KRIS MAYES
ATTORNEY GENERAL
(Firm State Bar No. 14000)

Joshua D. Bendor (No. 031908)
Hayleigh S. Crawford (No. 032326)
Joshua M. Whitaker (No. 032724)
Kathryn E. Boughton (No. 036105)
Timothy E.D. Horley (No. 038021)
Office of the Arizona Attorney General
2005 N. Central Avenue
Phoenix, AZ 85004-1592
(602) 542-3333
Joshua.Bendor@azag.gov
Hayleigh.Crawford@azag.gov
Joshua.Whitaker@azag.gov
Kathryn.Boughton@azag.gov
Timothy.Horley@azag.gov
ACL@azag.gov

Attorneys for Defendants Attorney General Kris Mayes, ADOT Director Jennifer Toth, and State of Arizona

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mi Familia Vota, et al., Plaintiffs, v. Adrian Fontes, et al., Defendants.	No. CV-22-00509-PHX-SRB (Lead) **DEFENDANTS ATTONRNEY GENERAL AND STATE OF ARIZONA'S TRIAL MEMORANDUM**
AND CONSOLIDATED CASES.	No. CV-22-00519-PHX-SRB No. CV-22-01003-PHX-SRB No. CV-22-01124-PHX-SRB No. CV-22-01369-PHX-SRB No. CV-22-01381-PHX-SRB No. CV-22-01602-PHX-SRB No. CV-22-01901-PHX-SRB

I. INTRODUCTION

Arizona has a strong interest in ensuring that voter registration is limited to those who meet eligibility requirements, including U.S. citizenship. Arizona also has a strong interest in ensuring that members of the public trust the electoral system.

Last year, in an effort to further those interests, the Arizona Legislature enacted H.B. 2492 and H.B. 2243 ("the Challenged Laws"). Shortly after enactment, Plaintiffs[1] filed lawsuits seeking to enjoin implementation of the Challenged Laws.

Trial will reveal that Plaintiffs' lawsuits were premature. Plaintiffs will largely be unable to prove that they have suffered an injury in fact—i.e., a "concrete and particularized" injury that is "actual or imminent, not conjectural or hypothetical"—caused by the statutory provisions they seek to enjoin. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Indeed, the Challenged Laws generally have not been implemented yet (even though they were enacted more than a year ago), and many of Plaintiffs' claims are based on speculation about how implementation may occur.

Even if Plaintiffs prove they have standing, many of their claims are a rehash of previous challenges to Arizona's proof of citizenship requirement, which were rejected after a bench trial. *See Gonzalez v. Arizona*, No. CV-06-1268-PHX-ROS, 2008 WL 11395512 (D. Ariz. Aug. 20, 2008). Such claims should be rejected here for similar reasons. And the remainder of Plaintiffs' constitutional claims should meet a similar fate.

To minimize duplication, Defendants have focused their trial memoranda on different aspects of the case:

1. In this memorandum, the State of Arizona and Attorney General Kris Mayes (collectively "the State") offer historical context and explain why Plaintiffs' constitutional claims fail.

2. The RNC's trial memorandum explains why Plaintiffs' statutory claims fail.

3. The Legislators' trial memorandum explains why Plaintiffs lack standing and identifies principles that guide judicial review of state legislation.

[1] This trial memorandum generally does not distinguish between Plaintiffs.

II. HISTORY OF THE CHALLENGED LAWS

A. Prop. 200's proof of citizenship requirement and the *Gonzalez* case

In 2004, Arizona voters approved Proposition 200, which required individuals to provide documentary proof of citizenship in order to register to vote. *See Gonzalez*, 2008 WL 11395512, at *1–2. This requirement triggered multiple lawsuits, which were consolidated before Judge Silver. *See id.* at *1 & n.1.

In 2008, Judge Silver held a six-day bench trial to determine whether to issue an injunction. *Id.* at *1. She considered evidence of the availability, cost, and impact of the proof of citizenship requirement. *Id.* at *4–8. She considered evidence of voter fraud, while acknowledging that "an evidentiary showing of fraud is not required to find a government's interest in preventing fraud to be important." *Id.* at *8–9, 19. And she considered the State's asserted interest in protecting voter confidence in the electoral system. *Id.* at *19.

Judge Silver then rejected the plaintiffs' constitutional claim that the proof of citizenship requirement unduly burdened the right to vote, finding that the burden was "not excessive" and that the State's interests in preventing voter fraud and protecting voter confidence were "important." *Id.* at *16–19.

Judge Silver also rejected the plaintiffs' constitutional claim that the proof of citizenship requirement was unlawful discrimination against naturalized citizens, finding that the plaintiffs had "failed to establish intentional discrimination." *Id.* at *20–21.

Judge Silver also rejected the plaintiffs' claim that the proof of citizenship requirement abridged voting rights of Latinos in violation of Section 2 of the Voting Rights Act, finding that the plaintiffs had "failed to demonstrate that Proposition 200 interacts with social and historical conditions to deny Latino voters equal access to the political process and to elect their preferred representatives." *Id.* at *22–27.[2]

[2] Judge Silver also rejected a similar Voting Rights Act claim regarding rights of American Indians. *Id.* at *27.

B. The *Inter Tribal* decision

Although Judge Silver rejected all of the plaintiffs' claims at trial, two later developments limited the effect of the proof of citizenship requirement that voters had approved. The first was the Supreme Court's *Inter Tribal* decision in 2013.

