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9
10 **IN THE UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**

12 MARIA M. GONZALEZ, et al.,
13 Plaintiffs,

14 v.

15 STATE OF ARIZONA, et al.,
16 Defendants.

NO. CV06-01268 PHX ROS

**RESPONSE IN OPPOSITION TO
PLAINTIFFS' ALTERNATIVE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

(Assigned to the Honorable Roslyn O.
Silver)

17
18 The State of Arizona and the Arizona Secretary of State (collectively, the
19 "State"), through counsel, respond in opposition to Plaintiffs' Alternative Application for
20 a Temporary Restraining Order (the "application").¹ This response is supported by the
21 Memorandum of Points and Authorities that follows, and by the accompanying exhibits.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION.**

24 This is the second attempt by these and other plaintiffs to invalidate Proposition
25 200 (formally called the "Arizona Taxpayer and Citizen Protection Act"), an initiative
26 approved by Arizona's voters in the general election of 2004. To reduce voter fraud and

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28 ¹ Plaintiffs filed an *ex parte* application for a temporary restraining order, followed by an
alternative application. Plaintiffs use the same legal memorandum for both applications.

1 protect the integrity of the election process, Proposition 200 requires proof of U.S.
2 citizenship from applicants registering to vote, and proof of identification before a voter
3 may receive a ballot at the polls.

4 Plaintiffs are trying to eliminate both components of Proposition 200 in this
5 lawsuit, but seek a temporary restraining order only as to the law that allows election
6 officials to verify that individuals registering to vote are U.S. citizens. According to
7 Plaintiffs, Congress has decided that no state can enact a law that requires individuals
8 registering to vote to verify that they are citizens—even though U.S. citizenship is
9 undeniably a basic prerequisite for being eligible to vote.

10 Specifically, Plaintiffs claim that the National Voter Registration Act (the
11 “NVRA”), 42 U.S.C. §§ 1973gg, *et seq.*, bans any state from requiring proof of
12 citizenship from any voter using the National Voter Registration Form (the “federal
13 form”). The NVRA did not restrict state authority as Plaintiffs claim, and since
14 enactment of the NVRA Congress has left no doubt that states do not merely serve as
15 filing desks for registration forms.

16 The Court should deny Plaintiffs’ application because they do not have a strong
17 likelihood of success on the merits. In addition, the public will suffer significant harm,
18 as a temporary restraining order (“TRO”) could only lead to confusion for voters and
19 officials in charge of elections pending a decision on the merits. Indeed, given that voter
20 registration for the primary election will not close until midnight on August 14, a
21 temporary restraining order is not appropriate.

22 **II. BACKGROUND FOR PLAINTIFFS’ APPLICATION.**

23 **A. The National Voter Registration Act.**

24 Plaintiffs’ application concerns Arizona’s use of the federal form created pursuant
25 to the NVRA. Congress enacted the NVRA (also known as the “Motor-Voter Law”) in
26 1993 to achieve four goals:

- 27 (1) to establish procedures that will increase the number of eligible
citizens who register to vote in elections for Federal office;
- 28 (2) to make it possible for Federal, State, and local governments to

- 1 implement this Act in a manner that enhances the participation of
2 eligible citizens as voters in elections for Federal office;
3 (3) to protect the integrity of the electoral process; and
4 (4) to ensure that accurate and current voter registration rolls are
5 maintained.

6 42 U.S.C. § 1973gg(b)(1)-(4).

7 Congress set out to achieve these goals by allowing applications for driver's
8 licenses to double as voter registration forms, *see* 42 U.S.C. § 1973gg-2(a)(1), by
9 requiring the states to permit voter registration by mail, *see* 42 U.S.C. § 1973gg-2(a)(2),
10 and by having public assistance agencies and other state offices serve as registration
11 sites, *see* 42 U.S.C. § 1973gg-5(a)(2)(A).² Congress also established procedures for
12 removing ineligible persons from the voter rolls. *See* 42 U.S.C. § 1973gg-6(c).

