IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRIS W. KOBACH, KANSAS SECRETARY OF STATE, *et al.*,	)	
Plaintiffs-Appellees,	)	
vs.	)	Case Nos. 14-3062, 14-3072
THE UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*,	)	
Defendants-Appellants,	)	
and	)	
PROJECT VOTE, INC., *et al.*,	)	
Intervenors-Appellants.	)	

PLAINTIFFS-APPELLEES' COMBINED BRIEF IN OPPOSITION TO DEFENDANTS-APPELLANTS' AND INTERVENORS-APPELLANTS' MOTIONS FOR STAY PENDING APPEAL

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INTRODUCTION

"Since the power to establish voting requirements is of little value without the power to enforce those requirements, Arizona is correct that it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Arizona v. Inter Tribal Council of Ariz., Inc.* (hereinafter "*Inter Tribal Council*"), 133 S. Ct. 2247, 2258-59 (2013). With this statement, the United States Supreme Court reiterated the longstanding principle that it is the province of the States to establish voting qualifications, not the Congress. *Id*. at 2258. As the Court recognized, the Framers were averse to concentrated power and sought to avoid a Congress "empowered to regulate the qualifications of its own electorate." *Id*. Thus, the Elections Clause of the U.S. Constitution empowers Congress to regulate only *how* federal elections are held, but not *who* may vote in them. *Id*. Since Congress lacks the power to set voter qualifications, it necessarily follows that a federal agency created by Congress lacks that power as well.

Here, the district court correctly recognized that (1) Arizona and Kansas modified their respective voter registration qualifications to require applicants to present proof of citizenship along with registration forms, and (2) the Election Assistance Commission ("EAC") lacked the authority to refuse to incorporate those requirements into the state-specific instructions for the National Voter Registration Form ("Federal Form"). On March 19, 2014, the district court ordered the EAC, or its acting executive director, "to add the language requested by Arizona and Kansas to the state-specific instructions on the federal mail voter registration form, effective *immediately*." (March 19, 2014 Memorandum and Order (ECF No. 157), attached as Exhibit B to EAC Motion at 1, hereinafter "March 19 Order.") (emphasis added). The Defendants-Appellants refused to

add the state-specific instructions and, twelve days later, requested a stay. The district court considered the motion for stay filed by the Defendants-Appellants, along with the separate motions of each of the Intervenors-Appellants, and denied relief, specifically finding "that any harm to the moving parties does not outweigh the harm to the states, that the public interest does not support a stay, and that the movants have not demonstrated a strong likelihood of success on appeal." (May 7, 2014 Order (ECF No. 195), attached as Exhibit A to EAC Motion at 1, hereinafter "May 7 Order.") The district court ordered the EAC to comply with the March 19 Order "forthwith without further delay." *Id*. at 8. By that time, the EAC had refused to obey the district court's March 19 Order for a full 49 days.

The Defendants-Appellants and the Intervenors-Appellants now ask this Court to grant a stay pending appeal even though the district court has already determined that they do not meet the elements required for a stay—an extraordinary and rarely granted device. They ask this Court to disregard the basic separation-of-powers principle reiterated by *Inter Tribal Council* and followed by the district court below, by seeking a ruling from this Court that a federal agency can disregard what the States themselves established as voting qualifications. Because the EAC and the Intervenors-Appellants have distorted the facts and procedural history that led to the district court's decision and misconstrue the decision itself, the Plaintiffs-Appellees ("the States") provide the following background in support of their opposition to the Appellants' motions for stay.

BACKGROUND

In 2004, Arizona's voters approved a citizens' initiative known as Proposition 200, which among other things, provided that applicants must provide evidence of citizenship when registering to vote. *Inter Tribal Council,* 133 S. Ct. at 2252.

Proposition 200 required election officials to reject voter registration forms that did not bear evidence of citizenship. *Id.* Two groups of plaintiffs sued to enjoin the implementation of Proposition 200, but failed to demonstrate that they were entitled to a preliminary injunction. *Id.* Although the Ninth Circuit briefly enjoined Proposition 200's proof-of-citizenship requirement, the United States Supreme Court reversed and allowed Arizona to conduct the 2006 election under the new rules instituted by Proposition 200. *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). From that time until shortly before the 2012 election, Arizona's county recorders implemented Proposition 200, rejecting the registration forms from prospective registrants who did not provide evidence of citizenship.

After the Supreme Court remanded that case to the district court, the parties presented evidence in a six-day bench trial and the district court issued an order setting forth detailed findings of fact and conclusions of law. *Gonzalez v. State of Arizona*, D. Ariz. CV06-01268-PHX-ROS, ECF No. 1041, identified as EAC001651-99 in the underlying EAC Record here, and attached hereto as Exhibit 1. The plaintiffs—many of whom are Intervenors-Appellants in this matter—asserted that Proposition 200 violated the Equal Protection Clause of the Fourteenth Amendment, the First Amendment, Section 2 of the Voting Rights Act, and Title VI of the Civil Rights Act of 1964. Exhibit 1 at EAC001652. The district court denied relief on all claims, holding that Proposition 200 serves the important governmental interests of preventing voter fraud and maintaining voter confidence. Exhibit 1 at EAC001684-85. The district court made specific factual findings that, under other circumstances, at least 208 individuals were not deterred by the threat of a conviction of perjury to falsely declare *under oath* that they were not citizens and that for this and other reasons, Arizona's citizens voted in favor of requiring

registration applicants to show affirmative proof of citizenship, rather than merely a sworn statement. Exhibit 1 at EAC001666. On July 11, 2012, after the Ninth Circuit reheard the case en banc and ordered injunctive relief, the district court ordered that the Arizona election officials could not reject Federal Forms for lack of proof-of-citizenship information and had to register those applicants for the upcoming 2012 election. (*See Gonzalez v. State of Arizona*, D. Ariz. CV06-01268-PHX-ROS, ECF No. 1073, attached hereto as Exhibit 2.)

In this appeal, the Intervenors-Appellants claim that *Inter Tribal Council* completely resolved all issues in their favor and held that through the NVRA, Congress preempted the States' rights to establish voter qualifications. Intervenors-Appellants' Motion for Stay (hereinafter "Intv. Motion") at 2-3. But they misread and improperly extend the holding of *Inter Tribal Council*. There, the Supreme Court did not hold that the EAC had the discretion to refuse to include a voter qualification requirement that a State deemed necessary to determine voter eligibility; nor did the Court hold that the EAC had the authority to engage in a quasi-judicial weighing of evidence to determine itself what was "necessary" to prove U.S. citizenship.[1] Instead, the Court strongly indicated that the EAC lacks such discretion and authority.

[1] In its Motion, the EAC quotes the Court's statement that the EAC must approve each state-specific instruction to support its contention that the EAC, not the States, determines whether information is necessary for a state official to assess an applicant's eligibility. EAC Motion at 11-12 (quoting *Inter Tribal Council*, 133 S. Ct. at 2252). But the Court's quoted statement is merely describing how the EAC in consultation with the States develop the state-specific instructions. The Court was not addressing whether Congress intended the EAC to have the discretion to determine what information is necessary "to enable the appropriate State election official to assess the eligibility of the applicant" when it enacted 42 U.S.C. § 1973gg-7(b)(1).

In *Inter Tribal Council*, the Supreme Court emphasized that the States have the exclusive constitutional authority to determine who may vote in federal elections, which necessarily includes the power to enforce those qualifications. *Inter Tribal Council*, 133 S. Ct. at 2257-59. The Court then suggested that Arizona should request that the EAC modify the Federal Form to include Arizona's proof-of-citizenship requirement and, if the EAC refused, Arizona should file suit to contest the EAC's refusal. *Id.* at 2260. The Supreme Court recognized that (1) "validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt"; (2) a State may challenge the EAC's rejection of its request to "alter the Federal Form to include information the *State deems necessary* to determine eligibility"; and (3) in the event the EAC failed to act on Arizona's request, it "would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a *nondiscretionary* duty to include Arizona's concrete evidence requirement on the Federal Form." *Id.* at 2259-60 (emphasis added) (citing 5 U.S.C. § 706(1)).

The district court in this case correctly followed the Supreme Court's roadmap. Because the *Inter Tribal Council* Court unanimously concluded that it would raise serious constitutional doubts "if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications" 133 S. Ct. at 2258-59, the district court determined that "Congress has no authority to preempt a State's power to enforce voter qualifications." March 19 Order at 11. And the district court found that "[b]y denying the states' request to update the instructions on the federal form, the EAC effectively strips state election officials of the power to enforce the states' voter

eligibility requirements," which "has the effect of regulating *who* may vote in federal elections." *Id.* at 12 (emphasis in original).

Recognizing its duty to construe the NVRA so as to avoid serious constitutional doubts, the district court rejected the EAC's construction of the NVRA, under which the EAC argued it had the authority to refuse Arizona's and Kansas's state-specific instructions. *Id.* at 26. Instead, the district court held that the language of NVRA did not preclude states from requiring proof of citizenship and that the EAC's own regulations anticipated that the states would notify it of necessary changes to the state-specific forms. *Id.* at 20-23.

As explained below, this Court should deny the Appellants' requests for a stay and order the EAC to obey the district court's Order and include Arizona's and Kansas's state-specific instructions on the Federal Form immediately.

LEGAL ARGUMENT

I. Legal Standard

The Appellants correctly state the elements that a court must consider in determining whether to grant a stay. But they fail to mention the limited review that an appellate court should engage in after a district court has already reviewed a motion seeking a stay pending appeal. Both the district courts and the courts of appeals consider whether a stay applicant has established the following: (1) likelihood of success on appeal; (2) the threat of irreparable harm to the moving parties if the stay is not granted; (3) the absence of harm to the opposing parties if the stay is granted; and (4) any risk of harm to the public interest. *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft* (hereinafter "*O Centro*"), 314 F.3d 463, 465-66 (10th Cir. 2002); *Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001). However, the court of appeals

"must consider, based on a preliminary record, whether the district court abused its discretion and whether the movant has demonstrated a clear and unequivocal right to relief." *Homans*, 264 F.3d at 1243. Similarly, when reviewing a district court's grant of preliminary injunctive relief, this Court may set it aside only for an abuse of discretion, an error of law, or clearly erroneous factual findings. *O Centro*, 314 F.3d at 466. The Appellants failed to meet this high standard.

II. The Balance of the Harms Does Not Weigh Decidedly in Favor of the Appellants.

Because the applicability of the relaxed likelihood of success factor turns on whether the three harm factors tip decidedly in the Appellants' favor, this brief will first address the three harm factors and will then address the likelihood of success factor. As explained below, the balance of the harm factors tips strongly in the States' favor, and thus the Appellants are not entitled to the relaxed likelihood of success factor.

A. The Appellants Have Failed to Demonstrate That They Will Suffer Irreparable Harm Absent a Stay of the District Court's Order.

In order to obtain a stay pending an appeal, the movant must demonstrate an injury that is "certain, great, actual, and not theoretical." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks and citation omitted). In fact, "irreparable harm is not harm that is merely serious or substantial." *Id.* (internal quotation marks and citation omitted). Instead, a party seeking to demonstrate irreparable harm "must show that the injury complained of is of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.*

i. The alleged harm that eligible voters will be prevented from registering to vote is merely theoretical.

The Appellants speculate that unless a stay is granted, irreparable harm will be incurred because eligible voters might be prevented from registering to vote. EAC Motion at 16 and 17; Intv. Motion at 2, 4, 13, 14, and 16. However, the alleged harm of eligible voters being prevented from registering to vote is purely theoretical. "To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman*, 348 F.3d at 1189 (quoting *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). "The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Wisconsin Gas Co.*, 758 F.2d at 674.

The Appellants fail to identify a single person that (1) has proven he or she is a United States Citizen, (2) has attempted to follow all of the avenues allowable under Arizona and Kansas law for providing proof of citizenship, and (3) has nevertheless been unable to register to vote in either Arizona or Kansas. Instead, the Appellants simply refer to the number of persons in Arizona and Kansas that have applied to register to vote without providing proof of citizenship documentation.[2] Intv. Motion at 15-16. The Appellants assume, without evidence, that those individuals are United States citizens who are somehow unable to comply with the proof of citizenship requirements of Kansas and Arizona. Indeed, in its May 7 Order the district court found that "the Intervenors have not shown facts in the record to support the idea that any eligible citizen has been or

[2] In *Gonzalez v. Arizona*, the U.S. District Court for the District of Arizona held that the Gonzalez plaintiffs failed to demonstrate "that the persons rejected are in fact eligible to vote." *See* Exhibit 1 at EAC001682.

will be denied the right to vote as a result of the States' laws requiring proof of citizenship." May 7 Order at 7.[3]

The Appellants could not make such a showing, because no such person exists. The Kansas and Arizona proof-of-citizenship requirements are designed to ensure that every eligible United States citizen is able to complete his or her registration. For example, in Kansas, the State provides free replacement birth certificates for any registrant who has lost a birth certificate. K.S.A. 65-2418(a)(3). In addition, twelve other documents suffice to prove citizenship under the Kansas law. K.S.A. 25-2309(l). Kansas also provides that any person without one of the qualifying documents proving citizenship may nonetheless demonstrate his or her citizenship by providing other information or affidavits to the State Election Board. K.S.A. 25-2309(m). The Appellants have not identified a single United States citizen in the State of Kansas who is unable to register through these procedures.

Similarly, the State of Arizona has taken steps to ensure that every eligible United States citizen is able to register to vote, by establishing six different categories of information that may be used to demonstrate citizenship. Ariz. Rev. Stat. ("A.R.S.") § 16-166(F). In addition, Arizona is currently subject to a permanent injunction as part of the final judgment in the *Gonzalez v. Arizona* matter. *See Gonzalez v. Arizona*, D. Ariz. CV06-1268-PHX-ROS, ECF No. 1123. Under that injunction, all applicants using the Federal Form without providing information required by A.R.S. § 16-166(F) but who

[3] Similarly, the district court in found "there is no evidence, only speculation, that [incomplete voter registration applicants] are unable to provide [proof of citizenship]. All the Court knows, from the evidence in the record, is that they have not–it hasn't been shown that they cannot." May 7 Order at 7.

otherwise meet the requirements of the Federal Form must be registered and are eligible to vote in elections for Federal Office. Arizona's county recorders then contact these Federal Form users to let them know that they are not currently eligible to vote in state and local elections and explain how they may become eligible by providing the information required by A.R.S. § 16-166(F). *See* Declaration of Ken Bennett, ECF No. 21 at ¶ 24, attached hereto as Exhibit 3.

For these reasons, the Appellants' claims that eligible voters will be prevented from registering to vote unless a stay is granted is unsupported by any evidence and is merely theoretical.

ii. The Appellants cannot show irreparable harm by asserting an injury that, if actual, would harm individual voter registration applicants and not the Appellants.

Even if the alleged harm of eligible voters being prevented from registering to vote were actual and not merely theoretical, the Appellants are unable to assert such harm as a basis for a stay in this matter. In order to obtain a stay pending an appeal, the movant "must make a showing of a threat of irreparable injury *to interests that he properly represents*." *Graddick v. Newman*, 453 U.S. 928, 933 (1981) (emphasis added). That is, an injury that a movant asserts as the basis for a stay must be an injury that the movant has standing to assert.[4] *Id.* The Appellants do not have standing to assert the rights of individuals that have allegedly been prevented from registering to vote.

[4] By raising the subject of standing, the States are not seeking to relitigate the issue of intervention. The States simply argue that the harm asserted in support of a stay must be an injury to the party asserting the harm and not an injury to another person. The subject of standing was not decided by Judge Waxse's order allowing Intervenors-Appellants to permissively intervene in this action. December 12, 2013 Memorandum and Order, ECF No. 105.

The United States Supreme Court requires a plaintiff to have suffered an injury-in-fact; that is, an invasion of a legally protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Appellants do not satisfy this requirement for standing because they possess no legally protected interest that has been allegedly invaded. The Appellants are a governmental agency and various associations and organizations; as such, they do not possess the right to register to vote in elections. Only individuals have the right to register to vote in elections. This personal right of individuals also includes the right *not* to vote. *See Dixon v. Maryland*, 878 F.2d 776, 782 (4th Cir. 1989); *Wrzeski v. City of Madison, Wisconsin*, 558 F. Supp. 664, 667 (W.D. Wis. 1983). Further, Appellants have no legally protected interest in ensuring that any particular individual is registered to vote. The alleged harm of individuals being prevented from registering to vote is an injury to the interests of individual voter registration applicants, not an injury to the Appellants.

iii. If this Court reverses the district court's order, any harm to voters can be easily avoided.

The Intervenors-Appellants claim that if a stay is granted and the district court's order is subsequently overturned on appeal, "U.S. citizens will have illegally been prevented from voting and restoration of their rights will be contingent on the States' ability to locate and reinstate them to the voter rolls." Intv. Motion at 16-17. The Intervenors-Appellants then assert that Kansas and Arizona have no ability to locate and add such persons to their voter registration rolls. Id. at 17. The Intervenors-Appellants are simply misinformed; both states would be able to retroactively register such applicants for Federal elections. Arizona has already proven its capability to do so and will do so again, if ordered to. In the *Gonzalez* case, the Arizona district court ordered

the retroactive registration of all applicants using the Federal Form that had been submitted on or after August 1, 2011 and that had been rejected for failing to provide proof of citizenship. (*Gonzalez v. State of Arizona*, D. Ariz. Case No. CV06-01268-PHX-ROS, ECF No. 1093, attached hereto as Exhibit 4.) Likewise, Kansas also has the ability to retroactively register Federal Form applicants for federal elections if the district court's Order is later overturned. (*See* Declaration of Brad Bryant, attached hereto as Exhibit 5.) Thus, if a stay is denied and the March 19 Order is later overturned, no irreparable harm will occur to voter registration applicants. The district court was correct that "any such harm would prove to be temporary and reversible if this Court's order is overturned on appeal." May 7 Order at 5.

iv. The alleged hindrance to conducting voter registration drives does not constitute irreparable harm.

The Appellants also assert that unless a stay is granted, their ability to conduct voter registration drives will be hindered and that such hindrance constitutes irreparable harm. The alleged hindrance to voter registration drives consists of two assertions. First, the Intervenors-Appellants claim they will be forced to expend more effort and resources to carry out their voter registration drives. Second, they assert that their voter registration drives will result in fewer individuals being registered to vote.

The expense of effort and resources is insufficient to show irreparable harm in the context of a motion for stay pending appeal. The United States Supreme Court has declared that "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (citation omitted). Therefore, the Intervenors-Appellants' claims that, unless a stay is granted, they will be forced to expend additional effort and resources to

conduct voter registration drives are insufficient to prove the irreparable harm required for a stay pending an appeal.

Similarly, the Intervenors-Appellants' claims that fewer individuals will be registered to vote as a result of voter registration drives conducted by the Intervenors-Appellants are insufficient to prove the irreparable harm necessary for a stay pending an appeal because, as shown above, this alleged harm is hypothetical and not a legally protected interest of the Intervenors-Appellants. *See* Section II.A.i. and II.A.ii. above. Notably, the Intervenors-Appellants make no claim that the absence of a stay will result in any direct infringement on their ability to *conduct* voter registration drives. This is because the placement of the States' documentary proof-of-citizenship requirements on their respective state-specific instructions places no direct burden on the Intervenors-Appellants.[5]

v. Denying the Appellants' request for a stay will not impede the EAC's ability to regulate the registration process for federal elections.

The EAC asserts that unless a stay is granted, it will be unable "to carry out its statutory mandate of regulating the registration process for federal elections." EAC Motion at 17-18. However, as is shown below, nothing in the NVRA requires the EAC to deny the States' requested modification to their state-specific instructions. Furthermore, the EAC has a nondiscretionary duty to implement the modifications requested by the states. Therefore denying a stay will not prevent the EAC from carrying

[5] The League of Women Voters claims that it "has stopped conducting voter registration drives in certain counties in Kansas" as a response to Kansas's proof-of-citizenship requirement. Intv. Motion at 14. However, the League of Women Voters made this choice of its own volition; it was not required by Kansas's proof-of-citizenship requirement.

out its asserted statutory mandate. What is more, this abstract and theoretical "harm" to the EAC's claimed regulator power rests on the assumption that the district court's decision on the merits was incorrect. As such, it cannot serve as a basis for a stay pending appeal.

B. Granting a Stay In This Case Will Substantially Injure the States.

When determining whether to grant a stay pending an appeal a court must consider whether a stay will substantially injure the other parties involved in the proceeding. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The movant has the burden of demonstrating that the harms caused absent a stay outweigh the harms caused to the opposing party in the event that the court issues a stay. *See, e.g., First Savings Bank, F.S.B. v. First Bank Sys., Inc.*, 163 F.R.D. 612, 614 (D. Kan. 1995); *United States v. RX Depot, Inc.*, 297 F. Supp. 2d 1306, 1310 (N.D. Okla. 2003). In the present case, a stay will inflict three distinct injuries on the States.

i. Granting a stay would prevent the States from effectuating their statutes requiring proof of citizenship.

