 463 U.S. 1319, 1320 (1983) (Brennan, J.) (denying stay application in election case) (quoting *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J.)). In cases that implicate the fundamental rights of thousands of people, like here, consideration of the balance of equities is especially important. *See Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (concluding that enjoining an election would burden the government, but that the interests of potentially disenfranchised voters outweighed the potential harm to the government).

ARGUMENT

The Court is unlikely to grant certiorari to review this interlocutory appeal, the balance of equities tips sharply in ITCA's favor, and the Court of Appeals ruled correctly

on an issue that was neither close nor difficult. Instructing voters that they must now bring ID to the polls – as the State and Five Counties request – would cause far greater disruption than leaving the Order intact. Simply put, there is no reason for this Court to intervene.

I. The Balance of the “Stay Equities” Tips Sharply in Favor of Denying the Application

We begin with the balance of equities, which bears paramount importance in cases involving a threat to fundamental rights. *See Lucas*, 486 U.S. at 1305. The decisive facts are not in dispute. If the Court grants the Application, Proposition 200 will deprive tens of thousands of Arizona citizens of their fundamental right to vote *before* the Court of Appeals (or this Court) has fully evaluated whether the Constitution permits this deprivation. In contrast, denying the Application will cause no harm. No Arizona general election has *ever* been conducted under Proposition 200’s identification rules, and thus the November 7, 2006 general election will proceed like general elections in Arizona have for years. There is no evidence that those past elections ever suffered from any fraud of the kind that Proposition 200’s Polling ID requirement will prevent – imposter voting. Conducting the election without asking voters for ID will be far easier and cause far less confusion.

A. Granting the Application Would Disenfranchise Thousands of Voters Who the Parties Agree Have the Fundamental Right to Vote

Conspicuously absent from the State or Five Counties’ briefs is any real attempt to confront the significant disenfranchising impact of their request. The State’s suggestion (at 13) that “voters have overwhelmingly complied” with Proposition 200’s requirements

in a few small elections cannot change what those elections forecast for the general election: imposing the Polling ID requirement means that in Maricopa County alone, nearly 4,400 ballots that are cast will likely not be counted.⁴⁴

Trying to minimize the impact of the voter registration requirements, the State (at 18) cites ITCA's expert's estimate that 98% of voters "do possess satisfactory evidence of U.S. citizenship." But this too merely *confirms* the critical point that an estimated 28,540 eligible Arizonans *do not* have any form of Registration ID, and that nearly 21,000 voter registrations were already rejected for lack of proof of citizenship.⁴⁵ The loss of one vote constitutes irreparable harm, and the issue here is thousands of lost votes.

B. Applicants Have Never Identified Any Evidence of Any Fraud That the Polling ID Requirement Will Prevent

As for the threat of fraud at the polling place, the Five Counties made no argument concerning fraud to the Court of Appeals. To support their new claim of Arizona's "real problem[]" with voter fraud (at 10), they invoke documents that are *not* in the record and that lack any foundation whatsoever. More fundamentally, both the Five Counties and State simply ignore that the alleged fraud they discuss in their papers has *nothing* to do with Proposition 200's Polling ID requirement. The undisputed fact is that *there is no evidence of any fraud of a kind that Proposition 200's Polling ID requirement will prevent* – imposter voting.

⁴⁴ See *infra*, n. 27.

⁴⁵ App. Tab B. at 27 (and citations therein).

As for registration fraud, the evidence here is also scant and no longer an issue for the general election given the lapsed registration deadline. Moreover, the evidence of alleged (not proven) fraud – 238 cases over a period of ten years – barely weighs on the scale as compared to the thousands of legitimate voters who could not register with the Registration ID requirement in place.

The Five Counties’ argument about Arizona’s few “close elections” thus demonstrates that the Court should deny the Application. There is no evidence that the Polling ID requirement will prevent any fraud in the upcoming general election. Yet, *in Maricopa County alone* the Polling ID requirement would prevent nearly 4,400 ballots from being counted – a number large enough to make a difference in every example cited by the Five Counties, and in elections not even that close. The Five Counties’ speculation thus pales in comparison to what we know: the Polling ID requirement is certain to disenfranchise thousands of voters in the general election.

C. Applicants’ Speculation About Confusion and Election Disruption Fails to Justify a Stay

Unable to dispute that thousands will be disenfranchised, Applicants speculate that unless voters are asked for ID at the polls, voter and poll worker confusion will result, and cause irreparable harm. But these arguments misconstrue the Order, and cannot be squared with either the record or common sense. Importantly, the Order simply means that the general election will proceed as have Arizona elections for decades – under a system that is already in place, and is far simpler and easier to administer.

As a threshold matter, considerations of “confusion” weigh strongly in favor of denying the Application. The Court of Appeals issued the Order over ten days ago, and immediately received front page media coverage that told voters: “Voter-ID Rules Suspended.”⁴⁶ Indeed, a real risk exists that voters who *have* the necessary ID would not bring it to the polls on election day were the Ninth Circuit’s Order reversed. Yet, no harm will occur if voters happen to bring with them unnecessary Polling ID. As a county recorder candidly acknowledged, “If people come and show [ID], we would just tell that that [the ID] was not needed.”⁴⁷

Less harm will also occur if a few poll workers (rather than all poll workers) request Polling ID because they are “confused.” Furthermore, there is a greater threat of “inconsistent application” *with* Proposition 200 in place due to the confusing rules concerning who gets what kind of ballot.⁴⁸ Hence, the Five Counties’ suggestion that “fairness” requires disenfranchising voters does not withstand scrutiny.

