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25 UNITED STATES DISTRICT COURT

26 DISTRICT OF ARIZONA

27 Maria M. Gonzalez, et al., )  
28 Plaintiffs, ) No. CV06-01268-PHX-ROS (Lead)  
29 vs. ) CV06-01362-PHX-ROS (Cons)  
30 State of Arizona, et al., ) CV06-01575-PHX-ROS (Cons)  
31 Defendants. ) **ITCA PLAINTIFFS'**  
32 ) **RESPONSE IN OPPOSITION TO**  
33 ) **ADDITIONAL BRIEFING BY**  
34 ) **THE STATE OF ARIZONA AND**  
35 ) **ARIZONA SECRETARY OF**  
36 ) **STATE**

37 Pursuant to this Court's September 11, 2006 Order, plaintiffs the Inter  
38 Tribal Council of Arizona, Inc., *et al.* hereby respond in opposition to the Additional  
39 Briefing by the State of Arizona and Arizona Secretary of State ("State Br.").

1 Preliminary Statement

2 Contrary to the suggestion of defendants the State of Arizona and  
3 Secretary of State Jan Brewer (collectively, the “State”), whether the proof of  
4 citizenship requirement of the Arizona Taxpayer and Citizen Protection Act (the “Act”  
5 or “Proposition 200”) constitutes a poll tax has nothing to do with whether the State may  
6 “require evidence that people who register to vote are actually U.S. citizens.” [State Br.  
7 at 2]<sup>1</sup> Rather, the issue is whether the State may require citizens to obtain documentary  
8 proof of citizenship at their own expense. On this issue, the law is clear -- making the  
9 “payment of [a] fee an electoral standard” is patently unconstitutional. *Harper v.*  
10 *Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966).

11 Faced with this clear law -- and the undisputed fact that Proposition 200’s  
12 proof of citizenship requirements impose a financial burden on those who lack  
13 “satisfactory evidence of citizenship” -- the State attempts to defend the Act by relying  
14 on three false premises, *i.e.*, that: (1) the costs of obtaining “satisfactory evidence of  
15 citizenship” are “incidental,” “indirect” or “attenuated,” (2) those costs are not within  
16 the State’s control, and (3) Arizona cannot verify the citizenship status of voter  
17 registrants in any other way. [State Br. at 4, 6-7] But for those who do not possess the  
18 “satisfactory evidence of citizenship” required by Proposition 200 (“Registration ID”),  
19 and who do not need such documents for any reason except to vote, the costs to obtain  
20 Registration ID are direct and substantial. A.R.S. § 16-166(F). Moreover, the State  
21 controls what constitutes “satisfactory evidence of citizenship,” and therefore controls  
22 whether voters must pay to comply with voter registration requirements. Furthermore,  
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24 \_\_\_\_\_  
25 <sup>1</sup> The other defendants, county recorders and elections directors from each of Arizona’s  
26 15 counties submitted no additional substantive briefing. Candace Owens and Patty  
27 Hansen, the Coconino County defendants, affirmatively support plaintiffs’ Motions for  
28 Preliminary Injunction. The remaining County Defendants “take no position on the  
constitutionality of the proof of citizenship requirement for voter registration.” [County  
Def. Not. of Non-Participation in Substantive Briefing, at 2]

1 the State has offered no evidence to show that it cannot verify United States citizenship  
2 in some way that does not require the purchase of Registration ID.

3 For years, Arizona has required evidence of citizenship -- in the form of a  
4 sworn attestation, under penalty of perjury -- from applicants for voter registration.  
5 Plaintiffs do *not* contend that the State cannot continue to do so.<sup>2</sup> Rather, the  
6 Constitution forbids the State from limiting “satisfactory evidence of citizenship” to a  
7 few categories of documentary evidence that *cannot* be obtained for free. By doing so,  
8 the State has placed a price tag on the franchise and unconstitutionally burdened the  
9 fundamental right to vote. *See Harper*, 383 U.S. at 666; *see also M.L.B. v. S.L.J.*, 519  
10 U.S. 102, 124 & n.14 (1996) (“The basic right to participate in political processes as  
11 voters and candidates cannot be limited to those who can pay for a license.”).

