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22 of Arizona, Inc., et al.

23 UNITED STATES DISTRICT COURT  
24 DISTRICT OF ARIZONA

25 Maria M. Gonzalez, et al., )  
26 ) No. CV06-01268-PHX-ROS (Lead)  
27 ) No. CV06-01362-PCT-JAT (Cons)  
28 ) Plaintiffs, )

29 vs. )

30 State of Arizona; Jan Brewer, in her )  
31 official capacity as Secretary of State of )  
32 the state of Arizona, et al., )  
33 Defendants. )

34 The Inter Tribal Council of Arizona, )  
35 Inc., et al. )  
36 Plaintiffs, )

37 vs. )

38 Jan Brewer, in her official capacity as )  
39 Secretary of State of Arizona, )  
40 Defendant. )

**REPLY IN SUPPORT  
OF PLAINTIFFS'  
ALTERNATIVE APPLICATION  
FOR TEMPORARY  
RESTRAINING ORDER AND  
ORDER TO SHOW CAUSE**

1 Pursuant to this Court’s May 31, 2006 Order, plaintiffs the Inter Tribal  
2 Council of Arizona, Inc., the League of Women Voters of Arizona, Arizona Advocacy  
3 Network, the Hopi Tribe, People for the American Way Foundation, the League of  
4 United Latin American Citizens and State Representative Steve M. Gallardo  
5 (collectively, the “ITCA plaintiffs”) hereby submit the following Reply Memorandum in  
6 Support of the Alternative Application for Temporary Restraining Order and Order to  
7 Show Cause (the “TRO Application”) filed by plaintiffs Maria M. Gonzalez, Jesus M.  
8 Gonzalez, Bernie Abeytia, Luciano Valencia, Debbie Lopez, Southwest Voter  
9 Registration Project, Valle del Sol, Friendly House, Chicanos Por La Causa, Inc. and  
10 Arizona Hispanic Community Forum (collectively, the “Gonzalez plaintiffs”).<sup>1</sup> [Order,  
11 May 31, 2006 (Doc. # 28), at 2]

## 12 MEMORANDUM OF POINTS AND AUTHORITIES

### 13 Preliminary Statement

14 Pursuant to its constitutional authority to regulate voter registration for  
15 federal elections, Congress enacted the National Voter Registration Act of 1993 (the  
16 “NVRA”) to “assist in reducing barriers, particularly government-imposed barriers, to  
17 applying for [voter] registration.” [Resp. in Opp. to Pls. Alternative App. for TRO  
18 (Doc. # 27), Ex. 3 at B-2 (H. Rep. 103-9, at 3)] Ten years after implementation of the  
19 NVRA, through the “Arizona Taxpayer and Citizen Protection Act” (“Proposition  
20 200”), and under the guise of discouraging illegal immigration, Arizona has attempted to  
21 erect new barriers to voter registration. As the Election Assistance Commission (the  
22 “EAC”) notified defendant Secretary of State Janice Brewer (“Secretary Brewer” or the  
23 “Secretary”) in March, however, the NVRA prohibits the State from enforcing A.R.S. §  
24 16-166(F), which contains Proposition 200’s supplemental evidence of citizenship  
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27 <sup>1</sup> The ITCA plaintiffs have been informed that Judge Silver signed an Order  
28 consolidating this case with *ITCA, et al. v. Brewer*, No. CV06-01362-PCT-JAT, on June  
5, 2005. Accordingly, pursuant to the May 31, 2006 Order, “the ITCA Plaintiffs will  
. . . be permitted to participate in the briefing schedule.”

1 requirement, for those registrants who use the Federal Mail Voter Registration Form  
2 (the “Federal Form”).<sup>2</sup>

3 Defendants’ principal argument is that Proposition 200’s proof of  
4 citizenship provision is not inconsistent with federal law.<sup>3</sup> [See Resp., § III.B] But this  
5 argument wholly ignores (a) the language of the NVRA limiting the information the  
6 Federal Form can require, (b) the statute’s incontrovertible legislative history, and (c)  
7 the contrary conclusion of the EAC, which is charged with administering the NVRA.  
8 Indeed, the State’s own evidence in support of its Response contains Congress’ crystal  
9 clear statement of intent -- that requiring submission of “documentation relating to  
10 citizenship . . . is *not necessary or consistent* with the purposes of [the NVRA].” [Resp.  
11 Ex. 3 at D-9 (H. Rep. 103-66, at 23) (emphasis added)] As such, plaintiffs have a  
12 substantial likelihood of success on the merits of their NVRA claim.

