

No. 06-16706

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

MARIA M. GONZALEZ, ET AL.,

Plaintiff-Appellant,

v.

STATE OF ARIZONA, ET AL,

Defendant-Appellee.

On appeal from the United States  
District Court for the District of  
Arizona

No. CV-06-01268-PHX-ROS

**DEFENDANT-APPELLEE STATE OF ARIZONA'S  
RESPONSE TO MOTION FOR INJUNCTIVE RELIEF**

Terry Goddard  
Attorney General

Mary O'Grady  
Solicitor General  
Peter Silverman  
Assistant Attorney General  
1275 W. Washington  
Phoenix, Arizona 85007-2997  
(602) 542-3333  
(602) 542-8308 (fax)

Attorneys for the State of Arizona and  
Arizona Secretary of State

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## INTRODUCTION

In an effort to enhance the integrity of elections in Arizona, the voters passed Proposition 200 in November 2004. It requires people who register to vote to provide satisfactory evidence of U.S. citizenship, and requires voters to provide identification at the polls. The Department of Justice precleared Proposition 200 on January 24, 2005. Since that time, the State has been implementing the requirement for evidence of citizenship. The requirement for identification at the polls has been implemented in local elections in March and May 2006 and the statewide primary September 12, 2006.

In their emergency motion, Plaintiffs ask this Court to enjoin Arizona from continuing to implement Proposition 200 while their appeal of the district court's order denying a preliminary injunction is pending. On September 11, 2006, the district court denied Plaintiffs' request for a preliminary injunction after full briefing and a two-day evidentiary hearing. The Court should deny Plaintiffs' Motion because they are not likely to prevail on the merits of their appeal and the balance of harms tips in favor of the State continuing to implement the requirements for proof of citizenship and identification at the polls.

The deadline for registering to vote in the November 7 general election is October 9; early voting begins in two days (October 5). Plaintiffs' emergency and last minute motion attempts to disrupt the State's election processes in the middle

of the election cycle. The court should preserve the status quo pending Plaintiffs' appeal and deny Plaintiffs' Motion.

## **FACTUAL BACKGROUND**

### **A. The Voting Provisions of Proposition 200.**

#### **1. Satisfactory Evidence of U.S. Citizenship.**

United States citizenship is a fundamental qualification for voting in Arizona elections. *See* A.R.S. § 16-101(A) (“Every resident of the state is qualified to register to vote if he . . . [i]s a citizen of the United States”). Proposition 200 amended A.R.S. § 16-166 to require that an application for voter registration be accompanied by satisfactory evidence of U.S. citizenship.

Under Proposition 200, satisfactory evidence of U.S. citizenship includes: (1) the number of an Arizona driver's or nonoperating identification license issued after October 1, 1996; (2) the number of a driver's or nonoperating identification license issued in another state, if it indicates that the applicant provided satisfactory proof of U.S. citizenship; (3) a copy of a birth certificate; (4) U.S. naturalization documents or the number of an applicant's certificate of naturalization; (5) a Bureau of Indian Affairs card number, Tribal Treaty card number or enrollment number; and (6) a copy of the pertinent pages of an applicant's U.S. passport. *See* A.R.S. § 16-166(F), State's App. Tab 11.

In most of these instances, the document itself need not be provided with the voter registration form—the number is sufficient. In addition, every voter who is already registered is grandfathered in. *See* A.R.S. § 16-166(G). Only voters who move from one county to another within the state or who register for the first time in Arizona must present satisfactory evidence of U.S. citizenship. *See id.*

## **2. Voter Identification at the Polls.**

Proposition 200 also requires voters to present identification before receiving a ballot at the polls, and voters can use a variety of commonly-held documents to satisfy this requirement. A voter may provide either one form of identification that contains the name, address and photograph of the elector, or two different forms of identification that need only bear the elector’s name and address. *See* A.R.S. § 16-579(A).<sup>1</sup>

To implement these provisions, the Secretary of State promulgated a Procedure for Proof of Identification at the Polls (the “Procedure”). *See* ITCA Plaintiffs’ App. Tab B, Ex. 3. Under the Procedure, the acceptable forms of identification that bear the photograph, name and address of the elector include: a valid Arizona driver’s license; a valid nonoperating identification license; a tribal enrollment card or other form of tribal identification; and a valid U.S. federal, state, or local government identification. *Id.*

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<sup>1</sup> See ITCA Plaintiffs’ App. Tab B, Ex. 2.

