

IN THE SUPREME COURT OF THE UNITED STATES

Nos. 6A 375 and 6A 379

STATE OF ARIZONA and ARIZONA SECRETARY OF STATE,
Applicants

v.

MARIA M. GONZALEZ, ET AL.
Respondents

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

Response to Application for Stay of Injunction
Pending Appeal in the United States Court of Appeals for the Ninth Circuit by Maria
Gonzalez, *et al.*

Ninth Circuit Cause No. 06-16702

Danny Ortega
Roush, McCracken, Guerrero,
Miller & Ortega.
650 North Third Avenue
Phoenix, AZ 85003

Karl J. Sandstrom
Perkins Coie LLP
607 Fourteenth Street, N.W.
Suite 800
Washington, DC 20005

Amelia Morrow Gerlicher
Perkins Coie Brown & Bain P.A.
2901 North Central Avenue
Phoenix, AZ 85012

NINA PERALES*
REGIONAL COUNSEL
Marisa Bono
Carlos G. Becerra
Mexican American Legal Defense
and Educational Fund
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
Attorneys for Maria Gonzalez, *et al.*

*Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 2

FACTUAL BACKGROUND 4

 The Proof of Citizenship Requirement for Voter Registration 6

 Costs Associated With Purchasing Proof of Citizenship 6

 Proposition 200 Treats Naturalized Citizens Differently From
 Native Born Citizens 10

 Arizona Refuses to Accept the Federal Voter Registration Form
 Mandated by the National Voter Registration Act 13

 Proposition 200 Imposes a Burdensome Voter Identification
 Requirement for In-Person Voting at the Polls on Election Day 13

 Costs Associated with Purchasing Voter Identification 14

 Proposition 200 Does not Address any Problem of Voting 15

 Procedural Background 15

ARGUMENT 17

I. It is Unlikely That the Supreme Court will Grant Review at This
 State of the Litigation 17

II. If the Supreme Court Granted Review of This Case, it Would Rule
 that the Voting Restrictions of Proposition 200 are Unconstitutional 17

 A. Arizona’s Proof of Citizenship Requirement for Voter
 Registration Violates the NVRA 17

B.	Arizona’s Proof of Citizenship Requirement for Voter Registration is Pre-empted by the NVRA	22
C.	Proposition 200 Burdens the Fundamental Right to Vote and Denies Naturalized Citizens the Equal Protection of the Laws	25
D.	Proposition 200’s Documentation Requirements Act as a Modern Day Poll Tax or Wealth Restriction Violating the Fourteenth and Twenty-Fourth Amendments	29
1.	Proposition 200 Imposes a Poll Tax by Requiring Voters to Purchase a Document to Establish Their Eligibility to Register and Vote	29
2.	The Documentation Requirements of Proposition 200 are not Narrowly Tailored to Achieve a Compelling State Interest	33
III.	There is no Threatened Irreparable Harm to the Applicants and the Balance of Equities Tips Sharply in Favor of Gonzalez Respondents	35
	CONCLUSION	36

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>ACORN v. Edgar</i> , 56 F.3d 791 (7th Cir. 1995)	25
<i>ACORN v. Miller</i> , 129 F.3d 833 (6th Cir. 1997)	25
<i>Bartlett v. Stephenson</i> , 535 U.S. 1301 (2002)	16
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	26
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	27
<i>Cipriano v. City of Houma</i> , 395 U.S. 701 (1969)	29
<i>Common Cause/Georgia v. Billups</i> , 406 F. Supp. 2d 1326 (N.D. Ga. 2005)	30
<i>Donatelli v. Mitchell</i> , 2 F.3d 508 (3rd Cir. 1993)	28
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	27, 33, 35
<i>Ex Parte Siebold</i> , 100 U.S. 371 (1879)	23
<i>Ex Parte Yarbrough</i> , 110 U.S. 651 (1884)	23
<i>Foster v. Love</i> , 522 U.S. 67 (1997)	24
<i>Goldie's Bookstore, Inc. v. Superior Court of Cal.</i> , 739 F.2d 466 (9th Cir. 1984)	35
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1960)	27
<i>Graves v. Barnes</i> , 405 U.S. 1201 (1972)	16
<i>Green v. City of Tucson</i> , 340 F.3d 891 (9th Cir. 2003)	26
<i>Harman v. Forssenius</i> , 380 U.S. 528 (1965)	26, 29, 30, 33

<i>Harper v. Virginia Bd. of Elections</i> , 383 U.S. 663 (1966)	26, 29, 31, 32
<i>Heckler v. Redbud Hospital Dist.</i> , 473 U.S. 1308 (1982)	16
<i>Hill v. Stone</i> , 421 U.S. 289 (1975)	29
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985)	27
<i>Lubin v. Panish</i> , 415 U.S. 709 (1974)	29
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	24
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	26, 27, 36
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982)	27
<i>Rostker v. Goldberg</i> , 448 U.S. 1306 (1980)	16
<i>Roudebush v. Hartke</i> , 405 U.S. 15 (1972)	24
<i>San Diegans For the Mt. Soledad Nat'l War Mem'l v. Paulson</i> , 126 S. Ct. 2856 (2006)	16
<i>Smiley v. Holm</i> , 285 U.S. 366 (1932)	24
<i>Stewart v. Blackwell</i> , 444 F.3d 843 (6th Cir. 2006)	28
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	24
<i>United States v. Classic</i> , 313 U.S. 299 (1941)	24
<i>U.S. Term Limits v. Bryant</i> , 514 U.S. 779 (1995)	24, 31
<i>Voting Rights Coalition v. Wilson</i> , 60 F.3d 1411 (9th Cir. 1995) <i>cert. denied</i> , 516 U.S. 1093 (1996)	25
<i>Weinschenk v. State of Missouri</i> , No. SC88039 (MO Oct. 16, 2006)	30
<i>Werme v. Merrill</i> , 84 F.3d 479 (1st Cir. 1996)	28

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 26

STATUTES

A.R.S. §16-166 F (2) *passim*

A.R.S. §16-166 F (4) *passim*

A.R.S. § 16-166(F) *passim*

8 U.S.C. 1101 5

8 U.S.C. 1304 (b)

11 C.F.R. § 8.3-8.5 (2006) 10

42 U.S.C. § 1973gg (a)(b) *passim*

42 U.S.C. § 1973gg-4(a)(1) *passim*

42 U.S.C. § 1973gg-4(b) *passim*

42 U.S.C. § 1973gg-2 (a) *passim*

42 U.S.C. § 1973gg-7(b)(3) *passim*

42 U.S.C. § 1973gg-4(a)(2) *passim*

42 U.S.C. § 1973gg-7 *passim*

11A WRIGHT, MILLER & KANE, FEDERAL PRACTICE
AND PROCEDURE § 2948.1 (Civil 2d ed. 1995) 35

INTRODUCTION

Maria M. Gonzalez, Jesus M. Gonzalez, Bernie Abeytia, Luciano Valencia, Debbie Lopez, Southwest Voter Registration Education Project, Valle Del Sol, Friendly House, Chicanos Por La Causa, Inc. and Arizona Hispanic Community Forum (“Gonzalez Respondents”) are Plaintiffs-Appellants below and urge the Court to deny the applications for a stay filed by the State of Arizona and several of its counties.

