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13 **UNITED STATES DISTRICT COURT**  
14 **DISTRICT OF ARIZONA**

15 MARIA M. GONZALEZ, et al.,

16 Plaintiffs,

17 v.

18 STATE OF ARIZONA, et al.,

19 Defendants.

20 Case No. CV-06-1268-PHX-ROS

21 PLAINTIFFS' REPLY TO  
22 DEFENDANTS' RESPONSE  
23 IN OPPOSITION TO  
24 PLAINTIFFS' ALTERNATIVE  
25 APPLICATION FOR TEMPORARY  
26 RESTRAINING ORDER

27 (Assigned to the Honorable  
28 Roslyn O. Silver)

29 NOW COME Plaintiffs Maria Gonzalez, *et al.* and file their Reply to the State's  
30 Response in Opposition to Plaintiffs' Alternative Application for Temporary Restraining  
31 Order ("Response").

32 **I. INTRODUCTION**

33 Plaintiffs' Alternative Application for Temporary Restraining Order  
34 ("Application") seeks an order requiring State Defendants to comply with the National  
35 Voter Registration Act ("NVRA") mandate that Arizona accept and use the federal mail  
36 voter registration form for federal elections.<sup>1</sup>

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37 <sup>1</sup>The State misapprehends Plaintiffs legal claim when it charges that "according to  
38 Plaintiffs, Congress has decided that no state can enact a law that requires individuals registering  
to vote to verify that they are citizens . . ." Response at 2. Plaintiffs make no such claim and

1 Because Section 6 of the NVRA unambiguously imposes upon states the  
2 obligation to use and accept the federal mail voter application for federal elections,  
3 Plaintiffs have demonstrated a strong likelihood of success on the merits. And because  
4 the new proof of citizenship requirements of Proposition 200 significantly altered  
5 Arizona’s previous voter registration process, resulting in the rejection of thousands of  
6 voter registration applications for failure to include proof of citizenship, removing the  
7 requirement will result in less confusion and more, not fewer, successful voter  
8 registrations.

9 Finally, it would be inappropriate to wait, as urged by State Defendants, until the  
10 voter registration period for the upcoming federal primary elections has almost closed.  
11 Each day Plaintiff Luciano Valencia and others like him experience irreparable harm as a  
12 result of having had their valid federal voter applications rejected because of the  
13 restrictions of Proposition 200. In addition, the organizational plaintiffs experience  
14 irreparable harm as a result of their inability to use the federal voter application to register  
15 voters. This harm is ongoing and, in the case of some rejected voters who do not attempt  
16 to re-register, threatens to become permanent. For these reasons, Plaintiffs urge the Court  
17 to grant their application as expeditiously as possible.

## 18 **II. ARGUMENT**

### 19 **A. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits.**

#### 20 1. The State Does not Accept and use the Federal Mail Voter Registration Form

21 Section 6 of the NVRA states “[e]ach State shall accept and use the mail voter  
22 registration application form prescribed by the Federal Election Commission pursuant to  
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24  
25 recognize that states are free, within constitutional limits, to regulate their own voter registration  
26 process. The question raised by Plaintiffs’ Application is whether Congress, under its  
27 constitutional authority to regulate federal elections, has set the criteria for federal mail voter  
28 registration in federal elections.

1 section 9(a)(2) for the registration of voters in elections for Federal office.” 42 U.S.C.  
2 1973gg-4 (a) (1). State Defendants contend, as a factual matter, that Arizona accepts and  
3 uses the federal mail voter application. In support of their contention, State Defendants  
4 assert that although they require voter registration applicants to provide additional proof  
5 of citizenship with the federal application, they still “accept” and “use” the federal form,  
6 albeit with new and different documentation requirements than those set out on the form  
7 itself. This assertion of fact is untenable.

