No. 08-17115

In the United States Court of Appeals

for the Ninth Circuit

MARIA M. GONZALEZ, et al.,
Plaintiffs-Appellants,
v.
STATE OF ARIZONA, et al.,
Defendants-Appellees,

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., et al.,
Plaintiffs-Appellants,
v.
STATE OF ARIZONA, et al.,
Defendants-Appellees,

On Appeal from the United States District Court
for the District of Arizona
Cause Nos. CV06-01268-PHX-ROS and CV06-01362-PHX-ROS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Appellant the Inter Tribal Council of Arizona, Inc. states that it is an Arizona non-profit corporation, that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

THE SPARKS LAW FIRM

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STATEMENT OF JURISDICTION

In the District Court, plaintiffs sought declaratory and injunctive relief barring enforcement of the voting-related provisions of the "Arizona Taxpayer and Citizen Protection Act," a citizens' initiative that appeared on Arizona's November 2004 general election ballot as Proposition 200 and was enacted by the State's voters. The Complaint filed by the Inter-Tribal Council of Arizona, Inc., the Arizona Advocacy Network, the Hopi Tribe, the League of Women Voters of Arizona, the League of United Latin American Citizens, People for the American Way Foundation and State Representative Steve Gallardo (collectively, the "ITCA Plaintiffs") alleged that Proposition 200 violates the 14th and 24th Amendments to the United States Constitution, the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(A) and (B), Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* (the "NVRA").[1] As such, this case arose under the Constitution, laws, or treaties of the United States, and subject matter jurisdiction in the District Court was based on 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1361 and 1367(a), and 42 U.S.C. §§ 1971(d),

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[1] Excerpts of Record, Tab 10, Clerk's Record, Doc. 1 (CV06-01362-PHX-ROS). Documents cited herein and contained in the Excerpts of Record ("ER") are cited by ER tab number and Clerk's Record ("CR") number, if any. If the document is not included in the CR for the lead case, No. CV06-01268-PHX-ROS, the case number is noted in parentheses following the CR number.

1973j(f) and 1983. The District Court had jurisdiction to grant both declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

Following a trial on the merits of the claims remaining after entry of partial summary judgment for defendants, the District Court issued Findings of Fact and Conclusions of Law, entered judgment for defendants and dismissed the Complaint.[2] This Court has jurisdiction pursuant to 28 U.S.C. § 1291. This appeal is from a final judgment that disposes of all of the parties' claims.

The District Court entered Judgment on August 20, 2008.[3] The ITCA Plaintiffs filed their Notice of Appeal on September 19, 2008.[4] Pursuant to Fed. R. App. P. 4(a)(1)(A), the Notice of Appeal was timely filed.

STATEMENT OF THE ISSUES

Proposition 200 imposed strict new documentary requirements for voter registration and election day voting in Arizona. Arizona residents, who otherwise are qualified to vote, now must produce documentary evidence of United States citizenship to register to vote and must produce documents establishing their identity to vote at the polls on election day. These requirements have a significant defect – to obtain the documents required by Proposition 200 and its implementing regulations, citizens who lack them must pay a fee or otherwise incur a cost. As

[2] ER 3, CR 1041; ER 2, CR 1042.

[3] ER 2, CR 1042.

[4] ER 1, CR 1047.

the Supreme Court recently explained in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), requiring voters to purchase documents necessary to cast a ballot makes payment of a fee an electoral standard, and constitutes an unconstitutional poll tax under the 14th Amendment's Equal Protection Clause and the 24th Amendment. In view of the Supreme Court's intervening decision, this Court's pre-*Crawford* interim ruling in this case that Proposition 200 does not impose a poll tax, to which the District Court adhered on remand, should not be followed as the law of the case.

In implementing Proposition 200, Arizona election officials refuse to register individuals who use the Federal Mail Voter Registration Form (the "Federal Form") mandated by the NVRA, 42 U.S.C. § 1973gg-7(a)(2), which does not call for submission of any documentary proof of citizenship. Contrary to this Court's interim ruling, again followed by the District Court, the NVRA does not permit Arizona to add documentation requirements to the Federal Form, or supplant it altogether with the State's own voter registration form. Indeed, Arizona, like all the other states subject to the NVRA, must "accept and use" the Federal Form as is, without imposing additional documentation requirements on would-be registrants. 42 U.S.C. § 1973gg-4(a)(1).

In light of this, the present appeal addresses whether the District Court erred in granting summary judgment on two of the ITCA Plaintiffs' claims. In particular:

1. Whether the District Court erred in concluding that Proposition 200 does not impose a poll tax in violation of the 14th and 24th Amendments; and

2. Whether the District Court erred when it determined that Arizona's implementation of Proposition 200 to require voter registration applicants who use the Federal Mail Voter Registration Form to submit documentary evidence of citizenship does not violate the National Voter Registration Act.

STATEMENT OF THE CASE

The ITCA Plaintiffs filed their challenges to the voting-related provisions of Proposition 200 in May 2006 and moved for a preliminary injunction on several grounds, including that (1) Proposition 200 imposes a poll tax in violation of the 14th and 24th Amendments, (2) imposes an unconstitutional burden on the fundamental right to vote, and (3) is pre-empted by the NVRA.[5] The District Court consolidated the ITCA Plaintiffs' case with cases filed by Maria Gonzalez and several other individuals and organizations that serve the Latino community (the "Gonzalez Plaintiffs") and Agnes Laughter and the Navajo Nation (the "Navajo

[5] ER 10, CR 1 (CV06-01362); CR 149.

Plaintiffs").[6] The ITCA Plaintiffs, Gonzalez Plaintiffs and Navajo Plaintiffs (collectively, the "Plaintiffs") all sought preliminary injunctive relief.[7] After a two-day hearing in late August 2006, the District Court denied Plaintiffs' motions, ruling that Plaintiffs had failed to demonstrate a likelihood of success on the merits and that the balance of equities tipped in the Defendants' favor.[8]

After the District Court ruled, the ITCA and Gonzalez Plaintiffs promptly appealed and filed an Emergency and Urgent Motion for Injunction Pending Appeal. On October 5, 2005, this Court granted the Emergency Motion, and enjoined implementation of Proposition 200's voting-related provisions pending the appeal.[9] The State and four counties appealed that ruling to the United States Supreme Court, which vacated the Ninth Circuit's interim order due to the lack of sufficient factual findings and possible voter confusion in the November 2006 election. *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006). On January 8, 2007, after briefing on the ITCA and Gonzalez Plaintiffs' appeal, which was limited to Proposition 200's citizenship documentation requirement for voter registration, this Court heard oral argument. On April 20, 2007 this Court issued an Opinion

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[6] CR 33; CR 142.

[7] CR 7; CR 149; CR 2 (CV06-01575).

[8] ER 6, CR 183; ER 5, CR 219.

[9] *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006) (order granting Emergency Motion for Injunction Pending Interlocutory Appeal).

affirming the District Court's denial of preliminary injunctive relief, concluding, *inter alia*, that Proposition 200's documentation requirement for voter registration does not (1) constitute a poll tax or (2) violate the NVRA. *Gonzalez v. Arizona*, 485 F.3d 1041, 1049-50, 1052 (9th Cir. 2007).

