

1 TERRY GODDARD  
2 Attorney General  
3 Firm Bar No. 14000  
4 Mary O'Grady, No. 011434  
5 Solicitor General  
6 Carrie J. Brennan, No. 018250  
7 Barbara A. Bailey, No. 018230  
8 Assistant Attorneys General  
9 1275 West Washington Street  
10 Phoenix, Arizona 85007-2926  
11 Tel: (602) 542-7826  
12 Fax: (602) 542-8308  
13 Attorneys for the State of Arizona and  
14 the Arizona Secretary of State

11 **IN THE UNITED STATES DISTRICT COURT**  
12 **DISTRICT OF ARIZONA**

13 MARIA M. GONZALEZ, et al.,

14 Plaintiffs,

15 v.

16 STATE OF ARIZONA, et al.

17 Defendants.

No. CV06-01268 PHX ROS  
No. CV06-1362 PCT JAT (Cons)  
No. CV06-1575 PHX EHC (Cons)

**REPLY IN SUPPORT OF MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT BY DEFENDANTS  
STATE OF ARIZONA AND THE  
ARIZONA SECRETARY OF STATE**

(Assigned to the Honorable  
Roslyn O. Silver)

1     **I.     THE NINTH CIRCUIT ALREADY DECIDED PLAINTIFFS’ NVRA CLAIM.**

2             The Gonzalez Plaintiffs devote nearly ten pages of their response, and much of  
3 their statement of “facts,” to their NVRA claim.<sup>1</sup> Nowhere in their papers, however, is  
4 any mention, much less an explanation, of the Ninth Circuit decision or its analysis of  
5 the NVRA claim. Instead, Plaintiffs make the same legal arguments that have been  
6 rejected by both this Court and the Ninth Circuit. The Ninth Circuit expressly held that  
7 the NVRA does not prohibit Arizona from requiring proof of citizenship when  
8 registering to vote. *Gonzalez v. Arizona*, 485 F.3d 1041, 1050-51 (9<sup>th</sup> Cir. 2007).  
9 Plaintiffs do not dispute that the Ninth Circuit already decided the matter. Instead,  
10 Plaintiffs ask this Court to reverse its previous ruling and to disregard the holding of the  
11 Ninth Circuit.<sup>2</sup> The Court should decline that invitation and enter judgment in favor of  
12 Defendants on Plaintiffs’ NVRA claim.<sup>3</sup>

13     **II.    THE IDENTIFICATION AND PROOF OF CITIZENSHIP REQUIREMENTS OF PROP**  
14     **200 DO NOT CONSTITUTE A POLL TAX.**

15             The ITCA Plaintiffs’ response consists of precisely the same poll tax arguments  
16 Plaintiffs made to the Ninth Circuit. The Ninth Circuit rejected each of those arguments

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17     <sup>1</sup> Paragraphs 1-51 of the Gonzalez Plaintiffs’ response to Defendants’ statement of facts  
18 is legal argument and should be disregarded by the Court. *E.g.*, *A.L. Pickens & Co., Inc.*  
19 *v. Youngstown Sheet & Tube Co.*, 650 F.2d 118, 121 (6<sup>th</sup> Cir. 1981) (where ultimate facts  
20 and conclusions of law are stated in an affidavit for summary judgment purposes, “the  
21 extraneous material should be disregarded, and only the facts considered”).

22     <sup>2</sup> To the extent the Court is inclined to reconsider the merits of Plaintiffs’ NVRA claim,  
23 Defendants incorporate the arguments made in opposition to the temporary restraining  
24 order (Dkt. 27) at pages 1-12.

25     <sup>3</sup> Summary judgment also is appropriate on Plaintiffs’ Supremacy Clause claim because  
26 it is based on their argument that the NVRA preempts Prop 200, which issue has been  
27 decided by the Ninth Circuit. The Gonzalez Plaintiffs respond (at 5) that Defendants’  
28 Supremacy Clause argument is “utterly groundless” but do not explain why that should  
be, in light of Defendants’ cited authorities. The Gonzalez Plaintiffs do not explain how  
they have an independent claim under the Supremacy Clause. Moreover, none of the  
cases they cite (at 5 n.6) stands for any such notion. *E.g.*, *Shaw v. Delta Air Lines, Inc.*,  
463 U.S. 85, 96 n.14 (1983) (stating that federal courts have jurisdiction in cases in  
which a party claims that a state regulation is preempted by a federal statute). Plaintiffs’  
preemption claim based on the NVRA was decided by the Ninth Circuit (and this Court).  
Under the authorities cited in Defendants’ motion (at 6 n.5), which Plaintiffs did not  
address in their response, there is no claim remaining under the Supremacy Clause.

1 and held that Arizona’s proof of citizenship requirement is not a poll tax under *Harman*  
2 or *Harper*. The Court held that Arizona’s law “is not like the system found  
3 unconstitutional in *Harman*.” *Gonzalez*, 485 F.3d at 1049. “Nor does Arizona’s new  
4 law ‘make[] the affluence of the voter or payment of any fee an electoral standard.’” *Id.*  
5 Not only is that holding binding on this Court, that decision is correct. Moreover, its  
6 reasoning applies with equal force to Plaintiffs’ poll tax claim based on the identification  
7 at the polls requirement.