The United States Supreme Court has ruled that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin E. Fox Co.*, 434 U.S. 1345, 1351 (1977). Granting a stay would prevent the States from effectuating their proof-of-citizenship statutes with respect to voter registration applicants that utilize the Federal Form. This would create a massive loophole in the States' proof-of-citizenship requirements, allowing noncitizens to register without complying with the States' registration requirements. Therefore, granting a stay in this matter would not only cause

the States to suffer a substantial injury, but would inflict an *irreparable injury*, i.e. preventing the States from effectuating their proof-of-citizenship statutes.

The harm caused by preventing the States from effectuating their proof-of-citizenship statutes is not merely theoretical. As was established to the district court, there is concrete evidence that noncitizens register to vote in Kansas and Arizona when the States' proof-of-citizenship requirements are not enforced. *See* Declaration of Brad Bryant, attached hereto as Exhibit 6; Declaration of Tabitha Lehman, attached hereto as Exhibit 7, and Declaration of Karen Osborne, attached hereto as Exhibit 8. The factual record shows that multiple noncitizens have continued to attempt to register to vote since the inception of this case. Fortunately, the proof-of-citizenship requirement prevented these applicants from completing their registrations. In the absence of the requirement, it is highly unlikely that any of these noncitizens would have been discovered on the voter rolls after being registered. Thus, the injury to the State is irreparable.

ii. Granting a stay would deprive the States of their sovereign and constitutional right to establish and enforce voting qualifications.

The Tenth Circuit has determined that a deprivation of constitutional rights constitutes an irreparable injury as a matter of law. *See Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005). Additionally, the Supreme Court has ruled that the deprivation of a constitutional right, such as a First Amendment right, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). An action that places a state's sovereign interests and public policies at stake is deemed to cause irreparable injury to that state. *Kansas v. United States*, 249 F.3d 1213, 1227-28 (10th Cir. 2001). Likewise, the this Court has

ruled that an intrusion of an Indian Nation's sovereignty constitutes irreparable injury. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006).

The U.S. Constitution confers to the States the constitutional right and power, exclusive of the federal government, to establish and enforce the qualifications for voting in both state and federal elections. *Inter Tribal Council*, 133 S. Ct. at 2258-59. If a stay is granted, the States will be prevented from enforcing their voter qualifications. Therefore, a stay will infringe on the States' sovereignty and constitutional rights. Consequently, the granting of a stay will inflict irreparable harm on the States.

iii. Granting a stay would force the States to implement a bifurcated voter registration system that is unduly burdensome.

The States commenced this case to ensure that their proof-of-citizenship requirements are applied equally to voter registration applicants that utilize state registration forms and those applicants that utilize the Federal Form. If a stay is granted, the States will be required to accept the Federal Form to register individuals to vote in federal elections without documentary evidence of citizenship as required by the States' laws. *Id.* at 2260. However, such registrants are not properly registered to vote in state and local elections under Kansas and Arizona law. K.S.A. 25-2309(l); A.R.S. § 16-166(F). Therefore, the Plaintiffs will need to administer one election system for voters registered only for federal elections and one system for voters registered for both state and federal elections.

As noted above, Arizona is already required to accept Federal Form applicants without additional proof of citizenship and must register such applicants as eligible to vote in elections for Federal Office. *See* Section II.A.i. above. As a result, there are numerous existing voters in this scenario. Arizona has already begun implementing its

dual registration system and has incurred significant costs associated with that implementation. *See* Exhibit 3. However, so long as the Federal Form instructions remain unchanged, common sense dictates that this pool of "Fed Only" voters will continue to grow. If, however, the EAC modifies the instructions, the pool is closed and the county recorders can focus their efforts on getting those persons to comply with the proof-of-citizenship requirement and thereby transfer them to the pool of "Full Ballot" voters who are eligible to vote in federal, state, and local races.

Kansas is in a different circumstance. It is not bound by a federal court injunction concerning Federal Form applicants. One of the principal reasons that Kansas pursued a quick resolution of this case was to avoid having to implement a bifurcated system like Arizona's. But if the August 5, 2014 primary election date arrives and the EAC has still not added the Arizona- and Kansas-specific instructions requiring proof of citizenship, Kansas will likely have to implement a bifurcated election in which certain Federal Form registrants are permitted to vote in federal elections only. Comparing these real burdens with the Appellants' purely theoretical burdens, it is clear that "any potential harm to the EAC and intervenors does not outweigh the harm to the States." May 7 Order at 6.

C. Granting the Stay Requested by the Appellants Is Not in the Public Interest.

There is a strong public interest in ensuring fair and honest elections. *Lair v. Bullock*, 697 F.3d 1200, 1215 (9th Cir. 2012). Furthermore, the public has an interest in preventing voter fraud and safeguarding confidence in the integrity of the electoral process. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194-97 (2008). The proof-of-citizenship requirements enacted by Arizona and Kansas ensure that noncitizens do not register to vote and do not actually vote in elections. Accordingly, the States'

proof-of-citizenship requirements advance the public interests of ensuring fair and honest elections, preventing voter fraud, and safeguarding confidence in the integrity of the electoral process. Granting a stay would prevent the States from protecting such public interests. Moreover, the States' proof-of-citizenship requirements were enacted by the elected representatives of Kansas and the people of Arizona. As succinctly stated by the district court, "Public interest is best expressed through laws enacted through the public's elected representatives." May 7 Order at 7. Therefore, granting a stay is not in the public interest.

The Appellants argue that not granting a stay is contrary to the public interest because implementing the March 19 Order may cause voter confusion. However, if a stay is granted, confusion is far *more* likely because the State of Kansas will be forced to implement a bifurcated election system. Some individuals will be registered to vote only in federal elections while others will be registered to vote in federal, state, and local elections. Many of those individuals will be confused as to why their ballot does not include state and local elections. It is likely that many voters will be confused as to which election they are registered to vote in. Furthermore polling places will be required to distribute a different ballot to each category of voter. Thus, a bifurcated election system will lead to more voter confusion than implementing the Court's order.

Further, the Appellants argue that denying a stay will hamper the enforcement of the NVRA and is thus adverse to the public interest. However, as shown below, the modifications to the state-specific instructions are not contrary to the provisions of the NVRA. Quite the opposite, the United States Constitution, as well as the EAC's own regulations, mandate that the EAC implement the requested modifications. Therefore, denying a stay cannot hamper the enforcement of the NVRA.

III. The Appellants Are Not Likely to Succeed on the Merits.

A. The Tenth Circuit's Relaxed Standard Does Not Apply to the Motions to Stay Pending Appeal Filed by the Appellants.

The Appellants assert that the Tenth Circuit's relaxed "probability of success requirement" applies to their motions. Under that standard, probability of success is demonstrated when the movant has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation. *Fed. Trade Comm'n v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852-53 (10th Cir. 2003). However, there are two reasons why this relaxed standard does not apply.

First, as the Tenth Circuit has emphasized, the relaxed standard only applies "where the moving party has established the three 'harm' factors tip *decidedly* in its favor." *Heideman*, 348 F.3d at 1189 (citations omitted; emphasis provided). As argued *supra*, and as found by the district court, May 7 Order at 8, the three harm factors do not tip in favor of the Appellants at all; instead, they tip in favor of the States.

Second, the less rigorous standard should not be applied to requests to stay governmental action taken in the public interest pursuant to a statutory and regulatory scheme. *Heideman*, 348 F.3d at 1189. In keeping with their constitutional prerogative to establish and enforce voter qualifications, the legislature of Kansas and the citizens of Arizona enacted documentary proof-of-citizenship requirements for voter registration applicants. To protect the public interest, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (citation omitted). The states are entitled to adopt generally applicable and evenhanded

restrictions that protect the integrity and reliability of the electoral process itself. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (citing *Celebrezze*, 460 U.S. at 788, n. 9). For these reasons, the relaxed standard should not be applied in this case.

B. The Appellants Are Not Likely to Succeed On the Merits.

i. The EAC Decision raises serious constitutional doubt, and the district court therefore correctly applied the canon of constitutional avoidance.

The canon of constitutional avoidance is a cardinal principle of statutory interpretation requiring courts to construe a federal statute to avoid serious constitutional doubt. *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011). This canon of statutory interpretation was of central importance to the district court's March 19 Order, especially on the questions of preemption, the nature of the EAC's discretion, and the applicability of *Chevron*[6] deference.[7] The Appellants, however, disagree with the district court's conclusion that the EAC Decision and its interpretations of the NVRA raised serious constitutional doubts, and that the court was therefore required to adopt a construction of the NVRA that avoids constitutional doubt. Instead, the Appellants argue that the *Inter Tribal Council* decision resolved *all* constitutional doubt.

This argument, however, misconstrues *Inter Tribal Council*, which merely stated that Arizona's request, along with its accompanying constitutional questions, should be submitted to the EAC and that the EAC's decision should be reviewed under the

[6] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 715 (2006).

[7] *See, e.g.*, March 19 Order at 11-12 (utilizing canon of constitutional avoidance in determining the NVRA does not preempt the Plaintiff's proof-of-citizenship requirements); *id*. at 14-15 (canon of constitutional avoidance trumps *Chevron* deference); *id*. at 26-27 (the EAC's discretion is limited by constitutional concerns).

Administrative Procedure Act, 5 U.S.C. § 500 *et seq.* (hereinafter "the APA"). The APA itself contemplates relief for constitutional violations, 5 U.S.C. § 706 (2)(B), and constitutional questions that arise during APA review fall expressly within the domain of the courts which conduct review *de novo*. *Darden v. Peters*, 488 F.3d 277, 284-85 (4th Cir. 2007); *Westar Energy Co. v. U.S. Dep't of Interior*, 932 F.2d 807, 809 (9th Cir. 1991). The *Inter Tribal Council* decision clearly anticipated that constitutional questions would remain to be resolved through judicial review under the APA.[8] And the Court specifically contemplated that the EAC's authority could be construed either in a manner that raised constitutional doubts or in a manner that avoided constitutional doubts, and advised the latter. *Inter Tribal Council*, 133 S. Ct. at 2259. Thus, it did not "resolve" all constitutional questions.

Relying on *Miller v. French*, 503 U.S. 527 (2000), the EAC now asserts for the first time that the canon of constitutional avoidance cannot justify the district court's interpretation of the NVRA because the interpretation is unreasonable and "plainly contrary to the intent of Congress." However, the district court correctly held that its interpretation was not contrary to the intent of Congress "because the NVRA is silent as to the issue."[9] It is preposterous for the EAC to infer from congressional silence a plain

[8] Indeed, there would otherwise been no reason for the *Inter Tribal Council* court to have noted that Arizona might be in a position to assert a constitutional right to enforce its proof of citizenship requirement apart from the Federal Form if the EAC was without authority to act on Arizona's renewed request, thereby foreclosing effective APA review. *Inter Tribal Council*, 133 S. Ct. at 2260, n. 10.

[9] March 19 Order at 27 (citing *Miller*, 530 U.S. at 341). The district court also rejected the Appellants' claim that Congress considered and rejected proof-of-citizenship requirements when enacting the NVRA:

(continued…)

intent to create a federal agency empowered to override the States' constitutional powers to establish and enforce voter qualifications.

ii. The NVRA does not preempt the States' proof-of-citizenship requirements.

The Appellants assert that the NVRA completely preempts the States' proof-of-citizenship laws, and that the *Inter Tribal Council* decision recognized this complete preemption. The Appellants therefore maintain that the States' proof-of-citizenship requirements can only be included in the state-specific instructions on the Federal Form if the States prove to the EAC's satisfaction that such requirements are necessary. The Appellants' reading of *Inter Tribal Council*, however, is simply wrong. If, as the Appellants assert, *Inter Tribal Council* held that the NVRA preempted state proof-of-

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> "According to the EAC decision, Congress considered including language that would allow states to require documentary evidence of citizenship (a requirement that no state had at the time) and decided not to include such language in the NVRA. [EAC Decision, ECF No. 129, at 20]. In its motion, the [States] point to other parts of the legislative history that purport to show that the NVRA's sponsor argued that the proposed language was unnecessary as redundant because nothing in the NVRA prevented a state from requiring proof of citizenship. Doc. 140, at 8-9. Either way, the Court is not impressed with the legislative history presented in the absence of statutory language addressing the subject. See *U.S. v. Cheever*, 423 F. Supp. 2d 1181, 1191 (D. Kan. 2006) (noting that 'it can be a dangerous proposition to interpret a statute by what it does *not* say' and that '[s]uch a negative inference is a weak indicator of legislative intent.'). The Court finds it unnecessary to consider the legislative history here. *See Shannon v. U.S.*, 512 U.S. 573, 583 (1994) (noting that courts have no authority to enforce a principle gleaned solely from legislative history that has no statutory reference point)."

Id. at 21, n. 92.

citizenship laws, there would be no reason for the Supreme Court to have discussed at length the serious constitutional doubts that would arise "if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id.* at 2258-59. As the district court correctly recognized,[10] the question of whether the NVRA attempts to preempt state proof-of-citizenship requirements was expressly *not* decided in *Inter Tribal Council*.

What is more, the Appellants do not articulate any alternative to the test utilized in the March 19 Order by which the district court determined that the NVRA does not preempt the States' laws. March 19 Order at 18-22. Instead, the Appellants baldly assert that the NVRA expressly preempted the States' proof-of-citizenship requirement even though they fail to identify one NVRA provision that conflicts with the States' proof-of-citizenship requirements.[11] It should further be noted that the Appellants' motions to stay do not apply the canon of constitutional avoidance to the question of preemption. Simply put, the States' proof-of-citizenship requirements do not conflict with any provision of the NVRA, and the district court's determination of non-preemption is likely to be upheld on appeal.

[10] See 12/13/2013 Hr'g Tr. at 27:10-21; 57:19-58:2, attached hereto as Exhibit 9.

[11] Indeed, the Appellants are essentially advancing the quite novel argument that while the NVRA does not by its own terms preempt the States' proof-of-citizenship requirements, the States' requirements are nevertheless preempted because a federal agency, the EAC, has decided in its discretion not to include the States' proof-of-citizenship requirements on the Federal Form. The States, however, are not aware of any legal authority holding that an otherwise non-preemptive federal statute can become imbued with preemptive powers at the whim of a federal agency.

iii. The EAC does not have discretion to infringe upon the States' exclusive constitutional power to establish and enforce voter qualifications.

The Appellants maintain that the EAC has the discretion to determine whether the States' proof-of-citizenship requirements are "necessary" under the NVRA, 42 U.S.C. § 1973gg-7(b)(1), or, as articulated in *Inter Tribal Council*, whether "a mere oath will not suffice to effectuate [their] citizenship requirement[s]." *Inter Tribal Council*, 133 S. Ct. at 2258-59, 2260. However, as recognized in *Inter Tribal Council*, such unlimited discretion involves "serious constitutional doubts" in light of the states' exclusive power to establish and enforce voter qualifications. *Id.* at 2258-59. As the Appellants would have it, the States' constitutional powers and rights are subject to the EAC's discretion. This proposition contradicts common sense—a constitutional power subject to an agency's discretion is no constitutional power at all—and also established precedent. *See Darden*, 488 F.3d at 284-85 (constitutional questions arising during APA review fall expressly within the domain of the courts which conduct review *de novo*); *Westar Energy Co.*, 932 F.2d at 809 (same).

The *Inter Tribal Council* Court did not find that the EAC had the discretion to refuse to include a voter qualification requirement that a State deemed necessary to determine voter eligibility. Instead, although the Court did not reach this legal question, it strongly indicated that it would find that the EAC lacks such discretion. The Supreme Court emphasized that the States have the exclusive constitutional authority to determine who may vote in federal elections, which necessarily includes the power to enforce those qualifications. In light of the states' exclusive constitutional authority to establish and enforce voter qualifications, the Supreme Court recognized that 1) "validly conferred discretionary executive authority is properly exercised . . . *to avoid serious constitutional*

doubt"; 2) a State may challenge the EAC's rejection of its request to "alter the Federal Form to include information the *State deems necessary* to determine eligibility"; and 3) in the event EAC failed to act on a Arizona's request, it "would have the opportunity to establish in a reviewing court that a mere oath will not suffice to effectuate its citizenship requirement and that the EAC is therefore under a *nondiscretionary* duty to include Arizona's concrete evidence requirement on the Federal Form." *Id.* at 2259-60 (emphasis added) (citing 5 U.S.C. § 706(1)).

Because of the "serious constitutional doubts" attending the EAC's role in developing the Federal Form, the *Inter Tribal Council* court explicitly limited the EAC's discretion by what it called an analogy to the canon of constitutional avoidance. *Inter Tribal Council*, 133 S. Ct. at 2259. The *Inter Tribal Council* Court therefore implicitly concluded that the canon of constitutional avoidance required that any ambiguity regarding who decides what information is necessary under the NVRA, 42 U.S.C. § 1973gg-7(b)(1) be resolved in favor of the states.

Yet the Appellants make much ado about the Court's phrase, which they rip out of context: "validly conferred discretionary executive authority." According to the Appellants, this phrase conclusively establishes that the *Inter Tribal Council* Court envisioned the EAC as having full discretion unrestrained by constitutional considerations.[12] This assertion, however, is shown to be false by the surrounding

[12] In an attempt to account for the *Inter Tribal Council* opinion's holding that the EAC is under a nondiscretionary duty when a state has established that "a mere oath will not suffice to effectuate its citizenship requirement," 133 S. Ct. at 2260, the Appellants assert that this nondiscretionary duty arises only when the *EAC determines* that the requested instruction is necessary. But this purported limitation on the EAC's discretion is illusory because the Appellants further assert that the EAC's determination regarding (continued…)

language and the entirety of the opinion, which clearly acknowledged that the EAC's discretion must be limited to avoid serious constitutional doubts. *Id.* at 2258-60.[13] Accordingly, the district court was correct when it held that the "EAC's decision to deny the states' requested instructions has precluded the states from obtaining proof of citizenship that the states have deemed necessary to enforce voter qualifications. Therefore, the EAC's interpretation of the NVRA raises the same serious constitutional doubts as expressed in [*Inter Tribal Council*]." March 19 Order at 14.

iv. The EAC's determination that the States' proof-of-citizenship requirement are unnecessary is not entitled to deference.

Lastly, the Appellants argue that the district court did not give proper deference to the EAC's determination that the States' proof-of-citizenship requirements were unnecessary. However, as previously noted, the APA itself contemplates relief for constitutional violations, 5 U.S.C. § 706(2)(B), and constitutional questions that arise

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an instruction's necessity is itself reviewed for abuse of discretion under the APA. An agency's discretion limited by its own discretionary determination is not limited at all.

[13] The Appellants further argue that *Inter Tribal Council* must have held the EAC to have full discretion to determine whether Arizona's proof of citizenship requirement is necessary because it would have been futile to direct Arizona to renew its request with the EAC if Arizona had the power to determine what is necessary. The Appellants similarly suggest the March 19 Order is erroneous because is effectively converts the agency into a rubber stamp containing authority only to approve state requests but not to deny them. The States disagree that this result necessarily follows. Indeed, in oral argument before the district court, both the EAC and the States agreed that the EAC retains discretion over "voter registration procedures," while the states have exclusive authority over enforcement of substantive registration requirements. 12/13/2013 Hr'g Tr. at 57:9-18; 115:16-20. In addition, the EAC retains the discretion to determine if a state's requested instruction accurately reflects that state's laws, and to determine if the proposed wording of the instruction would be confusing to voters. These are the areas in which the EAC retains discretion–areas that do not intrude upon the States' constitutional right to establish and enforce substantive voter registration requirements.

during APA review fall expressly within the domain of the courts which conduct review *de novo*. *Darden*, 488 F.3d at 284-85; *Westar Energy Co.*, 932 F.2d at 809.

Deference to the EAC's determination is particularly inappropriate where constitutional claims are made because, by the EAC's own admission, EAC proceedings are informal, non-adjudicatory in nature, and lack any means of discovery. 12/13/2013 Hr'g Tr. at 85:17-86:7, attached hereto as Exhibit 10. Giving deference to the EAC's informal adjudication of the States' constitutional powers and rights made in the absence of discovery or other formal procedures would raise serious procedural due process concerns. Further, there is absolutely nothing in the NVRA that suggests that Congress intended the EAC to undertake this type of quasi-judicial inquiry.

Moreover, the district court correctly determined that its construction of the NVRA and EAC's regulations was necessary to avoid a constitutional question and that the "canon of constitutional avoidance trumps *Chevron* deference owed to an agency's interpretation of a statute." March 19 Order at 15 and n. 57 (citing authority from the Tenth, Eighth, Ninth, and D.C. Circuits). The Appellants do not address the authority cited by the district court or explain why the canon of constitutional avoidance does not trump any deference owed to EAC.

v. This Court can affirm the judgment of the district court on alternative grounds.

The scope of appellate review is significant in determining whether the Appellants are likely to succeed on the merits on appeal. Appellate courts are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court. *D.A. Osguthorpe Family*

Partnership v. ASC Utah, Inc., 705 F.3d 1223, 1231 (10th Cir. 2013) (citation omitted). This Court should consider at least two alternative bases for affirmance.

