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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**

16 Maria M. Gonzalez, et al.,
17
18 Plaintiffs,

19 v.

20 State of Arizona, et al.,
21
22 Defendants.

23 § Case No. CV-06-1268-PHX-ROS
24 § Case No. CV-06-1362-PHX-ROS (cons)
25 § Case No. CV-06-1575-PHX-ROS (cons)

26 **SUPPLEMENTAL BRIEF OF**
27 **GONZALEZ PLAINTIFFS IN**
28 **SUPPORT OF THEIR MOTION**
FOR PRELIMINARY INJUNCTION

(Assigned to the Honorable
Roslyn O. Silver)

I. INTRODUCTION

In accordance with the Court's September 11, 2006 Opinion and Order, Plaintiffs submit this supplemental brief in support of their claim that the documentation requirements for voting registration constitute a poll tax. Based on the following, Plaintiffs request a Preliminary Injunction under Fed. R. Civ. P. 65(a)(2) enjoining the enforcement of Proposition 200 on the grounds that it violates the 14th and 24th

1 Amendments to the U.S. Constitution.¹ In addition to this supplemental brief, Plaintiffs
2 incorporate the facts, argument and authorities set out in their Motion for Preliminary
3 Injunction and Memorandum in Support of Plaintiffs' Request for a Temporary
4 Restraining Order.
5

6 II. BACKGROUND

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8 The State of Arizona implemented the proof of citizenship requirements of
9 Proposition 200 in January 2005, requiring voters to furnish documentary proof of
10 citizenship as part of the State's voter registration eligibility requirements. Registered
11 voters must also show proof of identity in order to cast a ballot at the polls. Every voter
12 registration application collected by national, state, or local voter registration
13 organizations, or through state agencies, that does not include documentary proof of
14 citizenship will not be processed. Likewise, any qualified voter who lacks documentary
15 proof of identity will be turned away from the polls, even if he or she fulfills all other
16 state voter eligibility requirements.
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19 Those qualified voter registration applicants who lack the required proof of
20 citizenship must purchase a citizenship document for a fee. Proposition 200's
21 requirements for proof of identity at the time of voting also require those voters who lack
22 one of the specified forms of identification to pay a fee to acquire one.
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26 ¹ The Plaintiffs acknowledge that their Ex Parte Application for Temporary Restraining Order and
27 Application for Preliminary Injunction were denied by Court Orders dated June 19, 2006 and
28 September 11, 2006, respectively. As the Court specifically requested supplemental briefing on
the issue of documentation requirements as a poll tax, the Plaintiffs respectfully construe the
September 11, 2006 as only a partial denial of preliminary injunction.

1 old, and \$10.00 for an individual who is 50 years old or older. Mot. Hrg. Exh. 40.²

2 A duplicate Arizona driver license showing a new address costs \$4.00. Mot. Hrg.
3 Exh. 40.
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5 ● *Birth Certificate:* A certified copy of a birth certificate in Arizona costs \$10.00 for
6 births occurring after 1990 and \$15.00 for those occurring before. Mot. Hrg. Exh.
7 42.
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9 ● *U.S. Passport:* A new or replacement U.S. passport for individuals 18 years old
10 and older costs \$97.00. The renewal fee for a U.S. passport is \$67. Mot. Hrg.
11 Exh. 43.
12

13 ● *U.S. Naturalization Documents / Immigration Documents:* A replacement
14 Declaration of Intent, Naturalization Certificate, Certificate of Citizenship, and
15 Repatriation Certificate, an applicant must pay a \$220 filing fee. Mot. Hrg. Exh.
16 230.
17

18 ● *Gas Utilities:* Southwest Gas Corporation requires a \$35 service establishment
19 charge for a first billing on gas connection. With certain exceptions, an \$80
20 residential security deposit is also required to avoid interruption of service. Mot.
21 Hrg. Exh. 27.
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23 ● *Electric Utilities:* APS, Arizona's largest electric utility, charges a \$25 residential
24 activation fee, in addition to a deposit depending on credit status, for electricity
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² The references to "Mot. Hrg. Exh." are to exhibits the Plaintiffs filed of record for the August 30, 2006 Motion / Evidentiary Hearing on Preliminary Injunction.

1 service. Mot. Hrg. Exh. 27. SRP, another Arizona electric utility, charges a \$28
2 residential activation fee. Mot. Hrg. Exh. 27.