12 The State attempts to cast the issue before the Court as a non-justiciable  
13 political question -- a “policy choice” made by a majority of Arizona voters. [State Br.  
14 at 2] But the Constitution flatly prohibits any initiative-based “policy” that places a  
15 price tag on voting, thereby barring tens of thousands of Arizonans, who are otherwise  
16 eligible to register, from registering to vote and exercising a fundamental constitutional  
17 right. Moreover, Proposition 200’s promise -- that it would “not deny any eligible U.S.  
18 Citizen their right to vote” -- contravenes the uncontested evidence submitted to this  
19 Court.<sup>3</sup> Tens of thousands of registration forms have already been rejected.<sup>4</sup> Those  
20 registration forms belong to people who, like Eva Steele, Kenneth Totten, Nicholas  
21 Fisher, Tammy Pattison and Tara Hernandez are eligible to vote, but lack Registration

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22 <sup>2</sup> Contrary to the State’s argument, federal law does not justify the Registration ID  
23 requirement. [See State Br. at 2] Indeed, the Help America Vote Act has no  
24 documentary proof of citizenship requirement, and the National Voter Registration Act  
25 requires precisely the attestation that Arizona considered sufficient evidence of  
26 citizenship before Proposition 200. *See* 42 U.S.C. §§ 1973gg-7(b)(2), 15483(b)(4)(A)(i)  
(requiring voter registration forms to contain a checkbox for a registrant to mark to  
indicate whether he is a citizen).

27 <sup>3</sup> Ex. 51, at SEC00010.

28 <sup>4</sup> *See* Ex. 21, at 5 (20,713 registration forms rejected in 11 counties as of July 2006).

1 ID, and who have therefore been denied the right to register and vote.<sup>5</sup> As explained  
2 more fully below, Proposition 200 imposes an unconstitutional poll tax, and its  
3 Registration ID requirement should be enjoined.

4 Argument

5 I. THE CONSTITUTIONAL PROHIBITION OF POLL TAXES BARS FAR  
6 MORE THAN WHAT THE STATE CHARACTERIZES AS A “GENUINE  
POLL TAX.”

7 The State argues that the Registration ID requirement passes constitutional  
8 muster because it differs in form (but not in function) from the “genuine poll tax” at  
9 issue in the seminal Twenty-fourth Amendment cases, *Harman v. Forssenius*, 380 U.S.  
10 528 (1965) and *Harper*. [State Br. at 4] Yet, the Twenty-fourth Amendment prohibits  
11 conditioning the franchise on payment of “a poll tax *or any other tax.*” U.S. Const.  
12 Amend. XXIV (emphasis added). Moreover, recent decisions striking down voter  
13 identification requirements in Georgia and Missouri make it clear that neither the name  
14 given to a law that bars voters who do not purchase required identification, nor the  
15 announced legislative purpose of such a law, renders it constitutionally permissible. *See*  
16 *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005);  
17 *Weinschenk v. State*, No. 06AC-CC00656, Slip op. at 8-9 (Mo. Cir. Ct., Cole County,  
18 Sept. 14, 2006) (recognizing state’s legitimate interest in establishing entitlement to  
19 vote, but holding voter ID law unconstitutional because the burden of obtaining ID  
20 “impermissibly infringe[s] on core voting rights”).<sup>6</sup> Thus, as the court recognized in  
21 *Billups*, a state may not circumvent the Twenty-fourth Amendment by requiring citizens  
22 to make a “purchase” as a condition of voting, even if couched in terms of merely  
23 verifying voters’ identities:

24 [for voters who] have no other need for a Photo ID card,  
25 requiring those voters to purchase a Photo ID card  
26 effectively places a cost on the right to vote. In that respect,

27 <sup>5</sup> *See, e.g.*, Ex. 22, ¶¶ 4-5; Ex. 33, ¶¶ 4-5; Ex. 34, ¶¶ 5-6; Ex. 35, ¶¶ 5-6; Ex. 36, ¶¶ 4-5.

28 <sup>6</sup> *See* Ex. 72.

