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

16 Maria M. Gonzalez, et al.,

17 Plaintiffs,

18 v.

19 State of Arizona, et al.,

20 Defendants.

21 The Inter Tribal Council of Arizona,
22 Inc., et. al.

23 Plaintiffs,

24 Jan Brewer, in her official capacity as
25 Secretary of State of Arizona,

26 Defendant.

27 Case No. CV-06-1268-PHX-ROS

28 **GONZALEZ PLAINTIFFS' REPLY
TO DEFENDANTS' RESPONSE IN
OPPOSITION TO THE MOTION
FOR PRELIMINARY INJUNCTION**

(Assigned to the Honorable
Roslyn O. Silver)

29 Plaintiffs Maria Gonzalez, *et al.* submit this Reply to Defendants' Response in
30 Opposition to the Motion for Preliminary Injunction.

31 **MEMORANDUM OF POINTS AND AUTHORITIES**

32 **I. INTRODUCTION**

33 Plaintiffs have moved for the entry of a preliminary injunction pursuant to
34 Fed.R.Civ.P. 65(a)(2) enjoining the enforcement of Proposition 200 which requires
35 county officials to reject voter application forms that fail to provide documentary proof of

1 citizenship and imposes burdensome polling place identification requirements.

2 This new requirement imposes an unauthorized, unnecessary, and undue burden on
3 the fundamental right to vote of hundreds of thousands of voters in the state of Arizona,
4 and is, therefore, unconstitutional on its face and as applied. It violates:

- 5 • the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg;
- 6 • the Fourteenth Amendment to the United States Constitution;
- 7 • the Twenty-Fourth Amendment to the United States Constitution;

8 The right to vote is entitled to special constitutional protection because:

9 The right to vote freely for the candidate of one's choice is of the essence of
10 a democratic society, and any restrictions on that right strike at the heart of
11 representative government . . .
12 [T]he right to exercise the franchise in a free and unimpaired manner is
preservative of other basic civil and political rights, any alleged
infringement of the right of citizens to vote must be carefully and
meticulously scrutinized.

13 *Reynolds v. Sims*, 377 U.S. 555, 562 (1964). Due to its status in our constitutional
14 system, “any illegal impediment to the right to vote, as guaranteed by the U.S.
15 Constitution or statute, would by its nature be an irreparable injury.” *Harris v. Graddick*,
16 593 F. Supp. 128, 135 (M.D. Ala. 1984). *See also Elrod v. Burns*, 427 U.S. 347, 373
17 (1976) (the loss of constitutionally protected freedoms “for even minimal periods of time,
18 unquestionably constitutes irreparable injury”).

19 Preliminary injunctive relief should be granted because the plaintiffs have
20 demonstrated: (1) a strong likelihood of success on the merits; (2) the possibility of
21 irreparable injury to plaintiff if preliminary relief is not granted; (3) a balance of
22 hardships favoring the plaintiff, and (4) advancement of the public interest . . .” *Earth*
23 *Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1297. (9th Cir. 2003) (citation
24 omitted). In the alternative a plaintiff may demonstrate ““either a combination of
25 probable success on the merits and the possibility of irreparable injury or that serious
26 questions are raised and the balance of hardships tips sharply in his favor.”” *Save Our*

1 *Sonoran, Inc. v. Flowers*, 381 F.3d 905, 912 (9th Cir. 2004) (citation omitted). ““These
2 two formulations represent two points on a sliding scale in which the required degree of
3 irreparable harm increases as the probability of success decreases. They are not separate
4 tests but rather outer reaches of a single continuum.”” *Id.* (citation omitted). Ultimately,
5 the court’s task is to “balance the equities in the exercise of its discretion.”

6 Defendants attempt to link Plaintiffs’ motion for preliminary injunction with
7 postponing an election when Plaintiffs simply seek a return to State policies pre-
8 Proposition 200. Defendants reliance on *Southwest Voter Registration Educ. Project v.*
9 *Shelley*, 344 F.3d 914 (9th Cir. 2003), is misplaced. In *Shelley*, the plaintiffs attempted to
10 halt a recall election a month before it was scheduled on the grounds that the planned use
11 of “punch card” balloting machines violated Section 2 of the Voting Rights Act. Unlike
12 the facts in *Shelley*, Plaintiffs are **not** attempting to postpone an election, and a return to
13 the *status quo* that existed before the implementation Proposition 200 can be easily
14 achieved.

