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20 UNITED STATES DISTRICT COURT  
21 DISTRICT OF ARIZONA

22 MARIA M. GONZALEZ, et al., ) CV 06-1268-PHX-ROS (LEAD)  
23 ) CV 06-1362-PHX-ROS  
24 Plaintiffs, ) CV 06-1575-PHX-ROS  
25 vs. )  
26 ) **(Consolidated)**  
27 STATE OF ARIZONA, et al., )  
28 ) **ITCA PLAINTIFFS' MOTION FOR**  
 ) **PRELIMINARY INJUNCTION**  
 )

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1 For decades, Arizona law required voters registering to vote to sign a statement  
2 declaring under penalty of perjury that they are citizens of the United States and  
3 stating their place of residence in Arizona. This system protected the State’s interest  
4 in maintaining the integrity of the voting process, while maximizing the opportunity  
5 for citizen participation in elections conducted in Arizona. Notwithstanding the  
6 proven track record of Arizona’s system – a system similar to that used by a majority  
7 of other states – the promoters of Proposition 200 have now dramatically altered  
8 Arizona election law by requiring citizens to: (1) present “documentary proof of  
9 citizenship” before they may participate in Arizona elections, and (2) present new  
10 kinds of identification at the polls as a condition of casting a ballot.

11 Proposition 200 did *nothing*, however, to address the fees that voters must pay  
12 to buy the needed “documentary proof.” Voting in Arizona now comes with a price  
13 tag. For many Arizonans– particularly minority voters, Native Americans, the  
14 elderly, the disabled, students, and others – obtaining the required proof of citizenship  
15 and identification for use at the polls imposes substantial financial and logistical  
16 burdens. If a voter simply cannot bear those burdens, the voter will be  
17 disenfranchised. The statistics provided by the Counties prove this – Proposition 200  
18 has already disenfranchised nearly 21,000 Arizona citizens who failed to provide  
19 proof of citizenship and therefore could not register. Statistics provided by the  
20 Counties demonstrate that they failed to count hundreds of provisional ballots cast  
21 because voters did not return with sufficient polling place identification.

22 This deprives tens of thousands of Arizonans of a fundamental right that is  
23 “preservative of other basic civil and political rights” – the right to vote and have their  
24 vote count – all an effort to solve a problem that does not exist: voter fraud by  
25 “illegal immigrants.” The fact is, of the 2,706,223 total registered voters in Arizona,  
26 an infinitesimal fraction of voters – between 0.0014% and 0.0088% – were alleged to  
27 be non-citizens registering or voting.



1 to vote in Arizona elections. In the years before Proposition 200's implementation,  
2 for example, there were only 42 allegations that a non-citizen had registered to vote,<sup>2</sup>  
3 and 23 instances of non-citizens actually voting in the entire state.<sup>3</sup> With 2,706,223  
4 registered voters in Arizona as of January 1, 2005,<sup>4</sup> these instances of possible voter  
5 fraud represent an infinitesimal percentage of the total number of Arizona registered  
6 voters, anywhere from 0.0015 percent (for non-citizens registering) of the voting  
7 population to 0.0008 percent (for non-citizens voting) of the voting population.

## 8 **II. Proposition 200 and Its Identification Requirements**

9 Despite the proven success of Arizona's voting system, Proposition 200's  
10 promoters claimed that citizens should meet strict identification requirements to  
11 protect voter rolls from fraud and corruption by non-U.S. citizens.<sup>5</sup> They proposed to  
12 impose a new proof of citizenship requirement for voter registration, as well as new  
13 requirements for presenting identification at polling places. Under their proposal,  
14 those without the required identification would need to purchase it, at their own  
15 expense, as a condition to participating in Arizona elections.

### 16 **A. The New Voter Registration Requirements**

17 Proposition 200 passed in November 2004, amending A.R.S. §§ 16-152  
18 (Ex. 1), 16-166, and 16-579 (Ex. 2).<sup>6</sup> The amended voter registration statute, A.R.S.  
19 § 16-166, now prohibits county recorders from registering Arizona citizens to vote  
20

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21 <sup>2</sup> Ex. 15; Ex. 31 (Exhibit 4 to Karen Osborne deposition (“**Osborne dep.**”));  
22 Ex. 4 at 2-5; Ex. 8 at 2-3 (and Ex. A attached thereto); Ex. 16 at 2.

23 <sup>3</sup> Ex. 56; Ex. 31; Ex. 4 at 2-5; Ex. 8 at 2-3 (and Ex. A attached thereto); Ex. 15.  
24 The remaining counties all responded they knew of no instances of non-citizens  
25 registering or voting at the polls. Exs. 5, 6, 7, 9, 10, 11, 12, 13, 14.

25 <sup>4</sup> Ex. 4 at 8.

26 <sup>5</sup> Ex. 50.

27 <sup>6</sup> Proposition 200 also amended Arizona law to require state employees to  
28 verify the immigration status of any applicant for certain public benefits. These  
provisions of Proposition 200 are not at issue in this case.

1 unless the citizen’s registration application is “accompanied by satisfactory evidence  
2 of United States citizenship.” A.R.S. § 16-166(F). For purposes of voter registration,  
3 Section 16-166 limits “satisfactory evidence of citizenship” to the following forms of  
4 identification (the “**Registration ID**”): the number of the applicant’s driver license or  
5 nonoperating identification license issued after October 1, 1996; a legible photocopy  
6 of the applicant’s birth certificate that verifies citizenship to the satisfaction of the  
7 county recorder; a legible photocopy of pertinent pages of the applicant’s United  
8 States passport identifying the applicant and the applicant’s passport number; a  
9 presentation to the county recorder of the applicant’s United States naturalization  
10 documents or the number of the certificate of naturalization; other documents  
11 established under the Immigration Reform and Control Act of 1986; or the applicant’s  
12 Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment  
13 number.<sup>7</sup> *Id.*

14 Proof of voter registration from another state or Arizona county does *not*  
15 suffice. Therefore, an individual whose county residence changes must resubmit  
16 “satisfactory evidence” of United States citizenship to register in his or her new  
17 county of residence. A.R.S. § 16-166(H).<sup>8</sup>

#### 18 **B. The New Polling Place Identification Requirements**

19 As amended by Proposition 200, A.R.S. § 16-579 (Ex. 2) also now requires  
20 those wishing to cast in-person ballots to satisfy new identification requirements (the

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22 <sup>7</sup> BIA and tribal treaty cards with numbers for identification of individual tribal  
members do not exist. *See* Affidavit of John Lewis, (“**Lewis Aff.**”), Ex. 58 ¶ 37, 38.

23 <sup>8</sup> Furthermore, if a registrant does not possess a driver’s license or  
24 nonoperating identification license number issued after October 1, 1996, a Bureau of  
25 Indian Affairs card number, tribal treaty card number or tribal enrollment number,  
A.R.S. § 16-166(F) requires the registrant to submit *copies* of personal identification  
26 documents to the county recorder – a birth certificate, passport or the applicant’s  
27 naturalization documents. Although A.R.S. § 16-166(F) states that photocopies are  
28 acceptable for birth certificates and passports, this language is absent in the subsection  
addressing naturalization documents. A.R.S. § 16-166(F)(4).

1 “**Polling ID**” requirements). Unlike mail-in voters, a voter who appears at a polling  
2 place to cast a ballot must present either one form of identification that bears the  
3 name, current address, and photograph of the voter, or two other forms of  
4 identification that bear the name and current address of the voter. A.R.S. § 16-579(A)  
5 (Ex. 2).

6 The Secretary of State has promulgated regulations implementing  
7 Proposition 200’s Polling ID requirement.<sup>9</sup> The Secretary’s “Procedure for Proof of  
8 Identification at the Polls” (the “**Polling Place Procedures**”) (Ex. 3) deems  
9 acceptable the following forms of identification with photograph, name, and address  
10 of the elector: (1) valid Arizona driver license, (2) valid Arizona nonoperating  
11 identification license, (3) Tribal enrollment card or other form of Tribal identification,  
12 (4) valid United States federal, state, or local government issued identification.

13 The Secretary of State has deemed “acceptable” the following forms of  
14 identification without a photograph that bear the name and address of the elector (two  
15 required): (1) utility bill of the elector dated within ninety days of the date of the  
16 election (for electric, gas, water, solid waste, sewer, telephone, cellular phone, or  
17 cable television); (2) bank or credit union statement that is dated within ninety days of  
18 the date of the election; (3) valid Arizona Vehicle Registration, (4) Indian Census  
19 Card, (5) property tax statement of the elector’s residence, (6) Tribal enrollment card  
20 or other form of Tribal identification, (7) vehicle insurance card, (8) Recorder’s  
21 Certificate, and (9) valid United States federal, state, or local government issued  
22 identification, including a voter registration card issued by the county recorder.

23 In addition to the enumerated forms of Polling Place ID, Proposition 200 vests  
24 county election officials with discretion to accept additional forms of identification  
25 not listed if they “establish the identity of the elector in accordance with the  
26  
27

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28 <sup>9</sup> See Ex. 3.

1 requirements of A.R.S. § 16-579(A) (Ex. 2).”<sup>10</sup> Exercising this discretion, several  
2 counties have chosen to accept, as a form of non-photo identification, “election  
3 material” mailed from their respective offices to voters within their counties, so long  
4 as that election material shows the voter’s name and address.<sup>11</sup> However, not all  
5 counties will accept such election mailings,<sup>12</sup> and for those that do, some counties  
6 send “official election material” only to “active” voters, not all registered voters, and  
7 not all election mail is acceptable because not all election mail contains a voter’s  
8 name and address.<sup>13</sup>

9 **C. Various Types of Ballots Are Issued at the Polling Place Depending**  
10 **on the Identification Presented**

11 Under the Polling Place Procedures, a voter’s ballot can be processed one of  
12 the three ways depending upon the form of the elector’s Polling Place ID:<sup>14</sup>

13 § Regular Ballot: If the voter presents one form of photo identification with  
14 name and address, or two forms of non-photo identification with name and  
15 address, and on those forms of identification (whether one photo identification  
16 or two non-photo identifications are presented), the name and address on the  
17 identification is the same as the name and address on the signature roster, and  
18 the photo reasonably appears to be the elector, then the voter is given a regular  
19 ballot.<sup>15</sup>

20 § Regular Provisional Ballot: If the name or address on either piece of non-  
21 photo identification does not match the name and address on the signature

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22 <sup>10</sup> *Id.* p. 1. This Polling Place ID is deemed “valid” unless it can be determined  
23 on its face to have expired.