- 3 ● *Utilities:* Arizona households on tight budgets must still make monthly payments
4 to receive utilities, even when receiving support through energy assistance
5 programs. For example, those individuals on Low-Income Ratepayer Assistance
6 (LIRA) receive only a 20% reduction on the “per therm” rate. Mot. Hrg. Exh. 27.
7
8 Low-income energy customers on the SRP Economy Price Plan receive no more
9 than \$14 off SRP charges each month. Mot. Hrg. Exh. 27.
- 10 ● *Checking Accounts:* Chase Bank and Bank of America require a minimum of \$25
11 to open a personal checking account. Mot. Hrg. Exh. 48. Wells Fargo Bank in
12 Arizona requires a minimum of \$100 to open a personal checking account. Mot.
13 Hrg. Exh. 48. The Arizona Federal Credit Union charges \$3 per month to
14 maintain a checking account. Mot. Hrg. Exh. 48.

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18 The forms of identification Proposition 200 requires to register and cast a ballot
19 require a fee and are not universally held. Both the Maricopa County Recorder and the
20 Pima County Recorder agree that there are U.S. citizens who lack the necessary
21 documents to register to vote in the wake of Proposition 200.³ In fact, F. Ann Rodriguez,
22 the Pima County Recorder, testified that her own mother, who was born in the State of
23 New Mexico, lacks the proof of citizenship required by Proposition 200.
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28 ³ Karen Osborne Dep. at 43:12-17 (July 31, 2006) and F. Ann Rodriguez Dep. at 130:17-131:8 (August 2, 2006),
provided to the Court in Plaintiffs’ deposition designations.

1 In addition, naturalized persons are singled out by Proposition 200 for different
2 and more onerous proof of citizenship requirements than other U.S. citizens.

3 Unlike other U.S. citizens, naturalized citizens may not mail a photocopy of their
4 naturalization certificate to the County Recorder. Citizens who rely on their
5 naturalization certificate to prove citizenship must present their certificate in-person to the
6 County Recorder. Native born citizens, on the other hand, may mail a photocopy of their
7 birth certificate to the County Recorder.⁴

8
9
10 Proposition 200 also imposes a proof of citizenship requirement on naturalized
11 voters that is incapable of being fulfilled. The statute states that a naturalized citizen, in
12 lieu of in-person registration at the County Recorder's office, may provide the number of
13 her certificate of naturalization on the voter registration form. However, if the voter
14 applicant writes the number of her certificate of naturalization on the registration form,
15 the voter cannot be added to the rolls until the County Recorder verifies that number with
16 the federal immigration service.⁵

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19 However, certificate of naturalization numbers are not capable of verification with the
20 federal immigration service. Joseph Kanefield, Arizona State Elections Director admitted
21 that County Recorders cannot verify the certificate of naturalization number provided by
22 naturalized citizens on their voter registration form.⁶ Similarly, F. Ann Rodriguez, the
23 Pima County Recorder, admitted that "We cannot verify the certificate of naturalization
24

25
26 ⁴ Compare A.R.S. 16-166 F (2) "A legible *photocopy* of the applicant's birth certificate" with A.R.S. 16-166 F (4) "A
presentation to the county recorder of the applicant's United States naturalization documents" (emphasis added).

27 ⁵ See A.R.S. 16-166 F (4) ("If only the number of the certificate of naturalization is provided, the applicant shall not
be included in the registration rolls until the number of the certificate of naturalization is verified with the United
States immigration and naturalization service by the county recorder.").

28 ⁶ Joseph Kanefield Dep. at 93-99 (July 25, 2006), provided to the Court in Plaintiffs' deposition designations.

1 number.”¹ Karen Osborne, testifying for the Maricopa County Recorder, also admitted
2 that the number of the certificate of naturalization is not verifiable with the federal
3 government.²
4

5 Nevertheless, Proposition 200 requires that persons applying to register to vote
6 provide “the number of the certificate of naturalization.”⁸ The official Arizona voter
7 registration application requires the voter applicant to provide the number of the
8 certificate of naturalization.⁹ The Arizona Secretary of State directs voter applicants to
9 provide the number of the certificate of naturalization on the registration form.¹⁰ The
10 Pima County Recorder and the Maricopa County Recorder direct voter applicants to
11 provide the number of the certificate of naturalization on the registration form.¹¹
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14 Thus, naturalized citizens who properly complete and mail their voter registration
15 applications, and who fully comply with the instructions to provide the number of their
16 certificate of naturalization, are automatically rejected by the County Recorder.
17 Proposition 200 accomplishes perfectly the rejection of every voter registration
18 application mailed by a naturalized citizen who relies upon his certificate of naturalization
19 for proof of citizenship. As a result, Proposition 200 provides only for in-person
20 registration for naturalized citizens who rely upon their certificate of naturalization for
21 proof of citizenship.
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24 In response to the fact that Proposition 200 is incapable of execution with respect to
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26 ¹ F. Ann Rodriguez Dep. at 59 (August 2, 2006), provided to the Court in Plaintiffs’ deposition designations.