13 Congress charged the Electoral Assistance Commission ("EAC") with developing
14 a federal form in consultation with the states. *See* 42 U.S.C. § 1973gg-7(a)(2). The
15 NVRA directs the states to "accept and use" the federal form when submitted by mail.
16 42 U.S.C. § 1973gg-4(a)(1), (2). The NVRA also allows applicants to register by mail
17 for federal elections using a state form. *See* 42 U.S.C. § 1973gg-4(a)(2).

18 **B. Proposition 200.**

19 U.S. Citizenship is a prerequisite for being eligible to vote under State (and
20 federal) law. *See* A.R.S. § 16-101(A). Proposition 200 amended A.R.S. § 16-166 to
21 instruct the recorders of Arizona's 15 counties to refuse an application for voter
22 registration that does not include satisfactory evidence of U.S. citizenship.

23 Satisfactory evidence of U.S. citizenship includes: (1) the number of an Arizona
24 driver's or nonoperating identification license issued after October 1, 1996; (2) the
25 number of a driver's or nonoperating identification license issued in another state, if it
26 indicates that the applicant provided satisfactory proof of U.S. citizenship; (3) a copy of

27 ² The NVRA does not apply to states that do not require voter registration, or that permit
28 voters to register at the time of voting in a general election for federal office. *See* 42
U.S.C. § 1973gg-2(b)(1), (2). Arizona requires voters to register for state or federal
elections up to 29 days before a primary or general election. *See* A.R.S. § 16-120.

1 a birth certificate; (4) U.S. naturalization documents or the number of an applicant's
2 certificate of naturalization; and (5) a Bureau of Indian Affairs card number, Tribal
3 Treaty card number or enrollment number. *See* A.R.S. § 16-166(F). In most of these
4 instances, the document itself need not be provided with the voter registration form—the
5 number is sufficient.³

6 The Department of Justice (“DOJ”) precleared Proposition 200 in a letter dated
7 January 24, 2005 (DOJ file #2004-5004). DOJ also precleared the Arizona Voter
8 Registration Form (the “state form”) amended after voters approved Proposition 200,
9 registration procedures for the Motor Vehicles Division and the Department of
10 Economic Security, and procedures for proof of identification at the polls.

11 **C. Voter Registration in Arizona.**

12 In Arizona, individuals may register to vote using the federal form or the state
13 form. Contrary to Plaintiffs’ assertions, Arizona has not stopped using and accepting the
14 federal form in the wake of Proposition 200. *See* Affidavit of Joe Kanefield (“Kanefield
15 Aff.”), ¶ 2, attached as Exhibit 1, hereto. Arizona merely complies with the State law
16 that requires proof of citizenship regardless of which form the applicant submits when
17 registering to vote.

18 Applicants who attempt to register without satisfactory proof of citizenship do not
19 forfeit the opportunity to register at a later time. Immediately after DOJ precleared
20 Proposition 200, the Secretary of State’s office sent a letter to county election officials
21 recommending that applicants who do not provide proof of citizenship be notified of the
22 new requirement and provided with information to comply with State law using
23 procedures provided in A.R.S. § 16-134(B). *See* Kanefield Aff., ¶ 13.

24 In Maricopa County, when a registration is rejected for failure to provide proof of
25 citizenship, the county recorder immediately notifies the applicant by letter that the

26
27 ³ Under Proposition 200, voters who move from one county to another within the state or
28 who register for the first time must present proof of citizenship; all other registered
voters are grandfathered in. *See* A.R.S. § 16-166(G).

