

**In the United States Court Of Appeals
for the Ninth Circuit**

MARIA M. GONZALEZ, *et al.*,
Plaintiffs/Appellees,

v.

STATE OF ARIZONA, *et al.*,
Defendants,

and

YES ON PROPOSITION 200,
Defendant-Intervenor-Appellant.

MARIA M. GONZALEZ, *et al.*,
Plaintiffs/Appellants,

and

THE INTERTRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
Plaintiffs,

v.

STATE OF ARIZONA, *et al.*,
Defendants-Appellees,

and

YES ON PROPOSITION 200,
Defendant-Intervenor.

**On Appeal from the United States District Court
for the District of Arizona
Cause No. CV-06-01268-PHX-ROS**

**BRIEF AMICUS CURIAE OF THE
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
IN SUPPORT OF PLAINTIFFS/APPELLANTS AND REVERSAL**

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INTEREST OF THE AMICUS

The Brennan Center for Justice at NYU School of Law (“Brennan Center”) respectfully submits this brief amicus curiae in support of plaintiffs/appellants and urges reversal of the district court’s order denying preliminary injunctive relief with respect to Arizona’s voter registration requirements. This brief focuses on the district court’s failure properly to apply the balancing test enunciated in *Burdick v. Takushi*, 504 U.S. 428 (1992), and marshals the nationwide evidence to show why the district court should be reversed on this ground alone.

The Brennan Center is a nonpartisan institute dedicated to a vision of effective and inclusive democracy. Through its Voting Rights and Elections project, a part of its Democracy Program, the Brennan Center seeks to protect rights to equal electoral access and full political participation. The project has extensively addressed issues relating to alleged voter fraud and methods for preventing it, co-authoring two reports on the subject and participating as counsel or amicus in a number of federal and state cases involving voting and election issues. Of particular relevance, the Brennan Center has served as counsel in successful challenges to restrictive voter registration laws that would have prevented eligible voters from registering in Florida, Ohio, and

Washington State and as amicus in several challenges to documentary identification requirements for voting.

STATEMENT OF THE ISSUE

Whether Arizona's interest in preventing voting by non-citizens is sufficient under the First and Fourteenth Amendments to justify the burdens imposed by Proposition 200's requirement that applicants present documentary proof of citizenship as a condition for voter registration.

SUMMARY OF THE ARGUMENT

In remanding this case for further proceedings, the Supreme Court emphasized that "the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges." *See Purcell v. Gonzalez*, 127 S. Ct. 5, 2006 WL 2988365, at *2 (Oct. 20, 2006). Amicus submits that the district court failed to do so.

As the district court recognized, it was obliged to apply the balancing test of *Burdick v. Takushi*, which requires that the magnitude and character of a burden on voting be weighed against "the precise interests put forward by the state" to justify those burdens, "taking into consideration the extent to which those interests make it *necessary* to burden the plaintiff's rights." 504 U.S. 428, 434 (1992) (emphasis added) (quotation marks and

citation omitted). But while the district court gave lip service to this test, it largely ignored it. Nothing in its findings indicates that the district court considered whether the “precise interest” offered by Arizona for Proposition 200—preventing non-citizens from voting—made it *necessary* to require documentary proof of citizenship as a condition of voter registration, thereby disenfranchising eligible voters who lacked such documentary proof and who would find it impossible or too costly or inconvenient to obtain.

This amicus brief reviews the nationwide experience which, together with the evidence of Arizona’s own experience, shows that Arizona’s interests in preventing voting by non-citizens do not justify imposing any of the burdens that the documentary proof of citizenship required by Proposition 200 entails. This is so because, as the nationwide experience confirms, (1) substantial numbers of citizens do not have the mandated proof of citizenship; (2) obtaining the required documents is so costly and burdensome, and in some cases impossible, that many of these eligible voters—particularly the poor, minorities, including Native Americans, naturalized citizens, and elderly and disabled persons—will be prevented or discouraged from registering to vote; (3) there is no serious problem of voting by non-citizens; and (4) requiring documentary proof of citizenship is a wholly disproportionate response to this insignificant risk and imposes burdens that are unnecessary to accomplish the

state's interest in preventing non-citizens from voting. Congress previously determined that such a requirement is unnecessary to prevent non-citizens from voting, and 48 other states have agreed. The fact that only one other state requires documentary proof of citizenship—and, even then, only for naturalized citizens and citizens of foreign birth who are not naturalized—is compelling evidence that Arizona's requirement is unnecessary and unreasonable.

Voting by non-citizens is an extremely rare occurrence. Where it does occur, the evidence shows that it is usually not the result of intentional voter fraud, but a misunderstanding of eligibility requirements by non-citizens who mistakenly believe they are entitled to vote. The federal government and 48 other states address this by trying to make eligibility requirements clear on voter registration forms and by warning of the criminal penalties that can be imposed for failure to adhere to these eligibility requirements. If mistakes nevertheless occur despite these warnings, the appropriately tailored remedy is to increase public outreach and education. But it is certainly not necessary to disenfranchise thousands of voters by imposing burdensome documentary proof requirements to prevent voting by—at most—a handful of non-citizens who do not realize they are not eligible to vote.