For context, Judge Silver had concluded on summary judgment that the proof of citizenship requirement was consistent with the National Voter Registration Act ("NVRA"). *See* 2007 WL 9724581, at *1 (D. Ariz. Aug. 28, 2007). The Supreme Court disagreed as to voters who register using the federal mail form (the "Federal Form"). The Supreme Court held that NVRA § 6 "precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 20 (2013).

But Arizona could still require State Form applicants to submit proof of citizenship. As the Supreme Court explained, NVRA § 6 is limited to Federal Form registration for federal elections, whereas "state-developed forms may require information the Federal Form does not" and "can be used to register voters in both state and federal elections." *Id.* at 5, 12–13. Thus, the Arizona Attorney General opined that, to continue implementing Prop. 200 consistent with *Inter Tribal*, election officials must establish "two distinct voter registration rolls." Ariz. Op. Atty. Gen. No. I13-011, 2013 WL 5676943, at *3.

Additional questions remained after the Supreme Court's decision. For example, the Supreme Court noted that the NVRA "does not preclude States from denying registration based on information *in their possession* establishing the applicant's ineligibility." *Inter Tribal*, 570 U.S. at 15 (cleaned up) (emphasis added). Yet the Supreme Court did not elaborate on the situations in which States could deny registration based on information in their possession.

The Supreme Court also noted that the Elections Clause of the Constitution "empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them," and that "it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications." *Id.* at

16–17. The Supreme Court felt no need to analyze those constitutional doubts further, however, because Arizona had another possible way to require documentary proof of citizenship on Federal Forms: Arizona could ask the Election Assistance Commission ("EAC") to "alter the Federal Form to include information the State deems necessary to determining eligibility." *Id.* at 18–20.[3]

C. The *LULAC* Consent Decree

The second development that limited the effect of Prop. 200's proof of citizenship requirement was a Consent Decree in 2018. The parties to the Consent Decree were plaintiff League of United Latin American Citizens of Arizona ("LULAC"), plaintiff Arizona Students' Association, defendant Arizona Secretary of State, and defendant Maricopa County Recorder. *See* No. 2:17-cv-04102-DGC, Doc. 37 (D. Ariz. June 18, 2018) ("*LULAC* Consent Decree").

The *LULAC* plaintiffs alleged that county recorders were processing State Forms differently from Federal Forms. On one hand, recorders were *fully rejecting* State Form applicants who lacked proof of citizenship (i.e., not registering them for federal or state elections). *Id.* at 1–2. On the other hand, recorders were *partially accepting* Federal Form applicants who lacked proof of citizenship (i.e., registering them for federal but not state elections). *Id.* at 2. The plaintiffs alleged that this unequal treatment was unconstitutional. *Id.* The Secretary of State denied that it was unconstitutional, but nevertheless agreed to tell county recorders to begin registering State Form applicants who lacked proof of citizenship for federal elections. *See id.* at 2–3, 8–10.

The result was: Both Federal Form applicants and State Form applicants could now vote in federal elections in Arizona *without* providing the proof of citizenship that Arizona voters had decided to require via Prop. 200 in 2004.

[3] Shortly after the *Inter Tribal* decision, Arizona did ask the EAC to alter the Federal Form to include state-specific instructions requiring applicants to provide documentary proof of citizenship, but the EAC refused. A district judge ruled that the EAC had a nondiscretionary duty to grant Arizona's request, but the Tenth Circuit reversed that ruling. *See Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1187–88 (10th Cir. 2014).

D. The Challenged Laws

The relevant provisions of H.B. 2492 are summarized in the Joint Proposed Pretrial Order. *See* Doc. 571 at 7–8. A House Summary describes the provisions of the bill as transmitted to the Governor. *See* House Summary, H.B. 2492 (Mar. 28, 2022).[4]

Upon signing H.B. 2492, the Governor wrote a letter explaining that "Arizona voters displayed their desire to have secure elections with the passage of Proposition 200," that the new law addresses "a growing number of new registrants participating in elections who have not provided evidence of citizenship," and that the new law "provides clarity to Arizona law on how officials process federal form voter registration applications that lack evidence of citizenship." *See* Letter from Governor Ducey to Secretary Hobbs (Mar. 30, 2022).[5]

The relevant provisions of H.B. 2243 are summarized in the Joint Proposed Pretrial Order. *See* Doc. 571 at 8–9. A House Summary describes the provisions of the bill as transmitted to the Governor. *See* House Summary, H.B. 2243 (June 28, 2022).[6]

III. ARGUMENT

A. Standing

The State concurs with the Legislators' arguments that Non-U.S. Plaintiffs will be hard-pressed to establish standing (and ripeness) at trial.[7] The State adds three observations.

First, unlike in some cases, standing is likely to be a significant issue in this trial. Standing in voting rights cases is often analyzed at summary judgment. *See, e.g.*, *Indiana*

---

[4] Available at https://www.azleg.gov/legtext/55leg/2R/summary/H.HB2492_032822_TRANSMITTED.pdf.

[5] Available at https://www.azleg.gov/govlettr/55leg/2r/hb2492.pdf.

[6] Available at https://www.azleg.gov/legtext/55leg/2R/summary/H.HB2243_062922_TRANSMITTED.pdf.

[7] "[I]n many cases, ripeness coincides squarely with standing's injury in fact prong. . . . [B]ecause the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (footnote omitted).

