Attachment A
POSITION STATEMENT
COMMISSIONER RAY MARTINEZ III
JULY 10, 2006

ON THE MATTER REGARDING EAC TALLY VOTE DATED JULY 6, 2006:
“ARIZONA’S REQUEST FOR ACCOMMODATION”

On Thursday, July 6, 2006, EAC Chairman Paul DeGregorio proposed, via a Tally Vote, that the EAC “…amend the Federal Form’s state specific instructions to accommodate Arizona’s proof of citizenship procedure.” In a letter from EAC Executive Director Tom Wilkey to the State of Arizona, dated March 6, 2006, the EAC had previously refused Arizona’s request to amend its state specific instructions affixed to the Federal Form and condition the use and acceptance of the Federal Form upon an applicant providing proof of citizenship.1 Because of the significance of this proposed Tally Vote, I write today to briefly explain my rationale for disapproval.

INAPPROPRIATE USE OF TALLY VOTE PROCEDURE

Throughout its 32-month history, the EAC has utilized Tally Votes for routine matters, most typically, for disbursement of Requirements Payments to States under Title II of HAVA.2 Never has the EAC utilized a Tally Vote procedure to overrule a decision of our executive director. To date, the EAC has recorded public votes on matters such as election of officers, adoption of the first set of voluntary guidance regarding statewide voter registration systems, and adoption of the Voluntary Voting System Guidelines of 2005. Moreover, on the one previous occasion when the EAC did consider a significant

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1 See, Letter from Thomas Wilkey to Arizona Secretary of State, dated March 6, 2006.
matter related to the National Voter Registration Act of 1993, the EAC took a public (and unanimous) vote to decide the issue. In my view, this decision is too significant to be taken without the benefit of a properly noticed and convened public meeting or hearing. This is particularly true in light of the fact that if the EAC were to approve this Tally Vote, we would be drastically altering our agency’s interpretation of NVRA on a matter of fundamental importance to the American public.

Importantly, while each commissioner possesses the authority under rules adopted by the EAC to procedurally object to any Tally Vote, delay its final implementation and require it to be debated at a future EAC public meeting, I will not exercise such authority today. In short, I stand by the EAC’s previously articulated legal rationale on this matter and I believe no further EAC action is currently warranted, especially in light of the fact that the EAC is not a party to any litigation on this matter nor has the EAC been ordered to take specific action by any court.

My further rationale for disapproval of this proposed Tally Vote is stated below:

1. **Confusion for Arizona Voters.** Chairman DeGregorio contends that the EAC’s prior determination of this matter, together with the “preliminary” decision by U.S. District Court Judge Roslyn Silver as well as Arizona’s current position regarding the Federal Form “have created significant confusion for the Arizona voters.” As a result, Chairman DeGregorio proposes that we “not allow this confusion to disenfranchise Arizona voters [and that] we amend the Federal Form’s state specific instructions to accommodate Arizona’s proof of citizenship procedure.”

However, nothing has changed with regard to how Arizona treats the Federal Form, even after the opinion issued last month by Judge Silver. That is, Arizona Secretary of State Jan Brewer, pursuant to Proposition 200, has previously

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4 See, EAC Tally Vote “Procedures for Voting by Circulation,” certified by a vote of 4-0 on May 4, 2004.
5 Letter from Thomas Wilkey to Arizona Secretary of State, dated March 6, 2006.
instructed Arizona county recorders to treat the Federal Form as incomplete if an applicant submits the form without appropriate proof of citizenship. Judge Silver’s opinion does not bar the State of Arizona from requiring proof of citizenship upon receipt of the Federal Form. Accordingly, any voter registration applicant utilizing the Federal Form in Arizona is today treated in the exact same manner as before Judge Silver’s opinion. Furthermore, since continued litigation and/or appeals on this matter are likely – including a hearing currently pending before Judge Silver later this month to decide the merits of a preliminary injunction sought by the plaintiffs in Gonzalez v. State of Arizona, (No. CV 06-1268-PHX-ROS) – it is evident that any action today by the EAC may be premature.

Furthermore, reversing our current agency position at this time may cause uncertainty in other NVRA-jurisdictions throughout the country who are undoubtedly closely monitoring legal and policy developments on this issue. Already, at least one state is considering legislation in the wake of Arizona’s decision to require proof of citizenship upon voter registration. Other states are likely to follow. For the EAC to reverse its position at a time when the courts have only just begun to contemplate this important issue is untimely at best.

What about the confusion that will be caused if today we grant Arizona its request for an accommodation and other States are left wondering whether they too, should (or can) be requiring proof of citizenship with the Federal Form? Will each State need to specifically come before the EAC to request an accommodation? Will each State need to pass a law or promulgate an administrative rule requiring proof of citizenship with the Federal Form before requesting an accommodation from the EAC? Or, will this specific decision for Arizona be deemed by the EAC as applicable across the board for all NVRA-covered jurisdictions? These are but a few of the many questions which will inevitably arise if we were to approve this Tally Vote – questions, by the way,

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which this Tally Vote does not address. State and local jurisdictions are best served by an EAC that exercises its limited authority under both NVRA and HAVA in a measured, deliberate and consistent manner.

Given that the EAC is not a party to the specific litigation referenced by Chairman DeGregorio; that the EAC has not been ordered by Judge Silver or any other court to take any specific action on this matter; that a voter registration applicant in Arizona is treated exactly the same today as before last month’s opinion by Judge Silver; that other States will be influenced by actions taken on this matter both by the courts and the EAC; and, that continued litigation and appeals are likely on this matter, it is clear that the EAC should today refrain from any further action that may ultimately cause even greater uncertainty not just for voters in Arizona, but for the entire country.

2. **EAC Precedent Already Established.** Last year, the EAC was presented with an analogous situation as that which confronts us today regarding the citizenship requirement in Arizona. That is, after passage of a new Florida law mandating that a voter registration applicant check a box attesting to the applicant’s mental capacity, the State of Florida requested that the EAC amend its state-specific instructions affixed to the Federal Form to condition the use and acceptance of the Federal Form in a similar manner as is now done on the state-issued Florida voter registration form.

In rejecting Florida’s request to allow conditional use and acceptance of the Federal Form, the EAC general counsel’s office, with the unanimous consent of the EAC commissioners, wrote the following:

“...Florida’s proposed policy, to treat all Federal Mail Registration Forms as incomplete, violates the provisions of the NVRA. The NVRA requires States to both “accept” and “use” the Federal Form. Under Florida’s policy, State officials would take in the Federal Form, only to turn around and require its user to re-file or otherwise supplement their
federal application using a state form. Under this scheme, the Federal Mail Registration Form would be neither “accepted” nor “used” by the State. That language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls. Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal Form is subject only to HAVA’s verification mandate. 42 U.S.C. 15483.”

Clearly, in refusing Florida’s request last year, the EAC not only established its own interpretive precedent regarding the use and acceptance of the Federal Form, but it also upheld established precedent from our predecessor agency, the Federal Election Commission. It is difficult for me to understand how today, we could reverse our agency’s position on this matter as it relates specifically to Arizona, and yet, somehow distinguish why Florida should not also be allowed to similarly condition the Federal Form. And, if this were to result, we would find ourselves headed down that perilous “slippery slope” where registration requirements would be markedly different from state to state for any applicant using the Federal Form – one of the principle reasons why Congress passed NVRA and created the Federal Form in the first place.