24 <sup>11</sup> *See e.g.*, Ex. 15 at 4-5; Ex. 8 at 8, and Ex. 18; Ex. 9 at 4-5.

25 <sup>12</sup> *See* Ex. 12 at 2-3; *see also* Ex. 20.

26 <sup>13</sup> Ex. 27 at 60; Ex. 24 at 49, 56; Ex. 18; Ex. 19.

27 <sup>14</sup> Ex. 3 at 2-3.

28 <sup>15</sup> Ex. 3 at 2.

1 roster, the voter receives a “regular” provisional ballot. The same is true if a  
2 voter presents a photo identification with some level of discrepancy – if the  
3 name or address on a photo identification does not match the name or address  
4 on the signature roster, or the photo does not reasonably appear to be the  
5 elector, the voter will receive a regular provisional ballot. In such cases, the  
6 ballot is verified in the same way that early ballots are verified. The county  
7 recorder compares the signature on the voter’s registration form with the  
8 signature on the provisional ballot envelope, and if they match, the vote is  
9 counted. A voter who is issued a regular provisional ballot need not return to  
10 the county recorder’s office to present additional identification.<sup>16</sup>

11 § “Conditional” Provisional Ballot: If the voter presents no identification  
12 whatsoever, or only one form of non-photo identification with name and  
13 address, the voter is issued a conditional provisional ballot. The poll worker  
14 must inform voters that to process and count the conditional provisional ballot,  
15 the voter must provide the identification required by A.R.S. § 16-579(A)  
16 (Ex. 2) to the county recorder’s office by 5:00 p.m. on the fifth business day  
17 after a general election that includes an election for federal office, or 5:00 p.m.  
18 on the third business day after any other election.<sup>17</sup>

19 § Native American Voters: Native American voters are issued a regular  
20 provisional ballot upon presenting one form of Tribal identification bearing  
21 only the voter’s name. These ballots are counted once the signatures are  
22 verified. A Native American voter presenting this kind of identification need  
23 not return to the county recorder’s office to show additional identification.<sup>18</sup>

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24 <sup>16</sup> *Id.* at 2-3.

25 <sup>17</sup> *Id.* at 4-5.

26 <sup>18</sup> Polling Place Procedures at 4 (Ex. 3). Thus, for Native American voters, the  
27 State deems the signed provisional ballot along with the address information on the  
28 voter roll as an acceptable form of identification under Proposition 200. While the  
Secretary has voluntarily “prescribed” procedures pursuant to A.R.S. § 16-579(A)

1           The Secretary of State has determined that using the Regular Provisional  
2 Ballot, which includes verifying the voter’s signature, adequately protects against  
3 voter fraud.<sup>19</sup> Several of the county election officials have testified that they agree  
4 that the signature matching procedure (which is similar to the procedure used for early  
5 voting) will protect against voter fraud.<sup>20</sup> In fact, a number of county recorders have  
6 agreed that a “common sense” approach, in which a voter lacking Polling ID would  
7 be allowed to cast a regular provisional ballot that would be subject to signature  
8 verification, would suffice to prevent voter fraud.<sup>21</sup>

9           **D.     Certain Classes of Voters Are Excepted From Proposition 200’s**  
10           **Identification Requirements Altogether**

11           The Act treats those who vote by mail – so-called “early voters” – differently.  
12 The Act allows first-time early voters to submit additional forms of identification,  
13 specifically copies of paychecks or government-issued checks. A.R.S. § 16-542(C).  
14 Moreover, unless it is their first time voting, early voters can avoid the Act’s

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15 (Ex. 2) whereby a voter who identifies himself or herself as a “member of a federally  
16 recognized Native American tribe” may be issued a provisional ballot upon presenting  
17 one form of tribal identification bearing the name of the voter, this procedure does not  
18 cure the unconstitutional nature of Proposition 200 for Native Americans, nor does it  
19 moot the need for injunctive relief as requested by Plaintiffs Inter Tribal Council of  
20 Arizona and the Hopi Tribe. It is well settled that mere voluntary cessation of  
21 allegedly wrongful conduct does not moot a case or a plaintiff’s request for injunctive  
22 relief, because if it did, “the courts would be compelled to leave the defendant . . . free  
23 to return to his old ways.” *United States v. Concentrated Phosphate Exp. Ass’n*, 393  
24 U.S. 199, 203 (1968). Thus, to render moot the injunctive relief being sought by the  
25 ITCA Plaintiffs, Defendants would have to show that the procedure prescribed by the  
26 Secretary has made it “**absolutely clear** that the allegedly wrongful behavior cannot  
27 reasonably be expected to recur.” *FTC v. Affordable Media, LLC*, 179 F.3d 1228,  
28 1238-39 (9th Cir. 1999) (emphasis added). There are simply no such assurances in  
this instance.

19 Joseph Kanefield deposition (“**Kanefield dep.**”) (Ex. 22) at 56, 64-65.

20 Ex. 24 at 68-69.

21 Ex. 24 at 67-7; Laurette Justman deposition (“**Justman dep.**”) (Ex. 26) at  
32-35.

1 identification requirements all together. To obtain a ballot, such persons need only  
2 submit their “date of birth and state or country of birth or other information that if  
3 compared to the voter registration information on file would confirm the identity of  
4 the elector.” A.R.S. § 16-542(A). After completing the early ballot and executing the  
5 accompanying affidavit attesting to the voter’s identity, the early voter may deliver or  
6 mail the ballot to the county recorder or other officer in charge of elections. A.R.S.  
7 §§ 16-547, 16-548. According to the Procedures, “[a]n elector who is dropping off  
8 his or her early ballot at a precinct voting location is not required to show  
9 identification.”<sup>22</sup> Instead, the county recorder merely compares the affidavit signature  
10 to the signature on the registration form, and if the voter’s affidavit is sufficient, the  
11 vote counts. A.R.S. §§ 16-550, 16-552(A).

12 The Act also treats differently those who were already registered. Under a  
13 “grandfather” clause, persons registered before the Act’s effective date are deemed to  
14 have provided satisfactory evidence of citizenship. Thus, unless a voter changes  
15 registration from one county to another, those already registered need never provide  
16 documentary evidence of their citizenship. A.R.S. § 16-166(G).

17 **III. Tens of Thousands of Arizonans Lack Any “Satisfactory Evidence of**  
18 **Citizenship” and Must Purchase Such Evidence to Register to Vote**

19 Today, at least 28,540 eligible Arizona residents do not have *any* form of  
20 documentation sufficient to “prove” their citizenship under A.R.S. § 16-166(F), and  
21 that number increases daily.<sup>23</sup> Although most new voter registrants have used a  
22 driver’s license number or non-operating identification license number to register,  
23 approximately 179,802 of eligible but unregistered Arizonans lack an Arizona  
24

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25 <sup>22</sup> See Ex. 3 at 5.

26 <sup>23</sup> Expert report of R. Anthony Sissons (“**Sissons Rep.**”) (Ex. 21) at 2. This  
27 figure is 2% of 1,427,000 – the number of eligible, potential registrants calculated by  
28 Mr. Sissons. Ex. 21 at 4-5.

1 driver's license or non-operating identification.<sup>24</sup> This is about 12.6% of eligible,  
2 potential registrants.<sup>25</sup>

3 Although acceptable forms of Registration ID include a BIA card and "tribal  
4 treaty card," neither type of card is used in Arizona.<sup>26</sup> Moreover, three Arizona tribes  
5 do not issue tribal enrollment or tribal identification cards.<sup>27</sup> The other forms of  
6 "acceptable" Registration ID do little to help those who lack an Arizona driver's  
7 license or non-operating identification card. Approximately 70% of eligible potential  
8 registrants lack a U.S. passport, 95% do not have a Certificate of Naturalization, at  
9 least 96% have no form of Tribal identification, and an estimated 25% do not have  
10 reasonable access to a birth certificate.<sup>28</sup> These figures indicate that, today, no fewer  
11 than 28,540 eligible potential registrants lack any form of ID sufficient to prove  
12 citizenship. As new people move into Arizona from out-of-state, and as Arizonans  
13 move from county to county within the state, the number of eligible potential  
14 registrants without Registration ID will increase at an average rate of 424 a month,  
15 adding nearly 5,100 people a year.<sup>29</sup> Several county election officials agreed that  
16 citizens in their jurisdictions lack any form of Registration ID.<sup>30</sup>

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18 <sup>24</sup> Ex. 21 at 5-6; *see also* Eva Steele declaration ("**Steele decl.**") (Ex. 35) ¶¶ 5,  
19 6; Tara Hernandez declaration ("**Hernandez decl.**") (Ex. 34) ¶¶ 6, 7, 10; Kenneth  
20 Totten declaration ("**Totten decl.**") (Ex. 36) ¶¶ 5, 6; and Nicholas Fisher declaration  
21 ("**Fisher decl.**") (Ex. 33) ¶ 6.

22 <sup>25</sup> Ex. 21 at 2.

23 <sup>26</sup> Ex. 58 at ¶¶ 37, 38.

24 <sup>27</sup> *Id.* ¶¶ 39, 40 (Navajo Nation, Zuni Pueblo, and Havasupai Tribes). Yavapai-  
25 Prescott issues Tribal identification cards only upon request to enrolled members. *Id.*

26 <sup>28</sup> Ex. 21 at 2.

27 <sup>29</sup> *See id.* at 4-7. By the time registration closes for the 2008 Presidential  
28 Election, **40,000** people will lack Registration ID.

<sup>30</sup> Ex. 24 at 33; F. Ann Rodriguez deposition ("**Rodriguez dep.**") (Ex. 29) at  
79; Lenora Johnson deposition ("**Johnson dep.**") (Ex. 25) at 32.

