August 17, 2005

Via Fax and U.S. Mail
Facsimile # 602-542-4085

Honorable General Terry Goddard
Office of the Attorney General
1275 West Washington Street
Phoenix, AZ 85007

RE: Secretary of State’s August 12, 2005 Voter Identification Proposal

Dear Attorney General Goddard:

I write on behalf of MALDEF, the Mexican American Legal Defense and Educational Fund, the undersigned elected officials and organizations, to urge that you reject Secretary of State Brewer’s latest proposals regarding implementation of the voter identification requirements of A.R.S. § 16-579(A).¹

While this latest version makes some minor improvements from the version submitted in July 2005, it is nonetheless still woefully inadequate and will likely result in the disenfranchisement of thousands of Arizonans. The proposal, on its face, violates federal law and the Equal Protection Clause of the Fourteenth Amendment. Additionally, if implemented, these requirements will create longer lines at polling places and needlessly increase and complicate the responsibilities of county registrars.

Provisional Ballots For All Voters Required Under Federal Law

The proposal does not provide for any fail-safe voting for those voters who may have forgotten their identification or where poll workers have rejected the offered form of identification as insufficient. Provisional ballots are required for every voter under the Help America Vote Act of 2002. Section 15482(a) of HAVA, which outlines the requirements for provisional voting, states in pertinent part:

MALDEF’s comments on this proposal shall be in no way construed as any admission of the constitutionality or legality of the voter identification provisions of A.R.S. § 16-579 as amended by Proposition 200.

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If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is—

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

(4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

(5) (A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.
(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

42 U.S.C. § 15482(a). The failure to provide voters with a provisional ballot, as outlined in the Arizona Secretary of State’s proposal, is a violation of federal law.

As written, the current proposal provides absolutely no options for people who want to exercise their right to vote but who may have forgotten their identification or whose proffered identification is rejected by a poll worker. There is no harm in extending the option of provisional ballots to persons in this category. Allowing everyone access to a provisional ballot will not frustrate the purported “anti-fraud” goals of A.R.S. § 16-579(A) because each provisional ballot, under state law, and under the directions provided in the Secretary of State’s Instructions and Procedures Manual, must be individually reviewed to ensure that the provisional ballot voter is indeed eligible to vote.

Furthermore, compounding the Secretary of State’s refusal to follow federal law, the refusal to allow provisional ballots to certain types of voters also inserts new requirements into A.R.S. § 16-579 that simply are not there. Secretary of State Brewer does not have the authority nor the discretion under state law to add language to the election codes of Arizona. Had the authors of Proposition 200 sought to prohibit all voters from obtaining a provisional ballot that did not show any or the proper identification at the polling site, as legally incorrect as that action may have been, they could have easily amended election codes sections relating to provisional ballots. They did not.

Added Address Matching Requirements Not Permissible Under State Law

Although A.R.S. § 16-579(A) requires an elector to present identification that has the voter’s name and address, the statute clearly requires only that the poll worker match the voter’s name, not their address, with the name listed on the precinct register. The address verification requirement of the Secretary of State’s latest proposals is not required under state law. Section 16-579(A) already provides a means by which an election official can determine whether the voter is in their assigned precinct by requiring the voter to provide the poll worker with their residence by announcing it when they approach the election official.
For those voters that have the required forms of identification, their ability to cast a ballot is not yet ensured. If the address on the precinct register does not match that on their identification, they will not be provided with a regular ballot. Instead, they will be provided with a provisional ballot. This, alone, will have numerous consequences, not only for the voter, but for election officials as well. Many voters, to the extent that they are even aware of the identification requirement at all, will rely on their driver’s license and their state identification card to satisfy the identification requirements of A.R.S. § 16-579(A), believing that it will be sufficient to cast a ballot. Tens of thousands of Arizonans change their residence each year and though they promptly submit corrected information to the Arizona Motor Vehicles Department, their actual driver’s licence card is not reissued with each address change. As such, tens of thousands of voters will be issued provisional ballots. The fact that Arizona’s driver’s licence is valid for thirty years complicates matters further.

This will create longer lines as poll workers have to walk people through the provisional ballot process. It will require that county election officials print provisional ballots in sufficient numbers, unnecessarily increasing the costs associated with each election. Further complicating matters is that each of these additional provisional ballots will also need to be printed in sufficient numbers, in accordance with Section 203 of the Voting Rights Act. See 42 U.S.C. § 1973aa-1a. Furthermore, with each provisional ballot cast, it will be even more important that the poll workers satisfy each of their obligations relating to the issuance of the provisional ballot to avoid unnecessary invalidation of the ballot. See Arizona Secretary of State Instructions and Procedures Manual.

Thus, at several points in this process, the poll worker is provided with authority to decide if a particular form of identification is valid. Placing more discretion with poll workers to reject a voter’s attempt to cast a ballot, especially if there is no ability to cast a provisional ballot, increases the likelihood that voters will be intentionally or unintentionally improperly denied the right to vote.

Identification Requirements Constitute Illegal Poll Tax

When the right to vote is conditioned on access to a form of identification, a real danger arises that certain voters may be unable to comply with the requirement. Because, in Arizona, registering to vote is also now conditioned on access to proof of citizenship, it is very likely that thousands of voters will neither have the funds or resources to obtain identification that is acceptable to register to vote or cast a ballot. In essence, A.R.S. 16-579(A)’s identification requirement constitutes a poll tax that under the Twenty-fourth Amendment is illegal.
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The Equal Protection and Due Process Clauses of the Fourteenth Amendment forbid use of citizens’ wealth or financial status to deny them the right to vote. The Supreme Court has struck down numerous qualifications that conditioned voting or other political participation on wealth, whether in the form of property ownership or the payment of fees. See, e.g., Hill v. Stone, 421 U.S. 289 (1975) (taxable property requirement for voters in city bond elections); Lubin v. Panish, 415 U.S. 709 (1974) (candidate filing fee); Cipriano v. City of Houma, 395 U.S. 701 (1969) (property ownership requirement); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966) (payment of poll tax); Harman v. Forssenius, 380 U.S. 528 (1965) (paying poll tax or filing certificate of residence). Accordingly, a state cannot constitutionally impose wealth qualifications that burden qualified persons in the exercise of their fundamental right to vote.