As for “retraining” poll workers, the county officials actually doing the work have confirmed that this merely involves communicating to poll workers that they need not apply Proposition 200’s complicated procedures – procedures that are *in addition* to those

⁴⁶ See Declaration of Sara S. Greene, attached hereto. Exhibit A to Ms. Greene’s declaration are two articles: Amanda J. Crawford, *Voter ID rules suspended for November Election*, The Arizona Republic, at A1, A18; E.J. Montini, *A court’s solution to a phony problem draws fake outrage*, The Arizona Republic, October 8, 2006 at B10.

⁴⁷ App. Tab H (Tr. at 100:21 – 101:3).

⁴⁸ See App. Tab B at 33-34 (noting an election director’s acknowledgement that poll workers will likely apply the Polling ID requirements inconsistently).

already in place and used in the last general election.⁴⁹ In fact, after the Court of Appeals issued its Order, a Maricopa County Federal Compliance Officer contacted dozens of affected parties explaining that, although poll workers would receive Proposition 200 training, they would also receive training to conduct the elections without the ID requirement. As the Compliance Officer explained, “it will be far easier to convey the message that ‘ID IS NOT REQUIRED TO OBTAIN A BALLOT’ if the ruling stands [than to forego Polling ID training altogether].” (Emphasis in original).⁵⁰ The Compliance Officer further explained that additional follow up with poll workers would occur to ensure they complied with the appropriate procedures, and that “on Election Day Trouble Shooters as well as Party Observers will be present to ensure compliance with whatever the final decision is” concerning procedures.⁵¹

Other county election officials have confirmed that administering the general election without Proposition 200’s complicated procedures, and three kinds of ballots, would *decrease* voter confusion, not cause it.⁵² This is because Arizona has never conducted a general election with the Polling ID requirements in place, and election

⁴⁹ See Declaration of Linda S. Brown, attached hereto. Exhibit A to Ms. Brown’s affidavit is an email dated October 6, 2006 from Tammy Patrick, Federal Compliance Officer for Maricopa County Elections Department, to members of the “Community Network,” describing Maricopa County’s decision to continue training poll workers on Proposition 200. Although not in the record, the Court may take judicial notice of the fact of this communication under Fed. R. Evid. 201.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See App. Tab B, Ex. 28, at ¶¶ 7-13 (Declaration of Patty Hansen).

officials are perfectly capable of conducting elections just as they have conducted them for decades. Applicants' suggestion that more problems will be caused by not asking voters for ID on election day is simply groundless.

The Five Counties' suggestions (at 18) that materials have been printed, and there is no "time to revise election materials," simply misconstrues the Court of Appeals' Order. As Coconino County confirmed to the Court of Appeals, counties need not prepare *any* new election materials or order *any* new supplies; rather, they simply need to *not use* the new and cumbersome election materials prepared specifically for Proposition 200.⁵³ Thus, counties will have *less* work because they will not need to post the billboards and other signs concerning Polling ID (nor will they have to print any new ballots). Although they will have expended resources on materials they need not use, that does not amount to irreparable harm in this context. *Cf. Fla. Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) (staying enforcement of city ordinance pending appeal and noting that "the public interest does not support the city's expenditure of time, money and effort in attempting to enforce an ordinance that may well be held unconstitutional").

⁵³ The Coconino County Elections Director, also testified that Proposition 200's Polling ID procedures are "complex and confusing," and explained specifically why proceeding without Proposition 200 could be "easily done" in a uniform manner. App. Tab H (Tr. at 99-101).

D. Applicants' Remaining Equities Arguments – Pre-clearance and “Enjoining” the Election – Have Nothing to Do With the Issues Here

The State’s suggestion (at 12) that absent a stay from this Court, the Order will “interfere[]” with an *impending* election is erroneous. As Applicants acknowledge, Proposition 200 has *no* impact on early voting. Moreover, the Order does not “enjoin” the election, but rather means it will proceed without Proposition 200 implemented – just like the last general election. Such relief is hardly unusual.⁵⁴

The Order also raises no issue concerning “Section 5 pre-clearance.” If a court stays implementation procedures that have been pre-cleared, the last legally enforceable procedures become operative. *See Abrams v. Johnson*, 521 U.S. 74, 96-97 (1997); *Navajo Nation v. Arizona Indep. Redistricting Comm’n*, 230 F. Supp. 2d 998, 1004 n.8 (D. Ariz. 2002); *Brooks v. State Bd. of Elections*, 775 F. Supp. 1470, 1480 (S.D. Ga. 1989) (“If a change is not precleared then the State retains the option of returning to the *status quo ante*.”). More fundamentally, “this Court has created an exception to the pre-clearance requirement in certain cases involving federally-court-ordered voting changes.” *Lopez v. Monterey County*, 525 U.S. 266, 286 (1999) (citing *Connor v. Johnson*, 402 U.S. 690, 691 (1971)). Simply put, voting changes made by a federal court trump any pre-clearance requirement. *See id.* (noting that this “exception grows largely from

⁵⁴ *See, e.g., Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1300 (N.D. Ga. 2006) (enjoining voter ID requirement six days before election); *Common Cause/Ga. v. Billups*, No. 4:05-CV-0201-HLM, slip op. at 44 (N.D. Ga., Sept. 15, 2006) (“[T]he Court is not enjoining the elections that are already in process Instead the Court simply is precluding the State from requiring that voters present a Photo ID The elections may still proceed.”).

separation-of-powers concerns arising where a voting measure is the product of a federal court”). Not surprisingly, courts in other states subject to pre-clearance have had no difficulty enjoining voter ID requirements, even days before an election.⁵⁵ Here, the Order merely means the election will be conducted in accordance with the last operative procedures – those used in the last general election. At bottom, pre-clearance is a non-issue.