3. **Break from Consensus Decision-Making by the EAC.** This proposed Tally Vote will mark the first time that a decision by the EAC commissioners will be decided by a less than unanimous basis. As such, regardless of the ultimate outcome, I am deeply troubled that a Tally Vote on this matter could produce a fundamental turning point in how present and future EAC commissioners approach contentious election administration issues. This, in my view, would be an unfortunate development for this agency. While public opinion among EAC

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8 See, Letter from Gavin Gilmour, Associate General Counsel, to Dawn Roberts, Director of the Division of Elections, July 26, 2005.

9 At least one hundred Tally Votes have been recorded by the EAC, with all Commissioners voting in the affirmative for each of the prior Tally Votes.
stakeholders is still mixed as to the benefits and drawbacks of a federal agency such as the EAC, there has been praise from nearly all fronts for the way the EAC has previously navigated difficult, politically-tinged issues while still maintaining unanimity on such matters.

For example, in the months leading up to the November 2004 presidential election, the issue regarding “casting” and “counting” of provisional ballots received much media scrutiny, as well as significant litigation in both state and federal courts throughout the country. Rather than wade directly into the issue by utilizing our voluntary guidance authority under Sections 311 and 312 of HAVA\(^\text{10}\) and, despite significant pressure to do so from various partisan interests, the EAC was able to deftly navigate this contentious issue. Ultimately, the EAC unanimously passed a timely resolution regarding provisional voting\(^\text{11}\) and prudently allowed the courts to decide this controversial and politically-charged matter.

Likewise, the EAC faced similar issues on at least two occasions last year. In March of 2005, the EAC was apprised of a decision by the State of Arizona to condition the casting of provisional ballots in federal elections to the showing of proper voter identification as required by Proposition 200. In response, the EAC commissioners unanimously agreed to initiate collaborative discussions with the Department of Justice (DOJ) to interject our agency’s view that such conditioning of provisional ballots was inconsistent with HAVA. Ultimately, DOJ clarified its previously-issued pre-clearance letter to Arizona and Arizona in turn, eliminated the conflict between Proposition 200 and HAVA’s provisional voting requirements.

Similarly, as has already been explained, the EAC was asked last year by the State of Florida to amend its state-specific instructions affixed to the Federal Form in order to condition the use and acceptance of the Federal Form upon the applicant

furnishing additional information regarding mental capacity. After careful analysis, the EAC’s general counsel, with the unanimous support of EAC commissioners, issued a determination to Florida which upheld the 13-year precedent of the NVRA – that the Federal Form, as promulgated by the EAC, must be unconditionally used and accepted by all NVRA-jurisdictions.

What is significant about the examples cited above – which involve issues that touch upon both the voluntary guidance and limited regulatory authority possessed by the EAC – is that when faced with these politically difficult decisions, the EAC commissioners have heretofore chosen a consensus-driven path that does not seek to alter the carefully crafted balance of federal/state roles regarding election administration. Such a measured and deliberate approach is most appropriate at this particular time for the EAC, especially as we approach a contentious 2006 general election in which state and local election administrators will need the support, resources and credibility of a fully functioning EAC. My strong concern is that this particular Tally Vote may lead the EAC down a path that many EAC stakeholders have explicitly said they do not want: an overly partisan federal agency that is more prone to deadlock than to fulfilling its ultimate and, in my view, most important promise of serving as a national clearinghouse and creating the “gold standard” in national voting system standards and certification.

CONCLUSION

Lastly, I would like to reiterate my ongoing commitment to the essential role played by state and local governments in administering the process of election administration. As an EAC commissioner, I have made it my priority to build a genuine and lasting partnership with election officials at all levels of government – irrespective of political party affiliation – and I have actively sought their input to guide my work on the EAC. I will continue to honor and support the strong tradition of state and local control over the process of election administration. I would also like to specifically mention the high personal regard I have for Arizona Secretary of State Jan Brewer. She and I have had a chance to extensively discuss this matter and, despite our obvious policy disagreement, I
believe she is committed to serving the people of Arizona with integrity and fairness – as she has throughout her extensive and notable career in public service.

Perhaps it is inevitable that someday, Congress will decide to vest greater authority upon the EAC, particularly as politically-charged issues become more frequent. While I reserve judgment today on whether or not such a development merits consideration, the EAC that currently exists – as envisioned by nearly all who participated in the development of HAVA – was one relegated largely to voluntary guidance and an advisory role on matters of election administration. As such, when any matter comes before this agency which would significantly alter the carefully crafted balance of federal/state authority that is implicit in laws such as NVRA and HAVA, I believe the EAC has an obligation to exercise its voluntary guidance and regulatory authority in the most limited, deliberative and transparent manner possible.

For the reasons put forth in Mr. Wilkey’s letter to Arizona dated March 6, 2006, and, after careful and due consideration of Judge Silver’s opinion, I continue to believe that our current agency position accurately reflects the plain language of NVRA, as well as Congressional intent in passing this historic law.

While I respect Chairman DeGregorio’s right to bring this matter before the EAC, for the reasons stated above, I respectfully disapprove of this proposed Tally Vote.

Respectfully Submitted,

[Signature]

COMMISSIONER RAY MARTINEZ III
July 10, 2006
March 6, 2006

Jan Brewer
Arizona Secretary of State
1700 West Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Dear Secretary Brewer,

This letter responds to your office’s December 12, 2005 e-mail to the U.S. Election Assistance Commission (EAC) requesting that the EAC apply Arizona state policy (derived from Proposition 200) to the Federal Mail Voter Registration Form (“Federal Registration Form” or “Federal Form”). Specifically, the inquiry sought to apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process. This request was sent by Robert A. Flores, Voter Outreach Coordinator in response to the EAC’s requests for updates pertaining to the Federal Registration Form. As you may know, use and acceptance of the Federal Form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. §1973gg et seq., (NVRA). The EAC is the Federal agency charged with regulating the development and substance of the Federal Form. (42 U.S.C. §1973gg-7(a)). After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. §1973gg-4(a)).

Arizona’s Policy. On December 12, 2005, the office of the Arizona Secretary of State (Chief State Election Official) requested that the EAC apply new Arizona procedural requirements to the Federal Form. These new procedural requirements reflected proof of citizenship provisions recently adopted by the state in Proposition 200. Generally, proposition 200 requires Arizona registrants to submit additional proof of citizenship with their voter registration forms. This usually requires the individual to record, on the form, his or her driver’s license number (or non-operating identification license) issued after October 1, 1996. If the registrant cannot provide this information (because they have no license or an older license) he or she will need to provide a copy of an alternative form of identification. These alternative forms include: a birth certificate, passport, certificate of naturalization number and other documents. This portion of Proposition 200 amended Arizona Revised Statute §§ 16-152 and 16-166, which set requirements for the State’s registration form and verification of the form. The proposition did not amend Arizona’s registration qualifications, found in Arizona Revised Statute §16-101. If Arizona were to apply this policy to its use and acceptance of the Federal Registration Form, the Federal Form’s acceptance would be conditioned upon the receipt of supplemental documentation of citizenship. In this way, any registrant who failed to supplement their Federal Registration Form would have their form rejected, resulting in the loss of voting rights.