For those voters who do not possess a photo ID, the Procedure leaves room for alternative forms of identification that need only contain the elector's name and address. These include: a utility bill that is dated within ninety days of the election; a bank or credit union statement dated within ninety days of the election; a valid Arizona vehicle registration; an Indian census card; a property tax statement of the elector's residence; a vehicle insurance card; a recorder's certificate; and a valid U.S. federal, state or local government issued identification, including a voter registration card. *Id.*

The Procedure makes clear that the acceptable forms of identification are not limited to the sources listed above. Indeed, to assist voters in complying with the requirements of Proposition 200, county election officials are sending election mail that is individually addressed to registered voters. *See, e.g.,* State's App. 2, Deposition of Karen Osborne ("Osborne Dep."), at 61:14-62:12; State's App. 3, Deposition of Kelly Dastrup, at 11:7-11:14. The mail may then be used as a form of identification at the polls. *See id.* In addition, intensive efforts have been ongoing for some time at the State and county level to educate voters regarding the requirements of Proposition 200.<sup>2</sup>

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<sup>2</sup> *See* State's App. Tab 7, Secretary of State's educational materials; State's App., Tab 8, Affidavit of Karen Osborne ("Osborne Aff."), ¶¶ 14-16; State's App. Tab 6, Hansen Dep. at 75:8-76:7.

The identification requirements of Proposition 200 do not apply to early voting. Under State law, any registered voter may cast an early ballot beginning thirty-three days before a primary or general election. *See* A.R.S. § 16-541(A). Those ballots are verified by comparing the signature on the outside of the ballot envelope with the voter's signature on file with the county recorders.<sup>3</sup>

### **3. The Fail Safe Measure of Provisional Ballots.**

Voters who present valid proof of identification but whose name or address is not consistent with the voter registration rolls are allowed to cast a regular provisional ballot. ITCA Plaintiffs' App. Tab B, Ex. 3 at 2. The regular provisional ballot is verified by comparing the signatures on the provisional ballot with the voter's signature on file with the counties.

In Arizona, a voter who lacks the required identification also is not turned away. Under a fail-safe measure built into the Secretary of State's Procedure, that voter may cast what is referred to as a conditional provisional ballot. The voter who casts a conditional provisional ballot has five business days after a general

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<sup>3</sup> By requiring ID at the polls, Proposition 200 brings polling place voting into parity with voting by mail. In-person voting and absentee (or early) balloting are different processes which inherently involve different procedures. *See Common Cause/Georgia League of Women Voters v. Billups*, 439 F. Supp.2d 1294, 1356 (N.D. Ga. 2006); *see also Indiana Democratic Party v. Rokita*, No. 1:05-CV-0634-SEB-VSS, 2006 WL 1005037 at \*41 (S.D. Ind. April 14, 2006). Indeed, comparing signatures is less practical at the polling place, while requiring early voters to include identification in the ballot envelope risks ballot secrecy as the envelope must be unsealed to confirm the voter's identity.

election that includes an election for federal office, or three business days after any other election, to provide identification at any number of designated sites throughout each county. *Id.* at 4-5.

### **STANDARD FOR INJUNCTION PENDING APPEAL**

A stay or injunction pending appeal is appropriate only if Plaintiffs establish (1) a probability of success on the merits of their appeal and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships “tips sharply in [their] favor.” *Lopez v. Heckler*, 713 F.2d 1432, 1435-36 (9<sup>th</sup> Cir. 1983).

On the merits of their appeal, Plaintiffs will prevail only if they establish that the district court abused its discretion by denying the preliminary injunction or if it “based its decision upon erroneous legal premises.” *Id.* at 1436 (quoting *Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1200 (9<sup>th</sup> Cir. 1980)). “Unless the district court’s decision relies on erroneous legal premises, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.” *Sports Form, Inc. v. United Press Int’l, Inc.*, 686 F.2d 750, 752 (9<sup>th</sup> Cir. 1982). “Review of an order granting or denying a preliminary injunction is . . . much more limited than review of an order involving a permanent injunction where all conclusions of law are freely reviewable.” *Id.*

In the election context, Plaintiffs' burden is particularly high. As this Court has noted, "[i]nterference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented." *Sw. Voter Registration Educ. Project*, 344 F.3d 914, 919 (9<sup>th</sup> Cir. 2003) (citation omitted).