Notwithstanding this, it is even more important to provide poll workers with uniform standards and guidelines so that discretionary decisions to accept a particular form of identification are unnecessary. Specific types of identification, including, but not limited to student identification cards, hunting licenses, welfare benefit cards, tax forms, identifications issued by homeless shelters, or any other documents mailed to a voter that has their name and address should be added to the list.

Secretary of State’s Proposal Raises Equal Protection Concerns Subject to Strict Scrutiny

We applaud the attempt that the Secretary of State has made to both recognize and address the problem that Native Americans have in obtaining access to different forms of identification. It is well-documented that Native Americans face significant challenges in obtaining birth certificates, driver’s licenses, state identification cards, passports, and other documents that might satisfy the Proposition 200 voter identification requirement. Indeed, recent efforts to pass the Tohono O’odham Citizenship Act of 2001 (H.R. 2348) provided a glimpse into the enormity of the problem and the consequences that flow from being unable to secure proper identification. In the book “It’s Not Our Fault: The Case for Amending Present Nationality Law to Make All Members of the Tohono O’odham Nation United States Citizens, Now and Forever” by Guadalupe Castillo and Margo Cowan, it is estimated that about 7,000 of the 24,000 O’odham were born in the United States but do not have any proof.

The Secretary of State should also realize that many thousands of Arizonans face similar challenges in obtaining any form of identification. The elderly, the homeless, the poor, and minorities are particularly prone to being unable to obtain identification. For some, the lack of access to original source documents, such as birth certificates (many in Arizona were not born in hospitals or were born
in hospitals that no longer exist) is the problem; for others, extreme poverty and lack of access to basic utility services, cars, or driver's licenses, much less passports, create the problem. Recognizing this, the Secretary of State should make it easier for those likely to have difficulty obtaining identification to exercise their right to vote.

Left unchanged, several parts of the Secretary of State's proposal implicates equal protection concerns by subjecting voters to different and unequal standards when trying to exercise their right to vote. First, under the terms of the proposal, "other forms of identification not on this list must be deemed acceptable by the county election official in charge of elections . . . ." See Proposal, at 1. Second, different procedures exist for groups of voters such that the Secretary of State has included two separate paths for obtaining a ballot – one for Native Americans and another path for all others. See Proposal, at 1; Flowchart.

As stated in Bush v. Gore, 531 U.S. 98, 104-05 (2000), equal protection does not just apply to the initial allocation of the franchise; it extends as well "to the manner of its exercise." "Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." See id (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966); Reynolds v. Sims, 377 U.S. 533, 555 (1964).

Because voting is a fundamental right and "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," differential treatment of voters will be subject to a strict scrutiny analysis. See Reynolds, at 562; Harper, 383 U.S. at 670 ("here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined"). See also Lubin v. Panish, 415 U.S. 709 (1974).

Arizona's Constitution similarly enshrines the important right to equal protection. See Ariz. Const. art. 2, § 13. Section 13 says, "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." When a classification involves a suspect class or a fundamental right, such as voting, the classification is subject to strict scrutiny. See Hunter Contracting Co., Inc. v. Superior Court, 190 Ariz. 318, 947 P.2d 892 (App. 1997), rev. denied; see also Malamed v. North Slope Borough, 70 P.3d 416 (Alaska 2003) (relying on Article I, section 1, of the Alaska Constitution, which provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law").
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A United States passport opens doors across the world, but under the proposed rules it appears that it cannot be used to gain access to receive a provisional ballot in Arizona. The passport contains a person’s name and photo but no address. Even the county election official cannot decide to accept a passport because it does not comply with A.R.S. § 16-579(A), which is limited to “identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector.” A Native American, however, may vote a provisional ballot using only a single tribal identification that bears only the name of the elector.

The rising tide should raise all ships. The standard we set for one group in voting should apply equally to all unless the state shows a compelling state interest and that the law is narrowly tailored to protect that interest. Here, Arizona at a minimum should allow any voter who presents a government issued document bearing the elector’s name the opportunity to vote a provisional ballot.

Conclusion

Not only do these proposed regulations violate the letter of Proposition 200, more importantly, they violate federal law. By pushing through these regulations, the Secretary of State will disenfranchise thousands of voters and invite unnecessary and costly litigation.

For these reasons, we urge you to reject the Secretary of State’s latest proposal.

Respectfully,

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Staff Attorney, MALDEF

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Representative Albert Tom  
Arizona State House of Representatives - District 2

Representative Steve Gallardo  
Arizona State House of Representatives - District 13

Representative Martha Garcia  
Arizona State House of Representatives – District 13

Representative Robert Meza  
Arizona State House of Representatives — District 14

Representative Kyrsten Sinema  
Arizona House of Representatives – District 15

Representative David Lujan  
Arizona State House of Representatives — District 15

Representative Phil Lopez  
Arizona State House of Representatives — District 27

Representative Ted Downing  
Arizona State House of Representatives — District 28

Representative Ben Miranda  
Arizona State House of Representatives — District 16

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cc: Governor Janet Napolitano