No. 12-71

In The Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

JESUS M. GONZALEZ; BERNIE ABEYTIA; DEBBIE LOPEZ; GEORGIA MORRISON FLORES; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; FRIENDLY HOUSE; CHICANOS POR LA CAUSA, INC.; ARIZONA HISPANIC COMMUNITY FORUM; COMMON CAUSE; PROJECT VOTE; AND THE INTER-TRIBAL COUNCIL OF ARIZONA; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; AND HOPI TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

GONZALEZ RESPONDENTS' BRIEF IN OPPOSITION

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
NINA PERALES
Counsel of Record
KAROLINA J. LYZNIK
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

ORTEGA LAW FIRM, PC
DANIEL R. ORTEGA, JR.
361 E. Coronado Rd.
Phoenix, AZ 85004

PERKINS COIE
KARL J. SANDSTROM
607 14th St. NW
Washington, DC 20005

Attorneys for Gonzalez Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In 1993 Congress enacted the National Voter Registration Act to increase the number of eligible citizens registered to vote in federal elections. 42 U.S.C. § 1973gg(b). One provision of the National Voter Registration Act requires states to "accept and use" a mail voter registration form promulgated by the U.S. Election Assistance Commission ("Federal Form"). Over the last 20 years, millions of Americans across the country have registered to vote using this simple postcard form.

Arizona's Proposition 200 requires state election officials to reject Federal Forms automatically, when the Federal Forms do not provide additional documentation required by Proposition 200.

The question presented is:

Whether the Ninth Circuit, sitting en banc, erred in applying the well-established Elections Clause preemption test to conclude that Arizona's refusal to process Federal Forms (unless accompanied by the documents set out in Proposition 200) departs from the mandate that all states "accept and use" the Federal Form and conflicts with the National Voter Registration Act.

PARTIES TO THE PROCEEDING[1]

Gonzalez Respondents, who were Plaintiffs-Appellants in the lead case below, are: Jesus M. Gonzalez; Bernie Abeytia; Debbie Lopez; Georgia Morrison Flores; Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Arizona Hispanic Community Forum; Common Cause; and Project Vote.[1]

ITCA Respondents, who were Plaintiffs-Appellants in a later-filed, consolidated case below, are: The Inter-Tribal Council of Arizona; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; and Hopi Tribe.

Petitioners, who were Defendants-Appellees below, are: the State of Arizona; Ken Bennett in his official capacity as Arizona Secretary of State; Shelly Baker, in her official capacity as La Paz County Recorder; Berta Manuz, in her official capacity as Greenlee County Recorder; Lynn Constable, in her official capacity as Yavapai County Election Director; Laura Dean-Lytle, in her official capacity as Pinal County Recorder; Judy Dickerson, in her official

[1] The caption and list of Parties to the Proceeding in the Petition for a Writ of Certiorari contains parties that were previously dismissed from the case, lists the parties in incorrect order and shows incorrect names for some county petitioners. For this reason, Gonzalez Respondents have provided a corrected caption and list of parties in this Brief in Opposition.

PARTIES TO THE PROCEEDING – Continued

capacity as Graham County Election Director; Donna Hale, in her official capacity as La Paz County Election Director; Robyn S. Pouquette, in her official capacity as Yuma County Recorder; Steve Kizer, in his official capacity as Pinal County Election Director; Christine Rhodes, in her official capacity as Cochise County Recorder; Sadie Jo Tomerlin, in her official capacity as Gila County Recorder; Linda Eastlick, in her official capacity as Gila County Election Director; Brad Nelson, in his official capacity as Pima County Election Director; Karen Osborne, in her official capacity as Maricopa County Election Director; Yvonne Pearson, in her official capacity as Greenlee County Election Director; Angela Romero, in her official capacity as Apache County Election Director; Helen Purcell, in her official capacity as Maricopa County Recorder; F. Ann Rodriguez, in her official capacity as Pima County Recorder; LeNora Fulton, in her official capacity as Apache County Recorder; Juanita Murray, in her official capacity as Cochise County Election Director; Wendy John, in her official capacity as Graham County Recorder; Carol Meier, in her official capacity as Mohave County Recorder; Allen Tempert, in his official capacity as Mohave County Elections Director; Suzanne "Suzie" Sainz, in her official capacity as Santa Cruz County Recorder; Melinda Meek, in her official capacity as Santa Cruz County Election Director; Leslie Hoffman, in her official capacity as Yavapai County

PARTIES TO THE PROCEEDING – Continued

Recorder; and Sue Reynolds, in her official capacity as Yuma County Election Director.