This case does not present an extraordinary circumstance in which the decision of the Ninth Circuit Court of Appeals, based on an extensive record, should be invalidated. Pending its disposition of the appeal filed by the Gonzalez Respondents and other challengers, the Ninth Circuit has prudently chosen to maintain, for the upcoming Arizona statewide and federal election, those same election procedures that they have used in the past to register and accept voters in statewide elections.

The Ninth Circuit’s injunction halts the implementation, for the first time in a statewide election, of new voter registration and voting restrictions. The Arizona Taxpayer and Citizen Protection Act (“Proposition 200”) has significantly altered the landscape of registration and voting across the State. Voter registration applicants, who formerly swore to their eligibility to vote under penalty of federal law, must now also provide documentary proof of U.S. citizenship with their application. Proposition 200's documentary proof of citizenship requirement has resulted in a registration disaster in the state, forcing counties to reject more than 20,000 registration applications submitted by

voters since January 2005 solely because they did not include documentary proof of citizenship. In addition, voter registration organizations have been unable to conduct community registration drives because many of the people they encounter wish to register but are not carrying their citizenship documents and because the voter registration organizations themselves lack the ability to photocopy citizenship documents where they register voters at community fairs, houses of worship and shopping malls.

Proposition 200 would also require, for the first time in the November 7 election, that every voter across the State produce a document proving his or her identity before casting a ballot at the polls. Those voters who lack proof of identity will not have their ballots counted, even if they are known to their poll workers and even if they have been registered and voting for years at the same polling place.

By contrast, the State and the five counties who wish to stay the injunction will suffer no irreparable harm if the upcoming election employs the long-standing procedures that were in place before Proposition 200. Proposition 200's voter identification requirements have never before been implemented in a statewide election. For this reason, Arizona and its ranks of experienced poll workers will simply conduct this statewide election as they have past statewide elections. Similarly, with respect to voter registration, since the Ninth Circuit entered the injunction the County Recorders in Arizona have simply returned to their normal practice of accepting properly-completed and signed voter registration applications and have ceased expending the extra resources

needed to collect and verify citizenship documents.

This case raises very serious issues, among others, regarding the disparate treatment by Proposition 200 of aspiring voters who are naturalized citizens. Enacted in the heat of this nation's debate over immigration, the public interest invoked by Proposition 200, as stated on the face of the statute, is to "discourage illegal immigration." App. 1. The provisions of the statute are aimed at immigrants and require state agencies to implement new procedures to verify immigration status or citizenship for public benefits and voting.¹

In their Application, several Arizona counties continue to maintain that Proposition 200's voting restrictions are justified by "the serious nature of the problem experienced in such Counties as Maricopa, with voter fraud, and illegal immigration . . ." Five Counties' Application for Emergency Stay at 2. Given that Proposition 200 singles out foreign born U.S. citizens for uniquely onerous voter registration requirements, the Ninth Circuit's decision to enjoin implementation of Proposition 200 pending a resolution of the appeal is well-founded and should remain undisturbed.²

¹The findings section of Proposition 200 repeatedly refers to undocumented immigration: "This state finds that illegal immigration is causing economic hardship to this state . . . illegal immigration is encouraged by public agencies . . . illegal immigrants have been given a safe haven in this state . . . and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship." App. 1.

²The applicants for a stay in this Court suggest that Proposition 200 merely requires voter registration applicants to prove their eligibility to vote. Plaintiffs do not dispute that U.S. citizenship is a necessary component of voter eligibility in Arizona and

FACTUAL BACKGROUND

Arizona has, unlike any other state in the union, imposed a documentary proof of citizenship requirement for voter registration. *See* App. 2. Now, every voter registration application submitted personally by the aspiring voter, or collected by national, state, or local voter registration organizations, that does not include documentary proof of citizenship will not be processed and the voter will remain unregistered despite fulfilling the state's voter eligibility requirements.

The State of Arizona implemented Proposition 200's proof of citizenship requirement in January 2005 and the number of rejected voter registration applications since that time reveals Proposition 200's substantial, negative effect on registration. Across the state, County Recorders have rejected more than 20,000 voter registration applications simply for failure to provide documentary proof of citizenship.

The Proof of Citizenship Requirement for Voter Registration

Proposition 200 requires that all voter registration applicants provide, with their completed voter registration form, "satisfactory evidence of U.S. citizenship." A.R.S. 16-166 (F). "Satisfactory evidence" includes only documents specified in the statute: 1) an Arizona driver's license or non-operating identification issued after October 1, 1996;³ 2)

federal elections. However, this case raises the question whether, under the guise of ensuring that only citizens register to vote, a State may place more onerous requirements on naturalized citizens than native-born citizens.

³Proposition 200 also permits voter registration applicants to satisfy the proof of citizenship requirement by submitting a driver's license from another state, if that state

a U.S. birth certificate; 3) a U.S. passport; 4) U.S. naturalization documents; 5) “other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986”; or 6) a Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number. App. 1.

The forms of identification required by Proposition 200 to register to vote require a fee and are not universally held. Both the Maricopa County Recorder and the Pima County Recorder agree that there are U.S. citizens who lack the necessary documents to register to vote in the wake of Proposition 200.⁴ In fact, F. Ann Rodriguez, the Pima County Recorder, testified that her own mother, who was born in the State of New Mexico, lacks the proof of citizenship required by Proposition 200.

Furthermore, the State’s own admission, Proposition 200 includes a grandfather clause which protects currently registered voters from having to meet the documentary proof of citizenship requirements unless they seek to register in a different county.

State’s Application at 3. The prospective application of the proof of citizenship requirement means that the new burdens of voter registration will fall more heavily on those entering the electorate in upcoming years. In short, Latino citizens of Arizona,

lists the driver’s citizenship on the license. However, because no state in the U.S. verifies citizenship and places that information on the face of its driver’s licenses, this provision is meaningless. App. 5. (Karen Osborne Dep. at 24:4-25:10 (July 31, 2006)). Similarly, with respect to subsection 5 of the citizenship provision, there exist no “other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986” to prove citizenship. *See* 8 U.S.C. 1101.

⁴App. 5.

many of whom are children who have not yet reached the age of 18 or are naturalizing immigrants, will bear the brunt of Proposition 200.

Costs Associated With Purchasing Proof of Citizenship

Those qualified voter registration applicants who lack the required proof of citizenship must purchase a citizenship document for a fee.