II. The Court of Appeals Correctly Applied the Standards for Interim Relief

“The standard for evaluating stays pending appeal” required the Court of Appeals to consider whether ITCA demonstrated: (1) “a probability of success on the merits and the possibility of irreparable injury,” or (2) “that serious legal questions are raised and that the balance of hardships tips sharply in [their] favor.” *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). The threatened deprivation of a fundamental right, by itself, constitutes a threat of irreparable injury. *See e.g., Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991). Moreover, a case that raises “serious questions” or a “colorable” claim regarding constitutional rights necessarily involves a potential for irreparable injury. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2002) (district court erred in applying preliminary injunction standard by requiring the constitutional violation to be “clearly established”).

⁵⁵ *See infra*, n. 54.

A. The Court of Appeals Correctly Recognized That Serious Questions Exist Concerning Proposition 200's Constitutionality

In the context of requesting interim relief, ITCA demonstrated that Proposition 200 suffers from several defects that raise serious questions about its constitutionality. Importantly, voting is a fundamental right protected by the Fourteenth Amendment's Equal Protection Clause. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969); *Wesberry v. Sanders*, 376 U.S. 1 (1964). Accordingly, courts have traditionally applied strict scrutiny to state regulations that impinge upon that right. *See, e.g., Kramer*, 395 U.S. at 633; *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). In the context of a challenge to candidate ballot access, the Court has also applied a sliding scale balancing test. *See Burdick*, 504 U.S. at 434. Under that analysis, "severe restrictions" must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (citations omitted). "[R]easonable, nondiscriminatory restrictions," require the State to show that "important regulatory interests . . . justify the restrictions." *Id.* (citations and internal quotations omitted).⁵⁶

Proposition 200's restrictions are severe, and are neither "reasonable" nor "nondiscriminatory," as shown by its disparate impact on minorities, Native Americans,

⁵⁶ Although the issue will not be addressed until the appeal, this case involved staying changes to Arizona's general election procedures that complicated the process, not stopping an election or requiring changes to the ballot. The district court incorrectly applied the standard applicable to requests to enjoin an election. *See State App. Tab 5* (Dist. Ct. Order) at 7 (invoking standard appropriate in cases involving stopping elections set forth in *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 197 (9th Cir. 2003)); *cf. Lucas*, 486 U.S. at 1305 (applying appropriate interim standard in cases like this).

the poor, the elderly, and others. Proposition 200 is neither necessary nor narrowly drawn to advance any legitimate state interest, as evidenced by the availability of other effective means to prevent voter fraud, *i.e.*, Arizona's prior system and other states' more-narrowly tailored ID laws. Unlike many states' voter ID laws, Proposition 200 fails to provide: (1) a catch-all provision to allow anyone lacking ID to cast a regular provisional ballot subject to signature verification – a system the State admits protects against voter fraud; and (2) a means for citizens to obtain the requisite ID without cost, which likewise renders the statute highly constitutionally suspect.⁵⁷

Finally, if a real problem with voter fraud existed, Proposition 200 addresses the issue in an irrational manner by requiring Polling ID for some but not all voters (*e.g.*, early voters), grandfathering in registered voters, and implementing an incoherent system of provisional ballots that has a discriminatory impact. *Cf. Common Cause/Georgia*, 406 F. Supp. 2d at 1367-68 (enjoining Georgia's photo identification requirement for in-person voting as a poll tax and undue burden on the right to vote, despite availability of state identification free of charge and claims by county officials of instances of voter fraud); *Campbell v. Hull*, 73 F. Supp. 2d 1081, 1082-83, 1092 (D. Ariz. 1999) (applying *Burdick* to ballot access challenge and noting that voting restrictions can be "severe" even if voters exercising "due diligence" could eventually comply with them); *Weinschenk v. State*, No. 06AC-CC00656, slip op. at 9 (Mo. Cir. Ct., Cole County, September 14, 2006) (voter ID requirement impermissibly burdened voting rights of "the

⁵⁷ See App. Tab B at 22-25, Tab D at 6-13.

elderly, the poor, the undereducated, or otherwise disadvantaged ... outside the mainstream of society who are least equipped to bear the costs or navigate the many bureaucracies” to obtain documentation).

Even if the disenfranchisement of thousands of Arizona citizens were considered less than a severe restriction on the right to vote, the absence of *any* evidence of voter impersonation fraud, and scant evidence of other fraud, renders Proposition 200 unlawful under any balancing test.

B. The State’s Efforts to Find Flaw With the Court of Appeals’ Order Fail

1. The State’s Standard of Review Argument Disregards That the Court of Appeals Entered an Interim Order and Has Not Yet Reviewed the District Court’s Ruling

The State argues (at 11-13) that the Court of Appeals failed to give the district court appropriate deference in reviewing its denial of “the preliminary injunction.” That argument, however, is fundamentally flawed because the Court of Appeals has not yet reviewed the district court’s underlying decision. Instead, it entered an interim stay order *pending* the appeal. Moreover, the district court never ruled on ITCA’s request for a stay pending the appeal, and thus the Court of Appeals did not review any such order from the district court. Thus, the State’s main argument for why the Court of Appeals was “demonstrably wrong” misses the point completely.