8 The affidavit of Joseph Kanefield, State Election Director, makes clear that the  
9 State will not permit County Recorders to process federal mail voter applications that are  
10 properly completed but lack the additional proof of citizenship required by Proposition  
11 200.<sup>2</sup> Mr. Kanefield’s directive to all County Recorders, in the context of whether or not  
12 to accept the federal mail voter registration application, stated that the additional proof of  
13 citizenship requirements of Proposition 200 “must continue to be enforced” on all federal  
14 mail voter applications.<sup>3</sup> County Recorders are complying with this directive from the  
15 State.

16 The State’s new voter registration application, made available to the counties in  
17 May 2005 and currently the only voter registration application made available online by  
18 the Secretary of State, explains that the application will be rejected if it does not contain  
19 the additional proof of citizenship required by Proposition 200.

20 There is simply no dispute that Arizona does not accept or use a federal mail voter  
21 application that is properly completed but lacks the additional proof of citizenship  
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25 <sup>2</sup>See Ex. 1 to State’s Response at ¶3.

26 <sup>3</sup>See e-mail correspondence of Joseph Kanefield to County Recorders, attached as Ex. 5  
27 to Plaintiffs’ Memorandum of Points and Authorities of Support of Plaintiffs’ Application for a  
Temporary Restraining Order.

1 required by Proposition 200.<sup>4</sup> By imposing new and different requirements for  
2 completion of a federal mail voter registration form, and rejecting properly-completed  
3 forms that lack the additional proof of citizenship required by Proposition 200, Arizona  
4 does not “accept” or “use” the federal form. The terms “accept” and “use” cannot mean to  
5 reject the form when it is properly completed but is unaccompanied by additional  
6 information required only by state statute.

7 State Defendants’ suggestion that they are simply acting to “verify” a federal mail  
8 voter application by requiring the applicant to photocopy and attach her birth certificate  
9 or passport (in the case where the applicant lacks an identification card issued by the state  
10 after 1996), stretches the meaning of the word “verify” beyond all reasonable limits.  
11 Similarly, forcing naturalized citizens to travel to the County Recorder’s office to present  
12 the original versions of their naturalization certificates goes far beyond any concept of  
13 verifying the affirmation of citizenship on the federal form.

## 14 2. Section 6 of the NVRA Pre-empts Proposition 200's Proof of Citizenship Requirement

15 Sidestepping well-established precedent on Congressional pre-emption of state  
16 election practices, State Defendants argue that because states have some regulatory power  
17 over elections, Congress lacks the authority to set the criteria for federal voter registration  
18 and to require Arizona to use and accept completed federal mail voter applications that  
19 satisfy federal criteria.

20 There can be no dispute that Congressional regulation of federal elections takes  
21 precedence over state statutes. “[I]t is well settled that the Elections Clause grants  
22 Congress ‘the power to override state regulations’ by establishing uniform rules for  
23 federal elections, binding on the states.” *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting  
24 *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-833 (1995)). *See also Smiley v.*

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26 <sup>4</sup>See Valencia Decl. attached as Exhibit B to Plaintiffs’ Memorandum of Points and  
27 Authorities of Support of Plaintiffs’ Application for a Temporary Restraining Order.

1 *Holm*, 285 U.S. 355, 366-67 (1935) (“It cannot be doubted that these comprehensive  
2 words [of the Elections Clause] embrace authority to provide a complete code for  
3 congressional elections, not only as to times and places, but in relation to notices,  
4 registration . . .”).

5 State Defendants do not contend that in enacting the NVRA, Congress acted  
6 beyond the scope of its authority under the Constitution to regulate federal elections.  
7 Thus, the only question that remains is whether the NVRA specifies and limits the criteria  
8 that states must use for mail voter registration in federal elections.

9 The statute in this case is unambiguous. The NVRA explicitly requires states to  
10 “accept and use” the federal mail voter application. *See* 42 U.S.C. 1973 gg-4 (a) (1). No  
11 provision of the NVRA permits states to create their own criteria for mail voter  
12 applications for federal elections.