ARGUMENT

PROPOSITION 200'S PROOF OF CITIZENSHIP REQUIREMENT IS A WHOLLY UNNECESSARY AND UNREASONABLE MEANS OF ADVANCING ARIZONA'S INTEREST IN PREVENTING VOTING BY NON-CITIZENS

The First and Fourteenth Amendments to the United States

Constitution protect the right to vote as a fundamental right. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992). As the Supreme Court has recognized, “It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” *Id.* at 433 (citation omitted). In *Burdick*, the Supreme Court made clear that election regulations pass constitutional muster only when they are reasonable and proportional responses to the state interests advanced to justify them:

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

Id. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

When an election law imposes a “severe” restriction on voting rights, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* (citation omitted). Appellants persuasively show

that the burdens imposed by Proposition 200's proof of citizenship requirement are severe, and accordingly, the district court should have, but failed to, apply strict scrutiny to determine whether the proof of citizenship requirement is "narrowly drawn to advance a state interest of compelling importance."

Burdick, 504 U.S. at 434. (App. Br. at 39-43.¹)

Even under a standard governing lesser burdens on the right to vote, however, the proof of citizenship requirement is not adequately justified. Under *Burdick*, when an election law imposes a less-than-severe restriction on voting rights, the Court must still balance the burden on voting rights against the "precise interests" the government puts forward and "the extent to which those interests make it *necessary* to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (emphasis added); *Anderson*, 460 U.S. at 789; *see also Common Cause/Georgia v. Billups*, 439 F. Supp. 2d 1294, 1350 (N.D. Ga. 2006) ("[T]he Court must examine the extent to which the State's interest in preventing voter fraud makes it necessary to burden the right to vote.').

Under the standard applicable to less than severe burdens on voting rights, courts still conduct a close and careful examination of the election law. *See, e.g., Reform Party of Allegheny County v. Allegheny County Dep't of*

¹ Citations to "App. Br." are to the consolidated opening brief filed by the Gonzalez/ITCA Plaintiffs/Appellants.

Elections, 174 F.3d 305, 315 (3d Cir. 1999) (en banc). “Especially 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) (emphasis added).

Under this review, the burden is on the government to establish that a regulation is justified in light of the interest it serves. Even where a burden imposed “is not insurmountable,” a law will fail constitutional scrutiny when the precise interests “put forth by the [state] do not adequately justify the restriction imposed.” *New Alliance Party v. Hand*, 933 F.2d 1568, 1576 (11th Cir. 1991). As the Fourth Circuit noted, “a regulation which imposes only moderate burdens could well fail the *Anderson* [and *Burdick*] balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational.” *McLaughlin v. North Carolina Bd. of Elections*, 65 F.3d 1215, 1221 n.6 (4th Cir. 1995).

It is within this framework that amicus brings to the Court’s attention the nationwide experience that confirms that Proposition 200’s requirement of documentary proof of citizenship imposes burdens on voting—particularly on those least able to bear them—that are neither a necessary nor reasonable response to the rare and usually unintended incidents of voting by non-citizens.

A. Proposition 200 Erects Substantial Hurdles To Voting That Will Prevent Or Discourage Many Eligible Voters From Registering To Vote

As appellants show, it is indisputable that a substantial number of Arizonans do not possess any of the forms of identification that Proposition 200 requires as proof of citizenship. (App. Br. at 12-13.) Studies across the country also consistently demonstrate that substantial numbers of citizens lack the documentary proof of citizenship that Proposition 200 demands.

In order to prove their citizenship under Proposition 200, Arizonans must provide the number of a state driver's license or nonoperating identification license issued after October 1, 1996;² another state's driver's license indicating citizenship (although no states currently issue such a license); a birth certificate; a U.S. passport; certain tribal identification; or naturalization papers. For those citizens who already possess these documents, the requirement of proving citizenship imposes little or no burden. But, as appellants show, there are thousands of eligible voters who lack such documentation, and the process of securing it is not so simple, and for some individuals—in particular low income voters, minorities, and others in

² As appellants' brief shows, a state driver's or nonoperating identification license does not actually prove citizenship. (App. Br. at 10-11.)

disadvantaged groups—the burden may be insurmountable. (App. Br. at 12-13, 16-23.)