1           Moreover, although many of these voters will simply be unable to obtain the  
2 requisite Registration ID, to the extent these eligible voters may be able to obtain such  
3 ID, they will have to purchase it at their own expense, meaning that the right to vote  
4 in Arizona now comes with a price tag. For example, Eva Steele, Tara Hernandez,  
5 Kenneth Totten, and Nicholas Fisher, Arizonans eligible to vote, do not have *any*  
6 forms of proof of Registration ID. Mr. Totten, Mr. Fisher, and Ms. Steele all live on  
7 limited income and cannot afford to purchase proof of citizenship to vote. As  
8 addressed further below, for these would-be voters, there are significant costs  
9 associated with obtaining every form of documentation that constitutes proof of  
10 citizenship, ranging from \$10 to \$220.

#### 11 **IV. What Arizona Citizens Must Do to Obtain Registration ID and Polling ID**

12           Although Proposition 200 changed Arizona law to require that Arizona citizens  
13 present various forms of identification as a condition to vote, the Act failed to ensure  
14 that Arizona citizens could obtain the identification without cost. In addition to the  
15 non-monetary hurdles that will preclude many from obtaining Registration ID, the  
16 Secretary of State never even considered the costs associated with obtaining the ID  
17 when drafting the implementing Procedures.<sup>31</sup> For the tens of thousands of Arizonans  
18 who lack Registration ID and/or Polling ID, obtaining it is not merely extremely  
19 inconvenient, it represents a significant financial burden.

##### 20           **A. Obtaining the Most Commonly Used Form of Identification: An** 21           **Arizona Driver’s License or Nonoperating Identification License**

22           An Arizona driver’s license or non-operating identification can be used both as  
23 Registration ID<sup>32</sup> and Polling ID.<sup>33</sup> As noted above, approximately 179,802 eligible  
24 but *unregistered* Arizonans lack an Arizona driver’s license or non-operating

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25  
26           <sup>31</sup> Ex. 22 at 60.

27           <sup>32</sup> If issued after October 1, 1996. A.R.S. § 16-166(F)(1).

28           <sup>33</sup> Ex. 3 at 1.

1 identification.<sup>34</sup> Moreover, approximately 374,595 *registered* voters do not have a  
2 driver's license or non-operating identification according to the State's own  
3 calculations.<sup>35</sup> Licenses from other states are not accepted as Polling ID.<sup>36</sup> Because  
4 an Arizona driver who moves need not obtain an updated license with a current  
5 address, those who move within Arizona and do not update their license cannot use  
6 their existing license as Polling ID.<sup>37</sup>

### 7 **1. MVD Branches in Arizona**

8 The Arizona Motor Vehicle Division is the only state agency from which a  
9 citizen may obtain official photo identification. Although every Arizona county has  
10 MVD offices, obtaining photo identification from an MVD office poses significant  
11 hurdles for some Arizonans.

12 Many of Arizona's counties are extremely large and rural, and drive times to  
13 an MVD office from rural communities in large counties can exceed two hours.<sup>38</sup>  
14 Indian reservations in Arizona exceed 27 million acres.<sup>39</sup> Some include several  
15 counties.<sup>40</sup> Travel times for some Native Americans with access to transportation  
16 may take an entire day.<sup>41</sup> Moreover, many Native Americans living on a reservation  
17

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18 <sup>34</sup> See Ex. 35 at ¶ 5; Ex. 36 at ¶ 5; Ex 34 at ¶ 6; Ex. 33 at ¶ 5; Ex. 21 at 2, 5-6.

19 <sup>35</sup> Ex. 51.

20 <sup>36</sup> Ex. 27 at 66; *but see* Penny Pew deposition ("**Pew dep.**") (Ex. 28) at 18-19.

21 <sup>37</sup> See Ex. 37.

22 <sup>38</sup> For example, Coconino County encompasses approximately 18,617 square  
23 miles, Mojave County encompasses 13,312 square miles, and Apache County  
24 encompasses 11,205 square miles. See Ex. 38.

25 <sup>39</sup> Ex. 58 ¶ 15.

26 <sup>40</sup> *Id.* ¶ 16.

27 <sup>41</sup> *Id.* ¶ 34. For example, the Havasupai Tribe's Members live in the bottom of  
28 the Grand Canyon, and must walk or travel by mule to get out of the Canyon, then  
travel to Flagstaff to reach an MVD office.

1 do not own a vehicle and, like other rural areas, there is no public transportation on  
2 some Indian reservations.<sup>42</sup>

3 Also, the vast majority of MVD offices are open only during business hours  
4 Monday through Friday, and may close during the lunch hour, when many voters  
5 work.<sup>43</sup> Moreover, four MVD offices in three counties – Coconino, Mojave, and  
6 Pima – do not operate on a full work week and are only open three to four weekdays  
7 and no weekends. Graham, Greenlee, La Paz, Santa Cruz, and Yuma counties have  
8 only one office issuing driver’s licenses.<sup>44</sup>

## 9 **2. The Photo Identification Is Costly, With No Waiver for Low-** 10 **Income Persons**

11 A non-operating identification license costs \$12, and a driver’s license costs  
12 between \$10 and \$25 depending on the driver’s age.<sup>45</sup> A duplicate license costs  
13 \$4.00.<sup>46</sup> Additionally, obtaining this identification requires an applicant to produce  
14 other forms of identification, the most common of which carry their own price tag.  
15 To obtain a driver’s license or non-operating identification, a voter must provide two  
16 documents from a combined list of “primary”<sup>47</sup> and “secondary”<sup>48</sup> documents, one of  
17 which must provide the voter’s photo and one of which must come from the list of

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18 <sup>42</sup> Ex. 29 at 108; Ex. 58 ¶ 33.

19 <sup>43</sup> See Ex. 39.

20 <sup>44</sup> *Id.*

21 <sup>45</sup> See Ex. 40.

22 <sup>46</sup> *Id.* Unless a person is over 65 or on Supplemental Security Income, the  
23 Arizona MVD provides no exceptions to these fees regardless of a citizen’s economic  
24 means.

25 <sup>47</sup> A “primary” document includes such documentation as a driver’s license  
26 from another state, a birth certificate, passport, certificate of naturalization or  
27 citizenship, tribal certificate of Indian blood, or military identification. See Ex. 41.

28 <sup>48</sup> Examples of secondary documents include a driver’s license from another  
state, social security card, bank card or credit card, marriage certificate, or documents  
from a court of record. *Id.*

1 “primary documents.”<sup>49</sup> If an applicant lacks any form of photo identification, the  
2 applicant may produce three such documents, which must include at least one primary  
3 document.

4 All documents must be originals or copies that are certified by the issuing  
5 agency. Two very common forms of primary documents are birth certificates and  
6 passports. For persons born in Arizona, a birth certificate costs between \$10-15<sup>50</sup> and  
7 a passport costs \$97.<sup>51</sup> Thus, at least some citizens wishing to participate in Arizona  
8 elections now face paying between \$10 - \$97 to exercise their right to vote.

9 **B. Obtaining a Birth Certificate Is Costly and the Process for a**  
10 **“Delayed” Birth Certificate Is Particularly Burdensome**

11 Birth certificates constitute satisfactory evidence of citizenship for purposes of  
12 registration. To obtain a birth certificate, one must pay \$10 to \$15, as well as produce  
13 “a valid government-issued picture identification” bearing the applicant’s signature.<sup>52</sup>  
14 A driver’s license or non-operating license suffices for this purpose, as does a  
15 passport. Those born outside Arizona face similar charges from other states.<sup>53</sup> In  
16 addition, older Arizonans born outside the state may be unable to obtain a copy of a  
17 birth certificate because some states do not issue birth certificates for individuals born  
18 before a certain date.<sup>54</sup>

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21  
22 <sup>49</sup> *Id.*

23 <sup>50</sup> *See* Ex. 42.

24 <sup>51</sup> *See* Ex. 43.

25 <sup>52</sup> *See* Ex. 42.

26 <sup>53</sup> *See* Ex. 44 (noting charges for California, Illinois, Georgia, Ohio, and New  
27 York birth certificates, including shipping fees ranging from \$5.50 to \$23).

28 <sup>54</sup> Ex. 58 ¶ 31; *See Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326,  
1341 (N.D. Ga. 2005); Ex. 44.

1           If an applicant born in Arizona was never issued a birth certificate, because, for  
2 example, she was not born in a hospital, as is the case for many Native Americans<sup>55</sup>  
3 and others, more requirements apply.<sup>56</sup> The difficulty in navigating these onerous  
4 requirements will present an insurmountable hurdle for some citizens. First, the  
5 applicant has to establish that, in fact, she has no birth certificate on file with the  
6 Office of Vital Records. The applicant must pay \$10 and file an application for a  
7 certified copy of her birth certificate. If none is found, Vital Records will issue a  
8 “Certificate of No Record” and mail the applicant a “Delayed Birth Application  
9 Packet.”

10           The applicant must complete the information in the Delayed Birth Application  
11 Packet, which, if the applicant is fifteen years or older, includes all of the following<sup>57</sup>:

12           § A notarized “Affidavit of Facts of Birth,” completed by a person with  
13 personal knowledge describing when and where the child was born.  
14 Notaries charge a fee, and are few, or entirely unavailable, on Indian  
reservations.<sup>58</sup>

15           § One “independent factual document” established before the child was ten  
16 years old, that contains the child’s name, date of birth, place of birth, and the  
date the document was established.

17           § One “independent factual document” that was established at least five years  
ago, containing the same information.

18           § One “independent factual document” establishing the mother’s presence in  
19 Arizona at the time of the child’s birth. The document must include the  
20 mother’s name, street address and date. The Vital Records website states  
21 that “th[e] information must establish that the mother was, in fact, in the  
State of Arizona on the date the child was born.”

22 The Delayed Birth Packet must include the Certificate of No Record.

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24           <sup>55</sup> See Ex. 24 at 21-22; Ex. 26 at 28-29.

25           <sup>56</sup> See Ex. 45.

26           <sup>57</sup> If the child is under fifteen, the requirements are identical except that two,  
27 rather than three, “independent factual documents” are required.

28           <sup>58</sup> Ex. 58 ¶ 30.

