

1 for failure to comply with one state's unique authentication requirements, such as exists under  
2 Arizona's Proposition 200. *See* S. Rep 103-6, at 26.

3 Congress' intent not to require additional forms of formal authentication, *see* S. Rep  
4 103-6 at 26 (describing purpose of aforementioned provision), was also echoed by the  
5 Federal Elections Commission. In creating its rules to implement the NVRA, the FEC did not  
6 require information regarding naturalization in part because "[t]he issue of U.S. citizenship  
7 is addressed within the oath required by the Act and signed by the applicant under penalty of  
8 perjury." 59 Fed. Reg. 32,316, Para. D (Information Regarding Naturalization). It concluded  
9 that "[b]ecause providing materially false information in the voter registration process is a  
10 felony, *see, e.g.*, 42 U.S.C. § 1973gg-10, these oaths are taken seriously and given significant  
11 weight." *Id.*

12 The Senate Minority report makes plain that the NVRA prohibits citizenship  
13 verification voter registration schemes. The Senate minority – the group of Congressmen that  
14 opposed the NVRA – lamented the NVRA's failure to require, and its prohibition against,  
15 citizenship verification. *See* S. Rep. 103-6, at 55 ("[Non-citizen voting] fraud might be  
16 combated by requiring proof of citizenship at the time of registration. However, mail  
17 registration under this bill would preclude such corrective action."). Proponents and  
18 opponents of the bill knew precisely the scope of permissible registration requirements  
19 contained in the NVRA.

20 The NVRA does allow the states some flexibility in the administration and  
21 development of its voter registration form, however, based on the plain language of the  
22 statute, a state must accept for registering voters in federal elections both its own form, so  
23 long as it is not inconsistent with the NVRA's mandates, and the uniform federal voter  
24 registration form. *See* 42 U.S.C. § 1973gg-4(a). Contrary to these requirements, it is clear  
25 that in Arizona, a voter submitting the federal, NVRA-compliant uniform voter registration  
26 form, will not be registered.

1           5.     Under the NVRA, Arizona's Proof of Citizenship Voter Registration  
2                     Requirement Is Illegal.

3           Proposition 200's citizenship verification requirements constitute "other formal  
4           authentication" that is expressly forbidden by the NVRA. Under the plain language of the  
5           NVRA, Proposition 200 impermissibly conflicts with the registration requirements Congress  
6           has enacted and which under the Election Clause, it has unilateral authority to regulate. *See*  
7           U.S. CONST. art. I Section. 4 cl. 1.

8           Certainly, A.R.S. §16-152(A)(23)'s requirement that a voter registration application  
9           be rejected by the registrar if it fails to supply the necessary "evidence of United States  
10           citizenship" and A.R.S. § 16-166(F)'s outline of the process by which the registrar must verify  
11           the citizenship of the applicant, constitutes additional "formal authentication" for the purpose  
12           of processing a voter registration application. It falls squarely into the category of  
13           information that the legislative history and the FEC had opposed and had contemplated when  
14           drafting the NVRA. As such, Sections 3 and 4 of Proposition 200 cannot avoid the inevitable  
15           conflict with federal voter registration form requirements set forth in section §1973gg-7(b).

16           The extent to which "formal authentication" is required under Prop. 200 is highlighted  
17           by A.R.S. § 16-166(F)(4) which even includes provisions that require the registrar to  
18           authenticate an applicant's citizenship status with federal agencies:

19           A presentation to the county recorder of the applicant's United States naturalization  
20           documents of the number of the certificate of naturalization. If only the number of the  
21           certificate of naturalization is provided, the applicant shall not be included in the  
22           registration rolls until the number of the certificate of naturalization is verified with  
23           the United States Immigration and Naturalization Service by the county recorder.

24           *See* A.R.S. 16-166(F)(23).

25           Compared to the witnessing-type authentication requirements that Congress saw fit to  
26           prohibit, the authentication/verification requirements contained in Proposition 200 appear  
27           much more onerous. Whereas witnessing requirements arguably left some power with the  
28           voter applicants to find others to vouch for them, Proposition 200's requirements are much  
29           more severe – after a voter registration application is submitted to an election official, it is

1 then sent to a federal agency to verify and authenticate citizenship status – a task which may  
2 or may not be done in a timely fashion, if at all.

3 The U.S. Election Assistance Commission (EAC) is charged by Congress with  
4 regulating the development and substance of the federal mail voter registration application,  
5 as well as with guiding states in their implementation of the NVRA. 42 U.S.C. 1973gg-7(a).  
6 The EAC’s strong reaction to Arizona’s refusal to use and accept the federal mail voter  
7 registration further reinforces Plaintiffs’ argument that Arizona is in violation of the NVRA.