8 The proof of citizenship and identification requirements do not condition the right  
9 to vote upon the payment of any fee. A poll tax is levied upon *all* persons within a  
10 jurisdiction. [Order dated 10/11/06 at 9 (quoting Black’s Law Dictionary 1498 (8<sup>th</sup> ed.  
11 2004))] That was the case in both *Harman* and *Harper*, but not here. Likewise, the law  
12 held to be an unconstitutional poll tax in *United States v. Texas* (cited by ITCA Plaintiffs  
13 at 10) declared a poll tax on *every voter* between the ages of 21 and 60. 252 F. Supp.  
14 234, 239 (W.D. Tex. 1966) (“the poll tax is actually a head tax”). Arizona does not  
15 require voters to pay a tax to vote. Moreover, even Plaintiffs agree that the majority of  
16 Arizona individuals qualified to vote or register to vote already possess sufficient  
17 identification. Thus, most individuals are not subjected to any additional costs  
18 associated with voting by Prop 200.<sup>4</sup>

19 Even for those individuals who do not possess such identification, however, the  
20 costs associated with obtaining identification are not a poll tax. Plaintiffs’ citation to  
21 *Weinschenk v. Missouri* does not support their argument to the contrary. Although the  
22 *Weinschenk* court invalidated a Missouri photo identification law, the court’s decision  
23 was not based on poll tax grounds. 203 S.W. 3d 201, 213 (Mo. 2006) (stating that  
24 “requiring payment to obtain a birth certificate *is not a poll tax*, as was the \$1.50 in

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25 <sup>4</sup> Plaintiffs dispute Defendants’ fact ¶ 11 that most individuals already possess a driver’s  
26 license or nonoperating identification card, and thus do not require any other  
27 identification to vote. That fact, however, is based upon the *Plaintiffs’ own expert*  
28 testimony. Moreover, the evidence submitted by Plaintiffs does not provide a basis for  
disputing that most individuals indeed already possess requisite identification. In any  
event, the dispute is not material to Defendants’ motion. Similarly, the asserted facts in  
each of Plaintiffs’ responses to Defendants’ statement of fact do not preclude summary  
judgment here. See Tabs A-C attached to this reply.

1 *Harper*”) (emphasis added). Thus, the ITCA Plaintiffs’ assertion (at 10) that any voting  
2 regulation that results in a cost to even a single voter is a poll tax lacks support in both of  
3 the cases they cite for that proposition.

4 The ITCA Plaintiffs also assert (at 8-9) that Arizona’s law “constructively”  
5 imposes a poll tax and therefore is unconstitutional. Neither of their cited cases,  
6 however, supports such a conclusion. *Cummings v. Missouri* involved a challenge to a  
7 state law that criminalized, among other things, a priest’s teaching without first having  
8 taken an oath. 71 U.S. 277, 316-17 (1866). *Fairbank v. United States* involved a  
9 challenge to a stamp duty that was imposed on every bill of lading under which the  
10 export of goods was made. 181 U.S. 283, 284 (1901). Neither case addressed any poll  
11 tax or voting regulation issue. *Cummings* did not even involve any tax issue. Although  
12 *Fairbank* involved the constitutionality of an export tax, the tax at issue was an actual  
13 tax, imposed by Congress, on every bill of lading under which an export was shipped.  
14 *Id.* Plaintiffs’ remaining “constructive poll tax” argument is based upon their  
15 interpretation of *Harman*—which was rejected in *Gonzalez*. 485 F.3d at 1049.<sup>5</sup>

16 For the same reasons, the Navajo Nation Plaintiffs’ argument (at 3) that their lack  
17 of discovery should preclude summary judgment on the poll tax claim is misplaced.  
18 Any uncertainty as to the precise number of Navajo citizens who must pay a fee to  
19 obtain sufficient identification does not provide a basis for denying summary judgment  
20 here. As explained above, Arizona’s law does not assess any tax on the head of each  
21 voter. Although Plaintiffs desire more discovery regarding their *equal protection* claim,

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23 <sup>5</sup> The ITCA Plaintiffs argue (at 10-11) that their poll tax claim has merit even though  
24 the State does not receive payment by potential voters for their respective forms of  
25 identification. Plaintiffs’ cases do not support their argument. In *Harper*, Virginia  
26 imposed a tax to be paid to the state to vote. 383 U.S. at 664 n.1. In *Billups*, the law at  
27 issue required individuals to present government-issued identification. 406 F.Supp.2d  
28 1326, 1331 (N.D. Ga. 2005). (The following year, after amendment of the state law, the  
district court *rejected* the plaintiffs’ poll tax claim. 439 F. Supp. 2d 1294, 1354-55  
(N.D. Ga. 2006).) In *Hill v. Stone*, the voting regulation permitted the franchise only to  
individuals who rendered their property for taxation to the county. 421 U.S. 289, 290-91  
(1975). The “poll tax” found in each of those cases connected the right to vote to the  
requirement of payment to the government.