Federal Authority To Regulate Elections. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and
Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. Voting Rights Coalition v. Wilson, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996) (citing Smiley v. Holm, 285 U.S. 355, 366 (1932)); Association of Community Organizations for Reform Now v. Edgar, 56 F.3d 791, 793 -794 (7th Cir. 1995) (citing Smiley, 285 U.S. at 366, Ex parte Siebold, 100 U.S. 371 (1879) and United States v. Original Knights of the Ku Klux Klan, 250 F.Supp 330, 351 - 355 (E.D.La 1965)); Association of Community Organizations for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution “explicitly grants Congress the authority either to ‘make’ laws regarding federal elections... or to ‘alter’ the laws initially promulgated by the states. Thus... article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections.” Miller, 129 F.3d at 836.

In this way, while Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal election (Edgar at 794), this does not limit the Federal authority to set voter registration procedures for such elections. Voting Rights Coalition, at 1413. This is true even where States have declared voter registration to be a voting qualification (Wilson, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (Edgar at 794-795).

**National Voter Registration Act.** Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA’s regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. Voting Rights Coalition, 60 F.3d F.3d 1411; Edgar, 56 F.3d 791; Miller, 129 F.3d 833. The NVRA mandates that States “shall accept and use the mail voter registration application proscribed by the U.S. Election Assistance Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office.” 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets the minimum NVRA criteria for the Federal form. 42 U.S.C. §1973gg-4(b). The EAC is the Federal agency charged with creating and regulating the Federal Form. The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

**Discussion.** While Arizona has authority to determine registrant/voter qualifications, the manner in which it registers voters for Federal elections is subject to Federal regulation. The Federal Government, through the NVRA and the Federal Form has regulated the process of registering voters in Federal Elections. Acceptance of the

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1 The Help America Vote Act amended the National Voter Registration Act transferring regulatory authority over the Federal Form to the EAC. (See 42 U.S.C. §15532 and 42 U.S.C. §1973gg-7(a)).
Federal Form is mandated by the NVRA. The Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof.

Arizona's voting qualifications remain unchanged and are contained in Arizona Revised Statute §16-101. These qualifications are presently reflected on the Federal Form. The statutory changes Arizona has initiated in Proposition 200, which require some residents to submit documentary evidence of citizenship, do not alter the state's voter qualifications. Rather, the statutory scheme is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form.

State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a "Checkbox." (42 U.S.C. §1973gg-7(b)(2) and 42 U.S.C. §15483(b)(4)). This Federal scheme has regulated the area and preempts state action. Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as "not necessary or consistent with the purpose of [the NVRA]."

The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both "accept" and "use" the Federal Form. Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the Federal Form is subject only to HAVA's verification mandate. (42 U.S.C. §15483).

**Conclusion.** While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form. Consistent with the above, 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. If you have any questions, please contact the undersigned at (202) 566-3100.

Thomas R. Wilkey
Executive Director

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2 These qualifications require a registrant to demonstrate that he or she is (1) a citizen of the United States, (2) at least 18 years of age before the date of the next general election, (3) a resident of Arizona for at least twenty-nine days, (4) has not been convicted of a felony unless restored to civil rights and (5) has not been determined mentally incapacitated.

Attachment C
IN THE
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,
Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA,
INC., and JESUS M. GONZALEZ, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE LEAGUE OF WOMEN VOTERS AS
AMICUS CURIAE
IN SUPPORT OF RESPONDENTS

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APPENDIX A

Letter from Gavin Gilmour, Associate General Counsel, Election Assistance Commission to Dawn Roberts, Director, Florida Dep't of State (July 26, 2005) .......... 1a
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OTHER AUTHORITIES
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Letter from Gavin Gilmour, Associate General Counsel, Election Assistance Commission to Dawn Roberts, Director, Florida Dep't of State (July 26, 2005) .................................................. 17, 20, 21


INTEREST OF THE AMICUS CURIAE

The League of Women Voters of the United States is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate actively and knowledgeably in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 140,000 members and supporters, and is organized in approximately 800 communities and in every state.

For more than 90 years, the League has worked to protect every American citizen's right to vote. As part of its mission, the League operates one of the longest-running and largest nonpartisan voter registration efforts in the nation. Moreover, the League has been a leader in seeking to remove the unnecessary barriers that too many Americans face in registering to vote and casting a ballot. To that end, the League has historically endorsed the adoption of simple, uniform voter registration forms that can be submitted through the mail without additional documentary requirements. Mail voter registration has long played a significant role in the League's voter registration drives and served as one

1 Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.
of the organization's primary tools for bolstering democratic participation. Accordingly, the League strongly supported the enactment and enforcement of the National Voter Registration Act of 1993, which aimed to increase the number of eligible citizens who register to vote by providing for standardized, non-discriminatory voter registration procedures.

The League's continuous involvement in the instant case reflects the organization's continuing commitment to its founding goals and to maintaining the integrity of the National Voter Registration Act. When this case was first appealed to the Ninth Circuit, the League filed an amicus brief arguing that Arizona cannot require documentary proof of citizenship as a condition for accepting the federal mail voter registration form. Brief for the League of Women Voters as Amicus Curiae Supporting Plaintiff-Appellants, *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (No. 06-16521). When the case returned to the Ninth Circuit, the League again sought to protect mail registration from debilitating restrictions. Brief for the League of Women Voters as Amicus Curiae Supporting Plaintiff-Appellants, *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010) (No. 08-17094). Subsequently, following the Ninth Circuit's original panel decision, the League filed a third amicus brief, this time urging the court to deny rehearing en banc. Brief for the League of Women Voters as Amicus Curiae Supporting Respondents' Opposition to Appellee's Petition for Rehearing En Banc, *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012) (en banc) (No. 08-17094). The League is filing this brief in support of Respondents in order to
ensure the viability of voter registration by mail and in furtherance of the League’s mission to increase participation in the democratic process.

SUMMARY OF ARGUMENT

1. The Ninth Circuit, sitting en banc, correctly concluded that that the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg et seq., preempts the documentary proof-of-citizenship registration requirement in Arizona’s Proposition 200.² As that court recognized, one of the NVRA’s primary purposes was to increase participation in federal elections by overriding burdensome state registration laws. Specifically, by mandating that states “accept and use” a standard mail voter registration application (the “Federal Form”), Congress sought to establish a single, uniform set of voter registration application requirements for federal elections that would operate independently of state law. This purpose, which is reflected in the NVRA’s text and legislative history, is the driving force behind the mail voter registration provisions at issue and must color any interpretation of the statute.

² Proposition 200 requires that an Arizona “county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship” and lists the documents that must be submitted to prove citizenship. Ariz. Rev. Stat. § 16-166(F) (emphasis added).
2. Congress delegated authority to the Election Assistance Commission ("EAC")\(^3\) to develop and administer the Federal Form. Exercising this authority, the EAC engaged in formal notice-and-comment rulemaking pursuant to the Administrative Procedure Act and determined that an attestation of citizenship under penalty of perjury was sufficient to prevent voter fraud. In reaching this decision, the agency concluded that requiring documentary proof of citizenship would violate the NVRA's mandate that the Federal Form "may require only" such identifying information as is "necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). Under *Chevron*, this Court must defer to the EAC's interpretation of what information is "necessary" under the NVRA. The EAC is the agency solely designated by Congress to interpret the NVRA and has codified its view rejecting a documentary proof-of-citizenship requirement in the Code of Federal Regulations, thereby giving its decision the force of law.