First, although the March 19 Order discussed the EAC's regulations, particularly 11 C.F.R. § 9428.3(b)[14], it does not appear that the district court held that this regulation standing alone affords a basis for granting relief to the States. It was not necessary for the court to do so, since the court had already established that the correct interpretation of the NVRA favored the States' position. However, the EAC's failure to comply with its own regulation provides an additional ground for affirming the district court.[15]

Second, the States maintain that vesting the EAC with authority or discretion to nullify state laws enacted in furtherance of the state's exclusive authority to establish and enforce voter qualifications would constitute a system of preclearance of the kind specifically disapproved of in *Shelby County, Ala. v. Holder*, __ U.S. __, 133 S. Ct. 2612 (2013). If the NVRA were interpreted to afford the EAC such authority, then the NVRA would violate Article I, Section 2, of the United States Constitution; and the EAC's action would be invalid on that basis as well.

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[14] The district court relied particularly on the EAC's regulation 11 C.F.R. § 9428.3(b), which states, "[t]he state-specific instructions shall contain the following information for each state…: the state's specific voter eligibility *and registration requirements*." March 19 Order at 16. The district court correctly concluded that this regulation uses mandatory language requiring the EAC to include the States' requested instructions. *Id*. at 22-24. Remarkably, the Appellants completely ignore this regulation.

[15] It is arbitrary, capricious, an abuse of discretion, and not in accordance with law for an agency to fail to comply with its own regulations. *Via Christi Reg'l Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 (10th Cir. 2007) (citations omitted).

CONCLUSION

For the reasons stated above, the Appellants' Motions for Stay Pending Appeal should be denied. For the same reasons, and if the Motions for Stay Pending Appeal are denied, the State oppose the Appellants' motions for an expedited briefing and hearing schedule. The efficient administration of the election in 2014 demands that the district court's correct decision remain in place and that additional uncertainty not be created by the prospect of litigation-driven, last-minute changes in the weeks before the elections.

Respectfully submitted this 13th day of May, 2014.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 13th day of May, 2014, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

s/ Thomas E. Knutzen
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Attorney for Plaintiffs-Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRIS W. KOBACH, KANSAS SECRETARY OF STATE, *et al.*,	)	
Plaintiffs-Appellees,	)	
vs.	)	Case Nos. 14-3062, 14-3072
THE UNITED STATES ELECTION ASSISTANCE COMMISSION, *et al.*,	)	
Defendants-Appellants,	)	
and	)	
PROJECT VOTE, INC., *et al.*,	)	
Intervenors-Appellants.	)	

EXHIBIT INDEX FOR EXHIBITS ATTACHED TO PLAINTIFFS-APPELLEES' COMBINED BRIEF IN OPPOSITION TO DEFENDANTS-APPELLANTS' AND INTERVENORS-APPELLANTS' MOTIONS FOR STAY PENDING APPEAL

Exhibit	*Description*
1	Findings of Fact and Conclusions of Law from *Gonzalez v. State of Arizona*, D. Ariz. CV06-01268-PHX-ROS, ECF No. 1041, identified as EAC001651-99.
2	Order from *Gonzalez v. State of Arizona*, D. Ariz. CV06-1268-PHX-ROS, ECF No. 1073.
3	Declaration of Ken Bennett, ECF No. 21.
4	Order from *Gonzalez v. State of Arizona,* D. Ariz. CV06-01268-PHX-ROS, ECF No. 1093
5	Declaration of Brad Bryant
6	Declaration of Brad Bryant, ECF No. 19
7	Declaration of Tabitha Lehman, ECF No. 20
8	Declaration of Karen Osborne, ECF No. 25
9	December 13, 2013 Hearing Transcript (excerpts)
10	December 13, 2013 Hearing Transcript (excerpt)

Respectfully submitted this 13th day of May, 2014.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the 13th day of May, 2014, I electronically filed the above and foregoing document using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

s/ Thomas E. Knutzen
Thomas E. Knutzen, Kansas Bar No. 24471
Attorney for Plaintiffs-Appellees

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al.,

Plaintiffs,

vs.

State of Arizona, et al.,

Defendants.

No. CV-06-1268-PHX-ROS
consolidated with:
No. CV-06-1362-PCT-JAT
No. CV-06-1575-PHX-EHC

ORDER; FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case comprises two actions: (1) Gonzalez v. State of Arizona, CV 06-1268-PHX-ROS (filed May 9, 2006) ("Gonzalez"); and (2) Inter Tribal Council of Ariz., Inc. v. Brewer, No. CV 06-1362-PCT-JAT (filed May 26, 2006) ("ITCA").[1]

Plaintiffs seek to permanently enjoin enforcement of the Arizona Taxpayer and Citizen Protection Act, also known as "Proposition 200." Enacted pursuant to a voter initiative in the 2004 general election, Proposition 200 requires proof of citizenship to register to vote and proof of identification to vote in person on election day. A.R.S. §§ 16-166(F), 579(A).

[1] The third consolidated action, Navajo Nation v. Brewer, CV 06-1575-PHX-EHC (filed June 20, 2006), was dismissed by stipulation of the parties on May 27, 2008. (Doc. 775).

Collectively, Plaintiffs assert that these requirements violate the Equal Protection Clause, First Amendment, Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*[2] (Doc. 352; ITCA, Doc. 1). For the reasons stated below, Plaintiffs' request for relief will be denied.

PROCEDURAL BACKGROUND

In May and August 2006, Plaintiffs filed motions for preliminary injunction, seeking to enjoin the enforcement of Proposition 200. (Docs. 7, 146, 149). On September 11, 2006, the motions were denied. (Doc. 183).

Plaintiffs appealed the denial, (Docs. 184, 189), and requested an emergency injunction pending appeal, see Purcell v. Gonzalez, 549 U.S. 1, 6 (2006). On October 5, the Ninth Circuit granted the request for an emergency injunction pending appeal. Id. The Supreme Court vacated the emergency injunction on October 20, 2006. Id. at 8.

On April 20, 2007, the Ninth Circuit affirmed the Court's order denying preliminary injunctive relief. Gonzalez v. Arizona, 485 F.3d 1041, 1052 (2007). The parties then underwent significant discovery and motions practice extending over a year and a half. The Court endeavored to give Plaintiffs access to all data in Defendants' possession to make their case.

Beginning July 9, 2008, the Court held a six-day bench trial to determine whether a permanent injunction should issue. Post-trial briefing was completed on July 30, 2008.

FACTUAL BACKGROUND

I. Proposition 200

On November 2, 2004, Arizona voters approved a voter initiative called Proposition 200, which was officially proclaimed law by Governor Janet Napolitano on December 13,

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[2] ITCA and Gonzalez Plaintiffs' other claims were dismissed on August 28, 2007 and February 5, 2008, respectively. (Docs. 330, 611).

2004.[3] (Trial Tr. 648). It was then submitted to the Department of Justice for preclearance under Section 5 of the Voting Rights Act.[4] Id. Upon approval by the Justice Department, Proposition 200 became effective January 25, 2005. Id.

A. Proof of Citizenship to Register to Vote

Before Proposition 200, a person seeking to register to vote did not need to provide proof of citizenship. (Ex. 6). Rather, the person signed a statement, under penalty of law, that the applicant is a U.S. citizen. Id.

Proposition 200, which amended A.R.S. §§ 16-152, 166, requires individuals wishing to register to vote to provide proof of citizenship. An applicant is still required to affirm, under penalty of law, that the applicant is a U.S. citizen. A.R.S. § 16-152(14). Section 16-166, as amended, states:

> The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:
> 1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.
> 2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.
> 3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.
> 4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be

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[3] The Arizona Constitution authorizes voter initiatives, which then become law "when approved by a majority of the votes cast thereon and upon proclamation of the governor." Ariz. Const. art. IV § 1.

[4] Arizona is a covered jurisdiction under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Therefore, Arizona is required to preclear any new voting "standard, practice, or procedure" with either the United States Attorney General or the District Court for the District of Columbia to ensure its new standard, practice, or procedure does "not have the purpose [or] effect of denying or abridging the right to vote on account of race or color." Id.; see also Purcell, 549 U.S. at 6.

included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the [I]mmigration [R]eform and [C]ontrol [A]ct of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

A.R.S. § 16-166(F).

Without this proof, a person may not register to vote. Id. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship. (Trial Tr. 701). There is no provision that permits waiver of the proof of citizenship requirement.

If an applicant does not provide proof of citizenship, the applicant is mailed a letter explaining why the application was rejected and instructing the applicant to submit a new registration form with proper proof of citizenship. (Rodriguez Dep. 77-78, Jan. 22, 2008; Altaha Dep. 12, Jan. 14, 2008; Wayman-Trujillo Dep. 50, 51, Jan. 9, 2008; Rodriguez Dep. 23, Aug. 2, 2006; Justman Dep. 15-16, Aug. 1, 2006). Counties are required to provide a blank voter registration form with this letter. (Ex.4, at 54).

Under the procedures implemented immediately after Proposition 200, an applicant relying on naturalization documents to provide proof of citizenship was required to provide a "certificate of naturalization number." (Trial Tr. 654; see also Ex. 147). It was soon learned, however, that this number could not be used to verify the person's citizenship using the federal immigration online database, the Systematic Alien Verification for Entitlements Program ("SAVE"). (Trial Tr. 654; Ex. 305). Rather, the database used the alien registration number, or "A-number." (Trial Tr. 654; Ratliff Dep. 32, Apr. 22, 2008). Consequently, the election procedures were amended to instruct an applicant to provide the alien registration number, which is also listed on a certificate of naturalization.[5] (Trial Tr. 654; Ex. 1357).

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[5] Before approximately 1975, certificates of naturalization did not have A-numbers printed on them. (Quinn Dep. 54, Apr. 22, 2008; see also Ex. 961 (certificate of naturalization from 1960 that does not have A-number)).

This change was precleared by the Justice Department on December 6, 2007. (Kanefield Dep. 8, Jan. 1, 2008).

B. Elector Identification to Cast a Ballot

i. *Voting In Person on Election Day*

Before Proposition 200, a person seeking to vote in person on election day did not need to provide proof of identification. (Ex. 5). Rather, the person stated his or her name and residence, and, if the name was found on the voter rolls, the person signed the signature roster and was given a ballot. Id.

After Proposition 200, which amended A.R.S. § 16-579, an elector voting in person on election day must now present proof of identification. A voter may obtain a regular ballot[6] only by presenting either one form of identification with a photograph, name, and address, or two forms of identification that bear the name and address. A.R.S. § 16-579(A).

The specific types of identification are set forth in the Election Procedures Manual, which has the force and effect of law. A.R.S. § 16-452(C). The current version, approved in October 2007 (the "Manual"), was drafted by Secretary of State Jan Brewer and then submitted to Governor Janet Napolitano and Arizona Attorney General Terry Goddard for review and approval. See generally Ex. 4; A.R.S. § 16-452(A)-(B). It was then precleared by the Department of Justice.

Acceptable forms of identification with a photograph, name, and address are: (1) a valid Arizona driver license; (2) Arizona nonoperating identification license; (3) tribal enrollment card or other form of tribal identification; or (4) other federal, state, or local government issued identification. (Ex. 4, at 128).

[6] The different types of ballots are discussed *infra*, Part C.

Acceptable forms of identification without a photograph that bear the name and address of the elector are: (1) utility bill dated within 90 days of the date of the election;[7] (2) bank or credit union statement dated within 90 days of the date of the election; (3) valid Arizona vehicle registration; (4) property tax statement of the elector's residence; (5) vehicle insurance card; (6) recorder's certificate; or (7) federal, state, or local government issued identification, including a voter registration card issued by the county recorder. Id.

In addition to these forms of identification, an elector who identifies himself or herself as a member of a federally recognized American Indian tribe may present tribal identification, including: (1) a tribal identification or enrollment card issued under the authority of a federally recognized Indian tribe, nation, community, or band, a tribal subdivision or the Bureau of Indian Affairs; (2) a Certificate of Indian Blood issued to a tribal member under the authority of a tribe or by the Bureau of Indian Affairs; (3) a voter registration card for tribal elections issued under the authority of a tribe; (4) a home site assignment lease, permit or allotment issued under the authority of a tribe, tribal subdivision, or the Bureau of Indian Affairs; or (5) a grazing permit or allotment issued to a tribal member under the authority of a tribe, tribal subdivision, or the Bureau of Indian Affairs.[8] (Docs. 775 & 776; Trial Tr. 680-81).

In addition, several counties have added "official election mail" sent by the county to individual voters to the list of acceptable non-photo identification. (See Trial Tr. 748; Osborne Dep. 60-61, Jul. 31, 2006 (Maricopa County); Dastrup Dep. 10, Aug. 1, 2006 (Navajo County); Hoyos Dep. 27-28, Jan. 16, 2008 (Pinal County); Hansen Dep. 55, Aug.

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[7] "A utility bill may be for electric, gas, water, solid waste, sewer, telephone, cellular phone, or cable television." (Ex. 4, at 128).

[8] These forms of tribal identification were part of the terms of settlement in Navajo Nation v. Brewer, CV 06-1575. They were precleared by the Department of Justice on May 22, 2008, (Doc. 774), and are currently an addendum to the Manual, (Trial Tr. 681). The next version of the Manual will include this addendum. Id.

1, 2006 (Coconino County); Pew Dep. 21-22, Aug. 1, 2006 (Apache County); Rodriguez Dep. 145-46, Aug. 2, 2006 (Pima County); Wayman-Trujillo Dep. 107-08, Jan. 9, 2008 (Yavapai County). But see Stallworth Dep. 32-33, Jan. 18, 2008 (Yuma County)). The counties are not required, however, to provide election mail, and their ability to do so is subject to budgetary constraints. (See Osborne Dep. 83-84, 86, Jan. 14, 2008; Wayman-Trujillo Dep. 108-09, Jan. 9, 2008).

ii. *Voting Early*

Proposition 200 did not change the requirements for voting early. Every registered voter is eligible to vote by early ballot. A.R.S. § 16-541. Proof of identification is not required to obtain or submit an early ballot. A.R.S. §§ 16-542, -547. An early ballot may be mailed or dropped off at a polling place by 7:00 p.m. on election day. A.R.S. § 16-548.

All counties also allow for in person early voting at certain polling places. No identification is required of early voters who wish to vote in person. (Trial Tr. at 689).

All early ballots, whether cast by mail or in person, are subject to signature verification, which the State and counties believe is sufficient to prevent voter fraud. (Trial Tr. 746; Rodriguez Dep. 151-52, Jan. 22, 2008; Hoyos Dep. 43-44, Jan. 16, 2008; Wayman-Trujillo Dep. 113, Jan. 8, 2008; Owens Dep. 111-12, Aug. 30, 2006; Dastrup Dep. 28, Aug. 1, 2006; Justman Dep. 35, Aug. 1, 2006; Hansen Dep. 70, Aug. 1, 2006; Pew Dep. 19, Aug. 1, 2006; Osborne Dep. 75, July 31, 2006).

C. Types of Ballots

There are three types of ballots provided for in person voting on election day: regular, provisional, and conditional provisional. (Ex. 4, at 129). The type of ballot issued depends upon what form of proof of identification is provided by the voter. Id.

i. *Regular Ballot*

If the voter's proof of identification matches the information on the voter rolls, the voter is issued a regular ballot. Id.

ii. *Provisional Ballot*

"If the name and address on the identification do not reasonably appear to be the same as the name and address on the signature roster or the photo does not reasonably appear to be the elector, then the elector shall not be issued a regular ballot, but shall be issued a provisional ballot." Id.; see also id. at 136. For example, if a person changes her name after marriage, but has not yet updated either the voter rolls or her identification, she will be issued a provisional ballot. (Trial Tr. at 708-09). In addition, if a voter presents one form of tribal identification, the voter is issued a provisional ballot. (Ex. 4, at 135).

If a voter casts a provisional ballot, the voter is not required to take additional steps. The county verifies that the voter's signature on the provisional ballot matches that on the voter rolls, and, as long as the voter did not already vote for that election, the voter's ballot is counted. (Ex. 4, at 164-65, 167-69).

iii. *Conditional Provisional Ballot*

If the voter presents only one form of non-photo identification or does not present any form of identification, the voter is issued a conditional provisional ballot. Id. at 129, 135.

If the voter casts the conditional provisional ballot, the voter must present proof of identification at certain designated locations within three-to-five days after the election, depending on the type of election. Id. at 135.

D. Availability and Cost of Proof of Citizenship

i. *Arizona Driver License and Non-Operating Identification Card*

A new Arizona driver license costs: $25.00 if the driver is between the ages 16 and 39; $20.00 if the driver is between the ages of 40 and 44; $15.00 if the driver is between the ages 45-49; and $10.00 if the driver is age 50 or older. (Ex. 676). A replacement or duplicate license costs $4.00. Id.

An Arizona non-operating identification card costs $12.00. Arizona Dep't of Transp., Motor Vehicle Div. ("MVD"), Frequently Asked Questions ("MVD FAQ") (last visited Aug. 3, 2008), http://www.azdot.gov/mvd/faqs/scripts/faqs.asp?section=dl#5. For persons age 65

or older, or anyone receiving federal Supplemental Security Income disability payments, there is no fee. A.R.S. § 28-3165(J); MVD FAQ.

Approximately 90% of voting-age Arizona citizens possess an Arizona driver's license. (Trial Tr. 706). There was no evidence regarding what portion of the remaining 10% had other forms of photo identification, including Arizona non-operating identification cards.

In order to obtain a new Arizona driver's license or non-operating card, an applicant must present identification consisting of either: (1) two documents, one of which has a photograph, or (2) three documents with no photograph. Arizona Dep't of Transp., MVD, Identification Requirements (last visited Aug. 4, 2008), http://mvd.azdot.gov/mvd/formsandpub/viewPDF.asp?lngProductKey=1410&lngFormInfoKey=1410. In either case, one of the documents must be considered a "primary" document. Id. (listing acceptable primary and secondary documents).

ii. *Birth Certificate*

In Arizona, a replacement birth certificate and a delayed birth registration costs $10.00. (Ex. 672, 675). To obtain a delayed birth certificate for a child who is 1-14 years of age, the following documentation must be provided: (1) an affidavit by someone with personal knowledge of when and where the child was born; (2) a document by an unrelated person that was established before the child was five years old stating the child's name, date of birth, place of birth, and the date the document was created; and (3) an independent factual document that establishes the mother's presence in Arizona at the time of the child's birth stating the mother's name, street address and date the document was created. (Ex. 672).

To obtain a delayed birth certificate for a child who is 15 years of age or older, the following documentation must be provided: (1) an affidavit by someone with personal knowledge of when and where the child was born; (2) a document by an unrelated person that was established before the child was ten years old stating the child's name, date of birth, place of birth, and the date the document was created; (3) an independent factual document

that was established at least five years prior to the application date stating the child's name, date of birth, place of birth, and the date the document was established; and (4) an independent factual document that establishes the mother's presence in Arizona at the time of the child's birth stating the mother's name, street address and date the document was created. Id. In other states, the cost and means of obtaining a birth certificate varies. (See Ex. 673).

iii. *Passport*

The cost for obtaining a passport book or card is $100 and $45, respectively. Dep't of State, Passport Fees (last visited Aug. 3, 2008), http://travel.state.gov/passport/get/fees/fees_837.html.

iv. *Certificate of Naturalization*

A replacement certificate of naturalization costs $380. Dep't of Homeland Security, U.S. Citizenship and Immigration Services, Instructions for N-565, Application for Replacement Naturalization/Citizenship Document (last visited Aug. 3, 2008), http://www.uscis.gov/files/form/N-565instr.pdf.

v. *Bureau of Indian Affairs Card, Tribal Treaty Card, or Tribal Enrollment Card*

Bureau of Indian Affairs and tribal treaty cards are not in use in Arizona. (Trial Tr. 474-75).

All tribes in Arizona, except the Havasupai Tribe and Navajo Nation,[9] issue tribal enrollment cards. (Id. at 483, 486; Ex. 1325). Cards issued by the Hopi Tribe, Yavapai-Apache Nation, and Tonto Apache Tribe do not include enrollment numbers. (Ex. 1325).

Tribal enrollment cards are free for most tribes. For the Hopi Tribe, the first card is free, and an additional card is $15. Id. For the Yavapai-Apache Nation, a card costs $5.00.

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[9] Navajo Nation is not a member of the Inter Tribal Council of Arizona, Inc., and was represented by separate counsel in this litigation. See Navajo Nation v. Brewer, CV 06-1575. It did not challenge Proposition 200's proof of citizenship requirement. (See Trial Tr. 483-84).

Id. And for the Colorado River Indian Tribe, the first card is free, and an additional card is $12.00. Id.

E. Verification of Proof of Citizenship

Photocopies of birth certificates, photocopies of U.S. Passports, tribal identification numbers, and naturalization certificates presented in person or via photocopy are accepted on their face without subsequent verification. (Ex. 4 at 48; Trial Tr. 700-01; Rodriguez Dep. 86-87, Jan. 22, 2008; Dean-Lytle Dep. 50, Jan. 16, 2008; Osborne Dep. 38-39, 50, Jan. 14, 2008; Wayman-Trujillo Dep. 63-65, Jan. 9, 2008; Rodriguez Dep. 68, 87, Jan. 22, 2008; Dean-Lytle Dep. 50, Jan. 16, 2008; Osborne Dep. 50, Jan. 14, 2008; Kanefield 19-21, Jan. 11, 2008; Marin Dep. 45-47, 113, Jan. 18, 2008).