More fundamentally, the State’s argument overlooks that the critical and material facts in this case are not in dispute, as both the record and district court’s order makes

clear.⁵⁸ Accordingly, when the Court of Appeals actually reviews the district court's order, it will do so almost entirely on the basis of the legal significance of the undisputed facts. Of course, the Court of Appeals always reviews such issues of law de novo. *Textile Unlimited, Inc. v. ABMH and Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001).

2. The State's Legal Standard Arguments Likewise Miss the Mark

Although the State also suggests (at 12-13) that the Court of Appeals failed to apply the correct legal standard in determining whether to issue the Order, it acknowledges (at 11) that the appropriate inquiry at this interim stage turns on whether "serious legal questions are raised" and "the balance of hardships." As noted above, numerous serious questions exist concerning Proposition 200's constitutionality, and hard data proves Proposition 200 has disenfranchised thousands of voters and will disenfranchise thousands more – data the State does not dispute.⁵⁹ Moreover, it is apparent that the district court applied the incorrect legal standard.⁶⁰ Thus, the appropriate legal standard required the Court of Appeals to issue the Order.

The State's remaining arguments merely address its general right to regulate elections. But no one contests this general right. Instead, the critical legal issue – not yet addressed by the Court of Appeals – will be whether *Proposition 200* advances the

⁵⁸ See, e.g. State App. Tab 5 (Dist. Ct. Order) at 9, 13 (noting Registration ID "will cost potential voters between \$10 and \$100," that "some individuals will have to obtain a form of [registration] identification, that the identification requirements are "a constructive poll tax," and that "hundreds, possibly thousands, of individuals will not be able to secure the requisite [polling] identification to enable them to vote").

⁵⁹ App. Tab B at 26-29 (and citations therein); App. Tab D at 9-10.

⁶⁰ See *infra*, n.56.

State's interests in preventing fraud in a manner consistent with the constitutional protections afforded to the fundamental right to vote. In the context of interim relief, it is enough to note that Proposition 200 purports to address voter fraud by imposing strict identification requirements on one voting method (in-person voting), while completely *exempting* another voting method from *any* identification requirements (early voting). Yet the latter method poses a *greater* risk of fraud, while the former is used in disproportionately larger percentages by poor and minority voters (particularly Native Americans). Moreover, the particular form of voting fraud targeted by the strict Polling ID requirements – imposter voting – is so rare that neither the State nor the counties have been able to identify *any* such fraud, and other states have addressed this interest with far less restrictive statutes. A statute like Proposition 200 that has so little connection to its stated purpose, while preventing thousands of citizens from exercising a fundamental right, raises serious constitutional questions.

The district court's order also acknowledged that “[P]laintiffs have shown a possibility of success on the merits” and that the evidence presented showed that “hundreds, possibly thousands, of individuals will not be able to secure the identification to enable them to vote.”⁶¹ This, of course, confirms the propriety of the Court of Appeals' interim Order: given the serious questions concerning Proposition 200, Arizona's general election should, as in the past, be conducted without Proposition 200,

⁶¹ State App. Tab 1 (Dist. Ct. Order) at 7, 13.

until the Court of Appeals has an opportunity to determine whether the Constitution permits that disenfranchisement.

III. The Five Counties' Laches Argument Provides No Reason to Stay the Order

“To establish laches, a defendant must establish (1) lack of diligence by the plaintiff, and (2) prejudice to the defendant.” *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 987 (9th Cir. 2004). Absent prejudice, laches does not apply, regardless of the plaintiff’s lack of diligence: “[L]aches is not a doctrine concerned solely with timing. Rather, it is primarily concerned with prejudice. A lengthy delay, even if unexcused, that does not result in prejudice does not support a laches defense.” *Id.* at 988 (citation and internal quotations omitted).

Moreover, “dilatory motions have had the effect of precluding injunctive relief only when they were filed on the eve of primaries or general elections themselves.” *Puerto Rican Legal Def. and Educ. Fund v. City of New York*, 769 F. Supp. 74, 79 (E.D.N.Y. 1991) (emphasis added) (quoting *South Carolina v. United States*, 585 F. Supp. 418, 423 (D.D.C. 1984)). Thus as courts recognize, “‘laches must be invoked sparingly’ in suits brought to vindicate the public interest.” *Apache Survival Coalition v. United States*, 21 F.3d 895, 905 (9th Cir. 1994) (quoting *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851 (9th Cir. 1982)). In the voting rights context, due to the ongoing harm, laches has accordingly been found inappropriate even though plaintiffs could have filed suit years earlier. *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990).

Plaintiffs filed this action in May 2006, in a timely manner and without unreasonable delay, after: (a) it became clear that the counties were rejecting thousands of voter registration applications due to applicants' failure to meet Proposition 200's proof of citizenship requirements; (b) voters in small local elections in the spring of 2006 were disenfranchised due to the polling place ID requirements; and (c) the Secretary of State announced in March 2006 that she would instruct the counties not to follow the U.S. Election Assistance Commission's guidance to accept Federal Mail Voter Registration Forms without supplemental proof of citizenship.

