

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

MARIA M. GONZALEZ, ET AL.,
Plaintiffs/Appellants,

v.

STATE OF ARIZONA, ET AL.,
Defendants/Appellees.

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

**ITCA PLAINTIFFS/APPELLANTS'
EMERGENCY AND URGENT MOTION FOR
INJUNCTION PENDING APPEAL**

David B. Rosenbaum
Thomas L. Hudson
Sara S. Greene
OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
(602) 640-9345

David J. Bodney
Karen J. Hartman-Tellez
STEPTOE & JOHNSON, LLP
Collier Center
201 E. Washington St., Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5200

Counsel for ITCA Plaintiffs/Appellants

Additional Attorneys Listed on Following Page

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Karen J. Hartman-Tellez
STEPTOE & JOHNSON, LLP
Collier Center
201 E. Washington St., Suite 1600
Phoenix, Arizona 85004-2382
(602) 257-5200

Counsel for ITCA Plaintiffs/Appellants

Additional Attorneys Listed on Following Page

Jon Greenbaum
Benjamin Blustein
1401 New York Avenue, Suite 400
Washington, D.C. 20005
Telephone: 202-662-8315
Attorneys for Lawyers' Committee For Civil Rights Under Law

Neil Bradley
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, GA 30303
Telephone: 404-523-2721
Attorneys for ACLU Southern Regional Office

Elliot M. Mincberg
David J. Becker
2000 M Street, NW, Suite 400
Washington, D.C. 20036
Telephone: 202-467-4999
Attorneys for People For The American Way Foundation

Daniel B. Kohrman (DC Bar No. 394064)
601 E Street, N.W., Suite A4-240
Washington, D.C. 20049
Telephone: 202-434-2064
Attorneys for AARP Foundation Litigation

Joe P. Sparks, No. 002383
Susan B. Montgomery, No. 020595
Sparks, Tehan & Ryley PC
7503 First St., Scottsdale, AZ 85251
Telephone: 480-949-1339
Attorneys for The Inter Tribal Council Of Arizona, Inc.

ATTORNEYS FOR ITCA PLAINTIFFS

Circuit Rule 27-3 Certificate

(i) Telephone numbers and addresses of attorneys for the parties.

This Emergency and Urgent Motion is being urged by Plaintiffs the Inter Tribal Council of Arizona, Inc., et al (“ITCA Plaintiffs”). As a result of the consolidation of three separate actions, the underlying action involves three groups of plaintiffs represented by three groups of counsel, as follows:

Attorneys for Plaintiffs Inter Tribal Council of Arizona, Inc., 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 (“ITCA Plaintiffs”):

David B. Rosenbaum, SBN: 009819
Thomas L. Hudson, SBN: 014485
Sara S. Greene, SBN: 022706
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, AZ 85012-2793
Telephone: 602-640-9000
Fax: 602-640-9050

David J. Bodney, SBN: 06065
Karen J. Hartman-Tellez, SBN: 021121
STEPTOE & JOHNSON LLP
Collier Center
201 East Washington Street, Suite 1600
Phoenix, AZ 85004-2382
Telephone: 602-257-5212
Fax: 602-257-5299

Jon Greenbaum, DC SBN: 166733
Benjamin Blustein, DC SBN: 418930
LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, Suite 400
Washington, D.C. 20005
Telephone: 202-662-8315
Fax: 202-628-2858

Neil Bradley, GA SBN: 75125
ACLU Southern Regional Office
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, GA 30303
Telephone: 404-523-2721
Fax: 404-653-0331

Elliot M. Mincberg
David J. Becker
PEOPLE FOR THE AMERICAN WAY FOUNDATION
2000 M Street, NW, Suite 400
Washington, D.C. 20036
Telephone: 202-467-4999
Fax: 202-293-2672