1 application has been refused. *See* Affidavit of Karen Osborne (“Osborne Aff.”), ¶ 7,
2 attached as Exhibit 2, hereto. The recorder provides the applicant with information
3 necessary to comply with Proposition 200, and supplies a new voter registration form in
4 a business reply envelope. *See id.*

5 Plaintiffs’ statistics regarding voter registration in Arizona do not assist the Court
6 to assess their claim. The statistics cited by Plaintiffs take the Court through May 2005,
7 just months after the Department of Justice precleared proposition 200. DOJ did not
8 preclear the amended state form that contained the instructions for submitting proof of
9 citizenship until May 6, 2005. Plus, it is not known how many applicants that did not
10 successfully register on a previous occasion are registered today.

11 Maricopa County accounts for more than 58 percent of all registered voters in
12 Arizona. *See* Osborne Aff., ¶ 9. From January 1, 2005 through March 6, 2006, the
13 county received 46,529 new voter registrations. *See id.* Of those registrations, the
14 county received one federal form that lacked adequate proof of U.S. citizenship.⁴ *See id.*

15 **III. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF A** 16 **PREEMPTION CLAIM.**

17 **A. Principles Governing Plaintiffs’ Federal Preemption Claim.**

18 The U.S. Constitution authorizes states to prescribe “[t]he Times, Places and
19 Manner of holding elections for Senators and Representatives.” U.S. Const. art. 1, § 4,
20 cl. 1. These words confer upon states the authority to develop complete election codes
21 for both federal and state elections that regulate not just the time, place and manner of
22 elections, but the registration of voters, and the prevention of fraud and corrupt practices.
23 *See Roudebush v. Hartke*, 405 U.S. 15, 24 (1972); *see also California Democratic Party*
24 *v. Jones*, 530 U.S. 567, 572 (2000) (“States have a major role to play in structuring and
25 monitoring the election process”); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004)
26 (“because . . . an unregulated election system would be chaos, state legislatures may

27 ⁴ In Maricopa County, an overwhelming number of applications—91 percent in 2006—
28 provide the number of a driver or nonoperating identification license as the means of
establishing citizenship. *See* Osborne Aff., ¶ 10.

1 without transgressing the Constitution impose extensive restrictions on voting.”).

2 Indeed, “as a practical matter, there must be a substantial regulation of elections if
3 they are to be fair and honest, and if some sort of order, rather than chaos, is to
4 accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). To
5 that end, the states have an undeniable interest in preventing voter fraud and protecting
6 the overall integrity of the election process. *See Burson v. Freeman*, 504 U.S. 191, 199
7 (1992) (a state “indisputably has a compelling interest in preserving the integrity of its
8 election process”).

9 The fact that Congress may also assume a role in our nation’s elections does not
10 mean that federal law erects a barrier to state action when Congress does decide to act.
11 In fact, given the independent powers of states within our federal system, courts start
12 with the presumption that Congress does not lightly displace state law. *See Medtronic,*
13 *Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *see also Malabed v. North Slope Borough*, 335
14 F.3d 864, 869 (9th Cir. 2003) (“the states are independent sovereigns in our federal
15 system, and preemption will not be easily found”).

16 Courts typically recognize three ways in which federal law may preempt state
17 action by way of the Supremacy Clause, U.S. Const., Art. VI, cl 2. These are: (1)
18 “express” preemption; (2) “field” preemption; and (3) “conflict” preemption. *See*
19 *English v. General Election Co.*, 496 U.S. 72, 78-79 (1990). Express pre-emption exists
20 if a federal law or regulation contains a specific command by Congress that any action
21 by the states is preempted. *See id.* at 79. Congress has not inserted explicit language in
22 the NVRA that preempts state action, nor does this appear to be Plaintiffs’ rationale.

23 Field preemption arises when federal law so completely occupies a legislative
24 field as to leave no room for the states to act. *See id.* (“in the absence of explicit
25 statutory language, state law is pre-empted where it regulates conduct in a field that
26 Congress intended the Federal Government to occupy exclusively”). This is not a field
27 preemption case. Federal law not only leaves room for states in setting policy regarding
28 voting, but permits the states to lead the way.