13 In support of the TRO Application, the Gonzalez plaintiffs and the ITCA  
14 plaintiffs (collectively, “plaintiffs”) presented substantial evidence of the irreparable  
15 harm they and thousands of United States citizens who reside in Arizona will suffer if  
16 the State continues to enforce Proposition 200 in violation of the NVRA. Plaintiffs’  
17 evidence shows that the State has rejected thousands of voter registration applications,  
18 thereby denying citizens their fundamental right to vote. [See ITCA Joinder in TRO  
19 App. (Doc. # 21), Ex. 1 (“Moeser Decl.”), ¶¶ 9-12] In addition, plaintiffs’ voter  
20 registration activities have been sharply curtailed by Proposition 200’s requirement that  
21 voter registration applications, including those using the Federal Form, be accompanied  
22 by documentary evidence of citizenship. [*Id.*, Ex. 2 (“Saunders Decl.”), ¶¶ 6-8; Mem. in

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23 <sup>2</sup> The NVRA prohibits defendants from applying A.R.S. § 16-166(F) to both the  
24 state mail registration form and the Federal Form. See 42 U.S.C. § 1973gg-4(a)(2).  
25 Because the TRO Application seeks relief vis-à-vis only the Federal Form, this Reply  
does not address the state registration form.

26 <sup>3</sup> The ITCA plaintiffs have sued only Secretary Brewer, while the Gonzalez  
27 plaintiffs asserted claims against the Secretary, the State of Arizona and election  
28 officials from Arizona’s 15 counties. The Gonzalez plaintiffs’ TRO Application, in  
which the ITCA plaintiffs joined, seeks relief against the Secretary and the State, who  
filed their Response together. Accordingly, this Reply responds to the arguments made  
by the State and Secretary Brewer and refers to them collectively as the “State.”

1 Supp. of TRO App. (Doc. # 5), Ex. C (“Camarillo Decl.”), ¶¶ 11-13] Balanced against  
2 these constitutional harms, the sum of the State’s alleged harm is “confusion” for voters  
3 and election officials. [Resp. at 2] In view of the fundamental rights at stake for  
4 plaintiffs, “confusion” is woefully insufficient to tip the balance of hardships in the  
5 State’s favor. For the foregoing reasons, as shown more fully below, this Court should  
6 promptly enter the requested TRO.

7 Argument

8 I. PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON THE  
9 MERITS BECAUSE THE STATE’S APPLICATION OF A.R.S. § 16-166(F)  
10 TO THE FEDERAL FORM DIRECTLY CONFLICTS WITH -- AND IS  
11 PREEMPTED BY -- THE NATIONAL VOTER REGISTRATION ACT.

12 A. The Election Clause Authorizes Congress to Preempt State Regulation of  
13 Voter Registration for Federal Elections.

14 While the State acknowledges its role under Article I, § 4, cl. 1 of the  
15 United States Constitution (the “Election Clause”), in prescribing the “[t]imes, [p]laces  
16 and [m]anner of holding” federal elections, it wholly ignores Congress’ authority to  
17 supplant state regulation of federal elections. *See* U.S. Const. Art. I, § 4, cl. 1  
18 (authorizing Congress “at any time” to “make or alter [state] Regulations”). Rather, to  
19 avoid preemption of Proposition 200 by the NVRA, the State relies only upon inapposite  
20 general pronouncements concerning preemption arising under different constitutional  
21 provisions. [*See* Resp. at 6 (citing *English v. General Elec. Co.*, 496 U.S. 72 (1990)  
22 (discussing preemption of a state employment retaliation claim by nuclear regulations);  
23 *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (considering preemption of state products  
24 liability claim against manufacturer of medical device by the Medical Device  
25 Amendment); *Malabed v. North Slope Borough*, 335 F.3d 864 (9th Cir. 2003)  
26 (concerning preemption of state constitutional provision prohibiting Native American  
27 hiring preference by the Civil Rights Act))] As courts considering the NVRA have  
28 emphasized, however, Congressional authority to preempt state regulation of federal  
elections is much broader than its authority to preempt state law under the Commerce  
Clause. *See Association of Cmty. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d

1 833, 836 (6th Cir. 1997); *ACORN v. Edgar*, 56 F.3d 791, 794 (7th Cir. 1995); *Voting*  
2 *Rights Coalition v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995).