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\(^3\) The Federal Election Commission ("FEC") was originally responsible for implementing the mail voter registration provisions of the NVRA. Following the passage of the Help America Vote Act of 2002 ("HAVA"), however, all responsibilities entrusted to the FEC under the NVRA were transferred to the EAC. 42 U.S.C. § 15532. In light of this complete transfer of responsibility, the actions, decisions, and interpretations of the FEC pertaining to the NVRA are imputed to the EAC. This brief thus uses "EAC" to refer to both the FEC and EAC.
3. The EAC's interpretation of the NVRA is controlling under Chevron regardless of whether this Court applies a preemption analysis under the Elections Clause or the Supremacy Clause. Although the Ninth Circuit correctly reasoned that history and this Court's precedent dictate that preemption under the Elections Clause operates differently than under the Supremacy Clause, this distinction is of no import with respect to Chevron principles. Even under traditional Supremacy Clause principles, Congress clearly intended for the Federal Form to operate independently of state voter registration requirements and delegated authority to the EAC to regulate accordingly. In light of this delegation, the agency's stance that the NVRA preempts Proposition 200's documentary proof-of-citizenship requirement must be taken as conclusive.

ARGUMENT


Because the NVRA was primarily intended to increase the ease with which citizens could register to vote in federal elections, the League strongly advocated for and participated in the negotiations surrounding the NVRA's passage in 1993. Exercising its authority under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, Congress passed the NVRA in part to address what it perceived as improper barriers to voter registration embedded in state law. As the statute itself acknowledged,
“discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.” 42 U.S.C. § 1973gg(a)(3). In its long history of promoting voter registration efforts, the League has experienced many of these unfair registration laws and procedures firsthand. Thus, amicus is in full agreement with the NVRA's stated goals of "increas[ing] the number of eligible citizens who register to vote in elections for Federal office” and implementing procedures at all levels of government to “enhance[] the participation of eligible citizens as voters in elections for Federal office.” Id. § 1973gg(b)(1), (2).

One of the primary ways in which the NVRA was intended to combat problematic state laws and facilitate voter registration was through its mail registration provisions for voters. The centerpiece of these new provisions was the creation of a standardized mail voter registration form that could be utilized by the citizens of any state to register for federal elections. Id. § 1973gg-4. By creating a standardized registration form that “[e]ach State shall accept and use,” id. § 1973gg-4(a)(1), Congress sought to ensure that states could not disenfranchise voters by setting discriminatory or burdensome registration requirements.4

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4 Although the NVRA also permits states to “develop and use” their own forms, § 1973gg-4(a)(2), the implementation of the
The Federal Form was also meant to benefit national organizations that registered voters in multiple jurisdictions, such as the League, which would no longer have to contend with varying and confusing state registration laws. See id. § 1973gg-4(b) (mandating that state officials make the standardized mail registration form available to "governmental and private entities, with particular emphasis on making them available for organized voter registration programs"). Underlying these efforts to "streamline the registration process" was the understanding that states could not unilaterally change the Federal Form. Gonzalez v. Arizona, 677 F.3d 383, 401 (9th Cir. 2012) (en banc). Rather, the development and implementation of the Federal Form was a task delegated exclusively to a federal agency – the EAC.

Federal Form was the true heart of the statute's mail provisions. As the Department of Justice has acknowledged, "[t]he principal purpose of [the NVRA] was to require that the states provide prospective voters with uniform and convenient means by which to register for the federal franchise." Craig C. Donsanto & Nancy L. Simmons, U.S. Dep't of Justice, Federal Prosecution of Election Offenses 55-56 (7th ed. 2007), available at http://www.justice.gov/criminal/pin/docs/electbook-0507.pdf; see also id. at 63 ("The major purpose of this legislation was to promote the exercise of the franchise by replacing diverse state voter registration requirements with uniform and more convenient registration options, such as registration by mail."); ACORN v. Miller, 129 F.3d 833, 835 (6th Cir. 1997) ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA].").
The EAC was not without guidance from Congress about how to develop and implement the Federal Form. In particular, the EAC knew exactly how Congress felt about the inclusion of a documentary proof-of-citizenship requirement for the Federal Form. *Gonzalez*, 677 F.3d at 440-42 (Kozinski, J., concurring). As the legislative history reveals, during congressional deliberations on the NVRA, the Senate passed an amendment to the bill providing that “[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration.” 139 Cong. Rec. 5098 (1993). Senator Simpson, who sponsored the amendment, stated that the amendment was necessary because “allow[ing] States to check documents to verify citizenship” would provide a safeguard against fraudulent voting practices. *Id.* (statement of Sen. Simpson).

The House version of the bill, however, did not include this amendment, and in reconciling the two versions, the Conference Committee ultimately rejected the Senate amendment. In its report, the Committee explained its decision: “[The amendment] is not necessary or consistent with the purposes of this Act. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act.” H.R. Rep. No. 103-66, at 23-24 (1993) (Conf. Rep.) (emphasis added).
After the bill was reported out of conference, its House opponents moved to recommit the bill to the Committee on House Administration, specifically to direct the Committee to reinsert the Senate amendment permitting states to require documentary proof of citizenship. That motion was defeated, 259 to 164. See 139 Cong. Rec. 9219, 9231-32 (1993). Thus, the final version of the NVRA passed by both Houses of Congress did not include any provision permitting states to require documentary proof of citizenship.

In passing the NVRA with only an attestation-of-citizenship requirement, Congress was well aware that states would be prohibited from requiring additional documentation. As the Senate minority emphasized, the bill was understood to effectively "eliminat[e] . . . state verification requirements with [its] mail-in applications." S. Rep. No. 101-140, at 38 (1989). Arguing that this created federalism concerns, the minority proceeded to list a number of state requirements that would be preempted by the NVRA, id. at 38-40, and quoted a letter from the Department of Justice highlighting that the federal mail registration form included no "procedures for independently confirming the information provided." Id. at 47. Squarely presented with concerns about states' ability to impose documentary proof requirements, Congress nevertheless passed the bill in a form that maximized the ease of registration.

Accordingly, the NVRA's "text, context, purpose, and . . . drafting history all point in the same direction." United States v. Hayes, 555 U.S. 415, 429
(2009). Congress did not intend for states to add their own registration requirements to the Federal Form. Reading the statute’s command that every state “shall accept and use” the Federal Form as anything other than an imperative would effectively override Congress’s deliberate exclusion of a documentary proof-of-citizenship requirement from the statute. Adopting Petitioner’s position would also undermine the driving principles behind the statute’s mail voter registration provisions. Indeed, it would be counterintuitive if the very mechanism for circumventing burdensome state registration requirements was itself subject to them. The Ninth Circuit recognized this truism in holding that “the NVRA does not give states room to add their own requirements to the Federal Form,” and this Court should adopt the same conclusion. *Gonzalez*, 677 F.3d at 401.

II. The EAC’s Determination That Documentary Proof of Citizenship Is Not Necessary for the Federal Form is a Valid Exercise of Delegated Power and Entitled to Deference Under *Chevron*.

In the NVRA, Congress mandated that states must “accept and use” the Federal Form. 42 U.S.C. § 1973gg-4(a)(1). However, Congress did not dictate exactly what the Federal Form should look like. Instead, it delegated the task of developing and implementing the Federal Form to the EAC. Consistent with long-standing principles of administrative law, this Court is required to defer to the EAC’s reasonable interpretation of the NVRA
and its determination that no documentary proof of citizenship requirement is necessary for voter registration.