Other parties before the Ninth Circuit in their official capacities were Candace Owens, Coconino County Recorder; Patty Hansen, Coconino County Election Director; Laurette Justman, Navajo County Recorder; and Kelly Dastrup, former Navajo County Election Director.

CORPORATE DISCLOSURE STATEMENT

Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; and Project Vote are incorporated as nonpartisan, nonprofit 501c(3) corporations. Common Cause is incorporated as a nonpartisan, nonprofit 501c(4) corporation. Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Common Cause; and Project Vote have no parent corporation or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATUTES

STATEMENT OF THE CASE

This case involves the voter registration provision of the Arizona Taxpayer and Citizen Protection Act ("Proposition 200"), which requires state election officials to reject voter registration applications unless they include certain documents listed in the statute as proof of U.S. citizenship. Voter registrants who submit valid Federal Forms but who do not provide the documentation required by Proposition 200 are rejected for voter registration.

I. Statutory and Regulatory Background.

A. The National Voter Registration Act.

The National Voter Registration Act of 1993 ("NVRA") establishes national standards and procedures to govern voter registration in federal elections. The statute includes findings that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation" and declares its purpose is to "establish procedures that will increase the number of eligible citizens who register to vote." 42 U.S.C. § 1973gg(a), (b). Congress chose to fulfill its purpose by mandating use of a uniform mail registration application and by requiring states to establish procedures by which individuals could register to vote in federal elections when applying for a driver's license (the so-called "motor-voter" rules) or when visiting certain public agencies. *Id*. § 1973gg-2(a).

In the NVRA, Congress specifically set forth the contents of a national voter registration form and required all states to accept and use the Federal Form for registration to vote in federal elections. Congress vested a federal agency, the Federal Election Commission (now the Election Assistance Commission), with the authority to design a simple, universal form in a "postcard" format. *Id*. § 1973gg-7. In doing so, Congress instructed the Election Assistance Commission ("EAC") to follow specific requirements when the agency designs the national form:

> The mail voter registration form developed [by the EAC] under subsection (a)(2) of this section –
>
> (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;
>
> (2) shall include a statement that –
>
> (A) specifies each eligibility requirement (including citizenship);
>
> (B) contains an attestation that the applicant meets each such requirement; and
>
> (C) requires the signature of the applicant, under penalty of perjury;

> (3) may not include any requirement for notarization or other formal authentication; and
>
> (4) shall include, in print that is identical to that used in the attestation portion of the application –
>
> (i) [voter eligibility requirements and the penalties provided by law for submitting false voter registration];

42 U.S.C. § 1973gg-7.

The mail registration provisions of the NVRA, which are at issue in this case, were modeled on postcard registration programs then existing in approximately half of the states, covering well more than half of the nation's population. The provisions created a uniform national voter registration card that would be made widely available and could be used to register a voter anywhere. The NVRA placed particular emphasis on making the card available to organized voter registration programs. 42 U.S.C. § 1973gg-4(b).

The mail registration provisions of the NVRA have a number of safeguards to prevent voter fraud, including an attestation clause on the Federal Form that sets out the requirements for voter eligibility, requiring registrants to sign the Federal Form under penalty of perjury and imposing criminal penalties on persons who knowingly and willfully engage in fraudulent registration practices. In addition, the NVRA allows states to require first-time voters who

register by mail to vote in person at the polling place, where the voter's identity can be confirmed. Finally, the NVRA requires states to send notices to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations if the mail is returned as undeliverable. *See* State App. C at 41c-42c.