The district court below acknowledged that “[i]t is undisputed that some individuals will have to obtain a form of identification” in order to register to vote. (Op. at 9.) The court suggested that as many as 3% of eligible Arizona voters may lack the proper documents and that the most reliable study in the record shows that at least 2% of the eligible voters in Arizona do not possess any form of the requisite proof of citizenship. *Id.* While the number of Arizonans who lack sufficient proof of citizenship cannot be known with precision, even according to the district court, thousands of eligible citizens do not possess the proper documents. Excluding thousands of eligible voters for lack of documentation is not a *de minimis* harm, especially when considered in light of the thin margins of victory seen in recent elections.³

The national experience is consistent with Arizona’s, and confirms that substantial numbers of citizens do not possess the documentary proof of citizenship that Arizona requires. For instance, in November 2006, the

³ Notably, in striking down a Missouri statute requiring a photo identification as a condition of voting, the Missouri Supreme Court found that “between 3 and 4 percent of Missouri citizens lack[ed]” such identification and that the statute imposed a substantial burden on voting rights by requiring those citizens to obtain the birth certificate or passport necessary to secure the state-issued identification. *Weinschenk v. Missouri*, 203 S.W. 3d 201, 206 (Mo. 2006).

independent Opinion Research Corporation conducted a national telephone survey, commissioned by the Brennan Center, of 987 U.S. citizens, asking whether they had a birth certificate, passport, or naturalization papers in a place where it could readily be found. *See* Brennan Center, *Citizens Without Proof* (Nov. 2006) (“Brennan Center Survey”), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf. Approximately 7% of voting age U.S. citizens surveyed (translating to roughly 13 million citizens nationwide) responded that they did not. *See id.* at 2. That number was far higher for low-income persons: At least 12% of U.S. citizens earning less than \$25,000 annually said they did not have ready access to such documents. *See id.* A similar Opinion Research Corporation survey for the Center for Budget and Policy Priorities in January 2006 yielded similar results. Asked “Do you currently have a U.S. birth certificate or a valid U.S. passport in your home?,” approximately 5.7% of U.S. born adults (roughly 11 million individuals nationwide) said they did not. The number was far higher for low-income, minority, and elderly citizens: 8.1% of those earning less than \$25,000 a year, 8.9% of African-Americans, and 7.4% of those 65 or older responded no. *See* Robert Greenstein et al., *Survey Indicates House Bill Could Deny Voting*

Rights to Millions (“CBPP Survey”), at 1-2 (Sept. 22, 2006), *available at* <http://www.cbpp.org/9-22-06id.pdf>.⁴

Various studies reveal that only 20 to 30 percent of Americans have passports. According to State Department officials, for instance, more than 75% of Americans lack passports. *See* 152 Cong. Rec. H3411-13 (daily ed. June 6, 2006) (statement of Rep. Issa) (noting that fewer than 23% of Americans possess a passport); *see also* Conference Board of Canada, *The Potential Impact of a Western Hemisphere Travel Initiative Passport Requirement on Canada’s Tourism Industry* (July 29, 2005) (surveys show that only 34% of voting-age U.S. residents possess a valid passport).

Studies also reveal that a substantial number of Americans lack birth certificates. *See* Brennan Center Survey at 2; CBPP Survey at 3. The national experience confirms that not all births are recorded with birth certificates and that the number of individuals with birth certificates varies by race and economic status. For instance, “a substantial number of elderly African

⁴ It is likely that these surveys actually underreport the number of people who do not have readily available birth certificates or passports. Telephone surveys have disproportionate difficulty capturing low-income people and minorities. *See, e.g.,* Stephen J. Blumberg et al., *Telephone Coverage and Health Survey Estimates: Evaluating the Need for Concern About Wireless Substitution*, 96 Am. J. Public Health 926 (2006); U.S. Bureau of the Census, *Statistical Brief: Phoneless in America* (1994), *available at* http://www.census.gov/apsd/www/statbrief/sb94_16.pdf.

Americans apparently were never issued birth certificates because they were born at home, in large measure as a result of racial discrimination or poverty that kept their mothers from delivering in hospitals (especially in the South).” CBPP Survey at 3. Similarly, a study published in 1950 found that only 92.5% of births were recorded in a four-month period during 1939 and 1940, meaning that 7.5% of those born in that time frame lacked birth certificates. S. Shapiro, *Development of Birth Registration and Birth Certificates in the United States*, 4 Population Studies 86, 98-99 (1950) (describing the efforts made by the Bureau of the Census to verify the birth registrations across the country between December 1939 and March 1940). That same study revealed that minorities born outside hospitals in rural areas had only a 75% chance of receiving a birth certificate. *Id.* at 99.⁵

Compared to passports and birth certificates, driver’s licenses are the most accessible form of identification. Yet twelve percent of the voting-age population nationwide does not possess a driver’s license. *See* Commission on Federal Election Reform, Building Confidence in U.S. Elections 73 n.22 (2005). Minorities are also less likely to possess driver’s licenses. For instance, a study

⁵ The Brennan Center Survey revealed that 48% of the women who reported having a birth certificate said that their birth certificates did not reflect their current legal name as a result of marriage and other name changes. Brennan Center Survey at 2.

of the Wisconsin voting-age population concluded that almost half of African-Americans and Hispanics did not have a valid driver's license, let alone one that indicates citizenship. *See* John Pawasarat, *The Driver License Status of the Voting Age Population of Wisconsin*, at 22 (2005), *available at* <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

Thus, the nationwide experience shows that many citizens, particularly those in disadvantaged groups, lack the documentary proof of citizenship required by Arizona. Furthermore, for many of these citizens, it may be difficult or even impossible to acquire such proof.