27 ² Karen Osborne Dep. at 34-35 (July 31, 2006), provided to the Court in Plaintiffs’ deposition designations.

⁸ See A.R.S. 16-166 F (4).

⁹ Mot. Hrg. Ex. 204.

¹⁰ Mot. Hrg. Ex. 205.

28 ¹¹ Mot. Hrg. Ex. 220 and <http://recorder.maricopa.gov/pdf/prop200.pdf>.

1 the number of the certificate of naturalization, County Recorders have departed from the
2 language of Proposition 200 and imposed requirements not present in the statute. County
3 Recorders have begun to require voter applicants who rely on their naturalization
4 certificate to provide new and different information, after the naturalized citizen mails in
5 a properly completed voter registration application.
6

7 After receiving a properly completed voter registration application containing a
8 certificate of naturalization number, some County Recorders now send a letter to the voter
9 applicant to request other information about the applicant. Pima and Maricopa County
10 Recorders request that the citizen provide their former Alien Registration Number.¹² As
11 a result, voter applicants who rely on their naturalization certificate to prove citizenship
12 are subjected to a second set of requirements imposed after they submit their registration
13 application. Even if these naturalized citizens comply with the additional requirements
14 imposed by the County Recorders, they are not added to the rolls as of the date they
15 submitted their original (correctly completed) application. As a result, these voter
16 registration applicants can be excluded from voting for failure to register at least 29 days
17 before an upcoming election.
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22 IV. ARGUMENT: PLAINTIFFS SATISFY THE
23 STANDARD FOR INJUNCTIVE RELIEF

24 A. STANDARD FOR INJUNCTIVE RELIEF
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28 ¹² See Mot. Hrg. Ex. 223; see also Karen Osborne Dep. at 35-36 (July 31, 2006), provided to the Court in Plaintiffs' deposition designations.

1 This Circuit has described two sets of criteria to obtain a preliminary injunction.
2 “Under the ‘traditional’ criteria, a plaintiff must show ‘(1) a strong likelihood of success
3 on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is
4 not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the
5 public interest’” *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1297
6 (9th Cir. 2003) (citation omitted).
7

8
9 Alternatively, a plaintiff must demonstrate “‘either a combination of probable success
10 on the merits and the possibility of irreparable injury or that serious questions are raised
11 and the balance of hardships tips sharply in his favor.’” *Save Our Sonoran, Inc. v.*
12 *Flowers*, 381 F.3d 905, 912 (9th Cir. 2004) (citation omitted). As this Circuit has
13 repeatedly stated, “‘These two formulations represent two points on a sliding scale in
14 which the required degree of irreparable harm increases as the probability of success
15 decreases. They are not separate tests but rather outer reaches of a single continuum.’”
16 *Id.* (citation omitted). Ultimately, the court’s task is to “balance the equities in the
17 exercise of its discretion.” *International Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d
18 819, 822 (9th Cir. 1993).
19
20

21 Plaintiffs easily satisfy the sliding scale standard established for issuance of
22 preliminary injunctions and Plaintiffs have demonstrated a substantial probability of
23 success on the merits.
24

25 **B. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS BECAUSE**
26 **PROPOSITION 200 CANNOT SURVIVE THE SCRUTINY APPLIED TO**
27 **RESTRICTIONS ON THE ELECTORAL PROCESS**
28

1 1. Proposition 200 is Subject to Strict Scrutiny Because it Burdens the
2 Fundamental Right to Vote.

3
4 The right to vote occupies a pre-eminent position in our constitution. “Voting is of
5 the most fundamental significance under our constitutional structure.” *Reynolds v. Sims*,
6 377 U.S. 533, 554 (1964); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Harper v.*
7 *Virginia Board of Elections*, 383 U.S. 663, 667 (1966) (noting that the right to vote is a
8 “fundamental political right, because [it is] preservative of all rights”) (quoting *Yick Wo*
9 *v. Hopkins*, 118 U.S. 356, 370 (1886)).

10
11 Because they implicate a fundamental right, restrictions on the electoral process
12 must survive “exacting scrutiny.” *Buckley v. Valeo*, 424 U.S. 1, 94 (1976). Even “[i]n
13 the absence of a suspect classification, the Supreme Court has applied strict scrutiny to . .
14 . . regulations that unreasonably deprive some residents in a geographically defined
15 governmental unit from voting in a unit wide election.” *Green v. City of Tucson*, 340
16 F.3d 891, 899 (9th Cir. 2003) (citations omitted).