1 further discovery will not change the outcome of their *poll tax* claim.<sup>6</sup>

2 The ITCA Plaintiffs' final poll tax argument (at 11) is that any costs resulting to  
3 voters from the proof of citizenship and identification requirements have a greater  
4 impact on the poor and that Prop 200 therefore is unconstitutional. Plaintiffs cite  
5 *Weinschenk* for that proposition. As discussed above, however, *Weinschenk* was not  
6 even decided on poll tax grounds; instead, it was decided on state equal protection  
7 grounds. Defendants' motion does not include Plaintiffs' equal protection claim.  
8 Indeed, Plaintiffs are now moving to litigate that claim to trial. The issue of equal  
9 protection, however, is separate from whether Arizona's identification and proof of  
10 citizenship requirements constitute a poll tax. For the reasons explained above, those  
11 requirements are not a poll tax. Accordingly, judgment should be entered on that claim.<sup>7</sup>

12 **III. PLAINTIFFS' CIVIL RIGHTS ACT CLAIMS SHOULD BE DISMISSED.**

13 The ITCA Plaintiffs argue (at 13) that the voter identification requirement  
14 violates 42 U.S.C. § 1971(a)(2)(A) because in-person, early voting "is identical to  
15 election day voting, except that early voters are not asked for identification."<sup>8</sup> Plaintiffs

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16 <sup>6</sup> Defendants object to Tabs 1-13 of the Navajo Nation Plaintiffs' factual submission  
17 (Dkt. #293). Those attachments were submitted without any authentication that meets  
18 the requirements of Rule 56(e). Accordingly, the Court should disregard them and the  
19 facts which they purport to support. *E.g., Canada v. Blain's Helicopters, Inc.*, 831 F.2d  
20 920, 925 (9<sup>th</sup> Cir. 1987) ("It is well settled that unauthenticated documents cannot be  
21 considered on a motion for summary judgment."). Attachments under Tabs 1, 5-9, and  
22 11 are hearsay and thus should not be considered by the Court in connection with  
23 Defendants' motion. *E.g., Vannatta v. Keisling*, 899 F. Supp. 488, 491 (D. Or. 1995)  
(disregarding news article exhibits in summary judgment submission offered for the  
24 truth of the facts stated therein). In any event, the existence of the "facts" asserted by  
25 Plaintiffs does not affect the legal analysis and do not preclude summary judgment.

26 <sup>7</sup> Without any citation to the record, the Gonzalez Plaintiffs "note" (at 13) that  
27 "hundreds of thousands of Arizonans" will be "forced to obtain costly citizenship  
28 documents as a prerequisite to voting." Defendants do not concede that "fact" but even  
if it were established, the identification and proof of citizenship requirements would not  
constitute a poll tax for the reasons already explained.

<sup>8</sup> The ITCA Plaintiffs cite (at 14 n.5) the testimony of the Coconino County Recorder to  
assert that "defendants have admitted that in-person voting and voting on election day  
are identical." Plaintiffs overreach with that testimony, however. The question put to  
the official (who is expressly aligned with Plaintiffs in this litigation) was, "[s]o in  
effect, it's almost identical to *what the voter goes through* at the polling place?"

1 assert that the Court was wrong by recognizing that early voting and in-person voting are  
2 inherently different procedures. [See Order dated 10/11/06 at 15-16] Plaintiffs do not  
3 dispute, however, that early ballots are treated differently by the election officials who  
4 process those ballots. *Compare, e.g.*, A.R.S. §§ 16-542, 16-550, 16-552 (specifying  
5 procedures or early voting and ballots) *with* A.R.S. §§ 16-579, 16-583, 16-584  
6 (specifying procedures for in-person voting). Moreover, such differences exist whether  
7 the early ballot is cast in person or by mail. *E.g.*, A.R.S. §§ 16-542(A) (providing for  
8 establishment of early, in-person voting sites), 16-542(E) (delineating time frame for  
9 early, in person voting), 16-550(A) (requiring signature verification of affidavits on  
10 early ballot envelopes); 16-550(C) (requiring preparation of list of all voters issued an  
11 early ballot).

12 The *voter* herself triggers the distinct process to be followed by election officials  
13 either by requesting an early ballot (either in mail or in person) or by appearing to vote  
14 on election day. Because the voting procedures are different, treating respective voters  
15 differently based on their chosen voting option is not a violation of the Civil Rights Act.  
16 *E.g., Common Cause/Georgia, League of Women Voters of Georgia, Inc. v. Billups*, 439  
17 F. Supp. 2d 1294, 1356-57 (N.D. Ga. 2006) (rejecting § 1971(a)(2)(A) challenge based  
18 on different treatment applied to early voting than election day voting).