Democratic Party v. Rokita, 458 F. Supp. 2d 775, 809–20 (S.D. Ind. 2006). But here, standing was not raised at summary judgment because the parties limited themselves to issues that could be decided without discovery. *See* Doc. 534 at 6. Similarly, plaintiffs in voting rights cases often include individuals who can testify about how the challenged law personally affected them. *See, e.g.*, *Gonzalez*, 2008 WL 11395512, at *9–11. But here, it appears there will be no individual plaintiffs at trial.[8]

Second, standing should be assessed with respect to *each* plaintiff at trial. While it is often said that only one plaintiff in a lawsuit must have standing when injunctive relief is sought, the more precise formulation is that only one plaintiff must have standing "to challenge a *given provision*" when injunctive relief is sought. *One Wisconsin Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 965 (W.D. Wisc. 2016) (emphasis added). For example, if Jones seeks to enjoin implementation of Provision A, and Smith (in the same lawsuit) seeks to enjoin implementation of Provision B, proof that Jones was injured by Provision A does not confer standing with respect to Provision B.

In this consolidated case, many provisions of H.B. 2492 and H.B. 2243 are at issue, and there is wide variation among Plaintiffs as to which provisions they seek to enjoin at trial. For example, the United States is now challenging only the birthplace provision in H.B. 2492, having prevailed at summary judgment on other claims. And, of the Non-U.S. Plaintiffs, some (but not all) are challenging proof of citizenship requirements in H.B. 2492; some (but not all) are challenging proof of location of residency requirements in H.B. 2492; and some (but not all) are challenging voter record review provisions in H.B. 2243.

Thus, care must be taken to ensure that, for each provision of the Challenged Laws, the plaintiff(s) seeking to enjoin the provision have proven injury that is "actual or imminent," "concrete and particularized," and "causal[ly]" connected to the provision. *Lujan*, 504 U.S. at 560–61.

---

[8] The only plaintiff group that included individuals is Tohono O'odham Plaintiffs, but they plan to attend trial "for monitoring purposes only" because, if their recent unopposed motion to amend their complaint is granted, they "will have no unresolved claims at the time of trial." Doc. 571 at 5 n.2.

Third, because standing is an "irreducible constitutional minimum," *Lujan*, 504 U.S. at 560, it is a threshold issue to be addressed before the merits. Indeed, "the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). Although the present trial memorandum focuses on the merits of Plaintiffs' constitutional claims, claims where Plaintiffs will have an especially hard time proving standing are flagged in footnotes below.

B. Facial Challenges versus As-Applied Challenges

As far as the State can tell, no Plaintiff is claiming that the Challenged Laws are unconstitutional *as applied* to a specific plaintiff in a specific situation. That makes sense because, as trial will show, the Challenged Laws generally have not been implemented. And "a plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him." *McCullen v. Coakley*, 573 U.S. 464, 485 n.4 (2014); *see also, e.g.*, *Almengor v. Schmidt*, 692 F. Supp. 2d 396, 397 (S.D.N.Y. 2010) ("The essence of an 'as applied' challenge therefore is a claim that the manner in which a statute or regulation was applied to a plaintiff in particular circumstances violated the Constitution.").

Plaintiffs claim, instead, that the Challenged Laws are unconstitutional on their face. Yet "a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008) (cleaned up); *see also Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008) ("A facial challenge must fail where the statute has a plainly legitimate sweep." (cleaned up)).

Caution dictates that facial challenges be held to a higher standard of proof. "Exercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy." *See Washington State*

Grange, 552 U.S. at 450 (cleaned up). "In determining whether a law is facially invalid," courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* at 449–50.

For example, in *Washington State Grange*, the Supreme Court rejected a facial challenge to an election law where the challenger asserted "the possibility that voters will be confused." *Id.* at 454. The Court explained that the law may ultimately be implemented in a way that "would eliminate any real threat of voter confusion." *Id.* at 455–57.

This Court should likewise hold Plaintiffs to a high standard here. Trial will reveal that many of Plaintiffs' claims about the Challenged Laws rest on fears about how the laws *might* be implemented, not evidence demonstrating how the laws have been implemented or will be implemented.

C. Constitutionality of the Challenged Laws

As a threshold matter, the State is unsure which provisions in the Challenged Laws will be at issue at trial given that the Court declared some provisions unlawful on other grounds at summary judgment. *See* Doc. 534 at 9–15, 21–22, 33–34. The State recommends that the Court limit its constitutional review at trial to provisions that were *not* deemed unlawful at summary judgment. *See* Docs. 555 (defense motion for clarification on this issue).

In the Joint Proposed Pretrial Order, Defendants used footnotes to identify which provisions in the Challenged Laws they believe need not be reviewed at trial, given that the Court's summary judgment ruling deemed the provisions unlawful on alternative grounds. *See* Doc. 571 at 12–14 nn. 9, 10, 12, 13, 14, 15, 16, 17.

Because the Court has not yet ruled on Defendants' motion for clarification, this trial memorandum offers a general defense of the constitutionality of the Challenged Laws, even though the Court ruled some provisions unlawful on other grounds at summary judgment.

1. The Challenged Laws do not unduly burden the right to vote.

Plaintiffs argue that several provisions in the Challenged Laws unduly burden the right to vote. *See* Doc. 571 at 11–12. These claims are evaluated under the *Anderson-*

Burdick framework. Courts 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." *Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1187 (9th Cir. 2021) (cleaned up).