In June 2007, Defendants moved for partial summary judgment on several of Plaintiffs' claims, including the poll tax and NVRA claims.[10] Relying on this Court's Opinion affirming the preliminary injunction ruling, the District Court granted Defendants' Motion for Partial Summary Judgment.[11]

In May 2008, ITCA, the Hopi Tribe and the Navajo Plaintiffs reached a settlement with Defendants concerning the forms of tribal identification that the State will accept at polling places. Consequently, ITCA and the Hopi Tribe dismissed their claims related to polling place identification, and the Navajo Plaintiffs dismissed their Complaint.[12]

In July 2008, the case proceeded to trial on the remaining issues, in particular, the claims asserting an unconstitutional burden on the right to vote and a

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[10] CR 282.

[11] ER4, CR 330.

[12] CR 775; CR 776. The Navajo Plaintiffs' Complaint did not include any claims concerning the voter registration requirements. The other ITCA Plaintiffs did not dismiss their claims related to polling place identification, presenting issues other than the forms of tribal identification acceptable at the polls on election day. In addition, People for the American Way Foundation withdrew as a plaintiff on April 1, 2008. CR 741; CR 743.

violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. On August 20, 2007, the District Court issued its Findings of Fact and Conclusions of Law, and entered judgment for Defendants on all of the ITCA Plaintiffs' remaining claims and all of the Gonzalez Plaintiffs' claims.[13]

STATEMENT OF FACTS

I. Proposition 200.

Heralded by its proponents as a means to "discourage illegal immigration" and prevent the State from becoming a "safe haven" for illegal immigrants who cause "economic hardship," the Arizona Taxpayer and Citizen Protection Act ("Proposition 200") was approved by Arizona voters in the November 2, 2004 general election.[14] In line with the Proposition's stated purpose, one section amended Arizona law concerning public benefits.[15] Despite no evidence whatsoever of registration or voting by illegal immigrants, the remainder of Proposition 200 altered three provisions of Arizona law related to voting – A.R.S. §§ 16-152, 16-166 and 16-579.[16] The amended statutes impose onerous documentation requirements on those seeking to register to vote and similarly

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[13] ER3, CR 1041; ER 2, CR 1042.

[14] ER 3, CR 1041, at 2-3; ER 11, § 2.

[15] ER 11, § 6.

[16] *Id.* §§ 3-5.

impose onerous identification requirements on registrants seeking to vote at a polling place on election day.

A. The New Registration Documentation Requirements.

As amended by Proposition 200, A.R.S. § 16-166(F) requires that "[t]he County Recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship."[17] The statute defines "satisfactory evidence of citizenship" as:

> [1] Arizona Driver's License or ID Issued After October 1, 1996: "The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship."
>
> [2] Birth Certificate: "A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder."
>
> [3] Passport: "A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport."
>
> [4] Certificate of Naturalization: "A presentation to the county recorder of the applicant's United States naturalization

[17] Proposition 200 also amended A.R.S. § 16-152 to specify that Arizona voter registration forms include "[a] statement that the applicant shall submit evidence of United States citizenship with the application, and that the registrar shall reject the application if no evidence of citizenship is attached." A.R.S. § 16-152(A)(23).

> documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be 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] IRCA Documents: "Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986."
>
> [6] BIA or Tribal Identification: "The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number."

A.R.S. § 16-166(F) ("Registration Documents").[18]

A.R.S. § 16-166(F), as amended by Proposition 200, was precleared by the United States Department of Justice pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and took effect on January 25, 2005.[19] After that date, every person who registers to vote for the first time must provide either (1) a number from, (2) a copy of or (3) an actual Registration Document to the County Recorder. Those who registered to vote in Arizona before January 25, 2005 need

[18] In practice, several of the Registration Documents specified in A.R.S. § 16-166(F) cannot be used. No other state indicates on the face of its driver or nonoperating identification licenses whether the holder has provided "satisfactory proof of United States citizenship." ER 12, at 19:19-21:4. Nor have there been any documents "established pursuant to [IRCA]." ER 13, at 79:19-24. Finally, two of the enumerated forms for Native Americans – BIA Cards and Tribal Treaty Cards – do not exist. ER 14, at 474:19-475:11; ER 15, at 4.

[19] ER 3, CR 1041, at 3; ER 16, at 648:3-7.

not provide a Registration Document unless re-registering in another Arizona county. A.R.S. § 16-166(G).

No provision of Proposition 200 permits waiver of the Registration Documents requirement for any reason. Defendant Arizona Secretary of State has instructed elections officials of all fifteen Arizona counties to reject voter registration forms submitted without a Registration Document.[20]

In particular, the Arizona Secretary of State has applied the Registration Document requirement to the Federal Form prescribed by the NVRA.[21] In March 2006, the Election Assistance Commission (the "EAC"), the federal agency responsible for implementing the NVRA, informed the Secretary of State that Arizona may not "condition acceptance of the Federal Form upon receipt of additional proof" of citizenship.[22] Despite the EAC's clear statement that Arizona's application of the Registration Document requirement to Federal Form registrations "would effectively result in a refusal to accept and use the Federal . . . Form in violation of [f]ederal law," the State has made no exception to the Registration Document requirement.[23]

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[20] ER 17, at 1; *see also* A.R.S. § 16-152.

[21] ER 17, at 1.

[22] ER 18, at 3.

[23] *Id.* at 1.

B. Polling Place Identification Requirements.

A.R.S. § 16-579(A), as amended by Proposition 200, requires voters casting their ballots at a polling place on election day to "present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector" ("Polling Place ID"). Voters seeking to cast a ballot at their polling place on election day cannot obtain a waiver of the Polling Place ID requirement for any reason.[24]

Because the law does not specify the acceptable forms of Polling Place ID, the Arizona Secretary of State has promulgated a "Procedure for Proof of Identification at the Polls" (the "Polling Place Procedures" or the "Procedures").[25] Under the Procedures, voters are provided a regular ballot if they present either one document that includes their photograph, name and current address, or two documents that contain their name and current address (but lack a photograph). The acceptable forms of photo identification are: (1) a valid Arizona driver's license, (2) a valid Arizona nonoperating identification license, (3) a tribal enrollment card or other form of tribal identification or (4) a valid United States federal, state or local government-issued identification.[26] Acceptable forms of non-photo identification are: (1) a utility bill (for electric, gas, water, solid waste,

[24] ER 19, at 748:16-749:5, 750:24-751:4; ER 20.

[25] *See* ER 21.