1 Many Tribal Members over 40 were born at home and have no birth  
2 certificates. Affidavits from those in attendance at the birth are usually impossible to  
3 obtain, because those who were present are deceased. The many elements of  
4 documentary proof are costly, impractical, and a great burden for older Native  
5 Americans living in poverty. For example, one of the “independent factual  
6 documents” requires that the document include the mother’s name and street address.  
7 This would present a real dilemma for many tribal members because street addresses  
8 do not exist on several reservations, and residential streets on the reservation are not  
9 named.<sup>59</sup>

### 10 **C. Certificate of Naturalization**

11 A Certificate of Naturalization is sufficient proof of citizenship to register to  
12 vote. A.R.S. § 16-166(F)(4). However, for those voters whose Certificate has been  
13 lost, stolen, or become faded or mutilated, replacing it costs \$220,<sup>60</sup> and takes almost  
14 two years.<sup>61</sup> While one may also provide the “number of the certificate of  
15 naturalization,” that person cannot be registered to vote until the number has been  
16 verified with the federal government. *Id.* However, the only number that the federal  
17 government can verify is the INS Registration Number, which does not appear on  
18 some certificates of naturalization.<sup>62</sup>

### 19 **D. Obtaining Non-Photo ID Is Costly, Certain Groups Are Far Less** 20 **Likely to Have These Forms of Identification, and Some Arizona** 21 **Tribes Do Not Issue “Tribal Enrollment Cards”**

22 Proposition 200’s Polling ID requirement mandates that a voter lacking photo  
23 identification provide two forms of non-photo identification bearing the voter’s name  
24

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25 <sup>59</sup> *Id.* ¶¶ 26, 27, 31.

26 <sup>60</sup> *See* Ex. 47.

27 <sup>61</sup> Ex. 27 at 46-47.

28 <sup>62</sup> Ex. 27 at 33-34.

1 and current address. However, for some, obtaining these items is neither cheap nor  
2 easy.

3 For example, most utility companies charge individuals “activation” or  
4 “service establishment fees” ranging from \$25 to \$30.<sup>63</sup> In addition, utility companies  
5 routinely require an \$80 - \$240 deposit for individuals with no prior payment history  
6 with the particular utility company.<sup>64</sup> Even opening a basic checking account requires  
7 a minimum opening deposit ranging from \$25 to \$100.<sup>65</sup> The other forms of  
8 acceptable non-photo identification also require that an individual incur significant  
9 costs because they are available only to persons who own a home (property tax  
10 statement) or own a car (vehicle insurance card or vehicle registration). Indians on  
11 Indian land within reservations, and Indian allotments outside reservations, in  
12 Arizona, are exempt from property tax. Ariz. Const. art. XX, Para. Fifth; Sec. 20,  
13 Para. Second, Federal Enabling Act of June 20, 1910, 36 Stat. 557, 568-579 (1910).

14 Certain populations are far more likely to lack some or all of the Polling ID.  
15 For example, many residences on Indian reservations lack any utilities at all.<sup>66</sup> Also,  
16 voters who are renters, students, elderly, or low-income<sup>67</sup> are less likely to have or be  
17 able to obtain a utility bill in their name because the utility will usually be paid by a  
18 landlord, the residential care or assisted living facility, or the university/college.<sup>68</sup>  
19 Around 236,500 voters live in rental structures containing multiple units. Tenants of  
20 these units would not have utility bills in their name.<sup>69</sup> For example, Mr. Fisher lives

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21 <sup>63</sup> See Ex. 47.

22 <sup>64</sup> See Ex. 47.

23 <sup>65</sup> See Ex. 48 (Bank One/Chase: \$25; Arizona Federal Credit Union: \$25;  
24 Bank of America: \$25; Wells Fargo: \$100).

25 <sup>66</sup> Ex. 58 ¶ 25.

26 <sup>67</sup> *Id.* ¶¶ 20, 21 (extremely high rates of unemployment on Indian reservations).

27 <sup>68</sup> Ex. 21 at 9; Ex. 24. at 60-61.

28 <sup>69</sup> Ex. 21. at 9.

1 in a halfway house and has no utilities in his name.<sup>70</sup> Arizona voters such as Mr.  
2 Totten, living in group quarters such as dormitories, nursing homes, and assisted  
3 living facilities<sup>71</sup> total around 59,689.<sup>72</sup> One of the two spouses in a married-couple is  
4 also very likely to lack a utility bill in his or her name.<sup>73</sup> Around 23%, or 693,000  
5 voters, are married individuals whose name is not on any utility bill.<sup>74</sup> In total, about  
6 989,189 voters have no utility bills in their name.<sup>75</sup>

7 Bank statements are similarly elusive for many voters, in particular people of  
8 color and voters who have not graduated from high school or are low-income voters.  
9 These “unbanked” populations are significant. While the Anglo population is 21%  
10 unbanked, the Black and Hispanic populations are 52% and 50% unbanked,  
11 respectively. Similarly, voters with an income of \$45,000 or more are only 17%  
12 unbanked, but those with an income of less than \$15,000 are 51% unbanked.<sup>76</sup> In  
13 addition, Arizona’s Indian reservations are underserved by bank branches,<sup>77</sup> and many  
14 Tribal Members have no bank accounts because of the expense involved and the  
15 scarcity of branches located on reservations.<sup>78</sup>

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17  
18 <sup>70</sup> Ex. 33 ¶ 9.

19 <sup>71</sup> Ex. 36 ¶ 6.

20 <sup>72</sup> Ex. 21 at 9.

21 <sup>73</sup> *Id.*

22 <sup>74</sup> *Id.*; Indeed, Coconino County Elections Director Patty Hansen testified  
23 about one elderly voter whose ballot was not counted during the March primary  
24 because “[e]verything was in her husband’s name” – even though the voter returned  
to the city clerk’s office after the election in an attempt to provide sufficient Polling  
ID. Ex. 24 at 62-64.

25 <sup>75</sup> Ex. 21 at 9-10.

26 <sup>76</sup> *Id.*

27 <sup>77</sup> *Id.* at 9; Ex. 24 at 42-43.

28 <sup>78</sup> Ex. 58 ¶ 29.

1           Likewise, 140,000 Arizonans, like Ms. Steele,<sup>79</sup> have disabilities that preclude  
2 their leaving home without assistance, and 90,000 Arizonans have vision, hearing or  
3 mental impairments.<sup>80</sup> They, along with 14,000 residents of long-term care facilities,  
4 are very unlikely to have vehicles to register and insure.<sup>81</sup> Thus, adjusted to reflect  
5 only voting-age residents, 193,000 registered voters would lack both of these forms of  
6 non-photo identification. Individuals lacking a driver’s license probably also lack  
7 vehicle registration cards and vehicle insurance cards. There are approximately  
8 323,650 voters who lack vehicle insurance and vehicle registration cards.<sup>82</sup> Although  
9 the Polling Place Procedures allow “valid United States federal, state or local  
10 government issued identification” containing name and address, or in some cases a  
11 photo (as required by A.R.S. § 16-579(A)) (Ex. 2), none of the 30(b)(6) deponents for  
12 the Secretary of State, or for the Counties of Maricopa, Pima, Navajo, Apache, or  
13 Coconino, could identify a single example of such identification not already listed in  
14 the Polling Place Procedures.<sup>83</sup>

15           Finally, although the Procedures provide a special process for Native American  
16 voters, through which a Native American voter could cast a regular provisional ballot  
17 with one form of tribal identification containing his or her name, that special process  
18 is not available to all Native American voters. Three Arizona tribes do not issue tribal  
19 identification or tribal enrollment cards.<sup>84</sup> And, there are hundreds of Native

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20           <sup>79</sup> Ex. 35 ¶ 6.

21           <sup>80</sup> Ex. 21 at 10.

22           <sup>81</sup> *Id.*

23           <sup>82</sup> *Id.*

24           <sup>83</sup> (Other than a driver’s license). *See, e.g.*, Ex. 22 at 37-39; Ex. 27 at 50; Ex.  
25 24 at 38-39, 46; Ex. 28 at 18-19; Kelly Dastrup deposition (“**Dastrup dep.**”) (Ex. 23)  
26 at 18-19; Ex. 29 at 130-31.

27           <sup>84</sup> Ex. 58 ¶ 39 (Navajo Nation, Zuni Pueblo, and Havasupai Tribes). Yavapai-  
28 Prescott will issue Tribal identification cards only upon request to enrolled members.  
*Id.*

1 Americans in Arizona who are not enrolled with a tribe.<sup>85</sup> For these Native American  
2 voters, the burdens imposed by Proposition 200 are severe.

3 **E. The Discriminatory Impact of Proposition 200’s Proof of**  
4 **Citizenship and Polling Place Identification Requirements**

5 Proposition 200 did not impose its fee requirements equally. Only *new*  
6 registrants must pay the fees if they lack a photo identification. Similarly, only voters  
7 who vote in person must pay the identification fees because Proposition 200 does not  
8 require voters voting by early ballot to present proof of citizenship.

9 Proposition 200’s identification requirements will disproportionately affect  
10 minorities because minorities are three and a half times more likely to vote at the polls  
11 than by mail (*i.e.*, vote early).<sup>86</sup> In the 136 voting precincts in which Anglo voters  
12 make up more than 95% of the voting age population, 52.6% of total ballots cast were  
13 cast by early vote.<sup>87</sup> In contrast, in the 102 voting precincts where minority voters  
14 make up 95% or more of the voting age population, only 15.2% of ballots were cast  
15 by early vote.<sup>88</sup> Similarly, in the 122 voting precincts that serve Indian reservations,  
16 only 12% of ballots were cast by early vote.<sup>89</sup> This tendency of Native Americans to  
17 vote in person is partly due to language issues, as some do not speak English and  
18 require the use of translators at the polls.<sup>90</sup>

19 The hurdles in obtaining documentary proof of citizenship and proof of  
20 identification for use at the polls are significant for the 14% of Arizonans whose  
21

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22 <sup>85</sup> *Id.* ¶ 30.

23 <sup>86</sup> *See* Ex. 34 ¶¶ 3, 9; Ex. 21 at 8.

