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25 UNITED STATES DISTRICT COURT

26 DISTRICT OF ARIZONA

27 Maria M. Gonzalez, et al.,  
28 Plaintiffs,

vs.

State of Arizona, et al.,  
Defendants.

)  
) No. CV06-01268-PHX-ROS (Lead)  
) CV06-01362-PHX-ROS (Cons)  
) CV06-01575-PHX-ROS (Cons)

) **ITCA PLAINTIFFS' RESPONSE**  
) **IN OPPOSITION TO**  
) **DEFENDANTS' MOTIONS**  
) **FOR PARTIAL SUMMARY**  
) **JUDGMENT**  
)  
)

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25 Pursuant to Fed R. Civ. P. 56(c), plaintiffs the Inter Tribal Council of  
26 Arizona, Inc., the Hopi Tribe, Arizona Advocacy Network, the League of Women  
27 Voters of Arizona, People for the American Way Foundation, the League of United  
28 Latin American Citizens and Rep. Steve Gallardo (collectively, the "ITCA Plaintiffs")

1 hereby submit their Response in Opposition to the Motion for Partial Summary  
2 Judgment by Defendants State of Arizona and the Arizona Secretary of State and the  
3 Thirteen County Defendants’ Joinder and Motion for Summary Judgment (collectively,  
4 the “Motions”). This Response is supported by the following Memorandum of Points  
5 and Authorities, the ITCA Plaintiffs’ Response to Defendants’ Separate Statement of  
6 Facts and Supplemental Statement of Facts and the Declaration of Karen J. Hartman-  
7 Tellez, filed contemporaneously herewith.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 Preliminary Statement

10 The defendants’ Motions for Partial Summary Judgment should be denied  
11 with respect to the ITCA Plaintiffs’ poll tax and Civil Rights Act Claims for several  
12 fundamental reasons.<sup>1</sup> First, as this Court and the United States Supreme Court have  
13 recognized, the factual record must be further developed to establish the magnitude of  
14 the disenfranchisement of eligible Arizona voters caused by the voting-related  
15 provisions of Proposition 200. *See Purcell v. Gonzalez*, 127 S. Ct. 5, 8 (2006); [Order,  
16 at 9-10 (Oct. 11, 2006) (the “Oct. 11 Order”)] Second, Proposition 200’s requirements  
17 that prospective voters (1) provide “satisfactory evidence of citizenship” when  
18 registering to vote and (2) present specific forms of identification when voting at a  
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20 <sup>1</sup> The ITCA Plaintiffs’ Complaint includes a claim under the National Voter  
21 Registration Act, 42 U.S.C. § 1973gg (the “NVRA”). The Court should not grant  
22 summary judgment for defendants on the NVRA claim. As set forth in greater detail in  
23 the ITCA Plaintiffs’ Joinder in Gonzalez Plaintiffs’ Ex Parte Application for Temporary  
24 Restraining Order and Order to Show Cause [Doc. 21] and the Gonzalez Plaintiffs’  
25 Opposition to Defendants’ Motion for Summary Judgment, both of which are  
26 incorporated by reference herein, Defendants have violated the NVRA by refusing to  
27 accept the Federal Mail Voter Registration Form (the “Federal Form”) unless the  
28 registrant also provides documentary proof of citizenship. The language of the NVRA,  
its legislative history, and the unambiguous guidance given to Defendant Brewer by the  
Election Assistance Commission, the federal agency exclusively responsible for issuing  
the Federal Form, all make clear that Arizona election officials must accept the Federal  
Form even when the registrant does not provide documentary proof of citizenship.

1 polling place on election day constitute a poll tax. A.R.S. § 16-166(F) (listing the  
2 documents acceptable as evidence of citizenship) (“Proof of Citizenship”); A.R.S. § 16-  
3 579(A); Procedures for Proof of Identification at the Polls (listing “Polling ID”). Third,  
4 defendants have not demonstrated that they are entitled to judgment as a matter of law  
5 on plaintiffs’ claims under 42 U.S.C. § 1971.