1 Congress enacted the Help America Vote Act (“HAVA”), 42 U.S.C. § 15301, *et*
2 *seq.*, nearly 10 years after the NVRA. HAVA states that its fraud-prevention measures
3 are “minimum requirements” and that “nothing in this subchapter shall be construed to
4 prevent a State from establishing election technology and administrative requirements
5 that are more strict” if they are not inconsistent with federal law. 42 U.S.C. § 15484.
6 Congress further counseled that “[t]he specific choices on the methods of complying
7 with the requirements of this subchapter shall be left to the discretion of the State.” 42
8 U.S.C. § 15485. Congress’ delegation of authority to the states is undeniable.

9 Plaintiffs are left trying to build a conflict preemption claim. Their hurdle is high.
10 Congress does not supplant states’ authority unless state law “actually conflicts” with
11 federal law. *English*, 496 U.S. at 79. Whenever possible, courts are to “reconcile the
12 operation of both statutory schemes with one another rather than holding [that state law
13 has been] completely ousted.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414
14 U.S. 117, 127 (1973); *see also Malabed*, 335 F.3d at 869 (“If we have any doubt about
15 Congressional intent, we are to err on the side of caution, finding no preemption”).

16 **B. Arizona’s Requirement That People Prove They Are U.S. Citizens**
17 **When Registering To Vote Does Not Collide With Federal Law.**

18 Before Proposition 200, Arizona law allowed individuals to declare that they are
19 citizens of the United States for purposes of registering to vote without presenting any
20 verification as to their citizenship. Now, Arizona law requires that people verify that
21 they are citizens—a fact that is a predicate to registering to vote in the first place. The
22 federal form itself requires the voter to check a box indicating whether the applicant is a
23 U.S. citizen. The voters of Arizona simply have decided that more is needed to ensure
24 accurate voter lists and to protect against voter fraud.⁵

25 While Plaintiffs may question this policy choice, the issue is whether Congress
26 actually prevents each and every state from requiring voters to verify information that

27 ⁵ In 2005, the Maricopa County Recorder Helen Purcell referred 159 matters to the
28 Maricopa County Attorney Andrew Thomas where there was of evidence that non-
citizens had registered to vote. *See Osborne Aff.*, ¶ 11.

1 they are required to provide on the federal form in the first place. Plaintiffs' answer—
2 that states cannot verify the eligibility of a person who completes a federal voter
3 registration form—is not supported by the language of the NVRA or HAVA.

4 **1. Congress Has Not Stripped States of Their Authority to Verify**
5 **U.S. Citizenship On a Voter Registration Form.**

6 The NVRA provides that states must “accept and use” the federal form, 42 U.S.C.
7 § 1973gg-4(a)(1), which is precisely what Arizona is doing. Today in Arizona,
8 individuals may register to vote using the federal form, just as they may register to vote
9 using the state form. Nothing about this policy has changed since the passage of
10 Proposition 200 in November 2004.

11 Under the NVRA, Congress did not require states to register any applicant who
12 submits a federal form. In *Association of Community Organizations for Reform Now v.*
13 *Miller*, 912 F. Supp. 976, 987 (W.D. Mich. 1995), *aff'd on other grounds*, 129 F.3d 833
14 (6th Cir. 1997), the court made clear that “the states are still left the task of determining
15 that an applicant is eligible, and that the registration form as submitted complies with
16 state law.” *Id.* at 987.

17 The Federal Election Commission (“FEC”), in offering its reading of the NVRA,
18 reached the same conclusion.⁶ See FEC, “Implementing the National Voter Registration
19 Act of 1993: Requirements, Issues, Approaches, and Examples,” 1-6 (January 1, 1994),
20 attached as Exhibit 3, hereto. The FEC stated that “although completing a voter
21 registration form may be *simultaneous* with other transactions, such application does not
22 constitute *automatic* registration.” *Id.* (italics in original).