8 On March 6, 2006, the EAC wrote to Secretary of State Jan Brewer in response to her  
9 request that the EAC “apply Arizona state policy (derived from Proposition 200) to the  
10 Federal Mail Voter Registration Form.” In its letter the EAC informed Ms. Brewer that  
11 Arizona’s documentary proof of citizenship requirement for registration was preempted by  
12 the NVRA and that “Arizona may not refuse to register individuals to vote in a Federal election  
13 for failing to provide supplemental proof of citizenship, if they have properly completed and  
14 timely submitted the Federal Registration Form.”<sup>15</sup>

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

20 On March 13, 2006, State Election Director Joseph Kanefield wrote to the State’s  
21 county recorders informing them of Defendant BREWER’s “position that the proof of  
22 citizenship requirement set forth in A.R.S. § 16-166(F) must continue to be enforced for all  
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26 <sup>15</sup>See Bernal Decl. attached as Exhibit A (Ex. 6, Letter from EAC to Brewer)

27 <sup>16</sup>See Bernal Decl. attached as Exhibit A (Ex. 7, Letter from Brewer to EAC).

1 newly registered voters and voters moving from one county to another.”<sup>17</sup>

2 B. Plaintiffs Will Suffer Irreparable Harm If Relief Is Not Granted.

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

13 The harm already caused by Prop. 200 is not abstract. The harm is real and shows no  
14 sign of abating. In Maricopa County, according to an Election Division press release issued  
15 on February 4, 2005, 74 percent of the voter registration applications it had received in since  
16 January 24, 2005 were rejected solely for failure to provide sufficient evidence of citizenship  
17 required under Proposition 200. *See Maricopa County Press Release, February 4, 2005*,  
18 available at <http://recorder.maricopa.gov/pressrelease05.aspx>.

19 On June 22, 2005, the Arizona Daily Star reported that “[a]ccording to the [Pima]  
20 County Recorder’s Office, 1,492 applications for registration have been denied, and 3,380  
21 have been approved since April, when it began keeping track of the numbers.”<sup>18</sup>

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23 <sup>17</sup>See Bernal Decl. attached as Exhibit A (Ex. 5, Correspondence from Joseph Kanefield to  
24 county recorders).

25 <sup>18</sup>See Bernal Decl. attached as Exhibit A (Ex. 4 *Prop. 200 Causing Voter Registration*  
26 *Rejections*, ARIZONA DAILY STAR June 22, 2005, also available at  
27 <http://www.azstarnet.com/dailystar/printDS/89552.php>, (detailing unsuccessful voter  
registration applications in Maricopa and Pima Counties)).

1 C. The Public Interest Will Be Advanced By Enjoining Proposition 200.

2 The public interest plainly will be furthered by enjoining Proposition 200's registration  
3 requirements, which will deny some citizens the opportunity to participate equally in the  
4 electoral process. *See Bay County Democratic Party v. Land*, 347 F.Supp.2d 404, 438 (E.D.  
5 Mich. 2004) (“The public interest is served when citizens can look with confidence at an  
6 election process that insures that all votes cast by qualified voters are counted. . . . The public  
7 interest is served when a federally granted right is enforced uniformly and voters are not  
8 disenfranchised.”) (citations omitted); *U.S. v. Berks County, Pa.*, 250 F.Supp.2d 525, 541  
9 (E.D. Pa. 2003) (“The Court finds that the public interest will be served by the issuance of a  
10 preliminary injunction. ‘[U]ndoubtedly, the right of suffrage is a fundamental matter in a free  
11 and democratic society.’ Ordering Defendants to conduct elections in compliance with the  
12 Voting Rights Act so that all citizens may participate equally in the electoral process serves  
13 the public interest by reinforcing the core principles of our democracy.”) (citations omitted);  
14 *Murphree v. Winter*, 589 F.Supp. 374, 382 (S.D. Miss. 1984) (“Clearly, the granting of this  
15 preliminary injunction will not disserve the public interest. The fundamental right to vote is  
16 one of the cornerstones of our democratic society. The threatened deprivation of this  
17 fundamental right can never be tolerated.”); *see also Sammartano v. First Judicial District*  
18 *Court, in and for the County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002) (noting “it  
19 is always in the public interest to prevent the violation of a party's constitutional rights”).