6 This Court has identified the genuine issues of material fact that preclude  
7 summary judgment on the poll tax claim -- “the number, if any, of eligible individuals  
8 that wish to register to vote and must obtain new forms of identification” and “the  
9 number of voters that do not have adequate forms of [Polling ID] and will not be  
10 receiving, free of charge, adequate forms of identification . . . .” [Oct. 11 Order, at 9,  
11 11] In addition, the record must be further developed concerning the option of early  
12 voting. This Court has noted that early voting is an alternative for voters who lack  
13 Polling ID, but plaintiffs have not yet had adequate opportunity to develop evidence  
14 concerning its availability to all voters. [See *id.* at 15-16; Declaration of Karen J.  
15 Hartman-Tellez (“Hartman-Tellez Decl.”) at ¶ 3] Plaintiffs must be permitted to obtain  
16 discovery and supplement the record concerning whether early voting is a realistic  
17 option for all voters, especially those who reside in rural areas and on Indian  
18 Reservations, lack reliable mail service or require language assistance.

19 The ITCA Plaintiffs have propounded discovery to obtain the information  
20 the Court found was lacking in the record, but have not had the opportunity to fully-  
21 develop these “hotly contested” facts. *Purcell*, 127 S. Ct. at 8. While the parties are  
22 engaged in this discovery, summary judgment is inappropriate. See Fed. R. Civ. P.  
23 56(f). Indeed, the extent of Proposition 200’s disenfranchising effect must be fully  
24 developed before the Court renders a decision on the merits of the poll tax claim. See  
25 *Askew v. Hargrave*, 401 U.S. 476, 479 (1971) (stating that equal protection claim should  
26 not be decided without a hearing to develop the critical facts); *Virgil v. Time, Inc.*, 527  
27 F.2d 1122, 1131 (9th Cir. 1975) (noting that the district court may exercise its discretion  
28 to postpone decision “until it can be founded on a more complete record”).

1 In short, at this time, discovery has been insufficient for the parties to  
2 develop a record upon which the Court could determine the absence of a genuine factual  
3 dispute. Moreover, even without a factual dispute, as shown below, *plaintiffs* -- not  
4 defendants -- are entitled to judgment on the poll tax and § 1971 claims. *See*  
5 *Portsmouth Square, Inc. v. Shareholders Protective Comm.*, 770 F.2d 866, 869 (9th Cir.  
6 1985) (approving *sua sponte* grant of summary judgment when one party moves for  
7 summary judgment, but “the *non-moving* party is entitled to judgment as a matter of  
8 law”).

#### 9 Factual and Procedural Background

10 It is undisputed that tens of thousands of eligible Arizona voters lack the  
11 Proof of Citizenship or Polling ID that would permit them to register and vote at the  
12 polls on election day. [*See* ITCA Plaintiffs’ Supplemental Statement of Facts (“ITCA  
13 SOF”), ¶¶ 6, 17] Indeed, since Proposition 200’s Proof of Citizenship Requirement  
14 went into effect, the number of registered voters has declined, despite a sharp increase in  
15 the number of Arizona residents. [*Id.* ¶ 8] In addition, the ITCA Plaintiffs have  
16 propounded supplemental discovery requests that will show a substantial increase in the  
17 number of rejected voter registration forms and eligible voters barred from casting a  
18 ballot at the polls. [Hartman-Tellez Decl., ¶ 2, Ex. A] Indeed, the few supplemental  
19 discovery responses that the ITCA Plaintiffs have received to date establish that Arizona  
20 counties have rejected nearly 30,000 voter registration forms since January 24, 2005.  
21 [ITCA SOF, ¶¶ 2-5] This number does *not* include the forms rejected by 10 of  
22 Arizona’s 15 counties since July 2006. [*See id.*]

23 This Court has recognized that “[o]btaining [Proof of Citizenship] for  
24 purposes of registering to vote will cost potential voters between 10 and 100 dollars”  
25 and that “it is undisputed that some individuals will have to obtain a form of  
26 identification” to register to vote. [Oct. 11 Order, at 9] Most forms of Polling ID carry  
27 similar costs. A voter who lacks Polling ID may vote a “conditional provisional ballot,”  
28 which is only counted if the voter returns to an “ID verification site” with Polling ID

1 within a few days of the election. [Hartman-Tellez Decl., Ex. H] In the six local and  
2 statewide elections in 2006 and 2007, in just three counties, nearly 2,000 conditional  
3 provisional ballots have *not* been counted -- representing more than 60 percent of the  
4 conditional provisional ballots cast in those counties. [ITCA SOF, ¶ 17]