24 <sup>87</sup> Ex. 21 at 8.

25 <sup>88</sup> *Id.*

26 <sup>89</sup> *Id.*

27 <sup>90</sup> *See* Ex. 58 ¶ 36 (percentages by age group of Native Americans who require  
28 language assistance at the polls); Ex. 28 at 14.

1 income falls below the poverty line<sup>91</sup> and also represent a burden to Arizonans who  
2 may not fall below the federal poverty line but live on a fixed income.<sup>92</sup> Other  
3 groups disproportionately affected by Proposition 200's requirement are student  
4 voters, elderly voters, and disabled voters.<sup>93</sup>

## 5 **V. Arizona's Experience With Voter Fraud in the Last Decade**

6 Proposition 200's proponents justified the law as necessary to combat voter  
7 fraud.<sup>94</sup> Thus, the State – now required to defend the law – has undertaken a  
8 concerted effort to identify instances of voter fraud. Notwithstanding this effort, the  
9 State has alleged that out of a pool of 2,706,223 registered voters in Arizona,<sup>95</sup> and  
10 over the past ten years, 238 were *allegedly* not U.S. citizens<sup>96</sup> – only 0.0088 percent  
11 of registered voters. Moreover, of those 238 allegations, the State charged only ten  
12 registered voters with a crime – a mere 0.00036 percent of registered voters.<sup>97</sup> An  
13 even smaller number of those charged were alleged to have actually voted – four out  
14

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15 <sup>91</sup> See Ex. 48 (listing percent of Arizonans below poverty line) *see* Ex. 49 (U.S.  
16 census listing of poverty thresholds for 2004).

17 <sup>92</sup> Ex. 35 ¶ 6; Ex. 36. ¶ 6; Ex. 33 ¶ 9.

18 <sup>93</sup> Ex. 35 ¶ 6.

19 <sup>94</sup> See State's Response ("**State's Resp.**") to Gonzalez/ITCA Plaintiffs'  
20 Motions for TRO at 1 (Ex. 4).

21 <sup>95</sup> Ex. 4 at 8; Ex. 15 at 2; Ex. 15 at 2; Ex. 31 (Ex. 4 to Karen Osborne dep.);  
22 Ex. 8 at 2-3 (and Ex. A attached thereto); Ex. 16 at 2.

23 <sup>96</sup> Ex. 30 ¶ 11 (Ex. 3 to Osborne dep.); Ex. 31 (Ex. 4 to Osborne dep.). It is  
24 entirely possible that some of the 159 names referred to the Maricopa County  
25 Attorney overlap with some of the names listed on Ex. 31, thus reducing the number  
26 of non-citizens alleged to have to have registered or voted. The calculations above  
27 are conservative, and assume no overlap.

28 <sup>97</sup> Ex. 30 ¶ 11. At least two of those cases have since been dismissed. *See*  
Ex. 52; Ex. 53 (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.

1 of 2.7 million, or 0.0014 percent.<sup>98</sup> As for non-citizens actually voting, the numbers  
2 are similarly miniscule – just 38 instances in which a non-citizen was initially alleged  
3 to have voted at a polling place. This is 0.0014 percent of registered voters. All but  
4 three Arizona counties reported *not a single* instance of non-citizens registering or  
5 voting in their counties.<sup>99</sup> None of the Defendants has identified even a single  
6 incident in which a person attempted to impersonate a registered voter at the polls –  
7 the only type of voter fraud that Polling ID might prevent.

## 8 ARGUMENT

### 9 I. The Preliminary Injunction Standard

10 Plaintiffs are entitled to injunctive relief if they can demonstrate “either a  
11 likelihood of success on the merits and the possibility of irreparable injury or that  
12 serious questions going to the merits were raised and the balance of the hardships tips  
13 sharply in [Plaintiffs’] favor.” *Cadence Design Sys., Inc. v. Avant! Corp.*, 125 F.3d  
14 824, 826 (9th Cir. 1997) (quotations and citations omitted); *see also Sammartano v.*  
15 *First Jud. Dist. Ct.*, 303 F.3d 959, 965 (9th Cir. 2002); *Johnson v. Cal. State Bd. of*  
16 *Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

### 17 II. Plaintiffs Are Likely to Prevail on Their Claim That Proposition 200 18 Constitutes a Poll Tax

19 Whatever merit the State may find in requiring its citizens to show voting ID,  
20 the Constitution does not permit it to impose fees on the right to vote. Thus, a state  
21 that decides to require its citizens to present identification before they may vote, must  
22 accept (or provide) forms of identification that come without charge, and cannot  
23 impose other unreasonable burdens on obtaining the required identification.  
24 Proposition 200 requires voters to acquire identification at their own expense and with  
25

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26 <sup>98</sup> Ex. 30 ¶ 11 (Ex. 3 to Osborne dep.).

27 <sup>99</sup> *See* Exs. 9, 10, 11, 12, 13, 14; Ex. 24 at 85-86; Ex. 23 at 29; Ex. 26 at 11.

1 significant burden in some instances. Consequently, the Act constitutes an  
2 unconstitutional poll tax.

3 **A. Proposition 200’s Requirements for Registration ID and Polling ID**  
4 **Impose an Unconstitutional Poll Tax on Arizona Voters**

5 In 1964, the states ratified the Twenty-fourth Amendment to the U.S.  
6 Constitution, which prohibits conditioning ballot access on payment of a poll tax or  
7 any other tax on voting. *See* U.S. Const., amend. XXIV. The prohibition on poll  
8 taxes extends to state elections, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663,  
9 666 (1966), and grew out of the basic repugnance to the idea of “exact[ing] a price for  
10 the privilege of exercising the franchise,” along with its “disenfranchisement of the  
11 poor.” *Harman v. Forssenius*, 380 U.S. 528, 539 (1965).

12 The Supreme Court first interpreted the Twenty-fourth Amendment in  
13 *Harman*, the seminal decision on the subject, when a voter challenged a Virginia law  
14 that allowed those voting in federal elections to submit a “certificate of residence” in  
15 lieu of paying Virginia’s poll tax. *Harman*, 380 U.S. at 540. In striking down the  
16 law, the Supreme Court emphasized that the Twenty-fourth Amendment “does not  
17 merely insure that the franchise shall not be ‘denied’ by reason of failure to pay the  
18 poll tax; it expressly guarantees that the right to vote shall not be ‘denied or abridged’  
19 for that reason.” *Id.* at 540. The Court expressly rejected the State’s attempt to justify  
20 the law as necessary to ensure that only residents voted, noting that Virginia’s “use of  
21 the criminal sanction, purging of registration lists, challenges and oaths [and] public  
22 scrutiny by candidates and other interested parties” could more narrowly protect the  
23 State’s interest. *Id.* at 542-43.

24 Proposition 200 likewise runs afoul of the Twenty-fourth Amendment. A  
25 prospective voter who does not possess any Registration ID cannot vote in any  
26 election in Arizona unless the voter obtains the required documentation by paying a  
27 fee ranging from \$10 (driver’s license for a driver over 49), \$97 (passport), to \$220  
28 (replacement Certificate of Naturalization). Likewise, a registered voter who does not

1 possess Polling ID cannot vote a regular ballot unless he buys an ID at a cost of \$4  
2 (duplicate driver’s license with current address) to more than \$100 (bank account or  
3 utility service). By conditioning the exercise of the right to vote on possession of  
4 Registration ID and Polling ID, which cannot be obtained free of charge,  
5 Proposition 200 institutes an unconstitutional poll tax.

6       It matters not that Proposition 200 does not label its identification requirements  
7 a “tax.” *See Harman*, 380 U.S. at 540 (the Constitution prohibits “indirect[]” denials  
8 of constitutional rights). Furthermore, the Twenty-fourth Amendment applies even if  
9 the regulation impeding the right is “somewhat less onerous than the poll tax” because  
10 “no equivalent or milder substitute may be imposed.” *Id.* at 542 (emphasis added).  
11 The State’s interest in preventing voter fraud likewise cannot salvage Proposition 200  
12 because the Twenty-fourth Amendment abolished the “poll tax, *regardless of the*  
13 *services it performs.*” *Id.* at 544. Furthermore, in view of the numerous devices  
14 observed in *Harman* to gauge a voter’s eligibility to register and vote, a poll tax such  
15 as that imposed by Proposition 200 is wholly unnecessary to the proper administration  
16 of Arizona’s election laws.

17       Indeed, last year, a federal district court held that Georgia’s requirement that  
18 in-person voters show government-issued photo identification was a poll tax because  
19 voters who would not have the identification would have to pay for it. *Common*  
20 *Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1366-70 (N.D. Ga. 2005). As with  
21 the Georgia law, Proposition 200 is a poll tax because it requires Arizona voters who  
22 do not have the required identification to pay for identification in order to vote.

23       **B.     The Cost of Obtaining Identification Documents Makes Wealth a**  
24       **Voting Qualification in Violation of the Equal Protection Clause**

25       By requiring Arizona voters to present identification that they cannot obtain  
26 without paying a fee, Proposition 200 makes wealth a qualification for voting. Such a  
27 qualification also runs afoul of the Equal Protection Clause. *See Harper*, 383 U.S. at  
28 666 (“a State violates the Equal Protection Clause of the Fourteenth Amendment

1 whenever it makes affluence of the voter or payment of *any fee* an electoral standard.  
2 *Voter qualifications have no relation to wealth nor to paying or not paying this or any*  
3 *other tax.”*) (emphasis added); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 124 & n.14  
4 (1996) (“The basic right to participate in political processes as voters and candidates  
5 cannot be limited to those who can pay for a license.”). The Court should thus enjoin  
6 Proposition 200’s implementation on this ground as well.

7 **III. Plaintiffs Are Likely to Prevail on Their Claims That Proposition 200**  
8 **Constitutes an Undue Burden on the Fundamental Right to Vote**

9 Voting is a fundamental right protected by the Fourteenth Amendment’s Equal  
10 Protection Clause. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Kramer v. Union*  
11 *Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969). Indeed, in *Wesberry v. Sanders*,  
12 376 U.S. 1 (1964), the Court observed the “precious” and foundational role of voting  
13 in our democracy:

14 No right is more precious in a free country than that of having a voice  
15 in the election of those who make the laws under which, as good  
16 citizens, we must live. Other rights, even the most basic, are illusory  
17 if the right to vote is undermined. Our Constitution leaves no room  
18 for classification of people in a way that unnecessarily abridges this  
19 right.