### **SUMMARY OF ARGUMENT**

Proposition 200 amended Arizona law to simply require satisfactory evidence of citizenship from people who want to register to vote and identification from people who vote at the polls to establish that they are who they say they are. Plaintiffs sought a preliminary injunction based on a variety of theories, leading to more than 60 pages of briefing, more than 700 pages of exhibits and a two-day evidentiary hearing. The trial court correctly concluded that Plaintiffs are not likely to prevail on the merits and declined to change the rules that apply to the impending elections.

Just under half of all states now require voters to confirm their identity at a polling site. Unlike other states, however, Arizona permits voters to present identification ranging from mail, to a utility bill, to a government-issued photo ID. Cases that have reviewed in-person identification laws establish that Plaintiffs have no likelihood of success on their claims, much less one that is strong.

Plaintiffs also believe that Arizona, or apparently any state, cannot require would-be voters to provide evidence of citizenship. As the district court observed,

however, “[d]etermining whether an individual is a United States citizen is of paramount importance when determining his or her eligibility to vote.” (State’s App. 1, June 19, 2006 Opinion and Order at p. 9).

The system before Proposition 200 allowed voters to participate in elections without proof of their identity and without evidence of their eligibility. Proposition 200 simply attempts to add integrity to the system that the voters of Arizona believed was lacking before.

The first statewide elections under Proposition 200 are the primary and general elections this fall. The primary election is over; voting for the general election begins in two days and voter registration closes October 9. The limited experience with Proposition 200’s requirements is not as Plaintiffs would have the Court fear, and Arizona should be allowed to continue implementing its law while Plaintiffs’ appeal is pending.

## **LEGAL ARGUMENT**

### **I. State Authority to Regulate Elections and Prevent Fraud.**

States have substantial authority to develop complete election codes for both federal and state elections that regulate not just the time, place and manner of elections, but the registration of voters, and the prevention of fraud and corrupt practices. *See Roudebush v. Hartke*, 405 U.S. 15, 24 (1972); *see also California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (“States have a major role to

play in structuring and monitoring the election process”). Indeed, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest, and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Consequently, states have a compelling interest in curbing fraud and protecting the integrity of elections. *See Burson v. Freeman*, 504 U.S. 191, 199 (1992) (a state “indisputably has a compelling interest in preserving the integrity of its election process”). Although the parties disputed the magnitude of voter fraud in Arizona, the record left no question that it exists.<sup>4</sup> As the Baker-Carter Commission recently noted, “[t]he problem . . . is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference.” State’s App. 4 at 18. In addition, the mere perception that it exists erodes confidence in our electoral system.

Even if fraud never occurred in Arizona, which is not the case, the

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<sup>4</sup> For examples of voter fraud in Arizona see ITCA Plaintiffs’ App. Tab B, Exs. 8, 16, 57; State’s App. Tab 5, Osborne Aff. 11. Nationally, the Commission on Federal Election Reform (the “Baker-Carter Commission”) recently recommended that States require identification at the polls “to make sure that the person arriving at a polling site is the same one that is named on the registration list.” State’s App. 4 at 18. The Commission also stated that “[t]he right to vote is a vital component of U.S. citizenship, and all states should use their best efforts to obtain proof of citizenship before registering voters.” *Id.* at 21.

Constitution still allows states to act with foresight in promoting fair and honest elections. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 196-97 (1986); *see also Griffin v. Roufas*, 385 F.3d 1128, 1131 (7<sup>th</sup> Cir. 2004) (“the striking of the balance between discouraging voter fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry”).

## **II. Proposition 200 Does Not Unduly Burden Voting; It Requires Information Basic to Voting.**

### **A. Permitting Voters to Present Multiple Forms Of ID at the Polls Is A Reasonable, Nondiscriminatory Requirement That Does Not Place A Severe Burden on the Right to Vote.**

A law that allows voters to present identification ranging from a free registration card to mail to a photo ID does not unduly burden the right to vote. Twenty-four states require some or all voters to present identification when at the polls. *See Billups*, 439 F. Supp.2d at 1305. Under the Help America Vote Act, Congress also has mandated that first-time voters who register by mail for federal elections provide identification with their application or when voting in person.<sup>5</sup>

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<sup>5</sup> Under section 303(b) of HAVA, in-person voters meet HAVA’s requirements by presenting a current and valid photo ID, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document showing the name and address of the voter.