First, there is a significant financial burden to acquire the necessary documents. As appellants show (App. Br. at 16), although a citizen born in Arizona may obtain a birth certificate for \$10 or \$15,⁶ for citizens born out of state, the cost can double.⁷ Acquiring a passport costs \$97,⁸ and replacing misplaced naturalization papers—or outdated papers with a maiden name—costs

⁶ *See* Arizona Department of Health Services, *Applying for a Certified Copy of a Birth Certificate* (March 14, 2006), http://www.azdhs.gov/vitalrcd/apply_birth_in_person.htm (birth certificates cost \$10 for persons born after 1990, and \$15 for others).

⁷ *See, e.g., Weinschenk v. Missouri*, 203 S.W. 201, 206 (Mo. 2006) (noting that fees for out of state birth certificates cost up to \$30).

⁸ This includes a processing fee of \$55, an application execution fee of \$30, and a security surcharge of \$12. *See* U.S. Dep't of State, *Application for a U.S. Passport*, <http://foia.state.gov/FORMS/Passport/ds0011.pdf>.

\$220.⁹ Even adjusted for inflation, these costs are substantially larger than the \$1.50 fee that was declared unconstitutional in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

Second, there is a significant burden in the time and effort required to overcome the bureaucratic hurdles and delays involved in obtaining documentary proof of citizenship. For example, it will take some time to receive an Arizona birth certificate by mail, and only by requesting expedited service—and paying at least an extra \$20—can a citizen guarantee that the birth certificate will be delivered within 5 business days.¹⁰ Other states have significant delays as well. For instance, in California, it generally takes 10 to 12 weeks to get a birth certificate. *See* Center on Budget and Policy Priorities, *The New Medicaid Citizenship Documentation Requirement*, at 2 (Sept. 28, 2006), <http://www.cbpp.org/4-20-06health.pdf>. Advance planning is also necessary to acquire a passport or naturalization documents,¹¹ and these delays impose

⁹ *See* U.S. Citizenship and Immigration Services, *Application for Replacement Naturalization/Citizenship Document* (2005), <http://www.uscis.gov/files/form/N-565.pdf>.

¹⁰ *See* Arizona Department of Health Services, *Applying for a Certified Copy of a Birth Certificate and Requesting Expedited Service* (Nov. 16, 2006), http://www.azdhs.gov/vitalrcd/apply_birth_expedited.htm.

¹¹ For example, according to the U.S. Citizenship and Immigration Service, it may take up to a year to replace naturalization papers, as is necessary after a name change following marriage or divorce. *See Boustani v. Blackwell*, No.

additional burdens on eligible voters. As the Missouri Supreme Court noted recently in striking down a burdensome Missouri voter ID law, “[t]hose things that require substantial planning in advance of an election to preserve the right to vote can tend to ‘eliminate from the franchise a substantial number of voters who did not plan so far ahead.’” *Weinschenk*, 203 S.W. 3d at 215 (quoting *Harman v. Forssenius*, 380 U.S. 528, 539-40 (1965)).

Finally, one of the most disturbing aspects of Proposition 200 is the burden it imposes on groups conducting voter registration drives, who could not obtain valid voter registrations door-to-door or at shopping malls or sidewalks without bringing photocopiers to copy the documentary proof needed by registrants.

As the district court acknowledged, thousands of eligible Arizona voters lack the proof of citizenship required under Proposition 200. For many of these potential voters—who are disproportionately disadvantaged citizens—the substantial costs, as well as the time and effort, involved in obtaining acceptable documentation will be insurmountable obstacles or discouraging burdens that will keep these otherwise eligible voters from registering and voting.

1:06CV2065, 2006 U.S. Dist. LEXIS 77989, at *5 (N.D. Ohio Oct. 26, 2006).

B. Arizona's Proof Of Citizenship Requirement Is A Disproportionate And Unnecessary Response To The Possibility Of Voting By Non-Citizens

1. Voting By Non-Citizens Is A Rare And Isolated Occurrence

Arizona now contends that the burdens imposed by Proposition 200 are justified by the state's interest in curbing voting by non-citizens. But when Proposition 200 was presented to Arizona voters before the 2004 election, a need to prevent voting by non-citizens was nowhere mentioned. Rather, the proposition's "Findings and declaration" included only three factual allegations, none of which had anything to do with voting: "illegal immigration is causing economic hardship to this state"; "illegal immigration is encouraged by public agencies within this state"; and "illegal immigrants have been given a safe haven in this state." Arizona 2004 Ballot Propositions: Proposition 200, *available at* <http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.pdf>. And not one of the seven arguments in favor of Proposition 200 that were appended to the proposal referred to voting by non-citizens. *Id.*

Only when forced to defend Proposition 200 before the district court did Arizona claim that "the problem of voter fraud" made it necessary to require voters to show proof of citizenship when registering. Docket No. 149, Response in Opposition to the Motions for Preliminary Injunction (Aug. 16, 2006), at 6-8. But this litigation-inspired justification is supported by neither the

record below nor the reality in Arizona or elsewhere. In fact, voting by non-citizens is an extremely rare occurrence—in Arizona and nationwide—and the “precise interest” in preventing it cannot justify Proposition 200’s onerous registration restrictions. *See Burdick*, 504 U.S. at 434.