20 376 U.S. at 17-18. Similarly, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court  
21 observed that the “right to exercise the franchise in a free and unimpaired manner is  
22 *preservative* of other basic civil and political rights,” and thus, “any alleged  
23 infringement of the right of citizens to vote must be carefully and meticulously  
24 scrutinized.” 377 U.S. at 561-62 (emphasis added). “[A] citizen has a  
25 constitutionally protected right to participate in elections on an equal basis with other  
26 citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

27 **A. The Standard of Review Applied in Challenges to a State Election**  
28 **Law**

When considering challenges to a state election law, a court should determine  
the “rigorousness of [its] inquiry” by examining “the extent to which a challenged

1 regulation burdens . . . Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S.  
2 at 434. If the regulation is a “severe restriction[],” the regulation must be “narrowly  
3 drawn to advance a state interest of compelling importance.” *Id.* (citations omitted).  
4 If it is a “reasonable, nondiscriminatory restriction[],” the State must show that  
5 “important regulatory interests . . . justify the restriction.” *Id.* (citations and internal  
6 quotations omitted). The Court should thus conduct a balancing test applying the  
7 appropriate level of inquiry by “weigh[ing] the character and magnitude of the  
8 asserted injury to the rights protected by the . . . Fourteenth Amendment . . . that the  
9 plaintiff seeks to vindicate against the precise interests put forward by the State as  
10 justifications for the burden imposed by its rule.” *Id.* (citations and internal  
11 quotations omitted).

12 **B. Proposition 200 Imposes a Severe Restriction on the Right to Vote**

13 Proposition 200’s Registration ID and Polling Place ID requirements impose a  
14 “severe restriction” on the fundamental right to vote, *Burdick*, 504 U.S. at 434, and  
15 operate to “deny or abridge” this right as to Native Americans and other language  
16 minority groups in the State in violation of the Fifteenth Amendment. At least  
17 179,802 (and likely many more) unregistered, voting-age Arizonans may be unable to  
18 provide the number of a driver’s license issued after October 1, 1996 when they  
19 register to vote.<sup>100</sup> Although Proposition 200 requires that these potential voters  
20 submit copies of documentary evidence of citizenship to register, tens of thousands of  
21 them will not have acceptable Registration ID, and cannot obtain it without investing  
22 time and money.<sup>101</sup> *See* Factual Section III(A)-(E), *supra*.

23  
24  
25 <sup>100</sup> Ex. 21 at 2, 5. This figure is based on the percentage of Arizonans who  
26 possess a driver’s license or non-operator’s license and does not account for the  
27 sizable number who possess such documents that were issued before October 1, 1996.

28 <sup>101</sup> *See* Gonzalez Plaintiffs’ Memorandum of Points and Authorities in Support  
of Application for TRO, App., Ex. A (“**Bernal Decl.**”) ¶ 14.

1 Proposition 200 has already *prevented* tens of thousands of Arizonans from  
2 registering. In Maricopa County alone, 15,090 voter registration applications have  
3 been rejected for failure to provide adequate Registration ID.<sup>102</sup> With other counties  
4 included, nearly 21,000 Arizonans have attempted to exercise their fundamental right  
5 to vote but have been prevented from doing so because they did not submit  
6 “satisfactory proof of citizenship.”<sup>103</sup>

7 Obtaining non-photo identification sufficient for Polling Place ID likewise  
8 presents significant hurdles to many voters because obtaining the ID requires that the  
9 voters either own property (property tax statement) or a car (vehicle registration or  
10 insurance), open a bank account (and pay a minimum opening balance), or start utility  
11 service (and pay activation fees and deposits).

12 The March 2006 and May 2006 local elections conducted in Maricopa County  
13 confirm that implementing Proposition 200 in a statewide election will have drastic  
14 consequences. In the March and May elections, 65% and 55%, respectively, of voters  
15 casting conditional provisional ballots never returned to present the required Polling  
16 ID.<sup>104</sup> The Pima County “return rate” was much worse. In the May 16, 2006  
17 Transportation Plan and Bond Election, 91% of voters casting conditional provisional  
18 ballots did not return to present Polling ID.<sup>105</sup>

19 In her deposition, Maricopa County Elections Director Karen Osborne  
20 estimated that during the upcoming general election, approximately 6,000 Maricopa  
21 voters would vote a conditional provisional ballot.<sup>106</sup> Coconino County is likewise

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22 <sup>102</sup> See Ex. 15 at 2-3.

23 <sup>103</sup> See Exs. 8, 5, 11, 14, 12, 9, 10, 6, and 13. These numbers are *understated*  
24 because two counties – Santa Cruz and Cochise –never responded to Plaintiffs’  
25 “track” rejected registration forms.

26 <sup>104</sup> See Ex. 15 at 3-4.

27 <sup>105</sup> See Ex. 8 at 7-8

28 <sup>106</sup> Ex. 17 at 68.

1 preparing for thousands of conditional provisional ballots.<sup>107</sup> The poor return rates  
2 from March and May predict that a *majority* of those voting conditional provisional  
3 ballots will *not* return with identification, and thus their vote will not be counted. The  
4 return rates for the general election will likely be even worse because, as Ms. Osborne  
5 explained, voters in early elections like those held in Maricopa County, are more  
6 likely to return with identification and have their vote counted than the average voter  
7 who votes only in national or gubernatorial races.<sup>108</sup>

8 Proposition 200's burdens will disenfranchise certain citizens even more,  
9 including those who are: (1) poor or on a fixed income and do not own a vehicle, do  
10 not have a passport, do not possess or have access to a birth certificate, and do not  
11 have recent utility bills or bank statements in their names;<sup>109</sup> (2) elderly and no longer  
12 drive, no longer have a passport because they do not travel abroad, and do not possess  
13 or have access to a birth certificate; (3) physically disabled and therefore do not drive,  
14 and either by necessity or choice do not travel abroad on a passport, and do not  
15 possess or have access to a birth certificate;<sup>110</sup> (4) residents of retirement, nursing,  
16 assisted living facilities, or halfway houses, who, by choice or necessity, do not have  
17 driver's licenses or passports, do not possess or have access to a birth certificate, and  
18 do not have utility bills in their names;<sup>111</sup> (5) married women who have changed their  
19 names; and (6) individuals who live in rural areas for whom providing a photocopy of  
20 the required documentation would impose a hardship.

21 Proposition 200 also burdens the rights of Plaintiffs who conduct voter  
22 registration. These organizations, many of which are dedicated to increasing the  
23

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24 <sup>107</sup> Ex. 24 at 71-73.

25 <sup>108</sup> Ex. 27 at 68.

26 <sup>109</sup> See Exs. 33, 35, 36.

27 <sup>110</sup> See Ex. 35.

28 <sup>111</sup> See Exs. 33, 36.

1 informed and active participation in the voting process, will be unable to register even  
2 those who possess the requisite documents because they lack the capacity and  
3 resources to make the required *copies*.<sup>112</sup>

4 Not surprisingly, courts faced with restrictions far less burdensome than  
5 Proposition 200 have had no difficulty finding the restrictions “severe” and  
6 unconstitutional. In *Campbell v. Hull*, for example, members of the Arizona Green  
7 Party (a “non-qualified” party), who sought to be included on the presidential ballot  
8 and circulated petitions to that end challenged the constitutionality of Arizona’s ballot  
9 access restrictions on First and Fourteenth Amendment grounds. 73 F. Supp. 2d  
10 1081, 1082-83 (D. Ariz. 1999). Applying *Burdick, id.* at 1086, the court found that  
11 the deadline and other restrictions combined to severely burden the plaintiffs’ rights to  
12 associate and to cast their votes effectively. *Id.* at 1092. In so holding, the court’s  
13 opinion confirmed that restrictions on voting can be “severe” even if a voter  
14 exercising “due diligence” could eventually comply with them. *Id.* at 1084.

15 **C. Proposition 200 Is Not Narrowly Drawn to Advance Any Legitimate**  
16 **Interest, Let Alone a Compelling State Interest**

17 Because Proposition 200 imposes a severe restriction on the fundamental right  
18 to vote, the state must show that it is “narrowly drawn to advance a state interest of  
19 compelling importance.” *Burdick*, 504 U.S. at 434. But not only does  
20 Proposition 200 come nowhere close to passing this strict scrutiny test, given its  
21 inherent irrationality it fails under any standard.

22 Proposition 200 fails under *Burdick* because: (1) existing Arizona law already  
23 effectively prevented voter fraud; (2) no evidence exists on this record demonstrating  
24 that voter fraud, either in voter registration or in actual in-person voting, is anything

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26 <sup>112</sup> See Bonnie Saunders declaration (“**Saunders decl.**”) ¶ 6-8, Ex. 2 to ITCA  
27 Plaintiffs’ Joinder in *Gonzalez* Plaintiffs Ex Parte Application for Temporary  
28 Restraining Order and Order to Show Cause; see also Kristin Bateman declaration  
 (“**Bateman decl.**”) (Ex. 32) ¶ 10, 11.

1 more than a *de minimus* problem; (3) even assuming *arguendo* that voter fraud  
2 presents a problem, Proposition 200 is so crudely drafted it leaves gaping loopholes  
3 that will actually perpetuate instances of voter fraud (if they already exist), or allow  
4 voter fraud in the future.

5 **1. Existing Law Before Proposition 200 Effectively Prevented**  
6 **Voter Fraud**

7 In *Dunn v. Blumstein*, the court struck down a Tennessee law that required  
8 voters to reside in the state for a year and in a given county for three months to  
9 register. 405 U.S 330, 331 (1972). In finding that the residency requirement was not  
10 the “least restrictive means” for the state to combat its stated interest – fraudulent  
11 voting – the court noted that Tennessee had criminal statutes addressing fraudulent  
12 voting, and concluded that they were “more than adequate to detect and deter  
13 whatever fraud may be feared,” including registering to vote without legal  
14 qualification. *Id.* at 346, 353.