Plaintiffs ignore the fact that voters have overwhelmingly complied with the requirements of Proposition 200. When the district court denied the preliminary injunction in this case, the identification requirement had been implemented in local elections in March and May of this year. In Maricopa County, voters cast a total of 110,802 ballots in elections in March. *See* ITCA Plaintiffs' App., Tab B, Ex. 15. Of those ballots, 177—or .16%—were conditional provisional ballots from voters who lacked the required ID. *See id.* Of the 39,496 ballots cast in person, 115—or .29%—were a conditional provisional ballot that was not counted. *See id.* In the May elections in that county, conditional provisional ballots accounted for 130—or .12%—of the 106,422 ballots cast. *See id.* Of the 35,752 regular ballots cast by voters in person, 72—or .20%—were not counted. *See id.*

The results of the primary election (which are not part of the record on this appeal) were similar. In Maricopa, of the 298,892 votes cast, only 520 conditional provisional ballots were issued, and 368 of these voters failed to return with identification so that their vote would count. Those failing to provide the required identification accounted for only .13% of all ballots cast in the election. ITCA Plaintiffs' App., Tab G. Similarly, of the 15,425 votes cast in Coconino County, only 132 voted conditional provisional ballots, and 98 of these voters failed to return with identification. *Id.* at Tab F. Only .63% of the people

who cast votes failed to comply with the identification requirements. In both counties cited by Plaintiffs, more than 99% of the primary election voters complied with the identification requirements or participated in early voting.

Identification is a part of America's everyday life, and even implicates many of our nation's most fundamental rights. Americans must present identification to board an airplane, cash a check, obtain a marriage license and to enter the federal courthouse in Phoenix. Proposition 200 does not impose a severe burden by requiring voters to also present identification at the polls.

Arizona's identification requirements do not deny anyone the right to vote. Under Arizona law, *every* voter has the option of casting an early ballot, which is not subject to the identification at the polls requirements.<sup>6</sup> In addition, *every* voter who goes to the polls casts a vote. The identification requirement just requires people who choose to vote at the polls and who do not bring identification to present identification within a specified period of time for their vote to count.

**B. Requiring Proof of Citizenship to Register to Vote Is a Reasonable, Nondiscriminatory Regulation That Does Not Severely Burden the Right to Vote.**

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<sup>6</sup> Although Plaintiffs argue that some voters prefer to vote at the polls, the Constitution does not require states to accommodate every voter's preference. *See Griffin*, 385 F.3d at 1130. In fact, Oregon primarily conducts its elections by mail. *See Or. Rev. Stat. § 254.465.*

Plaintiffs ask this Court to stop Arizona from implementing its requirement that would-be voters provide satisfactory evidence of U.S. citizenship when registering. There is no question that U.S. citizenship is a prerequisite to voting. Before Proposition 200, however, Arizona simply relied on an honor system that each applicant was qualified to vote. In the eyes of Arizona's voters, the system posed few barriers to registration by non-citizens.

Plaintiffs' statistics regarding unsuccessful voter registrations under Proposition 200 do not undermine this State law. The fact that some potential voters did not provide satisfactory evidence of citizenship when they attempted to register does not mean as much as Plaintiffs suggest. It does not mean that they cannot provide evidence of citizenship; it does not mean that they are not registered today or that they will not or cannot register in the future; it also does not mean that they are even eligible to vote.<sup>7</sup>

In fact, applicants who do not register successfully under Proposition 200 may be able to register later. Maricopa County, for instance, immediately notifies an applicant by letter when a registration is not accompanied by satisfactory evidence of citizenship. *See State's App. 8, Osborne Aff.*, ¶5. Maricopa County

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<sup>7</sup> Moreover, although the Department of Justice precleared Proposition 200 in January 2005, it did not preclear the amended Arizona voter registration form containing the new instructions under Proposition 200 until May 2005 (DOJ File #2005-1013). F. Ann Rodriguez, Recorder for Pima County, believes that compliance with Proposition 200 improved after the updated voter registration form was approved. *See State's App. 9 at 19:1-19:14.*

also supplies a new voter registration form and a postage-paid return envelope for trouble-free use by the registrant. *See id.* Pima County engages in a similar practice. *See State's App. 10, Rodriguez Dep. at 51:21-52:12.*

There may be individuals who do not possess the information necessary to register and will have to take some action in order to comply.<sup>8</sup> Nevertheless, even Plaintiffs' expert estimated that the large majority of citizens (98%) *do* possess satisfactory evidence of U.S. citizenship. ITCA Plaintiffs' App. Tab B, Ex. 21. The fact some people do not have the evidence necessary and would need to take some measures to satisfy Proposition 200 does not undermine the validity of this State law.