A-numbers are verified using USCIS's online system called the Systematic Alien Verification for Entitlements Program (SAVE). (Ex. 4 at 47; Trial Tr. 735).

Driver's licenses and non-operating identification cards are verified using the Secretary of State's online voter registration system, VRAZ,[10] which collects voter registration information from the counties and compares the information about the registrants and existing voters against the MVD database. (Exs. 38, 165, 167, 307.)

VRAZ flags applicants whose Arizona driver's licenses were issued before October 1, 1996 or are coded "Type F." (Exs. 126, 153, 175). One thousand three hundred applicants were unable to register online due to attempts to use a license issued before October 1, 1996 or a Type F license. (Kanefield Dep. 30-31, Jan. 11, 2008). It is unclear how many of these applicants were subsequently able to register.

Since 1996, before issuing an Arizona license, the MVD has verified lawful presence, and, since 2000, it has issued Type F licenses to non-citizens who establish lawful presence. (Yanofsky Dep. 14, 34, Jan. 10, 2008). Thus, even though MVD is not charged with

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[10] VRAZ also checks voter registration information against the Social Security Administration database, as well as Arizona death records and records of felony convictions. (Exs. 38, 165, 167, 307).

monitoring citizenship, and even though some older licenses belonging to non-citizens may not be coded Type F, there is a reasonable relationship between the type of license issued and a person's citizenship status.

Because a license does not reflect whether it is Type F on its face, a recently naturalized citizen who uses a Type F license to register to vote may have to provide additional proof of identification. (Ex. 175). In such circumstances, a naturalized citizen has the option of obtaining an updated license by presenting a naturalization certificate to the MVD and pay a fee of $4, or registering to vote without incurring additional cost using a naturalization certificate. (Yanofsky Dep. at 65-66; Gage Dep. 90, Jan. 10, 2008).

F. Impact of Proposition 200

i. *Proof of Citizenship Requirement*[11]

Between January 2005 and September 2007, the number of applicants in 14 of Arizona's 15 counties[12] unable (initially) to register to vote because of Proposition 200 was 31,550.[13] (Ex. 883, Table 1; Trial Tr. 246).

Of these applicants, Plaintiffs' expert, Dr. Louis Lanier, estimated that 5,258, or 16.7%, were Latino, which was 2.8% higher than their representation in total number of registration applicants. (Ex. 883, Table 2). To arrive at this estimate, Dr. Lanier used a list of Latino surnames compiled by the U.S. Census Bureau known as the "Passel-Word List." (Trial Tr. 242). This list divides surnames into five categories based on the probability that they represent a Latino person. Id. Dr. Lanier assumed names listed as "heavily Hispanic" and "generally Hispanic" were surnames for Latino persons for purposes of his analysis. Id. Defendants' expert, Dr. Jeffrey Zax, did not assert that use of the Passel-Word List was an inappropriate means of predicting whether a person is Latino. (Trial Tr. 800).

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[11] ITCA Plaintiffs' expert, Dr. Ronald Sissons, testified in his deposition that 2% of Arizona's non-registered, voting eligible population did not have proof of citizenship. (Sissons Dep. 9, 10, Aug. 11, 2006). His deposition testimony was admitted at trial by stipulation of the Parties. (Doc. 1014).

Dr. Sissons testified to the same at the preliminary injunction hearing. (Prelim. Inj. H'rg Tr. 138-39, Aug. 30, 2006). The Court, however, did not then find this testimony reliable, and the Court does not find it reliable here. (See Doc. 219 at 9 ("The Court has reservations regarding the reliability of [Dr. Sisson's] statistics."); id. at 10 ("[T]he Court was not presented with sufficiently reliable information regarding the number of voters that do not have adequate forms of identification.")).

[12] This number does not include rejected voter registration forms from Santa Cruz County, which did not produce any forms, and did not include a portion of the rejected forms from Yuma County. (Trial Tr. 246-47).

[13] This number is exclusive of duplicate forms, forms with missing information, forms with "no" in the U.S. citizenship field, and forms with a registration date prior to January 1, 2005. (Trial. Tr. 242). The total inclusive of these forms is about 38,000. Id.

Most rejected applicants listed their birthplace in the United States: 86.6% of Latinos, and 92.9% of non-Latinos. (Ex. 885, Table 3).

By comparing the names on rejected voter registration forms to the voter rolls, Dr. Lanier determined if an applicant, initially unsuccessful, was ultimately able to register to vote through a later successful application. (Trial Tr. 244). Of the 31,550 applicants initially unable to register to voter, approximately 11,000, or 30%, were subsequently able to register to vote. (Trial Tr. 329). Of the approximately 20,000 applicants unable to register to vote, 4,013, or about 20%, were Latino. (Ex. 884, Table 2; Trial Tr. 835-36).

Assuming that everyone prevented from registering by Proposition 200 was allowed to register, i.e., Proposition 200 had not gone into effect, Dr. Lanier predicted that 13.8% of the electorate would have been Latino. (Ex. 883, Table 4). Using Dr. Lanier's data, Dr. Zax calculated the percentage of the electorate that was Latino with Proposition 200 in effect as 13.7%—a difference of 0.1%. (Trial Tr. 799). Using the same data and incorporating Dr. Engstrom's turnout date, Dr. Zax also calculated what the Latino voter turnout would have been in the 2006 general election for Secretary of State with and without Proposition 200. Id. at 831. The difference in the Latino voter turnout was 0.06%. Id.

Plaintiff's expert Dr. Rodolfo Espino examined the effects of Proposition 200 on the flow of voter registrations in Arizona and its individual counties. He examined the 941 days before and after the implementation of Proposition 200. (Trial. Tr. 377). Both Latinos and non-Latinos experienced a drop in their registration rates following the implementation of Proposition 200 when compared to the period before Proposition 200. (Trial Tr. 391). This drop is not unexpected because the period before Proposition 200 included the 2004 Presidential election, which was accompanied by a drastic increase in the number of voter registrations. (Ex. 879, Chart 1[14]).

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[14] Although Dr. Lanier, no longer relied upon the expert report in which this chart is included in reaching his conclusions in this case, (Trial Tr. 271), the Court finds reliable the portion of Chart 1 that reflects actual voter registrations, as opposed to predicted voter

Statewide, the percent drop in number of individuals registered to vote per week was 36.67% for Latinos and 35.75% for non-Latinos, a difference of 0.92%. (Trial Tr. 411; Def. Imp. Ex. 2, Table 3). On a county-by-county basis, the percent drop for Latinos was greater than that of non-Latinos in seven of Arizona's fifteen counties, specifically Apache, Gila, Graham, Greenlee, Pima, Santa Cruz, and Yuma. (Def. Imp. Ex. 2, Table 4; Trial Tr. 432-33). Examining the percent change in weekly registration rates before and after Proposition 200 based upon the regression slope, the decline in the rate of Latinos becoming registered to vote was worse than non-Latinos in five of fifteen counties, specifically Apache, Greenlee, Pima, and Santa Cruz. (Trial Tr. 421-23; Ex. 877, Table 1).

ii. *Proof of Identification*

In the 2006 primary, 2006 general, and the 2008 Presidential preference elections, 3,135,951 ballots were cast. (Trial Tr. 683-84). Of these, 4,194 ballots, or 0.13%, were uncounted due to lack of proof of identification. (Trial Tr. 318). Of the uncounted ballots, 461, or 11%, were Latino. Id. As of September 2007, Latino represented 12.3% of registered voters. (Ex. 886).

Regarding the 2006 general election for Governor specifically, Dr. Lanier estimated that Latinos comprised between 2.6% and 4.2% of the voters who turned out that day, but Latinos cast 10.3% of ballots that went uncounted because of insufficient identification. (Ex. 886).

Regarding the 2008 presidential preference election, in a non-scientific study, Maricopa County reported, of 897 conditional provisional ballots, 739 went uncounted. (Ex. 954). Of the 739 uncounted ballots, 129, or 17%, were Latino. Id. Maricopa County further noted that 12% of its registered voters were Latino. Id.

VI. Evidence of Voter Fraud in Arizona

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registrations.

In 2005, Maricopa County Recorder Helen Purcell referred 159 matters to the Maricopa County Attorney Andrew Thomas based on evidence that non-citizens had registered to vote. (Osborne Dep. Ex. 3 at 4, July 31, 2006). In August 2005, Thomas announced that ten non-citizens had been charged in felony criminal complaints for falsely filing voter registration forms claiming they were in fact United States citizens, four of which had voted in an election. Id.

Maricopa County Elections Director Karen Osborne also testified to voter registration organizations, which are paid on a per-registration-form basis, submitting "garbage" voter registration forms and misleading non-citizen residents into registering to vote. (Osborne Dep. 16-28, 18-30, 70, Jan. 14, 2008).

In Pima and Maricopa counties, 208 individuals had their voter registrations cancelled after they swore under oath to the Jury Commissioner that they were not citizens, 56 of whom are alleged to have voted in a election. (Exs. 1108, 1351).

Pima County has also referred several instances of non-citizens either attempting to register to vote or cast votes to the Pima County Attorney. (Ex. 1108 at 2-3 & ex. A).

Yuma County Voter Registration Coordinator Krysty Marin testified that a woman who was not a citizen and who registered to vote right before the 2004 election. (Marin Dep. 98-99, 101-04, Jan. 18, 2008). Yuma County was able to identify her as a non-citizen because her license subsequently showed up as Type F. Id. at 98. Fortunately, she did not vote and has since cancelled her voter registration. Id. at 102. After talking with this woman, Marin believes she was a victim of an unscrupulous voter registration organization. Id. at 99, 103.

In addition, Defendants have introduced court records for nine persons prosecuted for illegal voting and presentment of false instrument for filing. Ex. 1349a-g,y-z. According to

the charging papers, five of the nine were alleged to be non-citizens that had in fact voted.[15] Ex. 1349a,c,d,e,f,g. Of the five, four pleaded guilty. Id.

V. Plaintiffs

A. Gonzalez

i. *Individual Plaintiffs*

There are four individual plaintiffs: Jesus Gonzalez, Bernie Abeytia, Georgia Morrison-Flores, and Debra Lopez.[16] Abeytia did not testify at trial.

a. Jesus Gonzalez

Jesus Gonzalez was born in Mexico and is Latino. (Trial Tr. 221-22). He became a naturalized citizen on August 18, 2005. (Id.; Ex. 711). After the naturalization ceremony, he applied to register to vote using the number from his certificate of naturalization, rather than his alien registration number, as proof of citizenship, which is what the voter registration form at the time required. (Trial Tr. 222-23; Ex. 712).

His application was denied for failure to provide proof of citizenship. (Ex. 712).[17] The letter of denial specified that satisfactory evidence of citizenship included the A-number on the naturalization certificate. Id. Jesus Gonzalez's naturalization certificate bears a series of numbers beginning with an "A." (Ex. 711). In addition, attached to the letter was Jesus Gonzalez's voter registration application with his certificate of naturalization number crossed out, and a notation "A#" written above.

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[15] The act of registering to vote by a non-citizen is a class six felony. A.R.S. §§ 16-182, 39-161. If that person also votes, the offense is a class five felony. A.R.S. § 16-1016.

[16] Naeem Abdul-Kareem, Luciano Valencia, and Maria Gonzalez were dismissed on June 27, 2008. (Doc. 883).

[17] Although the trial exhibit was in English, and Jesus Gonzalez cannot read English, he testified that the letter arrived in Spanish (for an example, see Ex. 697) and in English. (Trial Tr. 230).

In October 2006, Jesus Gonzalez tried to register again online at EZ Voter Registration, https://servicearizona.com/webapp/evoter/, using his Arizona driver's license. (Trial Tr. 220, 225, 235). His application was denied because his Arizona driver's license was issued to him before October 1, 1996. Id. at 225.

Jesus Gonzalez has a U.S. passport, issued November 8, 2006, which he purchased for $112.95. (Exs. 709-10). He purchased the passport to travel to and from Mexico, rather than to register to vote. (Trial Tr. 232).

There is no dispute that Jesus Gonzalez possess the documentation required to establish proof of citizenship to register vote—he has a naturalization certificate with an A-number and a U.S. passport.

b. Georgia Morrison-Flores

Morrison-Flores was born in Yuma, Arizona. (Morrison-Flores Dep. 12, Jan. 17, 2008). She got married on July 5, 2003. Id. Prior to her marriage, her name was "Georgia Morrison-Vasquez." Id. at 14. She registered to vote in 2004 under the name "Georgia Flores-Morrison." Id. at 34, 36-38, 41-42. It appears that she accidentally filled out the form incorrectly: it should read "Georgia Morrison-Flores." Id. at 41-42; see also Doc. 617, Ex. 21. There is no evidence that she has tried to correct her name on the voter rolls.

Morrison-Flores receives monthly bank statements from SunBank. Id. at 22-23. She also still has the voter registration card that she received from the Yuma County elections department after registering to vote in 2004. Id. at 41, 77. She also has received sample ballots from Yuma County. Id. at 65.

On November 7, 2006, she attempted to vote at her polling place using her license as proof of identification, but was not allowed to because the name on her license at the time was "Georgia Morrison-Vasquez," which did not match the name on the voter rolls, "Georgia Flores-Morrison." Id. at 43-44. She was not offered a provisional ballot. Id. at 45-46.

In April 2007, she went to an office of the MVD and updated her name in their records to reflect her married name. Id. at 48-49. Morrison-Flores' current drivers' license reads "Georgia Morrison-Flores." Id. at 51.

Morrison-Flores can correct the name on the voter rolls for free. Once she does this, she has the proof of identification required in order to vote in person on election day.

c. Debra Lopez

Lopez is a consultant, creating grass-root strategies for non-profit political and corporate clients. (Trial Tr. 605). For example, she worked for the Latino Vote Project and the Southwest Voter Registration Education Project. Id. at 619. She has been registering voters since she was 18 years old, as part of her employment and on a volunteer basis, and does so every chance that she gets. Id. at 606. She volunteers at festivals and fiestas, and conducts impromptu registration using registration forms she keeps in her car. Id. She focuses on registering Latino voters. Id. at 607. She herself is registered to vote, and she possesses sufficient voter identification to vote in person on election day. Id. at 617, 618.

Prior to Proposition 200, Lopez said she could register every person that wanted to register. Id. at 610, 621. After Proposition 200, it is more difficult for her because people she encounters sometimes do not carry the necessary documentation on their persons. Id. at 612. In addition, if the documents have to be photocopied, such as a birth certificate or passport, she has to bring a photocopy machine and rent a generator to run it. Otherwise, she tries to obtain copies on the person's behalf, or to explain to the person how to obtain photocopies. Id. at 612-13, 623. Her personal expenditures related to Proposition 200 involved time, gas, and photocopies. Id. at 622-23.

She did not identify any particular individuals who cannot register due to Proposition 200.

ii. *Organizational Plaintiffs*

The Gonzalez organizational plaintiffs include: Chicanos Por La Causa, Valle Del Sol, Association of Community Organizations for Reform Now, Arizona Hispanic Community

Forum, Friendly House, Project Vote, Southwest Voter Registration Education Project, and Common Cause. Only Chicanos Por La Causa and Valle Del Sol testified at trial.

a. Chicanos Por La Causa ("CPLC")

Vice President of Human Resources Salvador Martinez testified on CPLC's behalf. (Trial Tr. 551-52). CPLC is a statewide, community-based organization. Id. Its mission is to advocate on behalf of those individuals that are disenfranchised and to provide services for those unable to provide for themselves. Id. at 552. As part of that mission, it conducts voter registration, outreach, and education. Id. at 552-53.

Martinez testified that Proposition 200 is "somewhat burdensome" on CPLC. He stated that it has made voter registration more expensive because CPLC has to makes copies of registrants' documents, and more manpower is required. Id. at 554-55. In addition, Martinez testified that CPLC had to create and copy for distribution several documents because of Proposition 200 in order to educate CPLC's personnel and constituents about the new law's requirements. Id. at 557-58; Exs. 538, 563, 566, 569, 570. Only one of these documents, though, mentions Proposition 200's requirements. (Ex. 538).

Martinez testified that CPLC incurred $7,000 related to copying, *et cetera*, and unspecified labor costs because of Proposition 200. (Trial Tr. 566). No documentation was provided supporting these costs, nor was there evidence that these costs were due to Proposition 200, as opposed to its general voting expenditures.

When registering voters, Martinez encountered only two people who wished to register, but did not have the requisite proof of citizenship on their person. (Trial Tr. 559-60). He did not testify that they did not have proof of citizenship, merely that they did not have it with them. He instructed the first person to go home and return with the documents. Id. at 560. The person did not return, and Martinez does not know if he ever registered to vote. Id. at 561. Martinez drove the second person home to obtain the documents because that person did not have transportation. Id. at 560. Martinez testified that one of these persons was Latino, but did not testify whether either was a member of CPLC. Id. at 573.

b. Valle Del Sol ("Valle")

President and Chief Executive Officer Luz Sarmina testified on behalf of Valle. (Trial Tr. 490-91). Valle is a nonprofit community based organization, which focuses its services on the Latino community. Id. at 490. Its mission is to inspire positive change through its behavioral health services, family support services, and Latino leadership development program. Id. at 490-91, 498. Although Valle seeks to promote civic engagement through voter registration, voter registration is not one of its core businesses. Id. at 492-93.

Sarmina testified that Proposition 200 has had "not a huge impact but an impact" on Valle. Id. at 498, 500. She stated that voter registration is more expensive post Proposition 200 because of the copying and additional staff time dedicated to training voter registrars and registrants. Id. at 498, 500, 514; see also Exs. 541-45. She also testified that, when trying to register voters, Valle has encountered people that did not have the necessary proof of citizenship on their person. (Trial Tr. 500). In such instances, Valle advised the person to get the documents and bring them back for photocopying, or, if the person did not have documentation, Valle worked with the person to try to get documentation. Id. at 501-02. In its interrogatory answers, Valle states that it has incurred $11,047 in costs due to Proposition 200, (Ex. 1304), but did not provide any supporting documentation at trial.

Sarmina did not testify that a member of Valle did not or does not now possess proof of citizenship.

B. ITCA

i. *Individual Plaintiff*: Representative Steve Gallardo

Representative Steve Gallardo has been a member of the Arizona House of Representatives since 2002. (Trial Tr. 175). He is the minority whip for the House Democrats, and is Latino. Id. at 175, 190. The district that he represents, District 13, comprises parts of the Cities of Glendale, Phoenix, Tolleson, and Avondale, and the community of Cashion. Id. at 175-76. The voting age population in his district is majority

Latino. Id. at 176. Representative Gallardo is running for reelection this year for another two year term, and has qualified for the primary ballot. Id.

Representative Gallardo has also been an at-large member of the Phoenix Union High School Governing Board since 2004. Tr. 176-77. The high school district he represents covers the City of Phoenix, which contains over a million people, and is majority Latino. Id. at 177. Again, he is running for reelection this year for another four year term. Id. at 177-78.

Representative Gallardo was reelected to his House seat in 2006—after the implementation of Proposition 200. Id. at 189. Also he testified that, as a candidate, if he wants his constituents to vote for him, he needs to notify them about the acceptable forms of identification. Id. at 186. He is not aware, however, of any specific person who has been unable to register to vote or that would vote for him but cannot because of Proposition 200. Id. at 180, 198, 201.

ii. *Organizational Plaintiffs*

The ITCA organizational plaintiffs include: Inter Tribal Council of Arizona, Inc., Arizona Advocacy Network, League of Women Voters of Arizona, Hopi Tribe, and League of United Latin American Citizens. The Hopi Tribe and the League of United Latin American Citizens did not testify.

a. Inter Tribal Council of Arizona, Inc. ("ITC")

Executive Director John Lewis testified on behalf of ITC. (Trial Tr. 443-44). ITC comprises the highest elected tribal officials of 20 of the 22 tribes located in Arizona, not including the Navajo Nation. Id. at 444, 447; Ex. 1190. Its purpose is to work collectively on common issues that face them as tribal governments. Id. at 444. As part of that purpose, ITC seeks to promote American Indian voting rights and provides voter education programs for tribe members. Id. at 444-45, 470-71.

He testified tribal members were less likely to possess birth certificates, especially members over the age of 40, and driver's licenses due to lack of access to health care and economic conditions. (Trial Tr. 457-60, 472-74).

Lewis said, however, that neither he nor ITC was aware of any tribal member who lacks satisfactory evidence of citizenship to register to vote. Id. at 486-87, 489; see also Ex. 1311.

b. Arizona Advocacy Network ("AzAN")

Executive Director Linda Brown testified on AzAN's behalf. (Trial Tr. 581). AzAN's mission is to promote social, economic, and environmental justice by increasing civic participation. Id. To advance its mission, AzAN conducts voter registration. Id. at 582.

AzAN is affiliated with a national group called USAction Education Fund ("USAction"), one of the nation's leading organizations in nonpartisan voter registration. Id. at 584. AzAN has a contract with USAction to register a certain number of voters; their current goal is 5,000 voters for the 2008 Presidential election. Id. at 584, 585. AzAN is paid by USAction based on the number of confirmed registrations. Id. at 584.

AzAN spent $19,025 in polling place monitoring over the four elections held in 2006. (Trial Tr. 588; Ex. 1223). Brown personally monitored some polling places during two elections, during which she offered voters a "voter bill of rights" drafted by AzAN, describing, among other things, the proof of identification options. (Trial Tr. 588). AzAN spent $2,298 in printing costs for the voter bill of rights. (Ex. 1223).