5 Even though early, in-person voting is identical to election day voting,  
6 except that no Polling ID is required to vote early, it is likely that many potential eligible  
7 voters who lack Polling ID *cannot* choose to vote early as an alternative. Indeed, those  
8 who (1) live in rural areas far from early voting sites, (2) lack access to mail delivery or  
9 (3) need language assistance that is not offered at early voting sites cannot take  
10 advantage of early voting. As such, they must purchase Polling ID or be barred from  
11 voting. To supplement the record concerning early voting, the ITCA Plaintiffs intend to  
12 seek further discovery concerning its availability to voters. [Hartman-Tellez Decl., ¶ 3]

### 13 Argument

#### 14 I. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE THE RECORD 15 MUST BE DEVELOPED CONCERNING THE EXTENT OF PROPOSITION 200'S DISENFRANCHISEMENT OF POTENTIAL VOTERS.

16 This Court and the Supreme Court have recognized that the record in this  
17 case should be developed further before the court renders a final decision on the  
18 constitutionality of Proposition 200. Indeed, when reversing the Ninth Circuit's order  
19 staying application of Proposition 200 to the 2006 general election, the Supreme Court  
20 noted that "the facts in these cases are hotly contested." *Purcell*, 127 S. Ct. at 8. Justice  
21 Stevens concurred, stating that "the scope of the disenfranchisement that the novel  
22 identification requirements will produce" "remains largely unresolved." *Id.* (Stevens, J.,  
23 concurring). Likewise, this Court expressed concern that the record lacks evidence  
24 concerning "the number, if any, of eligible individuals that wish to register to vote and  
25 must obtain new forms of identification" and "the number of voters that do not have  
26 adequate forms of identification and will not be receiving, free of charge, adequate  
27 forms of identification [to vote at a polling place on election day]." [Oct. 11 Order, at 9-  
28 10]

1           Following the Supreme Court’s direction to supplement the record, the  
2 ITCA Plaintiffs have propounded discovery requests that seek updated information  
3 concerning the number of voter registration forms rejected because they lacked  
4 “satisfactory evidence of citizenship” and the number of voters who cast conditional  
5 provisional ballots that were not counted. [See Hartman-Telez Decl., ¶ 2, Ex. A] Those  
6 discovery requests also seek contact information for those potential voters who have  
7 been disenfranchised. [Id.] With this information in hand, plaintiffs will be able to  
8 demonstrate with statistical evidence the number of (1) eligible individuals who could  
9 not register to vote without purchasing “satisfactory evidence of citizenship” and (2)  
10 potential voters who lacked sufficient Polling ID. Only with such information in the  
11 record should the Court evaluate Proposition 200’s actual disenfranchisement of eligible  
12 voters and its unconstitutional burden on the right to vote.

13           In addition, the record contains scant evidence of the availability of early  
14 voting to voters lacking Polling ID. While the record contains some testimony  
15 concerning the similarity between early voting at an early voting site and voting at the  
16 polling place on election day, further factual development concerning the availability of  
17 early voting is required. [Id. ¶ 3] Indeed, though voters may use mail ballots, voters  
18 without postal delivery services do not have that option. [See ITCA SOF, ¶ 15] There  
19 are far fewer in-person early voting sites than polling places. [Id. ¶ 13] As such, they  
20 are generally located in urban centers, requiring rural voters to travel long distances to  
21 reach them. For those voters who require language assistance, especially Native  
22 American voters, such assistance is not available for mail ballots, and is unlikely to be  
23 available at early voting sites. [Id. ¶ 14]

24           In short, while there is no dispute that tens of thousands of voter  
25 registration forms have been rejected or that thousands of voters have failed to provide  
26 identification required to vote at their polling places, there exists a genuine dispute of  
27 material fact concerning the extent to which Proposition 200 has caused that  
28 disenfranchisement, making summary judgment inappropriate. See Fed. R. Civ. P.

1 56(c). Accordingly, the Court should deny defendants' Motions as premature because  
2 plaintiffs are awaiting discovery responses that are necessary to supplement the record  
3 as directed by this Court and the Supreme Court. *See* Fed. R. Civ. P. 56(f); *Texas*  
4 *Partners v. Conrock Co.*, 685 F.2d 1116, 1119 (9th Cir. 1982) (reversing grant of  
5 motion for summary judgment because plaintiffs had been denied the opportunity to  
6 proceed with discovery).

7 II. ALTERNATIVELY, BECAUSE PROPOSITION 200 IMPOSES AN  
8 UNCONSTITUTIONAL POLL TAX, THE COURT SHOULD DENY  
SUMMARY JUDGMENT.