Plaintiffs then diligently prosecuted this action at all times without delay. Because the original preliminary injunction hearing date of July 18 would have permitted *no* discovery – in a case where the facts, although ultimately largely undisputed, matter greatly – Plaintiffs requested, and the Court permitted, *expedited* discovery. Although Plaintiffs requested a hearing date of August 14-15 (weeks within the original date), the district court set the hearing for August 30-31. Although the district court did not issue its order until eleven days later (and did not issue its findings until 41 days later), Plaintiffs promptly appealed and sought interim relief from the district court and Court of Appeals.

The cases relied upon by the Five Counties are wholly inapposite. The Five Counties place great reliance on *Mathieu v. Mahoney*, 851 P.2d 81, 83-84 (Ariz. 1993), a lawsuit challenging a ballot initiative that was filed so late that “[l]ess than 24 hours passed from the time the complaint was served until the matter was litigated on the merits in the trial court.” As the Arizona Supreme Court noted, “[i]n 24 hours, defendants had

to retain counsel; marshal their witnesses, facts and legal arguments; analyze the challenge; research and brief the issues; and prepare for a trial on the merits to defend against undisclosed evidentiary materials presented by plaintiffs.” *Id.*, 851 P.2d at 84.

Unlike *Mathieu* or *Harris v. Purcell*, 973 P.2d 1166 (Ariz. 1998), also relied upon by the Five Counties, the present case was filed with sufficient time to allow the parties to take written discovery, depose witnesses, retain experts, research and brief the issues, and participate in hearings.

Moreover, unlike the cases cited by the Five Counties, the Plaintiffs – while seeking to protect the constitutional right to vote – have never sought to enjoin, delay, or postpone an election, or modify a ballot. *See Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (action seeking to postpone the California gubernatorial recall election after absentee voting had begun); *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004) (candidate, without offering reason for delay, challenged third-party petition deadline *after* deadline had passed and sought to get on ballot after some absentee ballots had been mailed); *Harris* (plaintiff acted with unreasonable delay in seeking to remove certified initiative from ballot); *Mathieu* (same). Lastly, as demonstrated above, the only “prejudice” Applicants can point to is the expense of printing election materials (like posters) that they will no longer need to use. That, of course, is not prejudice in the relevant sense. The equities in this case do not justify applying laches to stay the Order.

IV. The Full Court Will Not Likely Grant Certiorari in Connection With the Underlying Appeal Concerning a Preliminary Injunction

The State's suggestion that the full Court will take review of this appeal overlooks the procedural posture of this case. The Court of Appeals' Order did not permanently enjoin Proposition 200, and did not find the statute invalid. Rather, it merely entered an interim order staying implementation of "Proposition 200's voting identification requirement [only] in connection with Arizona's November 7, 2006 general election" and confirmed the existing briefing schedule.⁶² This limited interim order will almost certainly never be entertained by this Court.

Moreover, the Court of Appeals has yet to rule on the underlying appeal in this matter concerning the district court's denial of a preliminary injunction. Therefore, there is no "decision invalidating Proposition 200" by the appellate court for this Court to consider.⁶³ Moreover, after the Court of Appeals decides the appeal, there will likely be a trial on the merits in the district court, and potentially another appeal to the Court of Appeals. Consequently, it cannot be said that the Court will likely grant certiorari in connection with the underlying appeal.

The extraordinary relief sought here is not necessary "to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals." *New York Natural Res. Def. Council v. Kleppe*, 429 U.S. 1307, 97 S. Ct. 4, 6 (1976) (Marshall, J., in chambers). Nothing would bar this Court from entertaining a

⁶² State App. Tab 2 (9th Cir. Order) at 1-2.

⁶³ State's App. at 19.

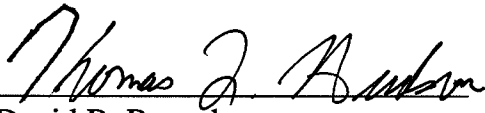
petition for certiorari should Applicants decide to eventually file one. But until the issues are clarified by the Court of Appeals' ruling (most likely after a trial on the merits), a grant of certiorari is not only far from "reasonably probable," but almost certain not to occur. Simply put, there is no reason for this Court to intervene at this stage in the proceedings. *Id.* (expressing doubt that four Justices would vote to grant a writ of certiorari on a question appropriately before the Court of Appeals); *see also Multimedia Holdings Corp. v. Circuit Ct.*, 544 U.S. 1301 (2005) (Kennedy, J., in chambers) (denying stay application because it was unlikely four Justices would vote to grant certiorari).

CONCLUSION

The balance of hardship equities tips sharply in favor of denying the Application, and the Supreme Court is not likely to grant certiorari in connection with the pending appeal. Accordingly, for the foregoing reasons, the Court should deny the Applications for stay and leave the Court of Appeals' interim Order intact pending the underlying appeal.

RESPECTFULLY SUBMITTED this 16th day of October, 2006.

OSBORN MALEDON, P.A.