Brown said that, because of Proposition 200, it takes more people more time to register each voter as compared to a state without identification requirements. Id. at 586. For example, in AzAN's 2008 projected voter registration budget, the cost per voter registered is estimated as between $9.28 and $12.21 in Arizona, as opposed to a typical state where it is between $7.08 and $7.81 per voter registered, which is a total cost difference of $11,000-22,000. (Ex. 1223). This reflects Brown's belief that, in Arizona, AzAN can register 6-10 persons in a four-hour shift in Arizona, as opposed to 15-20 per shift in other states. (Trial Tr. 586). As part of its efforts, AzAN also seeks to help recruit 120 poll

workers for the counties and conduct supplemental training focusing on Proposition 200's requirements. Id. at 602.

AzAN also has projected that it will spend $40,440 on election protection efforts for the 2008 general election. Id. Brown projected that all of this cost is attributable to Proposition 200. (Trial Tr. 601). This testimony is not particularly reliable, however, because AzAN conducted election related efforts before Proposition 200.

While conducting registration since Proposition 200's implementation, Brown encountered four people that were unable to register because they lacked proof of citizenship on their person. Id. at 583-84. She did not testify whether these people were members of AzAN.

c. League of Women Voters of Arizona (the "League")

President Bonnie Saunders, Ph.D., testified on behalf of the League. (Prelim. Inj. H'rg Tr. 116, Aug. 30, 2006). One of the League's primary goals is to promote voter participation. Id. Prior to Proposition 200, it conducted voter registration drives at parents' night in local schools and other venues. Id. at 118-21. After Proposition 200, it did not register voters, but merely passed out voter registration forms. Id. at 122-23. The League decided it would not take responsibility for peoples' drivers license numbers or making photocopies of other identification documents. Id. Saunders did not testify as to whether any member of the League did not possess proof of citizenship.

V. Defendants

Defendants comprise the State of Arizona, the Arizona Secretary of State, Jan Brewer, in her official capacity (collectively, the "State"), the County Recorder and County Director

of Elections of every county in Arizona in their official capacities[18] (collectively, the "Counties"). (Doc. 352; ITCA, Doc. 1).

VI. Lay Testimony by Non-Parties

A. Maria Gonzalez

Maria Gonzalez is a former Gonzalez plaintiff; she was dismissed for lack of standing on June 27, 2008. (Doc. 883). She was born in Mexico, and she became a naturalized citizen on August 18, 2005. (Trial Tr. 207; Ex. 715). After the naturalization ceremony, she applied to register to vote using the number from her certificate of naturalization, rather than her A-number, as proof of citizenship, which was required by the voter registration form at the time, now amended to allow the A-number. (Trial Tr. 207; Ex. 711).

Her application was denied for failure to provide proof of citizenship. (Ex. 697). But the letter she received in Spanish and English specified satisfactory evidence of citizenship included the "A-number" on the naturalization certificate. Id. Maria Gonzalez's naturalization certificate bears a series of numbers beginning with an "A." (Ex. 715). In addition, attached to the letter was Maria Gonzalez's voter registration application with her certificate of naturalization number crossed out, and a notation "A#" written above." (Ex. 697).

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[18] The specific persons are: Maricopa County Recorder Helen Purcell and Maricopa County Elections Director Karen Osborne; Apache County Recorder LeNora Johnson and Apache County Elections Director Penny L. Pew; Cochise County Recorder Christine Rhodes and Cochise County Elections Director Thomas Schelling; Gila County Recorder Linda Haught Ortega and Gila County Elections Director Dixie Mundy; Graham County Recorder Wendy John and Graham County Elections Director Judy Dickerson; Greenlee County Recorder Berta Manuz and Greenlee County Elections Director Yvonne Pearson; La Paz County Recorder Shelly Baker and La Paz County Elections Director Donna Hale; Mohave County Recorder Joan McCall and Mohave County Elections Director Allen Tempert; Pima County Recorder F. Ann Rodriguez and Pima County Elections Director Brad R. Nelson; Santa Cruz County Recorder Suzie Sainz and Santa Cruz County Elections Director Melinda Meek; Yavapai County Recorder Ana Wayman-Trujillo and Yavapai County Elections Director Lynn A. Constabile; and Yuma County Recorder Susan Hightower Marler and Yuma County Elections Director Patti Madrill.

In October 2006, Maria Gonzalez attempted to register again at EZ Voter Registration, https://servicearizona.com/webapp/evoter/, using her Arizona driver's license issued in 2005, and was successful. (Trial Tr. 214, 219-20). Thus, she is registered to vote in the 2008 Presidential election.

B. Agnes Laughter

Agnes Laughter is a former Navajo Nation plaintiff, which case was dismissed by stipulation on May 27, 2008. (Doc. 775). She was born Jane Begay in Chilchinbeto, located on the Navajo Nation reservation in Arizona. (Laughter Dep. 9, Oct. 19, 2006). She was born at home in a hogan, and is 74 years old. Id. She is now registered to vote, id. at 14-15, and has a certificate of Indian blood and a bank statement as voter identification. (Doc. 435, Ex. 9). Therefore, Laughter can vote in person on election day.

C. Shirley Preiss

Shirley Preiss, who, by stipulation, is not Latina, was born Shirley Meshew on August 17, 1910 in Clinton, Kentucky. (Trial Tr. 82; 89-90). She was born at home rather than a hospital, and was not issued a birth certificate. Id. at 83. She did not testify that she is American Indian.

Preiss moved to Arizona about three years ago. Id. at 84. She is cared for by her son and has made efforts to register to vote in Arizona, but has been unsuccessful because she does not possess the proof of citizenship required by Proposition 200. Id. at 87. She has tried to obtain a delayed birth certificate from Kentucky, but has also been unsuccessful in this pursuit. Id. at 83. She does not have an Arizona driver or nonoperating license, nor a passport. Id. at 87, 88.

D. Donna Fulton

In late 2007, Fulton moved from Safford, Arizona in Graham County, where she was a registered voter, to Eloy, Arizona in Pinal County. (Ex. 968). She did not testify whether she is either Latina or Native American. In December 2007, she completed a new voter registration form and mailed it to the Pinal County Recorder's Office. Id.

On February 5, 2008, Fulton attempted to vote in the Presidential preference primary election, but the poll worker could not find her name on the Pinal County voter roll. Id. After showing proof of identification with her current address, Fulton cast a conditional provisional ballot. Id. She reports that the poll worker did not instruct her to return to the County Recorder's Office to provide her identification again. Id.

Approximately one month after the election, Fulton received a letter in the mail stating that her ballot was not counted because she failed to provide proof of citizenship. Id.

Assuming the veracity of Fulton's testimony, County Defendants state that Fulton should have been issued a provisional ballot, rather than a conditional provisional ballot, and her ballot was improperly not counted. (Doc. 1031, at 4).

E. Brenda Rogers

Rogers lives on the Gila River Reservation, and is registered to vote in Pinal County. (Ex. 967). She did not testify whether she is either Latina or Native American. Rogers' driver's license does not reflect her current address. Id. Although her home does not have a street address, her registered voter address is Gila River Dist 4B, Sacaton, Arizona 85247. Id. Rogers receives mail at P.O. Box 13493, Chandler, Arizona 85248, which is also on her voter record.

On February 5, 2008, Rogers says she attempted to vote in the Presidential preference primary election. Id. She showed her voter registration card and driver's license. Id. The poll workers found her on the voter rolls but said that she had to vote a conditional provisional ballot because the address on her driver's license did not match her registered voter address. Id. Rogers cast a conditional provision ballot. Id.

Assuming the veracity of Rogers's testimony, County Defendants state that Rogers should have been issued a provisional ballot, rather than a conditional provisional ballot, and her ballot was improperly not counted. (Doc. 1031, at 4).

STANDARD OF REVIEW

To secure a permanent injunction, "[a] plaintiff must demonstrate: (1) [] it has suffered an irreparable injury; (2) [] remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) [] considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) [] the public interest would not be disserved by a permanent injunction." eBay Inc. v. MercExchange, L.L.C., 126 S.Ct. 1837, 1839 (2006). This burden must be demonstrated by a preponderance of the evidence. Walters v. Reno, 145 F.3d 1032, 1048 (9th Cir. 1998).

LEVEL OF SCRUTINY FOR CONSTITUTIONAL CLAIMS

I. Constitutional Challenges to Election Laws Generally

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" Burdick v. Takushi, 504 U. S. 428, 433 (1992) (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U. S. 173, 184 (1979)). Nonetheless, "'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" Id. (quoting Storer v. Brown, 415 U. S. 724, 730 (1974)); see also U.S. Const. Art. I, § 4, cl. 1 ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof . . . ."). "This [regulatory] power is not absolute, but is subject to the limitation that [it] may not be exercised in a way that violates . . . specific provisions of the Constitution.'" Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1992 (2008) (quoting Williams v. Rhodes, 393 U.S. 23, 29 (1968)).

Because of these competing interests, the Supreme Court has adopted a sliding-scale balancing approach for analyzing election laws. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1615-16 (2008); id. at 1624-25 (Scalia, J., concurring); id. at 1628 (Souter, J., dissenting); Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1191 (2008). Election regulations that impose a severe burden on constitutional rights are subject

to strict scrutiny. Wash. State Grange, 128 S. Ct. at 1191. "If a statute imposes only modest burdens, however, then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." Id. (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). That said, if the state's interest is unrelated to voter qualifications, the regulation likely will be struck down no matter how slight its burden. See Crawford, 128 S. Ct. at 1615-16; Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966).

Finally, in applying this approach, the Court is reminded, "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Reynolds v. Sims, 377 U. S. 533, 562 (1964).

II. Facial Versus As Applied Constitutional Challenges

Whereas a facial challenge seeks to invalidate a statute in all of its applications, an as applied challenge argues that the law is unconstitutional as applied to the plaintiff even though the law may be capable of valid application to others. See Foti v. City of Menlo Park, 146 F.3d 629, 635 (9th Cir. 1998) (discussing the difference between facial and as applied challenges).

Although the standard to be applied to a facial challenge is a subject of debate among the Justices of the Supreme Court, they do agree "a facial challenge must fail where the statute has a 'plainly legitimate sweep.'" Crawford, 128 S. Ct. at 1623 (quoting Washington State Grange, 128 S. Ct. at 1190).

ANALYSIS

I. Equal Protection: Undue Burden on the Fundamental Right to Vote

Plaintiffs, except the Hopi Tribe and ITC, assert Proposition 200's proof of citizenship and identification provisions impose an unconstitutional burden on the fundamental right to vote. The Hopi Tribe and ITC only challenge the proof of citizenship provision. ITCA

Plaintiffs' claims are facial and as-applied challenges, while Gonzalez Plaintiffs' claims are as-applied challenges only.

A. Strict Scrutiny is Not Appropriate.

Strict scrutiny of Proposition 200 is not warranted because Plaintiffs have failed to demonstrate that the character and magnitude of the asserted injury excessively burdens the right to vote.

i. The Burden on Naturalized Citizens Is Not Excessive.

Gonzalez Plaintiffs assert that naturalized citizens suffer an excessive burden under Proposition 200 because they have to "register twice or appear in person at the Recorder's Office to register to vote." (Doc. 1033, at 6). To the extent that some applicants had to register twice immediately following Proposition 200's implementation when they used their naturalization certificate number to provide proof of citizenship, current and future applicants do not.

Proposition 200 allows applicants to use "the number of the certificate of naturalization" to register. A.R.S. § 16-166(F)(4). There are two numbers on a certificate of naturalization, however: (1) a number with the heading "No."; and (2) a number with the heading "INS Registration No.," which begins with the letter A. No system exists, on the federal or state level, to verify the former. There is a federal system in place, SAVE, that verifies the latter. Given the clear requirement of Proposition 200 to verify "the number" with USCIS, id., election officials reasonably interpreted Proposition 200 to require an applicant to provide the A-number. See A.R.S. § 1-221(B) ("Statutes shall be liberally construed to effect their objects and to promote justice."); Berger v. City of Seattle, 512 F.3d 582, 597 (9th Cir. 2008) ("We give due consideration to the government's interpretation and past application of its rule.").

Prior to realizing that the number with the heading "No." is not verifiable, the voter registration forms revised immediately following Proposition 200's implementation asked for the certificate of naturalization number. As a result, some applicants, such as Maria and

Jesus Gonzalez, who correctly filed out their voter registration form by providing the number beginning with "No." were denied registration, and they had to try to register a second time.

The registration form, however, has now been revised to clearly require the A-number, which is verifiable. Thus, although some applicants unfortunately had to register twice immediately following Proposition 200's implementation, current and future applicants will not suffer the same impediment in the upcoming 2008 election. See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983) (noting that a prospective injunction requires the threat of future harm). Again, a "[plaintiff] must show a very significant possibility of future harm because he seeks injunctive relief." Mortensen v. County of Sacramento, 368 F.3d 1082, 1086 (9th Cir. 2004) (internal quotation marks omitted).

Moreover, if a newly naturalized citizen uses a Type F license to register to vote and is required to provide additional proof of citizenship, the applicant merely has to file a new form to register using his or her A-number. While inconvenient, this is hardly a severe burden. As the Supreme Court recently explained, "the inconvenience of making a trip to the [Bureau of Motor Vehicles], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." See Crawford, 128 S. Ct. at 1621.

Further, a naturalized citizen does not have to appear in person at the Recorder's Office to register to vote. An applicant may provide a license number, a photocopy of a U.S. passport, or an A-number to register without appearing in person.

In addition, if the applicant elects to forgo these options and to instead use the certificate of naturalization form to register to vote, several counties accept photocopies of naturalization certificates. (See Dean-Lytle Dep. 53, Jan. 16, 2008 (Pinal County); Marin Dep. 112, Jan. 18, 2008 (Yuma County); Osborne Dep. 38-39, Jul. 1, 2006 (Maricopa County); Hansen Dep. 27, Aug. 1, 2006 (Coconino County); Rodriguez Dep. 63, Aug. 2, 2006 (Pima County)). Contrary to Plaintiffs' assertion, accepting a photocopy of a

naturalization certificate is not forbidden by the Manual. (See Ex. 4, at 48). The Secretary of State's representative, Joseph Kanefield,[19] specifically testified that a county recorder is not violating the Manual by accepting photocopies. (Trial Tr. 756). Accordingly, it is the applicant's choice to travel to the county recorder to present a naturalization certificate.

Naturalized citizens do not suffer an excessive burden due to Proposition 200.

ii. The Burden on Arizona Citizens as a Whole Is Not Excessive.

Of the approximately 20,000 voters ultimately unable to register to vote due to Proposition 200's proof of citizenship requirement, Plaintiffs have not presented any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to attain it. See Crawford, 128 S. Ct. 1620 ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of [the voter identification statute."). Indeed, they have only produced one person, Shirley Preiss, who is unable to register to vote due to Proposition 200's proof of citizenship requirement. Nor have they demonstrated that the persons rejected are in fact eligible to register to vote.

Regarding Proposition 200's proof of identification requirement, Plaintiffs have not produced a single person who lacks proof of identification. In addition, individuals who lack proof of identification may vote early without providing identification, even on the day of the election itself.

Of the over 3 million ballots cast in the 2006 primary, 2006 general, and the 2008 Presidential preference elections, only 4,194 ballots, or 0.13%, were uncounted due to lack of proof of identification. County Defendants have admitted, two of these ballots, Fulton and

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[19] Joseph Kanefield is the Director of the Election Services Division of the Secretary of State's office. (Trial Tr. 644). His testimony both at trial and deposition demonstrates the significant efforts the Secretary of State's office has taken to liberally construe questions raised regarding the right of an elector to vote in favor of allowing the elector to vote.

Rogers, went uncounted by mistake, but Plaintiffs have not presented any evidence that the remaining 4,192 persons were in fact eligible to vote.[20]

Very recently, in Crawford, the Supreme Court found that Indiana's voter identification law did not deserve strict scrutiny. 128 S. Ct. at 1623. Plaintiffs seek to distinguish Crawford on the grounds that the plurality stated: "The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in Harper, if the State required voters to pay a tax or a fee to obtain a new photo identification," essentially a poll tax. Id. at 1620-21. Harper involved a poll tax unrelated to voter qualifications and is distinguishable. 383 U.S. at 666. Proposition 200's requirements go directly to voter qualifications: whether a registrant is a U.S. citizen, and whether an in person voter is who he or she says he or she is. Moreover, as the dissent in Crawford noted, the "free" identification provided by Indiana is a hollow promise, as obtaining the documents necessary to get the "free" identification require the payment of a fee. See 128 S. Ct. at 1631. The Court is bound by the Ninth Circuit's holding on appeal of this case that Proposition 200 is not a poll tax even though some Arizonans may be required to spend money to obtain necessary documents.[21] Gonzalez, 485 F.3d at 1048.

Proposition 200's burden on Arizona citizens as a whole is not excessive.

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[20] Although that Defendants admit that mistakes occurred and can occur in applying Proposition 200 at the polls, especially when it was new, they endeavor to "make it very clear to poll workers that under no circumstances is someone ever to be turned away from the polls without voting." (Trial Tr. 728). In addition, if it was brought to their attention that a poll worker misunderstood or was misapplying Proposition 200's requirements, they quickly tried to remedy the problem. Id.; Ex. 409.

[21] The Court is also bound by its prior holding that Proposition 200 does not constitute a poll tax. See Ingle v. Circuit City, 408 F.3d 592, 594 (9th Cir. 2005) ("Under the law of the case doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case."); Docs. 611 & 330.

Because neither the burden on naturalized citizens nor Arizonans generally is excessive, Plaintiffs' challenges are not subject to strict scrutiny. See id. at 1623.

B. Defendants' Interests in Prevention of Voter Fraud and Maintaining Voter Confidence in the Electoral System Are Important.

Defendants have asserted two interests to justify Proposition 200's burden on voters and potential voters: (1) prevention of voter fraud; and (2) maintaining voter confidence.

a. Voter Fraud

Although an evidentiary showing of fraud is not required to find a government's interest in preventing voter fraud to be important, id. at 1617 (deterring in person voter fraud an important state interest despite no evidence of fraud occurring in Indiana), the Defendants demonstrated instances of voter fraud in Arizona. See supra, Section V. In addition, in Crawford, the Supreme Court detailed examples of voter fraud in other states, supporting Defendants' assertion that voter fraud is a legitimate and real concern. 128 S. Ct. at 1619.

As the Supreme Court explained:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.

Id.; see also Purcell, 549 U.S. at 7 ("A state indisputably has a compelling interest in preserving the integrity of its election process.").

Defendants' interest in preventing voter fraud is an important governmental interest in Arizona.

b. Voter Confidence

Defendants also assert that they have an interest in protecting voter confidence in the electoral system. "While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." Id. at

1620; see also Purcell, 549 U.S. at 7 ("Confidence in the integrity of our electoral process is essential to the functioning of our participatory democracy.").

Defendants' interest in protecting voter confidence is an important governmental interest in Arizona.

C. Defendants' Important Interests Outweigh the Modest Burden on the Right to Vote Imposed by Proposition 200.

Because Plaintiffs have not demonstrated that Proposition 200 is excessively burdensome, "the State's important regulatory interests are [] sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." Wash. State Grange, 128 S. Ct. at 1191 (internal quotation marks omitted); see also Crawford, 128 S. Ct. at 1623.

Proposition 200 enhances the accuracy of Arizona's voter rolls and ensures that the rights of lawful voters are not debased by unlawfully cast ballots. See Commission on Federal Election Reform, Report, Building Confidence in U.S. Elections 18 (Sept. 2005) ("The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or confirm the identity of voters."). As such, Plaintiffs' challenge must fail. See Crawford, 128 S. Ct. at 1623; id. at 1627 (Scalia, J., concurring in the judgment).

II. Equal Protection: Discrimination Against Naturalized Citizens

Gonzalez Plaintiffs contend Proposition 200's proof of citizenship requirement violates the Equal Protection Clause by discriminating against naturalized citizens. To establish an equal protection claim for discrimination, "a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001). To show intentional discrimination, "a plaintiff must establish that 'the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Rosenbaum v. City and County of San Francisco, 484 F.3d 1142, 1153 (9th Cir. 2007) (quoting Wayte v. United States, 470 U.S. 598, 610 (1985)); see also Thornton v. Ctiy of St.

Helens, 425 F.3d 1158, 1167 (9th Cir. 2005) ("Mere indifference to the effects of a decision on a particular class does not give rise to an equal protection claim.").

Gonzalez Plaintiffs offer only three facts to show discriminatory intent.[22] First, Proposition 200's "findings and declaration" state:

> This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration.

Ex. 1. Second, Proposition 200 allows photocopies of an applicant's birth certificate and passport, but not certificate of naturalization. Id. And third, Proposition 200 states, "if only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate is verified . . . ." Id.