13 In addition, nothing in the legislative history of the NVRA suggests that Congress  
14 intended for states to impose different requirements for federal voter registration than  
15 those set out in the Act itself. The legislative history of the NVRA reveals that the  
16 purpose of the federal mail voter application is to ensure increased access of voters to  
17 registration with a simple form that does not require additional authentication. *See*  
18 NVRA Section 7 (b) (3) (“The mail voter registration form developed under subsection  
19 (a)(2) of this section . . . may not include any requirement for notarization or other formal  
20 authentication;”)<sup>5</sup>

21 Congress passed the NVRA specifically to eliminate voter registration barriers that  
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23

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24 <sup>5</sup>In their Response at 9, State Defendants urge the Court to understand the term  
25 “authenticate” as “[t]o establish or prove as authentic.” Plaintiffs agree and further urge the  
26 Court to read this ban on “authentication” in the Act to mean that states may not require formal  
27 authentication of information on the registration application. For this reason, the additional  
documentary requirements of Proposition 200 are exactly the type of formal authentication  
forbidden by the NVRA.

1 prevented individuals from exercising their constitutional right to vote.<sup>6</sup> In the legislative  
2 history to the NVRA, Congress recognized the continuing need to build on the  
3 elimination by the 1965 Voting Rights Act of barriers to registration, such as poll taxes  
4 and literacy tests. *See* H.R. REP. NO. 103-9, at 3 (1993). For this reason, the NVRA  
5 created a uniform mail registration program as well as expanded the locations at which  
6 individuals could register to vote in person to department of motor vehicle offices (the  
7 “motor-voter” provision) and government agencies.

8 Congress specifically intended to lessen the procedural burdens of state mail voter  
9 registration programs (which existed in only 27 states in 1993). In enacting Section 6 of  
10 the NVRA, Congress knew that a convenient mail registration program could increase  
11 voter registration through voter registration drives:

12 Mail registration...relieves the voter of the need to appear in  
13 person at one central registration office during prescribed hours  
14 and it permits organizations to go to the voter with organized  
15 registration drives. Mail registration is convenient for the voter,  
16 for registration drive organizers and for voter registrars as well.

17 S. REP. NO. 103-6, at 12 (1993).

18 Congress was aware of claims that mail voter registration would increase voter  
19 fraud and rejected these claims in enacting Section 6 of the NVRA. The Senate Report to  
20 the NVRA responded to concerns that increased voter fraud would result from inadequate  
21 verification methods.<sup>7</sup> The Senate Report cited a study by the Congressional Research  
22 Service of States, which found the post card registration program showed little or no  
23 evidence of fraud.<sup>8</sup> Congress also relied on the testimony of the governor of Oregon, who

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24 <sup>6</sup>“The unfinished business of registration reform is to reduce [the] obstacles to voting to  
25 the absolute minimum while maintaining the integrity of the electoral system.” H.R. REP. NO.  
26 103-9, at 3 (1993).

27 <sup>7</sup>During the Committee’s consideration of similar legislation in 1991, it frequently  
28 referred to an April 17, 1991 letter submitted by the U.S. Department of Justice which presented  
many arguments made by opponents to the NVRA. *See* S. REP. NO. 103-6, at 12 n. 2 (1993).

<sup>8</sup> *Id* at 12.

1 stated that there was “Literally no abuse of the [mail registration] system.”<sup>1</sup> The Senate  
2 Report rejected the notion that undocumented immigrants posed a threat to mail voter  
3 registration, noting that in Oregon, a state with a large migrant population, the state had  
4 not found any indication of non-citizens registering to vote.<sup>2</sup>

5 The Senate Committee addressed issues of potential voter fraud in the mail  
6 registration system by requiring that a first time voter who registered by mail make a  
7 personal appearance to vote.<sup>3</sup> The bill also required applicants to attest to their voting  
8 qualifications, including age and citizenship, under penalty of perjury.