Daniel B. Kohrman, DC SBN: 394064
AARP FOUNDATION LITIGATION
601 E Street, N.W., Suite A4-240
Washington, D.C. 20049
Telephone: 202-434-2064
Fax: 202-434-6424

Joe P. Sparks, SBN: 002383
Susan B. Montgomery, SBN: 020595
Sparks, Tehan & Ryley PC
7503 First St., Scottsdale, AZ 85251
Telephone: 480-949-1339
Fax: 480-949-7587

Attorneys for Maria M. Gonzalez, Jesus M. Gonzalez, Bernie Abeytia, Luciano Valencia, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Friendly House, Chicanos Por La Causa, Inc., and Arizona Hispanic Community Forum (“Gonzalez Plaintiffs”):

Nina Perales, TX SBN: 24005046

Diego M. Bernal, TX SBN: 24048350

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

110 Broadway, Ste. 300

San Antonio, TX 78205

Telephone: 210-224-5476

Fax: 210-224-5382

Daniel R. Ortega, Jr., SBN: 995515

ROUSH MCCracken GUERRERO MILLER & ORTEGA

650 N. 3rd Avenue

Phoenix, AZ 85003

Telephone: 602-253-3554

Fax: 602-340-1896

Attorneys for Plaintiffs Agnes Laughter And The Navajo Nation (“Navajo Nation Plaintiffs”):

Judith M. Dworkin, SBN: 010849

Marvin Cohen, SBN: 00923

Patricia Ferguson-Bohnee, SBN: 020996

SACKS TIERNEY P.A.

4250 N. Drinkwater Blvd., 4th Floor

Scottsdale, AZ 85251

Telephone: 480-425-2600

Fax: 480-425-4915

Brenna L. Clani,

THE NAVAJO NATION, DEPT. OF JUSTICE

P.O. Drawer 2010

Window Rock, AZ 86515

Telephone: 928-871-7510

Fax: 928-871-7570

Opposing Counsel:

Attorneys for Defendants State of Arizona, and Jan Brewer in her official capacity as the Secretary of State of Arizona:

Peter Alex Silverman, SBN: 020679
Mary Ruth O'Grady, SBN: 011434
William A. Richards, SBN: 013381
OFFICE OF THE ATTORNEY GENERAL
1275 W. Washington Street
Phoenix, AZ 85007-2926
Telephone: 602-542-8305
Fax: 602-542-8308

Catherine M. Stewart, SBN: 009143
Bruce L. Skolnik, SBN: 009848
ASSISTANTS ATTORNEY GENERAL
Liability Management Section
177 North Church, Suite 1105
Tucson, AZ 85701
Telephone: 520-628-6044
Fax: 520-628-6050

Attorney for Coconino County Defendants Owens and Hansen:

Terence C. Hance
COCONINO COUNTY ATTORNEY
Jean E. Wilcox, SBN: 014926
Deputy County Attorney
110 E. Cherry Avenue
Flagstaff, AZ 86001
Telephone: 928-779-6518
Fax: 928-779-5618

Attorneys for County Defendants (Except Coconino County):

M. Colleen Connor, SBN: 015679
MCAO DIVISION OF COUNTY COUNSEL
222 N. Central Avenue, Ste 1100
Phoenix, AZ 85003
Telephone: 602-506-0128
Fax: 602-506-6083

Dennis I. Wilenchik, SBN: 05350
Kathleen Rapp, SBN: 023982
WILENCHIK AND BARTNESS, P.C.
The Wilenchik & Bartness Building
2810 N. Third Street
Phoenix, AZ 85004
Telephone: 602-606-2810
Fax: 602-606-2811

(ii) Existence and Nature of the Emergency: Plaintiffs seek an order staying implementation of legislation in connection with the upcoming election scheduled for November 7, 2006 while the Ninth Circuit considers the merits of an appeal challenging that legislation. If this relief is granted, the general election would simply proceed like elections before it have been conducted for decades. Absent that relief, tens of thousands of Arizona citizens will be deprived of their fundamental right to register and vote.