However, these facts do not establish intentional discrimination by a preponderance of the evidence. Proposition 200's findings and declaration does not demonstrate that the voters in Arizona approved Proposition 200 because of its adverse effects upon naturalized citizens. Rather, the findings and declaration shows a concern with illegal immigrants, not with naturalized citizens. Moreover, unlike a finding or declaration in a bill vetted by Congress, Arizona voters did not have any input into its specific language, which weakens its evidentiary value as to the electorate's intent. Cf. Arlington Cent. School Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 312-13 (2006) (Souter, J., dissenting) (arguing that when members of the House and Senate met in conference to work out differences and then

[22] Although the admitted exhibits showed that, as anticipated problems, surfaced regarding Proposition 200's implementation, the response by the State and County Defendants was consistent and immediate. There is no evidence of a purposeful misapplication of Proposition 200's requirements or and intent to discriminate in its application.

produced a joint conference report that was subsequently adopted by the Senate and House, it is probative of Congress's intent).

The second fact also fails to establish that Arizona voters approved Proposition 200 because of its adverse effects upon naturalized citizens. An applicant need only present the certificate of naturalization in person if the applicant chooses not to write down the A-number on the voter registration form. In fact, federal law criminalizes the photocopying of certificates of naturalization without lawful authority. 18 U.S.C. § 1426(h).[23]

Finally, Plaintiffs argue that the third fact evidences discriminatory intent because "only naturalized citizens are subject to third-party verification." (Doc. 1029, at 4). This is not strictly true because naturalized citizens can use their driver's license or passport to register to vote, and, if they present their naturalization certificate in person, verification is not required.[24]

Importantly, the Help America Vote Act already requires Arizona driver's licenses to be verified, so there was no need to so specify in the text of Proposition 200. See 42 U.S.C. § 15483(b)(5). And, indeed, when an applicant provides a license number, the

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[23] 18 U.S.C. § 1426 (h) provides:
Whoever, without lawful authority, prints, photographs, makes or executes any print or impression in the likeness of a certificate of arrival, declaration of intention to become a citizen, or certificate of naturalization or citizenship, or any part thereof - Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

[24] For example, the counties often, if not always, attend naturalization ceremonies. If a naturalized citizen seeks to register after the ceremony and presents his or her naturalization certificate as proof of citizenship, the document is accepted on its face, and no further verification with USCIS is required.

application is not included on the voter rolls until the license is verified using Arizona's online system. (Trial Tr. 655-56).

Of course, alien registration numbers have to be verified with a third party—the federal government is the only entity that possesses such information. In contrast, county recorders can verify Arizona driver's licenses using their own system, which has not been proven to be unreliable.

Moreover, applicants who wish to use their certificate of naturalization have more options than applicants who use birth certificates or passports. Applicants who rely on a birth certificate or passport as proof of citizenship do not have the option of merely providing a number, but must incur the cost of photocopying the birth certificate. However, persons with a certificate of naturalization are allowed to prove citizenship by either: (1) presenting the actual certificate of naturalization, or (2) submitting the number on the naturalization certificate, subject to verification.

The purpose of Proposition 200 – preventing voter fraud and enhancing voter confidence – would be frustrated if naturalization numbers submitted without documentary proof were not subject to verification.

Thus, regardless of the standard of scrutiny, because Gonzalez Plaintiffs have failed to establish intentional discrimination, they have not proved that Proposition 200's proof of citizenship requirement violates the Equal Protection Clause by discriminating against naturalized citizens.

III. First Amendment

Gonzalez Plaintiffs assert that Proposition 200's proof of citizenship requirement, as applied, curtails their speech and associational rights in violation of the First Amendment by making it harder and more expensive to register people to vote.

There is no question that voter registration efforts are protected by the First Amendment. See Bernbeck v. Moore, 126 F.3d 1114, 1117 (8th Cir. 1997); Monterey County Democratic Cent. Comm. v. U.S. Postal Service, 812 F.2d 1194, 1196 (9th Cir.

1986); Project Vote v. Blackwell, 455 F. Supp. 2d 694, 706 (N.D. Ohio 2006). As the Supreme Court explained in McConnell v. Federal Election Commission:

> Common sense dictates . . . that a [group]'s efforts to register voters sympathetic to that [group] directly assist the [group]'s candidates for federal office. . . . It is equally clear that federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls.

540 U.S. 93, 167-68 (2003) (citations omitted).

Proposition 200, however, does not regulate voter registration organizations, and Plaintiffs are still able to disseminate their views to the public without restriction. Accordingly, Proposition 200 does not "necessarily reduce[] the quantity of expression." Buckley v. Valeo, 424 U.S. 1, 19 (1976); see also Meyer v. Grant, 486 U.S. 422-23 (1988).

Importantly, none of the Gonzalez Plaintiffs testified that Proposition 200 is a severe burden on their First Amendment rights. (See Trial Tr. 554-55 (Proposition 200 is "somewhat burdensome on CPLC"); id. at 514 (Proposition 200 has "not [had] a huge impact" on Valle)).

Because Proposition 200 imposes only a modest burden on Gonzalez Plaintiffs' First Amendment rights, Defendants' important regulatory interests, discussed supra, Part I(B), are sufficient to justify the asserted burden.

IV. Section 2 of the Voting Rights Act

Gonzalez and ITCA Plaintiffs allege Proposition 200 violates Section 2 of the Voting Rights Act ("VRA") by abridging Latino voters' right to vote. In addition, ITCA Plaintiffs allege that it also abridges the rights of American Indians.

Section 2 of the Voting Rights Act provides in relevant part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation

> by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

42 U.S.C. § 1973.

Thus, to establish a Section 2 claim, a plaintiff must show that its members have less opportunity to: (1) participate in the political process; and (2) elect representatives of their choice. Chisom v. Roemer, 501 U.S. 380, 396 (1991).

The challenged voting practice need only result in discrimination on account of race. Farrakhan v. Washington, 338 F.3d 1009, 1015 (9th Cir. 2003); see also Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003). A plaintiff need not demonstrate discriminatory intent. Farrakhan, 338 F.3d at 1014 ("Congress amended Section 2 of the VRA in 1982 to relieve plaintiffs of the burden of proving discriminatory intent."); Smith v. Salt River Project Agr. Imp. and Power Dist., 109 F.3d 586, 594 (9th Cir. 1997) ("Section 2 requires proof only of a discriminatory result, not of discriminatory intent.").

In analyzing whether Section 2 has been violated, the Court may consider:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> (6) whether political campaigns have been characterized by overt or subtle racial appeals;
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction;
> (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
> (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Farrakhan, 338 F.3d at 1015 (quoting S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07) (the "Senate Factors"); see also Gingles, 478 U.S. at 36-37.

This list is not exclusive, nor do "any particular number of factors [need to] be proved, or [] a majority of them point one way or the other." Farrakhan, 338 F.3d at 1015 (quoting S. Rep. No. 97-417 at 29). Rather, "courts must consider how the challenged practice 'interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'" Id. (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)). "[A] voting practice or procedure violates the VRA when a plaintiff is able to show, based on the totality of the circumstances, that the challenged voting practice results in discrimination on account of race." Id. at 1017 (emphasis in original omitted).

A. Latino Voters

i. *Statistical Evidence of Disparate Impact*

Taking all of the expert testimony into consideration, Plaintiffs have not demonstrated that Proposition 200 had a statistically significant impact. It is true that the percent of Latino voter registration applicants rejected was 2.8% higher than their representation in total number of registration applicants, 19.8% of those ultimately unable to register to vote were Latino, and the percent of Latino votes that go uncounted is higher than their representation in the number of voters casting ballots.

Despite this seeming disparity, even if everyone prevented from registering by Proposition 200 was allowed to register, the percentage of the electorate that was Latino would only increase by 0.1%, and the difference in Latino turnout in the 2006 general election for Secretary of State would have been even less, 0.06%. Further, although the drop in Latino registration rates was 0.92% more than the drop in non-Latino registration rates following Proposition 200, this could have been driven, at least in part, by the lower Latino population growth in 2005-2006.

Dr. Zax credibly testified that these differences were not nearly large enough to be statistically significant. (Trial Tr. 800-03). This is especially true in light of the fact that the Passel-Word List, while a good estimate, is merely an estimator of Latino descent. Id. at 801. Thus, when one considers the uncertainty as to the actual number of Latinos, minute differences of less than one-tenth of one percent are subsumed by the uncertainty associated with the original identification of who is and is not Latino. Id.

Thus, examining the facts as a whole, Proposition 200 does not have a statistically significant disparate impact on Latino voters.

ii. *Senate Factors*

Factors not considered because no evidence was presented at trial are: use of voting practices for discrimination; candidate slating process; racial appeals during political campaigns; lack of responsiveness; and tenuousness of the voting practice.

a. History of Discrimination

Plaintiffs expert, Dr. Arturo Rosales, testified to the history of discrimination against Latinos in Arizona from before statehood to the 1970's, and as to one court case in the 1990's. (Trial Tr. 264). Defendants do not contest these facts. Dr. Rosales concluded that discrimination against Latinos in Arizona has historically hindered their ability to fully participate in the political process. (Trial Tr. 363). The Court agrees.

From the beginning of Arizona's territorial history, Mexicans were excluded from the political process and discriminated against. (Trial Tr. 353-55). While still a U.S. territory, Arizona legislators adopted constitutional codes that restricted electoral eligibility requirements that allowed only white males and white Mexican males, a vast minority, to vote. Id. at 354.

Just prior to 1910, Arizona voters passed a literacy law that explicitly targeted Mexicans and disqualified non-English speakers from voting in state elections. Id. at 353-54. As late as 1960's, these literacy requirements were a precondition to voter registration in Arizona. Id.

After Arizona attained statehood in 1912, there was an anti-immigrant campaign characterized by increasingly racist rhetoric and a series of proposals restricting Mexican immigrants' political rights and the right to work in Arizona. Id. at 359-60. The new Arizona constitution restricted non-citizens from working on public projects. Id. at 361-62. And, in 1914, the legislature enacted the "eighty percent law," which stated that eighty percent of the employees in businesses that had five or more employees had to be "native-born citizens of the United States." Id. Employment discrimination continued throughout various sectors of the Arizona economy. Id. at 360-61. As recently as the 1990's in Tempe, Mexican-Americans brought a successful federal lawsuit in which they alleged systematic racial discrimination in employment practices against the City of Tempe. Id.

Latinos have also suffered a history of segregation. After World War II, Phoenix segregated Mexican American veterans in separate housing units. Id. at 362. Segregation of Latinos also occurred in schools, housing, theaters, swimming pools, parks, and restaurants. Id. Even after Mexican parents began to challenge school segregation successfully in court, school districts failed to comply with integration rulings. Id. at 357-58. Dr. Rosales credibly testified that segregation persists due to a lack of funding for English Language Learner programs. Id. at 358-59.

b. Current Demographic and Socioeconomic Statistics

Plaintiffs' expert, Dr. Jorge Chapa, testified to current demographic and socioeconomic statistics in Arizona. In 2006, Arizona's total population was 6,166,318, and its citizen voting age population ("CVAP") was 3,973,912. (Ex. 862, Tables 1, 3). Approximately one-third of Arizona's total population was Latino, and 17% of Arizona's CVAP was Latino. Id. at Tables 1, 9e.

Between 2000 and 2006, Arizona's CVAP grew by 17.3%. Id. at Table 9e. Between 2000 and 2004, the Latino CVAP grew at a rate of 16.7%, and white, non-Latino CVAP at 4.55%. (Trial Tr. 55-65). Between 2005 and 2006, the Latino CVAP grew at a rate of 4.62%, and non-Latinos at 5.82%. Id.

As of 2006, Latinos had lower levels of education when compared to white non-Latinos. (Ex. 862, Tables 6a, 6b; Trial Tr. 41-42). The average personal income of Latinos was also lower than white, non-Latinos. (Ex. 862, at Table 7 (Latino: $25,433; White, non-Latino: $37,843)).

In addition, as of 2004, the Latino voter registration rate is 56%, compared to 76% for white, non-Latinos. Id. at Table 8a. The percent of Latino citizens who voted is also lower compared to white, non-Latinos, 47% and 70%, respectively. Id. Dr. Chapa testified that there is a widely held belief that lower socioeconomic status is associated with lower rates of political participation. (Trial Tr. 43-44).

There are socioeconomic disparities between Latinos and white, non-Latinos, which hinders Latinos' ability to participate effectively in the political process.

c. Racially Polarized Voting

Dr. Engstrom analyzed ten racially contested (Latino versus non-Latino) elections held in Arizona since 2002 to determine whether voting is racially polarized. (Trial Tr. 99). "Elections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting." Old Person v. Cooney, 230 F.3d 1113, 1123-24 (9th Cir. 2000); see also Gingles, 478 U.S. at 80-82 (relying exclusively on interracial legislative contests to determine whether a legislative redistricting plan diluted the black vote); United States v. Blaine County, Mont., 363 F.3d 897, 911 (9th Cir. 2004) (contests between white and American Indian candidates are most probative of bloc voting).

Dr. Engstrom used three standard methodologies to measure racially polarized voting: ecological regression; homogeneous precinct analysis; and ecological inference. Id. at 100-02; see also United States v. City of Euclid, No. 1:06cv01652, 2008 WL 1775282, at *10, 13 (N.D. Ohio Apr. 16, 2008) (approving the use of these methods); Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1001-04 (D.S.D. 2004) (same) (collecting cases).

He analyzed four races in the 2002 Democratic primary; three in the 2004 general election; and three in the 2006 general election. (Ex. 872, Table). In the 2002 Democratic

primary elections, all four races demonstrated racially polarized voting. Id. at 124-25; Ex. 872, Table. In these elections, however, at most 10% of the total electorate voted. (Trial Tr. 153-54).

In 2004 general election, the Latino-preferred candidate won two out of three elections. Id. at 164. The Latino candidate also received a majority or near-majority of the non-Latino votes in two out of three races. (Ex. 872, Table). While Representative Pastor commanded a majority of the non-Latino vote, Representative Grijalva obtained a near-majority: 49.4% of the non-Latino vote according to ecological inference, 48.4% according to ecological regression, and 56.4% according to homogeneous precinct analysis. Id.

In 2006 general election, after the implementation of Proposition 200, the Latino preferred candidate again won two out of three elections. (Trial Tr. 164). The Latino candidate again received a majority of the non-Latino votes in two out of three races. (Ex. 872, Table). Representative Pastor again commanded, by a large margin, a majority of the non-Latino vote. Id. Receiving increased support amongst non-Latinos, Grijalva also commanded a majority of the non-Latino vote. Id.

Dr. Engstrom concluded that Latinos voters prefer Latino candidates. (Trial Tr. 120-21). With some significant exceptions, he also testified that this preference for Latino candidates is not shared by non-Latino voters. Id. at 121. These exceptions include U.S. Representatives Ed Pastor and Raul Grijalva. Id. Dr. Engstrom attempted to explain the reason for these exceptions was that they were Latino incumbents in Latino-majority districts. Id. at 122, 123; see also Gingles, 478 U.S. at 57 (incumbency is a special circumstance that may explain minority electoral success in an otherwise racially polarized electorate).

Defendants contend Plaintiffs have not established racially polarized voting because the Latino candidates fared better than the non-Latino candidates in two-thirds of the general elections both before and after Proposition 200. See Bone Shirt, 336 F. Supp. 2d at 1010 ("In order for white bloc voting to be legally significant, [] it ha[s] to be high enough to 'normally

defeat the combined strength of minority support plus white crossover votes.'" (quoting Gingles, 478 U.S. at 56)) (emphasis added).

However, the racially-polarized voting inquiry centers around districts with a non-Latino majority. See Old Person, 230 F.3d at 1122 (holding that the district court erred by failing to draw a distinction between majority-minority and majority-white districts in determining racial polarization). "To do otherwise would permit white bloc voting in a majority-white district to be washed clean by electoral success in neighboring majority-[minority] districts." Id.

Examining Latino candidates' performance in majority non-Latino districts in the 2004 and 2006 general elections, the Latino preferred candidate lost both times. (Ex. 872, Table).

The Court finds that to some degree there continues to be to some racially polarized voting in Arizona.

d. Latinos Elected to Public Office

As of 2007, there were 354 elected Latino officials in Arizona. (Trial Tr. 202-03).

ii. *Causation*

Although Plaintiffs have demonstrated, at best, limited statistical disparity and some of the Senate Factors, their Section 2 claim must fail because they have failed to demonstrate causation.

To establish a Section 2 claim, Plaintiffs must establish the Proposition 200 results in discrimination "on account of race or color." 42 U.S.C. § 1973. A mere statistical disparity in impact is not sufficient enough. Smith v. Salt River Project Agr. Improvement and Power Dist., 109 F.3d 586, 595 (9th Cir. 1997) ("[A] bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry.") (collecting cases). "Instead, Section 2 plaintiffs must show a causal connection between the challenged voting practice and a prohibited discriminatory result." Id. (emphasis added).

Under the totality of the circumstances, Plaintiffs have failed to demonstrate that Proposition 200 interacts with social and historical conditions to deny Latino voters equal access to the political process and to elect their preferred representatives. In particular, Plaintiffs have not adduced any evidence that the observed difference in voter registration and voting rates of Latinos is substantially explained by race, as opposed to factors independent of race. See Salt River, 109 F.3d at 591. Not a single expert so testified.

Because Plaintiffs have not established that the statistically disproportionate impact suffered by Latinos is on account of race or color, Proposition 200 does not violate Section 2 of the Voting Rights Act.

B. American Indian Voters

i. *Statistical Evidence of Disparate Impact*

Plaintiffs did not provide any statistical evidence of a disparate impact on American Indian voters.

ii. *Senate Factors*

Factors not considered because no evidence was presented at trial are: use of voting practices for discrimination; racially polarized voting; candidate slating process; racial appeals during political campaigns; lack of responsiveness; and tenuousness of the voting practice.

a. History of Discrimination

Lewis testified, and Defendants do not dispute, that American Indians have suffered a history of discrimination in Arizona. And the Court so finds.

American Indians were not recognized as citizens until 1924. Indian Citizenship Act of 1924, 8 U.S.C. § 1401. And they did not win the right to vote until 1948. (Trial Tr. 445-46 (citing Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948)).

Again, from 1909 until banned by the Voting Rights Act Amendments of 1970, Arizona had a literacy test for voting. (Trial Tr. 354). Arizona also held English-only

elections until the state became covered by the language minority provisions of the VRA. Id.

b. Current Socioeconomic Statistics

The Court finds there are substantial socioeconomic disparities between American Indians and the Arizona population as a whole, which hinders American Indians' ability to participate effectively in the political process.

As of 2000, 13.9% of Arizonans lived below the poverty line, compared to 38% of the American Indian population. (Trial Tr. 461; Ex. 1197-98). The median household income for all Arizona was $40,388, compared to $23,709 for the American Indian population. Id.

Among those 18 and over in Arizona, 7.6% had not completed the ninth grade, compared to 30.2% of the American Indian population. Id.

Among all households in Arizona in 2000, 7.4% had no vehicle available, while 20.3% of American Indian households did not. (Ex. 1198).

c. American Indians Elected to Public Office

As of 2007, there were 54 elected American Indian officials in Arizona. (Trial Tr. 202-03).

iii. Causation

Under the totality of the circumstances, Plaintiffs have failed to demonstrate that Proposition 200 interacts with social and historical conditions to deny American Indian voters equal access to the political process and to elect their preferred representatives. Therefore, they have not established a Section 2 violation.

V. Title VI of the Civil Rights Act of 1964

Gonzalez Plaintiffs assert Proposition 200's proof of citizenship requirement violates Title VI of the Civil Rights Act by discriminating against naturalized citizens. Title VI provides in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

To establish a claim under Title VI, a plaintiff must prove that the challenged law intentionally discriminates on the basis of race or national origin. Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (it is "beyond dispute" that "§ 601 prohibits only intentional discrimination"); Alexander v. Choate, 469 U.S. 287, 293 (1985) ("Title VI itself directly reach[es] only instances of intentional discrimination."). There is no private cause-of-action for mere disparate treatment. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 177-78 (2005); Sandoval, 532 U.S. at 285.

As discussed supra, Section II, Gonzalez Plaintiffs have failed to demonstrate intentional discrimination. Therefore, they have not established a violation of Title VI.

Accordingly,

IT IS ORDERED the Clerk of Court shall enter judgment on behalf of the Defendants.

IT IS FURTHER ORDERED this case shall be terminated.

DATED this 20th day of August, 2008.

Roslyn O. Silver
United States District Judge

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al.,

Plaintiffs,

v.

State of Arizona, et al.,

Defendants.

No. CV-06-01268-PHX-ROS

ORDER

This action is before the Court on remand from the United States Court of Appeals for the Ninth Circuit. Counsel for the Gonzalez Plaintiffs, the ITCA Plaintiffs and the Defendants ("the Parties") have conferred to determine what further actions are necessary. The Parties are in agreement that the decision of the Ninth Circuit Court of Appeals in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012), requires injunctive relief against the application of A.R.S § 16-166(f) as applied to the Federal Form for Voter Registration under the National Voter Registration Act.

Accordingly,

IT IS ORDERED AS FOLLOWS:

1. Effective as of this date, Defendants shall not reject Federal Forms from

those who seek to register to vote for the reason that they have not provided proof of citizenship under A.R.S § 16-166(f).

2. The parties shall brief the Court concerning the terms of any subsequent order according to the following schedule:

July 13, 2012 – Plaintiffs' opening briefs (ten pages each) are due;

July 19, 2012 – Defendants' response briefs (ten pages if separate, or seventeen pages if combined) are due;

July 24, 2012 – Plaintiffs' reply briefs (five pages each) are due.