3 In upholding the constitutionality of the NVRA, the Ninth Circuit noted in  
4 *Voting Rights Coalition* that

5 the Supreme Court has read the grant of power to Congress  
6 in Article I, section 4 as quite broad. In *Smiley v. Holm*,  
7 285 U.S. 355, 366 . . . (1932), the Court stated that Congress  
8 has authority to provide a complete code for congressional  
9 elections, not only as to times and places, but in relation to  
10 notices, registration, supervision of voting, protection of  
11 voters, prevention of fraud and corrupt practices, counting of  
12 votes, duties of inspectors and canvassers, and making and  
publication of election returns; in short, to enact the  
numerous requirements as to procedure and safeguards  
which experience shows are necessary in order to enforce  
the fundamental right involved.

13 60 F.3d at 1413-14. As such, the NVRA “*overrides* state law *inconsistent* with its  
14 mandates.” *Charles H. Wesley Educ. Found. v. Cox*, 408 F.3d 1349, 1354 (11th Cir.  
15 2005) (emphasis added).

16 B. The Express Language of the NVRA and its Legislative History Prohibit  
17 Application of Proposition 200 to the Federal Form.

18 Because Proposition 200’s requirement that an applicant submit  
19 supplemental documentary evidence of citizenship is inconsistent with the NVRA, it  
20 cannot be lawfully enforced. Specifically, the NVRA’s express language mandates that  
21 the Federal Form may require “*only* such identifying information (including the  
22 signature of the applicant) and other information (including data relating to previous  
23 registration by the applicant), as is necessary to enable the appropriate State election  
24 official to assess the eligibility of the applicant.” 42 U.S.C. § 1973gg-7(b)(1) (emphasis  
25 added). Accordingly, the self-contained Federal Form requires no proof of citizenship  
26 beyond an attestation made under penalty of perjury. [See Moeser Decl., Ex B]  
27 Registration procedures that require more information than that requested on the Federal  
28 Form violate the NVRA. See *ACORN v. Ridge*, 1995 WL 136913 at \*3, \*9 (E.D. Pa.

1 1995) (declaring that Pennsylvania’s mail voter registration form, which required  
2 applicants to state, *inter alia*, “their sex, the state or territory where they were born, their  
3 color, height, hair and eye color, and whether they are entitled to receive assistance,”  
4 was “contrary to the [NVRA]”).

5 The NVRA’s legislative history makes clear Congressional intent to  
6 prohibit states from requiring supplemental evidence of citizenship. Indeed, Congress  
7 could not have been more clear that requiring an applicant for voter registration to  
8 submit documentary evidence of citizenship conflicts with the NVRA. Congress’ Joint  
9 Explanatory Statement of the Committee of Conference (included in Exhibit 3 to  
10 defendants’ Response) states:

11 Section 13. Rule of Construction

12 House bill

13 No provision.

14 Senate amendment

15 Provides that nothing in this Act shall prevent a State from  
16 requiring presentation of documentation relating to  
17 citizenship of an applicant for voter registration.

18 Conference substitute

19 The conferees agree with the House bill and do *not* include  
20 this provision from the Senate amendment. ***It is not***  
21 ***necessary or consistent with the purposes of this Act.***  
22 Furthermore, there is concern that *it could be interpreted by*  
23 *States to permit registration requirements that could*  
24 *effectively eliminate, or seriously interfere with, the mail*  
25 *registration program of the Act. It could also adversely*  
26 *affect the administration of the other registration programs*  
27 *as well. In addition, it creates confusion with regard to the*  
28 *relationship of this Act to the Voting Rights Act. Except for*  
*this provision, this Act has been carefully drafted to assure*  
*that it would not supersede, restrict or limit the application*  
*of the Voting Rights Act. ***These concerns lead the****  
***conferees to conclude that this section should be deleted.***

1 [Resp., Ex. 3 at D-9 (H. Rep. 103-66 at 23) (emphasis added)]; *see also* 59 Fed. Reg.  
2 32,316 (1994) (FEC statement explaining that “[t]he issue of U.S. citizenship is  
3 addressed within the oath required by the [NVRA] and signed by the applicant under  
4 penalty of perjury,” and rejecting inclusion of naturalization information with the  
5 Federal Form). Consequently, by conditioning acceptance of the Federal Form on  
6 production of supplemental information, the State is not “accept[ing] and us[ing]” the  
7 Federal Form -- a direct violation of the NVRA. 42 U.S.C. § 1973gg-4(a)(1).

8 C. The EAC Correctly Interpreted the NVRA to Bar Arizona’s Practice of  
9 Requiring Documentary Evidence of Citizenship to Register to Vote.