17
18
19 Furthermore, because Proposition 200 mandates that voters produce documents
20 that impose a financial burden, it must withstand a more rigid standard of review than
21 mere rational basis. In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the
22 Court held that Virginia's imposition of an annual poll tax not exceeding \$1.50 on
23 residents over the age of 21 was a denial of equal protection. Subjecting the Virginia poll
24 tax to close scrutiny, the Court concluded that the placing of even a minimal price on the
25 exercise of the right to vote constituted an invidious discrimination. *Id.* at 667 (“[S]ince
26 the right to exercise the franchise in a free and unimpaired manner is preservative of other
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1 basic civil and political rights, any alleged infringement of the right of citizens to vote
2 must be carefully and meticulously scrutinized.”) (quoting *Reynolds*, 377 U.S. at 561-
3 62); *id.* at 670 (noting that where fundamental rights and liberties are at issue,
4 “classifications which might invade or restrain them must be closely scrutinized and
5 carefully confined”). As in *Harper*, the documentation requirements mandated by
6 Proposition 200 will impose a price on the vote for some applicants seeking to register
7 and qualified voters seeking to cast ballots.
8
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10 In addition, because Proposition 200 singles out naturalized citizens, who are
11 foreign born, for different and more demanding treatment in the voter registration
12 process, the proof of citizenship requirements also run afoul of the 14th Amendment’s
13 guarantee of equal protection of the laws. See *Hunter v. Underwood*, 471 U.S. 222
14 (1985); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).
15 This is particularly the case where, as here, Proposition 200 explicitly targets foreign born
16 persons.¹³
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19 The Court should therefore apply a strict standard of review to the proof of
20 citizenship requirements of Proposition 200, requiring that they be narrowly drawn to
21 advance a compelling state interest. See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).
22

23 Since *Harper*, the Court has required strict judicial scrutiny when considering
24 cases dealing with wealth restrictions on the right to vote. See, e.g., *McDonald v. Board*
25

26 ¹³ See Mot. Hrg. Ex. 5, Text of Proposition 200 (“This state further finds that illegal immigrants have been given a
27 safe haven in this state . . . and that this conduct contradicts federal immigration policy, undermines the security of
28 our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of
this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage
illegal immigration.”)

1 *of Election Com'rs*, 394 U.S. 802 (1969); *Bullock v. Carter*, 405 U.S. 134 (1972); *Goosby*
2 *v. Osser*, 409 U.S. 512 (1973).

3
4 Plaintiffs do not contend that all legislation or practices affecting the right to vote
5 must be reviewing under strict scrutiny. *Compare Dunn*, 405 U.S. at 342 (durational
6 residence laws subject to strict scrutiny); *with Burdick v. Takushi*, 504 U.S. 428, 434
7 (1992) (election practices must be “narrowly drawn to advance a state interest of
8 compelling importance” if they impose a *severe or unequal* burden on voting rights but
9 upholding state prohibition on write-in voting, concluding that it did not imposes a severe
10 restriction on the right to vote, but only “reasonable, nondiscriminatory [a] restriction[.]”)
11 (emphasis added). Documentary proof of citizenship requirements, however, simply do
12 not fall within the *Burdick* framework as urged by the Defendants. Proposition 200
13 effectively bars the franchise from those otherwise qualified voters who are unable to pay
14 the fees to obtain the necessary documentation to register or cast a ballot. It renders all
15 other proof, even where no doubt about the voter’s citizenship status exists, completely
16 irrelevant. This effect is in no way synonymous with that of other cases in which federal
17 courts applied rational basis, as the restrictions in those cases did not restrict the
18 fundamental right to vote. *See, e.g., Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006)
19 (use of punch card ballots and central-count optical scan systems); *Werme v. Merrill*, 84
20 F.3d 479, 485-86 (1st Cir. 1996) (prevention of a member of the Libertarian Party from
21 serving as a ballot clerk on Election Day); *Donatelli v. Mitchell*, 2 F.3d 508, 514-15 (3rd
22 Cir. 1993) (state reapportionment plan that temporarily assigned a state senator to a
23 district that had not elected him); *see also id.* at 515-16 (collecting court-of-appeals and
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1 district-court cases that reviewed claims of “temporary disenfranchisement” due to
2 reapportionment under a rational-basis standard). Because Proposition 200 imposes a
3 severe and unequal burden on voting rights, it can only be upheld if the State shows that
4 the statute is narrowly tailored to serve a compelling interest.
5

6 2. Proposition 200’s Documentation Requirements Act as a Modern
7 Day Poll Tax or Wealth Restriction Violating the Fourteenth and
8 Twenty-Fourth Amendments.