During debate over the NVRA, some in Congress objected that postcard registration and other provisions facilitating easier registration would open the door to fraud. Congress considered those objections and modeled each of the provisions of the NVRA after registration practices that had been proven to be sound, effective, and well tested in the states. Congress also included additional safeguards, such as a new criminal offense that severely punished voter registration fraud, 42 U.S.C. § 1973gg-10, and requirements that states establish procedures to maintain the accuracy of their voter registration rolls, 42 U.S.C. § 1973gg-6.[2]

---

[2] For some Members of Congress those protections were still insufficient to protect against the possibility that a noncitizen might register to vote. Members in both Houses proposed amendments that would expressly allow states to require that an individual provide additional documentation of his or her citizenship before being allowed to register. But those efforts were defeated in the House and in the Senate precisely *because* they made registration too difficult and thus undermined the central purpose of the NVRA. State App. C at 43c (explaining that the Conference Report indicates "Congress rejected an amendment to the NVRA which would have provided that

(Continued on following page)

In the last presidential election alone, 28 million citizens used the Federal Form to register to vote by mail, in person, or as part of a voter registration drive.[3]

In the NVRA, neither the language instructing the EAC on the contents of the Federal Form nor the provision requiring its acceptance by states permit states to require additional information with the Federal Form. Although states are authorized to design and use their own mail voter registration form, nothing in the statute permits states to use their forms to the exclusion of the Federal Form. *See* 42 U.S.C. § 1973gg-4(2) ("*In addition to* accepting and using the [federal] form . . . a state may develop and use a mail voter registration form . . . " (emphasis added)).

B. Proposition 200.

Proposition 200 was enacted in 2004 in order to "discourage illegal immigration." Gonzalez App. 13.

'nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration' because it was not 'consistent with the purposes of the NVRA' and 'could effectively eliminate or seriously interfere with the mail registration program of the Act.' ") (quoting H.R.Rep. No. 103-66, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148)).

[3] U.S. Election Assistance Commission, 2008 Election Administration and Voting Survey ("EAC Report 2008"), *available at* www.eac.gov/research/election_administration_and_voting_survey.aspx.

Proposition 200 states that "illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship." *Id.*[4]

Proposition 200's registration provision provides that "the county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of citizenship" and sets out a limited list of documents that registrants must produce in order to prove their citizenship.[5] Gonzalez App. 19-21. Pursuant to Proposition 200, Arizona counties reject all voter registration forms that are not also accompanied by the state-required documentation,

---

[4] In addition to the voter registration provision, Proposition 200 requires social service agencies to verify the immigration status of applicants for public benefits and requires voters to show identification at the polls on Election Day. Gonzalez App. 23, 25-27.

[5] Several documents listed in Proposition 200 as "satisfactory evidence of citizenship" either do not exist or do not prove U.S. citizenship, thus further narrowing the ability of registrants to comply with the registration provision. These include Bureau of Indian Affairs cards, tribal treaty cards, the naturalization certificate number, and an out of state driver's license. *See, e.g.*, Gonzalez ER Tab 3 at 4, 10. Naturalization certificates state on their face that it is a federal offense to photocopy the certificate without lawful authority, forcing some citizens who rely on the document to have to register in person at the county recorder's office. Gonzalez ER Tab 39.

including voter registration forms promulgated by the federal government under the National Voter Registration Act (NVRA) and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[6] *See* Gonzalez ER Tab 3 at 4 ("Without this proof [of citizenship], a person may not register to vote. *Id.* This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship.").

II. Factual and Procedural Background.

A. Factual Background.

The district court found that following enactment of Proposition 200, over 30,000 individuals were rejected for voter registration in Arizona. Gonzalez ER Tab 3 at 13. Reflecting the demographic composition of Arizona, over 80% of the rejected voters were not Latino. Gonzalez ER Tab 3 at 13. Less than one-third of the rejected registrants were subsequently able to register to vote. Gonzalez ER Tab 3 at 14.

---

[6] The NVRA's provisions related to the Federal Form are similar to the provisions of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff *et seq.,* which permits men and women in the military serving overseas to register to vote with a postcard application. Since implementing the law at issue here (Proposition 200), Arizona has treated UOCAVA forms from overseas military the same as NVRA postcards and rejected them when they are not accompanied by the documents required by Proposition 200.