- *Arizona Driver License:* A new or replacement Arizona driver license costs \$25.00 for a 18 to 39 year old, \$20.00 for a 40 to 44 year old, \$15.00 for a 45 to 49 year old, and \$10.00 for an individual who is 50 years old or older. App. 5. A duplicate Arizona driver license showing a new address costs \$4.00. *Id.*
- *Birth Certificate:* A certified copy of a birth certificate in Arizona costs \$10.00 for births occurring after 1990 and \$15.00 for those occurring before. App. 8
- *U.S. Passport:* A new or replacement U.S. passport for individuals 18 years old and older costs \$97.00. The renewal fee for a U.S. passport is \$67. App. 9.
- *U.S. Naturalization Documents / Immigration Documents:* A replacement Declaration of Intent, Naturalization Certificate, Certificate of Citizenship, and Repatriation Certificate, an applicant must pay a \$220 filing fee. App. 10.

Proposition 200 Treats Naturalized Citizens Differently from Native Born Citizens

Naturalized citizens are singled out by Proposition 200 for different and more onerous proof of citizenship requirements than native born U.S. citizens. Unlike native born U.S. citizens, naturalized citizens may not mail a photocopy of their naturalization

certificate to the County Recorder to satisfy the requirements of Proposition 200. An immigrants who relies on her naturalization certificate to prove U.S. citizenship must present the original of her certificate in-person to the County Recorder. Native born citizens, on the other hand, may mail photocopies of their birth certificates to the County Recorder.⁵

Proposition 200 also imposes a proof of citizenship requirement on naturalized voters that is incapable of being fulfilled. The statute states that, as an alternative to in-person registration at the County Recorder's office, a naturalized citizen may write the number of her certificate of naturalization on the voter registration form. However, the statute further provides that if the voter applicant writes the number of her certificate of naturalization on the registration form, the voter cannot be added to the rolls until the County Recorder verifies that number with the federal immigration service.⁶

However, certificate of naturalization numbers are not capable of verification with the federal immigration service. Joseph Kanefield, Arizona State Elections Director admitted that County Recorders cannot verify the certificate of naturalization number

⁵ Compare A.R.S. 16-166 F (2) "A legible *photocopy* of the applicant's birth certificate" with A.R.S. 16-166 F (4) "A *presentation* to the County Recorder of the applicant's United States naturalization documents" (emphasis added).

⁶ See A.R.S. 16-166 F (4) ("If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the County Recorder.").

provided by naturalized citizens on their voter registration form.¹ Similarly, F. Ann Rodriguez, the Pima County Recorder, admitted that “We cannot verify the certificate of naturalization number.”² Karen Osborne, testifying for the Maricopa County Recorder, also admitted that the number of the certificate of naturalization is not verifiable with the federal government.³

Nevertheless, Proposition 200 on its face requires that persons applying to register to vote provide “the number of the certificate of naturalization.”⁴ The official Arizona voter registration application requires the voter applicant to provide the number of the certificate of naturalization.⁵ The Arizona Secretary of State directs voter applicants to provide the number of the certificate of naturalization on the registration form.⁶ The Pima County Recorder and the Maricopa County Recorder direct voter applicants to provide the number of the certificate of naturalization on the registration form.⁷

¹ App. 4 (Joseph Kanefield Dep. at 93-99 (July 25, 2006)), provided to the Court in Plaintiffs’ deposition designations.

² App. 6 (F. Ann Rodriguez Dep. at 59), provided to the Court in Plaintiffs’ deposition designations.

³ App. 5 (Osborne Dep. at 34-35), provided to the Court in Plaintiffs’ deposition designations.

⁴See A.R.S. 16-166 F (4).

⁵ App. 11.

⁶ App. 12.

⁷ App. 13.

Thus, naturalized citizens who follow these instructions and properly complete and mail their voter registration applications, and who fully comply with the instructions to provide the number of their certificate of naturalization, are automatically rejected by their County Recorder. Proposition 200 accomplishes perfectly the rejection of every voter registration application mailed by a naturalized citizen who relies upon his certificate of naturalization for proof of citizenship. Because Proposition 200 does not allow naturalized citizens to mail in a copy of their certificate, the only alternative to this impossible procedure is to travel to the County Recorder's office and apply in person to register to vote. As a result, Proposition 200 allows only in-person registration for naturalized citizens who rely upon their certificate of naturalization for proof of citizenship.

In response to the fact that Proposition 200 is incapable of execution with respect to the number of the certificate of naturalization, County Recorders have departed from the language of Proposition 200 and imposed requirements not present in the statute. County Recorders have begun to require voter applicants who rely on their naturalization certificate to provide new and different information, after the naturalized citizen mails in a properly completed voter registration application.

After receiving a properly completed voter registration application containing a certificate of naturalization number, some County Recorders now send a letter to the voter applicant to request other immigration-related information about the applicant. Pima and

Maricopa County Recorders request that the citizen provide his or her former Alien Registration Number.¹² This request for a citizen's alien registration number is not authorized by Proposition 200 and the alien registration number is confidential under federal law. *See* 8 U.S.C. 1304 (b). Nevertheless naturalized citizens must disclose their alien registration number to these County Recorders in order to have any hope of being added to the voter rolls without having to travel to the County Recorder to apply in person.

As a result, voter applicants who rely on their naturalization certificate to prove citizenship are subjected to a second set of unauthorized requirements which are imposed after they submit their registration application.

Even if these naturalized citizens comply with the additional requirements imposed by the County Recorders, they are not added to the rolls as of the date they submitted their original (correctly completed) application. As a result, these voter registration applicants can be excluded from voting for failure to register at least 29 days before an upcoming election.

Arizona Refuses to Accept the Federal Voter Registration Form Mandated by the National Voter Registration Act

Arizona has refused to accept federal voter registration applications as required by the National Voter Registration Act, even when they are properly completed, if they do not also comply with Proposition 200's requirement to provide documentary proof of

¹² App. 14 ; *see also* App. 5 (Osborne Dep. at 35-36).

citizenship.

Under the National Voter Registration Act of 1993, states must “use and accept” a federal mail-in registration form created to comply with specific requirements of 42 U.S.C. § 1973gg-7. The federal form, available from the U.S. Election Assistance Commission (“EAC”) and a variety of other organizations, is a single page asking just eight required questions. *See* 11 C.F.R. § 8.3-8.5 (2006). The submission of the federal form is known as a “postcard registration,” as the hard copy application form is a two-sided card that can simply be folded in half and mailed like a postcard.¹ Applicants must check a box indicating U.S. citizenship and attest, under penalty of perjury, that they are United States citizens and eligible to vote. The form also includes a field called “ID number,” where Arizona and most other states request a driver’s license number, or, if the applicant has no license, the last four digits of the applicant’s social security number. State-specific instructions also explain the requirements to vote in each state and the address to which the form should be mailed.