[26] *See id.* at 128.

sewer, telephone, cellular phone or cable television) that is dated within ninety days of the date of the election, (2) a bank or credit union statement that is dated within ninety days of the date of the election, (3) a valid Arizona Vehicle Registration, (4) an Indian census card, (5) a property tax statement for the voter's residence, (6) a tribal enrollment card or other form of tribal identification, (7) a Recorder's Certificate or (8) a valid United States federal, state, or local government issued identification, including a voter registration card issued by the county recorder.[27]

The Polling Place Procedures permit counties to add other forms of Polling Place ID that "establish the identity of the elector in accordance with the requirements of A.R.S. § 16-579(A)."[28] Some, but not all, Arizona counties have added "Official Election Mail" sent by the county, addressed to individual voters, to the list of acceptable non-photo identification.[29]

Voters who cannot present sufficient Polling Place ID receive either a regular provisional ballot or a conditional provisional ballot. If the voter's Polling Place ID lacks a current address, has a name different from the name that appears in the precinct register or has a photograph that does not reasonably appear to be the voter, but otherwise complies with the Procedures, the voter receives a regular

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[27] *Id.*

[28] *Id.*

[29] ER 19, at 748:16-749:5, 750:24-751:4; ER 20.

provisional ballot.[30] If the voter has no acceptable Polling Place ID, or only one form of non-photo ID, the voter receives a conditional provisional ballot.[31] Regular provisional ballots are counted if election officials are able to match the voter's signature on the provisional ballot to the signature on the voter's registration form. Conditional provisional ballots, however, are not counted unless the voter appears before county elections officials within a few days of the election and provides sufficient Polling Place ID.[32]

The Department of Justice precleared the Polling Place Procedures under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and they went into effect on September 6, 2005.[33] The Procedures were implemented beginning with local elections in March 2006.[34] The September 2006 primary election was the first statewide election in which elections officials applied the Polling Place ID

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[30] ER 21, at 131.

[31] *Id.* at 127-28.

[32] *See id.* at 129-31, 135-36.

[33] ER 13, at 18:9-24, 52:1-15. As noted above, the Polling Place Procedures were amended pursuant to a May 2008 settlement agreement in this case to expand the types of tribal identification documents that constitute acceptable Polling Place ID. The amended Procedures received Section 5 preclearance from the Justice Department on May 22, 2008. ER 3, CR 1041, at 5; ER 22.

[34] *E.g.*, ER 12, at 73:23-74:2.

requirement.[35] All voters who vote at a polling place on election day must now comply with the Polling Place ID requirement. A.R.S. § 16-579(A).

II. Persons Eligible to Vote in Arizona Who Do Not Possess A Registration Document or Polling Place ID Are Forced to Pay to Obtain the Documents Necessary to Register and Vote.

A. Persons Lacking Registration Documents Must Pay a Fee Ranging From Four Dollars to $380.

As the District Court recognized, "[i]t is undisputed that some individuals will have to obtain a form of identification" to register to vote.[36] In other words, the District Court found that there are Arizonans who satisfy all state qualifications to vote, but who do not possess any of the Registration Documents specified in A.R.S. § 16-166(F). In order for these individuals to register and vote, they must obtain one of the enumerated Registration Documents, which they may need for no other purpose.

The District Court also recognized that, except for a few narrow categories of individuals, Arizonans cannot obtain any of the alternative Registration Documents without paying a fee, and therefore cannot register to vote without paying a fee.[37] The fees associated with Registration Documents range from four

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[35] *Cf.* ER 23, at 68:10-69:19.

[36] ER 5, CR 219, at 9.

[37] *Id.*; ER 3, CR 1041, at 8-11. Certain individuals are eligible to obtain an Arizona nonoperator's identification license without paying a fee, but must still provide at least one "primary" document, which includes a birth certificate, passport or certificate of naturalization or citizenship, *i.e.* other Registration

dollars for a replacement Arizona driver's license or nonoperator's identification card, to $380 for a replacement Certificate of Naturalization.[38]

B. Those Who Lack Polling Place ID Must Pay to Obtain It.

The District Court found that 4,194 ballots cast during the 2006 primary and general elections and the 2008 Presidential preference election were uncounted because the voters did not provide Polling Place ID.[39] To obtain the necessary Polling Place ID so that their ballots are counted in the next election, those voters must pay a fee. The forms of photo identification that are acceptable as Polling Place ID and are generally available – the Arizona driver's or nonoperating identification licenses – cost between four dollars and $25.[40] Voters without photo Polling Place ID must present two forms of non-photo Polling Place ID. Excluding voter registration cards, "Official Election Mail" addressed to an individual voter and some forms of identification issued by some tribal governments, non-photo Polling Place ID cannot be obtained without payment of

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Documents that are not free. ER 24. In addition, though some Arizona Indian tribes provide free tribal enrollment cards, not all tribes issue such cards, or provide them for free. ER 15, at 4; ER 25, at 15-18; *see also* ER 26, at 112:21-113:9 (Supai Tribe does not issue identification).

[38] ER 3, CR 1041, at 8-11. Fees for other Registration Documents are as follows: Arizona driver's license – $10-25, depending on age; Arizona nonoperating identification license – $12; Arizona birth certificate – $10; and U.S. passport – $100. *Id.*

[39] *Id.* at 15.

[40] *See supra* note 37.

(1) a fee for the identification itself, (2) the purchase price of property such as an automobile or house, or (3) a service such as a bank account, automobile insurance or utility service.[41]

Importantly, the law does not require Arizona election officials to provide free forms of Polling Place ID. Though the law requires counties to provide free voter registration cards, they are not required by law to send "Official Election Mail" individually addressed to any registered voter, and not all counties do so.[42] Indeed, most Arizona counties do not send Official Election Mail to "inactive" registered voters.[43] For the 2008 general election, Maricopa County, where more than 50 percent of Arizona voters reside, did not send Official Election Mail that could be used as Polling Place ID.[44] In short, the law provides no free Polling Place ID to Arizonans who must acquire such documents to be allowed to cast a ballot at the polls on election day.

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[41] *See* ER 21, at 128.

[42] *See* ER 12, at 57:5-17; ER 13, at 139:1-3; ER 19, at 748:22-749:5; ER 20 (limiting Polling Place ID to "those specifically noted in the Manuel [sic]"); ER 23, at 62:4-63:8, 63:25-64:10; ER 27, at 21:23-21:25; ER 28, at 23:4-18; ER 29, at 32:15-32:25; ER 30.

[43] *See* ER 12, at 50:2-50:4, 57:2-57:9; ER 23, at 59:21-60:18; ER 26, at 111:12-111:20.

[44] ER 31; *see also* ER 32, at 83:20-84:11, 86:1-86:4 (discussing cost of sending sample ballots to individual voters and potential for not doing so in 2008 to meet County-mandated budget reduction); ER 33, at 108:16-109:10 (Yavapai County may not send official election mail in 2008, and did not do so for the February 5, 2008 Presidential Preference Election).

STANDARD OF REVIEW

The District Court granted partial summary judgment for defendants on the poll tax and NVRA claims. Accordingly, this Court's review of these issues is *de novo*, applying the same standard used by the trial court under Fed. R. Civ. P. 56(c). *E.g., Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2000).

ARGUMENT SUMMARY

The District Court's grant of summary judgment on the poll tax and NVRA claims should be reversed. This Court's decision at the preliminary injunction stage in this case, that Proposition 200 does not constitute a poll tax, conflicts with intervening controlling authority and was clearly erroneous. The Supreme Court has broadly held that any requirement that a voter pay a fee as a prerequisite to voting in a state or federal election violates the 14th and 24th Amendments. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) (state elections – 14th Amendment); *Harman v. Forssenius*, 380 U.S. 528, 544 (1965) (federal elections – 24th Amendment). Moreover, after this Court's interim decision in this case, the Supreme Court issued its opinion in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), reiterating the breadth of the constitutional ban on poll taxes, and emphasizing that any state law that requires voters to purchase documents to vote is an unconstitutional poll tax. *See id.* at 1620-21. There is no dispute that some Arizonans lack Registration Documents or Polling Place ID and

must pay a fee (or its equivalent) to exercise their right to vote. Accordingly, by putting a price tag on the right to vote, Proposition 200 violates the Constitution.

