for failure to comply with one state’s unique authentication requirements, such as exists under

Congress’ intent not to require additional forms of formal authentication, see S. Rep
103-6 at 26 (describing purpose of aforementioned provision), was also echoed by the
Federal Elections Commission. In creating its rules to implement the NVRA, the FEC did not
require information regarding naturalization in part because “[t]he issue of U.S. citizenship
is addressed within the oath required by the Act and signed by the applicant under penalty of
that “[b]ecause providing materially false information in the voter registration process is a
felony, see, e.g., 42 U.S.C. § 1973gg-10, these oaths are taken seriously and given significant
weight.” Id.

The Senate Minority report makes plain that the NVRA prohibits citizenship
verification voter registration schemes. The Senate minority – the group of Congressmen that
opposed the NVRA – lamented the NVRA’s failure to require, and its prohibition against,
citizenship verification. See S. Rep. 103-6, at 55 (“[Non-citizen voting] fraud might be
combated by requiring proof of citizenship at the time of registration. However, mail
registration under this bill would preclude such corrective action.”). Proponents and
opponents of the bill knew precisely the scope of permissible registration requirements
contained in the NVRA.

The NVRA does allow the states some flexibility in the administration and
development of its voter registration form, however, based on the plain language of the
statute, a state must accept for registering voters in federal elections both its own form, so
long as it is not inconsistent with the NVRA’s mandates, and the uniform federal voter
registration form. See 42 U.S.C. § 1973gg-4(a). Contrary to these requirements, it is clear
that in Arizona, a voter submitting the federal, NVRA-compliant uniform voter registration
form, will not be registered.

Proposition 200's citizenship verification requirements constitute "other formal authentication" that is expressly forbidden by the NVRA. Under the plain language of the NVRA, Proposition 200 impermissibly conflicts with the registration requirements Congress has enacted and which under the Election Clause, it has unilateral authority to regulate. See U.S. CONST. art. I Section. 4 cl. 1.

Certainly, A.R.S. §16-152(A)(23)'s requirement that a voter registration application be rejected by the registrar if it fails to supply the necessary "evidence of United States citizenship" and A.R.S. § 16-166(F)'s outline of the process by which the registrar must verify the citizenship of the applicant, constitutes additional "formal authentication" for the purpose of processing a voter registration application. It falls squarely into the category of information that the legislative history and the FEC had opposed and had contemplated when drafting the NVRA. As such, Sections 3 and 4 of Proposition 200 cannot avoid the inevitable conflict with federal voter registration form requirements set forth in section §1973gg-7(b).

The extent to which "formal authentication" is required under Prop. 200 is highlighted by A.R.S. § 16-166(F)(4) which even includes provisions that require the registrar to authenticate an applicant's citizenship status with federal agencies:

A presentation to the county recorder of the applicant's United States naturalization documents of the number of the certificate of naturalization. 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 of naturalization is verified with the United States Immigration and Naturalization Service by the county recorder. See A.R.S. 16-166(F)(23).

Compared to the witnessing-type authentication requirements that Congress saw fit to prohibit, the authentication/verification requirements contained in Proposition 200 appear much more onerous. Whereas witnessing requirements arguably left some power with the voter applicants to find others to vouch for them, Proposition 200's requirements are much more severe -- after a voter registration application is submitted to an election official, it is
then sent to a federal agency to verify and authenticate citizenship status – a task which may
or may not be done in a timely fashion, if at all.

The U.S. Election Assistance Commission (EAC) is charged by Congress with
regulating the development and substance of the federal mail voter registration application,
as well as with guiding states in their implementation of the NVRA. 42 U.S.C. 1973gg-7(a).
The EAC’s strong reaction to Arizona’s refusal to use and accept the federal mail voter
registration further reinforces Plaintiffs’ argument that Arizona is in violation of the NVRA.