Appellants show that voting by non-citizens in Arizona is an extremely rare occurrence and that when it does occur, this is usually the result of the non-citizen’s misunderstanding of voter eligibility requirements, not intentional fraud. (App. Br. at 7-8.) The national experience confirms that voting by non-citizens is incredibly rare and that the very few non-citizens who registered or voted did so because they misunderstood applicable voting requirements. As discussed in Section B.2, *infra*, these mistakes can easily and adequately be addressed by more prominent warnings on voter registration forms and by voter outreach and education programs, and without any need to impose burdensome documentary proof requirements that discourage eligible citizens from registering to vote.

The U.S. Election Assistance Commission—an independent, bipartisan agency created by the Help America Vote Act (“HAVA”)¹²—recently commissioned a study that, among other things, analyzed all relevant news reports from January 1, 2001 through January 1, 2006 that mentioned potential

¹² *See* 42 U.S.C. § 15301 *et seq.*

voting fraud. U.S. Election Assistance Commission, Status Report on the Voting Fraud-Voter Intimidation Research Project (May 17, 2006), *available at* <http://www.votetrustusa.org/pdfs/2006-10-11-election-report.pdf>. Although the Commission has not yet released the study itself, the Commission's status report reveals that nationwide, "[t]here was only one self evident instance of a noncitizen registering to vote." *Id.* at 8 (emphasis added). Similarly, a comprehensive, nonpartisan survey of election fraud by Professor Lorraine Minnite of Barnard College and David Callahan of Demos, which consisted of a review of news and legal databases and interviews with attorneys general and secretaries of state in 12 states about incidences of election fraud from 1992 through 2002, did not uncover a single confirmed incident of intentional voting fraud by a non-citizen.¹³

A detailed study of voting fraud in Ohio, a state with nearly 200,000 non-citizens, confirms that voting by non-citizens is exceedingly rare. *See* Coalition of Homelessness and Housing in Ohio ("COHHIO") & League of Women Voters Coalition, Let the People Vote at 1 (June 14, 2005), *available at*

¹³ *See* Lorraine Minnite & David Callahan, *Securing the Vote: An Analysis of Election Fraud* 4, 17 (2003) ("Minnite Study"), *available at* http://www.demos.org/pubs/EDR_-_Securing_the_Vote.pdf. The study covered twelve states—Alabama, California, Florida, Georgia, Illinois, Minnesota, Mississippi, New York, Oregon, Pennsylvania, Texas, and Wisconsin—that collectively represent about half the U.S. electorate. *Id.* at 15.

www.cohhio.org/alerts/Election%20Reform%20Report.pdf. Faced with allegations that the Ohio elections of 2002 and 2004 were plagued by widespread voter fraud, researchers from COHHIO and the League of Women Voters of Ohio conducted telephone interviews with the director or deputy director of each of Ohio's 88 county boards of elections during June 2005 and found that, out of a total of 9,078,728 votes cast in 2002 and 2004, there were only four reported instances of ineligible persons voting or attempting to vote. *Id.* at 1. The researchers, who did not specify whether any of these four instances involved non-citizens, noted that “the odds were greater to win the lottery, or get struck by lightning than someone casting an ineligible vote in Ohio.” *Id.*

The national experience also shows that the few instances in which non-citizens vote are the result of honest mistake—not intentional fraud—for which the appropriately tailored remedy is better voter education and more prominent notice.

The Minnite Study, for instance, analyzed in detail the 1996 election in California's 46th Congressional district, where challenger Loretta Sanchez defeated incumbent Robert K. Dornan by 984 votes. Supporters of Arizona-style registration restrictions cite this election as “clear and convincing evidence” that illegal voting by non-citizens is a significant problem that has the

potential to affect election outcomes. *See, e.g.*, H.R. Rep. No. 109-666 (Sept. 19, 2006) at 7-8. After exhaustive investigations by federal, state and local authorities, however, “very little voter fraud was convincingly substantiated,” Minnite Study at 42, and the California Secretary of State determined that to the extent any non-citizens voted, they had registered and voted in error—and not with any criminal intent. *See California Won’t Prosecute Noncitizen Voters*, Wash. Post, Mar. 1, 1998, at A19. The House Oversight Committee unanimously voted not to overturn the election’s results. *See* H.R. Rep. No. 105-416 (Feb. 12, 1998) at 15.