10 Consistent with the language of the NVRA and its legislative history, the  
11 EAC -- the federal agency designated by Congress to implement the NVRA -- has  
12 concluded that the State may not “condition acceptance of the Federal Form upon  
13 receipt of additional proof,” and that refusal to accept the Federal Form without  
14 documentary evidence of citizenship violates the NVRA. [Mooser Decl., Ex. C] The  
15 EAC’s conclusion is entitled to this Court’s deference. *See Fed. Election Comm’n v.*  
16 *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 45 (1981). As the Supreme  
17 Court noted in the context of interpretation of the Federal Election Campaign Act, the  
18 EAC’s predecessor agency is “precisely the type of agency to which deference should  
19 presumptively be afforded.” *Id.* While the State offers several reasons for this Court to  
20 ignore the EAC’s determination that Proposition 200 violates the NVRA, none of the  
21 State’s proffered justifications for rejecting the EAC’s conclusion withstands scrutiny.

22 The State first argues that the EAC’s conclusion that “[a]ny Federal . . .  
23 Form that has been properly and completely filled-out by a qualified applicant and  
24 timely received by an election official must be accepted in full satisfaction of  
25 registration requirements” is at odds with the FEC’s determination that completion of a  
26 voter registration application “does not constitute *automatic* registration.” [Resp. at 8,  
27 11] But the quoted FEC statement relates to voter registration applications received by  
28 the state motor vehicle authority -- not to the Federal Form -- and merely acknowledges

1 the need for the motor vehicle authority to forward the voter registration application to  
2 the appropriate election officials for processing before the voter is registered. [*See id.*,  
3 Ex. 3, at 1-6] Moreover, even if the EAC’s 2006 interpretation of the NVRA conflicted  
4 with the FEC’s 1994 interpretation, the more recent agency interpretation must control.  
5 *See Public Lands Council v. Babbitt*, 167 F.3d 1287, 1305 (10th Cir. 1999) (upholding  
6 regulations that modified previous regulations).

7           Second, contrary to the State’s contention that the EAC lacks authority to  
8 issue legal opinions to the State, the Help America Vote Act (“HAVA”), 42 U.S.C. §§  
9 15301-15545, and the NVRA expressly grant the EAC authority to “issue rules and  
10 promulgate regulations” related to the Federal Form and “provide information to the  
11 States with respect to the responsibilities of the States under [the NVRA].” 42 U.S.C.  
12 §§ 1973gg-7(a)(4), 15329 (confining the EAC’s rulemaking authority to its duties under  
13 § 1973gg-7(a)). As such, the EAC’s interpretation of the NVRA is entitled to  
14 deference.<sup>4</sup> *See Federal Election Comm’n*, 454 U.S. at 45 (deferring to the FEC’s  
15 interpretation of the Federal Election Campaign Act).

16           Finally, the State’s interpretation of the legislative history of the NVRA is  
17 incorrect. Like the FEC guidance cited in the Response, the portion of the  
18 Congressional committee report on which the State relies relates not to the Federal  
19 Form, but to simultaneous application for voter registration and a driver’s license. [*See*  
20 *Resp.*, Ex. 3 at B-5 (H.R. Rep. 103-9, at 8)] In explaining the NVRA’s provisions  
21 related to the Federal Form, that same report recognized that the Federal Form “may not  
22 include any requirement for . . . formal authentication” and that the Federal Form’s  
23 requirement of an attestation to citizenship under penalty of perjury would prevent  
24 fraud. [*Id.*, at B-5-6 (H.R. Rep. 103-9, at 9-10)] In addition, while the State cites a  
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26           <sup>4</sup> The State also argues that the Department of Defense has instructed registrants  
27 using the Federal Post Card Application to provide “proof of citizenship.” [Response, at  
28 11] While this may be accurate, it is inapposite. Plaintiffs’ TRO Application relates  
only to the Federal Form, over which the EAC, not the Department of Defense, has  
regulatory authority. *See* 42 U.S.C. § 15329.