1 the Photo ID requirement runs afoul of the Twenty-fourth  
2 Amendment for federal elections and violates the Equal  
3 Protection Clause for State and municipal elections.  
4 406 F. Supp. 2d at 1369 & n.9 (“Requiring purchased photo identification is a reprise of  
5 the notorious poll tax scheme used in the past to prevent voting.”).

6 A poll tax is unconstitutional regardless of its purpose. It need not arise  
7 from a state policy to discriminate against minority voters. [*Cf.* State Br. at 6] Neither  
8 the language of the Twenty-fourth Amendment nor the Supreme Court’s interpretations  
9 of that Amendment in *Harman* and *Harper* require evidence of intent to discriminate.  
10 Indeed, the language of the Twenty-fourth Amendment could not be plainer -- the right  
11 of all citizens to vote “shall not be denied or abridged . . . by reason of failure to pay any  
12 poll tax or other tax.” U.S. Const. Amend. XXIV.

13 As the Court noted in *Harman*, “Congressional hearings and debates  
14 indicate a general repugnance to the disenfranchisement of the poor occasioned by  
15 failure to pay the tax.” 380 U.S. at 539 (emphasis added). While the Virginia poll tax at  
16 issue in *Harman* and *Harper* originally was “born of a desire to disenfranchise the  
17 Negro,” the Court made clear in *Harper* that the Virginia law’s unconstitutionality did  
18 not depend on whether “in its modern setting” it continued to “serve the same end.” 383  
19 U.S. at 666 n.3. Rather, Virginia’s law violated the Fourteenth Amendment because it  
20 made “the affluence of the voter or payment of any fee” a qualification to vote. *Id.* As  
21 the Court held, “[t]o introduce wealth or payment of a fee as a measure of a voter’s  
22 qualifications is to introduce a capricious or irrelevant factor.” *Id.* at 668. Proposition  
23 200’s Registration ID requirement does precisely that. As such, it is unconstitutional  
24 and its enforcement must be enjoined.

25 **II. FOR THOSE WHO DO NOT NEED REGISTRATION ID FOR ANY  
26 PURPOSE OTHER THAN VOTING, THE COST OF OBTAINING SUCH ID  
27 IS NOT “INCIDENTAL.”**

28 The State also argues that the fees required to obtain Registration ID are  
“incidental” costs, which are similar to the indirect costs of voting such as voting on a  
Tuesday, or traveling to a polling place. [State Br. at 4, 6] The State’s suggestion that a

1 fee of \$10 or more is “incidental” for its citizens living in poverty or on fixed incomes  
2 reveals, at best, a lack of understanding of the economic reality of many of its citizens.  
3 As a Missouri court recently noted about that state’s voter identification law, costs that  
4 the State here characterizes as “incidental” place an insurmountable barrier in the path  
5 of the most vulnerable citizens:

6           The photo ID burden placed on the voter may seem  
7 minor or inconsequential to the mainstream of our society  
8 for whom automobiles, driver licenses, and even passports  
9 are a natural part of everyday life. However, for the elderly,  
10 the poor, the under-educated, or otherwise disadvantaged,  
11 the burden can be great if not insurmountable, and it is those  
12 very people outside the mainstream of society who are least  
equipped to bear the costs or navigate the many  
bureaucracies necessary to obtain the required  
documentation.

13 *Weinschenk*, No. 06AC-CC00656, Slip op. at 9. Astonishingly, the State evidently  
14 believes that it is acceptable to force its most vulnerable citizens to choose between  
15 spending \$25 on food, shelter or medicine or using the money to purchase the right to  
16 vote. Notably, Proposition 200 contains no “safety net” allowing an alternative means  
17 of establishing citizenship for a citizen who lacks the funds to purchase Registration ID.  
18 In Arizona, a citizen who lacks Registration ID either must come up with the funds to  
19 purchase it, or else be disenfranchised. No other state has such a registration  
20 requirement, and to those Arizonans who are forced to this choice, the cost of obtaining  
21 Registration ID is not “incidental.”