This Court's previous ruling concluding that Proposition 200 does not violate the NVRA is clearly erroneous. The NVRA specifically provides that all states must "accept and use" the Federal Form for voter registration for federal elections. 42 U.S.C. § 1973gg-4(a)(1). The Federal Form requires applicants to sign and avow under penalty of perjury that the applicant is a United States citizen, but does not require registrants to possess or present any *additional* documents. By conditioning acceptance of the Federal Form on production of supplemental information, Arizona is not "accept[ing] and us[ing]" the Federal Form as required by the NVRA. *Id.* Because Proposition 200's additional registration requirements directly contradict the NVRA, federal law preempts them in connection with the Federal Form.

ARGUMENT

I. The Fourteenth Amendment's Equal Protection Clause and the Twenty-fourth Amendment Prohibit Arizona from Requiring that Qualified Voters Pay to Obtain a Registration Document or Polling Place ID.

A. The Constitution Prohibits States from Requiring Voters to Pay a Fee of Any Kind for the Privilege of Exercising the Franchise.

The 24th Amendment to the United States Constitution absolutely prohibits requiring payment of *any tax* as a precondition to exercising the right to vote in federal elections:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be *denied or abridged* by the United States or any state by reason of failure to pay any *poll tax* or *other tax*.

U.S. Const. amend. XXIV, § 1 (emphasis added). Shortly after the 1964 ratification of the 24th Amendment, the Supreme Court held that Virginia's poll tax scheme for federal elections was unconstitutional. *Harman*, 380 U.S. at 544 (1965) (striking down a system that required either payment of a $1.50 poll tax or filing a certificate of residence in lieu of payment of the tax). The Court reviewed the 24th Amendment's legislative history, and noted that "[o]ne of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise." *Id.* at 539. Even though the poll taxes in effect before the 24th Amendment were small, and imposed only "a slight economical obstacle" for voters, Congress recognized that exacting any fee for voting led to

"disenfranchisement of the poor." *Id.* Furthermore, a poll tax violates the 24th Amendment "regardless of the service it performs," since the Amendment "was . . . designed to absolve all requirements impairing the right to vote in federal elections by reason of failure to pay the poll tax." *Id.* at 544.

The following year, the Court again took up Virginia's poll tax, this time with respect to state elections, and held that the 14th Amendment's Equal Protection Clause barred imposition of a poll tax for state elections as well. *See Harper*, 383 U.S. at 666.[45] The Court explained that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of *any fee* an electoral standard." *Id.* at 666 (emphasis added). Because the Virginia poll tax made an irrelevant factor – payment of a tax, however small – a voter qualification, it "invidiously discriminate[d]." *Id.* at 666, 668.

For the next 40 years, the Court said little about the poll tax until its recent opinion in *Crawford*. The *Crawford* case involved a pre-enforcement challenge to Indiana's voter identification law. 128 S. Ct. at 1613-14. The Indiana law requires all voters who wish to cast a ballot at the polls on election day to present

[45] Unlike the poll tax scheme for federal elections invalidated in *Harman,* which included an option to file a "certificate of residence" in lieu of paying the poll tax, Virginia required all voters in state elections to pay a $1.50 poll tax. *Harper,* 383 U.S. at 665 n.1.

government issued photo identification.[46] *Id.* at 1613. Notably, Indiana provides "free photo identification to qualified voters able to establish their residence and identity." *Id.* at 1614. Indeed, the State took the affirmative step, as part of the law enacting the photo identification requirement, to alter state law to provide for free identification. *Id.* at 16 n.4.

The Court upheld the Indiana law, but emphasized that had the state not provided for free the document necessary to cast a ballot, the Indiana law would be unconstitutional. *Id.* at 1620-21. As the Court explained, "[t]he fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under [the Court's] reasoning in *Harper*, if the State required voters to pay a tax or a fee to obtain a new photo identification." *Id.*

The *Crawford* decision materially clarifies the effect of the constitutional ban on poll taxes on Arizona's similar, though even more onerous, law. Indeed,

[46] The Indiana photo identification requirement does not apply to absentee voting by mail. *Crawford*, 128 S. Ct. at 1613. The law also excepts those living and voting in state-licensed facilities such as nursing homes. *Id.* Indigent voters or those with a religious objection to being photographed may cast a provisional ballot that will be counted if they submit an "appropriate affidavit" to election officials within 10 days following the election. *Id.* at 1613-14.

Crawford demonstrates that Proposition 200 imposes a poll tax in violation of the 14th and 24th Amendments.[47]

B. Supreme Court Precedent Clearly Establishes that Proposition 200 Imposes an Unconstitutional Poll Tax.

1. *Without the Benefit of* Crawford*, this Court Previously Concluded that the Registration Document Requirement Does Not Constitute a Poll Tax.*

Before the Supreme Court's decision in *Crawford*, this Court affirmed the District Court's denial of a preliminary injunction, concluding in its interim ruling that the Registration Document requirement is not an unconstitutional poll tax. *Gonzalez v. Arizona*, 485 F.3d 1041, 1049 (9th Cir. 2007) ("*Gonzalez I*"). On

[47] Justice Stevens announced the judgment of the Court in *Crawford*, and was joined in a plurality opinion by Chief Justice Roberts and Justice Kennedy. *Id.* at 1613. None of the other Justices disagreed with the plurality's analysis of the poll tax issue, and all recognized the constitutional significance of Indiana's decision to make the requisite documentation available for free. Justice Scalia, in a concurring opinion joined by Justices Thomas and Alito, stressed that Indiana's photo identification may be obtained for free in arguing that the burdens imposed by the Indiana law are not constitutionally significant and noted the Supreme Court's special concern, shown in *Harper* and other decisions, with voting laws that require the payment of a fee. *Id.* at 1625, 1626 n.*, 1627. Justice Souter, in a dissenting opinion joined by Justice Ginsburg, argued that even with Indiana's provision of free photo identification, other economic burdens imposed by the Indiana scheme violate the rule established in *Harper*. *Id.* at 1643. Justice Breyer, in a separate dissent, agreed with Justice Souter's analysis of this issue. *Id.* at 1644.

remand, the District Court granted summary judgment on the poll tax claim, relying entirely on the *Gonzalez I* decision.[48]

In *Gonzalez I*, this Court explained its conclusion that Proposition 200 does not impose a poll tax as follows:

> Arizona's new law, however, is not like the system found unconstitutional in *Harman* [which] . . . required voters to pay a poll tax, but allowed those who were unwilling or unable to pay the tax to file a certificate of residency. . . .
>
> Here, voters do not have to choose between paying a poll tax and providing proof of citizenship when they register to vote. They have only to provide the proof of citizenship. Nor does Arizona's new law "make[ ] the affluence of the voter or payment of any fee an electoral standard."