19 The ITCA Plaintiffs also argue (at 16) that Arizona denies the right to vote based  
20 on “an error or omission on any record or paper relating to any application, registration,  
21 or other act requisite to voting.” *See* 42 U.S.C. § 1971(a)(2)(B). Even the most broad  
22 construction of “voting,” however, does not displace the statute’s plain language, which  
23 requires that the “error or omission” be “on any record or paper” relating to voting. *See*  
24 *id.* A requirement that an individual provide identification or proof of citizenship is not  
25 an “error or omission on any record or paper.” *See Billups*, 439 F. Supp. 2d at 1358  
26 (“[T]he act of presenting photo identification in order to prove one’s identity is by  
27 definition not an ‘error omission on any record or paper’ and, therefore, § 1971(a)(2)(B)

28 (Emphasis added.) As explained, the voter’s experience in casting an early ballot versus  
an election day ballot does not determine whether the procedures for the handling of  
those ballots is “identical.”

1 does not apply to this case.”).<sup>9</sup>

2 The ITCA Plaintiffs mischaracterize the court’s holding in *Schwier v. Cox*. 340  
3 F.3d 1284 (11<sup>th</sup> Cir. 2003). The plaintiffs in *Schwier* challenged the state’s denial of  
4 their voter registration based on the failure to include a social security number on their  
5 application form. *Id.* at 1286. The ITCA Plaintiffs mistakenly assert at (16) that the  
6 *Schwier* plaintiffs “prevailed under § 1971 even though their ‘omission’ was  
7 intentional.” The court did no such thing. Instead, the court decided that the plaintiffs  
8 could bring a private action to challenge conduct under the Voting Rights Act. *Id.* at  
9 1297. The court remanded the case to the district court to decide whether the disclosure  
10 of a voter’s social security number is material under § 1971(a)(2)(B). *Id.* *Schwier* did  
11 not address any challenge to the requirements of identification or proof of citizenship.

12 The ITCA Plaintiffs’ final argument (at 16) is that citizenship is material to  
13 voting but *proof* of citizenship is not. Plaintiffs ignore the language of § 1971(a)(2)(B),  
14 however, which defines a violation only where the error or omission is not material *in*  
15 *determining whether an individual is qualified to vote*. Although Plaintiffs disagree with  
16 the way Arizona has chosen to confirm an individual’s identity and citizenship,  
17 reasonable minds cannot differ that such information indeed *is* material to that person’s  
18 eligibility to vote. *E.g., Gonzalez*, 485 F.3d at 1050-51 (holding that the NVRA permits  
19 states to require identifying information, including citizenship status, as necessary to  
20 determine eligibility to vote).<sup>10</sup>

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23 <sup>9</sup> *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), does not support Plaintiffs’ Civil  
24 Rights Act argument. *Allen* did not even mention, much less interpret, 42 U.S.C. §  
25 1971. Instead, the issue in *Allen* was whether certain state laws were subject to § 5 of  
26 the Voting Rights Act, which requires covered jurisdictions to obtain DOJ preclearance  
27 of laws affecting voting. *See* 393 U.S. at 550.

28 <sup>10</sup> Courts are divided on whether there is a private right of action to enforce § 1971.  
(*See* Defs.’ Motion at 8 n.6.) The Ninth Circuit held that no private right of action for  
damages was available based on § 5 of the Voting Rights Act (42 U.S.C. § 1973c),  
although the court recognized a private right of action for injunctive relief to enforce that  
provision. *Olagues v. Russoniello*, 770 F.2d 791, 805 (9<sup>th</sup> Cir. 1985). *Olagues* did not  
involve any claim under § 1971.

1 **IV. SUMMARY JUDGMENT IS WARRANTED ON PLAINTIFFS' CLAIM UNDER**  
2 **SECTION 5 OF THE VOTING RIGHTS ACT.**

3 Plaintiffs' argument that the State did not inform the Department of Justice  
4 ("DOJ") that Arizona would begin requiring proof of citizenship is neither credible nor  
5 supported by the evidence. As the Court stated previously, in rejecting Plaintiffs'  
6 section 5 argument:

7 Plaintiffs believe, however, that "Defendants never revealed to the Justice  
8 Department that Arizona would cease to use and accept the federal mail  
9 voter registration form for federal elections." (Doc. P. 21) A complete  
10 copy of Proposition 200 was attached to Arizona's submission to the  
11 Justice Department. (Submission p. 1) The submission also contained an  
12 "Analysis by Legislative Council" pointing out that Proposition 200  
13 required "that evidence of United States citizenship be presented by *every*  
14 *person* to register to vote." (Submission p. 2) (Emphasis added.) Thus, it  
15 appears likely that the state's submission adequately [apprised] the Justice  
16 Department of Proposition 200's changes to Arizona law.

17 [Op. & Order dated 6/19/06 at 14] Moreover, Arizona's submission informed the DOJ  
18 that Prop 200 expressly amended the voter registration law (*i.e.*, A.R.S. § 16-166) by  
19 adding, "The county recorder shall reject *any application* for registration that is not  
20 accompanied by satisfactory evidence of United States citizenship."<sup>11</sup> The DOJ was  
21 informed that *all* applicants to register to vote would be required to provide proof of  
22 citizenship, notwithstanding the particular voter registration form they chose to use.