9 Furthermore, nothing in the Help America Vote Act (“HAVA”) permits states to  
10 enact laws that contradict the NVRA. *See* Sec. 906 (a)(4) of HAVA (“nothing in this Act  
11 may be construed to authorize or require conduct prohibited under any of the following  
12 laws, or to supersede, restrict, or limit the application of such laws . . . The National Voter  
13 Registration Act of 1993 . . .”). State Defendants concede in their Response that in  
14 HAVA, Congress responded to the fear of non-citizen registration by requiring federal  
15 mail voter applicants to check a box confirming that they are citizens, not by imposing  
16 requirements of additional documentation. *See* Response at 10.

17 State voter registration procedures that do not conform with the mandates of the  
18 NVRA are invalid. *See Condon v. Reno*, 913 F.Supp. 946, 957-58 (D.S.C. 1995) (finding  
19 South Carolina in violation of the NVRA because its mail voter registration form required  
20 a witness signature and the state had a “passive” system of distribution and outreach);  
21 *Association of Community Organizations for Reform Now (ACORN) v. Ridge*, 1995 U.S.  
22 Dist. LEXIS (E.D. Penn. March 30, 1995) (finding that Pennsylvania was not in  
23 compliance with the NVRA when its mail-in registration form required more information  
24 about the applicant than that required by the NVRA and setting later hearing to determine

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25  
26 <sup>9</sup> *Id* at 13.

27 <sup>10</sup>*Id.*

28 <sup>11</sup> S. REP. NO. 103-6, at 13 (1993).

1 relief); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110 (2<sup>nd</sup> Cir.  
2 2000) (ordering New York to provide voter registration at a number of public hospitals in  
3 order to comply with the NVRA); *National Coalition for Students with Disabilities*  
4 *Education and Legal Defense Fund v. Gilmore*, 152 F.3d 283 (4<sup>th</sup> Cir. 1998) (finding that  
5 Virginia’s failure to provide voter registration at social services offices violated the  
6 NVRA).

7 **B. A Temporary Restraining Order Will Relieve the Unjust Restriction on Voter**  
8 **Registration and not Confuse the Voters.**

9 State Defendants suggest that the new registration requirements are so ingrained in  
10 the state’s election procedures that to permit the use of federal mail voter applications  
11 would cause widespread confusion and throw the upcoming election into disarray. These  
12 contentions are not supported by either of the affidavits submitted by State Defendants in  
13 support of their Response. The State’s position is also undermined by its simultaneous  
14 argument that this Court should delay consideration of Plaintiffs’ Application because  
15 there remains a substantial amount of time (10 weeks) for voters in Arizona to register for  
16 the upcoming primary.

17 Requiring State Defendants to accept and use federal mail voter applications will  
18 not result in confusion. County Recorders, who manage many different types of voter  
19 registration applications, can readily identify federal voter applications and accept them if  
20 they are properly completed. Voters who complete the federal applications can rest  
21 assured that they will be added to the rolls without having to provide more documentation  
22 that is not requested on the form itself. Private organizations can resume their voter  
23 registration drives, distribute the federal application and not fear that they have to  
24 photocopy additional material in order to complete the applications.

25 **C. Plaintiffs Have Suffered and Continue to Suffer Irreparable Harm as a Result of**  
26 **the State’s Refusal to Comply With the NVRA.**

27 Plaintiff Luciano Valencia should have been registered to vote on or about May 3,  
28

1 2006, when he submitted to the Pima County Recorder his properly-completed federal  
2 mail voter application form. Instead, the clerk informed Mr. Valencia that he could not  
3 be registered to vote without documentary proof of citizenship because of the  
4 requirements of Proposition 200.<sup>12</sup> Mr. Valencia has suffered and continues to suffer  
5 irreparable harm as a result of State Defendants’ directives to the County Recorders that  
6 they impose the additional proof of citizenship requirements on properly-completed  
7 federal mail voter applications.