15 Arizona law likewise provided ample protection against voter fraud *before*  
16 Proposition 200. For example, Arizona law has long required a person registering to  
17 vote to sign a statement declaring that he or she is a United States citizen, and  
18 imposed criminal penalties for a violation. A.R.S. § 16-152(A)(14), (18)-(19) (2004).  
19 This is the same procedure required under the National Voter Registration Act<sup>113</sup> and  
20 it *educates* potential registrants of the criminal sanctions by requiring the voter to sign  
21 a statement acknowledging that executing a false registration is a felony. *Id.*; *see also*  
22 A.R.S § 16-182 (2004). Other acts, such as making a false statement as to the voter’s  
23 inability to mark a ballot or hindering the voting of others, likewise subject an  
24 offender to criminal penalties. A.R.S. § 16-1017. The Secretary of State also  
25 maintains “a toll free telephone number for the use of the public to report incidents of  
26 voter fraud.” A.R.S. § 16-142(C). As for “imposters” voting at the polls, in addition

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28 <sup>113</sup> 42 U.S.C. § 1973gg-7(b)(2).

1 to the above criminal penalties, Arizona’s system adequately protected against  
2 imposters via the list of registered voters maintained at each polling place. If an  
3 imposter attempts to vote – either before or after the legitimate voter – poll workers  
4 would discover the fraud. *See Common Cause*, 406 F. Supp. 2d at 1333 (describing  
5 protections against imposter voting afforded by same system used in Georgia).

6 The paucity of fraudulent voting before Proposition 200 confirms that  
7 Arizona’s prior methods were “more than adequate to detect and deter whatever fraud  
8 may be feared.” *Dunn*, 405 U.S. at 353.<sup>114</sup>

9 **2. The Voter Classifications in Proposition 200 Permit Inclusion**  
10 **of Many Voters Who Could Easily Engage in Voter Fraud**  
11 **While Excluding a Huge Class of Legitimate Voters Because**  
12 **They Lack the Necessary Identification**

12 Although purportedly drafted to remedy voter fraud – a virtually non-existent  
13 problem – Proposition 200 did so in an utterly irrational manner, and is thus not  
14 “narrowly drawn.” *Burdick*, 504 U.S. at 434.

15 In *Kramer v. Union Free School District Number 15*, the Supreme Court  
16 considered a New York statute limiting the franchise in certain school districts to  
17 owners or lessees of taxable realty (or their spouses) and parents or guardians of  
18 children in public schools. 395 U.S. at 632. It held that the statute did not meet strict  
19 scrutiny because the state did not accomplish its purpose “with sufficient precision to  
20 justify denying [the plaintiff] the franchise.” *Id.* The court noted repeatedly that the  
21 classifications must be “tailored so that exclusion of an appellant and member of his  
22 class is necessary to achieve the articulated state goal.” *Id.* The court found  
23 problematic the statutory classifications because they “permit inclusion of many  
24 persons who have, at best, a remote and indirect interest in school affairs, and, on the  
25 other hand, exclude others who have a distinct and direct interest in the school[]  
26 decision.” *Id.*

27  
28 <sup>114</sup> *See* Factual Section I, *supra*.

1 Proposition 200’s drafters likewise failed to craft the law with “sufficient  
2 precision to justify denying [Arizonans not possessing the required identification] the  
3 franchise.” *Id.* Proposition 200 excludes lawful voters who lack the necessary  
4 identification, and does nothing to prevent fraud by voters who are “grandfathered in”  
5 and those who choose to vote by early ballot. Thus, “[t]he non[citizen] intent on  
6 committing election fraud” will simply vote by early ballot. *See Dunn*, 405 U.S. at  
7 346. If previous practices led to non-citizens appearing on the voter rolls, it is  
8 irrational to grandfather in these voters.

9 Compounding the under and over inclusiveness of Proposition 200 is the lack  
10 of any connection between Proposition 200’s identification requirements and  
11 prevention of non-citizens from registering. As Arizona’s Attorney General admitted,  
12 “a person need not be a U.S. citizen to obtain an Arizona driver’s license or  
13 identification card, even after October 1, 1996.”<sup>115</sup> Non-citizens can likewise easily  
14 obtain services or purchase products that would render Polling ID, such as a bank  
15 account, utility service, or a car to insure and register. This is possible because one  
16 who is a lawful resident and therefore legally in this country, but not a U.S. citizen,  
17 may obtain all of these items.

### 18 **3. Proposition 200 and Its Polling Place Procedures Are** 19 **Irrational and Produce Absurd Results**

20 Proposition 200 is not narrowly drawn because it creates irrational and absurd  
21 results and includes a “catch all” identification provision that allows different  
22 identification requirements to apply to similarly-situated voters.

23 First, Proposition 200’s identification requirements create absurd results. For  
24 example, under the Secretary of State’s Polling Place Procedures, a voter who

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26 <sup>115</sup> *See* Bernal decl., attached to Gonzalez Plaintiffs’ Memorandum of Points  
27 and Authorities in Support of Application for TRO as Ex. A. (*See also* Ex. 12, Ariz.  
28 Attorney General, Opinion re Identification Requirements for Voter Registration,  
February 4, 2005, at 5.)

1 provides a piece of photo identification issued by an Arizona university, containing  
2 his name and photograph, and a recent utility bill containing his name and current  
3 address would receive a conditional provisional ballot, which would not be counted  
4 *unless* he returned to the recorder with additional acceptable identification. Yet a  
5 voter who provides a two-month old utility bill and a ten-year-old voter registration  
6 card – with two different and *incorrect* addresses – would receive a regular  
7 provisional ballot and *not* be required to return to the recorder for his vote to be  
8 counted.<sup>116</sup> Thus, the voter with *inaccurate* identification, and no photo identification,  
9 will be able to vote a regular provisional ballot, while the voter with a form of photo  
10 identification, issued by a state institution, and a form of non-photo identification with  
11 *correct* name and address information will have to vote a conditional ballot and return  
12 later to present acceptable identification to the county recorder.

13         Second, the degree of uncertainty and confusion over what combinations of  
14 identification, with what combinations of correct/incorrect names and/or addresses on  
15 them, will suffice for Polling Place ID, speaks volumes about its irrationality.<sup>117</sup>  
16 When confronted with hypotheticals of voters presenting various forms of Polling ID,  
17 and asked which of the three kinds of ballots (regular, provisional, conditional  
18 provisional) these voters would receive, Maricopa County Elections Director Karen  
19 Osborne, while doing her best to make sense of the Polling Place Procedures, was  
20 confused,<sup>118</sup> and contradicted herself.<sup>119</sup> She ultimately acknowledged that if ten poll  
21 workers were asked the same questions, she had a “zero level of confidence” that they  
22

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23  
24 <sup>116</sup> See Ex. 27 at 86; Ex. 23 at 28.

25 <sup>117</sup> Compare Ex. 23 at 28 (voter with student identification without address and  
26 utility bill obtains a conditional provisional ballot), *with* Ex. 27. at 86 (same voter gets  
a provisional ballot).

27 <sup>118</sup> Ex. 27 at 29-30, 49-50, 52, 57, 58.

28 <sup>119</sup> *Id.* at 80-87; Exs. 18, 19.

1 would give answers consistent with her own.<sup>120</sup> Elections officials in four counties,  
2 who should be the most knowledgeable about Polling ID gave widely varying answers  
3 to the same questions about whether a voter with certain forms of identification would  
4 receive a regular, provisional or conditional ballot.<sup>121</sup>

5 The counties' inconsistent treatment of their own "election mailings" as a  
6 form of Polling ID causes further uneven application of Proposition 200 and raises  
7 serious equal protection problems. A voter who appears at the polling place in  
8 Maricopa County with no identification other than a voter registration card and  
9 another form of "mail identified as 'election mail'" may vote a regular ballot. But a  
10 voter who appears at a Greenlee County polling place, during the same election, with  
11 no identification except the same two forms of election mail would have to vote a  
12 conditional provisional ballot and return with *other* forms of acceptable Polling ID –  
13 or forfeit his vote.<sup>122</sup> "[I]f a State imposes regulations that disenfranchise voters, the  
14 regulations must be 'appropriately defined and uniformly applied.'" *Charfauros v.*  
15 *Bd. of Elections*, 249 F.3d 941, 950 (9th Cir. 2001) (citation omitted). Because  
16 whether similarly situated citizens may vote depends upon the subjective choice of  
17 their county, the Polling Place Procedures, as applied, violate the Equal Protection  
18 Clause. *Dunn*, 405 U.S. at 336 ("a citizen has a constitutionally protected right to  
19 participate in elections on an equal basis with other citizens in the jurisdiction.").

20 Proposition 200 is thus both unnecessary and unduly broad in scope given:  
21 (1) the utter scarcity of evidence of voter fraud; (2) the fact that early voters and  
22 already-registered voters need not produce documentary proof of citizenship and  
23 therefore may continue to, or begin engaging in, voter fraud; (3) the fact that non-  
24 citizens who are legal permanent residents can obtain documentary proof of

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25 <sup>120</sup> Ex. 27 at 86.

26 <sup>121</sup> Ex. 55 (chart comparing differing answers given by Apache, Coconino,  
27 Maricopa and Navajo Counties).

28 <sup>122</sup> See Ex. 28 at 25-26; see also Ex. 20.

1 citizenship then register and vote; and (4) the fact that the Polling Place Procedures  
2 allow County Recorders in their discretion to allow some, none, or all forms of  
3 “election mail” as polling place identification, thereby disenfranchising similarly  
4 situated voters based on their misfortune in being in a “no election mail” county. In  
5 these circumstances the State cannot demonstrate Proposition 200 is “narrowly drawn  
6 to advance a state interest of compelling importance.” *Burdick*, 504 U.S. at 434.

7 **D. The Injury to Plaintiffs’ Fundamental Right to Vote Is Severe,**  
8 **While the State’s Justifications for its Rule Are Weak**

9 The evidence of Proposition 200’s “severe restriction” and the ensuing injury  
10 to Arizona registered voters and would-be registered voters, is clear – it has already  
11 disenfranchised nearly 21,000 Arizonans seeking to register to vote and prevented  
12 over half of all conditional provisional ballots cast from being counted. This injury to  
13 many Arizonans’ fundamental right to vote is thus serious and immediate.