1. The EAC is uniquely positioned to interpret the NVRA, and specifically, its mail voter registration provisions. As explained above, a standardized mail voter registration form was one of the centerpieces of the NVRA. The contents of this new Federal Form, however, were not explicitly defined in the statute. Rather, the NVRA directed the EAC to “develop a mail voter registration application form for elections for Federal office” by “prescrib[ing] . . . regulations.” 42 U.S.C. § 1973gg-7(a)(2), (1). This delegation of power, while broad, was accompanied by several limitations.

First, the EAC could “require only such identifying information . . . as [was] necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” Id. § 1973gg-7(b)(1). Second, the Federal Form was required to specify “each eligibility requirement (including citizenship).” Id. § 1973gg-7(b)(2)(A). Third, the form was required to contain “an attestation that the applicant meets each such requirement.” Id. § 1973gg-7(b)(2)(B). Fourth, the form must “require[] the signature of the applicant, under penalty of perjury.” Id. § 1973gg-7(b)(2)(C). Fifth, the form must list the “penalties provided by law for submission of a false voter registration application.” Id. §§ 1973gg-6(a)(5)(B), 1973gg-7(b)(4)(i). And finally, the statute dictated that the
Federal Form could “not include any requirement for notarization or other formal authentication.” *Id.* § 1973gg-7(b)(3).

Following the NVRA’s enactment, the EAC commenced official notice-and-comment rulemaking proceedings to develop the Federal Form in accordance with the statute’s goals and mandates. *See* Nat’l Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994). While this rulemaking was ongoing, the EAC released a guide containing its preliminary views to assist states in implementing the NVRA. In this guide, the agency noted that it was constrained by the statute to only request identifying information “necessary to . . . assess the eligibility of the applicant,” and was therefore prohibited from asking for superfluous data such as an applicant’s race, gender, or weight. Nat’l Clearinghouse on Election Admin., Fed. Election Comm’n, *Implementing the National Voter Registration Act of 1993* at 3-2, 3-3 (1994) (quoting 42 U.S.C. § 1973gg-7(b)(1)), available at http://www.eac.gov/assets/1/Page/Implementing%20the%20NVRA%20of%201993%20Requirements%20Issues%20Approaches%20and%20Examples%20Jan%20201994.pdf. Based on this interpretation, the EAC declared that the Form was required to include an attestation of citizenship, but made no mention of documentary proof. *Id.* at 3-4. This omission was not a fluke – the three sample mail registration forms that the EAC composed and included in the
guide explicitly required an attestation and nothing more. Id. at 3-10, 3-11, 3-13.

Once rulemaking was complete, the EAC did not deviate from its initial views. After consulting with state officials and referring to public comments, the agency developed a single-sheet registration form that an applicant could simply fill out, stamp, and mail as a postcard. See 11 C.F.R. § 9428.5. This design choice for postcard registration reflected three important conclusions reached by the EAC. First, by making the Federal Form a postcard, the EAC conveyed that the “necessary” information to determine voter eligibility could be contained on a single sheet of paper, and that further documentation was not required under the NVRA. Implementing the National Voter Registration Act at 3-4. Second, the design reflected the agency’s belief that the risk of voter fraud was sufficiently mitigated

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5 Petitioner portrays the EAC’s guide as permitting states to reject a voter registration application if it fails to meet any state registration requirement. Pet’t’s Br. 36-37. But this is not the case. In a preliminary section of the guide, the EAC clarified that an application received by state officials may be subject to “whatever verification procedures are currently applied to all applications.” Implementing the National Voter Registration Act at 1-6. Allowing states to utilize verification procedures after a complete application is accepted, however, is far different than permitting states to impose burdensome requirements during the application process. Moreover, in the section of the guide discussing the Federal Form, the EAC made clear its view that the NVRA “requires States to accept and use what amounts to a national voter registration form.” Id. at 3-1 (emphasis added).
by requiring an applicant to attest under penalty of perjury that she meets the state's eligibility requirements, and that the information provided is true. 11 C.F.R. § 9428.4(b). Third, the postcard format signaled the EAC's commitment to facilitating voter registration drives by national organizations, such as the League. See 42 U.S.C. § 1973gg-4(b).

Although the Federal Form has undergone minor revisions in recent years, its postcard format and attestation requirement have remained unchanged. The significance of this consistency is underscored by the fact that both Congress and the EAC could have chosen to change the Federal Form when the Help American Vote Act ("HAVA") was passed in 2002. HAVA presented an opportunity to modify the form to require more information from applicants. But instead of demanding any sort of documentation, Congress merely added one mandatory question asking the applicant to check a box affirming that she is a United States citizen.\(^6\) 42 U.S.C. § 15483(b)(4)(A)(i). In implementing HAVA's directives, the EAC similarly refused to exercise its broad authority to change the content or format of

\(^6\) Other HAVA provisions established new procedures for states to "verify" the eligibility of voter registration applicants after their completed applications were received, 42 U.S.C. § 15483(a)(5)(B)(i), and set ID requirements at the polls for certain persons who registered to vote "by mail." Id. § 15483(b)(1)(A), (B). However, there was no change made to the Federal Form other than the addition of the check box.
the Federal Form, adding the new check box and nothing more.

2. Over the past eighteen years, the EAC has consistently reiterated that documentary proof of citizenship is not "necessary . . . to assess the eligibility of the applicant" under the NVRA. 42 U.S.C. § 1973gg-7(b)(1). The agency’s preliminary views, its final version of the Federal Form, and its implementation of HAVA all reflect this stance by requiring only an attestation of citizenship on the postcard form. Implementing the National Voter Registration Act at 3-2, 3-4; 11 C.F.R. § 9428.4(b)(2). Thus, when specifically asked by Arizona’s Secretary of State whether Proposition 200 was consistent with the NVRA, the EAC had no difficulty concluding that it was not. See Letter from Thomas R. Wilkey, Executive Director, U.S. Election Assistance Comm’n to Jan Brewer, Arizona Secretary of State (March 6, 2006), available at http://www.eac.gov/assets/1/Page/EAC%20Letter%20to%20Arizona%20Secretary%20of%20State%20Jan%20Brewer%20March%2006%202006.pdf.

In a letter to Arizona’s Secretary of State in March 2006, the EAC emphasized that it was the sole entity charged with “creating and regulating the Federal Form,” and in this capacity, it had decided that documentary proof of citizenship was not necessary under the NVRA. Id. Because the agency had already “set[] the proof required to demonstrate voter qualification,” the EAC concluded that any effort by Arizona to “condition acceptance of the Federal Form upon receipt of additional proof” was
preempted. *Id.: see Gonzalez*, 677 F.3d at 399 (explaining that the NVRA preempts Proposition 200 because the latter's "registration provision directs county recorders to assess an applicant's eligibility based on proof of citizenship information that is not requested on the Federal Form").