A closer look at recent allegations of voting by non-citizens in Hawaii also reveals that non-citizen voting is extremely rare—and that to the extent it occurs at all, it is the result of misunderstandings about the requirements to vote. In June, Dan Stein, president of the Federation for American Immigration Reform, testified before Congress that in 2000, election officials in Hawaii “found 543 Oahu residents who were not U.S. citizens had registered to vote.” Testimony of Dan Stein before the Comm. on House Administration, June 22, 2006, *available at* <http://cha.house.gov/hearings/Testimony.aspx?TID=943>. Local officials later determined, however, that at least 100 of those identified were actually naturalized citizens and the remainder had likely registered by mistake because of language difficulties. *See* Scott

Ishikawa & Kevin Dayton, *City Steps Up Search for Illegal Voters*, Honolulu Advertiser, Sept. 8, 2000, at 1A. There was no evidence that any of those identified had actually voted illegally. *Id.*

There are obvious reasons why non-citizens so rarely intentionally attempt to register or vote. Falsely claiming U.S. citizenship in order to register or to vote in any federal, State, or local election is a felony under federal law, punishable by up to five years in prison and a \$10,000 fine. *See* 18 U.S.C. § 1015; 18 U.S.C. § 611; 18 U.S.C. § 911. If that weren't deterrent enough, non-citizens who fraudulently register or vote also face deportation. *See* 8 U.S.C. § 1101(a)(43)(P); 8 U.S.C. § 1227(a)(2)(A)(iii). Similarly, under Arizona law, falsely claiming to be a U.S. citizen when registering or voting is a Class 6 felony, punishable by up to one year in prison. *See* ARIZ. REV. STAT. ANN. § 16-182; ARIZ. REV. STAT. ANN. § 13-701. Moreover, the likelihood of a non-citizen who illegally votes getting caught is not insubstantial, because all voters leave a paper trail containing their identifying information in the form of voter registration and polling place records. Given the strict penalties facing non-citizens who attempt to register or vote and the ease with which they can be apprehended, the low incidence of such voting is unsurprising.

In sum, the evidence is overwhelming that the sporadic incidents of voting by non-citizens are rare and isolated occurrences, and are usually the

result of a misunderstanding by some non-citizens about the eligibility requirements for voting. As we show in the next section, under these circumstances, Arizona’s chosen remedy—which has an especially discriminatory impact on the right to vote of disadvantaged groups—is not a “reasonable, nondiscriminatory regulation” but is an unnecessary and disproportionate response to its alleged concern with non-citizen voting.

2. Congress And Forty-Eight States Have Concluded That A Proof Of Citizenship Requirement Is Unnecessary

Arizona is one of only two states that requires registrants to present proof of citizenship (and the other state, Louisiana, seeks such proof only from naturalized citizens and citizens of foreign birth who are not naturalized). Recognizing the disenfranchising potential of such a regulation, Congress rejected a proof of citizenship requirement when it adopted the National Voter Registration Act (“NVRA”), 42 U.S.C. § 1973gg *et seq.* Similarly, 48 states address the risk of voting by non-citizens without requiring documentary proof of citizenship. These facts, coupled with the fact that voting by non-citizens is a rare occurrence, demonstrates that Proposition 200’s proof of citizenship requirement is out of all proportion—and unnecessary—to address its asserted justification. Even when non-citizens do register or vote, it is usually the result of a non-citizen’s misunderstanding the eligibility requirements. The notice requirements on existing registration forms have proven sufficient to deter such

voting in all but a handful of cases. To the limited extent that mistakes still occur, they can be appropriately corrected by better notice and education.

(a) Congress Recognized That A Proof Of Citizenship Requirement Would Reverse Decades Of Progress In Ensuring That Registration Laws Are Not Barriers To Voting

In response to a persistent decline in the nation's rate of voter turnout, Congress adopted the NVRA in 1993 to increase voter participation. Because Congress recognized that "restrictive or prohibitively inconvenient voter registration requirements . . . [could] discourage or even prevent qualified voters from registering and participating in elections," it adopted the NVRA "[i]n an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements." *Assoc. of Cmty. Orgs. for Reform Now v. Miller*, 129 F.3d 833, 834-35 (6th Cir. 1997). Congress understood that "registration, rather than being simply a mechanism to facilitate orderly elections" could—and historically did—function as "a significant barrier to voting." *Condon v. Reno*, 913 F. Supp. 946, 949 (D.S.C. 1995). As Congress recognized, "Throughout the history of this country there have been attempts to keep certain groups of citizens from registering to vote . . . [and] discriminatory and unfair practices still exist and deprive some citizens of their right to vote." S. Rep. No. 103-6 at 3 (Feb. 25, 1993); *see also* Stephen Ansolabehere & David M. Konisky, *The Introduction of Voter Registration and Its Effect on Turnout*,

14 Pol. Analysis 83 (2006), *available at* http://www.truman.missouri.edu/uploads/Publications/PA_article.pdf; Glenn E. Mitchell & Christopher Wlezien, *The Impact of Legal Constraints on Voter Registration, Turnout, and the Composition of the American Electorate*, 17 Pol. Behavior 179, 188-89 (1995). Based on research indicating that, although only slightly more than 60% of eligible voters were registered, more than 80% of registered voters turned out to vote in presidential elections, Congress concluded that “the registration process has been the principle [sic] vehicle keeping voter participation down.” *Condon*, 913 F. Supp. at 949; *see also* H.R. Rep. No. 103-9 at 3 (Feb. 2, 1993); S. Rep. No. 103-6 at 2.