14 On the other hand, the State’s justification for Proposition 200’s identification  
15 requirements – minimizing voter fraud – is not an interest that “make[s] it necessary  
16 to burden [] plaintiffs’ rights.” *Burdick*, 504 U.S at 434. Arizona law already  
17 adequately protected against voter fraud, and Proposition 200’s selective (and  
18 discriminatory) targeting of the problem it purportedly seeks to address renders the  
19 statute fatally flawed.

20 On the basis of facts strikingly similar to those here, the court in *Common*  
21 *Cause*, 406 F. Supp. 2d at 1359-66, preliminarily enjoined Georgia’s in person photo  
22 identification requirement on ground that it violated the fundamental right to vote  
23 under the Fourteenth Amendment (in addition to being a poll tax). The *Common*  
24 *Cause* court stated that the burden on those who did not have the required  
25 identification was “undeniably demoralizing and extreme” and that the identification  
26 provision was not narrowly tailored because of a lack of evidence of voter fraud and  
27 the existence of other provisions to prevent fraud. *Id.* at 1365-66.

1 **IV. Plaintiffs Have a Strong Likelihood of Success on the Merits of Their**  
2 **NVRA Claim**

3 Plaintiffs renew their request for injunctive relief pursuant to the National  
4 Voter Registration Act of 1993 (the “NVRA”), and incorporate their prior briefing on  
5 this claim.

6 **A. The NVRA Must Be Interpreted Consistent With its Purpose,**  
7 **Legislative History and the Implementing Agency’s Direction**

8 Although the NVRA’s language does not expressly state whether or not a state  
9 may require voters to prove they are United States citizens by providing documentary  
10 evidence of their citizenship status, Arizona’s previous Secretary of State maintained  
11 that the NVRA *prohibits* the State from inquiring into the citizenship status of those  
12 who have registered to vote. Defendant Brewer, on the other hand, contends that the  
13 NVRA permits the State to demand documentary evidence of citizenship.<sup>123</sup> The  
14 NVRA is thus ambiguous with respect to whether a state may require registrants to  
15 provide proof of citizenship. Consequently, to resolve the ambiguity, this Court  
16 should look to the NVRA’s purpose, legislative history and administrative  
17 interpretations by the Federal Elections Commission (the “FEC”) and the Election  
18 Assistance Commission (the “EAC”). *See Cmty. Bank of Ariz. v. G.V.M. Trust*, 366  
19 F.3d 982, 986 (9th Cir. 2004) (a court “must consider the purpose, subject matter, the  
20 context and the legislative history” of an ambiguous statute and “grant a degree of  
21 deference to the interpretation of an administrative agency charged with implementing  
22 the statute”) (alterations and citations omitted).

23 The NVRA’s express purpose is, *inter alia*, to (1) “increase the number of  
24 eligible citizens who register to vote,” (2) “enhance[ ] the participation of eligible  
25 citizens as voters,” and (3) remedy “discriminatory and unfair registration laws and  
26 procedures [that have had] a direct and damaging effect on voter participation . . . and

27 \_\_\_\_\_  
28 <sup>123</sup> *See* Ex. 22 at 154:22-155:17.

1 disproportionately [have] harm[ed] voter participation by various groups, including  
2 racial minorities.” 42 U.S.C. § 1973gg. Consistent with these purposes, the NVRA  
3 directed the EAC to develop and implement the Federal Mail Voter Registration  
4 Form (the “**Federal Form**”), a uniform *postcard* voter registration application that  
5 must be “accept[ed] and use[d]” by all 50 states to register voters for federal  
6 elections.<sup>124</sup> 42 U.S.C. § 1973gg-4(a)(1); *see also* S. Rep. 103-6, at 11 (Feb. 25,  
7 1993) (discussing a “uniform” and “universal mail registration form”). Defendants  
8 have rejected 20,713 voter registration forms for failure to provide satisfactory  
9 evidence of citizenship, thereby *decreasing* voter participation, directly contrary to the  
10 NVRA’s purpose.

11         The NVRA’s legislative history confirms that the State’s interpretation runs  
12 contrary to Congress’ intent. *See* S. Rep. 103-6, at 53 (stating that voting by non-  
13 citizens “might be combated by requiring proof of citizenship at the time of  
14 registration. . . . mail registration under this bill would preclude such corrective  
15 action”); H. Rep. 103-66, at 23 (Apr. 28, 1993) (rejecting amendment that would  
16 permit states to require documentary proof of citizenship because it *could effectively*  
17 *eliminate, or seriously interfere with, the mail registration program of the Act.*  
18 (emphasis added)).

19         The administrative interpretations by the relevant agencies likewise show the  
20 State is acting unlawfully. Consistent with NVRA’s language and legislative history,  
21 the EAC has concluded that the State may not “condition acceptance of the Federal  
22 Form upon receipt of additional proof,” and that refusal to accept the Federal Form  
23 without documentary evidence of citizenship violates the NVRA.<sup>125</sup> The EAC’s  
24 conclusion is entitled to deference. *See Chevron U.S.A., Inc. v. Natural Res. Def.*

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25         <sup>124</sup> *See* Dkt. 21. Plaintiffs renew their request for injunctive relief pursuant to  
26 the NVRA and incorporate by reference the argument in favor of their Application for  
27 TRO so that the Court’s ruling on this motion includes its ruling on the NVRA claims.

28         <sup>125</sup> Dkt. 21, Ex. 1, Ex. C; *see also* 59 Fed. Reg. 32,316 (1994).

1 *Council, Inc.*, 467 U.S. 837, 843 (1984) (When a “statute is silent . . . with respect to  
2 the specific issue” a court must defer to the implementing agency’s interpretation of  
3 the statute so long as it is based on a “permissible construction of the statute.”); *Fed.*  
4 *Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 47 (1981)  
5 (deferring to the FEC’s interpretation of the Federal Election Campaign Act); *Cnty.*  
6 *Bank of Ariz.*, 366 F.3d at 987 (relying on statutory interpretation in agency’s  
7 interpretive letters).

8 **B. 42 U.S.C. § 1973gg-7 Describes the Information That the EAC May**  
9 **Require a Voter Provide on the Federal Form, *Not* the Information**  
10 **That a State May Demand**

11 In ruling on Plaintiffs’ Application for TRO, this Court relied upon the  
12 requirements for the Federal Form set forth in 42 U.S.C. § 1973gg-7. However, that  
13 section of the NVRA provides direction to the EAC, and does *not* provide guidance to  
14 the states concerning what requirements they may place on voter registration  
15 applicants. *See* 42 U.S.C. §§ 1973gg-7(a)(2) (directing *the EAC* to develop a mail  
16 voter registration application form), 1973gg-7(b) (listing the contents of the Federal  
17 Form to be developed by the EAC). As such, the plain meaning of § 1973gg-7(b)(1)  
18 is *not* that “if the state deems some information necessary to identify the applicant, the  
19 information can be required.” (June 19 Order at 9.) Rather, the *Federal Form* may  
20 require identifying information and other information necessary to judge an  
21 applicant’s eligibility. 42 U.S.C. § 1973gg-7(b)(1). But it is the EAC that decides  
22 what the form contains, consistent with the NVRA, *not* the State. 42 U.S.C.  
23 § 1973gg-7(a)(2). The State may thus not unilaterally change the Form.

24 **V. Plaintiffs Will Suffer Irreparable Injury**

25 Plaintiffs will suffer irreparable harm if injunctive relief is not granted, as  
26 demonstrated *supra*, Legal Argument Sections III(B) and III(D). The threatened  
27 deprivation of a fundamental right, by itself, constitutes a threat of irreparable injury.  
28 *See e.g. Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity*, 950

1 F.2d 1401, 1412 (9th Cir. 1991); *see also* 11A Wright, Miller & Kane, Federal  
2 Practice and Procedure § 2948.1 (2d ed. 1995) (“when an alleged deprivation of a  
3 constitutional right is involved, most courts hold that no further showing of  
4 irreparable injury is necessary.”). Moreover, a case that raises “serious questions” or  
5 a “colorable” claim regarding constitutional rights requires finding a potential for  
6 irreparable injury. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973 (9th Cir.  
7 2002) (district court erred in applying preliminary injunction standard by requiring the  
8 constitutional violation to be “clearly established”). Without relief, tens of thousands  
9 of voters will be disenfranchised from the upcoming elections. This harm is “not  
10 theoretical, it is actual,” and amply demonstrates irreparable harm for purposes of  
11 emergency injunctive relief. *See, e.g., Washington Ass’n of Churches v. Reed*, CV06-  
12 0726RSM (W.D. Wa. Order dated August 1, 2006).<sup>126</sup>

#### 13 **VI. Public Policy Considerations Favor Granting Preliminary Relief**

14 The public interest is always served when “citizens can look with confidence at  
15 an election process that ensures that all votes cast by qualified voters are counted . . .  
16 [and] when a federally granted right is enforced uniformly and voters are not  
17 disenfranchised.” *See Bay County Democratic Party v. Land*, 347 F. Supp. 2d at 438.  
18 Moreover, “it is always in the public interest to prevent the violation of a party’s  
19 constitutional rights.” *Sammartano*, 303 F.3d at 974 (quoting *G & V Lounge, Inc. v.*  
20 *Mich. Liquor Control Com’n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Enjoining  
21 Proposition 200’s implementation will thus further the public interest.

#### 22 **CONCLUSION**

23 For the above reasons, Plaintiffs respectfully request that the Court enter a  
24 preliminary injunction order enjoining Defendants from: (1) implementing  
25 Proposition 200 Registration ID requirements; and (2) implementing Proposition 200  
26 Polling ID requirements in connection with the upcoming elections. Granting such an

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28 <sup>126</sup> Attached as Ex. 54.

1 injunction would allow the elections to proceed in accordance with the well-  
2 established and understood pre-Proposition 200 process, familiar to the voters and the  
3 State.

4 Dated this 9th day of August, 2006.

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