3. In the event that this Court's final judgment issues before the Supreme Court's disposition of the Defendants' petition for *certiorari*, any application for attorneys' fees shall be due within thirty days following the Supreme Court's determination.

4. This Court shall retain jurisdiction to enforce the terms of this Order, to address the matters raised by the Parties in their briefs filed pursuant to this Order, and to award such further relief as is required by the 9th Circuit Court of Appeals' decision in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012).

Dated this 11th day of July, 2012.

Roslyn O. Silver
Chief United States District Judge

EXHIBIT 3

DECLARATION OF KEN BENNETT

I, Ken Bennett, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I was appointed as the Arizona Secretary of State in 2009 when former Secretary Jan Brewer succeeded to the governorship after then-Governor Janet Napolitano was confirmed as Director of Homeland Security. I was then elected to the position in 2010. Before becoming Secretary, I spent approximately twenty years in public service, including eight years in the Arizona Senate, the last four as Senate President.

2. As Secretary, I oversee all facets of the state's elections and work with the counties to promote uniformity throughout the state in election practices.

3. I am competent to testify as to the matters contained herein and make this declaration based upon my own personal knowledge and experience.

4. As is evident from the rest of this declaration, having two voter registration systems is not optimal. My office is in the unenviable position of being stuck between a valid federal law and a valid state law which say different things. Casting a ballot represents the exercise of a fundamental right and should be open to all qualified individuals. My office's mission, with respect to elections, is to never stop searching for ways to improve on helping people choose their leaders through fair, honest, and accurate elections.

5. Arizona law has always required applicants seeking to register to vote to be United States citizens. Ariz. Const. art. VII, § 2; Arizona Revised Statutes ("A.R.S.") § 16-101(A)(1).

6. In 1993, the United States Congress passed the National Voter Registration Act ("NVRA"), which was codified as 42 U.S.C. § 1973gg *et seq.* The NVRA required the Elections Assistance Commission ("EAC") to develop a mail voter registration application form (the "Federal Form") in consultation with the chief election officers of

the States. 42 U.S.C. § 1973gg-7(a)(2). The Federal Form does not require applicants to provide evidence of citizenship, but requires merely an attestation by the applicant that he or she is a citizen and the applicant's signature under penalty of perjury. 42 U.S.C. § 1973gg-7(b)(2).

7. In 2004, Arizona voters passed Proposition 200, which was then codified as Arizona Revised Statutes ("A.R.S.") § 16-166(F). Under that provision, prospective voters must provide satisfactory evidence of United States citizenship in order to register to vote.

8. A.R.S. § 16-166(F) permits a variety of documents and identification numbers to be used as evidence of citizenship, including an individual's driver license number or non-operating identification number. The proof-of-citizenship provisions enable Arizona's election officials to assess the eligibility of voter registration applicants.

9. On December 12, 2005, the Secretary of State's Office, under then-Secretary Jan Brewer, requested the EAC's approval of State-specific instructions for the Federal Form that would incorporate Arizona's proof-of-citizenship requirement. On March 6, 2006, Thomas Wilkey, then-Executive Director of the EAC, wrote to Secretary Brewer, stating that the NVRA preempted Arizona's proof-of-citizenship requirement and refusing to include it in the Arizona-specific instructions. (*See* Doc. No. 1-10.)

10. Secretary Brewer then wrote to Paul DeGregorio, then-Chairman of the EAC, to request reconsideration of Mr. Wilkey's decision. (*See* Doc. No. 1-11.)

11. Shortly after Proposition 200 was enacted, the Secretary's Office sought approval from the Department of Defense ("DOD") to include Arizona's proof-of-citizenship requirement in the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) materials for the Federal Post Card Application (FPCA). The DOD approved inclusion of Arizona's proof-of-citizenship requirement in the instructions. A copy of the Arizona-specific instructions for filling out the FPCA is attached hereto as

Attachment 1. This document is available online through the Federal Voting Assistance Program's website at http://www.fvap.gov/resources/media/vagAZ.pdf.

12. In mid-2006, two groups of plaintiffs filed lawsuits against the State of Arizona and its fifteen counties, asserting that Arizona's proof-of-citizenship requirement could not be applied to the federal voter registration form created by the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg *et seq.*, as administered by the Election Assistance Commission ("EAC"). The two cases were consolidated as *Gonzalez v. Arizona*, D. Ariz. Cause No. CV06-1268-PHX-ROS.

13. In that case, the court denied the plaintiffs' request for a temporary restraining order in an opinion and order dated June 19, 2006. The order stated that "Arizona's proof of citizenship requirement does not conflict with the plain language of the NVRA."

14. After that order was issued, Secretary Brewer sent another letter to the EAC renewing the request that EAC approve inclusion of Arizona's proof-of-citizenship requirement in the State-specific instructions. (*See* Doc. No. 1-12.) Then-EAC Chair DeGregorio submitted a Tally Vote to the Commissioners, which failed on a 2 to 2 tie. (*See* Doc. No. 1-13.)

15. The *Gonzalez* case proceeded through the courts, going twice to the Ninth Circuit and the United States Supreme Court. On June 17, 2013, the U.S. Supreme Court issued its Opinion in *Arizona v. Inter Tribal Council*, __ U.S. __, 133 S. Ct. 2247 (2013) ("*Inter Tribal Council*"), which is what the *Gonzalez* case ultimately became known as. The Court held that Arizona must accept and use the Federal Form to register voters for elections for federal office.

16. The *Inter Tribal Council* Opinion also provided that nothing precluded Arizona from renewing its request that the EAC include Arizona's proof-of-citizenship requirement in the State-specific instructions and, if the EAC refused, challenging that rejection under the Administrative Procedures Act. *Id.* at 2259-60.

17. In light of the *Inter Tribal Council* Opinion, my staff and I conducted telephone conferences with the various county election officials multiple times to discuss what that decision meant with respect to state and local elections and whether voters who registered using the Federal Form without providing evidence of U.S. citizenship were eligible to vote in state and local elections.

18. In the meantime, on June 19, 2013, I wrote to Alice Miller, acting Executive Director of the EAC, to renew our request for approval of the Arizona-specific instructions. (*See* Doc. No. 1-14.)

19. On August 13, 2013, Ms. Miller responded to my letter, stating that the EAC staff could not process my request "due to a lack of a quorum on the Commission." She attached a copy a memorandum authored by former EAC Executive Director Thomas Wilkey, which provided that "Requests that raise issues of broad policy concern to more than one State will be deferred until the re-establishment of a quorum." (*See* Doc. No. 1-17.)

20. On August 20, 2013, I requested an official Opinion from Arizona Attorney General Tom Horne in accordance with A.R.S. § 41-193, on the following issue, among several others: are registrants who use the Federal Form without providing sufficient proof of citizenship eligible to vote in state and local issues? On October 7, 2013, the Attorney General issued Opinion No. I13-011, which answered my question in the negative. The Opinion stated that "Registrants who use the Federal Form and did not provide sufficient evidence of citizenship are not eligible to vote for state and local races." Copies of the opinion request letter and the Opinion are attached hereto as Attachments 2 and 3.

21. Based on this Opinion, the State and counties must establish a dual registration system to keep track of voters who registered with evidence of citizenship and those who did not. The voters who provided evidence of citizenship will be able to vote in all elections, including races for federal, state, and local office, as well as ballot

measures. The voters who did not provide evidence of citizenship will be able to vote in elections for federal offices only.

22. From the time that the question was raised in light of the *Inter Tribal Council* opinion through the present, my staff and I have been brainstorming to determine all the necessary steps that would have to take place in order to implement a dual registration system.

23. I believe that we need to proceed carefully with respect to implementing a dual registration system. There are competing interests involved, including compliance with the federal and state constitutions and statutes, encouraging uniformity across the state, and mitigating voter confusion.

24. Among the first steps is that the county recorders will have to identify the impacted voters and notify them that they have registered using the Federal Form without providing evidence of citizenship, that they are currently only eligible to vote in elections for federal offices, and that they are not eligible to vote in state or local elections, or to sign nomination petitions and petitions for initiatives, referenda, and recall.

25. We will modify the Election Procedures Manual to implement the dual registration system. The Election Procedures Manual is a publication that the my office is required to produce in order to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots throughout the State's fifteen counties. A.R.S. § 16-452(A). The Election Procedures Manual has the force and effect of law and violators may be prosecuted and found guilty of a class 2 misdemeanor for each violation.

26. Making changes to the Election Procedures Manual is a long process that involves seeking input from stakeholders such as interested voters, the counties, cities, and towns, voter outreach groups and others about suggested changes. The changes are then drafted and stakeholder meetings are held to discuss the suggestions. My office then

finalizes the draft manual and submits it to the Governor and Attorney General for review. A.R.S. § 16-452(B).

27. At a minimum, there will be changes to the following chapters:

Chapter 2 - Qualification and Registration of Electors

Chapter 3 - Early Voting

Chapter 7 - Nominating Procedures

Chapter 10 - Conduct of Elections

Chapter 11 - Central Counting Place

28. I estimate that the changes to the Election Procedures Manual can be completed by March, 2014, and that it will take an estimate of thousands of dollars and hundreds of man-hours to complete this task. This estimate is based on the data from the efforts to produce an updated 2013 Election Procedures Manual, which was completed shortly before the *Inter Tribal Council* decision was issued and awaited only the Governor's signature. I decided not to issue the 2013 Election Procedures Manual and instead to start the process over to take into account the dual registration system and other changes in Arizona election laws since the 2013 edition was completed.

29. My office administers a statewide database of voter registration information that contains the name and registration information of every registered voter in Arizona. This system will have to be enhanced in order to identify registrants who used a Federal Form, but did not provide proof of citizenship, and in some way indicate that those registrants are eligible to vote in federal races only.

30. The voter registration system will have to allow for special voter registration cards and special mailings for these voters who are eligible to vote in federal races only.

31. The voter registration system will also have to be enhanced in order to create the ability to run statistics for these federal-race-only voters by precinct for ballot ordering and to allow statistical tracking of these voters throughout the process.

32. The voter registration system must be enhanced so that ballot eligibility is clearly identifiable (1) on a signature roster; (2) to the early voting clerk and for early voting ballot preparation; (3) to the call center and customer service personnel; (4) on the county recorder websites for voter lookup tools; and (5) on voter registration lists so that candidates and challengers can identify eligibility for signing petitions.

33. The voter registration system must further be enhanced to enable a voter who is currently eligible to vote federal races only to submit evidence of citizenship and then demonstrate that voter's eligibility to vote in all races.

34. With respect to elections themselves, there will have to be new federal-only ballot styles for each party for the primary election by precinct and new federal-only ballot styles for the general election by precinct. There will also have to be federal-only sample ballots. This will substantially increase the cost of each election.

35. The counties will have to be able to tabulate and report the federal-only ballots by precinct. My office will have to be able to receive that information and report it as well.

36. In addition to the practical changes, I, along with my staff, intend to work with the counties and other local jurisdictions in an education and outreach effort to the voters. Currently, we plan on holding a series of statewide meetings and producing advertisements and letters to individual voters.

37. Since the Attorney General's Opinion was issued and released to the media, my office has received calls from angry and confused voters who are upset that the State is considering implementing a dual registration system. Many of these callers want to know if they have registered properly. My office and the county recorders offices will have to modify IT to make it easier for voters to determine which form they used to register and which elections they are eligible to vote in.

38. Uncertainty undermines the integrity of our electoral process. With voters being unsure of which races they will be allowed to vote on, the level of voter unhappiness is sure to increase.

39. In my opinion, Arizona is being forced to implement a dual registration system because both the NVRA and Proposition 200 are valid enforceable laws that must be given effect. But the dual registration system would be completely avoidable if the EAC would accept Arizona's requirement into the state-specific instructions.

40. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 10/22, 2013.

Ken Bennett
Arizona Secretary of State

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CV-06-1268-PHX-ROS **ORDER**

On August 6, 2012, the Court issued its order regarding Defendants' handling of voter registrations using the National Voter Registration Form under the National Voter Registration Act (the "Federal Form"). The Court provided general guidance and directed the parties to attempt to reach an agreement on specific issues. The parties were not able to agree and have now submitted competing proposals. Defendants have also moved for reconsideration of certain aspects of the Court's August 6, 2012 Order. Having considered the parties' proposals, Defendants' motion for reconsideration, and the entire record, the Court enters the following Order.

IT IS ORDERED the Motion for Entry of Preliminary Order (Doc. 1071) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Motion to Withdraw (Doc. 1072) is **DENIED** based on the failure to comply with Local Rule 83.3.

IT IS FURTHER ORDERED the Motion for Reconsideration (Doc. 1088) is **DENIED.**

IT IS FURTHER ORDERED AS FOLLOWS:

A. Defendants shall not reject Federal Forms from those who seek to register to vote for the reason that they have not provided proof of citizenship under A.R.S. § 16–166(F).

B. For the reasons explained in this Court's Order of August 6, 2012, the Ninth Circuit's decision is retroactive. (Doc. 1082). But in the interest of maintaining the accuracy of the voter registration database, and in the interest of avoiding the imposition of significant hardships on Defendants, retroactive registration of applicants using the Federal Form is limited to forms submitted on or after August 1, 2011.

C. For each voter registration applicant who applied to register to vote on or after August 1, 2011, and who used a Federal Form that was rejected solely due to A.R.S. § 16-166(F), Defendants shall determine whether the applicant was subsequently registered to vote. If not, Defendants shall create a new record for a successful registration of that individual and promptly notify that new registrant of his or her eligibility to vote for candidates for state and federal office.

D. Defendants shall complete the registration required by Paragraph C above on or before August 21, 2012.

E. As previously stated in this Court's order of August 6, 2012, Defendants shall ensure widespread distribution of the Federal Form through all reasonable channels, including channels the Secretary of State has identified as appropriate for distribution of the State Form. Thus, no later than August 31, 2012 Defendants shall make the Federal Form available where they make the State Form available, including websites.

F. Where Defendants provide paper copies of the State Form they must also provide paper copies of the Federal Form, in both Spanish and English, with the applicable instructions. Defendants need not provide the entire instruction booklet as large portions of that booklet do not apply to Arizona.

G. All state and local employees responsible for processing voter registrations must immediately be informed of the change in the law and instructed to comply with the new procedures.

H. Defendants have not presented the specific changes they propose making to the Secretary of State Election Procedures Manual but some of the changes proposed by Plaintiffs go beyond what is necessary to comply with the law. Defendants will be permitted to make the changes they deem appropriate but they must do so on an expedited basis. Therefore, within sixty days of this Order Defendants shall revise the Secretary of State Election Procedures Manual to reflect compliance with federal law.

DATED this 15th day of August, 2012.

Roslyn O. Silver
Chief United States District Judge

EXHIBIT 5

DECLARATION OF BRAD BRYANT

I, Brad Bryant, Deputy Secretary of State for the Kansas Secretary of State's Office, having been duly sworn, do hereby depose and state as follows to the best of my knowledge and belief:

1. I am a Deputy Assistant Secretary of State for the Kansas Secretary of State's Office, and my primary job responsibilities are related to Kansas elections. I have held this position since February 1993. Pursuant to my duties, I supervise and direct the planning of elections for our office.

2. Working with the county election officers in the various counties in Kansas, this office has in the past formulated a list of voter registration applicants who attempted to register to vote in Kansas using the universal federal voter registration form prescribed by the Election Assistance Commission, but who did not provide proof of citizenship in accordance with Kansas law.

3. If required to do so as the result of a decision by the court, our office would issue a directive to the county election officer in each Kansas county instructing each such officer to review the county's voter registration files and report to us a list of applicants for voter registration who submitted the federal voter registration form beginning January 1, 2013 to the present, but who did not provided proof of citizenship.

4. Having formulated the list of federal-form applicants who did not provide proof of citizenship, our office would instruct the county election officer in each county that has received one or more such application to prepare ballots for the 2014 state primary and the 2014 general election containing only federal offices and to train the appropriate precinct poll workers

to issue the federal-only ballots to the federal-form voter registration applicants who have not provided proof of citizenship.

5. I understand that it has been alleged that Kansas would be unable to retroactively register applicants who submitted the federal voter registration form without proof of citizenship subsequent to January 1, 2013. This is incorrect. Utilizing the procedures above, Kansas would be able to retroactively register such applicants to vote in federal elections.

Brad Bryant

Brad Bryant, Deputy Assistant Secretary of State
KANSAS SECRETARY OF STATE'S OFFICE

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

SUBSCRIBED, ACKNOWLEDGED, AND SWORN TO before me, the undersigned Notary Public, by Brad Bryant in his capacity as Deputy Assistant Secretary of State, Kansas Secretary of State's Office, on this the 12 day of May, 2014.

Notary Public

My Appointment Expires: May 9, 2017

Linda C. Limon-Rocha
NOTARY PUBLIC–STATE OF KANSAS
MY APPT EXP: 5-9-2017

EXHIBIT 6

DECLARATION OF BRAD BRYANT

I, Brad Bryant, Deputy Assistant Secretary of State for the Kansas Secretary of State's Office, having been duly sworn, do hereby depose and state as follows to the best of my knowledge and belief:

1. This Affidavit is made in support of the Plaintiffs' Motion for Preliminary Injunctive Relief, filed contemporaneously. I am a Deputy Assistant Secretary of State for the Kansas Secretary of State's Office, and my primary job responsibilities are issues related to Kansas elections. I have held this position since February 1993. Pursuant to my duties, I supervise the efforts of the Kansas Secretary of State's Office to identify individuals who have unlawfully registered to vote in Kansas or who have unlawfully voted in Kansas elections.

2. Our office utilizes various software and networks to manage voter registration records as well as to maintain voter records. Our office utilizes a software and network system known as the Election Voter Information System (hereinafter "ELVIS") to manage voter registration records across the State of Kansas. Through ELVIS, our office is able to review voter registration records to determine whether individual registrants have been unlawfully registered to vote. In 2009 and 2010, our office obtained from the Kansas Department of Revenue a list of individuals who had obtained temporary driver's licenses in Kansas. These lists included names, dates of birth, driver's license numbers, and the last four digits of the cardholders' social security numbers. Under Kansas law, only non-United States citizens are issued temporary driver's licenses.

3. Upon receipt of these lists from the Kansas Department of Revenue, our office compared the information from the lists with the information stored in ELVIS to ascertain whether any non-United States citizens were registered to vote. Our office utilized the above-

described procedure in 2009 and identified 13 individuals who were not United States citizens but who were registered to vote in Kansas. These unlawful voter registrations were made in Finney, Johnson, Lyon and Sedgwick Counties. Utilizing ELVIS, our office then determined that of the 13 aliens unlawfully registered to vote, three had voted in Kansas elections. Because not all aliens residing in Kansas apply for temporary driver's licenses, the 13 aliens unlawfully registered to vote likely represent only a subset of the total number of aliens who successfully registered to vote in Kansas prior to January 1, 2013, the date Kansas's proof-of-citizenship requirement for voter registration applications took effect.

4. In another instance, in 2010, the Sedgwick County election commissioner informed our office that he had been contacted by an official with the Department of Homeland Security alerting him to the possibility that a non-United States citizen had registered and voted. The person was found to be a registered voter in the ELVIS database, and records indicated the person had voted in five elections between 2000 and 2008.

5. Pursuant to my job responsibilities with the Kansas Secretary of State's Office, I participate in communications with the United States Election Assistance Commission (hereinafter "the EAC") regarding the contents of the mail voter registration form (hereinafter "the Federal Form"). The Federal Form is developed by the EAC in consultation with the chief election officers of the several states pursuant to the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq*. In particular, I communicate with Alice Miller, currently the Acting Director of the EAC. The EAC does not have particular procedures concerning how states are supposed to request modifications to the Federal Form. During my tenure with the Kansas Secretary of State's Office, Kansas has obtained modifications to the Federal Form simply by sending written requests to the EAC.

6. In 2011, the Kansas legislature passed and the Kansas Governor signed into law HB 2067, known as the "Secure and Fair Elections Act" which amended various Kansas statutes concerning elections in Kansas. Section 8(l) of HB 2067, codified as K.S.A. 25-2309(l), provides: "The county election officer or secretary of state's office shall accept any completed application for registration, but an applicant shall not be registered until the applicant has provided satisfactory evidence of United States citizenship." The statute then enumerates 13 different documents that constitute satisfactory evidence of citizenship. HB 2067 took effect on January 1, 2012, however the proof-of-citizenship provision did not take effect until January 1, 2013.