In recognition of this fact, Congress adopted the NVRA “to establish procedures that [would] increase the number of eligible citizens who register to vote in elections for Federal office.” 42 U.S.C. § 1973gg(b)(1). In so doing, Congress rejected a provision that would have permitted states to adopt proof of citizenship requirements for registration, recognizing that such a provision was “*not necessary*” or consistent with the registration-increasing purpose of the NVRA. *See* H.R. Conf. Rep. 103-66, *reprinted at* 1993 U.S.C.C.A.N. 140, 148-49 (Apr. 28, 1993) (emphasis added).

Moreover, Congress rejected a documentary proof of citizenship requirement even though it was also concerned with election integrity. In

enacting the NVRA, Congress specifically stated that it was concerned with “protect[ing] the integrity of the election process overall.” 42 U.S.C.

§ 1973gg(b)(3). Nevertheless, Congress believed that the safeguards in the NVRA were adequate to address “concern” with “the issue of fraud” in the voter registration process by people who are not citizens:

With regard to the registration of noncitizens, current law . . . prohibits the knowing and false assertion of United States citizenship by an alien. Under the provisions of this bill, every application for voter registration must include a statement that sets forth all the requirements for eligibility, including citizenship, and requires that the applicant sign an attestation clause, under penalty of perjury, that the applicant meets those requirements. Together with the criminal penalties section of the bill, the Committee is confident that this Act provides sufficient safeguards to prevent noncitizens from registering to vote.

S. Rep. No. 103-6, at 11; *see also* 139 Cong. Rec. H495-03 (daily ed. Feb. 4, 1993) (Statement of Rep. Becerra) (“Some of my colleagues have expressed concern that noncitizens will register to vote These fears are unfounded. First, the documentation required to register . . . is more extensive than the documentation currently required to register to vote in any State. Second, the voter registration forms will clearly state in no uncertain terms that only U.S. citizens can register to vote. And finally, it is clear from the evidence in those States that utilize motor-voter and other registration techniques that noncitizens are not registering to vote.”)

Since the NVRA, Congress has increased the prominence of the notice to registrants that only U.S. citizens are entitled to register, without requiring any documentation of citizenship status. In HAVA, Congress required that the standard federal mail-in voter registration form include “[t]he question, ‘Are you a citizen of the United States of America?’ and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.” 42 U.S.C. § 15483(b)(4)(A)(i).

(b) Forty-Eight States Do Not Require Registrants To Present Documentary Proof Of Citizenship

Aside from Arizona, only Louisiana requires residents to provide documentary proof of citizenship—and even then, Louisiana requires such proof of citizenship only from naturalized citizens and citizens of foreign birth who are not naturalized. *See* LA. REV. STAT. ANN § 18:105; La. Atty. General Op. No. 00-48 (Mar. 15, 2000). Notably, a similar provision in Ohio was declared unconstitutional earlier this year. *See Boustani*, 2006 U.S. Dist. LEXIS 77989, at *1. Every other state has chosen to rely on less burdensome procedures to address potential voting by non-citizens. These alternative measures include clearly posting both eligibility requirements and the potential penalties for ineligible voting. Every state requires an applicant to affirm that she or he is a

citizen, either through a check-box on the registration form, a signed oath, or both. Every state also warns voters that they commit a crime by false voting.¹⁴

Colorado's approach is particularly instructive because it effectively protects the electoral process without unduly burdening eligible voters. *See* COLO. REV. STAT. § 1-2-204; *see also id.* § 1-1-103 (mandating liberal construction of the election code "so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections."). Accordingly, Colorado maintains a simple registration process while still safe-guarding against non-citizen voting through its voter registration form. This form requires registrants to sign a statement, under oath, attesting to their citizenship: "I do solemnly affirm that I am a citizen of the United States and that on the date of the next election I shall have attained the age of eighteen years and shall have resided in the state of Colorado at least 30 days and in my present precinct at least 30 days before the election" And Colorado accompanies the citizenship oath with a clear, strategically placed warning that false voting is a crime: "WARNING: IT IS A CRIME: To swear or affirm falsely as to your qualifications to register to vote." *Id.* Other states follow the same approach.

¹⁴ *See e.g.,* ARK. CODE ANN. § 7-5-107; COLO. REV. STAT. § 1-2-205; OR. REV. STAT. § 247.171.