The relief requested involves two components of the legislation – one requiring emergency relief, and the other requiring urgent relief under Fed. R. Civ. App. P. 27-3. Registration for the November 7, 2006 election closes on October 9, 2006. Eligible citizens will be deprived of their right to register unless this Court

grants relief before October 9, 2006, which is less than twenty-one days away.

Relief from the burdensome polling identification requirements is needed in advance of the November 7, 2006 general election. A ruling from the Court on the polling identification issue by October 27, 2006 would afford Defendants sufficient time to notify poll workers that they should not implement Proposition 200's identification procedures for the November 7, 2006 general election.

(iii) Notice: On September 27, 2006, between 3-4 p.m. p.m, I, Sara S. Greene, counsel for ITCA Plaintiffs, contacted counsel in this matter by phone and by email. I left voice messages for Nina Perales, Judith Dworkin, Peter Silverman, and Jean Wilcox, and I spoke with Colleen Connor. In these voicemails, and in the email to all counsel, I informed counsel of our intent to file the Emergency Motion. On September 28, 2006, I emailed to each of them a PDF copy of our signed Motion as mailed to the Ninth Circuit.

As required by Circuit Rule 27-3(a), on September 27, 2006, I contacted the Ninth Circuit Clerk's office at 415-556-9890. I spoke with duty attorney Allison Taylor at approximately 4 p.m. I informed her of the nature of the emergency and that Plaintiffs intended to file an emergency and urgent motion for injunction pending appeal.

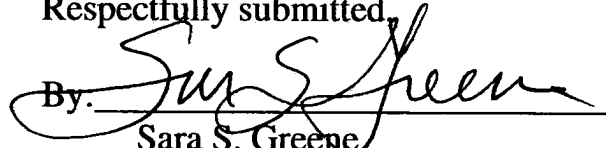
(iv) Prior Relief Sought in District Court: Plaintiffs asked the district court to enter an order providing preliminary injunctive relief, which relief the district

court denied on September 11, 2006. Plaintiffs additionally sought a stay pending appeal from the district court on September 25, 2006. The district court has not ruled on that motion, and given the impending registration cut-off date and upcoming general election, relief from this Court is necessary.

I declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge. Executed at Phoenix, Arizona.

Dated: September 28, 2006.

Respectfully submitted,

By. 
Sara S. Greene
Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 27(d), I certify that the ITCA
PLAINTIFFS/APPELLANTS' EMERGENCY AND URGENT MOTION FOR
INJUNCTION PENDING APPEAL is

 X Double-spaced and does not exceed 20 pages (a motion
or a response to a motion must not exceed 20 pages; a reply
to a response must not exceed 10 pages).

 9-28-06
Date

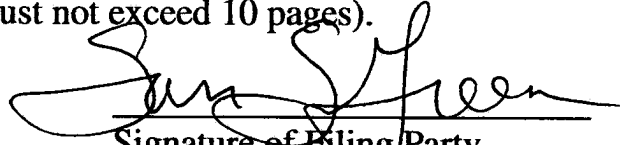

Signature of Filing Party

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INTRODUCTION AND OVERVIEW

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, a ballot initiative that, among other things, imposed new strict identification requirements for registration and voting at the polls. Since Proposition 200’s passage, a few small, local elections and the recent primary election have been held in Arizona. The results of those elections demonstrate that if Proposition 200 is implemented in the upcoming November 7, 2006 general election – the first general election since Proposition 200’s passage – thousands of Arizona citizens will be deprived of their fundamental right to vote.