8 In addition, plaintiff organizations that conduct community-based voter  
9 registration in order to fulfill their organizational goals have been impeded in their ability  
10 to register voters since Proposition 200's documentary proof of citizenship requirements  
11 have gone into effect.<sup>13</sup> Because Proposition 200 requires any individual or organization  
12 that seeks to conduct voter registration in the community to bring a photocopy machine or  
13 a scanner with them in order to make copies of the citizenship documents of voter  
14 registration applicants, and the plaintiff organizations lack the resources and equipment to  
15 meet these requirements, they have suffered and continue to suffer irreparable harm.

16 State Defendants’ suggestion that, because voter registration ends on August 14,  
17 Plaintiffs have not suffered irreparable harm, is unavailing. Individuals improperly  
18 excluded from the voter registration rolls, as well as organizations prevented from  
19 conducting voter registration, have been irreparably harmed. *See Charles H. Wesley*  
20 *Educ. Found., Inc. v. Cox*, 408 F.3d 1349 (11<sup>th</sup> Cir. 2005) (affirming injunction  
21 prohibiting Secretary of State from rejecting voter registration applications gathered by  
22 private charitable organization because “[t]he associational and franchise-related rights  
23 asserted by the Plaintiffs were threatened with significant, irreparable harm . . .”);

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25 <sup>12</sup>See Valencia Decl. attached as Exhibit B to Plaintiffs’ Memorandum of Points and  
26 Authorities of Support of Plaintiffs’ Application for a Temporary Restraining Order.

27 <sup>13</sup>See Camarillo Decl. attached as Exhibit C to Plaintiffs’ Memorandum of Points and  
28 Authorities of Support of Plaintiffs’ Application for a Temporary Restraining Order.

1 *Williams v. Salerno*, 792 F.2d 323, (2<sup>nd</sup> Cir. 1986) (when elections commissioners  
2 prohibited college students from registering to vote at their campus addresses “[t]he  
3 registration applicants in this case would certainly suffer irreparable harm if their right to  
4 vote were impinged upon.”).

5 **D. State Defendants did not Inform the U.S. Department of Justice During the**  
6 **Section 5 Preclearance Process That They Would Cease to use and Accept the**  
7 **Federal Mail Voter Registration Form.**

8 In their Response, State Defendants claim that their Section 5 submission to the  
9 U.S. Department of Justice was adequate to preclear their plan to no longer accept and  
10 use the federal mail voter application. See Response at 12-13. On the contrary, no  
11 language in the preclearance submission itself notified the Department of Justice that  
12 Arizona would no longer process federal mail voter registrations unless they were  
13 accompanied by new proof of citizenship.

14 Although Arizona’s Section 5 submission stated that under Proposition 200, new  
15 voters would have to provide documentary proof of citizenship, the State did not explain  
16 that this requirement applied not only to state registration forms, but federal registration  
17 forms as well.<sup>14</sup> For this reason, the Department of Justice was not informed of the plan  
18 by Arizona to abandon compliance with the NVRA (a statute that the Department of  
19 Justice is charged with enforcing) and did not preclear Arizona’s plan to impose proof of  
20 citizenship requirements in the registration process for federal elections.

21 **III. CONCLUSION**

22 For the reasons set out above and in Plaintiffs’ Memorandum of Points and  
23 Authorities of Support of Plaintiffs’ Application for a Temporary Restraining Order,  
24 Plaintiffs respectfully request that the Court restrain and enjoin State Defendants from  
25 failing to distribute, use and accept the federal mail voter registration application form

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26 <sup>14</sup>See Arizona Preclearance Application, attached as Ex. 4 to State Defendants’ Response.  
27

1 prescribed by the U.S. Election Assistance Commission.

2  
3 Date: June 5, 2006

Respectfully submitted,

4  
5 By: \_\_\_\_\_/S/\_\_\_\_\_  
6 Nina Perales

7 Counsel for Plaintiffs

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11  
12 COPY of the foregoing filed electronically  
13 this 5<sup>th</sup> day of June, 2006.

14 COPY of the foregoing mailed with Notice  
15 of Electronic Filing this 5<sup>th</sup> day of June, 2006 to:

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