22           In addition, the State erroneously relies on the Indiana District Court’s  
23 ruling in *Indiana Democratic Party v. Rokita* 2006 WL 1005037 (S.D. Ind. Apr. 14,  
24 2006), to support its claim that the costs imposed on voters are “incidental,” and  
25 therefore not a poll tax. [State Br. at 6] In fact, the court in *Rokita* never determined  
26 whether the cost of purchasing documents created a poll tax. Rather, it left the issue  
27 unresolved because the plaintiffs provided no evidence that any person would be  
28 required to pay money to obtain identification. *See Rokita*, 2006 WL 1005037 at \*38.

1 In this case, defendants do not dispute that Registration ID is not available for free, and  
2 plaintiffs have identified several individuals who cannot register to vote in Arizona  
3 because they lack Registration ID and cannot afford to purchase it.<sup>7</sup> As such,  
4 requirement of Registration ID unconstitutionally bars those potential voters from  
5 exercising their rights to vote.

6 At bottom, a citizen in Arizona has the right to vote, whether or not he has  
7 \$10, \$25 or \$1000 in his pocket. Indeed, a citizen has the right to cast a ballot “whether  
8 the citizen, otherwise qualified to vote, has \$1.50 in his pocket or nothing at all.”  
9 *Harper*, 383 U.S. at 668. As the Court emphasized in *Harper*, “wealth or fee paying  
10 has, in our view, no relation to voting qualifications; the right to vote is too precious, too  
11 fundamental to be so burdened or conditioned.” *Id.* at 670.

12 III. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN PLAINTIFFS’ FAVOR  
13 AND THE PROOF OF CITIZENSHIP REQUIREMENT SHOULD BE  
ENJOINED.

14 The State does not contend that enjoining the Registration ID requirement  
15 will cause *any* harm to the registration process for the upcoming general election.  
16 Indeed, the only evidence in the record on this point shows that pre-Proposition 200  
17 procedures for voter registration were “adequate to ensure that qualified persons were  
18 registering to vote” and reverting to those procedures “would cause *no hardship*” or  
19 “confusion” for election officials.<sup>8</sup> Thus, for purposes of a preliminary injunction, the  
20 issue is neither close nor difficult -- the Court should enjoin Proposition 200’s  
21 Registration ID requirement until the Court can fully consider the merits in connection  
22 with later proceedings.

23 Moreover, the widespread disenfranchisement of tens of thousands of  
24 eligible Arizonans who have been denied their right to register to vote without paying  
25 for Registration ID far outweighs any harm to Arizona elections caused by non-citizen

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26  
27 <sup>7</sup> See Ex. 22, ¶¶ 5,9; Ex. 33, ¶¶ 5, 9; Ex. 34, ¶ 6; Ex. 35, ¶¶ 5-6; Ex. 36, ¶¶ 5-6.

28 <sup>8</sup> Osborne Dep. 104:22-105:6; Ex. 23, ¶ 13 (emphasis added).

1 voters (*i.e.*, 38 non-citizens casting ballots in Arizona elections in the last ten years).  
2 Indeed, non-citizen voters are but a minute percentage of the tens of millions of voters  
3 who cast ballots in the dozens of federal, statewide and local elections that have  
4 occurred in the past decade.<sup>9</sup> Accordingly, the balance of hardships tips sharply in  
5 plaintiffs' favor, and enforcement of A.R.S. § 16-166(F) should be enjoined forthwith.

6 Conclusion

7 For the foregoing reasons, Proposition 200's Registration ID requirement  
8 imposes an unconstitutional poll tax and its enforcement should be enjoined  
9 immediately.

10 RESPECTFULLY SUBMITTED this 25th day of September, 2006.

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25 <sup>9</sup> Of course, Proposition 200 was designed to discourage *illegal* immigration. County  
26 election officials testified only concerning non-citizens who are lawfully present in the  
27 United States, who had registered to vote. [Osborne Dep. at 19:4-25; Rodriguez Dep. at  
28 118:19-119:10] Moreover, county elections officials testified that they had no  
knowledge that the non-citizens who registered to vote did so understanding that they  
were not entitled to vote. [Osborne Dep. at 96:3-9; Rodriguez Dep. at 120:6-10]

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I further certify that I caused a copy of the attached document to be mailed  
on the 25th day of September, 2006 to:

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