Since implementing Proposition 200, Arizona has required its County Recorders to reject all voter registration applications, including federal NVRA applications, that are not accompanied by documentary proof of citizenship.

On March 6, 2006, the EAC informed Arizona Secretary of State Jan Brewer that applying Proposition 200 to the federal registration form would “effectively result in a

¹ If retrieved online and not printed double-sided, the application needs to be folded and placed in an envelope.

refusal to accept and use the Federal Registration Form in violation of Federal law.”

App. 15. On March 13, 2006, Ms. Brewer wrote to the EAC charging that the EAC’s opinion was “completely inconsistent, unlawful, and without merit.” The letter further stated that “After consulting with the Arizona Attorney General, I will instruct Arizona’s County Recorders to continue to administer and enforce the requirement that all voters provide evidence of citizenship when registering to vote as specified in A.R.S. § 16-166(F).” App. 15.

On March 13, 2006, State Election Director Joseph Kanefield wrote to the State’s County Recorders informing them of Defendant Brewer’s “position that the proof of citizenship requirement set forth in A.R.S. § 16-166(F) must continue to be enforced for all newly registered voters and voters moving from one county to another.” App. 15.

In addition to this policy’s impact on individual voters, voter registration organizations cannot register an Arizona resident without a post-1996 driver’s license unless: the person happens to have important identification documents with her; the organization has a copier or scanner on hand and is in a location where it can make use of the equipment; the organization has envelopes on hand (otherwise not required to mail the NVRA postcard form); and the canvasser is aware of the special Arizona requirements and thus knows to ask for the documents in the first place. This is hardly a simple or uniform system. Postcard registration was an important part of NVRA specifically because it reached those who could not take advantage of the motor-voter provisions of

the NVRA—those who lack a driver’s license—and the Proposition 200 places the greatest burden on precisely that group of citizens.

Proposition 200 Imposes a Burdensome Voter Identification Requirement for In-Person Voting at the Polls on Election Day

Registered voters must also show proof of identity in order to cast a ballot at the polls. Any qualified voter who lacks documentary proof of identity will be turned away from the polls, even if he or she fulfills all other state voter eligibility requirements.

Proposition 200's requirements for proof of identity at the time of voting also require those voters who lack one of the specified forms of identification to pay a fee to acquire one.

Costs Associated with Purchasing Voter Identification

Most of the forms of identification required to cast a ballot at the polls require fees to obtain. In addition to the \$10.00 to \$25.00 fee associated with obtaining a driver’s license:

- *Gas Utilities:* Southwest Gas Corporation requires a \$35 service establishment charge for a first billing on gas connection. With certain exceptions, an \$80 residential security deposit is also required to avoid interruption of service. App. 7.
- *Electric Utilities:* APS, Arizona’s largest electric utility, charges a \$25 residential activation fee, in addition to a deposit depending on credit status, for electricity service. Mot. Hrg. Exh. 27. SRP, another Arizona electric utility, charges a \$28

residential activation fee. App 8.

- *All Utilities:* Arizona households on tight budgets must still make monthly payments to receive utilities, even when receiving support through energy assistance programs. For example, those individuals on Low-Income Ratepayer Assistance (LIRA) receive only a 20% reduction on the “per therm” rate. App. 18. Low-income energy customers on the SRP Economy Price Plan receive no more than \$14 off SRP charges each month. App. 18.
- *Checking Accounts:* Chase Bank and Bank of America require a minimum of \$25 to open a personal checking account. App. 19. Wells Fargo Bank in Arizona requires a minimum of \$100 to open a personal checking account. App. 19. The Arizona Federal Credit Union charges \$3 per month to maintain a checking account. App. 19.

Proposition 200 Does not Address any Problem of Voting

The record in this case is devoid of *even one example* of an undocumented immigrant registering or voting in Arizona. The State of Arizona and its counties have experienced only a few isolated incidents in which legal permanent residents have registered and voted, among the 2.5 million voters in Arizona. App. 20. The testimony of County Recorders in the case is that non-citizen voter registration is an isolated occurrence and the result of confusion on the part of the applicant. App. 6 (Rodgriuez Depo. at 119:6-10) and App. 5 (Osborne Depo. at 95:4-22).

Similarly, the State and its recorders have been unable to produce any evidence of “imposter” voting in which persons appear to vote in person and attempt to vote under someone else’s name. *See* Appendix to Counties’ Application for Emergency Stay.

Procedural Background

The Gonzalez Respondents filed their challenge to the voting restrictions of Proposition 200 on May 9, 2006 in the U.S. District Court for the District of Arizona. On June 19, 2006 the District Court denied the Gonzalez Respondents’ Motion for a Temporary Restraining Order and on September 11, 2006, the District Court denied the Gonzalez Respondents’ Motion for a Preliminary Injunction. On September 12, the Gonzalez Respondents filed their Notice of Appeal to the Ninth Circuit Court of Appeals and on October 3, 2006 the Gonzalez Respondents filed with the Ninth Circuit their Joinder with the ITCA Plaintiffs/Appellants’ Emergency and Urgent Motion for Injunction Pending Appeal.

The Ninth Circuit issued its order on October 5, 2006, enjoining “implementation of Proposition 200’s voting identification requirement in connection with Arizona’s November 7, 2006 general election; and enjoin[ing] Proposition 200’s registration proof of citizenship requirements so that voters can register before the October 9, 2006 registration deadline.”

ARGUMENT

The Supreme Court grants stays pending appeal only in extraordinary

circumstances. *See Heckler v. Redbud Hospital Dist.*, 473 U.S. 1308, 1311-12 (1982); *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). A lower court judgment is entitled to a presumption of validity because it was entered by a tribunal that was closer to the facts than the single Justice reviewing the stay. *Graves*, 405 U.S. at 1203.

As a threshold consideration, Justices of the Court have consistently required that any party seeking a stay of a lower court judgment bears the burden of showing a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant a writ of certiorari. *Id.*; *see also Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002) (denying stay after finding that the case at issue did not satisfy any of the criteria for the exercise of Supreme Court discretionary jurisdiction pursuant to Supreme Court Rule 10). Further, an applicant seeking stay must show a "fair prospect" that the decision from the court below was erroneous, *see Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980), and that the implementation of the judgment pending appeal will lead to irreparable harm to the movant. *See Graves*, 405 U.S. at 1203. In determining irreparable harm, a Circuit Judge may "balance the equities," or examine the relative harms faced by the applicant and the respondent, as well as the interests of the public at large. *Rostker*, 448 U.S. at 1308; *see also San Diegans For the Mt. Soledad Nat'l War Mem'l v. Paulson*, 126 S. Ct. 2856 (2006) (citations omitted). (finding that when considering stay applications on matters pending before the Court of Appeals, a Circuit Justice must "try to predict whether the Court would then set the order aside; and balance

the so-called ‘stay equities.’”).