23 Because submitting a federal form may not equal registration, the NVRA directs
24 states to notify registrants of the “disposition” of their application. 42 U.S.C. § 1973gg-
25 6(a)(2). Congress did not specify what form the notice should take, leaving that decision
26 to the states. The FEC did, however, give a suggestion. The FEC’s sample form

27 _____
28 ⁶ Congress transferred the FEC’s responsibilities under the NVRA to the EAC as part of
HAVA. See 42 U.S.C. § 15532.

1 provides a space for advising individuals when their application is “rejected” and for
2 explaining the reasons why. See FEC, “Implementing the National Voter Registration
3 Act of 1993: Requirements, Issues, Approaches, and Examples,” 5-26 (January 1, 1994).

4 Plaintiffs attempt to show a conflict between Arizona law and language from the
5 NVRA, but Plaintiffs’ language does not say that a state may never require proof of
6 citizenship to confirm information on a federal form. The NVRA states, for instance,
7 that the mail voter registration form “may not include any requirement for notarization or
8 other formal authentication.” 42 U.S.C. § 1973gg-7(b)(3). Proposition 200 does not
9 require applicants to notarize the form or otherwise establish that it is authentic.⁷ State
10 law seeks only to verify information provided on the form.

11 The NVRA also states that the federal form may require only such identifying
12 information as is necessary to enable the states to assess the eligibility of the applicant.
13 See 42 U.S.C. § 1973gg-7(b)(1). Proposition 200 asks for information that is necessary
14 to assess an applicant’s eligibility, and speaks directly to subject matter required by the
15 federal form. It makes no sense that Congress would want states to verify other
16 information on the federal form, but not the applicant’s citizenship.

17 Indeed, throughout HAVA, Congress evinced its intent that states verify
18 information provided on voter registration forms. Under 42 U.S.C. § 15483(a)(5)(A), for
19 instance, HAVA forbids states from even accepting voter registration forms from
20 applicants who possess a driver’s license or social security number, but do not provide
21 that information on the form. For those applicants who do provide a driver’s license or
22 social security number, Congress still instructs the states to verify that the numbers
23 provided are accurate. See 42 U.S.C. § 15483(a)(5)(A)(iii).

24 In a separate section entitled “Requirements for state officials,” HAVA states that

25
26 ⁷ Because the term “formal authentication” is not defined in the NVRA, the Court may
27 consider its ordinary meaning. See *Asgrow Seed Co. v. Winerboer*, 513 U.S. 179, 187
28 (1995). The term “authenticate” means “[t]o establish or prove as authentic.” *Amer.*
Heritage Dictionary (2nd College ed. 1995). The term “authentic” is defined as
“[h]aving an undisputed origin; genuine.” *Id.*

1 the chief state election official and the official responsible for the state motor vehicle
2 authority shall enter into an agreement to match information from the statewide voter
3 registration database with information in the database of the motor vehicle authority in
4 order “to verify the accuracy of the information provided on applications for voter
5 registration.” 42 U.S.C. § 15483(a)(5)(B)(i). An applicant’s citizenship is among the
6 information provided on the federal form.

7 Besides confirming an applicant’s eligibility at the time of registering, HAVA
8 requires states “to ensure that voter registration records in the State are accurate” and to
9 have a “system of file maintenance that makes a reasonable effort to remove registrants
10 who are ineligible to vote.” 42 U.S.C. § 15483(a)(2)(B)(4). And, Congress was
11 sufficiently concerned with a voter’s citizenship that Congress changed the content of
12 federal form to require applicants to check a box confirming that they are U.S. citizens.
13 *See* 42 U.S.C. § 15483(b)(4)(A)(i). Previously, Congress only required a statement on
14 the form that U.S. citizenship is among the criteria required to register to vote.

15 Proposition 200 complements these efforts by Congress, which left substantial
16 policy decisions to the states in implementing HAVA’s provisions. *See* 42 U.S.C. §
17 15485 (“The specific choices on the methods of complying with the requirements of this
18 subchapter shall be left to the discretion of the State”). Congress also said that its
19 requirements are only “minimum requirements” and do not prevent a state from
20 establishing requirements that are “more strict” than the measures taken by Congress, as
21 long as they are not inconsistent with other federal law. *See* 42 U.S.C. § 15484.