Id. at 1049 (quoting *Harper*, 383 U.S. at 666) (alteration in original). In other words, in *Gonzalez I*, this Court viewed Arizona's Registration Document requirement as akin to the Virginia certificate of residency, not the Virginia poll tax, regardless of whether some Arizona citizens lack Registration Documents and must pay a fee to obtain that documentation in order to register to vote. Arizona's

[48] ER 4, CR 330, at 3. In post-trial briefing, the ITCA Plaintiffs requested that the District Court reconsider its grant of summary judgment on the poll tax claim in light of *Crawford*. CR 1024, at 16-17. The District Court briefly re-visited the poll tax issue, noting the Supreme Court's *Crawford* decision, but held again that it was bound by this Court's earlier poll tax ruling. ER 3, CR1041, at 33.

pre-registration fee did not constitute a poll tax because, according to the *Gonzalez I* opinion, the fee was not "an electoral standard."[49]

2. *This Court's Previous Ruling Should Not Be Followed as Law of the Case Because it Conflicts with Intervening Controlling Authority and Is Clearly Erroneous.*

It is generally appropriate to follow an earlier appellate ruling in the same case. However, the discretionary "law of the case" doctrine does not require affirmance of the District Court's summary judgment ruling, which was based on this Court's *Gonzalez I* decision. *See Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990) (noting that a District Court judge has discretion not to follow the law of the case). The prior decision should not be followed when "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Hegler v. Borg*, 50 F.3d 1472, 1475 (9th Cir. 1995). Consequently, this Court should revisit the poll tax issue because the Supreme Court's intervening opinion in *Crawford* demonstrates that the previous rulings were clear error. *See id.*; *Milgard*, 902 F.2d at 715 (stating that a court "properly exercises its discretion to reconsider an issue previously decided . . . [if] the first

[49] Neither this Court, in *Gonzalez I*, nor the District Court, in its summary judgment ruling or in the post-trial Findings of Fact and Conclusions of Law, specifically addressed whether the Polling Place ID requirement also constitutes a poll tax.

decision was clearly erroneous . . . [or] an intervening change in the law has occurred"). Moreover, the "law of the case" applies only to issues "decided explicitly or by necessary implication in the previous disposition." *Milgard*, 902 F.2d at 715. This Court has not yet considered whether the Polling Place ID requirement constitutes a poll tax.[50]

In light of the Supreme Court's recent decision in *Crawford*, this Court's conclusion in *Gonzalez I* that Arizona's voting-related documentation requirements are not a poll tax, should be disregarded. More specifically, *Crawford* makes it clear that the fees required by Arizona to obtain Registration Documents, and the fees or other cost involved to obtain Polling Place ID, are indeed an electoral standard. Accordingly, Proposition 200's documentation requirements may not be analogized to the Virginia certificate of residency reviewed in *Harman*, and represent an unconstitutional poll tax.

First, Indiana's "no fee" provision for obtaining photo identification – addressed in *Crawford* – has precisely the same relationship to voting as the fees in Arizona for obtaining a Registration Document and Polling Place ID. In both states, the "no fee" or fee is directly attached to documents needed by a citizen to exercise the electoral franchise.

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[50] This Court's ruling in *Gonzalez I*, related only to the Registration Documents requirement, and did not address the Polling Place ID requirement. 485 F.3d at 1046-47.

Second, as explained in *Crawford,* the "no fee" provision in Indiana clearly was an electoral standard, given that the imposition of a fee would have made the Indiana photo identification requirement an unconstitutional poll tax. Thus, the Supreme Court in *Crawford* made explicit what was at least implicit in *Harper* regarding the breadth of the constitutional prohibition on poll taxes: the prohibition extends not only to fees which themselves must be paid in order to vote, but also includes any requirement that a fee be paid to obtain a document, which in turn is needed to register or to vote in-person on election day.

Third, to register and vote, Arizonans who lack the necessary documents must purchase them – the law does not provide any cost-free way to register or obtain a ballot on election day to those who lack Registration Documents or Polling Place ID. The District Court found that "[o]btaining proper forms of identification for purposes of registering to vote will cost potential voters between 10 and 100 dollars" and "it is undisputed that some individuals will have to obtain a form of identification" to register to vote.[51] After trial, the District Court recognized that costs for Registration Documents can actually be as high as $380.[52]

The District Court did not make any specific findings concerning the costs of Polling Place ID. However, the lower court found that two forms of Polling

[51] ER 5, CR 219, at 9.

[52] ER 3, CR 1041, at 10.

Place ID – the Arizona driver's license or non-operator's identification license – range in cost from $4 for a replacement card, to $25 for a driver's license if the driver is under 40 years old.[53]

Only one form of Polling Place ID is available to all voters free of charge – a voter registration card.[54] Because Arizona voter registration cards do not bear a photograph of the voter, however, this form of free ID alone will not allow a voter to cast a ballot on election day. *See* A.R.S. § 16-579(A) (requiring two forms of non-photo ID). The trial court correctly acknowledged that elections officials are *not* required to provide voters with any other form of free Polling Place ID.[55]

Consequently, the only way to obtain sufficient Registration Documents or Polling Place ID is to pay for them. Under Proposition 200, a person who lacks a Registration Document cannot register to vote and a person who lacks Polling Place ID cannot cast a ballot in person on election day that is counted. As such, for those who lack a Registration Document or Polling Place ID in Arizona, payment of a fee to obtain those documents is an electoral standard. *See Crawford*, 128 S.

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[53] *Id.* at 8.

[54] *See* ER 21, at 128.

[55] ER 3, CR 1041, at 7. Though some counties accept another form of free non-photo Polling Place ID – "Official Election Mail," the law does not require counties to provide such ID to voters. Indeed, as the District Court recognized, budgetary constraints may prohibit counties from mailing such identification to voters, as they did for the 2008 general election for more than half of the state's voters. ER 31; ER 32, at 83:20-84:11, 86:1-4; ER 33, at 108:16-109:10.

Ct. at 1620-21; *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005) ("*Billups I*") ("[R]equiring . . . voters to purchase a Photo ID card effectively places a cost on the right to vote" and "runs afoul of the Twenty-fourth Amendment for federal elections and violates the Equal Protection Clause for State and municipal elections.").[56]

Here, it is undisputed that some Arizonans lack the documents necessary to register or vote. For these individuals, *Crawford* makes clear that the State must, at a minimum, provide a cost-free way to exercise the franchise, as is provided in Indiana and Georgia. One practical – and necessary – step after *Crawford* would be to make the Arizona nonoperator's identification license – a document that can be both a Registration Document and Polling Place ID – available for free to those who otherwise lack the necessary documents.

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[56] The successive opinions of the Georgia District Court in the *Billups* cases are instructive. In 2005, the court held that requiring voters to purchase a photo ID card to cast their vote imposed a poll tax. *Billups I*, 406 F. Supp. 2d at 1369. After the Georgia legislature changed the law to make the voter photo ID available for free, the court concluded that the poll tax problem had been cured. *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1305, 1355 (N.D. Ga. 2006). After trial on the merits, the amended Georgia ID requirement was upheld. *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1382-83 (N.D. Ga. 2007). The case is on appeal, where plaintiffs contend the requirement imposes an undue burden on voters, but the poll tax issue was resolved by the provision of free photo ID. *Young v. Billups*, No. 07-14664 (11th Cir.).