9 A. The Proof of Citizenship and Polling ID Requirements Force Potential  
10 Voters to Pay a Fee to Register and Vote.

11 Even without a complete record concerning the disenfranchisement of  
12 eligible voters, summary judgment is inappropriate because Proposition 200 constitutes  
13 an unconstitutional poll tax. By conditioning the exercise of the right to vote on  
14 possession of Proof of Citizenship, Proposition 200 unconstitutionally taxes the right to  
15 vote. In October 2006, this Court found that “[o]btaining proper forms of identification  
16 for purposes of registering to vote will cost potential voters between 10 and 100 dollars”  
17 and that “it is undisputed that some individuals will have to obtain a form of  
18 identification” to register to vote. [Oct. 11 Order, at 9]

19 Because Proposition 200 allows no alternative to purchasing Proof of  
20 Citizenship or Polling ID -- which an eligible voter may not need or want for any other  
21 purpose -- the law is even more onerous than the one the Supreme Court held  
22 unconstitutional in *Harman v. Forssenius*, 380 U.S. 528, 541 (1965).<sup>2</sup> In *Harman*,  
23 Virginia voters could choose to submit a certificate of residence, which cost nothing,  
24 then vote without paying the poll tax. *Id.* at 529. The Court struck down the Virginia  
25 law because the Twenty-fourth Amendment “nullifies sophisticated as well as simple-

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26 <sup>2</sup> While the State relies on most counties' practice of providing acceptable Polling  
27 ID free of charge, this practice is not universal, nor is it required by A.R.S. § 16-579.  
28 [See ITCA SOF, ¶¶ 10-11] As such, counties are free to change course and eliminate  
this free form of Polling ID.

1 minded modes' of impairing the right." *Harman*, 380 U.S. at 540-41 (citations omitted).  
2 While the Court did not decide whether Virginia could require everyone to submit a free  
3 certificate of residence, it conclusively determined that both a poll tax requirement and a  
4 system that provides an alternative to a poll tax are unconstitutional. *Id.*

5 Unlike Virginia voters before *Harman*, eligible Arizona voters have *no*  
6 *option* to escape paying a tax. Indeed, potential Arizona voters are saddled with *both*  
7 burdens held unconstitutional in *Harman* -- submitting documentary evidence that they  
8 are entitled to vote (Proof of Citizenship or Polling ID, akin to the certificate of  
9 residence) and paying to do so (by purchasing Proof of Citizenship or Polling ID). In  
10 short, if Arizona voters do not pay for acceptable documentation of their entitlement to  
11 vote, they are barred from the polls in violation of the Twenty-fourth Amendment.  
12 *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005) (holding  
13 Georgia's Photo ID requirement to be an unconstitutional poll tax because "requiring  
14 those voters to purchase a Photo ID card effectively places a cost on the right to vote").

15 B. Requiring Payment of a Poll Tax -- Whether "Express," "Indirect" or  
16 "Constructive" -- Is Unconstitutional.

17 The State argues that Proposition 200 does not violate the Twenty-fourth  
18 Amendment because it does not require payment of any "express" poll tax. [Mot. at 6]  
19 Yet this Court recognizes that Proposition 200 imposes a "constructive poll tax." [Oct.  
20 11 Order, at 9] Importantly, the Twenty-fourth Amendment prohibits conditioning  
21 ballot access on payment of a poll tax or *any other tax*. U.S. Const., Amend. XXIV.  
22 Indeed, the Amendment was adopted to prevent "disenfranchisement of the poor" and  
23 "does not merely insure that the franchise shall not be 'denied' by reason of failure to  
24 pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied *or*  
25 *abridged*' for that reason." *Harman*, 380 U.S. at 539-40 (emphasis added).

26 Even if Proposition 200 imposes fees that are only "indirectly connected to  
27 the right to vote," that does not render it constitutional. [Oct. 11 Order, at 9-10] It is a  
28 bedrock principle of constitutional law that a state may not do indirectly what the

1 Constitution forbids it to do directly. *Fairbank v. United States*, 181 U.S. 283, 294  
2 (1901) (holding that stamp tax on bill of lading accompanying export indirectly taxed  
3 the exported goods in violation of the Constitution); *see also Cummings v. Missouri*, 71  
4 U.S. 277, 325 (1866) (“[W]hat cannot be done directly cannot be done indirectly. The  
5 Constitution deals with substance, not shadows.”). Indeed, the Supreme Court has  
6 firmly rejected the notion that an indirect poll tax would be permissible. In *Harman*, the  
7 Court concluded that Virginia’s option of filing a certificate of residence in lieu of  
8 paying a poll tax improperly imposed “a material requirement solely upon those who  
9 refuse to surrender their constitutional right to vote in federal elections without paying a  
10 poll tax,” and therefore violated the Twenty-fourth Amendment. *Harman*, 380 U.S. at  
11 541. Thus, the Court held, the Twenty-fourth amendment “nullifies sophisticated as  
12 well as simple-minded modes’ of impairing the right.” *Id.* at 540-41 (citations omitted).