15 **II. DEFENDANT’S VIOLATION OF THE NVRA SHOULD BE** 16 **ENJOINED**

17 The National Voter Registration Act (NVRA) provides unambiguously that
18 “[e]ach State shall accept and use the mail voter registration application form prescribed
19 by the Federal Election Commission pursuant to section 1973gg-7(a)(2) of this title for
20 the registration of voters in elections for Federal office.” 42 U.S.C. 1973gg-4. No part of
21 the NVRA permits states to decide whether or not they will accept a properly-completed
22 federal mail voter registration application.¹

24 ¹As an initial matter, Gonzalez Plaintiffs wish to point out that State Defendants
25 incorrectly state that Gonzalez Plaintiffs do not seek an injunction against the proof of
26 citizenship requirement of Proposition 200. *See* State Defendants Response in Opposition to the
27 Motions for Preliminary Injunction at 13. On the contrary, Gonzalez Plaintiffs have consistently
sought to enjoin the proof of citizenship requirement of Proposition 200, both at the TRO and
Preliminary Injunction stage of the case. *See* Docket Entry Nos. 1, 3, 5, 7, and 13.

1 vote,

2 . . . must be measured by a strict equal protection test: they are unconstitutional
3 unless the State can demonstrate that such laws are **necessary** to promote a
4 compelling governmental interest . . .

5 It is not sufficient for a State to show that [voting] requirements further a very
6 substantial State interest. In pursuing that important interest, the State cannot
7 choose means that unnecessarily burden or restrict constitutionally protected
8 activity. Statutes affecting constructional rights must be drawn with precision . . .
9 and must be tailored to serve their legitimate objectives . . . And if there are other,
10 reasonable ways to achieve those goals with a lesser burden on constitutionally
11 protected activity, a State may not choose the way of greater interference. If it acts
12 at all, it must choose lest drastic means.

13 *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (internal citations and quotations
14 omitted).

15 Even where the state has a legitimate interest, a statute that imposes a significant
16 burden on the right to vote is not “necessary” if the state’s interest could be achieved in
17 another way that would impose a lesser burden on the right to vote. Consistent with long-
18 standing Supreme Court precedents applying “strict scrutiny” analysis to circumstances
19 where some otherwise eligible voters are fenced out by a regulation, such as an annual
20 state poll tax of \$1.50, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), a
21 statute limiting participation in school board elections to parents and property owners,
22 *Kramer v. Union Free School District*, 395 U.S. 621, 626-627 (1969).

23 Defendants assert that the fees paid by voter registrants for obtaining identification
24 that proves citizenship are “incidental” and not a poll tax. Defendants attempt to
25 distinguish between a poll tax assessed by a state with fees a potential voter registrant
26 would pay for documents that prove citizenship. There is simply no distinction – a fee
27 incurred in the process of attempting to vote or register to vote is a undeniably a poll tax.

28 Moreover, Defendants assert that the documents required by Proposition 200 for
voter registration are commonly held. However, F. Ann Rodriguez, the Pima County
Recorder, stated that not all of the documents required by Proposition 200 to register to
vote are commonly held:

15 Q. Let me just ask you a series of summary

1 16 questions, and then I believe that's all I have.
2 17 Would you agree with me that not all citizens
3 18 who are eligible to register to vote in Pima County
4 19 possess an Arizona driver's license or a non-operator's
5 20 license that was issued after October 1st of 1996?

6 21 A. That's true.

7 22 Q. And would you agree with me that not every
8 23 citizen who is eligible to vote in Pima County possesses
9 24 or has access to a birth certificate?

10 25 A. I agree.

11 1 Q. Would you agree with me that not every citizen
12 2 who is eligible to register to vote in Pima County
13 3 possesses a U.S. passport?

14 4 A. I'm one. I agree.

15 5 Q. Would you agree with me that not every citizen
16 6 eligible to vote in Pima County possesses naturalization
17 7 documents or tribal I.D.?

18 8 A. Agree.

19 9 Q. And would you agree with me that not every
20 10 citizen eligible to register to vote in Pima County
21 11 possesses at least one form of the I.D. necessary to
22 12 register?

23 13 A. I probably -- they may not have one form,
24 14 yeah.

25 Deposition of F. Anne Rodriguez ("Rodriguez Dep."), August 2, 2006 at 130:15 - 131:14.

26 Defendants' reliance on *Burdick v. Takushi*, 504 U.S. 428 (1992), is also
27 misplaced. In *Burdick*, the Supreme Court upheld a Hawaii law that banned write-in
28

1 signifies an exaction for the support of the government.”).