"A law that imposes a 'severe' burden on voting rights must meet strict scrutiny." *Id.* (citation omitted). "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Id.* (citation omitted). "[W]hen a challenged rule imposes only limited burdens on the right to vote, there is no requirement that the rule is the only or the best way to further the proffered interests." *Dudum v. Arntz*, 640 F.3d 1098, 1114 (9th Cir. 2011).

a. Requiring documentary proof of citizenship is not an undue burden.

Various parts of H.B. 2492 require documentary proof of citizenship, either for being registered to vote (for at least some elections) or for being eligible to vote by mail. *See* A.R.S. §§ 16-101(A)(1), 16-121(A), 16-121.01(A), (C), (D), (E), 16-127(A).

In each instance, documentary proof of citizenship is defined by reference to A.R.S. § 16-166, which is the statutory requirement put in place by Prop. 200 in 2004. *See Gonzalez*, 2008 WL 11395512, at *2.

The *Gonzalez* trial already settled that this proof of citizenship requirement is not an undue burden on the right to vote. *See* 2008 WL 11395512 at *16–19. There is no need to revisit the *Gonzalez* analysis here.

Nor have Plaintiffs offered a compelling reason to revisit *Gonzalez*. Then, as now, documentary proof of citizenship may cost some voters a small amount of money to obtain, but the burden is not excessive. *See id.* at *16–18. Then, as now, the State has important interests in preventing voter fraud and maintaining voter confidence. *See id.* at *18–19.

Then, as now, the State's important interests outweigh the modest burden on voters. *See id.* at *19.

Plaintiffs may argue that there is not much evidence of voter fraud by non-citizens in Arizona in the last several years. This argument is unpersuasive for several reasons including:

1. An "evidentiary showing of fraud is not required to find a government's interest in preventing voter fraud to be important." *Gonzalez*, 2008 WL 11395512, at *19 (citing *Crawford*, 533 U.S. at 191–93).

2. Trial will reveal evidence of a few instances of non-citizens voting in Arizona in the last several years, and it is reasonable for the State to try to eliminate even these few instances.

3. If Prop. 200 is working as intended, one would *not expect* to find as much voting by non-citizens in Arizona since its passage.

Plaintiffs may also argue that there is no evidence that the Challenged Laws increase voter confidence. But again, an evidentiary showing of increased voter confidence is not required. *Gonzalez*, 2008 WL 11395512, at *19 (finding State's interest in protecting voter confidence important without analyzing evidence); *see also Crawford*, 553 U.S. at 197 (similar). After all, the question of what voters want is best answered by the elected policymakers who represent them. Moreover, there is evidence that Arizona voters want a proof of citizenship requirement: they approved Prop. 200.

b. Requiring registration applicants to list their state or country of birth is not an undue burden.

Part of H.B. 2492 requires that State Form applicants list their place of birth for the applicant to be presumed to be properly registered. A.R.S. § 16-121.01(A). Trial will show that this requirement has not yet been implemented.

This requirement will impose a minimal burden, if any. The vast majority of people know their state or country of birth offhand and can write it with no difficulty.[9]

To the extent there may be registration applicants in Arizona who do not know their state or country of birth, such exceptional situations may be addressed during implementation of the birth place requirement. For example, trial will show that the current ServiceArizona registration website has an option for "unknown" in the "State or Country of Birth" dropdown menu.[10]

Birthplace also serves at least one purpose: It can help confirm a voter's identity, as the RNC's trial memorandum explains in more detail. Indeed, trial will show that even Plaintiffs' expert on this subject acknowledges that birthplace is useful in some situations for helping confirm identity. In addition, a birthplace within the United States can help confirm citizenship (although of course persons born outside the United States may be citizens too). The State's interests here outweigh any minimal burden that might be borne by writing one's state or country of birth.

c. Citizenship verifications by elections officials, and the possibility of rejections or cancellations, are not an undue burden.

Parts of H.B. 2492 require citizenship verifications by election officials at the front-end of the registration process, when receiving a voter registration form. Similarly, parts of H.B. 2243 require database checks by election officials at the back-end, for voters who are already registered. Both are considered below.

Under H.B. 2492: County recorders, upon receiving a Federal Form that lacks documentary proof of citizenship, must consult certain databases (if they have access) to try to verify citizenship. A.R.S. § 16-121.01(D). If citizenship is verified, the applicant is

---

[9] For this reason, Non-U.S. Plaintiffs will have an especially hard time proving standing to challenge the birth place requirement. The requirement of writing one's state or country of birth on a form has not caused Plaintiffs an injury that is both "actual or imminent" and "concrete and particularized." *Lujan*, 504 U.S. at 560–61.

[10] *See* https://servicearizona.com/VoterRegistration/selectLanguage.

registered. If *non*-citizenship is verified, the applicant is rejected (and notified). If citizenship status cannot be verified either way, the applicant is generally registered (and notified), but is not registered for presidential elections and is not eligible to vote early by mail—unless the applicant then provides proof of citizenship. *See* A.R.S. § 16-121.01(E).

Trial will show that county recorders had already been conducting a somewhat similar verification process before H.B. 2492 was enacted. For example, county recorders had already been checking Department of Transportation records upon receipt of a registration form that lacked documentary proof of citizenship (regardless of whether the form was a State Form or Federal Form). *See, e.g.*, Petty Tr. at 86:10-87:8, 123:8-12. And if Department of Transportation records showed that the applicant is a citizen, county recorders deemed this as proof of citizenship. *Id.*

To the extent the citizenship verification process in H.B. 2492 differs from what county recorders were already doing, trial will show that the new aspects have not been implemented. It is therefore unknown how these provisions will impact voters.