13           It matters not that the voter identification provisions of Proposition 200 are  
14 not denominated a “tax.” As *Harman* emphasized, “[c]onstitutional rights would be of  
15 little value if they could be . . . indirectly denied” by such methods. *Id.* at 540. The  
16 Twenty-fourth Amendment applies even if the regulation impeding the right is  
17 “somewhat less onerous than the poll tax” because “no equivalent or milder substitute  
18 may be imposed.” *Id.* at 542 (emphasis added).

19           C.     Even if Many Arizonans Need Not Pay for Proof of Citizenship or Polling  
20                 ID, Thousands Must Pay an Unconstitutional Poll Tax.

21           Defendants focus on the percentage of voters who will not need to pay a  
22 poll tax to vote, but ignore the undisputed tens of thousands of eligible voters who lack  
23 Proof of Citizenship and the thousands of voters turned away from the polls last fall.  
24 Contrary to the State’s contention, Proposition 200 imposes an unconstitutional poll tax  
25 even though some, but not all, Arizonans must purchase Proof of Citizenship to register  
26 to vote. [See Mot. at 6-7] While “poll tax” once meant a “head” tax levied on each  
27 person in a jurisdiction, regardless of any link to voting, the Twenty-fourth Amendment  
28 is clear -- “[t]he right of citizens of the United States to vote . . . shall not be denied or

1 abridged by the United States or any State by reason of failure to pay any poll tax *or*  
2 *other tax.*” U.S. Const. Amend. XXIV (emphasis added). As such, the imposition of a  
3 fee as a prerequisite to voting on *any* voter, not just *all* voters, is unconstitutional. *See*  
4 *United States v. Texas*, 252 F. Supp. 234, 252 (W.D. Tex. 1966) (noting that only “a  
5 portion of those qualified” to vote were subject to the poll tax at issue, and holding it  
6 unconstitutional); *Weinschenk v. State*, 200 S.W.3d 201, 213-14 (2006) (“[A]ll fees that  
7 impose financial burdens on eligible citizens’ right to vote, not merely poll taxes, are  
8 impermissible under federal law.”).

9 D. Proposition 200 Constitutes a Poll Tax Even Though the State May Not  
10 Receive Annual Remittances from All Voters.

11 The State argues that because some forms of Proof of Citizenship or  
12 Polling ID are obtained from entities other than the State, requiring such identification  
13 does not impose a poll tax. However, it does not matter that the fees for Proof of  
14 Citizenship and Polling ID are not imposed annually and may be collected by an entity  
15 separate from the State. Indeed, construing the Twenty-fourth amendment to apply only  
16 if a State deposits that fee into its coffers annually would eviscerate the Amendment. It  
17 is not the repetitive nature of a poll tax that makes it unconstitutional, but its mere  
18 existence. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (stating that  
19 making payment of “*any fee* an electoral standard” violates the Fourteenth Amendment)  
20 (emphasis added); *see also Billups*, 406 F. Supp. 2d at 1369 (“[R]equiring . . . voters to  
21 purchase a Photo ID card [once every five years] effectively places a cost on the right to  
22 vote. In that respect, the Photo ID requirement runs afoul of the Twenty-fourth  
23 Amendment.”).

24 Moreover, the recipient of the fees paid to achieve the franchise is  
25 immaterial. An intent to generate revenue is not what makes imposing a fee upon the  
26 franchise unconstitutional. Rather, it violates the Twenty-fourth Amendment simply  
27 because *the voter* must pay a fee -- the recipient of that fee is irrelevant. *See Hill v.*  
28 *Stone*, 421 U.S. 289, 292, 298 (1975) (striking down a law that did not give equal

1 weight to ballots cast by voters who failed to render property for taxation, regardless of  
2 whether those who rendered property actually paid any tax). Indeed, in *Harman*, the  
3 announced purpose of the poll tax was not to generate revenue, but to ensure voters were  
4 residents of the state, and therefore eligible to vote. *Harman*, 380 U.S. at 544. Yet the  
5 Court struck down the tax.