9 In *Harman v. Forssenius*, the Supreme Court held Virginia’s \$1.50 poll tax
10 unconstitutional under the Twenty-Fourth Amendment¹⁴ as applied to federal elections.
11 380 U.S. 528 (1965). A year later in *Harper*, the Supreme Court held the same \$1.50 poll
12 tax assessed by the State of Virginia unconstitutional as applied to state elections under
13 the Fourteenth Amendment, declaring that “a State violates the Equal Protection Clause
14 of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of
15 any fee an electoral standard.” 383 U.S. 663 at 666. *See also, Hill v. Stone*, 421 U.S. 289
16 (1975) (taxable property requirement for voters in city bond elections); *Lubin v. Panish*,
17 415 U.S. 709 (1974) (candidate filing fee); *Cipriano v. City of Houma*, 395 U.S. 701
18 (1969) (property ownership requirement).
19
20

21 Here, it is impossible to distinguish the imposition of a poll tax and requiring
22 applicants to provide documentary proof of citizenship in order to register to vote. By
23 making registration contingent on the payment of fees necessary to obtain documentation
24

25 ¹⁴The Twenty-Fourth Amendment provides:

26 The right of citizens of the United States to vote in any primary or other election. . . shall not be
27 denied or abridged by the United States or any State by reason of failure to pay any poll tax or
28 other tax.

1 of citizenship, Arizona has impermissibly burdened the right to vote by basing it on an
2 individual's financial resources. Proposition 200 provides no exceptions or waivers from
3 its requirements, and mandates the rejection of any application that does not meet them.
4

5 On similar grounds, a federal district court in Georgia recently enjoined the
6 implementation of a photo identification requirement for voting at the polls, finding that
7 plaintiffs were likely to prevail on the merits of their claim that photo identification
8 requirement at polls was an unconstitutional poll tax. *Common Cause / Georgia v.*
9 *Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). The court premised the injunction on the
10 Plaintiff's likelihood of success on its undue burden and poll tax claims, virtually
11 identical to the claims at hand here. *Id.* at 1367-69 (noting that Act No. 53 forced voters
12 who did not have other acceptable forms of Photo ID to pay for Photo ID cards - \$20 for a
13 five-year card and \$35 for a ten-year card - to be able to vote in-person at the polls, and
14 reasoning that because "most voters who do not possess other forms of Photo ID must
15 obtain a Photo ID card to exercise their right to vote, even though those voters have no
16 other need for a Photo ID card, requiring those voters to purchase a Photo ID card
17 effectively places a cost on the right to vote").
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22 A new version of the Georgia law, which removed the fee for a Photo ID, was
23 again enjoined as an undue burden on voting even under the less stringent *Burdick*
24 standard of review. *Common Cause / Georgia v. Billups*, 439 F.Supp.2d 1294,1343-49
25 (N.D. Ga 2006).
26

27 Defendants' assertion that Arizona lacks discriminatory intent in creating and
28 enforcing its voting scheme is irrelevant. The Supreme Court has never held that proof of

1 discriminatory purpose is necessary to assess whether impediments to electoral
2 participation are inconsistent with the fundamental right to vote. “Constitutional rights
3 would be of little value if they could be . . . indirectly denied.” *Harman*, 380 U.S. at 540
4 (citation omitted). As a result, “[t]he Constitution ‘nullifies sophisticated as well as
5 simple-minded modes’ of infringing on constitutional protections.” *U.S. Term Limits v.*
6 *Bryant*, 514 U.S. 779, 829 (1995) (citation omitted). This is particularly true when it
7 comes to voting. *See Harper v. Virginia Bd. of Elections*, 383 U.S. at 670 (invalidating a
8 \$1.50 poll tax imposed as a precondition to voting, noting that “the right to vote is too
9 precious, too fundamental to be so burdened or conditioned”).