In contrast, if, while the appeal in this matter proceeds, the Court stays enforcement of Proposition 200’s registration and voting regulations (and the November 7 general election is conducted under Arizona’s long-standing system of election procedures like previous Arizona elections), neither Arizona nor its citizens will suffer any harm. As the record shows, requiring voters to produce the identification required by Proposition 200 before being allowed to cast a ballot attempts to solve a problem that does not exist in Arizona – impersonation of a registered voter at the polls, *i.e.*, “imposter” voting. In fact, there is no evidence of *anyone* in Arizona attempting to vote in the name of another, let alone evidence involving a non-citizen impersonating a registered voter. Similarly, the evidence

of non-citizen registration is virtually non-existent. All told, of the 2,706,223 registered voters in Arizona as of January 2005, an infinitesimal fraction – 0.0088% – have even been *alleged* to be non-citizens.

Even a cursory review of Proposition 200 also reveals that it takes an utterly irrational approach to the non-existent “problem” it seeks to solve, and is not drafted sufficiently narrowly to survive constitutional scrutiny. Among other constitutional problems, Proposition 200:

- conditions the right to register and vote upon a citizen’s affluence and ability to purchase satisfactory identification;
- provides no “catch all” provision to allow voters who lack the requisite identification an opportunity to cast a provisional ballot;
- provides no mechanism for those who cannot afford the requisite identification to obtain such identification without cost; and
- completely exempts “early voters” – who are far less likely to be members of racial or ethnic minorities – from the burdensome polling place identification requirements.

In light of these facts, this Motion asks the Court to enter an order immediately staying implementation of Proposition 200’s registration and voting identification requirements so that voters may register for the November 7, 2006 election before the October 9, 2006 registration deadline and exercise their constitutional right to vote in the general election. Such an order cannot, as a matter of either law or logic, cause *any* constitutional harm or irreparable injury; it will simply mean delaying implementation of Proposition 200’s radical changes while this Court determines whether Proposition 200 passes constitutional scrutiny.

Denying the Motion, however, will result in the disenfranchisement of thousands of voters in the general election *before* this Court has had an opportunity to determine whether the Constitution permits that disenfranchisement. The issue presented in this Motion is thus neither close nor difficult: There are “serious questions” regarding Proposition 200’s constitutionality, and the “balance of hardships tips sharply in [Plaintiffs’] favor.” *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983).

PROCEDURAL BACKGROUND

On May 24, 2006, after Proposition 200’s effects on small local elections became known, Plaintiffs 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”). (Dkt. 21); (Separate Appendix to Emergency Motion (“App.”) Tab A.) The action was ultimately consolidated with separate lawsuits filed by the Gonzalez Plaintiffs and the Navajo Nation Plaintiffs. (Dkt. 33, 142.)

On August 30 and 31, 2006, the district court (Silver, J.) held an evidentiary hearing in connection with the Motion for Preliminary Injunction. Eleven days later, on September 11, 2006, Judge Silver issued an order denying Plaintiffs’ Motions for Preliminary Injunction, noting that “[d]etailed findings of fact and

conclusions of law will follow.” (Dkt. 183.) Plaintiffs promptly filed a notice of appeal and asked Judge Silver to expedite the issuance of the Court’s findings of fact and conclusion of law. (Dkt. 189, 194.) On September 25, 2006, Plaintiffs filed a Motion for Injunction Pending Appeal in anticipation of this Emergency Motion. (Dkt. 203, 209.) To date, no written opinion has issued and Judge Silver has not ruled on the Motion for Injunction. Thus, given the quickly approaching deadlines – October 9, 2006 and November 7, 2006 – Plaintiffs now ask this Court for emergency and urgent relief.

FACTUAL 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).¹ On election day, registered voters would announce their 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 (2004). This system served

¹ The facts herein are largely undisputed, and are explained more fully in Plaintiffs’ Motion for Preliminary Injunction. The briefing submitted below, and exhibits necessary to resolve this Motion, are included in the Separate Appendix.