I. It is Unlikely That the Supreme Court will Grant Review at This Stage of the Litigation

At this stage of the case, the Ninth Circuit is moving forward with its consideration of the Gonzalez Respondents’ appeal and has entered its injunction on a temporary basis and only with respect to the November 7 election. While the Court of Appeals simply holds election procedures constant until it has a chance to hear the full appeal, the election moves forward under long-standing prior practices. At this point, the case is not sufficiently developed for the Court to conduct a review on the merits; for this reason, the Court is not likely to accept the case for consideration.

II. If the Supreme Court Granted Review of This Case, it Would Rule that the Voting Restrictions of Proposition 200 are Unconstitutional

Similarly, the applicants for a stay have failed to meet their burden to demonstrate that this Court would conclude that Proposition 200 is both legal and constitutional. On the contrary, Gonzalez Respondents and other challengers of Proposition 200 have presented strong and substantial arguments in support of striking down the statute.

A. Arizona’s Proof of Citizenship Requirement for Voter Registration Violates the NVRA

The National Voter Registration Act of 1993 (“NVRA” or “Act”) establishes national standards and procedures to govern voter registration in federal elections. The statute includes findings that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation” and declares as its purpose to “establish

procedures that will increase the number of eligible citizens who register to vote.” 42 U.S.C. § 1973gg (a), (b). Congress chose to fulfill its purpose by allowing people to register to vote by mail, when applying for a driver’s license (the so-called “motor-voter” rules), or when visiting certain federal agencies. *Id.* § 1973gg-2(a).

Congress specifically set forth the contents of a national voter registration form and a provision requiring its acceptance for registering voters for federal elections in all states. Within these guidelines, the FEC developed the federal postcard form that states must accept. First, Congress mandated that states use federal procedures:

[N]otwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State *shall establish* procedures to register to vote in elections for Federal office [through motor vehicle license application, mail-in application, and at certain agency offices].

Id. § 1973gg-2(a) (emphasis added).

Then, it set out specific requirements for the design of the federal form:

The mail voter registration form developed under subsection (a)(2) of this section—

- (1) may require only such identifying information (including the signature of the applicant) and other information

(including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

- (2) shall include a statement that—
 - (A) specifies each eligibility requirement (including citizenship);
 - (B) contains an attestation that the applicant meets each such requirement; and
 - (C) requires the signature of the applicant, under penalty of perjury;
- (3) may not include any requirement for notarization or other formal authentication; and
- (4) shall include, in print that is identical to that used in the attestation portion of the application—
 - (i) [voter eligibility requirements and the penalties provided by law for submitting false voter registration];

42 U.S.C. § 1973gg-7. On its face, neither the language setting forth the contents of the form nor the provision requiring its acceptance allow states to require additional information with the federal form. Indeed, investing states with authority to modify the form or add to its contents is incompatible with the postcard nature of the form. While Congress allows states to develop their own forms, such forms must mirror the simplicity and ease of use of the federal form to maintain consistency within the federal registration scheme. *Id.* § 1973gg-4(a)(2).

Furthermore, Congress intended to make obtaining and returning voter registration cards simple and uniform nationwide. A key feature of the law, for example, is the requirement that all states, other than those that permit same-day registration, accept registrations by mail. Congress considered mail registration to be an effective and convenient means to register to vote and a necessary supplement to the other forms of registration required by NVRA. Rather than relying on each state to develop its own form, Congress vested a federal agency with the authority to design a simple, universal form in a “postcard” format. *Id.* § 1973gg-7. In turn, all states must “use and accept” the federal form. *Id.* § 1973gg-4(a)(1). States must also distribute the forms, with “particular emphasis on making them available for organized voter registration programs.” *Id.* § 1973gg-4(b).

By creating a uniform system of postcard registration, Congress sought to ameliorate a number of concerns regarding access to voting, including facilitating national voter drives, easing registration for the disabled and others not reached by other registration methods, and

reducing confusion for members of the public faced with complicated and inconsistent state registration requirements.

The NVRA requires state acceptance of the common federal form. 42 U.S.C. § 1973gg-4(a)(1). Arizona is in direct violation of this statute, as Proposition 200 requires Arizona County Recorders to reject the form if it is not accompanied by a document in all cases where the applicant lacks a post-1996 driver's license number. Applications from eligible voters that either lack an appropriate driver's license or fail to provide documentation of citizenship are rejected pursuant to the order of Secretary of State Brewer, in violation of federal law.

Because Congress chose to facilitate registration by minimizing the amount of information that may be requested, Congress's intent must be respected by strictly construing the necessity of additional information. Unlike political party or race (non-identifying information requested on the federal form), additional citizenship documentation provides no new information; it only confirms the sworn statement of citizenship.

Congress also intended that a signature on the registration form, which includes both the requirements of voter eligibility and the penalties for perjury by filing a false application, be considered sufficient to ensure that the information contained within is truthful. There are a variety of ways to give meaning to a signature and verify that the information to which it is attached is authentic, including notarization, witnesses, and signature guarantees.

Congress, however, specifically prohibited states from requiring “notarization or other formal authentication.” 42 U.S.C. 1973gg-7(b)(3).

The Arizona requirement for supporting documentation directly contradicts the statute. Rather than relying on the attestation signature, Arizona officials require formal government documents in order to authenticate some applications. In addition, for some forms of identification such as naturalization documents, state officials must separately verify the information with the federal government. *See* A.R.S. § 16-166(F). These barriers are precisely the kind that the NVRA seeks to remove.

These hurdles created by Proposition 200 are precisely the type of restrictions that Congress intended to prevent. To allow their implementation not only violates the language of the National Voter Registration Act, but also renders meaningless the entire mail-in registration program. An interpretation of federal law that allows such a result is absurd and unsustainable.

B. Arizona’s Proof of Citizenship Requirement for Voter Registration is Pre-empted by the NVRA

Art. I Section. 4 cl. 1 of the United States Constitution, known as the “Elections Clause,” reserves to Congress the right to regulate the manner of holding congressional

elections.¹ U.S. CONST., art I, s. 4 cl. 1. The Supreme Court has often interpreted the Election Clause and upheld Congressional authority to preempt contrary state laws.

In 1879, the Court in *Ex Parte Siebold*, 100 U.S. 371 (1879), upheld Congressional authority to impose penalties for violating laws governing the election of congressional members. The Court stated that the Elections Clause conferred upon Congress authority to regulate congressional elections and that the “power of Congress over the subject is paramount.” *Id.* at 384. It also opined that “[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.” *Id.*

Several years later, in 1884, the Supreme Court upheld federal laws that protected voters, in this case an African American voter, from harassment and intimidation while “enjoying the right and privilege of suffrage in the election of a lawfully qualified person as a member of the congress of the United States of America.” *Ex Parte Yarbrough*, 110 U.S. 651, 656 (1884). In what are known as the Ku-Klux Cases, the Court held that, under the Election Clause, that Congress has unfettered authority to act when it “finds it necessary to make additional laws for the free, the pure, and the safe exercise of this right of voting” *Id.* at 662.