3. *Even if Some, But Not All, Arizonans Must Pay a Fee to Register or Vote, Proposition 200 Imposes an Unconstitutional Poll Tax.*

A system like Arizona's that imposes fees on voter registration or voting at the polls is unconstitutional, regardless of whether all voters or only a few must pay the fee. In *Crawford*, the Court was concerned not with all voters, but with "persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of [Indiana law]." 128 S. Ct. at 1620. The lower court had estimated that around 43,000 Indiana voters lacked the required photo ID. But the proportionately small number of voters without ID did not matter to the Supreme Court. The Court stated that "[t]he 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* . . . ." *Id.* at 1620-21.

Indeed, while "poll tax" once meant a "head" tax levied on each person in a jurisdiction, the 24th Amendment clearly applies to any tax that many people or just one must pay in order to vote – "[t]he right of citizens of the United States to vote . . . shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax *or other tax*." U.S. Const. amend. XXIV (emphasis added); *see United States v. Texas*, 252 F. Supp. 234, 238 (W.D. Tex. 1966). Similarly, the 14th Amendment renders unconstitutional the imposition of a fee as

a prerequisite to voting, regardless of the number of voters who are subject to the fee. *See Crawford*, 128 S. Ct. at 1620; *United States v. Texas*, 252 F. Supp. at 252 (noting that only "a portion of those qualified" to vote were subject to the poll tax at issue, and holding it unconstitutional); *United States v. Alabama*, 252 F. Supp. 95, 97 (M.D. Ala. 1966) (striking down poll tax that applied only to 21 to 45-year-olds and exempted most military veterans); *Weinschenk v. State*, 200 S.W.3d 201, 213-14 (Mo. 2006) ("[A]ll fees that impose financial burdens on eligible citizens' right to vote, not merely poll taxes, are impermissible under federal law.").

4. *Regardless of Whether Proposition 200 Serves a Legitimate State Interest, Exacting a Fee of Any Kind in Exchange for the Right to Vote Is Impermissible.*

Even if Proposition 200's Registration Document and Polling Place ID requirements serve a legitimate state interest, the costs they impose are simply impermissible. In *Harman*, the Supreme Court held that a "poll tax, regardless of the service it performs, was abolished by the Twenty-fourth Amendment." 380 U.S. at 544 (rejecting the poll tax even though Virginia contended that it served as a reliable indicator of residence, a voter qualification). Similarly, "although the State's justification [in *Harper*] for the tax was rational, it was invidious because it was irrelevant to the voter's qualifications." *Crawford*, 128 U.S. at 1616; *see Harper,* 383 U.S. at 674 (Black, J., dissenting) (listing "(1) the state's desire to collect its revenue, and (2) its belief that voters who pay a poll tax will be

interested in furthering the state's welfare when they vote," as the state's rational reasons for its poll tax, which the majority did not find sufficient to save the poll tax); *cf. United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (stating that "laws which actually affect the exercise of [fundamental constitutional] rights cannot be sustained merely because they . . . provide a helpful means of dealing with . . . an evil [within a state's legislative competence]").

Accordingly, although Arizona's interest in assuring the qualifications of voters is a valid interest, including a fee as part of the structure to implement that state interest is irrelevant to voters' qualifications and is impermissible. *See Harper,* 383 U.S. at 670; *cf. Dunn v. Blumstein*, 405 U.S. 330, 345-46 (1972) (recognizing that assuring voters were state residents was a valid interest, but a durational residency requirement was unconstitutional because it excluded bona fide residents from voting).

II. Proposition 200's Demand for Additional Documentary Evidence of Citizenship Violates the NVRA.

A. The Previous Rulings that Arizona "Accept[s] and Use[s]" the Federal Mail Voter Registration Form Required by the NVRA Are Clearly Erroneous.

The principal NVRA issue in this case is whether Arizona can invoke Proposition 200 to reject voter registration applications using the Federal Mail Voter Registration Form issued by the Election Assistance Commission – which the NVRA specifically requires that Arizona "shall accept and use." 42 U.S.C. §

1973gg-4(a)(1).[57] Despite recognizing the nature of the NVRA claim before it,[58] the District Court failed to analyze directly the claim that Arizona was violating the specific textual directive of the NVRA to "accept and use" the Federal Form.[59] *Id.* Instead, the District Court looked to 42 U.S.C. § 1973gg-7(b), which prescribes the contents of the Federal Form to be developed by the Election Assistance Commission.[60] Moreover, the court improperly inferred Congressional intent from the absence of language in the NVRA, but ignored incontrovertible legislative history that establishes a contrary intent. The District Court's failure to recognize the NVRA's grant of authority to the EAC, and the concomitant limits on the State's authority were clear legal error.

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[57] The Court further noted that "Plaintiffs explicitly state that the issue currently before the court is Arizona's refusal to accept the *federal* form." ER 7, CR 68, at 4.

[58] The District Court also noted "[i]n Plaintiffs' view, once an individual has fully and accurately completed the federal mail registration form, he or she should be registered to vote; the state may not condition registration on any additional requirements or actions not specifically set forth in the statute." ER 7, CR 68, at 7. This linkage of what is "set forth in the statute" with conditions set *by the State* on acceptance and use of the federal form constitutes the District Court's basic analytical error.

[59] The District Court's order denying Plaintiffs' Applications for Temporary Restraining Order contains the only extended analysis of the NVRA issues in this case. The Order granting summary judgment provides no additional analysis of 42 U.S.C. § 1973gg-4(a)(1).

[60] ER 7, CR 68, at 7-12.

B. Congress Has Preempted Some State Regulation of Voter Registration by Enacting the NVRA.

Congress enacted the NVRA to increase the number of registered voters. 42 U.S.C. § 1973gg(b)(1). A key component of the NVRA was the development and implementation of the Federal Mail Voter Registration Form, a uniform postcard voter registration application that must be "accept[ed] and use[d]" by all states subject to the NVRA to register voters for federal elections. 42 U.S.C. § 1973gg-4(a)(1).[61] Because the State has taken the position that Proposition 200 requires it to demand that a registrant submit Registration Documents with the Federal Form and rejects all applications that are not accompanied by Registration Documents, Arizona is *not* "accept[ing] and us[ing]" the Federal Form as the NVRA's plain language requires. *Id.* This prevents Arizonans from taking advantage of a federal law meant to provide a "uniform" and simple means of registering to vote for federal elections, and the State is in violation of the NVRA. *See* S. Rep. No. 103-6, at 11 (1993) (discussing a "uniform" and "universal mail registration form").

The Elections Clause, U.S. Const. art I, § 4, cl. 1, gives Congress "the power to override state regulations" with uniform rules for federal elections, binding on

[61] Six states, Idaho, Minnesota, North Dakota, New Hampshire, Wisconsin and Wyoming, are not required to comply with the NVRA because they had election day registration or no voter registration requirement as of August 1, 1994. 42 U.S.C. § 1973gg-2(a) and (b).

the states. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995); *Ex parte Siebold*, 100 U.S. 371, 384 (1879) ("[T]he regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative."). Congress retains complete supervisory power over state mechanisms affecting federal elections, and may supplement or even supersede them altogether. *See Siebold*, 100 U.S. at 384 ("When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them."); *Foster v. Love*, 522 U.S. 67, 69 (1997) (finding well-settled Congressional "'power to override state regulations' by establishing uniform rules for federal elections, binding on the States") (citation omitted).