1 House report issued on February 2, 1993, the EAC cited the April 28, 1993 statement of  
2 the Committee of Conference -- the joint House and Senate Committee that reconciled  
3 the differing versions of the bills passed by the House and Senate and recommended the  
4 bill actually enacted. That report -- which, in fact, represents the collective expression  
5 of Congress concerning interpretation of the NVRA -- states that requiring provision of  
6 documentation relating to citizenship “is not necessary or consistent with the purposes  
7 of [the NVRA].” [*Id.* at D-9 (H. Rep. 103-66, at 23); *see also id.* at I-4 (recommending  
8 consulting the Conference Statement because the “language in the House and Senate  
9 reports is not controlling if the provisions discussed were amended prior to final  
10 passage”)]

11 D. The Help America Vote Act Does Not Change the Requirements of the  
12 NVRA.

13 In sum, defendants’ argument is inconsistent with (a) the language of the  
14 NVRA, (b) Congress’ intent as evinced by the NVRA’s legislative history, and (c) the  
15 EAC’s interpretation of the NVRA. Instead, to justify requiring documentary proof of  
16 citizenship, the State argues that Proposition 200 “complements” HAVA and represents  
17 an exercise of its discretion to make “choices on the methods of complying with the  
18 requirements of [HAVA].” [Resp. at 7, 10] Proposition 200, however, was *not* enacted  
19 to implement HAVA. Neither the Proposition’s language nor its legislative history  
20 contains any reference whatsoever to HAVA. [*See generally* Moeser Decl., Ex. C]  
21 Moreover, the State’s HAVA plan -- published May 15, 2003, more than a year and a  
22 half *before* Proposition 200 took effect -- nowhere mentions requiring documentary  
23 proof of citizenship. *See* HAVA State Plan, [www.azsos.gov/hava/2003/state\\_plan/  
24 HAVA\\_Arizona\\_State\\_Plan.pdf](http://www.azsos.gov/hava/2003/state_plan/HAVA_Arizona_State_Plan.pdf). As such, this Court should not countenance the State’s  
25 *post hoc* contention that Proposition 200 constitutes an attempt to comply with HAVA.

26 In certain limited respects, HAVA addresses voter registration under the  
27 NVRA and modifies the information required from some first-time voters who register  
28 by mail. *See* 42 U.S.C. § 15483(b)(2)(A) (requiring provision of identification, not

1 proof of citizenship, the first time the voter votes); *see also* 42 U.S.C. § 15545(a). A  
2 first-time voter may avoid HAVA’s voting identification requirement if he submits  
3 certain specified forms of identification -- but not documentary proof of citizenship --  
4 with his voter registration application. 42 U.S.C. § 15483(b)(3). Submission of such  
5 identification, however, is entirely voluntary, and HAVA does *not* bar an applicant who  
6 declines to do so from registering to vote. Indeed, like the NVRA, HAVA requires only  
7 an attestation that a registrant is a United States citizen. 42 U.S.C. § 15483(b)(4)(i).  
8 Because Proposition 200 makes submission of evidence of citizenship mandatory, it  
9 goes far beyond and does not implement or “complement” HAVA.

10           Importantly, HAVA does *not* require applicants for voter registration to  
11 provide documentary proof of citizenship. Moreover, HAVA expressly states that  
12 “nothing in [HAVA] may be construed to authorize or require conduct prohibited under  
13 [the NVRA], or to supersede, restrict, or limit the application of [the NVRA].” 42  
14 U.S.C. § 15545(a)(4); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153  
15 (1976) (“It is a basic principle of statutory construction that a statute dealing with a  
16 narrow, precise, and specific subject is not submerged by a later enacted statute covering  
17 a more generalized spectrum”). Because Proposition 200 directly conflicts with the  
18 NVRA, it does not and cannot implement HAVA. 42 U.S.C. § 15545(a).

19           E.     Section 5 Preclearance of Proposition 200 Does Not Erase the State’s  
20                   Violation of the NVRA.

21           When the State submitted Proposition 200 to the Department of Justice  
22 (the “DOJ”) for preclearance under 42 U.S.C. § 1973c, it did not expressly notify the  
23 DOJ that it would reject Federal Forms submitted without supplemental citizenship  
24 documentation. *See Young v. Fordice*, 520 U.S. 273, 288 (1997) (preclearance  
25 submissions must explain the changes clearly and in detail, and any ambiguities will be  
26 construed against the state) (citations omitted); *McCain v. Lybrand*, 465 U.S. 236, 249  
27 (1984) (DOJ preclearance cannot happen “when the proposal was neither properly  
28 submitted nor in fact evaluated by [the Attorney General]”); [Resp., Ex. 4] Moreover,

1 DOJ preclearance has no bearing on compliance with the NVRA. *Charles H. Wesley*,  
2 408 F.3d at 1355 n.6 (“[P]reclearance has no bearing on the legitimacy of a given rule,  
3 procedure or action with regard to other federal electoral laws.”) (citing *Reno v. Bossier*  
4 *Parish*, 528 U.S. 320, 335 (2000)). Consequently, the DOJ’s determination pursuant to  
5 the Voting Rights Act that Arizona could enforce Proposition 200 does not bar this  
6 Court from determining that the proof of citizenship requirement violates the NVRA.

