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United States District Court,
D. Arizona.

Maria M. GONZALEZ, et al., Plaintiffs,
v.
STATE OF ARIZONA, et al., Defendants.

Nos. CV 06–1268–PHX, CV 06–1362–PHX, CV 06–1575–PHX. | Sept. 11, 2006.

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Opinion

ORDER

ROSLYN O. SILVER, United States District Judge.

***1** Each group of Plaintiffs in the three consolidated cases filed a Motion for Preliminary Injunction. The Court held a two-day hearing on August 30 and August 31, 2006. On September 11, 2006, the Court issued a short order denying the request for a preliminary injunction. (Doc. 183) Pursuant to Federal Rule of Civil Procedure 52(a), the following are the Court's findings of fact and conclusions of law.[1]

I. Proposition 200

Passed in 2004, Proposition 200 made two changes to Arizona law relevant to the requests for a preliminary injunction. First, individuals wishing to register to vote must present identification at the time they register. Second, individuals must present identification when they wish to cast their vote at a polling location on election day. Proposition 200 allows for different types of identification depending on whether an individual is registering to vote or verifying identity on election day.

A. Identification for Registration

After passage of Proposition 200, individuals wishing to register to vote must present "satisfactory evidence of United States citizenship" at the time they register. Arizona Revised Statutes ("A.R.S.") section 16–166. Satisfactory evidence of citizenship includes one of the following: "[t]he number of the applicant's driver license or nonoperating identification license issued after October 1, 1996"; "[a] legible photocopy of the applicant's birth certificate"; "[a] legible photocopy of pertinent pages of the applicant's United States passport"; "[a] presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization"; "[o]ther documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986"; or "[t]he applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number." *Id.* If an individual does not present such evidence, his or her registration will be rejected, often with instructions how the registration should be resubmitted. (Doc. 175, Ex. 1, p. 30) (deposition of Karen Osborne stating rejected registrations are sent back to applicant with instructions on how to cure deficiencies and a stamped envelope for return to County Recorder).

B. Identification for Voting

Registered voters wishing to vote in-person on election day must present some form of identification to the poll workers. A.R.S. § 16–579. Proposition 200 provides a list of acceptable forms of identification and the Secretary of State has promulgated regulations setting forth the specific types of identification that are acceptable. *Id.* (Doc. 150, Ex. 3.) A voter may present either one form of

identification with her photograph, name, and address, or two forms of identification that bear her name and address. A voter may present one of the following: a valid driver license; nonoperating identification license; tribal enrollment card or other form of tribal identification; or some other federal, state, or local government issued identification. *Id.* (Doc. 150 Ex. 3) If a voter does not have or does not wish to present one of the forms listed above, two of the following types of identification may be presented: utility bill; bank or credit union statement; vehicle registration; Indian census card; property tax statement; tribal enrollment card; vehicle insurance card; recorder's certificate; or federal, state, or local government issued identification, including a voter registration card issued by the county recorder. (Doc. 150 Ex. 3) Certain counties have also chosen to accept "election material" as a form of non-photographic identification. Such "election material" is "Official Election Mail" that includes the voter's name and address and is sent, free of charge, to registered voters. (Doc. 150 Ex. 18)

C. Early Voting

***2** Arizona has maintained an extensive early voting process. A.R.S. §§ 16–541–542. By law, "[a]ny election called pursuant to the laws of [Arizona] shall provide for early voting." A.R.S. § 541(A). Every registered voter is eligible to vote by early ballot. *Id.* Without the identification for voting at the polls, a registered voter may request an early ballot, complete the ballot, and then return the ballot through the mail or drop it off at a polling place. A.R.S. § 16–548. (8/30/06 Transcript pp. 106–107) An early ballot may also be dropped off at any polling place up through election day. *Id.* Counties also allow for inperson early voting at certain polling places.[2] No identification is required of early voters that wish to vote in-person and language assistance is available at certain early voting locations. (Transcript pp. 105–106)

II. Procedural History

Plaintiffs seek an injunction prohibiting the enforcement of both the registration and in-person voting identification requirements in advance of this Fall's elections. Registration for the primary election closed on August 14, 2006, early voting began on August 10, 2006, and the election itself was held on September 12, 2006. It is already too late for a preliminary injunction to affect the primary election. Registration for the November 7, 2006 election closed on October 9, 2006 and early voting began October 5, 2006. (Doc. 175 Ex. 4) In light of these deadlines, the timing of each of the cases is relevant to the preliminary injunction issue. The relatively late filing of these three lawsuits, and the rejection by certain Plaintiffs of the Court's expedited briefing and hearing schedule, undermines Plaintiffs' claims that immediate relief is mandated. See *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.,* 762 F.2d 1374, 1377 (9th Cir.1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.").