By enacting the NVRA, Congress sought to implement a *uniform* nationwide system of voter registration to help "increase the number of eligible citizens who register to vote," and eradicate discriminatory and unfair registration practices that diminish voter turnout. 42 U.S.C. § 1973gg(a), (b)(1). Proposition 200's unique requirement that registrants provide Registration Documents has led to the rejection of voter registration applications from more than 31,550 people, two-thirds of whom have not successfully re-registered.[62] Because the additional registration requirements imposed by Proposition 200 conflict with the letter and

[62] ER 3, CR 1041, at 13-14.

the purpose of the NVRA, they are pre-empted. *See Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005) (stating that state statute concerning voter registration "would have to give way to the clear mandates of the NVRA" if it conflicted with the federal law).

C. The State's Ability to Demand Registration Documents Under the NVRA Is Circumscribed by the EAC's Authority to Develop the Federal Form.

The District Court began its NVRA analysis by invoking the primacy of the statutory plain language.[63] It framed the analysis around the question of "whether the NVRA requirements act as a ceiling or as a floor" on what states may require.[64] But the District Court established no justification for this "ceiling or floor" analysis, and under the plain directive language of 42 U.S.C. § 1973gg-4(a)(1), the "ceiling or floor" inquiry is irrelevant to whether Arizona is "accept[ing] and us[ing]" the Federal Form. In other words, the NVRA does not set a standard by which to measure the Federal Form, but rather requires states, including Arizona, to accept the Federal Form that was actually adopted.

Despite its supposed reliance on the plain language of the statute, the District Court ignored an important aspect of the text – the allocation of power among the EAC and the states. The court cited 42 U.S.C. § 1973gg-7(b)(1) as permitting

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[63] ER 7, CR 68, at 6.

[64] *Id.* at 8.

states to require information to "determine eligibility."[65] For purposes of the Federal Form, however, that section sets parameters for the *EAC*, not the states. It is the EAC, not the states, to which the statute commits the rulemaking authority as to the classes of information that are required for the Federal Form. While the states play a consultative role, they may not add requirements once the EAC has promulgated the Federal Form and its state-by-state instructions. By allowing the State to add new requirements, the District Court clearly erred.

Congress granted the Federal Election Commission (and later the EAC) the power to "develop a mail voter registration application form for elections for Federal office." 42 U.S.C. § 1973gg-7(a)(2). While the NVRA directs the EAC to consult with the "chief election officers of the States," the EAC – and the EAC alone – is charged with creating the Federal Form. 42 U.S.C. § 1973gg-7(a)(2). The District Court therefore fundamentally erred by arrogating to the states the EAC's rulemaking authority, and the District Court's conclusion that "Arizona's proof of citizenship requirement does not conflict with the plain language of the NVRA," is inextricably premised upon that error.[66]

Once the EAC has consulted with the states and created the Federal Form and its instructions, the NVRA does not permit the states to deviate from the

[65] ER 7, CR 68, at 8-9.

[66] *Id.* at 9.

Federal Form. They must "accept and use" that form. 42 U.S.C. § 1973gg-4(a)(1). Indeed, allowing states to modify the form or add to its contents would undermine the uniform nationwide registration system created by the postcard form.

Here, the EAC has developed the Federal Form. Neither the Form nor its state-specific instructions include Arizona's Registration Document requirement.[67] As such, the contents of the Federal Form reflect the EAC's judgment that Registration Documents are not "necessary to enable . . . election official[s] to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).[68]

D. The NVRA's Plain Language Prohibits the State from Demanding Registration Documents in Connection with the Federal Form.

1. *Arizona Must Accept and Use the Federal Form.*

Once the EAC has consulted with the states and promulgated the Federal Form and instructions, the State must "accept and use" that Federal Form as is. 42 U.S.C. § 1973gg-4(a)(1). Use and acceptance of the Federal Form are mandatory. 42 U.S.C. § 1973gg-4(a)(1)-(2). "Accept and use" means exactly what it says –

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[67] In response to the EAC's request for updates to the Federal Form, the Arizona Secretary of State requested that the EAC amend the Arizona portion of the instructions to include the Registration Document Requirement, but the EAC declined to do so. *See* ER 18.

[68] Indeed, as demonstrated by the evidence below, the Registration Document requirement does *not* enable election officials to establish voter eligibility. For example, the most commonly used Registration Document – the Arizona driver's license – does *not* establish U.S. citizenship. ER 34, at 12:24-13:17; *see also* Ariz. Op. Atty. Gen. No. I05-001, at 3 (2005) ("[A] person need not be a United States citizen to obtain an Arizona driver license or identification card, even after October 1, 1996.").

that states must take in and process Federal Forms when they are completed, submitted and the information provided *on the form* demonstrates eligibility.

Moreover, the statute plainly requires that even if states develop their own form, they must still accept and use the Federal Form too. 42 U.S.C. § 1973gg-4(a)(2) ("*In addition to accepting and using the* [*Federal Form*], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b) . . . ."") (emphasis added). The states are not given the alternative of using their own form to the exclusion of the Federal Form. Consequently, this Court's statement to the contrary in *Gonzalez I* is clearly erroneous with respect to Arizona's treatment of the Federal Form and should not control here. *See* 485 F.3d at 1050; *cf. Milgard*, 902 F.2d at 715.

2. *The District Court's Focus on Irrelevant Provisions of the NVRA Led to its Erroneous Conclusion.*

The District Court noted that the NVRA requires states to provide notice of the disposition of each registration application. 42 U.S.C. § 1973gg-6(a)(2). From this the court found support for the idea that the Federal Form "simpliciter, may not be enough."[69] This section of the NVRA merely recognizes that some Federal Form registration applications may be rejected, whether because they are incomplete, or because the information provided demonstrates ineligibility on the part of the applicant. It cannot possibly justify the wholesale rejection of duly

[69] ER 7, CR 68, at 10.

completed Federal Forms that federal law requires the State to "accept and use." 42 U.S.C. § 1973gg-4(a)(1).

The District Court then went on to analyze the term "formal authentication" as used in 42 U.S.C. § 1973gg-7(b)(3).[70] The District Court read the statutory prohibition on "authentication" as applying only to the registration form itself, and not to the underlying qualifications of the voter. Even if this reading is correct, it only can apply to the question of whether Arizona's own registration forms violate the NVRA. It does not provide a justification for Arizona to reject the Federal Form.

The remainder of the District Court's NVRA analysis focused upon the proposition that the NVRA does not regulate voter qualifications.[71] Here, the District Court mistakenly treated Proposition 200 as governing eligibility to vote in Arizona. Proposition 200 did not amend the State Constitution to restrict the franchise only to those citizens who can provide documentary proof of citizenship. Under Proposition 200, millions of existing registered voters were "grandfathered in," exempt from the Registration Document requirement (at least until they re-register in another county). Eligibility to vote in Arizona remains in relevant part determined by one's status as a citizen. Proposition 200 imposed a procedural

[70] *Id.* at 10-12.