Moreover, following the March 2006 letter, the EAC commissioners twice voted on proposals to amend the Federal Form to accommodate Arizona’s Proposition 200. Election Assistance Comm’n, Tally Vote In the Matter of Arizona Request for Accommodation (July 31, 2006), *available at* http://www.eac.gov/assets/1/Page/EAC%20Tally%20V otte%20Regarding%20Arizona%27s%20Request%20for%20Accommodation%20July%2031%202006.PDF; Election Assistance Comm’n, Public Meeting (Mar. 20, 2008), *available at* http://www.eac.gov/assets/1/Events/minutes%20public%20meeting%20march%2020%202008.pdf. In both instances, the vote failed, resulting in no modification of the agency’s position. As Commissioner Ray Martinez, III explained, the EAC has “established its own interpretive precedent regarding the use and acceptance of the Federal Form [and] upheld established precedent from our predecessor agency, the Federal Election Commission.” Ray Martinez III, Commissioner, Election Assistance Comm’n, Position Statement on EAC Tally Vote Dated July 6, 2006: “Arizona’s Request for Accommodation” at 5 (July 10, 2006), *available at* http://www.eac.gov/assets/1/News/Vice Chairman%20Ray%20Martinez%20III%20Position%20Statement%20Regarding%20Arizona’s%20Request%20for%20Accommodation.pdf. Under this
precedent – which remains intact – the “language of NVRA mandates that the Federal Form, without supplementation, be accepted and used by states to add an individual to its registration rolls.” Id. (quoting Letter from Gavin Gilmour, Associate General Counsel, Election Assistance Comm’n to Dawn Roberts, Director, Division of Elections, Florida Dept. of State (July 26, 2005), LWV App. 6a).

3. Under the principles announced in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the EAC's interpretation of the NVRA to preclude a state from adding a documentary proof-of-citizenship requirement to the Federal Form is entitled to deference. In Chevron, the Supreme Court "held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005). Filling these gaps "involves difficult policy choices that agencies are better equipped to make than courts," and as such, "Chevron requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." Id. (citing Chevron, 467 U.S. at 843-44 & n.11, 865-66).

Deference is required regardless of whether the agency's interpretation conflicts with state law; as long as the "agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,

Viewing the instant case in light of Chevron, the EAC interpreted the NVRA as permitting it to request only “necessary” identifying information. 42 U.S.C. § 1973gg-7(b)(1). Building upon this interpretation, the agency determined that documentary proof of citizenship was not “necessary,” and thus could not be required of applicants. This interpretation is eminently reasonable. Congress deliberately refused to allow states to condition their acceptance of the Federal Form on proof of citizenship. See H.R. Rep. No. 103-66, at 23-24. Furthermore, through rulemaking, the EAC had the opportunity to gather information, balance the risks of voter fraud, and ultimately make an educated decision regarding what information was “necessary” for the Federal Form. 59 Fed. Reg. 32,311.

Petitioner implies that it is better suited to determine what information is “necessary” under the NVRA. Pet’r’s Br. at 35-37. But for better or worse, Congress delegated authority to the EAC to determine what information is “necessary” for state officials to determine eligibility — not to state
officials. Under these circumstances, the agency’s view must prevail over Petitioner’s, even if this Court finds the statutory language to be ambiguous. *United States v. Eurodif S.A.*, 555 U.S. 305, 316, (2009) ("[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." (quotation marks omitted; brackets in original)); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering.").

The EAC’s determination that the NVRA specifically preempts Proposition 200’s proof-of-citizenship requirement is likewise entitled to deference under *Chevron*. In the agency’s March 2006 letter, the agency determined that “Arizona’s statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law.” March 6, 2006 Letter from Thomas Wilkey to Jan Brewer at 3. Petitioner argues that EAC Executive Director Wilkey’s letter does not reflect the agency’s position. Pet’r’s Br. at 18-19, 46. This is simply not true; the letter speaks

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7 As part of the regulatory process, the EAC was directed to “consult” with state election officials in developing the Federal Form. 42 U.S.C. § 1973gg-7(a)(1), (2). This further clarifies that the role of the states is a consultative one, not a prescriptive one; the authority to craft the Federal Form rests with the EAC.
with the authority of the EAC — not any of its individual members — and is consistent with the agency's policies. Moreover, regardless of whether the letter carries the force of law, the EAC's determination "certainly may influence courts facing questions the agencies have already answered." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

Two votes by the Commission on Arizona's Proposition 200 subsequently confirmed that the agency would not deviate from its precedent of reading the NVRA to require that states accept the Federal Form "without supplementation." Ray Martinez III Position Statement (July 10, 2006) (quoting July 26, 2005 Letter from Gavin Gilmour to Dawn Roberts, LWV App. 6a); see also EAC Tally Vote (July 31, 2006); EAC Public Meeting (Mar. 20, 2008). While several of Petitioner's amici focus on the fact that a majority of EAC commissioners were unable to agree on an official position concerning Proposition 200 and deadlocked in their tally votes to amend the Federal Form, these arguments overlook the agency precedent on preemption. In 2005, the EAC's General Counsel, with the unanimous consent of the commissioners, advised Florida that it could not require applicants to answer additional questions about mental capacity and felony status on the Federal Form. July 26, 2005 Letter from Gavin Gilmour to Dawn Roberts, LWV App. 2a. The advisory went on to clarify the agency's position that "states may not create policies or pass laws" that alter the Federal Form's requirements in any way. *Id.* at 7a. Thus, regardless of any failed tally votes
as to Arizona’s Proposition 200, the last time a majority of commissioners spoke on the issue of preemption, they took the position that “states may not create policies or pass laws” that alter the Federal Form’s requirements in any way. *Id.*; see also 42 U.S.C. § 15328 (requiring that any official action by the EAC must be approved by a majority of commissioners). This official position requires deference. Arizona may not now attempt an end-run around the EAC by indirectly challenging the agency’s refusal to accommodate Arizona’s Proposition 200 when Arizona never instituted any such challenge directly as required under the Administrative Procedure Act.

In any event, the EAC has long regulated with the assumption that the Federal Form’s requirements preempt state law. In establishing the content of the Federal Form, for example, the agency labored to prevent applicants from having to provide unnecessary information. *See* 59 Fed. Reg. 32,311. The fact that the agency expended such effort is evidence of its belief that states could not unilaterally require additional information from applicants, and demonstrates that the EAC has a “thorough understanding of its own regulations and its objectives and is ‘uniquely qualified’ to comprehend the likely impact of state requirements.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996)); see also *New York v. FCC*, 486 U.S. at 64. In light of this expertise, coupled with the broad delegation of authority to EAC in the text of the NVRA, 42 U.S.C. § 1973gg-7(a)(1), (2), the agency’s
stance regarding the preemptive power of its own regulations must be given deference.

Indeed, the EAC's conclusions are entitled to further deference because they carry the force of law. Following the official rulemaking proceedings, the EAC codified the content of the Federal Form in the Code of Federal Regulations. 11 C.F.R. § 9428.4. In so doing, the agency formalized its conclusions that an attestation of citizenship under penalty of perjury was sufficient and that requiring further documentation was not appropriate under the NVRA. Id. § 9428.4(b)(2), (3); 59 Fed. Reg. at 32,316 ("The issue of U.S. Citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury."). Even absent Chevron deference, such codified requirements are controlling. As this Court has recognized, "an agency regulation with the force of law can pre-empt conflicting state requirements." Wyeth v. Levine, 555 U.S. 555, 576 (2009). This is especially true where, as here, the agency's regulations are clear manifestations of Congress's objectives and directly conflict with state law. Id. at 565, 576-77; Geier, 529 U.S. at 884.

Amicus does not contest that additional, documentary proof of citizenship might, under some circumstances, be helpful to state officials in assessing some applicants' eligibility to vote. But Congress's clear mandate is that the Federal Form require "only such ... information ... as is necessary," not "all" or "any" such information as "might be helpful" to state election officials. 42
U.S.C. § 1973gg-7(b)(1) (emphasis added). In its capacity as the sole agency charged with designing the Federal Form, the EAC interpreted this mandate, and its reasonable conclusion that an attestation under penalty of perjury is sufficient to verify citizenship is entitled to deference. As the Ninth Circuit opined, even though the petitioner "has eloquently expressed its reasons for striking the balance differently, the federal determination controls in this context." Gonzalez, 677 F.3d at 403.