¹The Election Clause reads:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

In *Foster v. Love*, 522 U.S. 67 (1997), the Supreme Court again reaffirmed Congressional power to regulate elections for congressional members by striking down a Louisiana law in place since 1978 that set an open primary election in October. The Court noted that the Election Clause “is a default provision; it invests the States with responsibility for the mechanics of congressional elections, see *Storer v. Brown*, 415 U.S. 724, 730 (1974), but only so far as Congress declines to preempt state legislative choices, see *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (‘Unless Congress acts, Art. I, § 4, empowers the States to regulate’).”¹ The Court found well-settled Congressional “‘power to override state regulations’ by establishing uniform rules for federal elections, binding on the States.” See *Foster*, 522 U.S. at 69 (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)).

The text and legislative history of the NVRA make clear that Congress intended to act under the authority granted to it by the Elections Clause:

Congress has the power to regulate Federal elections, including the establishment of national voter registration procedures for Presidential and congressional elections. Congress’ power has been clearly established under the Times, Places

¹Although states have been granted the authority to legislate on the “time, place, and manner” of elections, under the Constitution, it is only “to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution ‘To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.’” *United States v. Classic*, 313 U.S. 299, 315 (1941); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding constitutionality of federal statute barring a state from denying the right to vote in any election because of a literacy test). The provision confers on Congress a “general supervisory power,” *Ex parte Siebold*, *supra*, 100 U.S. 371 (1879), under which it may “supplement . . . state regulations or may substitute its own.” *Smiley v. Holm*, 285 U.S. at 366-67 (1932); see also *Ex parte Yarbrough*, 110 U.S. 651 (1884).

and Manner Clause and the Necessary and Proper Clause of the Constitution. These provisions, as interpreted by the Supreme court, belie assertions by those who argue that the States have exclusive authority to regulate the manner in which Federal elections are conducted.

See S. Rep. 103-6, at 3-4; H.R. Rep 103-9, at 6.

After passage of the NVRA, Illinois, California, and Michigan challenged the NVRA as unconstitutional because it infringed on state power, “conscripting state agencies, personnel, and funds to further a federal purpose, thereby impinging upon basic principles of federalism and violating the Tenth Amendment.” *See Association of Comm. Organizations for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997). Each time, however, the challenges failed. *ACORN*, 129 F.3d at 836; *see also ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995) *cert. denied*, 516 U.S. 1093 (1996). And, in each case, the court relied on the Elections Clause to justify the extent and nature of Congressional regulation of various aspects of the election process. *See, e.g., ACORN*, 129 F.3d at 836 (holding passage of NVRA was proper exercise of Congressional power to regulate federal elections).

By imposing a documentary proof of citizenship requirement for voter registration in federal elections, Proposition 200 violates not just the NVRA but also the Supremacy Clause to the U.S. Constitution.

C. Proposition 200 Burdens the Fundamental Right to Vote and Denies Naturalized Citizens the Equal Protection of the Laws

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

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

Because Proposition 200 mandates that voters produce documents that impose a financial burden, it must withstand a more rigid standard of review than mere rational basis. In *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court held that Virginia's imposition of an annual poll tax not exceeding \$1.50 on residents over the age of 21 was a denial of equal protection. Subjecting the Virginia poll tax to close scrutiny, the Court concluded that the placing of even a minimal price on the exercise of the right to vote constituted an invidious discrimination. *Id.* at 667 (“[S]ince the 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.”) (quoting *Reynolds*, 377 U.S. at 561-62); *id.* at 670 (noting that where fundamental rights and liberties are at issue, “classifications which might invade or restrain them must be closely scrutinized and carefully confined”). As in *Harper*, the documentation requirements mandated by Proposition 200 will impose a price on the vote for some applicants seeking to register and qualified voters seeking to cast ballots.

In addition, because Proposition 200 singles out naturalized citizens, who are foreign born, for different and more demanding treatment in the voter registration process, the proof of citizenship requirements also run afoul of the 14th Amendment’s guarantee of equal protection of the laws. See *Hunter v. Underwood*, 471 U.S. 222 (1985); *Rogers v. Lodge*, 458 U.S. 613 (1982); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). This is particularly the case where, as here, Proposition 200 explicitly targets foreign born persons.

Gonzalez Respondents do not contend that all legislation or practices affecting the right to vote must be reviewing under strict scrutiny. Compare *Dunn*, 405 U.S. at 342 (durational residence laws subject to strict scrutiny); with *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (election practices must be “narrowly drawn to advance a state interest of compelling importance” if they impose a *severe or unequal* burden on voting rights but upholding state prohibition on write-in voting, concluding that it did not imposes a severe

restriction on the right to vote, but only “reasonable, nondiscriminatory [a] restriction[.]”) (emphasis added). Documentary proof of citizenship requirements, however, simply do not fall within the *Burdick* framework as urged by the State Applicants. See State Application for Stay of Injunction at 12-14.

Proposition 200 effectively bars the franchise from those otherwise qualified voters who are unable to pay the fees to obtain the necessary documentation to register or cast a ballot. It renders all other proof, even where no doubt about the voter’s citizenship status exists, completely irrelevant. This effect is in no way synonymous with that of other cases in which federal courts applied rational basis, as the restrictions in those cases did not restrict the fundamental right to vote. See, e.g., *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (use of punch card ballots and central-count optical scan systems); *Werme v. Merrill*, 84 F.3d 479, 485-86 (1st Cir. 1996) (prevention of a member of the Libertarian Party from serving as a ballot clerk on Election Day); *Donatelli v. Mitchell*, 2 F.3d 508, 514-15 (3rd Cir. 1993) (state reapportionment plan that temporarily assigned a state senator to a district that had not elected him); see also *id.* at 515-16 (collecting court-of-appeals and district-court cases that reviewed claims of “temporary disenfranchisement” due to reapportionment under a rational-basis standard). Because Proposition 200 imposes a severe and unequal burden on voting rights, it can only be upheld if the State shows that the statute is narrowly tailored to serve a compelling interest.

D. Proposition 200's Documentation Requirements Act as a Modern Day Poll Tax or Wealth Restriction Violating the Fourteenth and Twenty-Fourth Amendments

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

1. Proposition 200 Imposes a Poll Tax by Requiring Voters to Purchase a Document to Establish Their Eligibility to Register and Vote

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

¹⁴The Twenty-Fourth Amendment provides:

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

U.S. CONST. AMEND. XXIV.