Arizona well by maximizing the opportunity for citizen involvement while protecting the integrity of the voting system.²

II. Proposition 200's New Identification Requirements

Despite the proven success of Arizona's voting system, Proposition 200's promoters claimed that Arizona must protect against voting by non-U.S. citizens. Among other things, the legislation they crafted imposed: (1) new documentary proof of citizenship requirements for voter registration; and (2) new identification requirements for in-person voting by registered voters.³

A. Proposition 200's Voter Registration Requirements

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 United States citizenship," such as a passport ("**Registration ID**").⁴

² In the years before Proposition 200's implementation, for example, there were only 42 allegations that a non-citizen had registered to vote, 23 instances of non-citizens actually voting in the entire state, and no instances of persons impersonating another voter at the polls. *See* App. Tab B at 2-3.

³ 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.

⁴ Registration ID is limited to: 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

No other state in the country imposes a proof of citizenship requirement on voter registration.

B. Proposition 200's Polling Place Identification Requirements

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.⁵ The Secretary of State has also

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. *See* App. Tab B, Ex. 58, ¶¶ 37, 38.

⁵ 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 license, (2) valid Arizona nonoperating identification license, (3) Tribal enrollment card or other form of Tribal identification, or (4) valid United States federal, state, or local government issued identification.

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.⁶

C. Other Notable Features of Proposition 200

1. The Complete Exemption for Early Voters

Arizona has a system of “early” voting that allows voters to vote by mail.

Minorities use the system far less than Caucasians,⁷ and Native Americans in particular, for whom voting in-person carries special significance due to cultural, language, and historical reasons, rarely vote by mail.⁸

Under Proposition 200, early voters need not show *any* Polling ID.

Moreover, an “early” voter may drop off his or her ballot at the polls on election

⁶ 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. In addition to the enumerated forms of Polling ID, the Procedures vest county election officials with discretion to accept additional forms of identification not listed if they “establish the identity of the elector in accordance with the requirements of A.R.S. § 16-579(A).”

⁷ Minorities are three and a half times more likely than Anglo voters to vote at the polls. App. Tab B, Ex. 21 at 8; Transcript of Preliminary Injunction Hearing (“Tr.”) at 26-28.

⁸ See App. Tab B, Ex. 58, ¶ 36 (percentages of Native Americans who require language assistance at the polls), Ex. 28 (Pew depo.) at 14; Tr. at 57:3-58:3.

day without showing any Polling ID. Instead, such ballots are verified by matching signatures.

2. The Multiple Ballot System for In-Person Voters

Those who vote at the polls receive different treatment. Depending on the ID the voter presents, the voter may receive one of three different kinds of ballots. A voter who presents sufficient Polling ID with name and address information that matches the information available to the poll worker receives a **regular ballot**. A voter who presents recognized and sufficient “forms” of identification (such as an Arizona post-1996 driver’s license or both a bank statement and a utility bill), and the name or address is close, but does not match, the name and address on the signature roster receives a **regular provisional ballot**. Finally, unless Native American, a voter who has no acceptable form of Polling ID (or only one form of acceptable non-photo Polling ID) receives a “**conditional**” **provisional ballot**. Native American voters, if they first identify themselves as members of a federally-recognized Indian tribe, should receive a regular provisional ballot upon presenting one form of Tribal identification bearing the voter’s name.⁹

A regular provisional ballot will be counted after being verified simply by matching signatures, without any requirement that the voter return to the county recorder’s office with more ID. A voter who casts a conditional provisional ballot,

⁹ However, not all Indian tribes issue enrollment or other identification cards. App. Tab E (summarizing the various forms of ID and their costs).

however, must submit adequate 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).¹⁰

3. The Lack of a “Catch All” For Voters Without ID

Proposition 200, in contrast to laws in other states that require polling identification,¹¹ provides no “catch all” provision to allow those who either lack, cannot afford, or could not locate acceptable Polling ID, the option of casting a regular provisional ballot subject only to signature verification. Yet, it relies upon such a system to prevent voter fraud in early voting, and the State agrees signature verification adequately protects against voter fraud.¹²

4. The Failure to Make ID Available Without Charge

The vast majority of Proposition 200 ID require voters to incur fees (*e.g.*, a driver's license) or costs (*e.g.*, utility deposit) to obtain the ID.¹³ A voter lacking any form of acceptable Registration or Polling ID must acquire and pay for the missing ID at the voter's own expense.