On March 6, 2006, the EAC wrote to Secretary of State Jan Brewer in response to her
request that the EAC “apply Arizona state policy (derived from Proposition 200) to the
Federal Mail Voter Registration Form.” In its letter the EAC informed Ms. Brewer that
Arizona’s documentary proof of citizenship requirement for registration was preempted by
the NVRA and that “Arizona may not refuse to register individuals to vote in a Federal election
for failing to provide supplemental proof of citizenship, if they have properly completed and
timely submitted the Federal Registration Form.”¹⁵

On March 13, 2006, Ms. Brewer wrote to the EAC charging that the EAC’s opinion
was “completely inconsistent, unlawful, and without merit.” The letter further stated that
“After consulting with the Arizona Attorney General, I will instruct Arizona’s county
recorders to continue to administer and enforce the requirement that all voters provide
evidence of citizenship when registering to vote as specified in A.R.S. § 16-166(F).”¹⁶

On March 13, 2006, State Election Director Joseph Kanefield wrote to the State’s
county recorders informing them of Defendant BREWER’s “position that the proof of
citizenship requirement set forth in A.R.S. § 16-166(F) must continue to be enforced for all

¹⁵See Bernal Decl. attached as Exhibit A (Ex. 6, Letter from EAC to Brewer)
¹⁶See Bernal Decl. attached as Exhibit A (Ex. 7, Letter from Brewer to EAC).
newly registered voters and voters moving from one county to another.”

B. Plaintiffs Will Suffer Irreparable Harm If Relief Is Not Granted.

The threatened deprivation of a fundamental right by itself constitutes a threat of irreparable injury. *See, e.g., Goldie’s Bookstore, Inc. v. Superior Court of Cal., 739 F.2d 466, 472 (9th Cir. 1984) (“alleged constitutional infringement will often alone constitute irreparable harm”); 11A Wright, Miller & Kane, Federal Practice and Procedure § 2948.1 (Civil 2d ed. 1995) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”).* Here, Proposition 200 threatens deprivation of the fundamental right to vote, and thus threatens irreparable injury. *See Reynolds, 377 U.S. at 585 (illegal impediments to the right to vote, as guaranteed by the U.S. Constitution or statute, by their nature constitute irreparable injury).*

The harm already caused by Prop. 200 is not abstract. The harm is real and shows no sign of abating. In Maricopa County, according to an Election Division press release issued on February 4, 2005, 74 percent of the voter registration applications it had received in since January 24, 2005 were rejected solely for failure to provide sufficient evidence of citizenship required under Proposition 200. *See Maricopa County Press Release, February 4, 2005, available at http://recorder.maricopa.gov/pressrelease05.aspx.*

On June 22, 2005, the Arizona Daily Star reported that “[a]ccording to the [Pima] County Recorder’s Office, 1,492 applications for registration have been denied, and 3,380 have been approved since April, when it began keeping track of the numbers.”

17 See Bernal Decl. attached as Exhibit A (Ex. 5, Correspondence from Joseph Kanefield to county recorders).

18 See Bernal Decl. attached as Exhibit A (Ex. 4 Prop. 200 Causing Voter Registration Rejections, ARIZONA DAILY STAR June 22, 2005, also available at http://www.azstarnet.com/dailystar/printDS/89552.php, (detailing unsuccessful voter registration applications in Maricopa and Pima Counties)).
C. The Public Interest Will Be Advanced By Enjoining Proposition 200.

The public interest plainly will be furthered by enjoining Proposition 200's registration requirements, which will deny some citizens the opportunity to participate equally in the electoral process. See Bay County Democratic Party v. Land, 347 F.Supp.2d 404, 438 (E.D. Mich. 2004) ("The public interest is served when citizens can look with confidence at an election process that insures that all votes cast by qualified voters are counted. . . . The public interest is served when a federally granted right is enforced uniformly and voters are not disenfranchised.") (citations omitted); U.S. v. Berks County, Pa., 250 F.Supp.2d 525, 541 (E.D. Pa. 2003) ("The Court finds that the public interest will be served by the issuance of a preliminary injunction. '[]ndoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.' Ordering Defendants to conduct elections in compliance with the Voting Rights Act so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy.") (citations omitted); Murphree v. Winter, 589 F.Supp. 374, 382 (S.D. Miss. 1984) ("Clearly, the granting of this preliminary injunction will not disserve the public interest. The fundamental right to vote is one of the cornerstones of our democratic society. The threatened deprivation of this fundamental right can never be tolerated."); see also Sammartano v. First Judicial District Court, in and for the County of Carson City, 303 F.3d 959, 974 (9th Cir. 2002) (noting "it is always in the public interest to prevent the violation of a party's constitutional rights").