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

On similar grounds, a federal district court in Georgia recently enjoined the implementation of a photo identification requirement for voting at the polls, finding that plaintiffs were likely to prevail on the merits of their claim that photo identification requirement at polls was an unconstitutional poll tax. *Common Cause / Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). The court premised the injunction on the Plaintiff's likelihood of success on its undue burden and poll tax claims, virtually identical to the claims at hand here. *Id.* at 1367-69.

A new version of the Georgia law, which removed the fee for a Photo ID, was again enjoined as an undue burden on voting even under the less stringent *Burdick* standard of review. *Common Cause / Georgia v. Billups*, 439 F.Supp.2d 1294,1343-49 (N.D. Ga 2006).

On this day, the Supreme Court of Missouri struck down that state's voter ID law. App. 21. Applying strict scrutiny, the court found that the voter ID law violated the Missouri constitution because it created a heavy burden on the fundamental right to vote and was not narrowly tailored to meet a compelling state interest. *Id.*

The State Applicants' assertion that Arizona lacks discriminatory intent in creating and enforcing its voting scheme is irrelevant. *See State Application for Stay of Injunction*

at 14-17. The Supreme Court has never held that proof of discriminatory purpose is necessary to assess whether impediments to electoral participation are inconsistent with the fundamental right to vote. “Constitutional rights would be of little value if they could be . . . indirectly denied.” *Harman*, 380 U.S. at 540 (citation omitted). As a result, “[t]he Constitution ‘nullifies sophisticated as well as simple-minded modes’ of infringing on constitutional protections.” *U.S. Term Limits v. Bryant*, 514 U.S. 779, 829 (1995) (citation omitted). This is particularly true when it comes to voting. *See Harper v. Virginia Bd. of Elections*, 383 U.S. at 670 (invalidating a \$1.50 poll tax imposed as a precondition to voting, noting that “the right to vote is too precious, too fundamental to be so burdened or conditioned”).

Similarly, the specific amount of the cost incurred by a qualified voter seeking to register under Proposition 200 is irrelevant to the Court’s review. “To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. . . . [A]s a condition of obtaining a ballot, the requirement of fee paying causes an invidious discrimination that runs afoul of the Equal Protection Clause.” *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966). The Equal Protection Clause commands, the Court concluded, that “a citizen, a qualified voter, is no more nor no less so” because he or she has \$1.50 in his or her pocket or nothing at all. Similarly, a citizen is no more nor no less qualified to vote because he or she has \$10, \$15, \$25, or \$85 in his or her pocket, or because he or she pays

or fails to pay the fee to obtain a driver's license, birth certificate, or passport. *See Harper*, 383 U.S. at 668. The principle that denies the State the right to dilute a citizen's vote on account of his or her economic status or other such factors by analogy bars a system which excludes those unable to pay or fail to pay a fee to vote, *see id.* at 667-68, no matter how seemingly "tangential" or "incidental" the fee may seem. The Supreme Court has held, "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670.

Furthermore, the State Applicants' claim that the fee obligation relates, not to voting, but to obtaining a driver's license, birth certificate, or passport, is unavailing. *See State Application for Stay of Injunction* at 18. The Supreme Court has already rejected the argument that "a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting." *Harper*, 383 U.S. at 668.

Although fees and financial burdens may very well be appropriate in the case of non-fundamental rights, such as traveling abroad with a passport, they have no place as a condition of a fundamental right, such as voting. Accordingly, while Arizona is permitted to require a fee as a condition of obtaining a driver's license or birth certificate, it may not require payment of that same fee as a condition of registering to vote. Any claim to the contrary elevates form over substance, ignoring the Supreme Court's injunction "to

carefully and meticulously scrutinize[]” any alleged infringement of the right to vote. *See Harper*, 383 U.S. at 667. Arizona has conditioned the right to vote on the basis of wealth – “a capricious or irrelevant factor,” *see Harper*, 383 U.S. at 668 – for those individuals who wish to register, but do not already possess the requisite documentation. The net of this restriction is wide and undiscerning in its scope, casting a dangerous potential to unduly burden a wide range of qualified voters, from the wife who has adopted her husband’s surname, the college student who has recently changed residence, an arson victim who lost her birth certificate in a fire, to a new citizen in need of replacement naturalization papers. Similarly, Proposition 200’s mandate that voters show an identification document or documents requires voters to purchase those documents, or to possess property, such as a bank account, or to assume financial responsibility for a utility bill.

Finally, the State Applicants’ claim that Proposition 200 simply requires prospective voters to prove their eligibility, and such a requirement can never violate the Constitution, is unavailing. *See State Application for Stay of Injunction* at 17. Restrictive requirements on voter registration and voting, including the imposition of a fee, do not pass constitutional muster automatically simply because they are related to proving voter eligibility. *See Harman v. Forssenius*, 380 U.S. 528, 537 (1965) (striking down the requirement that a voter file a certificate of state residence); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (durationsal residence laws subject to strict scrutiny).

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

In order to satisfy strict scrutiny, the State must show that the documentation requirements set forth by Proposition 200 are narrowly tailored to achieve a compelling state interest. While ensuring that only eligible persons are allowed to vote is unquestionably an important state interest, the State cannot show that Proposition 200's registration requirements are remotely tailored to serve that interest.

The Supreme Court's approach in analyzing the governmental need for a certificate requirement in *Harman* is particularly instructive here because the purported justification is the same as that which the State asserts here – namely, fraud prevention. *Harman*, 380 U.S. at 540. In *Harman*, the Court struck down a poll-tax substitute that did not even require a financial payment. There, Virginia required that a federal voter either pay a poll tax as required for state elections or file a certificate of state residence. The Court held that “[f]or federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed,” adding that “constitutional deprivations may not be justified by some remote administrative benefit to the State.” *Id.* at 542 (emphasis added). Thus, the Court rejected the State's contention that the statutory scheme should be upheld because the certificate was a “necessary substitute method of proving residence, serving the same function as the poll tax.” *Id.* at 542. In addition, the Court held that the State failed to show that the

certificate was “necessary to the proper administration of its election laws.” *Id.* at 543.

As the Court concluded,

[t]he availability of numerous devices to enforce valid residence requirements – such as registration, use of the criminal sanction, purging of registration lists, challenges and oaths, public scrutiny by candidates and other interested parties – demonstrates quite clearly the lack of necessity for imposing a requirement whereby persons desiring to vote in federal elections must either pay a poll tax or file a certificate of residence six months prior to the election.

Id.; *see also Dunn*, 405 U.S. at 345-46 (stating that although “‘purity of the ballot box’ is a formidable state interest” and the prevention of voter fraud “is a legitimate and compelling governmental goal,” the means employed were too imprecise to pass constitutional muster because the durational residency requirement at issue excluded legitimate voters and because the State’s interest in fraud prevention was protected in other ways).