For example, suppose that during the verification process in H.B. 2492, one database returns information indicating that an applicant *is* a citizen, but another database returns information indicating that the applicant is *not* a citizen. How will the recorder proceed? The answer is unknown because the provisions have not been implemented.

Similarly, suppose that during verification, a database returns information indicating that the applicant *may* not be a citizen—perhaps because the database does not conclusively determine non-citizenship.[11] How will the recorder proceed? Again, the answer is unknown because the provisions have not been implemented.

As a result, basic questions about the impact of this citizenship verification process remain unanswered, such as:

- How many Federal Forms will be submitted without documentary proof of citizenship and therefore subjected to the verification process?

[11] The State acknowledges that trial will show that some of the databases are not always conclusive for determining non-citizenship.

- Of all the application forms that are subjected to the verification process, what percentage will be rejected in part or in whole as a result?
- Of all the applications forms that are rejected in part or in whole, what percentage will be approved shortly afterward because the applicant, upon receiving notice, provides proof of citizenship?

In short, given the current status of (non)implementation, Plaintiffs cannot show the burden of this citizenship verification process on voters. *See Crawford*, 553 U.S. at 200–03 (finding that "on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified"). Plaintiffs' challenge fails for this reason.[12]

Moreover, the verification process itself imposes no extra burden on voters, as voters are not required to do anything while their application is being verified.[13] And, while some applications may be rejected in whole or in part as a result of the verification process, the burden placed on rejected voters is no greater than the requirement imposed by Prop. 200: provide documentary proof of citizenship.

In addition, trial will show that at least some of the databases listed in H.B. 2492 are reliable. As a result, the State's important interests in preventing voter fraud and protecting voter confidence are served by verification and outweigh the ill-defined burden asserted by Plaintiffs. *See Crawford*, 553 U.S. at 202 ("In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any class of voters." (citation omitted)).

---

[12] Relatedly, Plaintiffs will have an especially hard time proving standing to challenge this citizenship verification process at trial. A verification process that has not been implemented and whose impact is unknown has not caused Plaintiffs an injury that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61.

[13] Plaintiffs may argue that the verification process will delay resolution of the registration application. But the statute specifies that verification must occur within ten days. A.R.S. § 16-101(D). And the average time to complete the verification is unknown because the process has not been implemented.

Under H.B. 2243: Election officials must also conduct certain database checks for voters who are already registered. For example:

- Each month the Secretary of State must compare the statewide voter registration database to the driver license database maintained by the Department of Transportation, and must notify county recorders of registered voters who are not citizens. A.R.S. § 16-165(G).
- Each month, to the extent practicable, county recorders must compare their registration database to the Social Security Administration Database. A.R.S. § 16-165(H).
- Each month, to the extent practicable, county recorders must compare registered voters who the recorders have "reason to believe" are not citizens with a USCIS database to verify citizenship. A.R.S. § 16-165(I).
- For registered voters who have not provided documentary proof of citizenship,[14] county recorders must compare an Electronic Verification of Vital Events database (if accessible) with the voter registration files. A.R.S. § 16-165(J).

In addition, if a county recorder "obtains information pursuant to this section *and confirms*" that a registered voter is not a U.S. citizen, the recorder must notify the voter, give the voter 35 days to provide documentary proof of citizenship, and if no such proof is provided, cancel registration. A.R.S. § 16-165(A)(10) (emphasis added).

Here, too, trial will show that these provisions have not yet been implemented. It is therefore unknown how these database checks will impact voters, if at all.

For example, county recorders have not yet reached a consensus on what constitutes "reason to believe" for purposes of the USCIS database check.

Perhaps more importantly, county recorders have not yet reached a consensus on what constitutes "confirmation" that a registered voter is not a citizen, for purposes of initiating the 35-day notice requesting proof of citizenship. For example, if a database indicates that a registered voter *may not* be a citizen, is that "confirmation"? The answer is

[14] Voters who were already registered before the effective date of Prop. 200 were "deemed to have provided" proof of citizenship. A.R.S. § 16-166(G).

unknown because the provisions have not been implemented. Plaintiffs have not identified anyone whose registration has been cancelled as a result of these provisions in H.B. 2243.

Thus, again, Plaintiffs cannot show the burden of these database checks on voters. *See Crawford*, 553 U.S. at 200–03. Plaintiffs' challenge fails for this reason.[15]

Moreover, as before, the mere checking of databases imposes no extra burden on voters. Even for the (as-yet unknown) percentage of registered voters who will receive a 35-day notice as a result of the database checks, the burden is no greater than the requirement imposed by Prop. 200: provide proof of citizenship.

In addition, trial will show that at least some of the databases listed in H.B. 2243 are reliable. As a result, the State's important interests in preventing voter fraud and protecting voter confidence are served by database checks and outweigh the ill-defined burden asserted by Plaintiffs. *See Crawford*, 553 U.S. at 202.

d. The possibility of investigation by the Attorney General or county attorneys is not an undue burden.

Parts of H.B. 2492 and H.B. 2243 described referrals to the Attorney General or county attorneys for investigation. Most such referrals are individualized. One referral, however, is for a large group. Both types are considered below.