Laws that regulate elections will inevitably create some burden on voter participation. *See Griffin*, 385 F.3d at 1130 (“Any such restriction is going to exclude, either de jure or de facto, some people from voting”). Requiring that a voter register at all can have the unintended effect of erecting for some a barrier to voting. Plaintiffs fail to meet their burden of showing that Arizona goes too far. Under Plaintiffs' theories, no State could require would-be voters to verify that they are citizens.

### **III. The Balance of Harms Favors Allowing Arizona to Continue Implementing Its State Laws.**

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<sup>8</sup> The declarants for the ITCA Plaintiffs, who themselves are not plaintiffs and did not register to vote before Proposition 200, claim to fall into this category.

This Court should permit Arizona to continue implementing Proposition 200 while Plaintiffs appeal the district court's denial of a preliminary injunction. Early voting for the general election starts October 5, programs to educate voters about the identification at the polls requirements are underway, thousands of pollworkers are being trained, and voter registration for the general election closes October 9. All state and local procedures regarding Proposition 200 have been precleared by the U.S. Department of Justice and any changes would also require preclearance.

The basic purpose of an injunction is to preserve the status quo pending the resolution of an action on the merits. *See Chalk v. United States District Court Cent. Dist. of Calif.*, 840 F.2d 701, 704 (9<sup>th</sup> Cir. 1988). The relief Plaintiffs seek does just the opposite. Plaintiffs want this Court to permit any person to register to vote in Arizona without complying with its new law that requires proof of citizenship. Arizona has been requiring proof of citizenship since January 2005. Rather than preserve the status quo, this relief would change the way that voter registration works in Arizona.

Arizona is simply too far into the 2006 election cycle to change the rules that apply to this year's primary or general election. *See Sw. Voter Registration Educ. Project*, 344 F.3d at 919 ("Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented."). The counties are already administering the elections. The brief filed by the fourteen

county co-defendants made clear that a preliminary injunction would cause significant harm to the citizens of Arizona, the counties and to the public interest. ITCA Plaintiffs App. Tab C.<sup>9</sup>

The trial court appropriately denied the preliminary injunction so Arizona can continue implementing the proof of citizenship requirement and requiring identification at the polls while Plaintiffs' lawsuit is pending. Proposition 200 is an initiative approved by Arizona voters, and the State has a strong interest in implementing its State laws and preventing fraud.

Plaintiffs argue that they will suffer irreparable harm because implementing the law risks depriving people of the right to vote. That is not correct, but in the election context, even constitutional claims give way to the needs of the elections:

In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws . . . . With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree.

*Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The balance of harms and the public interest both favor denying the preliminary injunction and permitting Arizona to continue to implement Proposition 200.

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<sup>9</sup> Plaintiffs rely on the position of Coconino County election officials to support their motion and ignore the views of the fourteen other counties, which opposed the relief Plaintiffs seek.

## CONCLUSION

For the reasons above, the State respectfully requests that the Court deny Plaintiffs' motion for injunctive relief pending appeal.

Respectfully submitted this 3<sup>rd</sup> day of October, 2006.

Terry Goddard  
Attorney General

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Mary O'Grady  
Solicitor General  
Peter Silverman  
Assistant Attorney General

Attorneys for State of Arizona and  
Arizona Secretary of State

## CERTIFICATE OF SERVICE

Original and four copies mailed  
this 3<sup>rd</sup> day of October, 2006, to:

United States Court of Appeals  
Ninth Circuit  
95 Seventh Street, Suite 429  
San Francisco, CA 94103-1526

And copy e-mailed and mailed the same day to:

David B. Rosenbaum  
Thomas L. Hudson  
Sara S. Greene  
OSBORN MALEDON, P.A.  
2929 N. Central Ave., Suite 2100  
Phoenix, AZ 85012-2794  
[drosenbaum@omlaw.com](mailto:drosenbaum@omlaw.com)  
[thudson@omlaw.com](mailto:thudson@omlaw.com)  
[sgreene@omlaw.com](mailto:sgreene@omlaw.com)