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11
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13 Similarly, the specific amount of the cost incurred by a qualified voter seeking to
14 register under Proposition 200 is irrelevant to the Court’s review. “To introduce wealth
15 or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or
16 irrelevant factor. The degree of the discrimination is irrelevant. . . . [A]s a condition of
17 obtaining a ballot, the requirement of fee paying causes an invidious discrimination that
18 runs afoul of the Equal Protection Clause.” *Harper v. Virginia Bd. of Elections*, 383 U.S.
19 663, 668 (1966). The Equal Protection Clause commands, the Court concluded, that “a
20 citizen, a qualified voter, is no more nor no less so” because he or she has \$1.50 in his or
21 her pocket or nothing at all. Similarly, a citizen is no more nor no less qualified to vote
22 because he or she has \$10, \$15, \$25, or \$85 in his or her pocket, or because he or she pays
23 or fails to pay the fee to obtain a driver’s license, birth certificate, or passport. *See*
24 *Harper*, 383 U.S. at 668. The principle that denies the State the right to dilute a citizen's
25 vote on account of his or her economic status or other such factors by analogy bars a
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1 system which excludes those unable to pay or fail to pay a fee to vote, *see id.* at 667-68,
2 no matter how seemingly “tangential” or “incidental” the fee may seem. The Supreme
3 Court has held, “wealth or fee paying has, in our view, no relation to voting
4 qualifications; the right to vote is too precious, too fundamental to be so burdened or
5 conditioned.” *Id.* at 670.

7
8 Furthermore, Defendants’ claim that the fee obligation relates, not to voting, but to
9 obtaining a driver’s license, birth certificate, or passport, is unavailing. The Supreme
10 Court has already rejected the argument that “a State may exact fees from citizens for
11 many different kinds of licenses; that if it can demand from all an equal fee for a driver's
12 license, it can demand from all an equal poll tax for voting.” *Harper*, 383 U.S. at 668.

14 Although fees and financial burdens may very well be appropriate in the case of
15 non-fundamental rights, such as traveling abroad with a passport, they have no place as a
16 condition of a fundamental right, such as voting. Accordingly, while Arizona is permitted
17 to require a fee as a condition of obtaining a driver’s license or birth certificate, it may not
18 require payment of that same fee as a condition of registering to vote. Any claim to the
19 contrary elevates form over substance, ignoring the Supreme Court’s injunction “to
20 carefully and meticulously scrutinize[]” any alleged infringement of the right to vote. *See*
21 *Harper*, 383 U.S. at 667. Arizona has conditioned the right to vote on the basis of wealth
22 – “a capricious or irrelevant factor,” *see Harper*, 383 U.S. at 668 – for those individuals
23 who wish to register, but do not already possess the requisite documentation. The net of
24 this restriction is wide and undiscerning in its scope, casting a dangerous potential to
25 unduly burden a wide range of qualified voters, from the wife who has adopted her
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1 husband's surname, the college student who has recently changed residence, an arson
2 victim who lost her birth certificate in a fire, to a new citizen in need of replacement
3 naturalization papers. Similarly, Proposition 200's mandate that voters show an
4 identification document or documents requires voters to purchase those documents, or to
5 possess property, such as a bank account, or to assume financial responsibility for a utility
6 bill.
7

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9 Finally, Defendants' claim that Proposition 200 simply requires prospective voters
10 to prove their eligibility, and such a requirement can never violate the Constitution, is
11 unavailing. Restrictive requirements on voter registration and voting, including
12 imposition of a fee, do not pass constitutional muster automatically simply because they
13 are related to proving voter eligibility. *See Harman v. Forssenius*, 380 U.S. 528, 537
14 (1965) (striking down the requirement that a voter file a certificate of state residence);
15 *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (durational residence laws subject to strict
16 scrutiny).
17
18

19 3. The Documentation Requirements of Proposition 200 are not
20 Narrowly Tailored to Achieve a Compelling State Interest.

21 In order to satisfy strict scrutiny, the State must show that the documentation
22 requirements set forth by Proposition 200 are narrowly tailored to achieve a compelling
23 state interest. While ensuring that only eligible persons are allowed to vote is
24 unquestionably an important state interest, the State cannot show that Proposition 200's
25 registration requirements are remotely tailored to serve that interest.
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1 The Supreme Court’s approach in analyzing the governmental need for a
2 certificate requirement in *Harman* is particularly instructive here because the purported
3 justification s the same as that which the State asserts here – namely, fraud prevention.
4
5 *Harman*, 380 U.S. at 540. In *Harman*, the Court struck down a poll-tax substitute that did
6 not even require a financial payment. There, Virginia required that a federal voter either
7 pay a poll tax as required for state elections or file a certificate of state residence. The
8 Court explained that:
9

10 the Twenty-fourth Amendment does not merely insure that the franchise shall not
11 be “denied” by reason of failure to pay the poll tax; it expressly guarantees that the
12 right to vote shall not be “denied or abridged” for that reason. Thus. . . the Twenty-
13 fourth [Amendment] “nullifies sophisticated as well as simple-minded modes” of
impairing the right guaranteed.