III. The NVRA Preempts Proposition 200's Documentary Proof-of-Citizenship Requirement Regardless of Whether the Court Applies a Preemption Analysis Under the Elections Clause or the Supremacy Clause.

No matter what conclusions this Court reaches regarding the proper preemption analysis under the Elections Clause or the Supremacy Clause, the EAC's interpretation of the NVRA dictates the outcome of this case. The NVRA was passed to override burdensome state voter registration laws and streamline the registration process. In order to effectuate these goals, Congress intended the statute to have preemptive effect and for the Federal Form's registration requirements to exist independent of state law. Under either the Elections Clause or the Supremacy Clause, such clear congressional intent is sufficient to empower the EAC to preempt Proposition 200's documentary proof-of-citizenship requirement.

1. The Elections Clause grants Congress "a general supervisory power over the whole subject" of

Based on the history of the Elections Clause and this Court's precedent on the matter, the Ninth Circuit correctly concluded that the "Elections Clause operates quite differently from the Supremacy Clause." *Gonzalez*, 677 F.3d at 391. In reaching this conclusion, the court reasoned that the "Elections Clause affects only an area in which the states have no inherent or reserved power," and as such, courts "need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Id.* at 392. The court then proceeded to examine the NVRA and Proposition 200 to determine if there was an actual conflict. On this question, the court had no difficulty holding that the two provisions, "when interpreted naturally, do not operate harmoniously as a single procedural scheme for the registration of voters for federal elections. Therefore, under Congress's expansive Elections Clause power, . . .
Proposition 200's] registration provision, when applied to the Federal Form, is preempted by the NVRA." *Id.* at 403.

This Court has never conflated the analysis required under the Elections Clause with that mandated by the Supremacy Clause, and in light of their differing histories and purposes, there is no basis for doing so now. Maintaining federal administrative oversight over elections has long been viewed as vital to the integrity of this nation's government, and to this end, it is imperative that Congress remain empowered to regulate this subject matter as needed. *See* The Federalist No. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that "[n]othing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy"). Preemption is thus appropriate whenever a federal provision passed under the Elections Clause directly conflicts with a state law, regardless of other factors or concerns. *Gonzalez*, 677 F.3d at 394. Under this standard, Proposition 200's documentary proof-of-citizenship requirement is preempted because it conflicts with both the EAC's determination of what information is "necessary" and the NVRA's command that states "accept and use" the Federal Form. *Id.* at 403.

2. Even if this Court agrees with Petitioner that preemption principles derived from the Supremacy Clause are applicable in the Elections Clause context, it still must find that the NVRA preempts
Proposition 200's documentary proof-of-citizenship requirement. The analysis under the Supremacy Clause is governed by congressional intent, which serves as the "ultimate touchstone in every pre-emption case." *Wyeth*, 555 U.S. at 565 (quotation marks omitted). Consequently, when faced with a possible conflict between state and federal law, courts begin by examining whether Congress intended for federal law to prevail. Congress may express its intent either directly in the statute's language, or implicitly through its structure and purpose. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Here, Congress expressly delegated authority to the EAC in the NVRA to determine what information was "necessary" for the Federal Form. The EAC acted pursuant to that delegation, and in doing so, preempted state law to the contrary. It is well-established that even under Supremacy Clause preemption principles, a "formal agency statement of pre-emptive intent" is not necessary. *Geier*, 529 U.S. at 884. "To insist on a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking, would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended." *Id.* at 885. Moreover, if the conflict between state and federal law is clear and insurmountable, preemption must follow. *Id.*

There are undeniable conflicts between Proposition 200's documentary proof-of-citizenship requirement and the Federal Form. Arizona
dictating the content of the Federal Form directly contradicts Congress's exclusive delegation of authority to the EAC to develop the form and determine what identifying information is "necessary." 42 U.S.C. § 1973gg-7(b). And as the Ninth Circuit explained, "Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." Gonzalez, 677 F.3d at 398. Such direct conflicts, coupled with a clear Congressional desire to supplant state law, are sufficient to overcome even the strongest interpretation of the presumption against preemption.

Petitioner's claim that Congress expressly denied the EAC preemptive authority in the NVRA is wrong and plainly misreads the statute. Pet'r's Br. at 44-45. Though Congress prohibited the EAC from imposing some requirements on states, Congress expressly carved out the EAC's authority to impose requirements on states "to the extent permitted under section 1973gg-7(a)." 42 U.S.C. § 15329 (emphasis added). Section 1973gg-7(a), in turn, granted the EAC broad power to "prescribe such regulations as are necessary" to "develop a mail voter registration application form for elections for Federal office." 42 U.S.C. § 1973gg-7(a)(1), (2). Congress

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8 Indeed it is difficult to imagine formulations more at odds with one another than Arizona's requirement to "reject" and the NVRA's requirement to "accept" the same registration application. Compare Ariz. Rev. Stat. § 16-166(F) with 42 U.S.C. § 1973gg-4(a)(1).
thus explicitly exempted the EAC's authority to craft and regulate the Federal Form from any limitations otherwise imposed on the agency. If anything, this exemption demonstrates congressional awareness that the Federal Form would necessarily preempt state law.

The EAC's position that a state cannot add a proof-of-citizenship requirement to the Federal Form is thus dispositive regardless of what preemption principles the Court employs. Under either standard, the NVRA carries preemptive force, and because the statute delegates authority to the EAC, the agency is likewise empowered to preempt state law. See New York v. FERC, 535 U.S. 1, 18 (2002) ("[A] federal agency may pre-empt state law . . . if it is acting within the scope of its congressionally delegated authority." (quotation marks omitted)). Aware of its preemptive authority, the EAC decided that it could not require documentary proof of citizenship on the Federal Form, and under Chevron, Petitioner has no basis for questioning this reasonable decision.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.
Respectfully submitted,

LLOYD LEONARD
THE LEAGUE OF WOMEN
VOTERS OF THE UNITED
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January 22, 2013

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APPENDIX A

U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

RECEIVED
DEPARTMENT OF STATE
05 AUG – 1 AM 11:51
DIVISION OF ELECTIONS
TALLAHASSEE, FLORIDA

July 26, 2005

Ms. Dawn Roberts
Director, Division of Elections
Florida Department of State
500 South Bronough Street
Tallahassee, Florida 32399

Dear Ms. Roberts,

This letter responds to your June 1, 2005 request for guidance from the U.S. Election Assistance Commission (EAC) regarding Florida's proposed policies governing the acceptance of the Federal Mail Voter Registration Form.1 As you know, use and

1 You have also requested guidance from EAC regarding Florida’s policies as they relate to the Federal Postcard Application. The EAC is not the appropriate agency to provide guidance on the use and acceptance of that form, rather, the
acceptance of this Federal form are mandated by the
1973gg et seq., (NVRA). After review of your letter
and its attachments, the EAC concludes that the
policies you propose effectively result in a refusal to
accept and use the Federal Voter Registration Form
in violation of Federal law (42 U.S.C. § 1973gg-4(a)).