20 D. The Balance of Hardships Tips Strongly in Plaintiffs’ Favor.

21 On the other side of the balance of equities, Defendants can offer no significant reason  
22 to continue to implement registration requirements that inevitably will deprive a significant  
23 portion of the electorate of the fundamental right to vote. Defendants’ purported interest in  
24 preventing voter fraud cannot justify Proposition 200's unfair and inflexible registration  
25 requirements. There is no evidence that failure to implement Proposition 200 will result in  
26 massive voter fraud – as Proposition 200 was purportedly designed to address. Proposition  
27

1 200's proponents cited widespread voting fraud by non-citizens as necessitating its citizenship  
2 requirements. However, Proposition 200 makes not one single finding or declaration with  
3 respect to voting, let alone cite a single instance of voter fraud.<sup>19</sup>

4 E. Plaintiffs Are Entitled to an Injunction Pursuant to Section 5 of the Voting  
5 Rights Act of 1965.

6 Section 5 of the Voting Rights Act of 1965 requires that all qualifications,  
7 prerequisites, standard, practices, or procedures with respect to voting in covered  
8 jurisdictions must be determined, either by the United States District Court for the District  
9 of Columbia or the United States Attorney General, not to have the purpose or effect of  
10 denying or abridging the right to vote on account of race, color or membership in a language  
11 minority group. 42 U.S.C. 1973, *et seq.* Jurisdictions seeking federal preclearance of their  
12 voting changes must demonstrate that the change does not have the effect of discriminating  
13 on the basis of race, color or membership in a language minority group. *See Allen v. State*  
14 *Board of Elections*, 393 U.S. 544, 569-570 (1969).

15 Plaintiffs are likely to prevail on the merits of this action because the facts of this case  
16 satisfy the three-part test for Section 5 enforcement actions. *See Lopez v. Monterey*  
17 *County*, 519 U.S. 9, 23 (1996). Changes in the manner in which votes are cast and tabulated  
18 are voting changes covered by Section 5. *See* 28 C.F.R. §§51.12 and 51.13. The State of  
19 Arizona, is a covered jurisdiction required to seek preclearance of its voting changes. *See* 40  
20 F.R. § 43746.

21 Although the U.S. Department of Justice precleared Defendants' proposed changes on  
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23 <sup>19</sup>The State admits, as it must, that there are successful measures in place to protect  
24 against non-citizens registering to vote. The Attorney General states that "the requirement  
25 that a person registering to vote attest that he or she is a citizen and the associated criminal  
26 penalties for violating this requirement" afford "protections against non-citizens  
27 registering to vote in Arizona." *See* Bernal Decl. attached as Ex. A. (Ex. 12, Ariz. Attorney  
28 General, Opinion re: Identification Requirements for Voter Registration, Feb. 4, 2005, at  
7).

1 January 24, 2005, Defendants never revealed to the Justice Department that Arizona would  
2 cease to use and accept the federal mail voter registration form for federal elections as  
3 required by the National Voter Registration Act. There is no dispute that Defendants will  
4 implement a voting change without required preclearance under Section 5 of the Voting  
5 Rights Act. Defendants' failure to obtain federal preclearance for their change in election  
6 system renders such change legally unenforceable regardless of the substantive nature of the  
7 proposed changes themselves. *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991) (“If voting  
8 changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction  
9 prohibiting the State from implementing the changes.”).<sup>20</sup>

10 The appropriate remedy for an impending violation of Section 5 of the Voting Rights  
11 Act is to enjoin Defendants from refusing to use and accept the federal mail voter registration  
12 form for registration of voters in federal elections.

#### 13 IV. CONCLUSION

14 The Elections Clause of the Constitution provides Congress with the express authority  
15 to regulate voter registration rules and regulations for congressional elections. Exercising  
16 that authority through passage of the NVRA, Congress outlined specific requirements and  
17 forbade others with respect to the form and content of voter registration forms. Proposition  
18 200 imposes harsh voter registration requirements that run contrary to the spirit and letter of  
19 the NVRA’s mandate to remove obstacles to voting. In so doing, Arizona has impermissible  
20 treaded upon voter registration procedures which Congress has expressly carved out for itself,  
21 to ensure the protection of the electorate. If allowed to stand, Proposition 200's citizenship  
22 verification requirements threaten to quickly undo the well-documented progress of the  
23 NVRA.

24 For these reasons, Plaintiffs respectfully request that the Court find that Defendants’

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26 <sup>20</sup>For the same reason, Plaintiff satisfies the three-part test for entitlement to injunctive relief in  
27 Section 5 enforcement actions as set out in *U.S. v. Louisiana*, *supra*.



**CERTIFICATE OF SERVICE**

I here by certify that on this 9<sup>th</sup> day of May, 2006, I served a true and correct copy of Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Temporary Restraining Order on counsel of record by sending said copy via U.S. certified mail, return receipt requested to:

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