7 II. THE HARM TO PLAINTIFFS FROM CONTINUED ENFORCEMENT OF  
8 PROPOSITION 200 FAR OUTWEIGHS THE *DE MINIMIS* BURDENS A TRO  
WOULD PLACE ON DEFENDANTS.

9 A. The State’s Evidence of Voter Fraud Is Insufficient to Warrant  
10 Disenfranchising Thousands of Eligible Voters.

11 To support its claims that Proposition 200 is necessary to combat voter  
12 fraud, and therefore the requested TRO will harm defendants, the State points to 159  
13 registered voters that the Maricopa County Recorder referred to the Maricopa County  
14 Attorney, alleging that they were not United States Citizens. [Resp. at 7 n.5] The  
15 County Attorney, however, filed charges against very few of those people -- and even  
16 fewer are alleged to have actually voted. [*Id.*, Ex. 2, ¶ 11] Placed in perspective, the  
17 State’s allegations do not support its claims of substantial voter fraud. Indeed, out of a  
18 pool of 2,624,559 registered voters in Arizona, the State has alleged that 159 (0.0061  
19 percent of registered voters) were not United States Citizens. Those allegations led the  
20 State to charge ten of those 2.6 million registered voters (0.00038 percent) with a  
21 crime.<sup>5</sup> The State alleges that an even smaller number of registered voters who were not  
22 United States citizens -- four of 2.6 million (0.00015 percent) -- actually cast a ballot.  
23 Even if the State’s allegations that non-citizens have registered and voted are true, they  
24 do *not* constitute evidence of widespread voter fraud, but represent, at most, *de minimis*  
25 harm.

26 \_\_\_\_\_  
27 <sup>5</sup> At least two of those cases have since been dismissed. *See State v. Garibo*, No.  
28 CR2005-011818 (Ariz. Super. Ct., Maricopa County) (Minute Entry, Oct. 21, 2005)  
(dismissing case for lack of sufficient evidence); *State v. Ethan*, No. CR2005-011820  
(Ariz. Super. Ct., Maricopa County) (Minute Entry, Jan. 13, 2006).

1           Balanced against the State’s statistically insignificant allegations of  
2 improper voter registration are exponentially greater numbers of potentially  
3 disenfranchised voters. In eight months in 2005, 8,673 voter registration applications  
4 were rejected in two Arizona counties for failure to provide documentary evidence of  
5 citizenship. [Moeser Decl., ¶¶ 11-12] In addition, as many as 100,000 or more  
6 unregistered, voting-age Arizonans may not be able to provide the number of a driver’s  
7 license issued after October 1, 1996 when they register to vote.<sup>6</sup> Accordingly,  
8 Proposition 200 requires that those potential voters submit copies of documentary  
9 evidence of citizenship to register. *See* A.R.S. § 16-166(F)(2)-(6). Many of those  
10 people may not have the requisite documents, and cannot obtain them without an  
11 investment of time and money. [See TRO App., Ex. A (“Bernal Decl.”), ¶ 14]  
12 Moreover, the plaintiffs who conduct voter registration drives will be unable to register  
13 even those who possess the requisite documents because they lack the capacity and  
14 resources to make copies of those documents to submit with the Federal Form.  
15 [Camarillo Decl., ¶ 12; Saunders Decl., ¶ 7]

16           The harm to the disenfranchised far outweighs the harm inflicted by the  
17 few registered non-citizens the State has identified. Voting is undeniably a fundamental  
18 right. *E.g.*, 42 U.S.C. § 1973gg(a)(1). Denying that right to thousands of people causes  
19 substantial, irreparable harm -- harm far greater than the infinitesimal dilution of  
20

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21           <sup>6</sup> Nine percent of voter registration applicants in Maricopa County who provided  
22 “satisfactory evidence of citizenship” did not use a driver’s license number. [Resp., Ex.  
23 2, ¶ 10] There are approximately 1,139,126 voting-age Arizonans who are not  
24 registered to vote. [Moeser Decl., ¶¶ 7-8] Applying Maricopa County’s nine percent  
25 figure to this number, Proposition 200 could require more than 100,000 people to  
26 provide copies of documents establishing United States citizenship to register to vote.  
27 While not all voting age Arizona residents may be eligible to vote, far more than nine  
28 percent may lack a driver’s license issued after October 1, 1996. Indeed, it is also likely  
that the percentage of people without driver’s licenses may be much higher outside the  
urban areas of Maricopa County. Moreover, the nine percent figure comes only from  
the registrations that provided “proper documentation” and does not reflect the  
thousands of registrations submitted without documentation. [Resp., Ex. 2, ¶10] As  
such, though these figures are inexact, they show the substantial likelihood that  
thousands of United States citizens may be barred from exercising their fundamental  
right to vote because they cannot provide documentary evidence of citizenship.