A. *Gonzalez, et al. v. State of Arizona et al.*, 06–1268

Maria M. Gonzalez, et al. ("Gonzalez Plaintiffs"), filed their complaint on May 9, 2006, requesting a temporary restraining order and a preliminary injunction that same day. (Case 06–1268, Doc. 1, 3, 7) The Gonzalez Plaintiffs filed on May 16, 2006 an alternative application for a temporary restraining order focusing on a statutory argument. (Doc. 13) The Court held a status hearing on May 17, 2006 and set an expedited briefing schedule for the temporary restraining order issue. (Doc. 26) Oral argument solely on this issue was held on June 9, 2006. (Doc. 64) The Court denied the temporary restraining order ten days later. (Doc. 68) In the order denying the temporary restraining order, the Court set forth an expedited briefing schedule for the preliminary injunction. (Doc. 68)

One week after the briefing schedule was set, Plaintiffs submitted a request for a three week extension of all deadlines. (Doc. 82) Defendants objected to any extension, arguing that an extension would "leave insufficient time to resolve the legal issues and deal with election administration concerns prior to the primary election and perhaps the general election." (Doc. 88) The Court held a status conference to resolve the appropriate dates, expressing concern whether a decision could be issued before the elections. After hearing from both sides, the Court directed the parties to meet and propose mutually agreeable dates. (Doc. 98) The parties eventually agreed on a new schedule, setting the due date for the Gonzalez Plaintiffs' brief *four weeks* later than originally set by the Court. (Doc. 97) The Court entered an Order adopting the parties' proposed dates. (Doc. 101) The parties later sought additional extensions. (Doc. 135, 156, 163)

B. Inter Tribal Council of Arizona, et al. v. Jan Brewer, et al., 06–1362

***3** The Inter Tribal Council of Arizona, Inc., et al. ("ITCA Plaintiffs"), filed their complaint on May 26, 2006 but did not file a separate motion or application for a temporary restraining order or preliminary injunction at

the time the complaint was filed. (Case 06–1362, Doc. 1) The ITCA Plaintiffs sought consolidation with the *Gonzalez* case and consolidation was granted on June 6. (Doc. 13)

B. Navajo Nation, et al. v. Jan Brewer et al., 06–1575

The Navajo Nation, et al. ("Navajo Nation Plaintiffs"), filed a complaint and a motion for preliminary injunction on June 20, 2006. (Case 06–1575, Doc. 1) On June 30, Defendant Jan Brewer requested that this case be consolidated with the *Gonzalez* case. (06–1268, Doc. 92) The Navajo Nation Plaintiffs opposed the consolidation request, arguing that unique factual and legal issues were present such that consolidation would not be proper. (06–1575, Doc. 15) On July 17, the Navajo Nation Plaintiffs filed a motion to expedite hearing on their preliminary injunction request. (Doc. 14) According to that motion, the Court needed to provide relief prior to the primary election scheduled for September 12, 2006. The case was ordered consolidated on August 4. (Doc. 25)

Taken together, the three groups of Plaintiffs filed suit approximately eighteen months after Proposition 200 became effective and only four months before the primary election and six months before the general election. (Doc. 175 p. 2 n. 1) When the Court set an expedited briefing schedule, Plaintiffs objected to the schedule and requested additional time. These delays raise serious questions regarding Plaintiffs' need and desire for immediate injunctive relief.