22 With Proposition 200, the voters of Arizona have chosen to require applicants to
23 take an added step beyond simply checking a box on the federal form, though for most
24 that step entails nothing more than placing a driver’s license number on the voter
25 registration form. The voters’ choice falls comfortably within the strictures of HAVA,
26 and Plaintiffs have not demonstrated in their application that Arizona’s proof of
27 citizenship requirement may not be harmonized with the acts of Congress.⁸

28 ⁸ With all of HAVA’s measures, Congress explained that—with one exception—none

1 **2. The EAC Letter Is Not A Substitute For The Court's Judgment.**

2 There is no secret that the executive director of the EAC wrote to Secretary of
3 State Brewer in early March offering his opinion that Arizona may not require proof of
4 citizenship from applicants using the federal form. The author took the position that
5 “[a]ny Federal Registration Form that has been properly and completely filled-out by a
6 qualified applicant and timely received by an election official must be accepted in full
7 satisfaction of registration requirements.”

8 His opinion takes an overly restrictive view of the role of states for the reasons
9 already discussed and cannot be squared with earlier interpretations of the NVRA by the
10 FEC. Moreover, the EAC has no authority to issue legal opinions to states, and is not
11 assigned enforcement power under the NVRA.⁹ See 42 U.S.C. § 15329. Of the federal
12 agencies, only DOJ is assigned that authority. See 42 U.S.C. § 1973gg-9(a).

13 In contrast to the EAC, moreover, the Department of Defense is instructing
14 military and overseas voters who register to vote using the Federal Post Card Application
15 to provide proof of citizenship in compliance with Arizona law. See *Kanefield Aff.*, ¶ 6.
16 Even the EAC’s instructions for the federal form instruct military and overseas voters to
17 use the Post Card Application rather than the federal form. See *id.*, ¶ 5.

18 Adding to the confusion, the EAC letter cited cases that merely establish
19 Congress’ authority to pass the NVRA. In fact, it was apparent that the EAC would not

20 are at odds with the role already envisioned for states under the NVRA. See 42 U.S.C. §
21 15545(a) (“Except as specifically provided in section 303(b) of this Act with regard to
22 the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), nothing in this
23 Act may be construed to authorize or require conduct prohibited under any of the
24 following laws [including the NVRA], or to supersede, restrict, or limit the application
25 of such laws”). In the one exception, HAVA changed the NVRA to require identification
26 from certain first-time voters who register by mail. See 42 U.S.C. § 15483(b)(1).

27 ⁹ HAVA states that the EAC “shall not have authority to issue any rule, promulgate any
28 regulation, or take any other action which imposes any requirement on any state” except
as permitted under section 9(a) of the NVRA. 42 U.S.C. § 15329. Section 9(a) of the
NVRA limits the EAC’s authority to preparing the federal form and giving information
to states regarding responsibilities under the Act. See 42 U.S.C. § 1973gg-7(a).

1 have reached its conclusion but for a piece of the legislative history in which conferees
2 from the House of Representatives reportedly convinced their Senate counterparts to
3 leave language out of the NVRA expressly allowing states to require proof of
4 citizenship. The committee report predates HAVA, and the concern exhibited by
5 Congress over verifying voter eligibility, including citizenship.

6 Moreover, the conferees from the House and their fellow House members were
7 not on the same page, as a separate committee report from the House of Representatives
8 stressed that local officials in charge of elections should continue to confirm an
9 applicant's eligibility under the NVRA, even as to citizenship:

10 Only the election officials designated and authorized under State law are
11 charged with the responsibility to enroll eligible voters on the list of voters.
12 [The NVRA] should not be interpreted in any way to supplant that
13 authority. The Committee is particularly interested in ensuring that election
14 officials continue to make determinations as to applicants' eligibility, *such*
as citizenship, as are made under current law and practice.