6 E. For Those Who Do Not Need Proof of Citizenship or Polling ID for Any  
7 Purpose Other Than Voting, the Cost of Obtaining Such ID Is Prohibitive.

8 The burdens of Proposition 200 fall most harshly and disproportionately  
9 on the poor. For Arizonans living in poverty or on fixed incomes, the cost of obtaining  
10 Proof of Citizenship or Polling ID is beyond their means. Proof of Citizenship may cost  
11 anywhere from \$10 to \$220. Likewise, most forms of Polling ID require payment of  
12 fees for the ID or a service the voter may not need or want. As the Missouri Supreme  
13 Court recently noted about that state’s voter identification law, such costs place an  
14 insurmountable barrier in the path of the most vulnerable citizens, those “least equipped  
15 to bear the costs”:

16 For [voters] who live beneath the poverty line, the \$15 they  
17 must pay in order to obtain their birth certificates and vote is  
18 \$15 that they must subtract from their meager ability to feed  
19 shelter and clothe their families. The exercise of  
20 fundamental rights cannot be conditioned upon financial  
21 expense.

22 *Weinschenk*, 200 S.W.3d at 214. It is unacceptable and unconstitutional for the State to  
23 force its most vulnerable citizens to choose between spending \$25 on food, shelter or  
24 medicine or using the money to purchase the right to vote. Notably, Proposition 200  
25 contains no “safety net” allowing an alternative means of establishing citizenship for a  
26 citizen who lacks the funds to purchase Proof of Citizenship. In Arizona, a citizen who  
27 lacks Proof of Citizenship either must come up with the funds to purchase it, or else be  
28 disenfranchised. No other state has such a registration requirement, and to those  
Arizonans who are forced to this choice, the cost of obtaining Proof of Citizenship is  
dear.

1           At bottom, a citizen in Arizona has the right to vote, whether or not he has  
2 \$10, \$25 or \$1000 in his pocket. Indeed, a citizen has the right to cast a ballot “whether  
3 the citizen, otherwise qualified to vote, has \$1.50 in his pocket or nothing at all.”  
4 *Harper*, 383 U.S. at 668. As the Court emphasized in *Harper*, “wealth or fee paying  
5 has, in our view, no relation to voting qualifications; the right to vote is too precious, too  
6 fundamental to be so burdened or conditioned.” *Id.* at 670.

7 III. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON  
8 PLAINTIFFS’ SECTION 1971 CLAIMS.

9 A. The Ninth Circuit Recognizes a Private Cause of Action for Violations of  
10 42 U.S.C. § 1971.

11 Defendants argue that private actors cannot enforce 42 U.S.C. § 1971.  
12 This is not the law in the Ninth Circuit. Indeed, private parties are entitled to seek the  
13 same equitable relief as the Attorney General under the Voting Rights Act. *Olagues v.*  
14 *Russoniello*, 770 F.2d 791, 805 (9th Cir. 1985), 797 F.2d 1511, 1518 (9th Cir. 1986) (en  
15 banc), *vacated on other grounds*, 484 U.S. 806 (1987); *see also Allen v. State Board of*  
16 *Elections*, 393 U.S. 544, 554-57 (1969); *Schwier v. Cox* 340 F.3d. 1284, 1294-97 (11th  
17 Cir. 2003) (reversing district court ruling that 42 U.S.C. § 1971 did not contain a private  
18 right of action).<sup>3</sup> Further, both historically and today, courts across the nation have  
19 permitted the application of § 1971 to address non-racial discrimination. *See Shivelhood*  
20 *v. Davis*, 336 F. Supp. 1111, 1113-15 (D. Vt. 1971) (certifying § 1971 class action based  
21 on non-resident college student status); *Brier v. Luger*, 351 F. Supp. 313, 314-16 (M.D.  
22 Pa. 1972) (considering a § 1971(a) claim based on political party affiliation); *Ballas v.*  
23 *Symm*, 494 F.2d 1167, 1171-72 (5th Cir. 1974) (considering § 1971 class action based  
24 on non-resident student status); *Schwier*, 340 F.3d at 1285-1286 (recognizing a § 1971  
25 cause of action for voters who refused to provide their social security numbers when

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26  
27 <sup>3</sup> The Supreme Court also found a private right of action in § 1971’s predecessor  
28 statutes, 8 U.S.C. §§ 31 and 43. *See Smith v. Allwright*, 321 U.S.649 (1944) (prohibiting  
all-white primaries).