¹⁰ App. Tab B, Ex. 3 at 4-5.

¹¹ 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).

¹² See App. Tab B at 8 (and citations therein).

¹³ App. Tab E.

III. Evidence Concerning the Harm That Will Result If Proposition 200 Is Implemented During the November 2006 General Election

Many citizens lack any form of acceptable Registration or Polling ID. In addition to the poor, the elderly, Native Americans and other minority populations (who have disproportionately felt Proposition 200's impact), women who have changed their names, citizens who use a P.O. box to avoid identity theft, and people who have moved but not received new licenses, are prevented from voting under Proposition 200. *Unless stayed, Proposition 200 will deprive tens of thousands of Arizona citizens from their right to vote on November 7, 2006.*

A. Tens of Thousands of Arizonans Will Be Unable to Register for This Election Unless the Court Stays Implementation of the Registration ID Requirements Before October 9, 2006

Plaintiffs' expert, using a conservative methodology, estimated that at least 28,540 eligible Arizona residents do not have *any* form of Registration ID.¹⁴ The State, although quibbling with this precise number, has 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, *as of August 9, 2006, and according to the Counties' own statistics, nearly 21,000 voter registrations have actually been rejected for lack of proof of citizenship.*¹⁵

¹⁴ App. B Tab B at 9-10 (and citations therein); Tr. at 137:23-25; *see also* Tr. at 138:11-141:3 (explaining the conservative nature of the methodology).

¹⁵ App. Tab B at 27 (and citations therein).

B. Thousands of Already Registered Arizona Voters Will Be Unable to Vote in the November 2006 Election Unless the Court Stays Implementation of the Polling ID Requirements

Proposition 200's impact on the small elections in which it was implemented confirms that Arizona is headed for disaster in the upcoming general election. In Maricopa County, *over half of all conditional provisional ballots cast* in these elections *were not counted* because voters did not or could not produce proper Polling ID. In Pima County, *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.¹⁶ 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 reservations precincts in three counties were not counted.¹⁷ If this percentage does *not* increase in the general election (contrary to what one would predict because the previous elections

¹⁶ Affidavit of Helen Purcell ("Purcell Aff."), App. Tab G, ¶ 3.

¹⁷ 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).

involved “high efficacy voters”),¹⁸ *nearly 4400 conditional provisional ballots will likely not be counted – in Maricopa County alone.*¹⁹

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. 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). Thus, the statute is far less generous than its promoters led voters to believe. Proposition 200 also impacts certain groups of citizens – including minorities, poor, elderly, and disabled citizens – more than others.²⁰

¹⁸ App. Tab B, Ex. 27 at 68 (Osborne depo.).

¹⁹ Maricopa County Elections Director Karen Osborne testified in her deposition that she estimated approximately 6,000 Maricopa 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 primaries – 73 percent – means that 4,380 conditional ballots cast will not be counted in the general election.

²⁰ 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).

IV. Evidence Concerning the Harm That Will Result from Staying Implementation of Proposition 200 Pending the Appeal

The State contends that Proposition 200's Registration and Polling ID requirements advance its interest in preventing voter fraud. The State has further suggested that because Proposition 200 was implemented in a few elections, the general election must go forward with Proposition 200 for logistical reasons.

A. The Evidence Concerning Voter Fraud

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.²¹ 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*.²² Of those 238 allegations, only ten resulted in criminal charges.²³ And of the ten charged with a crime, only four were alleged to have actually voted – just 0.0014 percent of registered voters.²⁴

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

²² *Id.*

²³ *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.