23 Plaintiffs' argument that Arizona violated § 5 "by excluding from its submission  
24 a copy of A.R.S. § 16-121.01" is misplaced. Prop 200 did not amend § 16-121.01. [See  
25 Counsel Decl. Tab 1, ex. A at pp. 1-3] As noted below in section V, § 16-121.01 sets  
26 forth the requirements for voter registration and conditions registration upon the  
27 completion of a voter registration form "as prescribed in § 16-152." A.R.S. § 16-121.01.  
28 Prop 200 did amend § 16-152 to require that the Arizona voter registration form  
expressly state that proof of citizenship must be submitted with the form in order for the  
applicant to be registered. *See id.* § 16-152(A)(23). A copy of § 16-152, as it existed  
before the Prop 200 amendments, indeed *was* submitted to the DOJ. There was no

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<sup>11</sup> See Decl. of Counsel (filed June 4, 2007) (Dkt. 282) ("Counsel Decl."), Tab 1, ex. A  
at p. 2 (adding A.R.S. § 16-166(F)) (emphasis added).

1 improper exclusion from Arizona’s preclearance submission to DOJ. Neither was there  
2 any omission of material information about Arizona’s new proof of citizenship  
3 requirement.<sup>12</sup>

4 **V. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’**  
5 **CLAIMS UNDER ARIZONA REVISED STATUTES §§ 16-151(B) AND 16-121.01.**

6 The Gonzalez Plaintiffs assert (at 16) that “Defendants do not make available the  
7 voter registration forms prescribed by the FEC, now the EAC, and thus are in violation  
8 of A.R.S. § 16-151(B).” Plaintiffs apparently rely on deposition testimony by Joseph  
9 Kanefield, Karen Osborne and F. Ann Rodriguez. Plaintiffs did not submit the actual  
10 testimony in opposition to summary judgment. Instead, Plaintiffs assert as “fact” their  
11 characterizations of that testimony.<sup>13</sup> Mr. Kanefield, State Election Director, testified  
12 that he did not know if the federal form was available at the Department of Motor  
13 Vehicle. He testified, however, that the Secretary of State indeed does make the federal  
14 form available to anyone who requests it. [SOF ¶ 10] The fact that Mr. Kanefield was  
15 not aware whether the form is made available at the DMV does not create a factual issue  
16 about whether the Secretary makes the form available.

17 Plaintiffs’ characterization of Karen Osborne’s testimony is misleading. Ms.

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18 <sup>12</sup> *Young v. Fordice* does not support Plaintiffs’ argument that Arizona’s preclearance  
19 submission was insufficient. 520 U.S. 273 (1997). In *Young*, Mississippi submitted a  
20 voter registration plan, which implemented NVRA requirements for registration for  
21 federal elections and modified registration procedures for state elections so that  
22 individuals could register for both federal and state elections with a single application.  
23 *Id.* at 277-78. After the plan was submitted, the legislature rejected the proposed  
24 legislation that was to authorize the new procedures for state registration. *Id.* at 278.  
25 Consequently, the state implemented a dual registration system. *Id.* at 278-79. The  
26 Court held that the dual registration system had not been precleared by the DOJ because  
27 the submission had specified a single registration scheme. *Id.* at 283-84. Here, there is  
28 no question that the DOJ knew of the change in registration procedure, which would  
require an applicant to provide proof of citizenship as a prerequisite to registration.  
Neither do Plaintiffs’ remaining cases support their argument here. *E.g., McCain v.*  
*Lybrand*, 465 U.S. 236, 239-41, 250 (1984) (preclearance of 1971 law which changed  
district boundaries and added districts did not suffice for 1966 law which had instituted  
the districts and elected offices therefor); *Clark v. Roemer*, 500 U.S. 646, 659 (1991)  
(preclearance of state’s submission of voting changes relating to judgeships did not cure  
earlier failure to obtain preclearance of the creation of such judgeships).

<sup>13</sup> Gonzalez Plaintiffs’ Resp. to Separate Statement of Fact (filed 7/12/07) ¶¶ 62, 66, 73.

1 Osborne is the Maricopa County Election Director. Although she testified that the  
2 county does not keep paper copies of the federal form at the county elections office, she  
3 testified that the county can access forms online so that if anyone were to request the  
4 federal form from the county the form would be provided to them. [Defs.' Supplemental  
5 Statement of Facts (filed herewith) ¶ 13] Finally, Plaintiffs point to the testimony of F.  
6 Ann Rodriguez, Pima County Recorder, who testified that she did not recall whether the  
7 Secretary ever instructed her to make the federal form available. Such a statement is not  
8 proof that the Secretary does not make the federal form available to anyone who requests  
9 it, however.

10 Moreover, apart from Plaintiffs' failure to manufacture a factual dispute, they  
11 have not alleged that any of them ever has sought a federal form from the Secretary and  
12 was denied it. Without any allegation, much less evidence, of injury Plaintiffs' claim  
13 based on § 16-151(B) fails. *E.g., Perdue v. Lake*, No. S07A0525, \_\_ S.E.2d \_\_, 2007  
14 WL 1660734, at \* 2 (Ga. June 11, 2007) (dismissing voter identification law challenge  
15 where the plaintiff could not show that he or she was harmed by the alleged violation).