David J. Bodney  
Karen J. Hartman-Tellez  
STEPTOE & JOHNSON, LLP  
201 E. Washington St., Suite 1600  
Phoenix, AZ 85004-2382  
[dbodney@steptoe.com](mailto:dbodney@steptoe.com)  
[khartman@steptoe.com](mailto:khartman@steptoe.com)

Jon Greenbaum  
Benjamin Blustein  
1401 New York Avenue, Suite 400  
Washington, D.C. 20005  
[jgreenbaum@lawyerscommittee.org](mailto:jgreenbaum@lawyerscommittee.org)  
[bblustein@lawyerscommittee.org](mailto:bblustein@lawyerscommittee.org)  
Attorneys for Lawyers' Committee For Civil Rights Under Law

Neil Bradley  
2600 Marquis One Tower  
245 Peachtree Center Avenue  
Atlanta, GA 30303  
[nbradley@aclu.org](mailto:nbradley@aclu.org)  
Attorneys for ACLUE Southern Regional Office

Elliot M. Mincberg  
David J. Becker  
2000 M Street, NW, Suite 400  
Washington, D.C. 20036  
[eminberg@pfaw.org](mailto:eminberg@pfaw.org)  
[dbecker@pfaw.org](mailto:dbecker@pfaw.org)  
Attorneys for People For The American Way Foundation

Daniel B. Kohrman  
601 E Street, N.W., Suite A4-240  
Washington, D.C. 20049  
[dkohrman@aarp.org](mailto:dkohrman@aarp.org)  
Attorneys for AARP Foundation Litigation

Joe P. Sparks, No. 002383  
Susan B. Montgomery, No. 020595  
Sparks, Tehan & Ryley PC  
7503 First St.  
Scottsdale, AZ 85251  
[joe-sparks@qwest.net](mailto:joe-sparks@qwest.net)  
Attorneys for The Inter Tribal Council of Arizona, Inc.

Nina Perales  
Diego M. Bernal  
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND  
110 Broadway, Ste. 300  
San Antonio, TX 78205  
[nperales@maldef.org](mailto:nperales@maldef.org)  
[dbernal@maldef.org](mailto:dbernal@maldef.org)

Daniel R. Ortega, Jr.  
ROUSH MCCrackEN GUERRERO MILLER & ORTEGA  
650 N. 3<sup>rd</sup> Avenue  
Phoenix, AZ 85003-0001  
[danny@mrmgmoinjurylaw.com](mailto:danny@mrmgmoinjurylaw.com)

Judith M. Dworkin  
Marvin Cohen  
Patricia Ferguson-Bohnee  
SACKS TIERNEY P.A.  
4250 N. Drinkwater Blvd., 4<sup>th</sup> Floor  
Scottsdale, AZ 85251  
[Judith.dworkin@sackstierney.com](mailto:Judith.dworkin@sackstierney.com)  
[Marvin.cohen@sackstierney.com](mailto:Marvin.cohen@sackstierney.com)  
[Patty.ferguson@sackstierney.com](mailto:Patty.ferguson@sackstierney.com)

Brenna L. Clani  
THE NAVAJO NATION, DEPT. OF JUSTICE  
P.O. Drawer 2010  
Window Rock, AZ 86515  
[brennalclani@navajo.org](mailto:brennalclani@navajo.org)

Terrance C. Hance  
Coconino County Attorney  
Jean E. Wilcox  
Deputy County Attorney  
110 E. Cherry Avenue  
Flagstaff, AZ 86001  
[thance@co.coconino.az.gov](mailto:thance@co.coconino.az.gov)  
[jwilcox@co.coconino.az.us](mailto:jwilcox@co.coconino.az.us)

M. Colleen Connor  
MCAO Division of County Counsel  
222N. Central Ave., Suite 1100  
Phoenix, AZ 85003  
[connorc@mcao.maricopa.gov](mailto:connorc@mcao.maricopa.gov)

Dennis I. Wilenchik  
Kathleen Rapp, SBN  
Wilenchik and Bartness, P.C.  
The Wilenchik & Bartness Building  
2810 N. Third Street  
Phoenix, AZ 85004  
[diw@wb-law.com](mailto:diw@wb-law.com)  
[kathleenr@wb-law.com](mailto:kathleenr@wb-law.com)

By: \_\_\_\_\_  
482557