Proposed Policy. In your letter, you conclude that
Florida law requires all registration applications to
contain three boxes that must be checked in order to
affirmatively respond to voter qualification questions
regarding felony status, mental incapacity and
citizenship. This mandate has been deemed to apply
to the Federal Mail Voter Registration Form. As two
of the Florida required “checkboxes” are not present
on the Federal Registration Form,² the State intends
to treat all Federal forms received as incomplete.
Under Florida’s proposed policy, applicants using the
Federal form will be notified that their submission
was incomplete and will be required to submit
supplemental information prior to “book closing.”
Failure of applicants to take such action will result
in an invalid registration and the loss of voting
rights.

Department of Defense’s Federal Voting Assistance Program is
the cognizant authority. 42 USCS § 1973 ff et seq.

² The Federal Mail Registration Form does not have check
boxes to affirm mental capacity and felony status. However,
the Help America Vote Act of 2002 required the addition of a
check box to affirm citizenship status. 42 U.S.C. §15483(b)(4).
The State's position on this matter is based upon Florida Statutes and changes thereto contained in a newly passed bill (HB 1567). This bill was recently signed into law by Florida's Governor. The changes to the Florida Statutes noted in your letter include an amendment to section 97.052. This change adds the aforementioned "checkboxes" to the "uniform statewide voter registration application." Also included in the changes, is an amendment to section 97.012, stating that a voter registration is complete only if there is a mark in each if [sic] these "checkboxes." The letter also cites section 97.052(5), noting that the voter registration application prescribed by the Election Assistance Commission will be accepted only if it contains information required by State law. Based upon the information we have received, the Florida Legislature has not changed its voting qualifications found in Section 97.041 of the Florida Statutes.

Federal Authority. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. 

Cir. 1995) (citing Smiley, 285 U.S. at 366, Ex parte Siebold, 100 U.S. 371 (1879) and United States v. Original Knights of the Ku Klux Klan, 250 F.Supp 330, 351 – 355 (E.D.La 1965)); Association of Community Organizations for Reform Now v. Miller, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution “explicitly grants Congress the authority either to ‘make’ laws regarding federal elections... or to ‘alter’ the laws initially promulgated by the states. Thus... article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections.” Miller, 129 F.3d at 836.

In this way, while it is clear that Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal election (Edgar at 794), this does not limit the Federal authority to set voter registration procedures for such elections. Voting Rights Coalition, at 1413. This is true even where States have declared voter registration to be a voting qualification (Wilson, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (Edgar at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NRVA’s regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. Voting Rights Coalition, 60 F.3d 1411; Edgar, 56 F.3d 791; Miller, 129 F.3d 833. The NVRA mandates that States “shall accept and use
the mail voter registration applicant proscribed by the U.S. Election Assistance Commission pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets NVRA criteria for the Federal form. 42 U.S.C. §1973gg-4(b). The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2). The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Florida has sole authority to determine voter qualifications, the manner in which it registers voters is subject to Federal regulation. Florida's voting qualifications remain unchanged and are contained in Section 97.041 of the Florida Statutes. The Federal Mail Registration Form, per its State instructions section, accurately reflects these qualifications. The statutory changes Florida has initiated, requiring the use of a "checkbox" in its registration forms, do not alter its voter qualifications. Rather, the "checkbox" scheme is merely a means to determine, document and communicate existing voter eligibility requirements.

As such, Florida's statutory changes deal with the manner in which registration is conducted and are,
therefore, subject to Federal law. Congress has clearly regulated in this area by prescribing the Federal Mail Registration form. The NVRA and HAVA have determined the manner in which voter eligibility shall be documented and communicated on this Federal form. State voter requirements are documented by the applicant via a signed attestation.\footnote{As previously noted, HAVA requires the Federal form to document citizenship and age requirements (common to all States) through the use of two “checkboxes.” 42 U.S.C. §15483(b)(4).} 42 U.S.C. §1973gg-7(b)(2).

In this way, Florida’s proposed policy, to treat all Federal Mail Registration Forms received as incomplete, violates the provisions of the NVRA. The NVRA requires States to both “accept” and “use” the Federal Form. Under Florida’s policy, State officials would take in the Federal form, only to turn around and require its user to re-file or otherwise supplement their Federal application using a state form. Under this scheme, the Federal Mail Registration Form would be neither “accepted” nor “used” by the State. The language of the NVRA mandates that the Federal form, without supplementation, be accepted and used by States to add an individual to its registration rolls. Any Federal Mail Registration Form that has been properly and completely filled-out by an applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such acceptance and use of the
Federal form is subject only to HAVA’s verification mandate. 42 U.S.C. §15483.

Given that Florida’s proposed policy conflicts with the NVRA, these policies are untenable. Article I, Section 4 and Article II, Section 1 of the U.S. Constitution grant the Congress the authority to regulate the manner in which States conduct voter registration in Federal elections. Congress has chosen to regulate voter registration through HAVA and the NVRA; this regulation, therefore, supersedes State law. Thus, states may not create policies or pass laws which conflict with these authorities. 4

Conclusion. Florida’s proposed policy violates NVRA requirements. The State may not refuse to accept and use the Federal form. If you have any questions regarding this letter or wish to discuss

4 While the EAC does not make a practice of interpreting State law, it is important to note that the statutory changes identified in the June 1st letter do not necessarily prohibit acceptance of the Federal form. The changes to section 97.052 clearly alter the State form, not the Federal form. The changes to section 97.012, requiring boxes to be checked before a form is complete, may also be reasonably interpreted to apply only to the State registration form. Similarly, Section 97.052(5), requiring the Federal form to be accepted only if it complies with State requirements, must be interpreted to reject the form only when it fails to reflect State voter eligibility requirements. Otherwise, the section would contradict Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, which grants Congress authority to regulate the manner in which Federal elections are held.
alternative policies, please contact the undersigned at (202) 566-3100.

/Gavin S. Gilmour/

Gavin S. Gilmour
Associate General Counsel
Attachment D
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").

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).

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, 2004.

² ITCA and Gonzalez Plaintiffs’ other claims were dismissed on August 28, 2007 and February 5, 2008, respectively. (Docs. 330, 611).
2004. 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

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).

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)).

- 4 -
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 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. \(^{1d}\)

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.

\(^7\)“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. \(^{1d}\)
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.
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.*

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&lngFormInf oKey=1410. In either case, one of the documents must be considered a “primary” document.

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


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.

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).
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, 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

   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).

\(^{11}\) 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 vote, 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 114).

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.

- 15 -
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 an 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.\textsuperscript{15}
Ex. 1349a,c,d,e,f,g. Of the five, four pleaded guilty. \textit{Id.}

V. Plaintiffs

A. Gonzalez

i. Individual Plaintiffs

There are four individual plaintiffs: Jesus Gonzalez, Bernie Abeytia, Georgia Morrison-Flores, and Debra Lopez.\textsuperscript{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. (\textit{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).\textsuperscript{17}

The letter of denial specified that satisfactory evidence of citizenship included the A-number on the naturalization certificate. \textit{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.

\begin{enumerate}
\item 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.
\item Naeem Abdul-Kareem, Luciano Valencia, and Maria Gonzalez were dismissed on June 27, 2008. (Doc. 883).
\item 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).
\end{enumerate}
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
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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\textsuperscript{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-
umber, 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).

\textsuperscript{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, 1192 (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
naturalization certificate is not forbidden by the Manual. (See Ex. 4, at 48). The Secretary of State’s representative, Joseph Kanefield, 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

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.

\(^{20}\) 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.


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. City 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

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.


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.”

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

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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. . . .


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.

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

Plaintiff's 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
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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.


“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.


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.

[Signature]

Roslyn O. Silver
United States District Judge