Based on the rare incidence of non-citizen voting nationwide, and the extent to which the few past instances have been attributed to mistakes, it is no surprise that states find these voter registration warnings sufficient to deter non-citizens from voting. Until last year, Arizona did as well. Arizona includes such warnings on its registration form. Arizona law requires that its registration form contain a “statement that the registrant is a citizen of the United States” and that executing a false registration is a felony. ARIZ. REV. STAT. ANN. § 16-152(a)(14). The Arizona voter registration form contains bright red and blue text stating, “To Register To Vote In Arizona You Must . . . Be a United States citizen (see citizenship requirements on back).” Following the list of qualifications, the form then states: “WARNING: Executing a false registration is a class 6 felony.” *See Arizona Voter Registration Form, available at* <http://www.azsos.gov/election/forms/VoterRegistrationForm.pdf>. This undoubtedly is one reason why non-citizen voting in Arizona is so rare. Arizona has never explained why the qualifications and warnings on its voter registration form are inadequate to address any concern of non-citizen voting, and why it is now necessary to require documentary proof of citizenship when registering to vote.

In addition to these warnings on voter registration forms, every state (including Arizona) and the federal government have criminalized

intentional voting by ineligible persons, including voting by non-citizens. Most states classify intentional voting by non-citizens a felony, *see, e.g.*, FLA. STAT. § 104.011, although in some states it is a misdemeanor, *see, e.g.*, N.D. CENT. CODE, § 16.1-01-12. Moreover, federal law and the law of most states also criminalize false attestations of citizenship on voter registration forms. *See* 18 U.S.C. § 1015(f); *see also* ARK. CODE ANN. § 7-5-107. And non-citizens who vote or attempt to do so also face deportation. *See* 8 U.S.C. § 1101(a)(43)(P); 8 U.S.C. § 1227(a)(2)(A)(iii). By highlighting the serious penalties faced by any non-citizen who attempts to vote during the registration process, it is possible to ensure that these sanctions serve as effective deterrents to voting by non-citizens.

Forty-eight states and the federal government have concluded that non-citizen voting can be deterred by clear warnings on registration forms that non-citizens may not register to vote and by stiff criminal penalties for those who do not comply with the warnings. This consensus demonstrates that Arizona's proof of citizenship requirement is unnecessary to address the risk of non-citizen voting. And given the serious burdens it imposes and the number of Arizonans whom it will prevent from voting, it is unreasonable as well.

* * *

The United States already suffers from shamefully low voter turnout rates: Based on election participation between 1945 and 1998, the U.S. ranks 139th out of 172 nations. *See* International Institute for Democracy and Electoral Assistance, *Turnout in the World—Country by Country Performance* (Mar. 7, 2005), http://www.idea.int/vt/survey/voter_turnout_pop2.cfm. And leading up to this year's election, a number of states enacted burdensome election regulations that threatened further to disenfranchise voters; in fact, voter registration requirements were recently invalidated in Florida, Ohio, and Washington State for this very reason.¹⁵ As appellants show, the number of active voters registered in Arizona has decreased by more than 137,000 since January 2005, even as the State's population continues to increase. (App. Br. at 15.)

Voting requirements that unnecessarily burden eligible voters deserve careful scrutiny to ensure that they are not simply exclusionary devices—in intent or effect—that reduce competitive elections, disenfranchise disadvantaged groups, and undermine democracy. An election law cannot

¹⁵ *See League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006); *Project Vote v. Blackwell*, No. 06cv1628, 2006 WL 2600366 (N.D. Ohio Sept. 8, 2006); *Washington Ass'n of Churches v. Reed*, No. 06-0726RSM, Order Granting Motion for Preliminary Injunction (W.D. Wash. Aug. 1, 2006), *available at* http://projectvote.org/fileadmin/ProjectVote/Legal_Documents/WAC__PI_Decision.pdf.

survive constitutional scrutiny when it has the potential to disenfranchise thousands of legitimate voters—and in this case has already done so—and might, at best, prevent a handful of cases of election fraud, especially where there are other less burdensome means of addressing the alleged harm.

Proposition 200's proof of citizenship requirement does not pass any level of scrutiny. The onerous restriction Arizona has adopted cannot be considered a reasonably tailored, nondiscriminatory response to potential voting by non-citizens, given the variety of effective and less restrictive alternatives that prevail throughout the rest of the nation. Arizona's decision to burden substantially its most disadvantaged voters by conditioning their right to register on the possession of costly, difficult-to-obtain documentation is a disproportionate, unreasonable, and discriminatory response to the possible problem of voting by non-citizens. It, therefore, violates the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the district court's order denying preliminary injunctive relief with respect to the voter registration requirements should be reversed, and Arizona should be enjoined *pendente lite* from enforcing Proposition 200's proof of citizenship requirement.

November 29, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in 14-point Times New Roman and complies with the type-volume limitation of the rule, containing 6,821 words, excluding those sections of the brief that do not count towards that limitation, in accordance with Rule 32(a)(7)(B), as determined by the word processing system used to prepare this brief.

November 29, 2006



J. Adam Skaggs

CERTIFICATE OF SERVICE

This is to certify that I have this day caused two true and correct copies of the foregoing **BRIEF AMICUS CURIAE OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF PLAINTIFFS/APPELLANTS AND REVERSAL** to be served by Overnight Courier Service (Federal Express) upon the following:

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