16 With regard to Plaintiffs' claim based on § 16-121.01, that section sets forth the  
17 requirements for voter registration and requires a completed registration form as  
18 prescribed in § 16-152. Section 16-152, in turn, requires that the form expressly state  
19 that proof of citizenship must be provided in order for the applicant to register to vote.  
20 The two provisions together provide that an applicant must complete the voter  
21 registration form and that completion of that form for purposes of registration  
22 necessarily requires the submission of proof of citizenship. Plaintiffs do not explain why  
23 § 16-121.01 cannot be read harmoniously with other voter registration provisions so as  
24 to give effect to all.<sup>14</sup>

25 **VI. PLAINTIFFS HAVE NOT MADE A PROPER SHOWING UNDER RULE 56(F).**

26 Plaintiffs ask the Court to delay entry of summary judgment by submitting Rule  
27 56(f) declarations stating that they need additional discovery.<sup>15</sup> The Navajo Nation

28 <sup>14</sup> The Navajo Nation Plaintiffs concede (at 2) that summary judgment should be entered in Defendants' favor on their mandamus claim.

<sup>15</sup> See Decl. of Patricia Ferguson-Bohnee Pursuant to Rule 56(f) (filed 7/12/07)

1 Plaintiffs (at 3) and the ITCA Plaintiffs (at 3) assert that the following evidence is  
2 needed to prove their poll tax claims:

- 3 • Information regarding the number of voters that do not have sufficient  
4 identification to vote in person on election day.
- 5 • Information about the availability of early voting.<sup>16</sup>

6 In addition, the ITCA Plaintiffs assert that they need for their poll tax claim information  
7 regarding the number of individuals who wish to vote but lack proof of citizenship.  
8 [Tellez Decl. ¶ 2] The Gonzalez Plaintiffs assert that they need for their NVRA claim  
9 information regarding: the number of NVRA applications accepted by Defendants  
10 before and after Prop 200; the number of voter registration applications submitted by  
11 community voter registration efforts before and after Prop 200; efforts made by counties  
12 to verify the documentation of citizenship; and rejected voter registration forms.  
13 [Perales Decl. ¶¶ 2-4]

14 To rely on Rule 56(f) to delay summary judgment, a party must set forth the  
15 specific facts the party expects to obtain in discovery, must show that the facts sought  
16 exist, and must establish that those facts are essential to defeat summary judgment.  
17 *California v. Campbell*, 138 F.3d 772, 779 (9<sup>th</sup> Cir. 1998); *see also Tatum v. City &*  
18 *County of San Francisco*, 441 F.3d 1090, 1100 (9<sup>th</sup> Cir. 2006) (denying request for  
19 additional discovery under Rule 56(f) because the plaintiff failed to explain why the  
20 sought deposition transcripts were essential to oppose summary judgment).<sup>17</sup>

21 Moreover, the party must demonstrate that he diligently pursued previous  
22 discovery opportunities. *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 (9<sup>th</sup> Cir.  
23 2001) (upholding denial of Rule 56(f) request for additional discovery where the party  
24 failed to take additional discovery in the seven months between learning of the need for  
25 such discovery and the entry of summary judgment); *see also Brae Transp., Inc. v.*

26 (“Bohnee Decl.”); Decl. of Karen J. Hartman-Tellez (filed 7/12/07) (“Tellez Decl.”);  
27 Fed. R. Civ. 56(f) Decl. of Nina Perales (filed 7/12/07) (“Perales Decl.”).

28 <sup>16</sup> See Tellez Decl. ¶ 2; Bohnee Decl. ¶¶ 2-3, 5.

<sup>17</sup> District courts have broad discretion in directing discovery, and their rulings will be affirmed absent a clear abuse of discretion. *Campbell*, 138 F.3d at 779 (affirming district court’s denial of relief under Rule 56(f)).

1 *Coopers & Lybrand*, 790 F.2d 1439, 1443 (9<sup>th</sup> Cir. 1986) (holding that district court’s  
2 denial of further discovery was proper where the plaintiff failed to take discovery during  
3 four months between learning of need for discovery and summary judgment hearing).

4 Plaintiffs’ request to delay entry of judgment for further discovery should be  
5 denied for two reasons: (1) they cannot show that the requested discovery would save  
6 their claims; and (2) they have not diligently pursued discovery in this case.

7 Regarding Plaintiffs’ NVRA claim, no additional discovery would change either  
8 the legal analysis or the outcome. As explained above in section I, *Gonzalez* rejected the  
9 entire basis for Plaintiffs’ NVRA claim—that the act preempts Prop 200’s proof of  
10 citizenship requirement. *Gonzalez* holds that the NVRA does not prohibit Arizona from  
11 requiring proof of citizenship in voting registration. 485 F.3d at 1050. Plaintiffs do not  
12 explain how any of their items for additional discovery could affect their NVRA claim  
13 given the Ninth Circuit’s holding.