Individualized referrals: Under H.B. 2492, if the citizenship verification process for Federal Forms that lack proof of citizenship (described above) matches the applicant with information that the applicant is *not* a U.S. citizen, the county recorder must not only notify and reject the applicant (as stated above) but also "forward the application to the county attorney and attorney general for investigation." A.R.S. § 16-121.01(E).

Similarly, under H.B. 2243, if a county recorder "obtains information pursuant to this section *and confirms*" that a registered voter is not a U.S. citizen, then sends the 35-day notice requesting proof of citizenship, then does not receive such proof, the recorder must

[15] And, again, Plaintiffs will have an especially hard time proving standing to challenge this citizenship verification process at trial. Database checks that have not been implemented and whose impact is unknown have not caused Plaintiffs an injury that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61.

not only cancel the registration (as stated above) but also "notify the county attorney and attorney general for possible investigation." A.R.S. § 16-165(A)(10) (emphasis added).

Again, these provisions have not been implemented. Plaintiffs do not identify anyone who has been subjected to investigation pursuant to these provisions. Nor can Plaintiffs predict the course of, or the results of, any such hypothetical investigation. The burden on voters here is simply unknown. *See Crawford*, 553 U.S. at 200–03. Plaintiffs' challenge fails for this reason.[16]

Moreover, the State's important interests in preventing voter fraud and protecting voter confidence are served when elections officials refer potential evidence of false registration to authorities who can investigate. *See, e.g.*, A.R.S. § 16-182 (knowingly registering oneself while ineligible is a crime).

Large group referral: Part of H.B. 2492 goes farther. The Secretary of State and each county recorder are instructed to provide the Attorney General a list of all registered voters who have not provided documentary proof of citizenship. A.R.S. § 16-143(A).[17] The Attorney General is directed to "use all available resources to verify the citizenship status" of applicants, including checking various databases. *Id.* § 16-143(B). The Attorney General is directed to "prosecute individuals who are found not to be United States citizens" pursuant to the statute that criminalizes knowingly registering oneself while ineligible. *Id.* § 16-143(C).

To the Attorney General's knowledge, the Attorney General has not received the lists of registered voters contemplated by the statute. Here, too, Plaintiffs do not identify individuals who have been subjected to investigation pursuant to these provisions. Nor can

---

[16] For similar reasons, Plaintiffs will have an especially hard time proving standing to challenge these provisions. The possibility of a referral to an investigating authority does not cause Plaintiffs injury that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61; *see also, e.g.*, *Thomas*, 220 F.3d at 1138–1141 (finding no standing where there was no "genuine threat of imminent prosecution").

[17] Again, voters who were already registered before the effective date of Prop. 200 were "deemed to have provided" proof of citizenship. A.R.S. § 16-166(G).

Plaintiffs predict the course of, or results of, any such hypothetical investigation. Again, the burden on voters is unknown. *See Crawford*, 553 U.S. at 200–03. Plaintiffs' challenge therefore fails.[18]

Moreover, as stated above, the State's interests in preventing voter fraud and protecting voter confidence are served when elections officials refer matters to authorities who can investigate.

e. The possibility of differential treatment as to the proof of location of residency requirement is not an undue burden.

H.B. 2492 also requires registration applicants to submit an "identifying document that establishes proof of location of residence." A.R.S. § 16-123. The Court's summary judgment ruling clarified what counts as proof of location of residence. *See* Doc. 534 at 33–34. The Court also ruled that NVRA § 6 preempts this proof of location of residence requirement insofar as it may apply to Federal Form applicants. *See id.* at 9.

Plaintiffs have indicated they may continue challenging this requirement, depending on how Defendants implement the Court's summary judgment ruling. *See* Doc. 571 at 12 & n.11. Because such implementation is unknown, this issue is premature for adjudication.

2. The Challenged Laws do not violate procedural due process.

Although Plaintiffs label some of their claims "procedural due process" claims, the *Anderson-Burdick* framework applies, to the extent such claims survived the Court's ruling on the motion to dismiss. *See* Doc. 304 at 27–28. These claims should be rejected now,

[18] And again, Plaintiffs will have an especially hard time proving standing to challenge these provisions. The possibility of a referral to an investigating authority does not cause Plaintiffs injury that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61; *see also, e.g.*, *Thomas*, 220 F.3d at 1138–1141 (finding no standing where there was no "genuine threat of imminent prosecution").

because they either (1) misread the statute, or (2) rest on speculation that notice will be deficient in hypothetical situations.[19]

First, Plaintiffs claim that the cancellation provision in H.B. 2243 is "without an adequate opportunity to contest or cure." *See* Doc. 571 at 13. This claim misreads the statute. Such cancellation can occur only if (1) the county recorder obtains information "and confirms" that the voter is not a U.S. citizen, (2) the county recorder sends the voter notice requesting proof of citizenship in 35 days, and (3) the voter fails to provide proof. A.R.S. § 16-165(A)(10). Thus, the voter has an opportunity to contest and cure.

In any event, Plaintiffs identify no person to whom the 35-day notice has been sent, much less a person who had difficulty responding in 35 days.

Second, Plaintiffs claim that the procedures for the Attorney General's investigation of the large group referral in H.B. 2492 are "without a chance to contest or cure." *See* Doc. 571 at 13. This claim is speculation. Nothing in A.R.S. § 16-143 prevents a person from contesting or curing an allegation. Plaintiffs identify no situation where anyone has been subjected to this investigation, much less where the person could not contest or cure.