²⁴ App. Tab B, Ex. 30 ¶ 11 (Ex. 3 to Osborne dep.).

Polling ID: 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).²⁵

B. Evidence Concerning the Practical Effect of Enjoining Implementation of Proposition 200 in Connection with the November Election

The State and some of the County Defendants have argued that eliminating the ID requirements will cause confusion. (App. Tab C (Counties’ Response) at 4-12, App. Tab C (State’s Response) at 22-23.) But as Coconino County has explained, “it is a simple matter to delete the [Polling ID] requirement” in connection with the upcoming election. (App. Tab C (Response of Coconino County) at 6.) Moreover, no harm will occur if voters happen to bring Polling ID to the polls, and less harm will occur if a few poll workers (rather than all) request Polling ID because they are “confused.” Thus as Coconino County confirmed, “[n]o harm will result to the county elections process.” *Id.*; see also Tr. at 100:21-102:1 (testimony of Coconino County Recorder); App. Tab B, Ex. 23, ¶¶ 7-13. Rather, enjoining Proposition 200’s Polling ID rules will simply mean that the

²⁵ 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.

upcoming general election will use the same procedures employed in the 2004 general election.

THE STANDARD FOR INTERIM RELIEF

“The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction.” *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983). Plaintiffs must demonstrate either: (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.” *Id.* 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”).

In light of these standards, the Ninth Circuit has granted interim relief where constitutional issues are raised shortly before an upcoming election. *See, e.g., The Daily Herald Co. v. Munro*, 758 F.2d 350, 354 (9th Cir. 1984) (granting emergency motion “to expedite the appeal because of the upcoming election” in

connection with an exit-polling statute); *see also Garza v. County of Los Angeles*, 918 F.2d 763, 768-69, 777 (9th Cir. 1990) (staying county election procedures pending decision on appeal).

ARGUMENT

This is not a close case. The “balance of hardships tips sharply in Plaintiffs’ favor” and there are “serious questions” going to the merits.

I. The Balance of Hardships Tips Sharply in Plaintiffs’ Favor as They Will Suffer Irreparable Harm if Relief Is Not Granted Whereas the State Will Suffer No Harm if Relief Is Granted

If the Court does not grant the interim relief requested, tens of thousands of Arizona citizens will be deprived of their fundamental right to vote. This potential deprivation of a fundamental right constitutes a threat of irreparable injury. *See e.g., Associated Gen. Contractors of Cal.*, 950 F.2d at 1412.

In contrast, if the Court grants the interim relief (and the November 7, 2006 general election proceeds in accordance with Arizona’s long-standing system of election procedures), neither Arizona nor its citizens will suffer any harm.²⁶ The risk of non-citizens attempting to register is extraordinarily small, and there is no

²⁶ Arizona is subject to pre-clearance by the Department of Justice. If the Court stays implementation of Proposition 200 during the appeal, the last legally enforceable procedures are operative, and need not be precleared a second time. *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).

reason to believe that any imposter voting will occur at the November 7, 2006 general election. Thus, the balance of hardships tips sharply in Plaintiffs' favor.

II. Plaintiffs Have Raised "Serious Questions" Concerning the Merits

Proposition 200 suffers from several fatal 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 v. Takushi*, 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).

Proposition 200's restrictions are severe, and are neither "reasonable" nor "nondiscriminatory," as shown by its disparate impact on minorities, Native Americans, the poor, the elderly and others. Moreover, Proposition 200 fails under

any standard, because it is neither necessary to 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. Proposition 200 also 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.²⁷ 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), and implementing an incoherent system of provisional ballots that has a discriminatory impact.