1 registering to vote). As such, plaintiffs may seek to have the voting-related provisions  
2 of Proposition 200 enjoined for violations of § 1971.

3 B. By Not Requiring Polling ID at Early Voting Sites, Proposition 200  
4 Subjects Similarly-Situated Voters to Different Standards, Practices or  
5 Procedures in Violation of 42 U.S.C. § 1971(a)(2)(A).

6 Section 1971 prohibits Arizona from “apply[ing] any standard, practice, or  
7 procedure different from the standards, practices, or procedures applied under such law  
8 or laws to other individuals within the same county, parish, or similar political  
9 subdivision who have been found by State officials to be qualified to vote.” 42 U.S.C. §  
10 1971(a)(2)(A). Yet the Polling ID component of Proposition 200 does precisely that. It  
11 creates two classes of voters: those who vote early and those who vote at the polls on  
12 election day. Voters who vote at the polls on election day -- by choice or necessity --  
13 are subject to the onerous identification requirements of Proposition 200, while voters  
14 who participate in early voting are not.

15 Defendants base their argument on this Court’s statement that early voting  
16 and election day voting are inherently different processes and, as such, different  
17 standards can apply. [Mot. at 9 (citing Oct. 11 Order)] However, the record shows that  
18 one component of early voting -- in-person, early voting -- is identical to election day  
19 voting, except that early voters are not asked for identification.<sup>4</sup> The testimony indicates

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20 <sup>4</sup> The Coconino County Recorder testified on cross-examination as follows:

21 Q. And can you describe the process that the voter goes  
22 through when he or she shows up at your office to vote at the  
23 early voting site?

24 A. Yes. If you're talking about if -- if you're talking about the  
25 county elections office, that's one thing. It may be  
26 somewhere else, like we have a branch in Tuba City, so I'll  
27 use the county elections office. They come in, they identify  
28 who they are. They sign in. They're given a ballot to vote.  
They're shown, you know, there is both sides, giving some  
instructions. They are pointed over to the Voteromatic to  
complete that ballot, to seal it, to sign it, and return it to us.

Q. So in effect, it's almost identical to what the voter goes  
through at the polling place?

A. Except there is no ID asked for.

1 that fraud is prevented by a signature check between the early ballot and the voter's  
2 signature on file. [Oct. 11 Order, at 3-4] Defendants' admission that the processes for  
3 pre-election day in-person voting and election day in-person voting are identical --  
4 except for the request for Polling ID -- cannot be reconciled with the claim that the  
5 processes are inherently different.<sup>5</sup> Indeed, each ballot cast, whether early or on election  
6 day, weighs equally in determining the outcome of an election. At a minimum, this  
7 creates a triable issue of fact.

8 C. Failure to Provide Proof of Citizenship Is an "Error or Omission" on a  
9 "Record or Paper" Relating to Voting, for Which Defendants Cannot Deny  
10 the Right to Vote.

11 Proposition 200 also creates a question of fact with respect to compliance  
12 with § 1971 (a)(2)(B). In relevant part, 42 U.S.C. § 1971 (a)(2)(B) provides:

---

13 Q. No identification?

14 A. No identification is asked for per statute. The idea is it's an  
15 early ballot, because we check the signature, so no ID is asked  
16 for.

17 Q. So to vote early at one of these voting sites, a voter could  
18 show up, assuming there are no challenges, 33 days before the  
19 election --

20 A. That's correct.

21 Q. Vote a ballot, and not have to produce identification?

22 A. That's correct, because the ballots are all turned in back to  
23 us with their signatures on them, to compare to the rolls  
24 before they are determined if that ballot counts or doesn't  
25 count.

26 [Oct. 11 Order, at 3-4]

27 <sup>5</sup> Defendants also cite *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775,  
28 840 (S.D. Ind. 2006), *affirmed sub nom Crawford v. Marion County Election Bd.*, 472  
F.3d 949 (7th Cir. 2007), in support of their argument. In that case, however, the court  
indicated that there were several differences between absentee and election day voting  
and, according to the court, the plaintiffs' proposed construction of § 1971(a)(2)(A)  
would compel the invalidation of vast portions of the Indiana Election Code." *Id.* In  
this case, defendants have admitted that in-person early voting and voting on election  
day are identical except for the Polling ID requirement.