7. Due to the changes in Kansas election law made by the Secure and Fair Elections Act, I contacted the EAC attempting to have the Kansas-specific instructions on the Federal Form changed to reflect Kansas law. It is my understanding that the EAC currently has no Commissioners and has not had a quorum of Commissioners for several years. Further, based on my conversations with Ms. Miller, it is my understanding that as of November 9, 2011, the EAC has been processing requests by states for modifications to the Federal Form pursuant to a memorandum issued by Thomas Wilkey, then-Executive Director of the EAC (hereinafter "the Wilkey Memorandum"). My office has since obtained a copy of the Wilkey Memorandum from the EAC. (see Doc. No. 1-3)

8. On August 9, 2012, I sent a letter to Ms. Miller at the EAC, requesting that the EAC modify the Kansas-specific instructions of the Federal Form to reflect Kansas law in three ways. (see Doc. No. 1-4) My August 9 letter first requested that the Kansas-specific instructions be modified to change the voter registration deadline from 15 days before the election to 21 days before the election. This request was made due to a change in Kansas law by Kansas Session

Laws 2011, ch. 112, § 19, codified as K.S.A. 25-2311(e), which took effect July 1, 2011. My letter also requested that the Kansas-specific instructions be modified by deleting the words "for mental incompetence" from the portion of the instruction stating that to register to vote in Kansas an applicant must not be excluded from voting by a court of competent jurisdiction. This request was made to clarify existing Kansas law under K.S.A. 25-2316c(f).

9. My August 9 letter also requested the Kansas-specific instructions of the Federal Form be modified to reflect changes in Kansas law resulting from the passage of HB 2067, specifically the proof-of-citizenship requirement of Section 8(l) of HB 2067, codified as K.S.A. 25-2309(l). The letter requested the following instruction be added to the Kansas-specific instructions: "An applicant must provide qualifying evidence of U.S. citizenship prior to the first election day after applying to register to vote."

10. On October 11, 2012, Alice Miller sent me a letter (see Doc. No. 1-5) which indicated that the first two requested modifications to the Kansas-specific instructions had been approved, but that no action would be taken on the third requested modification regarding Kansas's proof-of-citizenship provision because the EAC was without any Commissioners at that time. The letter indicated that this request "appears to have broad policy impact and would require consideration and approval by the EAC Commissioners. The authority of staff to modify the state instructions is limited to issues that do not have any policy impact." The letter indicated that the EAC will postpone action on this particular request until a quorum is established on the Commission. The letter did not indicate when, if ever, a quorum would be established, and did not provide any additional information regarding how Kansas might be able to obtain approval for the requested instruction.

11. On June 18, 2013, Kansas Secretary of State Kris W. Kobach sent a letter to Alice Miller at the EAC, renewing Kansas's request that the Kansas-specific instructions be modified to reflect Kansas's proof-of-citizenship requirement for voter registration applications. (see Doc. No. 1-6) This letter requested the following instruction be added to the Kansas-specific instructions: "To cast a regular ballot an applicant must provide qualifying evidence of U.S. citizenship prior to the first election day after applying to register to vote."

12. On July 31, 2013, Ms. Miller sent a letter to Secretary Kobach (see Doc. No. 1-7), again stating that the EAC could not process Kansas's request to modify the Kansas-specific instructions because the EAC lacked a quorum of Commissioners. This letter stated that, pursuant to the Wilkey Memorandum, the EAC could not process Kansas's request without a quorum because the request raised "issues of broad policy concern to more than one state." This letter again did not indicate when, if ever, a quorum would be established, and did not provide any additional information regarding how Kansas might be able to obtain approval for the requested instruction. Ms. Miller's July 31 letter expressed the EAC's belief that Kansas would not accept and use the Federal Form without proper citizenship documentation.

13. On August 2, 2013, Secretary Kobach sent a letter to the EAC (see Doc. No. 1-8) clarifying to the EAC that Kansas will accept and use the Federal Form submitted without proof of citizenship documentation to register voters for elections for Federal office until the EAC adds the requested Kansas-specific instruction to the Federal Form or until Kansas is otherwise relieved of that duty by a court of competent jurisdiction. This letter further clarified that once the requested instruction was added, the Federal Form would be accepted to register voters for both Federal and State elections assuming the Federal Form was submitted with a qualifying citizenship document. The August 2 letter also made the following modification to the proposed

Kansas-specific instruction to remove a possible ambiguity in the language of the proposed instruction: "To cast a regular ballot an applicant must provide evidence of U.S. citizenship prior to the ~~first~~ election day ~~after applying to register to vote~~."

14. On August 6, 2013, Ms. Miller sent a letter to Secretary Kobach (see Doc. No. 1-9) in which Ms. Miller again informed Secretary Kobach that the EAC could not process Kansas's request to modify the Federal Form due to a lack of a quorum on the EAC. Again citing the Wilkey Memorandum, Ms. Miller stated that the "EAC staff believes that this request raises issues of policy concern that would impact other states." This letter again did not indicate when, if ever, a quorum would be established, and did not provide any additional information regarding how Kansas might be able to obtain approval for the requested instruction.

15. Based on my experience as Deputy Assistant Secretary of State for elections issues, I am of the opinion that inclusion of the proposed Kansas-specific instruction on the Federal Form is necessary to effectuate Kansas's proof-of-citizenship requirement for voter registration applicants. I am particularly of the opinion that a mere oath attesting to United States citizenship, as currently allowed by the Federal Form, is not effective to prevent aliens from registering to vote in Kansas elections. A mere oath's failure to prevent non-citizens from registering to vote is exacerbated by the fact that once unqualified individuals are registered to vote it is extremely difficult to detect them and remove them from the voting rolls. My years of experience as an election official in Kansas lead me to the conclusion that it is much easier to prevent registrations by unqualified persons than to detect and remove them after they are on the rolls.

16. Moreover, as long as Kansas is required to register voters for Federal elections by accepting the Federal Form without a qualifying citizenship document, Kansas will be forced to maintain a bifurcated voter registration system. One system will be needed to manage voters that are properly registered for both state and federal elections and another system will be needed to manage voters that are only registered for federal elections. Such a registration system will be highly burdensome on the State of Kansas and on county election officers that administer elections at the local level.

17. For example, the State of Kansas will be required to spend money and time reprogramming its voter registration system, ELVIS. The State of Kansas will also need to expend resources retraining county election officers and educating the public. Every county in Kansas will be required to spend large amounts of money and time developing and printing additional federal only ballots, reprogramming multiple types of voting machines, and retraining the more than 8,000 poll workers that are needed to conduct a general election. The burden of retraining these more than 8,000 poll workers will be shouldered by both the State of Kansas and the individual counties located in Kansas. The State of Kansas will have to spend resources developing and printing training materials. Additionally the State will need to conduct training sessions for county election officials. The county election officials must then conduct training sessions for the 8,000 poll workers and provide them written training materials.

18. Further, the process of counting ballots in a bifurcated system presents several difficulties. The State of Kansas tallies and reports election results according to precincts. If federal only ballots are to be counted and reported, then a separate ballot must be developed and printed for each precinct. This is likely to increase the number of voters that receive the wrong ballot due to the fact that multiple precincts often vote at the same location. If the State of

Kansas attempts to simplify the process by developing one federal only ballot that will be utilized by all precincts, then every federal only ballot must be counted by hand, thus making precinct tabulation and reporting much more difficult. This will increase the number of people necessary to tally votes, cause delays in reporting election results, and increase the occurrences of human error.

Brad Bryant

Brad Bryant, Deputy Assistant Secretary of State
KANSAS SECRETARY OF STATE'S OFFICE

STATE OF KANSAS)
) ss:
COUNTY OF SHAWNEE)

Linda C. Limon-Rocha
NOTARY PUBLIC—STATE OF KANSAS
MY APPT EXP: 5-9-2017

SUBSCRIBED, ACKNOWLEDGED, AND SWORN TO before me, the undersigned Notary Public, by Brad Bryant in his capacity as Deputy Assistant Secretary of State, Kansas Secretary of State's Office, on this the 22 day of October, 2013.

Notary Public

My Appointment Expires: 5-9-2017

EXHIBIT 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KRIS W. KOBACH, KANSAS SECRETARY OF STATE;

KEN BENNETT, ARIZONA SECRETARY OF STATE;

THE STATE OF KANSAS;

THE STATE OF ARIZONA;

Plaintiffs,

vs.

THE UNITED STATES ELECTION ASSISTANCE COMMISSION;

ALICE MILLER, in her capacity as the ACTING EXECUTIVE DIRECTOR & CHIEF OPERATING OFFICER OF THE UNITED STATES ELECTION ASSISTANCE COMMISSION;

Defendants.

Case No. 13-4095-EFM-DJW

AFFIDAVIT

I, Tabitha Lehman, Sedgwick County, Kansas, Election Commissioner, having been duly sworn, do hereby depose and state as follows to the best of my knowledge and belief:

This Affidavit is made in support of the Plaintiffs' Motion for Preliminary Injunctive Relief, filed contemporaneously. I am the Election Commissioner for Sedgwick County, Kansas. My job duties include supervising and overseeing the registration process for voter registration applicants in Sedgwick County, Kansas.

On February 13, 2013, my office received a certain application for voter registration submitted electronically via the Kansas Division of Motor Vehicles online registration. The name of the applicant has been omitted from this Affidavit in order to protect the applicant's privacy. The application was not accompanied by any documentation that proved the applicant is a citizen of the United States as required by Kansas law pursuant to K.S.A. 25-2309(l). On February 15, 2013, my office mailed the applicant a notice informing him/her that his/her voter registration application was not accompanied by documentation proving citizenship, and that the voter

registration application was not complete until such documentation was received. My office did not receive a response to the February 15, 2012, notice. On June 6, 2013, my office mailed the applicant a second notice informing him/her that his/her voter registration application was not accompanied by documentation proving citizenship as required. On June 17, 2013, the second notice was returned to my office marked as "undeliverable."

On June 27, 2013, my office called the applicant to inform him/her that his/her application was not accompanied by a proof of citizenship document, and that his/her application was therefore incomplete. The applicant informed my office that he/she did not have documentation proving that he/she is a United States citizen because he/she is in fact not a citizen of the United States.

Tabitha Lehman, Election Commissioner
Sedgwick County, Kansas

STATE OF KANSAS)
) ss:
COUNTY OF Sedgwick)

SUBSCRIBED, ACKNOWLEDGED, AND SWORN TO before me, the undersigned Notary Public, by Tabitha Lehman in her capacity as Sedgwick County, Kansas, Election Commissioner, on this the 17 day of October, 2013

Notary Public

My Appointment Expires: 3/30/2016

NOTARY PUBLIC - State of Kansas
CONNIE McAFEE
My Appt Expires 3/30/16

EXHIBIT 8

DECLARATION OF KAREN OSBORNE

I, Karen Osborne, hereby state, under penalty of perjury, that the following information is true to my knowledge, information, and belief:

1. I am employed by the Elections Department of the Maricopa County (Arizona) Recorder's Office as the Director of Elections for Maricopa County, and I have held that position since 1996. I also serve as a deputy to the Maricopa County Recorder, Helen Purcell.

2. Just prior to my employment as the Maricopa County Director of Elections, I was the Maricopa County Assistant Director of Elections from 1991 to 1995. Prior to that, I served as the Assistant Secretary of State from 1978 to 1991. As a result, I have over 35 years of experience in elections and voter registration. In all, I have worked in Arizona state and county government since 1969.

3. In my capacity as the Director of Elections for Maricopa County, I am responsible for voter registration as well as the administration of the elections process in Maricopa County. In that capacity, my duties involve directly overseeing the voter registration process in the County including (1) ensuring that state mail-in voter registration forms are distributed throughout Maricopa County, (2) designating proper places throughout the County to receive completed voter registration forms, (3) reviewing completed voter registration forms, (4) notifying applicants if their registration is incomplete or illegible, (5) transmitting evidence of voter registration fraud or confusion to the proper enforcement authority, and (6) adding properly completed voter registrations to the County register.

4. I am competent to testify as to the matters contained herein and make this declaration based upon my own personal knowledge, experience, and analysis.

5. In November 2004, Arizona voters passed through an initiative Proposition 200, which was then codified as A.R.S. § 16-166(F). Under that provision, which went

into effect on January 24, 2005, prospective voters in Arizona must provide satisfactory evidence of United States citizenship in order to register to vote.

6. In 2006, two groups of plaintiffs filed lawsuits against the State of Arizona and its fifteen counties, asserting that Arizona's evidence-of-citizenship requirement could not be applied to the federal voter registration form created by the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*, as administered by the Election Assistance Commission. After years of litigation, the U.S. Supreme Court issued its opinion in *Arizona v. Inter Tribal Council*, 133 S. Ct. 2247 (2013) ("*Inter Tribal Council*") on June 17, 2013. The U.S. Supreme Court held that Arizona must accept and use the Federal Form to register voters for elections for federal office.

7. I was deposed in the litigation in the *Gonzalez v. Arizona* case, which ultimately resulted in the *Inter Tribal Council* opinion. In that litigation, I testified as to the various instances in which the Maricopa County Recorder's Office determined that, through voter registration fraud or mistake, non-U.S. citizens had managed to register and or vote in Maricopa County. I testified to the following instances and figures in that litigation.

8. As I understand it, at some point in the early 2000s, the U.S. Immigration and Naturalization Service (INS) implemented a process by which it required certain people applying for U.S. citizenship to get a letter from the county recorder's office in the county in which they resided that affirmed that the applicant had never registered to vote or voted. Beginning in 2003, people began coming into the Maricopa County Recorder's Office asking for a letter that said they had never registered to vote or actually voted in Maricopa County. In responding to these requests, as of July 11, 2006, we identified at least 37 individuals who were applying for U.S. citizenship but had either voted or registered to vote in Maricopa County.

9. Leading up to the 2004 election, the Maricopa County Recorder's Office received multiple voter registration forms, delivered by private organizations that ran

voter registration drives, that failed to indicate that the registrant was a U.S. citizen. When we contacted the individual registrants, many of them did not appear to understand that they had to be a U.S. citizen to register to vote and appeared to have been persuaded to register by the organization running the voter registration drive.

10. To the best of my recollection, in 2005, the Maricopa County Recorder's Office referred 159 matters to the then-Maricopa County Attorney, Andrew Thomas, in which it was determined that there was evidence that non-citizens had registered to vote. A large number of these individuals had sworn to the Maricopa County Jury Commissioner that they were not U.S. citizens and therefore could not perform their jury duties. In August of 2005, the Maricopa County Attorney's Office announced that ten non-citizens had been charged in felony criminal complaints for falsely filing voter registration forms claiming they were in fact U.S. citizens. Some of those individuals were identified as having voted in an election under falsely filed voter registrations.

11. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 21, 2013.

Karen Osborne
Maricopa County Director of Elections
& Deputy Maricopa County Recorder

EXHIBIT 9

09:55:03 registration, without trenching upon this Article I, Section 2,
09:55:06 authority? Well, the Arizona Tribal Council addressed that
09:55:10 too. "Since the power to establish" -- this is on page 2258
09:55:12 and '59.
09:55:13 THE COURT: Mr. Kobach, as fast as you normally
09:55:16 talk, you talk faster when you read, so --
09:55:18 MR. KOBACH: Okay. Thank you.
09:55:19 THE COURT: -- keep it in mind as you read this
09:55:21 next section to me.
09:55:22 MR. KOBACH: 2258 and on to '59. "Since the power
09:55:26 to establish voting requirements is of little value without the
09:55:30 power to enforce those requirements, Arizona is correct that it
09:55:34 would raise serious constitutional doubts if a federal statute
09:55:38 precluded a state from obtaining the information necessary to
09:55:42 enforce its voter qualifications." "[I]t would raise serious
09:55:46 constitutional doubts if a federal statute precluded a state
09:55:50 from obtaining the information necessary to enforce its voter
09:55:53 qualifications." Who determines what is necessary? Then we go
09:55:56 to the quote I mentioned earlier on page 2259.
09:55:58 THE COURT: Wherein Justice Scalia punts and we
09:56:01 receive.
09:56:01 MR. KOBACH: Well, actually, no, that's another
09:56:03 quote. This is a different one.
09:56:04 THE COURT: It's the same paragraph.
09:56:06 MR. KOBACH: It is. No, it's two paragraphs

10:31:57 MR. HEARD: Well, going back to I think it's
10:32:00 page 2253 of the Court's opinion, where it says the Clause's --
10:32:05 "The [Election] Clause's substantive scope is broad. 'Times,
10:32:09 places, and manner,' we have written, are 'comprehensive
10:32:11 words,' which embrace [the] authority to provide a complete
10:32:14 code for Congressional elections,' including, as relevant here
10:32:18 and as petitioners do not contest, regulations relating to
10:32:21 'registration.'"
10:32:22 So it's the registration regulations, the control
10:32:28 of voter registration in federal elections, that's governed by
10:32:31 the Elections Clause. And that's, again, part of the time,
10:32:34 place and manner. So they're making a distinction, Your Honor,
10:32:37 between voter qualifications -- which is a separate
10:32:39 responsibility of the state, the substantive, who is entitled
10:32:41 to vote in elections -- and, and this is an important
10:32:45 distinction in the case, all right, the difference between the
10:32:48 voter qualifications and the procedures relating to voter
10:32:52 registration.
10:32:52 THE COURT: Well, I understand, and I dialoged
10:32:55 with Mr. Kobach a little bit about this. And it's one thing to
10:32:59 say that no one disputes that a requirement to vote is you have
10:33:02 to be a citizen. The question then is how do you establish
10:33:05 whether or not one is a citizen. And on a sentence that split
10:33:11 page 2259 and carries over to 2259, Justice Scalia says, "The
10:33:15 power to establish voting requirements is of little value

10:33:18 1 without the power to enforce those requirements." And this is,
10:33:21 2 of course, where he goes on to happily punt to me.
10:33:26 3 But, although I agree that it's the requirements
10:33:31 4 that are a state issue, doesn't that also mean that the state
10:33:34 5 gets to decide whether those requirements are met?
10:33:37 6 MR. HEARD: Not necessarily, Your Honor. There is
10:33:40 7 an interplay that is at issue. And I'm sort of muddling up my
10:33:46 8 four points.
10:33:47 9 THE COURT: It's my fault.
10:33:48 10 MR. HEARD: But the interplay at issue is this
10:33:51 11 interplay between the state's ability to set the voter
10:33:54 12 qualifications, Congress' ultimate authority to establish voter
10:33:58 13 registration procedures relating to federal elections, and, you
10:34:03 14 know, whether -- whether those -- I mean, those two things
10:34:06 15 interplay, and whether a Congressional voter registration
10:34:13 16 requirement prohibits a state from enforcing its voter
10:34:15 17 qualifications. Those are sort of interrelated issues that
10:34:18 18 this case presents.
10:34:19 19 But what the Supreme Court held, and what the
10:34:22 20 Supreme Court reaffirmed, is what the Supreme Court has held
10:34:25 21 for eight something years, is that it's Congress' province to
10:34:29 22 establish voter registration regulations. Congress has done
10:34:32 23 that in the NVRA. That is how Congress created the Federal
10:34:38 24 Form that's at issue in this case.
10:34:40 25 And so the court held that Congress -- that the

EXHIBIT 10

11:07:02 THE COURT: I understand you disagree with that.
11:07:03 MR. HEARD: -- it doesn't agree with that
11:07:05 resolution, but the court, if it decided to undertake this
11:07:08 inquiry itself, would have to do the same thing the agency
11:07:12 would have to do, which is take -- evaluate the evidence that
11:07:17 the state submits in support of its contention that it
11:07:22 absolutely has to have this instruction or it will be unable to
11:07:25 enforce --
11:07:26 THE COURT: So it would be some form of an
11:07:28 evidentiary hearing?
11:07:29 MR. HEARD: It would be -- it would -- it would
11:07:31 require evidence. It would require discovery from parties.
11:07:37 THE COURT: What sort of discovery would be
11:07:38 required?
11:07:38 MR. HEARD: Well, the discovery into the factual
11:07:40 issue at hand, which is whether --
11:07:43 THE COURT: Does the EAC normally conduct
11:07:45 discovery?
11:07:45 MR. HEARD: The EAC would need to receive facts,
11:07:49 which is our point before.
11:07:50 THE COURT: But do they normally conduct discovery
11:07:53 in advance of their adjudication?
11:07:54 MR. HEARD: The EAC does not have formal ajud- --
11:07:57 the EAC --
11:07:58 THE COURT: The decision-making process, however

11:08:00 you want to call it.
11:08:00 MR. HEARD: Its informal decision-making process,
11:08:03 so there's no adjudicatory procedure at the EAC.
11:08:06 THE COURT: So there's no discovery.
11:08:07 MR. HEARD: There's no discovery, but the agency
11:08:08 has to have a record upon which to make a decision.
11:08:11 THE COURT: Right. Well, we could have an
11:08:12 evidentiary hearing at which we established a record, but we
11:08:15 don't need a period of discovery prior to that, because the
11:08:18 EAC's regulations don't require that; correct?
11:08:20 MR. HEARD: The EAC's regulations don't require
11:08:23 that. But if the Court were to make that decision the rules of
11:08:26 civil procedure would require --
11:08:28 THE COURT: Sadly, I think if the Court makes that
11:08:30 decision, I'm acting in lieu of the administrative agency
11:08:32 because the administrative agency is incapable of acting, to
11:08:35 use Justice Scalia's framework.
11:08:37 MR. HEARD: Well, the Court would certainly need
11:08:39 to receive evidence. And normally if the court is deciding
11:08:42 something as -- in its original jurisdiction -- the rules of
11:08:46 civil procedure would allow the parties to undertake discovery
11:08:50 and eventually, you know, undertake discovery and get to a
11:08:53 process open.
11:08:53 THE COURT: Now, see, that is just more
11:08:56 unreasonable delay, Mr. Heard. I don't like where that train