Thus, “weigh[ing] the character and magnitude of the asserted injury to the [right to vote] that the plaintiff[s] seek[] to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule,” shows Plaintiffs have suffered and will continue to suffer serious injury, while the State’s justifications for the burden it has imposed on voting are extremely weak. *See Burdick*, 504 U.S. at 434; *cf. Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1367 (N.D.Ga. 2005) (enjoining Georgia’s photo identification requirement for in-person voting as a poll tax and undue burden on the right to vote, despite

²⁷ *See* App. Tab B at 22-25, Tab D at 6-13.

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).²⁸

III. Defendants’ Other Arguments Below Provide No Reason to Rush Forward with Proposition 200 Before the Court Passes on Its Constitutionality

None of the grounds on which Defendants sought to defend Proposition 200 provides a reason to implement Proposition 200’s ID requirements before the Ninth Circuit has reviewed its constitutionality. For example, Defendants emphasized that the “policy” debate over Proposition 200 is over because the measure passed. But the Court will address constitutional issues that by definition may override an initiative-based “policy.” Defendants also minimized the absence of evidence concerning fraud, arguing that fraud is hard to detect, and that the State need not wait for evidence of significant voter fraud before taking action. That argument, however, confirms that implementation of Proposition 200 may be delayed while the Ninth Circuit fully reviews its constitutionality.

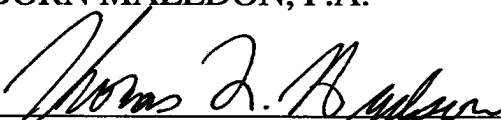
²⁸ The public interest will be served by an injunction pending appeal. *See Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 438 (E.D. Mich. 2004); *Sammartano*, 303 F.3d at 974.

CONCLUSION

For the reasons outlined above, and pursuant to Fed. R. App. P. 8 and Circuit Rule 27-3, the Court should grant this Motion and enter an order: (1) staying implementation of Proposition 200's voting identification requirement in connection with the November 7, 2006 election; (2) immediately staying Proposition 200's registration proof of citizenship requirements so that voters may register before the October 9, 2006 registration deadline; and (3) directing county election officials to reconsider all voter registrations that have been rejected for lack of proof of citizenship.

RESPECTFULLY SUBMITTED this 28th day of September, 2006.

OSBORN MALEDON, P.A.

By 

David B. Rosenbaum

Thomas L. Hudson

Sara S. Greene

2929 North Central Avenue, Suite 2100

Phoenix, Arizona 85012-2794

David J. Bodney

Karen J. Hartman-Tellez

STEPTOE & JOHNSON, LLP

201 E. Washington St., Suite 1600

Phoenix, AZ 85004-2382

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF MAILING

Original and four copies of the foregoing sent
via Federal Express this 28th day of September,
2006 to:

Office of the Clerk
U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

Copy of the foregoing e-mailed and mailed this
28th day of September, 2006, to:


Peter Alex Silverman
Mary Ruth O'Grady
William A. Richards
Office of the Attorney General
1275 W. Washington Street
Phoenix, AZ 85007-2926
Telephone: (602) 542-8305
Fax: (602) 542-8308

Catherine M. Stewart
Bruce L. Skolnik
Assistants Attorney General
Liability Management Section
177 North Church, Suite 1105
Tucson, AZ 85701
Telephone: (520) 628-6044
Fax: (520-628-6050

Terence C. Hance
Coconino County Attorney
Jean E. Wilcox
Deputy County Attorney
110 E. Cherry Avenue
Flagstaff, AZ 86001
Telephone: (928) 779-6518
Fax: (928) 779-5618

M. Colleen Connor
MCAO Division of County Counsel
222 N. Central Avenue, Ste 1100
Phoenix, AZ 85003
Telephone: (602) 506-0128
Fax: (602) 506-6083

Dennis I. Wilenchik
Kathleen Rapp, SBN
Wilenchik and Bartness, P.C.
The Wilenchik & Bartness Building
2810 N. Third Street
Phoenix, AZ 85004
Telephone: (602) 606-2810
Fax: (602) 606-2811


Patricia D. Palmer
Patty Palmer

1368927