The State cannot demonstrate a connection between Proposition 200’s identification requirement and preventing non-citizens from registering to vote since the State cannot identify, as an initial matter, any more than the rare and incidental occurrence of non-citizen voter registration.

III. There is no Threatened Irreparable Harm to the Applicants and the Balance of Equities Tips Sharply in Favor of Gonzalez Respondents

Proposition 200 will unduly burden thousands of potential voters who do not possess any of the required forms of identification to vote and has already resulted in the rejection of voter registration forms of 20,000 Arizonans who took the trouble to complete and submit a voter registration form..

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

For this reason, the balance of hardships tips strongly in plaintiffs’ favor. On the other side of the balance of equities, Defendants can offer no significant reason to continue to implement registration and identification requirements that inevitably will deprive a portion of the electorate of the fundamental right to vote. Defendants’ purported interest in preventing voter fraud cannot justify Proposition 200's unfair and inflexible registration requirements, especially in the case, such as this, when the State

cannot demonstrate the existence of imposter voting or fraudulent non-citizen voting to justify burdening the rights of all citizens in Arizona.

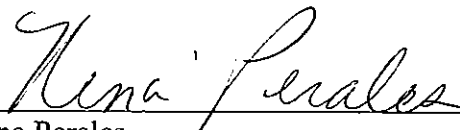
With respect to proof of citizenship, denying the request for a stay allows county election officials to continue the familiar process of voter registration they engaged in prior to January of 2005. It is simply not a hardship to instruct a small number of county staff to accept voter registration forms that satisfy the previous requirement of confirming an individual's citizenship by having him swear under penalty of law that he is a citizen. Similarly, returning to previous practices for accepting voters at the polls is not burdensome to Defendants.

CONCLUSION

For the foregoing reasons, Gonzalez Respondents respectfully request that this Court deny the Applicants' motions to lift the stay entered by the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 16th day of October, 2006.

MEXICAN AMERICAN LEGAL DEFENSE &
EDUCATIONAL FUND, INC. (MALDEF)



Nina Perales
Regional Counsel
Marisa Bono
Carlos Becerra
110 Broadway, Suite 300
San Antonio, TX 78205
Phone: (210) 224-5476

Danny Ortega
Roush, McCracken, Guerrero, Miller and Ortega
650 North Third Avenue
Phoenix, AZ 85003
Phone: (602) 253-3554, Ext. 214
Fax: (602) 340-1896

Karl J. Sandstrom
Perkins Coie LLP
607 Fourteenth Street N.W.
Suite 800
Washington, DC 20005

Amelia Morrow Gerlicher
Perkins Coie Brown & Bain P.A.
2901 North Central Avenue
Phoenix, Arizona 85012

Attorneys for Gonzalez, *et al.*
Plaintiffs/Respondents

CERTIFICATE OF SERVICE

Pursuant to Rule 29(5) and 29(5)(b) of the
Rules of the Supreme Court of the United States

I hereby certify that I caused a copy of the Response to Application for Stay of Injunction Pending Appeal in the United States Court of Appeals for the Ninth Circuit by Maria Gonzalez, *et al.* to be served on October 16, 2006, by mailing it with the United States Parcel Services via first class mail, postage pre-paid, to the attorneys of record for the parties, as follows:

COPY emailed to: dbickell@sc-us.gov
this October 16, 2006

ORIGINAL AND FOUR COPIES Federal Expressed
this October 16, 2006 to:
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543

United States Court of Appeals for the
Ninth Circuit
95 Seventh Street
San Francisco, CA 94119

COPIES e-mailed and mailed this day to:
Attorneys for Maricopa County, Apache County, Cochise County, Gila County,
Graham County, Greenlee County, La Paz County, Mohave County, Navajo County,
Pima County, Pinal County, Santa Cruz County, Yavapai County, Yuma County (“County
Defendants”):

Dennis I. Wilenchik
Thomas E. Lordan
Wilenchik & Bartness, PC
The Wilenchik & Bartness Building
2810 North Third Street
Phoenix, AZ 85004
DIW@wb-law.com

Colleen Connor
Deputy County Attorney

Division of County Counsel
222 North Central Ave., Ste. 1100
Phoenix, AZ 85004-2206
connorc@mcao.maricopa.gov
Attorney for Coconino County Defendants:

Terence C. Hance
Coconino County Attorney
Jean E. Wilcox
Deputy County Attorney
110 East Cherry Avenue
Flagstaff, AZ 86001
jwilcox@coconino.az.gov

Attorney for State of Arizona and Secretary of State Jan Brewer:

Peter A. Silverman
Assistant Attorney General
Office of the Attorney General
1275 W. Washington
Phoenix, AZ 85007
peter.silverman@azag.gov

Attorneys for Plaintiffs Inter Tribal Council of Arizona, et al.:

David B. Rosenbaum
Thomas L. Hudson
Sara S. Greene
Osborn Maledon, PA
2929 North Central Avenue, 21st Floor
Phoenix, AZ 85012-2793
thudson@omlaw.com
drosenbaum@omlaw.com
sgreene@omlaw.com

David J. Bodney
Karen J. Hartman-Tellez
Steptoe & Johnson, LLP
Collier Center
201 East Washington St., #1600
Phoenix, AZ 85004-2382

dbodney@steptoe.com
khartment@steptoe.com

Jon Greenbaum
Benjamin Blustein
1401 New York Ave., Suite 400
Washington, DC 20005
jgreenbaum@lawyerscommitte.org
bblustein@lawyerscommittee.org

Neil Bradley
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, GA 30303
nbradley@aclu.org

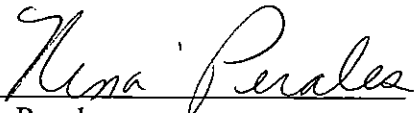
Elliot M. Mincberg
2000 M. Street, NW, Suite 400
Washington, DC 20036
eminberg@pfaw.org

Daniel B. Kohrman
601 E Street, NW, Suite A4-240
Washington, DC 20049
dkohrman@aarp.org

Joe P. Sparks
Susan B. Montgomery
Sparks, Tehan & Ryley, PC
7503 First Street
Scottsdale, AZ 85251
joe-sparks@qwest.net

Attorneys for Attorneys Plaintiffs Navajo Nations:
Marvin S. Cohen
Judith M. Dworkin
4250 N. Drinkwater Blvd., 4th Floor
Scottsdale, AZ 85251-3693
Sacks Tierney P.A. Attorneys
Marvin.Cohen@SacksTierney.com
judith.dworkin@sackstierney.com

Brenna L. Clani
The Navajo Nation, Dept. of Justice
P.O. Drawer 2010
Window Rock, AZ 86515
brennalclani@navajo.org



Nina Perales