Third, Plaintiffs claim that the prohibition on voting in presidential elections or early by mail (for registrants who have not provided proof of citizenship) violates due process. *See* Doc. 571 at 12. This claim is speculation too. Again, nothing in A.R.S. § 16-123 prevents notice from being communicated to the voter in this circumstance. Plaintiffs identify no one who has been affected by A.R.S. § 16-123, much less without notice.

3. The Challenged Laws do not violate equal protection.

Plaintiffs assert a hodgepodge of claims using the labels "equal protection," "intentional discrimination," and "disparate treatment." *See* Doc. 571 at 13–14, 17–21. The exact nature of Plaintiffs' claims is not clear, but the gist seems to be threefold: (1) the Challenged Laws discriminate on the basis of a suspect classification such as race, national origin, or alienage, (2) the Challenged Laws treat two groups differently, not on the basis

[19] And, for each of these claims, Plaintiffs will have an especially hard time proving injury that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61.

of a suspect classification, but without any rational basis for differentiating, and (3) the Challenged Laws cause arbitrary treatment in citizenship investigations. Each is considered below.

a. The Challenged Laws do not unlawfully discriminate on the basis of a suspect classification.

The Challenged Laws make no "express classification" based on race, national origin, or alienage. *United States v. Carrillo-Lopez*, 68 F.4th 1133, 1139 (9th Cir. 2023). The laws are therefore facially neutral.

A statute that is facially neutral may still violate equal protection, "but only if a discriminatory purpose was a motivating factor for the legislation." *Id.* To establish discriminatory purpose, "it is not enough to show that the lawmakers had an awareness of the consequences of the legislation for the affected group, that those consequences were foreseeable, or that the legislature acted with indifference to the effect on that group." *Id.* (cleaned up). "Rather, the lawmaking body must have selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.* (cleaned up). In other words, Plaintiffs must prove that "discrimination was a substantial or motivating factor in enacting the challenged provision." *Id.* (cleaned up).

Any evidence presented, however, "must be considered in light of the strong presumption of good faith on the part of legislators." *Id.* at 1140 (cleaned up). And "the statements of a handful of lawmakers may not be probative of the intent of the legislature as a whole." *Id.* Moreover, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (cleaned up).

In addition, although courts "may consider evidence that the legislation at issue has a disproportionate impact on an identifiable group of persons," such evidence "is generally not dispositive, and there must be other evidence of a discriminatory purpose." *Id.* at 1141.

Here, Plaintiffs cannot prove that discriminatory purpose was a substantial or motivating factor for the Challenged Laws. Moreover, the history behind the laws provides important context.

To summarize: In 2004, Arizona voters approved a proof of citizenship requirement for all registration forms. *See* Part II.A above. Judge Silver upheld the requirement after a trial, rejecting claims that it was unconstitutional. *See id.* Then, in 2013, the Supreme Court held that the proof of citizenship requirement could not be applied to Federal Forms for federal elections, but was otherwise still in effect. *See* Part II.B above. The Supreme Court's decision left some questions open, such as what are the situations in which States can deny a Federal Form application "based on information in their possession establishing the applicant's eligibility." *See id.* Then, in 2018, the Secretary of State entered into a Consent Decree, agreeing to tell recorders to register State Form applicants who lacked proof of citizenship for federal elections. *See* Part II.C above. As a result, any registration applicant could vote in federal elections in Arizona without providing proof of citizenship, contrary to what voters approved in 2004.

This history strongly supports the already "strong presumption of good faith" owed to state policymakers. *Carrillo-Lopez*, 68 F.4th at 1140. Rather than attempting to discriminate, the Legislature was attempting to further the State's interests in preventing voter fraud and protecting voter confidence, consistent with voters' intent in Prop. 200.

Plaintiffs may cite statements by individual legislators, but such statements must be considered in context and, in any event, "may not be probative of the intent of the legislature as a whole." *Id.*

Plaintiffs may describe what they believe to be a history of discrimination in Arizona, but "past behavior cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (cleaned up).

Plaintiffs may point to ways in which the Challenged Laws could have been better, such as improving the accessibility or reliability of the databases cited in the laws. But laws

are often imperfect. That does not mean "discrimination was a substantial or motivating factor." *Id.* at 1139.

b. There is a rational basis for treating Federal Form applicants differently from State Form applicants.

Under H.B. 2492 as written, a State Form application that lacks proof of citizenship is to be "rejected," whereas a Federal Form application that lacks proof of citizenship is to undergo a citizenship verification process that may result in acceptance, partial acceptance, or rejection. *See* A.R.S. § 16-121.01(C), (D), (E).

Because State Form applicants and Federal Form applicants are not suspect classes, the State "need only show that there is a rational basis" for differentiating the two. Doc. 304 (citing *McDonald v. Bd. of Election Com'rs of Chicago*, 394 U.S. 802, 808–09 (1969); *Weber v. Shelley*, 347 F.3d 1101, 1107 n.2 (9th Cir. 2003)).

Here, the rational basis is simply to return as much as possible to what Arizonans approved in Prop. 200: namely, reject *all* registration applications that lack proof of citizenship. *See Gonzalez*, 2008 WL 11395512, at *2 (explaining Prop. 200).

A full return to Prop. 200 is not possible, however, given the Supreme Court's *Inter Tribal* decision regarding Federal Forms. But the next closest thing is to (1) reject all State Form applications that lack proof of citizenship, and (2) reject as many Federal Form applicants that lack proof of citizenship as allowed under *Inter Tribal* (for example, due to "information in [the State's] possession establishing the applicant's ineligibility," 570 U.S. at 15).