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CERTIFICATE OF MAILING

Original and two copies of the foregoing sent
via Federal Express this 16th day of October,
2006 to:

Supreme Court of the United States
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Washington, DC 20543

Copy of the foregoing e-mailed this 16th day of
October, 2006 to:

Danny Bickell
United States Supreme Court
dbickell@sc-us.gov

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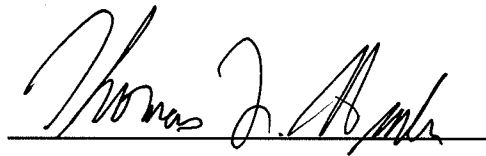
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Thomas J. Ambler

Declaration of Sara S. Greene

Pursuant to 28 U.S.C. § 1746, I, SARA S. GREENE, hereby declare as follows:

1. I am attorney with Osborn Maledon, counsel for Plaintiffs Inter Tribal Council of Arizona, Inc. et al. I am a member in good standing with the State Bar of Arizona.

2. I submit this declaration in support of Plaintiffs/Respondents' Opposition to Applications for Emergency Stay of the Order of the Ninth Circuit enjoining Proposition 200 pending appeal.

3. Attached hereto are true and correct copies of an article that appeared in the Arizona Republic on October 6, 2006 entitled "Voter ID rules suspended for November election," as well as an editorial that appeared in the Arizona Republic on October 8, 2006 entitled "A court's solution to a phony problem draws fake outrage." Also attached is a true and correct copy of an article that appeared in the Arizona Republic on October 11, 2006 entitled "Almost 11,000 register to vote by Monday's deadline." These are attached as Exhibit A to this affidavit.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 16 day of October, 2006.

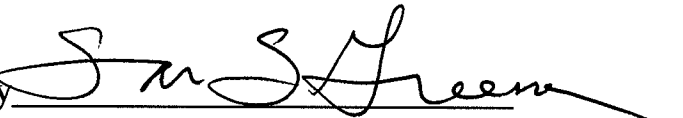
By 
Sara S. Greene

Exhibit A



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Almost 11,000 register to vote by Monday's deadline

Oct. 11, 2006 12:00 AM

Nearly 11,000 Arizonans registered to vote Monday, the deadline for the Nov. 7 general election.

Figures released Tuesday by the Arizona Secretary of State's Office showed that 10,967 forms were filed Monday, of which 6,931 came through online requests via the state's EZ Voter program.

The registrations come after the 9th Circuit Court of Appeals on Thursday put a hold on voting requirements approved by voters two years ago. Those provisions include a requirement that anyone registering to vote show proof of U.S. citizenship.

Although the citizenship standard was not required for this last round of registrations, elections officials note that most registrations happened through the EZ voter system, which requires a valid Arizona driver's license. Those with licenses must have shown citizenship status to get their licenses.

The EZ Voter system has grown in popularity, statistics show. In the month preceding Monday's deadline for registrations, 39,375 people signed up online, a more than threefold increase over the number who did so in 2002, the last statewide election not held in a presidential-election year.

The recorders' offices in Arizona's 15 counties will process the forms and provide breakdowns by party.

Voter ID goes to high court

Arizona Attorney General Terry Goddard announced Tuesday that he would soon take up the issue of the state's voter-identification law with the U.S. Supreme Court.

On Monday, the 9th Circuit Court of Appeals denied Goddard's motion to reconsider its ruling from Thursday to put the voter-ID requirements of 2004's Proposition 200 on hold. His office plans to ask the Supreme Court for "emergency relief" in hopes the high court will review the decision before the Nov. 7 general election.

The 9th Circuit order last week came after several plaintiffs charged that the requirement for Arizonans to prove citizenship and present identification when voting was unconstitutional and violated federal voting law. Among their arguments: forcing citizens to purchase appropriate identification in order to vote amounted to a poll tax that was unfair to the poor.

Unless the high court acts before the election, voters will not be required to show identification at the polls.

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Voter-ID rules suspended for Nov. election

9th Circuit blocks Arizona's Prop. 200

Amanda J. Crawford
The Arizona Republic
Oct. 6, 2006 12:00 AM

Arizonans won't have to prove citizenship to register to vote or show identification at the polls in November, a federal appeals court ruled Thursday.

The 9th U.S. Circuit Court of Appeals blocked the controversial new voting requirements passed in 2004 as part of Proposition 200.

Opponents argued the provisions were unconstitutional, amounting to a poll tax that could keep legal voters from casting ballots.

The ruling is likely to be appealed by the state. But, as of now, those who had problems registering because of the new requirements have until Monday to sign up to vote on Nov. 7.

What it means

- Arizonans have until Monday to register to vote in the Nov. 7 general election. No proof of citizenship will be required.

- On Nov. 7, the polls will be run the old way: No photo identification or proof of address will be required unless the courts overturn Thursday's order.

More on the ruling's impact.

- **Voter-ID action called victory for poor**

- **What Valley residents have to say**

- **Proposition 200 at a glance**

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A court's solution to phony problem draws fake outrage

Oct. 8, 2006 12:00 AM

After the 9th U.S. Circuit Court of Appeals blocked the voter identification requirements of Proposition 200, Rep. J.D. Hayworth issued a statement that read, "This decision is a slap in the face to every Arizona voter by out-of-control activist judges. It risks throwing the upcoming election into chaos. Every illegal vote dilutes every legal one, robbing legal voters of a fundamental constitutional right."

Chaos? Illegal voting? Robbery?

Kind of makes me wonder why Hayworth opposed Proposition 200 when it was proposed in 2004.

Then again, the rules that existed before the proposition passed are the same ones that essentially existed from the time Arizona became a state. Has there been chaos all that time? Millions of illegal votes cast?