14 The same is true for Plaintiffs’ poll tax claim. As explained in section II above,  
15 Plaintiffs’ poll tax claim fails as a matter of law because Arizona’s identification and  
16 proof of citizenship requirements do not tax the right to vote under *Harman* or *Harper*.  
17 *Gonzalez*, 485 F.3d at 1049. Plaintiffs do not explain why or how a further showing of  
18 the numbers of individuals without identification or proof of citizenship would change  
19 the analysis or outcome of their poll tax claim. Plaintiffs may attempt to argue that the  
20 “numbers” matter for purposes of their undue burden on the right to vote (*i.e.*, equal  
21 protection) claim. They have not shown, however, that the numbers of individuals  
22 affected somehow can convert identification costs into a “tax.”<sup>18</sup>

23 Apart from Plaintiffs’ failure to establish that additional discovery would  
24 preclude summary judgment on their NVRA and poll tax claims, they have not made  
25 *any* showing that they have acted diligently in attempting to obtain that discovery. After

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26 <sup>18</sup> Plaintiffs’ own argument demonstrates that their requested discovery is addressed to  
27 their equal protection claim. The ITCA Plaintiffs assert (at 6) that they need to  
28 supplement the record to show the “unconstitutional burden on the right to vote” that  
they allege results from Prop 200. Plaintiffs confuse the equal protection analysis (*i.e.*, a  
*Burdick* analysis of undue burden on the right to vote) with their poll tax claim, which  
does not depend upon any such analysis, as explained in section II above.

1 nearly one year of virtual silence, and only *after* Defendants moved for summary  
2 judgment, Plaintiffs finally sought discovery regarding registration applications and  
3 conditional provisional votes cast at the polls. Plaintiffs now claim in their Rule 56(f)  
4 affidavits that such information is necessary to oppose summary judgment. Before the  
5 ITCA Plaintiffs served this round of discovery, however, the last discovery served by  
6 Plaintiffs was one year ago—on August 2, 2006.

7 Plaintiffs do not provide any reason why they could not have pursued that  
8 information sooner.<sup>19</sup> Counsel for the Gonzalez Plaintiffs suggests in her declaration  
9 that because the Court never entered an order regarding the confidentiality of  
10 information in voter registration forms, Plaintiffs are excused from failing to pursue  
11 discovery for one year. If Plaintiffs really believed such an order were necessary, they  
12 easily could have raised it with the Court long ago. Instead, Plaintiffs did nothing to  
13 pursue discovery in this case until Defendants moved for summary judgment. Their  
14 failure to seek the requested information in a timely manner both undermines their  
15 assertion of its necessity and provides no basis for delaying summary judgment now.

16 More discovery will not make identification costs any “more” of a tax or make  
17 Prop 200 any “more” preempted by the NVRA. Accordingly, the Court should deny  
18 Plaintiffs’ Rule 56(f) request. *E.g.*, *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844  
19 (9<sup>th</sup> Cir. 1994) (affirming denial of Rule 56(f) request where the additional discovery  
20 sought “would not have shed light on any of the issues upon which the summary  
21 judgment decision was based”); *Byrd v. Guess*, 137 F.3d 1126, 1135 (9<sup>th</sup> Cir. 1998)  
22 (affirming denial of a Rule 56(f) request where the plaintiffs failed to show they acted  
23 diligently in pursuing discovery opportunities), *abrogated by statute on other grounds*.

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24 <sup>19</sup> The ITCA Plaintiffs cite (at 7) *Texas Partners v. Conrock Co.*, 685 F.2d 1116 (9<sup>th</sup> Cir.  
25 1982), in support of their Rule 56(f) argument. In *Conrock*, after the district court  
26 denied a motion for preliminary injunction the defendants moved for summary  
27 judgment. *Id.* at 1118. The district court stayed all discovery until the hearing on the  
28 motion, and then granted the motion. *Id.* The Ninth Circuit held that the district court  
had erred in granting summary judgment “without affording plaintiffs-appellants the  
opportunity to proceed with discovery.” *Id.* Here, nothing has precluded Plaintiffs from  
taking discovery at any point. They simply chose not to do so until after Defendants  
sought adjudication of their claims.

1 **Relief Requested**

2 For the reasons stated in Defendants’ motion and this reply, the Court should  
3 grant summary judgment in favor of Defendants State of Arizona and the Arizona  
4 Secretary of State and against Plaintiffs on all claims included therein and as  
5 summarized on page 15 of Defendants’ memorandum.