1 No person acting under color of law shall . . . deny the right  
2 of any individual to vote in any election because of an error  
3 or omission on any record or paper relating to any  
4 application, registration, or other act requisite to voting, if  
5 such error or omission is not material in determining  
6 whether such individual is qualified under State law to vote  
7 in such election.

8 Defendants argue that § 1971 (a)(2)(B) does not apply because a failure to  
9 provide identification “is not an error or omission on any record or paper relating to any  
10 application, registration or other act requisite to voting and therefore §1971(a)(2)(B)  
11 does not apply to this case.” [Mot. at 9] This claim ignores the broad definition of  
12 “vote” in § 1971:

13 When used in the subsection, the word “vote” includes all  
14 action necessary to make a vote effective including, but not  
15 limited to, registration or other action required by State law  
16 prerequisite to voting, casting a ballot and having such ballot  
17 counted and included in the appropriate totals of votes cast  
18 with respect to candidates for public office and proposition  
19 for which votes are received in an election

20 42 U.S.C. § 1971(e).

21 The Supreme Court has affirmed this definition of “vote,” emphasizing  
22 that voting includes “all action necessary to make a vote effective.” *See Allen v. State*  
23 *Bd. of Elections*, 393 U.S. 544, 565-566 (1969) (discussing the Court’s practice of  
24 broadly defining the right to vote under the Voting Rights Act). Defendants’  
25 construction requiring that the error or omission be on a “record or paper” is inconsistent  
26 with the broad construction Congress intended for § 1971. [Mot. at 9] Moreover,  
27 Congress was concerned with the great variety of devices that resulted in vote denial and  
28 amended § 1971 “to help meet the problem of lengthy and often unwarranted delays  
which have occurred in the course of judicial proceedings under the prior acts . . . .” H.  
Rep. No. 914, reprinted in 1964 USCCAN 2391, 2394. Section 1971 provides a no  
fault, prophylactic remedy. The type, cause or source of the omission and the intent of  
the election officials are not relevant. Congress meant to streamline litigation, not invite

1 new defenses. For example, in *Schwier*, the plaintiffs intentionally withheld their social  
2 security numbers and were denied the right to vote. 340 F.3d at 1286. They prevailed  
3 under § 1971 even though their “omission” was intentional. *See id.* A voter’s failure or  
4 inability to provide Proof of Citizenship or Polling ID is sufficient to satisfy the error or  
5 omission requirement.

6 Defendants also err in asserting that providing Proof of Citizenship or  
7 Polling ID is “material” to voting. The Arizona Constitution, which establishes voter  
8 qualifications, lacks any provision requiring a voter to present identification and proof  
9 of address. To be qualified to vote in Arizona, an individual need only be: (1) a citizen  
10 of the United States, (2) at least 18 years of age, (3) not a convicted felon, whose civil  
11 rights have not been restored, and (4) not adjudicated incompetent. Ariz. Const. art. VII,  
12 § 2. Eligible voters must swear under penalty of perjury that these conditions are true.  
13 But none of these requirements includes the presentation of additional Proof of  
14 Citizenship or Polling ID. Thus such a requirements cannot be deemed material.

15 Moreover, the fact that election day voters are required to present Polling  
16 ID, but early voters are not, confirms that such a requirement cannot be material.  
17 Election officials can use signature comparison for those election day voters whose  
18 identity is in question, the same method used to confirm the identity of early voters.  
19 Moreover, before Proposition 200 took effect in 2005, the state never required the  
20 presentation of identification as a prerequisite to voting or when registering to vote.  
21 Furthermore, while *citizenship* may be material to an individual’s eligibility to vote,  
22 *Proof of Citizenship* is *not*. Indeed, in Arizona before Proposition 200, and today in the  
23 other 49 states, Proof of Citizenship is not required, even though citizenship is an  
24 eligibility requirement everywhere. Affirmation of citizenship under penalty of perjury  
25 is sufficient proof that the voter meets the eligibility requirements and has been  
26 successful in preventing fraudulent votes cast by ineligible voters. [See ITCA SOF ¶  
27 18]

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Conclusion

For the foregoing reasons, the Court should deny the Motions for Summary Judgment.

RESPECTFULLY SUBMITTED this 12th day of July, 2007.

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