"When our attorneys asked all of the counties in Arizona to present all of the evidence they had of anybody who was not a citizen registering or voting they came up with a total of 38 allegations over 10 years," said Linda Brown, of the Arizona Advocacy Network, one of the groups trying to block the ID provisions. "And they came up with zero allegations of voter impersonation."

Those who argue against the voter identification requirements of Proposition 200 describe it as a solution to a problem that didn't exist.

"That's it in a nutshell," said David Rosenbaum, a lawyer who worked on the case. The only harm done, he added, was to the legitimate voters who were turned away at the polls on Election Day.

According to Secretary of State Jan Brewer, 398 people in Maricopa County cast ballots that weren't counted because they didn't follow up with ID. This doesn't mean that they weren't legitimate, only that they didn't take the steps to go back and prove it.

"The ID provision throws the baby out with the bath water," Rosenbaum said.

That won't stop some politicians from trying to capitalize on it, however.

"There are supporters of Prop. 200 who were shocked when they realized that these voting barriers are having no impact on the immigration problem but instead are prohibiting disabled people, the elderly, low-income people from this most basic right," Brown said.

One plaintiff in the case was a disabled woman named Eva Steele, a resident of an assisted-living facility who has had trouble meeting Proposition 200's proof-of-citizenship and residency requirements. She tried to speak at a hearing conducted by Hayworth and others on this issue but wasn't permitted to do so.

When I wrote about her a few months back she said, "If I can't vote and I can't speak, what's the next of our rights to go?"

On Friday, a Hayworth spokesman told me the "chaos" comment was meant to reflect an observation by Secretary of State Brewer, who told one reporter, "I'm very concerned about the confusion that this (court decision) potentially will create in the upcoming election, with the retraining of all the poll workers and the re-education of the public so close to November 7."

Hayworth's "chaos" statement doesn't mention Brewer, polls or retraining, however. Nor does it mention his opposition to Proposition 200. Besides, what would retraining poll workers or voters involve beyond telling them to follow the same old rules we've always used?

The same rules that were in effect when Proposition 200 passed. And when Hayworth was first elected. And re-elected five times. Is that evidence of chaos?

Reach Montini at ed.montini@arizonarepublic.com or (602) 444-8978. Read his blog at montiniblog.azcentral.com.

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Declaration of Linda S. Brown

Pursuant to 28 U.S.C. § 1746, I, LINDA S. BROWN, hereby declare as follows:

1. My name is Linda S. Brown. I am the Executive Director for the Arizona Advocacy Network Foundation ("AzAN"), a non-partisan coalition of grassroots and advocacy organizations, individuals, and leaders that promotes social, environmental, and economic justice for all of Arizona's citizens. One of the goals of AzAN is to promote the participation of Arizona voters in elections.

2. In my capacity as Executive Director, I seek to stay informed of advocacy organizations' voting-related efforts, as well as the work of Arizona counties in administering elections.

3. Toward that end, I am on various email distribution lists, including one that is sent periodically to the "Community Network" from election officials in Maricopa County. The Community Network includes board workers, city clerks, as well as advocates and activists for civic participation.

4. On October 6, 2006, I received an email from Tammy Patrick, Federal Compliance Officer for Maricopa County, that was also sent to other individuals in the Community Network. A true and correct copy of that email is attached as Exhibit A to this affidavit.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 9 day of October, 2006.

By



Linda S. Brown

Exhibit A

From: Linda Brown [Azadvocacy@msn.com]
Sent: Monday, October 16, 2006 12:05 PM
To: Greene, Sara; Rosenbaum, David; khartman
Subject: Fw: Re Ninth Circuit Decision