D. The Balance of Hardships Tips Strongly in Plaintiffs' Favor.

On the other side of the balance of equities, Defendants can offer no significant reason to continue to implement registration requirements that inevitably will deprive a significant portion of the electorate of the fundamental right to vote. Defendants' purported interest in preventing voter fraud cannot justify Proposition 200's unfair and inflexible registration requirements. There is no evidence that failure to implement Proposition 200 will result in massive voter fraud – as Proposition 200 was purportedly designed to address. Proposition
200's proponents cited widespread voting fraud by non-citizens as necessitating its citizenship requirements. However, Proposition 200 makes not one single finding or declaration with respect to voting, let alone cite a single instance of voter fraud.19

E. Plaintiffs Are Entitled to an Injunction Pursuant to Section 5 of the Voting Rights Act of 1965.

Section 5 of the Voting Rights Act of 1965 requires that all qualifications, prerequisites, standard, practices, or procedures with respect to voting in covered jurisdictions must be determined, either by the United States District Court for the District of Columbia or the United States Attorney General, not to have the purpose or effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. 42 U.S.C. 1973, et seq. Jurisdictions seeking federal preclearance of their voting changes must demonstrate that the change does not have the effect of discriminating on the basis of race, color or membership in a language minority group. See Allen v. State Board of Elections, 393 U.S. 544, 569-570 (1969).

Plaintiffs are likely to prevail on the merits of this action because the facts of this case satisfy the three-part test for Section 5 enforcement actions. See Lopez v. Monterey County, 519 U.S. 9, 23 (1996). Changes in the manner in which votes are cast and tabulated are voting changes covered by Section 5. See 28 C.F.R. §§51.12 and 51.13. The State of Arizona, is a covered jurisdiction required to seek preclearance of its voting changes. See 40 F.R. § 43746.

Although the U.S. Department of Justice precleared Defendants' proposed changes on

19The State admits, as it must, that there are successful measures in place to protect against non-citizens registering to vote. The Attorney General states that "the requirement that a person registering to vote attest that he or she is a citizen and the associated criminal penalties for violating this requirement" afford "protections against non-citizens registering to vote in Arizona." See Bernal Decl. attached as Ex. A. (Ex. 12, Ariz. Attorney General, Opinion re: Identification Requirements for Voter Registration, Feb. 4, 2005, at 7).
January 24, 2005, Defendants never revealed to the Justice Department that Arizona would cease to use and accept the federal mail voter registration form for federal elections as required by the National Voter Registration Act. There is no dispute that Defendants will implement a voting change without required preclearance under Section 5 of the Voting Rights Act. Defendants' failure to obtain federal preclearance for their change in election system renders such change legally unenforceable regardless of the substantive nature of the proposed changes themselves. *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991) ("If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.").

The appropriate remedy for an impending violation of Section 5 of the Voting Rights Act is to enjoin Defendants from refusing to use and accept the federal mail voter registration form for registration of voters in federal elections.

IV. CONCLUSION

The Elections Clause of the Constitution provides Congress with the express authority to regulate voter registration rules and regulations for congressional elections. Exercising that authority through passage of the NVRA, Congress outlined specific requirements and forbade others with respect to the form and content of voter registration forms. Proposition 200 imposes harsh voter registration requirements that run contrary to the spirit and letter of the NVRA’s mandate to remove obstacles to voting. In so doing, Arizona has impermissible treaded upon voter registration procedures which Congress has expressly carved out for itself, to ensure the protection of the electorate. If allowed to stand, Proposition 200's citizenship verification requirements threaten to quickly undo the well-documented progress of the NVRA.

For these reasons, Plaintiffs respectfully request that the Court find that Defendants’

20For the same reason, Plaintiff satisfies the three-part test for entitlement to injunctive relief in Section 5 enforcement actions as set out in *U.S. v. Louisiana, supra.*
implementation Proposition 200 violates the NVRA and the Supremacy Clause, as well as Section 5 of the Voting Rights Act of 1965.

Accordingly, for all these reasons, Proposition 200's registration requirements should be enjoined.

Date: May 9, 2006

Respectfully submitted,

BY: /s/ Nina Perales

Counsel for Plaintiffs
CERTIFICATE OF SERVICE

I here by certify that on this 9th day of May, 2006, I served a true and correct copy of Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Temporary Restraining Order on counsel of record by sending said copy via U.S. certified mail, return receipt requested to:

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