14 *Id.* at 540-41 (citations omitted). The Court held that “[f]or federal elections, the poll tax
15 is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute
16 may be imposed,” adding that “constitutional deprivations may not be justified by some
17 remote administrative benefit to the State.” *Id.* at 542 (emphasis added). Thus, the Court
18 rejected the State’s contention that the statutory scheme should be upheld because the
19 certificate was a “necessary substitute method of proving residence, serving the same
20 function as the poll tax.” *Id.* at 542. In addition, the Court held that the State failed to
21 show that the certificate was “necessary to the proper administration of its election laws.”
22
23 *Id.* at 543. As the Court concluded,
24

25 [t]he availability of numerous devices to enforce valid residence requirements –
26 such as registration, use of the criminal sanction, purging of registration lists,
27 challenges and oaths, public scrutiny by candidates and other interested parties –
28 demonstrates quite clearly the lack of necessity for imposing a requirement

1 whereby persons desiring to vote in federal elections must either pay a poll tax or
2 file a certificate of residence six months prior to the election.

3 *Id.*; see also *Dunn*, 405 U.S. at 345-46 (stating that although “‘ purity of the ballot box’ is
4 a formidable state interest” and the prevention of voter fraud “is a legitimate and
5 compelling governmental goal,” the means employed were to imprecise to pass
6 constitutional muster because the durational residency requirement at issue excluded
7 legitimate voters and because the State’s interest in fraud prevention was protected in
8 other ways). Like the certificate requirement in *Harman*, Proposition 200's proof of
9 citizenship and voter identification requirements must be struck down.
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12 The State cannot demonstrate a connection between Proposition 200's
13 identification requirement and preventing non-citizens from registering to vote. As the
14 Arizona Attorney General admits, “a person need not be a United States citizen to obtain
15 an Arizona driver license or identification card, even after October 1, 1996.”¹⁵ That is to
16 say, although applicants for a driver’s license may well have their lawful presence in this
17 country verified, they do not have their citizenship verified, so a driver’s license cannot
18 establish that any given applicant is a citizen as opposed to a lawful permanent resident.
19 Accordingly, by permitting a driver’s license to constitute satisfactory proof of identity
20 for voting, Proposition 200 undermines its own purported goal in preventing non-citizens
21 from voting. Notably, the State has been unable to produce a single example of non-
22 citizens registering or voting with the knowledge that they were ineligible due to non-
23 citizenship.
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15 Mot. Hrg. Ex. 216.

1 4. Even If a Standard Less Than Strict Scrutiny Were Applied,
2 Proposition 200 Still Violates Equal Protection by Creating a Burden
3 Outweighing the Interests Served by the Statute.

4 As explained above, strict scrutiny applies to laws that discriminate against a
5 category of voters with respect to the fundamental right to vote. Because Proposition 200
6 does this, it is subject to strict scrutiny.

7 Even if a lesser standard were applied, however, the statute would still be
8 unconstitutional, as the burden it creates on voting outweighs the interests served by the
9 statute. Proposition 200’s burden on voting is “significant,” not only due to the wealth
10 restrictions it places on low-income voters, but also due to the difficulties voters would
11 experience in traveling to obtain the necessary documents at local agencies. Furthermore,
12 in *Burdick*, the Supreme Court held that “reasonable, nondiscriminatory restrictions” on
13 voting rights are still subject to constitutional scrutiny. 504 U.S. at 434. While
14 discriminatory laws – like the one at issue in this case – must satisfy strict scrutiny, “the
15 State’s imposed regulatory interests are generally sufficient to justify nondiscriminatory
16 restrictions.” *Id.* Thus, even if Proposition 200 were deemed “nondiscriminatory,” an
17 important interest would be required to uphold it. Arizona has provided no significant
18 evidence of voter fraud outside of a minimal number of reports. Arizona also fails to
19 provide any evidence showing how the provisional ballot exception eliminates the
20 financial and time burdens imposed by Proposition 200. Yet this is exactly the type of
21 evidence the State would have to produce to show that Proposition 200 serves an
22 “important regulatory interest” justifying the burdens it creates on the right to vote.
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1 C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF RELIEF IS
2 NOT GRANTED

3 The threatened deprivation of a fundamental right by itself constitutes a threat of
4 irreparable injury. *See, e.g., Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d
5 466, 472 (9th Cir. 1984) (“alleged constitutional infringement will often alone constitute
6 irreparable harm”); 11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE
7 § 2948.1 (Civil 2d ed. 1995) (“When an alleged deprivation of a constitutional right is
8 involved, most courts hold that no further showing of irreparable injury is necessary.”).
9 Here, Proposition 200 deprives individuals of the fundamental right to vote, and thus
10 causes irreparable injury. *See Reynolds*, 377 U.S. at 585 (holding that illegal
11 impediments to the right to vote, as guaranteed by the U.S. Constitution or statute, by
12 their nature constitute irreparable injury).