----- Original Message -----

From: Tammy Patrick - RISCX

To: director@acluaz.org ; herediaf@dnc.org ; Jason Barraza ; Leticia Ramos - RISCX ; Azadvocacy@msn.com ; lisa.magana@asu.edu ; lprashad@arizonapirg.org ; serena@azstudents.org ; Terri Leija ; ben_arredondo@tempe.gov ; danny@mgmoinjurylaw.com ; paul@kidsvotingaz.org ; Al Macias - PIOX ; Alexander Rachel ; Connor Colleen ; Cris Meyer ; Helen Purcell - RISCX ; Karen Osborne - RISCX ; laguirre@azleg.state.az.us ; Linda Weedon - RISCX ; sgallard@azleg.state.az.us ; Amanda Swain ; Chad Douwstra ; Charlie Freer ; Clay Goodman ; Cynthia Dunham ; Dr. Albert Celozza ; Dr. Bernie Ronan ; Dr. Brian Dille ; Dr. Linda Thor ; Dr. Steve Helfgot ; Frank Pierson ; Greg Reents ; Greg Stanton ; Herschel Jackson ; Janet Valder ; Janine Adkins ; Jeffrey Schrade ; John Oyler ; Jonelle Moore ; Jorge Rodriguez ; Jose Mendoza ; Kevin Tyne ; Kristi Passarelli - RISCX ; Leah Palmer ; Linda Rosenthal ; Maria Hesse ; Martha Bergin ; Matt Ortega ; Michael Greene ; Noel Morelos ; Pat Wyler ; Paul Dale ; Paula Vaughn ; rflores@sos.state.az.us ; Rose Pferfferbaum ; Sandy Baker ; Sandy Kaszeta ; Stanley Grossman ; mario.paniagua@phoenix.gov ; Barbara Jones ; Bender, Bev ; Betsy Wise ; Beverly Turner ; Carolyn Jagger ; Carrie Dyrek ; Cathy Templeton ; Chris Hagen ; Dee Cockrum ; Donna Riffel ; Duncan Miller ; Edith Hoover ; Jennifer Bigby ; Jennifer Robinson ; karen.clifford-anderson@phoenix.gov ; Kathleen Connelly ; Kathy Matz ; Linda Farris ; Maria Paddock ; Mary Jo Kief ; McCracken, Darcie ; Michael Claspell ; Pam Hanna ; RoseMary Arrellano ; Sherry Aguilar ; AZGlow@gmail.com ; barbbass2@cox.net ; bknudson@asdb.state.az.us ; boardofdirectors@abil.org ; dcurry24@cox.net ; info@acdhh.state.az.us ; post@deaftoday.com ; comments@deafblindinfo.org ; info@pad.cc ; Clayton Guffey ; jason@azqcdd.org ; KennethJacuzzi ; csryan@extremezone.com ; Amahl Richardson ; April Reed ; AZ Center for the Blind and Visually Impaired ; AZ Council of the Blind ; cindy.tuxford@AZDOA.GOV ; Dottie Sanderson ; dragonpam.1@netzero.net ; emyers@azdisabilitylaw.org ; Eddie Sissons ; George Lasica ; Marc Strohmaier ; Marilonc@abil.org ; mark feliz ; Mary Hartle-Smith ; mpsmom@juno.com ; patconnell333@yahoo.com ; PATRICIA JONES ; pradecic@acdl.com ; Shari Bombeck ; Timothy Steinbrink ; United Cerebral Palsy of Central AZ ; United Cerebral Palsy of Central AZ ; Bettina@hgdr.com ; edmund.hidalgo@cplc.org ; jose.cortez@cplc.org ; mail@losabogados.org ; npisano46@hotmail.com ; anital@valledelsol.com ; carlosg@valledelsol.com ; Chicanos Por La Causa ; Cox Communication ; Dan Cortez ; Daniel Ruiz - RISCX ; Friendly House ; irene.aguirre@aps.com ; jeanie.olivares@cplc.org ; La Voz Newspaper ; nora.coronado@asu.edu ; npowers@clsaz.org ; PALACIOSIRMA@yahoo.com ; Salt River Project ; sreyes@maldef.org ; Telefutera-Univision ; Valley Hispanic Bomberos ; executivemail@gric.nsn.us ; npryor@pascuayaqui-nsn.gov ; pthomas@ftmcdowell.org ; vera.phillips@indianaffairs.state.az.us ; abrown@ftmcdowell.org ; Joyce McAfee ; joyce.lopez@gric.nsn.us ; larussoa@dnc.org ; ltapahe@aol.com ; Patty Ferguson ; rbear@ftmcdowell.org ; travis.lane@itcaonline.com ; Lpickard.maricopagop@cox.net ; phxjbc@msn.com ; Warren.severin@lpmaricopa.org ; Adam P. Andrews ; amanuel@toua.net ; daniellopez@tocc.cc.az.us ; dandrew@toua.net ; garcia@toua.net ; namiqyel@toua.net ; sortega@toua.net

Cc: Colleen Connor

Sent: Friday, October 06, 2006 1:33 PM

Subject: Re Ninth Circuit Decision

As I am sure you are aware yesterday the Ninth Circuit Court of Appeals issued an injunction enjoining implementation of Prop 200's documentation of citizenship requirement for voter registration as well as identification requirements to vote at the polls on Election Day.

<<9th Circuit Injunction Pending Appeal 1.pdf>>

Yesterday we halted all citizenship documentation requirements upon receiving notice of the Court's decision. This decision is, however, being appealed so as election administrators we find ourselves facing some very important questions on how to best serve the voters in these rather uncertain times. Until a definitive answer is reached we will proceed as follows:

1. Boardworker training has already begun and will continue to cover the ID requirements over the weekend with the caveat that they will ***NOT*** be required if the recent ruling stands. If we do not train our boardworkers on the requirements, and the ruling is reversed, it could be catastrophic to the voters as it would be a near impossibility to get all of our 7,000+ boardworkers to commit to a second class to cover the ID requirements in what could potentially be a very short time frame. However, if we DO cover the materials it will be far easier to convey the message that **"ID IS NOT REQUIRED TO OBTAIN A BALLOT"** if the ruling stands. (I am attaching the handout we will be distributing at the Bilingual Boardworker classes.)

<<9th circuit.pdf>>

We will send a direct mailing to all boardworkers, include information in the Inspector's Packet of information so that they can speak to their boardworkers directly, Trouble Shooters will confirm at the set-up meetings the day before the election that boardworkers understand what procedure is being implemented, and on Election Day Trouble Shooters as well as Party Observers will be present to ensure compliance with whatever the final decision is.

2. Sample ballots containing the ID requirements are already printed and are in the mailing process so will not be revoked.
3. Are not currently running ID requirement PSAs and/or advertising.
4. ID requirement information has been removed from all outreach materials and is not being distributed.
5. Public presentations will not cover the ID requirements.

As I am sure you realize, if the ruling is reversed we will have lost time in educating the public on what the requirements are, so we are hoping for an expeditious decision so that we can proceed in ensuring that our voters are well served.

Tammy Patrick

Federal Compliance Officer

Maricopa County Elections

111 S 3rd Avenue

Phoenix, AZ 85003

tpatrick@risc.maricopa.gov