III. Standard for Preliminary Injunction

The Ninth Circuit has been unable to settle on a single test for determining if a preliminary injunction should issue. "A preliminary injunction is appropriate where plaintiffs demonstrate either (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor." *Southwest Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 917 (9th Cir.2003) (quotation omitted). The public interest must also be considered when evaluating certain preliminary injunction requests. *Id.* In cases involving the public interest, such as those impacting elections, the preliminary injunction test has been formulated to require Plaintiffs to "establish (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff[s] if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the public interest." *Id.* This test "creates a continuum: the less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Id.*

***4** The Ninth Circuit, sitting en banc, recognized that a request for a preliminary injunction in a case involving state elections is unique. Observing that "a federal court cannot lightly interfere with or enjoin a state election," the court recognized that "election cases are different from ordinary injunction cases. *Interference with impending elections is extraordinary* and interference with an election after voting has begun is unprecedented." *Id.* at 918 (emphasis added) (citations omitted). Accordingly, Plaintiffs needed to make a particularly strong showing that they were entitled to injunctive relief.

IV. Plaintiffs' Arguments

All three Plaintiffs groups assert that Proposition 200 acts as an unconstitutional poll tax, violates the Equal Protection Clause of the Fourteenth Amendment, and impedes the fundamental right to vote. The Navajo Nation Plaintiffs raise claims pursuant to the Voting Rights Act and the Civil Rights Act. And the ITCA and Gonzalez Plaintiffs argue that Proposition 200 conflicts with the National Voter Registration Act of 1993 (the "NVRA"), the argument that was rejected by the Court in the Order denying the request for a temporary restraining order. After consideration of the parties' filings, the evidence presented at the preliminary injunction hearing, and the additional briefing requested on the poll tax issue, the Court finds that "[P]laintiffs have shown a possibility of success on the merits" of some of their arguments but the Court "cannot say that at this stage they have shown a strong likelihood." *Southwest,* 344 F.3d at 919. Also, the balance of hardships and the public interest tips in favor of Defendants.

A. Poll Tax

Plaintiffs assert that Proposition 200 constitutes a poll tax in violation of the Twenty-fourth Amendment to the United States Constitution. That Amendment states, in relevant part,

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the

> United States or any State by reason of failure to pay any poll tax or other tax.

The parties agree that the most instructive case is *Harman v. Forssenius,* 380 U.S. 528 (1965). There the Supreme Court addressed the constitutionality of Virginia's system. At the time, a Virginia statute required the payment of a $1.50 annual poll tax. Potential voters not wishing to pay the poll tax could file a certificate of residency each election year. According to *Harman,* the Twenty-fourth Amendment "nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed." *Id.* at 540–541. Therefore, the Court determined that Virginia's system would be invalid if it "impos[ed] a material requirement solely upon those who refuse[d] to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541. The Court concluded that the residency certificate was a "cumbersome procedure" and held that "the requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax." *Id.* at 542.

***5** The issue in *Harman* was not that the state was imposing certain procedural hurdles to voting, such as certificates of residency, but that the system explicitly included a poll tax. *Id* . at 538 ("[I]t is important to emphasize that the question presented is not whether it would be within a State's power to abolish entirely the poll tax and require all voters—state and federal—to file annually a certificate of residence."). In the present case, the parties agree that there is no explicit poll tax at issue. The only issue is whether requiring forms of identification should be classified as a poll tax under the reasoning in *Harman.* The types of identification required by Proposition 200 are different depending on whether an individual is registering to vote or simply providing identification at the polls. Registration and poll-identification requirements are addressed separately.

1. Registration Identification

Obtaining proper forms of identification for purposes of registering to vote will cost potential voters between 10 and 100 dollars. (Doc. 149 p. 13) These amounts represent the price of obtaining a birth certificate, drivers license, or passport. The cost of certain of these forms is not within Defendants' control.[3] From statistics submitted by the ITCA Plaintiffs, the vast majority of eligible voters already possess a useable form of identification such that no additional fee will be required to register to vote. (Doc. 150 Ex. 21) (showing that approximately 98% of eligible individuals already possess adequate forms of identification). The Court has reservations regarding the reliability of these statistics and no other reliable evidence was presented regarding the number, if any, of eligible individuals that wish to register to vote and must obtain new forms of identification. It is undisputed that some individuals will have to obtain a form of identification, but that requirement cannot be considered a poll tax. (Doc. 150 Ex. 33, 34)