This appears to be what the Legislature had in mind, and it is rational. Indeed, the Supreme Court confirmed that "state-developed forms may require information the Federal Form does not." *Inter Tribal*, 570 U.S. at 12. That necessarily means there are situations where Arizona may reject a State Form but accept a Federal Form, even if they have the same information.

c. The Challenged Laws do not cause unacceptably arbitrary citizenship investigations.

Plaintiffs broadly argue that the "citizenship investigation procedures" in the Challenged Laws cause "arbitrary and disparate treatment of voter registration applicants and registered voters." Doc. 571 at 18 (capitalization altered). Relatedly, Plaintiffs argue that the provision directing county recorders to compare registered voters who they have "reason to believe" are not U.S. citizens with a USCIS database gives election officials "unfettered discretion in voter registration." Doc. 571 at 20–21 (capitalization altered).

The parties dispute which doctrinal framework governs these claims. Plaintiffs say the arbitrariness of the citizenship investigation procedures should be analyzed under *Bush v. Gore*, which prohibits "arbitrary and disparate treatment" in either the "allocation of the franchise" or the "manner of its exercise." *See* Doc. 571 at 18 (quoting *Bush v. Gore*, 531 U.S. 98, 104 (2000)). Somewhat in tension with themselves, Plaintiffs say the arbitrariness of the "reason to believe" standard should be analyzed under cases such as *Louisiana v. United States*, which prohibited an arbitrary constitutional understanding test for voter registration as "completely devoid of standards and restraints" for elections officials. *See* Doc. 571 at 20–21 (quoting *Louisiana v. United States*, 380 U.S. 145, 152–53 (1965)). Defendants think the more familiar frameworks of *Anderson-Burdick* or the Equal Protection Clause should apply to these claims. *See* Doc. 571 at 18, 21.

Resolving the doctrinal dispute is unnecessary, though, because these claims all fail for the same three reasons.

First, the alleged arbitrariness, to the extent it exists, is only one part of a process with significant objective components. For example, under the Challenged Laws, the only thing that happens when a county recorder has "reason to believe" a registered voter is not a U.S. citizen is a check of the USCIS database. A.R.S. § 16-165(I). Trial will show this database is generally reliable and can provide information to the county recorder. But even if the database returns information that is less than 100% reliable, the county recorder is

still required to "confirm" the voter is not a citizen before initiating the 35-day notice requesting proof of citizenship. *See* A.R.S. § 16-165(A)(10).

Similarly, under the Challenged Laws, the front-end citizenship verification process does not begin until a Federal Form is received without proof of citizenship, and even then, the process involves checking multiple databases. *See* A.R.S. § 16-121.01(D), (E). Likewise, the procedures governing the Attorney General's investigation for the large group referral are not triggered until the Attorney General receives lists of voters who have not provided proof of citizenship, and even then, the process involves checking multiple databases. *See* A.R.S. § 16-143(A), (B). These objective components help ensure the process is not arbitrary.

Second, the registration applicant or registered voter can have a say in the process as well. For example, even if a county recorder has "reason to believe" a registered voter is not a U.S. citizen, then receives information from the USCIS database, then confirms that the voter is not a U.S. citizen, and then sends the voter a 35-day notice requesting proof of citizenship, the voter then has the opportunity to respond to the notice. *See* A.R.S. § 16-165(A)(10).

Similarly, if the front-end citizenship verification process results in a partial or entire rejection of the Federal Form application, the voter is notified and may decide to submit proof of citizenship. *See* A.R.S. § 16-121.01(D), (E). Likewise, although the procedures for the Attorney General's investigation for the large group referral do not specify whether the person being investigated may provide input, Plaintiffs provide no reason to think the person being investigated could *not* do so. *See* A.R.S. § 16-143(B).

Third, as stated elsewhere, the citizenship investigation and verification procedures described in these claims have not been implemented. Plaintiffs have not identified persons who have been subjected to these procedures, nor can they show whether they will be arbitrary in practice. Thus, the Court should hesitate to adopt "premature interpretations of

statutes in areas where their constitutional application might be cloudy." *Wash. State Grange*, 552 U.S. at 450 (cleaned up).[20]

IV. CONCLUSION

The Court should first examine whether each plaintiff group has standing to challenge the statutory provisions they are challenging. There may well be some statutory provisions that no plaintiff group has standing to challenges.

For the statutory provisions were standing has been established, the Court should reject Plaintiffs' constitutional claims on the merits. Plaintiffs have not shown that these provisions are "unconstitutional in all of [their] applications." *Washington State Grange*, 552 U.S. at 449 (cleaned up). Rather, the provisions have "a plainly legitimate sweep." *Crawford*, 533 U.S. at 202 (cleaned up).

DATED this 19th day of October, 2023.

KRISTIN K. MAYES
ATTORNEY GENERAL

By: /s/ Joshua M. Whitaker
Joshua D. Bendor (No. 031908)
Hayleigh S. Crawford (No. 032326)
Joshua M. Whitaker (No. 032724)
Kathryn E. Boughton (No. 036105)
Timothy E.D. Horley (No. 038021)

Attorneys for Defendants
Attorney General Kris Mayes,
ADOT Director Jennifer Toth,
and State of Arizona

[20] For similar reasons, Plaintiffs will have an especially hard time proving that the allegedly arbitrary aspects of these investigation and verification procedures have caused them injury that is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560–61.