6 RESPECTFULLY SUBMITTED this 3rd day of August, 2007.

7  
8 TERRY GODDARD  
9 Arizona Attorney General

10 s/Barbara A. Bailey  
11 Mary O’Grady  
12 Solicitor General  
13 Carrie J. Brennan  
14 Barbara A. Bailey  
15 Assistant Attorneys General  
16 Attorneys for the State of Arizona and the  
17 Arizona Secretary of State  
18  
19  
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 3rd day of August, 2007, I electronically transmitted  
3 the attached document to the Clerk's Office using the ECF System for filing, and  
4  
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6 David J. Bodney  
7 Karen J. Hartman-Tellez  
8 Steptoe & Johnson LLP  
9 201 East Washington St., Ste. 1600  
10 Phoenix, Arizona 85004-2382  
11 [dbodney@steptoe.com](mailto:dbodney@steptoe.com)  
12 [khartman@steptoe.com](mailto:khartman@steptoe.com)

13 David B. Rosenbaum  
14 Thomas L. Hudson  
15 Sara S. Greene  
16 Osborn Maledon, P.A.  
17 2929 N. Central, 21<sup>st</sup> Floor  
18 Phoenix, Arizona 85012-2793  
19 [drosenbaum@omlaw.com](mailto:drosenbaum@omlaw.com)  
20 [thudson@omlaw.com](mailto:thudson@omlaw.com)  
21 [sgreene@omlaw.com](mailto:sgreene@omlaw.com)

22 Jon Greenbaum  
23 Benjamin Blustein  
24 Lawyers' Committee For  
25 Civil Rights Under Law  
26 1401 New York Avenue, Ste. 400  
27 Washington, D.C. 20005  
28 [jgreenbaum@lawyerscommittee.org](mailto:jgreenbaum@lawyerscommittee.org)

29 Neil Bradley  
30 ACLU Southern Regional Office  
31 2600 Marquis One Tower  
32 245 Peachtree Center Avenue  
33 Atlanta, Georgia 30303  
34 [nbradley@aclu.org](mailto:nbradley@aclu.org)

1 Elliot M. Mincberg  
2 People for the American  
3 Way Foundation  
4 2600 M Street, NW, Ste. 400  
5 Washington, DC 20036  
6 [eminberg@pfaw.org](mailto:eminberg@pfaw.org)

7 Daniel B. Kohrman  
8 AARP Foundation Litigation  
9 601 E Street, N.W., Ste. A4-240  
10 Washington, DC 20049  
11 [dkohrman@aarp.org](mailto:dkohrman@aarp.org)

12 Joe P. Sparks  
13 Susan B. Montgomery  
14 Sparks, Tehan & Ryley PC  
15 The Inter Tribal Council of Arizona, Inc.  
16 7503 First Street  
17 Scottsdale, Arizona 85251  
18 [joe-sparks@qwest.net](mailto:joe-sparks@qwest.net)

19 David J. Becker  
20 People for the American Way Foundation  
21 2000 M Street, NW, Suite 400  
22 Washington, D.C. 20036  
23 [dbecker@pfaw.org](mailto:dbecker@pfaw.org)

24 Daniel R. Ortega, Jr.  
25 Roush McCracken Guerrero  
26 Miller & Ortega  
27 650 N. 3<sup>rd</sup> Avenue  
28 Phoenix, Arizona 85003  
[danny@rmgmoinjurylaw.com](mailto:danny@rmgmoinjurylaw.com)

Nina Perales  
Mexican American Legal Defense and Education Fund  
110 Broadway, Ste. 300  
San Antonio, Texas 78205  
[nperales@maldef.org](mailto:nperales@maldef.org)

1 M. Colleen Connor  
2 MCAO Division of County Counsel  
3 222 N. Central Avenue, Ste. 1100  
4 Phoenix, Arizona 85003  
[connorc@mcao.maricopa.gov](mailto:connorc@mcao.maricopa.gov)

5 Dennis I. Wilenchik  
6 Kathleen Rapp  
7 Wilenchik and Bartness, P.C.  
8 2810 N. Third Street  
9 Phoenix, Arizona 85004  
[diw@wb-law.com](mailto:diw@wb-law.com)  
[kathleenr@wb-law.com](mailto:kathleenr@wb-law.com)

10 Judith M. Dworkin  
11 Marvin S. Cohen  
12 Patricia Ferguson-Bohnee  
13 SACKS TIERNEY P.A.  
14 4250 N. Drinkwater Blvd. 4<sup>th</sup>  
15 Scottsdale, Arizona 85251-3693  
[Judith.Dworkin@sackstierney.com](mailto:Judith.Dworkin@sackstierney.com)

16 Criss E. Candelaria  
17 Bradley Carlyon  
18 Apache County Attorneys Office  
19 PO Box 637  
20 St. Johns, Arizona 86025  
[bcarlyon@apachelaw.net](mailto:bcarlyon@apachelaw.net)

21 Melvin R. Bowers, Jr.  
22 Lance B. Payette  
23 Navajo County Attorneys Office  
24 PO Box 668  
25 Holbrook, Arizona 86025  
[lance.payette@co.navajo.az.us](mailto:lance.payette@co.navajo.az.us)

26 Brenna L. Clani  
27 Navajo County Department of Justice  
28 PO Box 2010  
Window Rock, Arizona 86515  
[brennalclani@navajo.org](mailto:brennalclani@navajo.org)

1 Jean E. Wilcox  
2 Coconino County Attorney's Office  
3 110 East Cherry Ave.  
4 Flagstaff, Arizona 86001  
5 [jwilcox@coconino.az.gov](mailto:jwilcox@coconino.az.gov)

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12 Phoenix, AZ 85003-2158

13 /s Erica Martinez

14 28019

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17

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