The constructive poll tax at issue here does not fit within the traditional definition of a poll tax. Black's Law Dictionary defines a "poll tax" as a "fixed tax levied on *each person* within a jurisdiction." *Black's Law Dictionary* 1498 (8th ed.2004) (emphasis added); see also *United States v. State of Texas,* 252 F.Supp. 234, 239 (W.D.Tex.1966) ("The poll tax is imposed on all residents of the State...."). The poll tax here will not have to be paid by approximately 98% of potential voters who already possess appropriate identification. The poll tax is only indirectly connected to the right to vote. Rather than paying a fee to be eligible to vote, Arizona voters must pay a fee for the issuance of a form of identification. Arizona does not bar from voting individuals who have not paid any voting fee to Arizona or completed any Arizona specific voting paperwork.[4] Finally, Proposition 200 could impose some burdens on the limited class of individuals that do not currently possess appropriate identification but "[e]lection laws will invariable impose some burden upon individual voters." *Burdick v. Takushi,* 504 U.S. 428, 433 (1992). States have always "retain[ed] the power to regulate their own elections." *Id.* Arizona has chosen to require individuals prove they are eligible to participate in elections. Defining the fees some voters must pay to prove their eligibility (via proper identification) as "poll taxes" "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[5] *Id.* Plaintiffs have not shown a strong likelihood of success on this issue.

2. Identification at the Polls

***6** Proposition 200 allows for a wide variety of forms of identification at the polls. Some of those forms, such as "Official Election Mail," are sent to prospective voters free of charge. Certain counties, including Coconino County, plan on sending out two pieces of election mail. Thus, certain voters will receive, free of charge, the requisite two forms of identification for identification at the polls. (Transcript p. 100) Again, the Court was not presented with sufficiently reliable information regarding the number of voters that do not have adequate forms of identification and will not be receiving, free of charge, adequate forms of identification prior to the elections. Also, the wide variety of acceptable forms of

identification renders the connection between a poll tax and these forms of identification even more attenuated than the registration identification requirements. Finally, registered individuals who do not wish to present identification at the polls have the option of participating in early voting. No identification is required of early voters and early voting is open to all registered voters. Early voters may vote by mail, or if they prefer to vote in-person they may go to an early-voting polling location. Plaintiffs have not shown a strong likelihood of success on the issue of identification at the polls constituting a poll tax.

B. Equal Protection

A case involving Virginia's poll tax is also the basis for Plaintiffs' Equal Protection argument. Because the Twenty-fourth Amendment is addressed to *federal* elections, Virginia's poll tax for state elections was not automatically barred by the adoption of that Amendment. *Harman,* 380 U.S. at 540 ("Upon adoption of the Amendment, of course, no State could condition the *federal* franchise upon payment of a poll tax.") (emphasis added). The Supreme Court turned to the Equal Protection clause to resolve the constitutionality of the poll tax for state elections.

In *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966), the Court found "that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666. That holding is premised on the finding that "the interest of the State, when it comes to voting, *is limited to the power to fix qualifications.* Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668 (emphasis added). Accordingly, here Plaintiffs argue that the costs in obtaining proper identification result in making the affluence of the voter a relevant factor. Proposition 200 makes the affluence of the voter a relevant factor only in the same manner that a variety of other requirements do so as well.

The State of Arizona seeks to enforce the basic voter qualification of citizenship. The state does so by requiring individuals verify their identity when registering to vote and when voting in person.[6] These verification requirements understandably impose some cost on voters. The State of Arizona operates a limited number of polling locations. Travel to and from these polling locations imposes some cost on voters. A strict interpretation of Plaintiffs' argument would mean that requiring individuals to travel to the polls violates the Equal Protection Clause; voters with some financial means undoubtedly have an easier time traveling to the polls than poorer individuals. If states were barred from having any policies that impose a disproportionate burden on voters based on their wealth, every election conducted in the United States would be conducted in violation of the Equal Protection Clause. This is not a finding the Court will make. The State is not distinguishing among voters based on wealth, rather it is distinguishing between individuals that are able to prove their eligibility to vote and those that are not.[7] Plaintiffs have not shown a likelihood of success on this issue.

C. Fundamental Right to Vote

***7** All Plaintiffs argue that Proposition 200 infringes on the fundamental right to vote in violation of the Fourteenth Amendment. The parties agree that the appropriate framework for evaluating this claim comes from *Burdick v. Takushi,* 504 U.S. 428 (1992). There the Supreme Court specifically rejected the idea that "any burden upon the right to vote must be subject to strict scrutiny." *Id.* at 433. Instead of strict scrutiny, "[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434. If a restriction is determined to be "severe," the restriction "must be narrowly drawn to advance a state interest of compelling importance." *Id.* (quotations omitted). If, however, "a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quotations omitted).