15 H.R. Rep. No. 103-9, at 8 (1993) (italics added).

16 The committee report cited by the EAC does not represent the collective
17 expression of all members of Congress when it comes to interpreting the statute. *See*
18 *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 530 (1989) (Scalia, J., concurring)
19 (saying Congress has spoken should not mean a committee report). The legal opinion
20 offered by the EAC should not supplant this Court's judgment in upholding Arizona law.

21 **IV. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THEIR CLAIM** 22 **UNDER THE VOTING RIGHTS ACT.**

23 Section 5 of the Voting Rights Act of 1965 (the "VRA") requires covered
24 jurisdictions to obtain preclearance when "enact[ing] or seek[ing] to administer any
25 voting qualification or prerequisite to voting, or standard, practice, or procedure with
26 respect to voting . . ." 42 U.S.C. § 1973c. Arizona is a covered jurisdiction under the
27 VRA, which is why the State obtained preclearance of Proposition 200, as well as the
28 procedures and forms adopted by the State to implement its voting provisions.¹⁰

¹⁰ DOJ also precleared the amended state voter registration form (DOJ file #2005-1013),

1 Nearly 18 months later, Plaintiffs are claiming that “Arizona did not explain in its
2 [preclearance] submission that it would cease to use and accept the federal mail voter
3 registration form mandated by the NVRA.” Plaintiffs’ memorandum at p. 3. Arizona
4 has not ceased to use and accept the federal form, but simply requires proof of
5 citizenship when registering to vote. This is precisely the law that DOJ precleared, and
6 there has been no change in voting that requires more preclearance of Proposition 200.

7 The State’s submission to DOJ included a full copy of Proposition 200, including
8 the amendment to A.R.S. § 16-166(F) that “[t]he county recorder shall reject any
9 application for registration that is not accompanied by satisfactory evidence of United
10 States citizenship.” See Voting Rights Act Submission, attached without exhibits as
11 Exhibit 4, hereto. An analysis by the Legislative Counsel, also part of the submission,
12 states that “Proposition 200 would require that evidence of United States Citizenship be
13 presented by every person to register to vote . . .” *Id.*

14 The State’s submission made clear that the proof of citizenship requirement
15 would apply to all applicants registering to vote in Arizona. DOJ precleared the
16 requirement fully advised of the law, and this is not a proper forum for Plaintiffs to
17 review that determination. See *Morris v. Gressette*, 432 U.S. 491, 504 (1977).

18 **V. THE BALANCE OF HARMS FAVORS CONTINUED**
19 **IMPLEMENTATION OF ARIZONA’S LAW.**

20 The basic purpose of a preliminary injunction is to preserve the status quo
21 pending the resolution of an action on the merits. See *Chalk v. United States District*
22 *Court Central District of Calif.*, 840 F.2d 701, 704 (9th Cir. 1988). The relief Plaintiffs
23 seek does just the opposite. Plaintiffs want this Court to permit any person using the
24 federal form to register to vote in Arizona without complying with its new law that
25 requires proof of citizenship. Rather than preserve the status quo, this relief would
26 change the way that voter registration works in Arizona.

27
28 DMV motor-voter form (DOJ file #2005-2441), DES voter registration procedures (DOJ
file #2006-2223), and procedures for identification at the polls (DOJ file #2005-2943).

1 Plaintiffs would permit voters to be deemed registered even though they have not
2 complied with the requirements of Arizona law. If ultimately the Court decides that
3 federal law does not preempt Arizona's proof of citizenship requirement, the counties
4 would then need to identify and remove voters from the rolls who had not complied with
5 Arizona law but had been permitted to register because of a TRO. This is an
6 unwarranted burden on the counties and unfair to citizens whose status as a registered
7 voter would remain uncertain until this lawsuit is resolved on the merits.