2 The Twenty-Fourth Amendment abolished “[T]he poll tax . . . absolutely as a
3 prerequisite to voting and no equivalent or milder substitute may be imposed.” *Harman*,
4 380 U.S. at 542. In addition, the Twenty-Fourth Amendment “nullifies sophisticated as
5 well as simple-minded modes of impairing the right guaranteed.” *Id.* at 540-41. Because
6 a fee is required to obtain a form of identification and Proposition 200 requires proof of
7 citizenship to vote it is effectively a poll tax in the vein of the \$1.50 poll tax that was
8 declared unconstitutional in both *Harman* and *Harper*.

9 In *Harper*, the Supreme Court struck down a \$1.50 poll tax under the Equal
10 Protection Clause:

11 It is argued that a State may exact fees from citizens from many different
12 kinds of licenses; that if it can demand from all an equal fee for a driver’s
13 license, it can demand from all an equal poll tax for voting. **But we must**
14 **remember that the interest of the state, when it comes to voting, is**
15 **limited to the power to fix qualifications . . .** To introduce wealth or
16 payment of a fee as a measure of a voter’s qualifications is to introduce
17 capricious or irrelevant factor, the degree of discrimination.

18 *Harper*. 383 U.S. at 668 (emphasis added).

19 *Harper* also held that legislation that attempts to put a price on the right to vote fail
20 strict scrutiny analysis because “wealth or fee paying has . . . no relation to voting
21 qualifications, the right to vote is too precious, too fundamental to be so burdened or
22 conditioned.” *Id.* at 670. Defendants purported justification for imposing the
23 identification requirement on voter registrants is pretextual and does not withstand any
24 level of analysis. Again, *Harper* is instructive. Any qualification to voting based on
25 wealth or fee paying is unconstitutional, and no justification asserted by the state would
26 be sufficient to allow such a qualification to stand. 383 U.S. at 670. *See also United*
27 *Mine Workers v. Illinois State Bar Ass’n.*, 389 U.S. 217, 222 (1967) (“We have therefore
28 repeatedly held that laws which actually affect the exercise of these vital rights cannot be
sustained merely because they were enacted for the purpose of dealing with some evil

1 with the state's legislative competence, or even because the laws do in fact provide a
2 helpful means of dealing with such an evil.”)

3 **V. THE BALANCE OF HARM FAVORS PLAINTIFFS**

4 Defendants assert that they should be allowed to continue to implement the voter
5 identification provisions of Proposition 200 because an injunction would not preserve the
6 *status quo*, an election is currently pending, and this is the first statewide election in
7 which Proposition 200 will be enforced. When compared to the irreparable injury of
8 having the right to vote deprived, the balance of harm is in Plaintiffs favor.

9 For example, the practical effect of enjoining the requirement to present
10 documentary proof of citizenship for voter registration is minimal and will **not** interfere
11 with the upcoming election. The voter registration period is currently closed for the
12 upcoming primary and new voters will be added for the general election in the usual
13 manner. County Recorders will not have to retrain large numbers of staff. Voter
14 registration in Pima County is conducted by the County Recorder's Office where eleven
15 people perform the task of reviewing and accepting voter registration forms.²

16 With respect to proof of citizenship, granting Plaintiffs' request for preliminary
17 injunction would simply require county election officials to return to the familiar process
18 of voter registration they engaged in prior to January of 2005. It is simply not a hardship
19

20 ²See Deposition of F. Anne Rodriguez (“Rodriguez Dep.”), August 2, 2006 at 30:8 -
21 30:15:
22

23 8 Q. And how many people in your office are in a
24 9 position to decide whether or not the voter registration
25 10 application is sufficient under Prop 200?

26 11 A. It would be everyone that's a data entry
27 12 operator.

28 13 Q. How many of those people do you have?

14 A. Right now 11, plus all the intermittents, or
15 temporary workers, that we have right now.

1 to instruct a small number of county staff to accept voter registration forms that satisfy the
2 previous requirement of confirming an individual's citizenship by having them swear
3 under penalty of law that they are a citizen. Similarly, returning to previous practices for
4 accepting voters at the polls is not burdensome to Defendants.

5 **VI. CONCLUSION**

6 For the foregoing reasons, Gonzalez Plaintiffs respectfully request this Court grant
7 Plaintiffs' motion for preliminary injunctive relief.

8 Date: August 25, 2006

Respectfully submitted,

9 By: s/Nina Perales
Nina Perales

10
11 Counsel for Plaintiffs
Gonzalez, et al.

12
13
14 COPY of the foregoing filed electronically
this 25th day of August, 2006.

15 COPY of the foregoing mailed with Notice
16 of Electronic Filing this 25th day of August, 2006 to:

17 The Honorable Roslyn O. Silver
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