Supreme Court cases establish that there is " '[n]o bright line separat[ing] permissible election-related regulation from unconstitutional infringements.' " *Rubin v. City of Santa Monica,* 308 F.3d 1008, 1014 (9th Cir.2002) (quoting *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359 (1997)). Often, "courts are required to make 'hard judgments' given the interests involved." *Id.* The Ninth Circuit has observed that "[c]ourts will uphold as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process." *Id.* Also, regulations promoting traditional goals, such as "accurate and complete voter registration" do not qualify as severe. *Hussey v. City of Portland,* 64 F.3d 1260, 1265 (9th

Cir.1995).

Assessing the severity of the restrictions in this case requires an intense factual inquiry. Plaintiffs presented some evidence that hundreds, possibly thousands, of individuals will not be able to secure the requisite identification to enable them to vote. But at best these numbers represent less than 3% of the voting population, and it is not clear what percentage of these individuals wish to vote but are *actually* unable to obtain identification. Also, " 'there must be a substantial regulation of elections if they are to be fair and honest.' " *Rubin,* 308 F.3d at 1014 (quoting *Storer v. Brown,* 415 U.S. 724, 730 (1974)). Proposition 200 is a "generally applicable" attempt at protecting the "reliability and integrity of the election process." *Id.* While not wishing to downplay the burden on certain individuals, Plaintiffs have not established that Proposition 200 represents a "severe" burden. Because Plaintiffs have not proven the burden is "severe," the State of Arizona's interest in ensuring the integrity of elections is sufficient to justify Proposition 200. Plaintiffs have not shown a substantial likelihood of success on this issue.

D. Voting Rights Act

***8** The Navajo Nation Plaintiffs make two statutory arguments not made by the other two groups of Plaintiffs.[8] The first statutory argument is based on Section 2 of the Voting Rights Act, which states

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....
>
> 42 U.S.C. § 1973(a). This section allows disparate impact claims. See *Smith v. Salt River Project Agr. Imp. and Power Dist.,* 109 F.3d 586, 594 (9th Cir.1997) ("Section 2 requires proof only of a discriminatory result, not of discriminatory intent."). Because disparate impact claims are cognizable, if Plaintiffs can show that Navajos will suffer disproportionate harm under Proposition 200, a preliminary injunction may be appropriate.

"In determining whether a challenged voting practice violates § 2, the district court must examine the totality of the circumstances and determine, based upon a searching practical evaluation of the past and present reality ... whether the political process is equally open to minority voters. This examination is intensely fact-based and localized." *Smith v. Salt River Project Agr. Imp. and Power Dist.,* 109 F.3d 586, 591 (9th Cir.1997) (citations and quotations omitted). There are a variety of factors a court may use when evaluating the totality of circumstances. *Id.* at 594 n. 6 (listing factors contained in Senate Report). The Court was not presented with adequate evidence on any of these factors to enable an appropriate evaluation. Accordingly, the Navajo Nation Plaintiffs have not met their burden of showing a substantial likelihood of success.

E. Civil Rights Act

The other statutory argument made only by the Navajo Nation Plaintiffs involves two subsections of the Civil Rights Act: 42 U.S.C. § 1971(a)(2)(A) and 42 U.S.C. § 1971(a)(2)(B). Subsection (A) provides

> No person acting under color of law shall in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote....

Subsection (B) provides no person acting under color of law may

> deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.

Relief does not appear appropriate under either of these subsections.

The Navajo Nation Plaintiffs argue that subsection (A) is implicated because Navajos tend to vote at the polls on election day and different standards are applied to early voters and voters at the polls.[9] Early voting "is an *inherently* different procedure from voting in person, requiring a state which allows both in-person and absentee voting to apply different 'standards, practices, or

procedures' to these two groups of voters." *Indiana Democratic Party v. Rokita,* No. 1:05–CV–0634–SEB–VSS, 2006 WL 1005037, at *47 (S.D. Ind. April 14, 2006). It is not a violation of subsection (A) for a state to apply different standards to two inherently different procedures. Further, the Navajos have not sufficiently dealt with the reality that Navajos can appear, without identification, at the polls and present a previously completed early ballot. Plaintiffs have not shown a likelihood of success on this issue.