13 Proposition 200 will unduly burden thousands of potential voters who do not
14 possess any of the required forms of identification. In 1994, the Department of Justice
15 (DOJ) rejected Louisiana’s plan to require first-time voters who had registered by mail to
16 present at the polls photo identification or other picture identification card. As the DOJ
17 concluded, “black persons are four to five times less likely than white persons in the state
18 to possess a driver’s license or other picture identification card Consequently, the
19 imposition of the driver’s license/picture identification requirement is likely to have a
20 disproportionately adverse impact on black voters in the state, and will less their political
21 participation opportunities.” Letter from Deval Patrick, Asst. Attorney General, Civil
22 Rights Division, to Sheri Marcus Norris, Asst. Attorney General, Nov. 21, 1994.
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1 The public interest plainly will be furthered by enjoining Proposition 200's
2 registration and identification requirements, which deny some citizens the opportunity to
3 participate equally in the electoral process. *See Bay County Democratic Party v. Land*,
4 347 F.Supp.2d 404, 438 (E.D. Mich. 2004) (“The public interest is served when citizens
5 can look with confidence at an election process that insures that all votes cast by qualified
6 voters are counted. . . . The public interest is served when a federally granted right is
7 enforced uniformly and voters are not disenfranchised.”) (citations omitted); *U.S. v. Berks*
8 *County, Pa.*, 250 F.Supp.2d 525, 541 (E.D. Pa. 2003) (“The Court finds that the public
9 interest will be served by the issuance of a preliminary injunction. ‘[U]ndoubtedly, the
10 right of suffrage is a fundamental matter in a free and democratic society.’ Ordering
11 Defendants to conduct elections in compliance with the Voting Rights Act so that all
12 citizens may participate equally in the electoral process serves the public interest by
13 reinforcing the core principles of our democracy.”) (citations omitted); *Murphree v.*
14 *Winter*, 589 F.Supp. 374, 382 (S.D. Miss. 1984) (“Clearly, the granting of this
15 preliminary injunction will not disserve the public interest. The fundamental right to vote
16 is one of the cornerstones of our democratic society. The threatened deprivation of this
17 fundamental right can never be tolerated.”); *see also Sammartano v. First Judicial*
18 *District Court, in and for the County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002)
19 (“[I]t is always in the public interest to prevent the violation of a party's constitutional
20 rights.”).

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27 The balance of hardships tips strongly in plaintiffs’ favor. On the other side of the
28 balance of equities, Defendants can offer no significant reason to continue to implement

1 registration and identification requirements that inevitably will deprive a portion of the
2 electorate of the fundamental right to vote. Defendants' purported interest in preventing
3 voter fraud cannot justify Proposition 200's unfair and inflexible registration
4 requirements.
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6 Last, and most important, Defendants cannot make wealth or payment of a fee a
7 measure of a voter's qualifications because, in the words of the Supreme Court, this is a
8 "capricious or irrelevant factor." *See Harper*, 383 U.S. at 668. Accordingly, the balance
9 of hardships tilts sharply in favor of enjoining Proposition 200's registration requirements.
10

11 V. CONCLUSION

12 For the reasons set out above, Plaintiffs respectfully request that the Court find that
13 Defendants' implementation Proposition 200 violates the 14th and 24th Amendments to
14 the U.S. Constitution.
15

16 Accordingly, for all these reasons, Proposition 200's registration and voter
17 identification requirements should be preliminarily enjoined.
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19
20 Dated: September 18, 2006

Respectfully submitted,

21
22 By: s/Nina Perales
Nina Perales

23
24 Counsel for Plaintiffs
Gonzalez, *et al.*

25
26
27 COPY of the foregoing filed electronically
28 this 18 day of September, 2006.

1 COPY of the foregoing mailed with Notice
2 of Electronic Filing this 18 day of September, 2006 to:

3 The Honorable Roslyn O. Silver
4 United States District Court
5 Sandra Day O'Connor U.S. Courthouse, Suite 624
6 401 West Washington Street, SPC 59
7 Phoenix, AZ 85003-2158

7

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9 s/Nina Perales

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