8 Any change in the requirements for voting and registering to vote also brings the
9 potential for confusion among election officials, voters and people attempting to register
10 voters. The relief that Plaintiffs seek would result in different voter registration
11 requirements depending on what form a voter happens to use. If Plaintiffs' request for a
12 TRO is granted, the State would need to educate everyone involved with voter
13 registration that the rules are different depending on which form a person chooses to
14 complete—at least until this lawsuit is resolved.

15 Plaintiffs' alleged harms do not justify blocking the State's effort to implement its
16 law. Plaintiffs argue, for example, that proving citizenship poses a burden on groups
17 trying to conduct voter registration drives. This argument is really just an attack on the
18 public policy choice of Arizona voters when they approved Proposition 200. They
19 decided in favor of requiring proof of citizenship when people register to vote—a
20 decision intended to further the State's compelling interest in preventing election fraud.
21 Plaintiffs may disagree with the decision of Arizona voters, but that does not justify
22 preventing Arizona from continuing to fully implement this State law while this Court
23 addresses the merits of Plaintiffs' claims.

24 Any rush to beat the August 14 voter registration deadline is an emergency
25 created by the Plaintiffs. As Plaintiffs note in their complaint, a lawsuit some of these
26 same plaintiffs represented by the same lawyers filed November 30, 2004 alleged that the
27 NVRA preempted the proof of citizenship requirement. Although the Ninth Circuit
28 directed that the lawsuit be dismissed for lack of standing, no lawsuit was refiled even

1 though according to Plaintiffs thousands of people attempting to register to vote have
2 been turned away because of Arizona's new requirement. They rely on February 4, 2005
3 statistics from Maricopa County and June 22, 2005 information from Pima County to
4 support their request for relief, but waited until May 9, 2006 to file this new lawsuit and
5 seek an *ex parte* TRO to stop Arizona from fully implementing this State law.

6 There is time to resolve the preemption issue on the merits before the primary
7 election voter registration deadline. Rather than change the requirements for some voter
8 registrations while this lawsuit is pending and then potentially have to "unregister"
9 people who did not provide proof of citizenship, the TRO should be denied, and the
10 Court and the parties should attempt to expedite a resolution of this issue on the merits.

11 Plaintiffs also cannot receive effective injunctive relief by a TRO against only the
12 State. The county recorders are responsible for registering voters. *See, e.g.*, A.R.S. §§
13 16-120 (registration must be "received by the county recorder or his designee. . . prior to
14 midnight of the twenty-ninth day preceding the date of the election"); -131 (registration
15 of electors); -134 (return of registration forms) -139 (cost of registration a county
16 charge). They also are independently elected officials. *See* Ariz. Const. art. XII, § 3.

17 The Secretary of State has no authority to enforce the NVRA under either State or
18 federal law. The NVRA itself provides a right of enforcement only to the United States
19 Government and "a person who is aggrieved by a violation of [the NVRA]." 42 U.S.C. §
20 1973gg-9(a) and (b). The Secretary of State would certainly advise the county recorders
21 of judicial directives regarding voter registration, but as a legal matter any injunction
22 regarding voter registration is ineffective unless it applies to county recorders.

23 VI. CONCLUSION.

24 For the reasons above, the State respectfully requests that the Court deny
25 Plaintiffs' Alternative Application for a Temporary Restraining Order.

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DATED this 31st day of May, 2006.

TERRY GODDARD
Arizona Attorney General

s/Peter A. Silverman
Mary O'Grady, Solicitor General
Peter A. Silverman, Asst. Attorney General
Attorneys for the State of Arizona and the
Arizona Secretary of State

COPY of the foregoing filed electronically
this 31st day of May, 2006.

COPY of the foregoing mailed with Notice of
Electronic Filing this 31st day of May, 2006 to:

The Honorable Roslyn O. Silver
United States District Court
Sandra Day O'Connor U.S. Courthouse, Suite 624
401 West Washington Street, SPC 59
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