***9** The second statutory argument is that subsection (B) prohibits Defendants from preventing someone from voting based on an "error or omission" that is "not material" for determining voter eligibility. Presenting "identification in order to prove one's identity is by definition not an 'error or omission on any record or paper' and, therefore, § 197 1(a)(2)(B) does not apply to this case." *Common Cause/Georgia League of Women Voters of Georgia, Inc. v. Billups,* No. CIVA 4:05CV0201 HLM, 2006 WL 2089771, at *65 (N.D.Ga. July 14, 2006). Plaintiffs have not shown a likelihood of success on this issue.

F. NVRA

The Court addressed Plaintiffs' arguments pursuant to the NVRA in the Order denying the request for a temporary restraining order. Plaintiffs have not presented any convincing reason for the Court to reverse its prior ruling. Plaintiffs have not shown a likelihood of success on the merits of this claim.

G. Balance of Hardships

Proposition 200 has been in effect since January 2005 and elections have been held after its adoption. Since its initiation, Defendants have invested "enormous resources" in preparing to apply Proposition 200 to this Fall's elections. See *Southwest Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 919 (9th Cir.2003) (observing state of California and its citizens had already invested "enormous resources" in upcoming election). In July 2005, the State revised the voter registration forms to highlight Proposition 200's identification requirements. (Doc. 158 Ex. 1) Elections workers throughout the state have "undergone extensive training ... to ensure consistent application of the proof of citizenship for voter registration and identification at the polls." (*Id.*) This training includes "classroom-type training of more than 7,000 boardworkers." (*Id.*) In March 2006, the Maricopa County Recorder launched a public awareness campaign aimed at educating the public regarding Proposition 200's requirements. Maricopa County has sent a new voter registration card to each registered voter and that mailing includes information regarding Proposition 200's requirements. (Id.) An injunction would force Defendants to change their registration and voting procedures, retrain all poll workers, and attempt to communicate with eligible voters regarding the changes. This would undoubtedly cause confusion among election officials, boardworkers, and voters.[10] The balance of hardships tips in favor of Defendants.

Plaintiffs have not shown a strong likelihood of success and the balance of hardships tips in favor of Defendants.

Accordingly,

IT IS ORDERED the Motion to Expedite (Doc. 194) is DENIED AS MOOT.

ORDER

This case consists of three consolidated actions. Each group of Plaintiffs has filed a Motion for Preliminary Injunction. The Court held a two-day hearing on August 30 and August 31, 2006. Election cases are different from ordinary injunction cases. "Interference with impending elections is extraordinary and interference with an election after voting has begun is unprecedented." *Southwest Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 919 (9th Cir.2003). In cases involving the public interest, such as cases impacting elections, the preliminary injunction test has been formulated to require Plaintiffs to "establish (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff[s] if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the public interest." *Id.* at 917–18. Plaintiffs have not shown a strong likelihood of success on the merits, the balance of hardships favors the Defendants, and the public interest would not be advanced by granting the injunction. The Motions for Preliminary Injunction will be denied. Detailed findings of fact and conclusions of law will follow.

***10** Accordingly,

IT IS ORDERED the Motions for Preliminary Injunction (06–1268: Doc. 7, 146, 149) are DENIED.

IT IS FURTHER ORDERED the Motion for Preliminary Injunction and Motion to Expedite (06–1575: Doc. 2, 14) are DENIED.

IT IS FURTHER ORDERED the Motion to Exceed Page Limits (06–1268: Doc. 166) is GRANTED.

IT IS FURTHER ORDERED the parties are to submit simultaneous briefing on whether the identification requirements for registration constitute a poll tax by September 18, 2006. Simultaneous responses are due September 25, 2006. No replies are allowed.

IT IS FURTHER ORDERED the Navajo Nation Plaintiffs are to submit additional briefing on their Voting Rights Act and Civil Rights Act claims by September 25, 2006. Defendants' response is due October 2, 2006. The reply is due October 6, 2006. A hearing for the Court to consider additional facts on the Voting Rights Act and Civil Rights Act claims will be held October 19, 2006 at 9:00 a.m.