[71] *Id.* at 12-13.

hurdle for the class of new registration applicants which, based upon personal circumstance, may or may not easily be satisfied. But the Federal Form fully respects the definition of voter eligibility in Arizona's constitution.

E. The NVRA's Legislative History Makes it Abundantly Clear that Congress Did Not Intend to Allow States to Require Additional Documentation of Citizenship as a Condition to Accepting the Federal Form.

1. *Any Ambiguity in the NVRA is Properly Resolved by Deferring to the Implementing Agency's Interpretation of the Statute.*

The District Court observed that "Congress did not specifically bar any other type of information being required for registration," and noted that Congress could have, but did not bar any requirement that individuals provide proof of citizenship.[72] The District Court thus attempted to infer Congress' intent, while simultaneously rejecting the unambiguous legislative history with regard to proof of citizenship requirements. If the District Court found it necessary to consider Congress' intent by looking beyond what is in the text of the statute, then the legislative history should also have been considered.[73]

As the District Court recognized, the NVRA does not expressly specify whether or not a state may require voters to prove they are United States citizens by providing documentary evidence of their citizenship status. Arizona's previous

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[72] ER 7, CR 68, at 11-12.

[73] *See* ER 7, CR 68, at 6 & n.6 (rejecting an analysis of legislative history because Plaintiffs had not established the statute's ambiguity).

Secretary of State took the position that the NVRA *prohibits* the State from inquiring into the citizenship status of those who have registered to vote.[74] Defendant Brewer, on the other hand, contends that the NVRA permits the State to demand documentary evidence of citizenship from all applicants.[75] As such, the NVRA arguably is ambiguous with respect to whether a state may require registrants to provide proof of citizenship. *See DeGeorge v. United States Dist. Court*, 219 F.3d 930, 939-40 (9th Cir. 2005) ("A statute is ambiguous if it gives rise to more than one reasonable interpretation."). Consequently, to resolve any such ambiguity, this Court should look to the NVRA's purpose, legislative history and administrative interpretations by the Federal Elections Commission (the "FEC") and the EAC. *See Cmty. Bank of Ariz. v. G.V.M. Trust*, 366 F.3d 982, 986 (9th Cir. 2004) (a court "must consider the purpose, subject matter, the context and the legislative history" of an ambiguous statute and "grant a degree of deference to the interpretation of an administrative agency charged with implementing the statute") (alterations and citations omitted).

[74] *See* ER 13, at 151:2-11.

[75] *Id.* at 151:18-152:4.

2. *The NVRA's Legislative History and Agency Interpretations Prohibit Application of Proposition 200's Registration Document Requirement to Federal Form Registrations.*

The NVRA's legislative history makes clear Congressional intent to prohibit states from requiring supplemental evidence of citizenship. The minority in Congress that opposed the NVRA did so in part because its mail registration provisions prohibit states from requiring an applicant to provide proof of citizenship in addition to the information required by the Federal Form. *See* S. Rep. No. 103-6, at 53 (stating that voting by non-citizens "might be combated by requiring proof of citizenship at the time of registration. . . . mail registration under this bill would preclude such corrective action"). Indeed, Congress could not have been more clear that requiring an applicant for voter registration to submit documentary evidence of citizenship conflicts with the NVRA. Congress' Joint Explanatory Statement of the Committee of Conference states:

> Section 13. Rule of Construction
>
> House bill
>
> No provision.
>
> Senate amendment
>
> Provides that nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration.
>
> Conference substitute

> The conferees agree with the House bill and do *not* include this provision from the Senate amendment. ***It 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. It could also adversely affect the administration of the other registration programs as well. In addition, it creates confusion with regard to the relationship of this Act to the Voting Rights Act.* Except for this provision, this Act has been carefully drafted to assure that it would not supersede, restrict or limit the application of the Voting Rights Act. ***These concerns lead the conferees to conclude that this section should be deleted***.

H.R. Rep. No. 103-66, at 23 (1993) (emphasis added).

Because the "statute is silent . . . with respect to the specific issue" a court must defer to the implementing agency's interpretation of the statute so long as it is based on a "permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984). As such, this Court must rely on the FEC's and EAC's interpretations of the NVRA, which bar adding documentary proof of citizenship requirements to the Federal Form.

Consistent with the language of the NVRA and its legislative history, the EAC has concluded that the State may not "condition acceptance of the Federal Form upon receipt of additional proof," and that refusal to accept the Federal Form without documentary evidence of citizenship violates the NVRA.[76] After

[76] ER 18, at 3; *see also* 59 Fed. Reg. 32,311, 32,316 (June 23, 1994) (FEC statement explaining that "[t]he issue of U.S. citizenship is addressed within the oath required by the [NVRA] and signed by the applicant under penalty of

Proposition 200 became effective, Defendants requested that the EAC "apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process."[77] But the EAC concluded "that the policies you propose would effectively result in a refusal to accept and use the Federal . . . Form in violation of [f]ederal law (42 U.S.C. § 1973gg-4(a))."[78] The EAC further informed Defendants that "[t]he Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof."[79]

The EAC's conclusion is entitled to this Court's deference. The Help America Vote Act and the NVRA expressly grant the EAC authority to "issue rules and promulgate regulations" related to the Federal Form and "provide information to the States with respect to the responsibilities of the States under [the NVRA]." 42 U.S.C. §§ 1973gg-7(a)(4), 15329 (confining the EAC's rulemaking authority to its duties under § 1973gg-7(a)); *see Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 45 (1981) (deferring to the FEC's interpretation of the Federal Election Campaign Act); *Cmty. Bank of Ariz.*, 366

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perjury," and rejecting inclusion of naturalization information with the Federal Form).

[77] ER 18, at 1.

[78] *Id.*

[79] *Id.* at 3.

F.3d at 987 (relying on statutory interpretation in agency's interpretive letters). The EAC interprets the NVRA to bar application of Proposition 200's proof of citizenship requirements to Federal Form registrations. Accordingly, this Court should do the same.

CONCLUSION

For the foregoing reasons, the District Court's grant of summary judgment on the ITCA Plaintiffs' poll tax and NVRA claims should be reversed, and enforcement of Proposition 200 should be enjoined.

RESPECTFULLY SUBMITTED this 5th day of January, 2009.

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STATEMENT OF RELATED CASES

Pursuant to this Court's November 5, 2008 Order, this appeal has been consolidated with Ninth Circuit Cause No. 08-17094 for purposes of calendaring.

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A) FOR CASE NO. 08-17115

I hereby certify that the Opening Brief of Appellants the Inter Tribal Council of Arizona, et al. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,621 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using MS Word in 14-point Times New Roman.

Dated this 5th day of January, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2009, I electronically filed the Opening Brief of Appellants the Inter Tribal Council of Arizona, et al. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed a copy of the Opening Brief and one copy of the Excerpts of Record of Appellants the Inter Tribal Council of Arizona, et al. by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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In addition, I certify that pursuant to Fed. R. App. P. 25(d) and Rule 4(a)(2) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases (11/10/08), on the 5th day of January, 2009, four copies of the Excerpts of Record were sent by Federal Express to:

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I further certify that on the 5th day of January, 2009, I mailed one copy of the Excerpts of Record by First-Class Mail, postage prepaid, to the following CM/ECF participants:

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