1 registered voters' votes by four improperly registered individuals. In short, on the  
2 record before this Court, the balance of harms tips sharply in plaintiffs' favor.

3 B. Any Administrative Burden on Defendants Would Be Minimal.

4 The State argues that if the Court restrains it from requiring applicants  
5 using the Federal Form to provide additional evidence of citizenship, those registrations  
6 will be in legal limbo, causing "confusion." [Resp. at 14] Yet the State provides no  
7 reason that Federal Form registrations submitted during the effective period of the  
8 requested TRO would be invalid. As such, even if this Court were to rule on the merits  
9 that Proposition 200's voter registration provisions do not violate the U.S. Constitution  
10 or federal law, the validity of Federal Form registrations would not be in doubt.

11 Proposition 200 did *not* change voter eligibility requirements. *See* A.R.S.  
12 § 16-101. Rather, it established a burdensome and costly procedure for ensuring that  
13 applicants meet those eligibility requirements. *See* A.R.S. § 16-166(F). The State offers  
14 no authority to support its contention that it would need to remove from the registration  
15 rolls eligible voters -- who have sworn under penalty of perjury that they are United  
16 States citizens -- simply because they did not provide supplemental documentation with  
17 their registration forms. Importantly, Arizona law recognizes the validity of voter  
18 registrations submitted without supplemental proof of citizenship. Indeed, as a result of  
19 Proposition 200's "grandfather clause," voters registered before Proposition 200's  
20 effective date -- the vast majority of registered Arizona voters -- remain on the voter  
21 registration rolls even though they have not provided the "satisfactory evidence of  
22 citizenship" required by Proposition 200. *See* A.R.S. § 16-166(G). The State has  
23 offered nothing to suggest that this "grandfather clause" could not apply to validate  
24 Federal Form registrations processed during the effective period of the requested TRO.

25 Even if the State were required to identify and remove from the list of  
26 registered voters those who were allowed to register pursuant to the requested TRO,  
27 defendants have not shown that the expense of such a task is significant, let alone great  
28 enough to outweigh the fundamental right to vote of thousands of citizens. Indeed, it

1 should be quite simple to note on the voter registration list the voters who register with  
2 the Federal Form without providing the evidence of citizenship required by Proposition  
3 200. In the event this Court decides that the federal law and the Constitution permit  
4 enforcement of Proposition 200, the State could then notify the listed registrants that  
5 they may be removed from the registration rolls if they do not provide “satisfactory  
6 evidence of citizenship.” A.R.S. § 16-166(F); *see* 42 U.S.C. § 1973gg-6(a)(2).  
7 Likewise, the State has not shown that education of election officials concerning the  
8 inapplicability of Proposition 200 to Federal Form registrants would be difficult or  
9 costly.

10 In view of the State’s failure to demonstrate with specificity any  
11 substantial effort or expense, the harm that will occur absent the requested TRO --  
12 disenfranchisement of thousands of eligible voters -- tips the balance sharply in  
13 plaintiffs’ favor. *See Charles H. Wesley*, 408 F.3d at 1355-56 (granting preliminary  
14 injunction under the NVRA because the state’s administrative burden of treating  
15 registration forms differently and the public interest in protecting against electoral fraud  
16 were insufficient to outweigh the harm to plaintiffs’ associational and franchise-related  
17 rights); *cf. Phoenix Newspapers, Inc. v. Keegan*, 35 P.3d 105, 111-12 (Ariz. Ct. App.  
18 2001) (holding that “expense and difficulty of administration” occasioned by disclosure  
19 of public records did not outweigh the public’s right under Arizona law to view those  
20 records).

21 C. Secretary Brewer Is the Proper Party To Be Restrained from Enforcing  
22 Proposition 200 With Respect to the Federal Form.