Footnotes

1 The parties subsequently filed notices of appeal. (Doc. 184, 189) "Ninth Circuit law follows the general rule that a party's filing a notice of appeal ... divests the district court of jurisdiction over the matters appealed." *Hybritech Inc. v. Abbott Labs.,* 849 F.2d 1446, 1450 (Fed.Cir.1988). But the Court has jurisdiction to enter findings of fact and conclusions of law because doing so will aid appellate review. See *id.* (district court retained jurisdiction to enter findings of fact and conclusions of law because it would aid appellate review).

2 The Coconino County Recorder was asked about this process on cross-examination. (The following comes from the Realtime transcript.)

> Q. And can you describe the process that the voter goes through when he or she shows up at your office to vote at the early voting site?
> A. Yes. If you're talking about if—if you're talking about the county elections office, that's one thing. It may be somewhere else, like we have a branch in Tuba City, so I'll use the county elections office. They come in, they identify who they are. They sign in. They're given a ballot to vote. They're shown, you know, there is both sides, giving some instructions. They are pointed over to the Votermatic to complete that ballot, to seal it, to sign it, and return it to us.
> Q. So in effect, it's almost identical to what the voter goes through at the polling place?
> A. Except there is no ID asked for.
> Q. No identification?
> A. No identification is asked for per statute. The idea is it's an early ballot, because we check the signature, so no ID is asked for.
> Q. So to vote early at one of these voting sites, a voter could show up, assuming there are no challenges, 33 days before the election—
> A. That's correct.
> Q. Vote a ballot, and not have to produce identification?
> A. That's correct, because the ballots are all turned in back to us with their signatures on them, to compare to the rolls before they are determined if that ballot counts or doesn't count.
>
> (8/30/06 Transcript pp. 106–107)

3 For example, Defendants have no control over the cost of federal forms of identification.

4 Some individuals who do not pay any fee to the State of Arizona or complete any paperwork for the State will be eligible to vote. A .R. S. § 28–3165(J) (providing that persons aged 65 or older and disabled persons are entitled to identification at no cost); (Doc. 150 Ex. 3) (allowing federal forms of identification).

5 In addition to the fees for obtaining the state-issued identification, Plaintiffs also claim that Arizona is assessing a poll tax through the "copying fees," "gas costs," and "bureaucratic hurdles" associated with obtaining a state-issued identification. (Doc. 198 p. 11) This is unrealistic. Were Plaintiffs' arguments accepted, Arizona would not be allowed to implement *any* identification requirement because there would inevitably be some second-level costs, such as "bureaucratic hurdles," present in such a scheme. Finding second-level costs constitute poll taxes would cripple Arizona's ability to conduct elections, not the intent of the Twenty-fourth amendment.

6 Plaintiffs repeatedly argue that Proposition 200 was unnecessary and unwise. This is not an issue for the Court to decide. *See F.C.C. v. Beach Communications, Inc.,* 508 U.S. 307, 313 (1993) ("Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.").

7 Again, the many opportunities to vote available, such as voting by mail, substantially reduces the burden on voters without the means to travel to the polls.

[8] The Navajo Nation Plaintiffs do not attack the identification for registration aspects of Proposition 200; they only take issue with the identification at the polls requirements. The Court ordered additional briefing on the Navajo Nation Plaintiffs' statutory claims. Because the statutory claims are "intensely fact-based and localized," a more detailed order addressing these claims will be issued after the conclusion of the hearing scheduled for October 19, 2006. *Smith v. Salt River Project Agr. Imp. and Power Dist.,* 109 F.3d 586, 591 (9th Cir.1997) (citations and quotations omitted).

[9] It is not clear that the Voting Rights Act applies to this non-race based claim. See *Indiana Democratic Party v. Rokita,* No. 1:05–CV–0634–SEB–VSS, 2006 WL 1005037, at *47 n. 106 (S.D. Ind. April 14, 2006) (citing cases establishing Voting Rights Act aimed at eliminating racial discrimination). The Court will assume that it does for purposes of this Order.

[10] Coconino County was the only county that presented credible evidence that the burdens might be overcome. But Coconino County did not address the significant burdens that might result were Proposition 200 enjoined but later found valid. In that event, counties would have to go through voter lists and remove individuals that did not comply with Proposition 200 at the time they registered.