23 The State argues that the requested TRO would be ineffective because  
24 Secretary Brewer lacks power to enforce the NVRA. The State, however, takes too  
25 narrow a view of the Secretary’s responsibility for voter registration and her role under  
26 the NVRA. Indeed, pursuant to the State’s HAVA Plan, the “official voter registration  
27 list will remain under the central control of the secretary of state.” [HAVA State Plan,  
28 at 19] Moreover, the State has designated Secretary Brewer as the “chief state election

1 officer . . . responsible for coordination of state responsibilities under the [NVRA].”  
2 A.R.S. § 16-142(A)(1); *see also* 42 U.S.C. § 1973gg-8 (requiring designation of “the  
3 chief State election official . . . responsible for coordination of State responsibilities”).  
4 Accordingly, the Secretary is primarily responsible for Arizona’s compliance with the  
5 NVRA. *See National Coalition for Students with Disabilities Ed. & Legal Def. Fund*  
6 *(NCSD) v. Bush*, 170 F. Supp. 2d 1205, 1210-11 (N.D. Fla. 2001) (concluding that  
7 county officials were not indispensable parties and declining to dismiss NVRA lawsuit  
8 against governor, secretary of state and elections director for failure to join those county  
9 officials); *NCSD v. Taft*, 2001 WL 1681115 (S.D. Ohio 2001) (dismissing NVRA claims  
10 against governor because, under the NVRA and Ohio law, the *secretary of state* “has the  
11 duty and authority to implement and enforce the provisions of the NVRA”).

12 In addition, Secretary Brewer has provided extensive guidance to  
13 Arizona’s county recorders about implementation of the voter registration provisions of  
14 Proposition 200 as they relate to the NVRA. The Secretary has instructed Arizona’s  
15 county recorders not to accept the Federal Form without the documentary evidence of  
16 citizenship required by Proposition 200. [Moerer Decl., Ex. D-E] Indeed, on March 13,  
17 2006, the State Election Director sent an e-mail to the county recorders that emphasized  
18 “Secretary Brewer’s position that the proof of citizenship requirement set forth in A.R.S.  
19 § 16-166(F) *must continue to be enforced* for all newly registered voters and voters  
20 moving from one county to another.” [*Id.*, Ex. E (emphasis added)] She cannot now  
21 claim that she is powerless to direct the county recorders *not* to enforce the voter  
22 registration provisions of Proposition 200 in the event this Court enters a TRO. *See*  
23 *United States v. New York*, 255 F. Supp. 2d 73, 79-80 (E.D.N.Y. 2003) (holding that  
24 state agencies, not local offices, were responsible for ensuring compliance with NVRA  
25 and noting that state agencies had “taken actions consistent with their responsibilities to  
26 ensure compliance by their local offices with the NVRA by the issuance of  
27 Administrative Directives”). To date, the county recorders have followed Secretary  
28 Brewer’s directive to reject Federal Forms not accompanied by the “satisfactory

1 evidence of citizenship” described in A.R.S. § 16-166(F). As such, there is no reason to  
2 believe they would not follow a directive to accept the Federal Form without  
3 supplemental documentation if this Court were to enter a TRO.

4 D. Time for Voter Registration is Running Short.

5 Contrary to the State’s contention that emergency relief is inappropriate  
6 because voter registration does not close until August 14, 2006, time is of the essence.  
7 The deadline to register for the September primary is barely more than two months away  
8 -- giving plaintiffs little time to conduct voter registration drives. Every day that the  
9 State is in violation of the NVRA hampers plaintiffs’ ability to register voters. [See  
10 Camarillo Decl., ¶¶ 6-7, 12 (describing plaintiffs’ voter registration program); Saunders  
11 Decl., ¶¶ 4, 6-7 (same)] It is unrealistic to expect that plaintiffs could conduct all of  
12 their voter registration activities in less than two months, let alone in the final days of  
13 the registration period. Accordingly, the only way to mitigate the substantial harm to  
14 plaintiffs’ voter registration activities is prompt entry of a TRO.

15 Conclusion

16 For the foregoing reasons, this court should grant the Gonzalez plaintiffs’  
17 Alternative Application for Temporary Restraining Order and Order to Show Cause.

18 RESPECTFULLY SUBMITTED this 5th day of June, 2006.

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1 CERTIFICATE OF SERVICE

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3 document to be electronically transmitted to the Clerk's Office using the CM/ECF  
4 System for filing and transmittal of a Notice of Electronic Filing to the following  
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I further certify that I caused a copy of the attached document to be mailed  
on the 5th day of June, 2006 to:

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