Voter registration in community-based voter drives plummeted 44%.[7]

Individuals whose voter registration forms are commonly rejected for failure to provide proof of citizenship include Arizona residents who have a driver's license issued before October 1, 1996 (such as those over age 32), who do not have a current Arizona driver's license (including students and new state residents), or who, unbeknownst to them, have a driver's license with a state database code of "Foreign" because the license was issued to them before they became naturalized citizens. The Pima County Recorder testified that even her mother, who was born in New Mexico, could not satisfy the documentation requirements to register to vote under Proposition 200. Gonzalez Tr. Ex. 930, Dep. Ann Rodriguez Aug. 2, 2006, at 90:15-91:3.

In order to register, these citizens must include with their registration – which otherwise can be a stand-alone postcard – a copy of their U.S. birth certificate, passport or naturalization papers. Even if a registrant has a document to satisfy the provision, Proposition 200 requires the registrant to locate the document, photocopy it, and enclose the photocopy with the form in a postage-paid envelope for mailing. State App. C at 36c-37c. Alternatively, the registrant must travel to the county recorder's office to present the required document. The Ninth Circuit concluded that "much of the value of the Federal

[7] Gonzalez ER Tab 8, Trial Ex. 966.

Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." *Id*.

In March 2006, Arizona wrote the EAC, which is authorized by the NVRA to promulgate the Federal Form, to request that the EAC add to its state-specific instructions on the Federal Form a notice that Arizona would reject Federal Forms that did not comply with Proposition 200. The EAC responded, "After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law (42 U.S.C. § 1973gg-4))." Gonzalez App. 1-2. Following this correspondence, in which the EAC declined to amend the Federal Form instructions, Arizona continued to reject all Federal Forms that did not provide the supplemental information required by Proposition 200.

B. Procedural History.

Because Proposition 200's registration requirement flatly contradicted the NVRA, Gonzalez Respondents challenged this and other parts of Proposition 200 in 2006. The district court denied Gonzalez Respondents a preliminary injunction. The Ninth Circuit's review of that decision was limited to one provision of the NVRA (allowing states to promulgate registration forms for federal elections in addition to accepting the Federal Form), leading it to conclude that the language of the NVRA allowed Arizona to impose its state requirements on top of the Federal

Form. State App. D at 17d. The case returned to the district court on the merits, and the district court granted summary judgment to Petitioners ("Arizona") on the NVRA issue based entirely on the Ninth Circuit's finding of law. *Gonzalez v. Arizona*, No. CV 06-1268 at 2-3 (D. Ariz. Aug. 28, 2007) (order granting summary judgment).

After trial on the remaining issues, a new panel of the Ninth Circuit took up the entire case and found the earlier panel decision regarding the NVRA to be "clear error." This panel, and later the Ninth Circuit en banc, held that Proposition 200's registration requirements are preempted by the NVRA when registrants use the Federal Form. State App. A at 53a-54a; State App. C at 44c. Following the en banc decision, Arizona asked the Ninth Circuit to stay its mandate. The Ninth Circuit properly refused, concluding it is unnecessary for this Court to take the case, and that Arizona failed to demonstrate the necessary irreparable harm. *Gonzalez v. Arizona*, No. 08-17094 at 7, 8 (9th Cir. June 7, 2012) (order denying stay). On June 28, 2012, this Court denied Arizona's application for a stay of the Ninth Circuit's mandate. *Arizona v. Abeytia*, No. 11-1189 (U.S. June 28, 2012) (order denying stay).

Following issuance of the mandate, the district court ordered that Arizona "shall not reject Federal Forms from those who seek to register to vote for the reason that they have not provided proof of citizenship under [Proposition 200]." Gonzalez App. 11.

The Ninth Circuit's en banc decision was not closely divided; eight of the ten judges on the panel found that the NVRA provision requiring states to "accept and use" the Federal Form preempted Proposition 200's additional registration requirements in instances where the applicant submitted the Federal Form to register to vote. In doing so, the Court carefully analyzed the Elections Clause and this Court's related jurisprudence, focusing primarily on cases in which this Court decided issues relating to Elections Clause preemption, *Ex Parte Siebold,* 100 U.S. 371 (1879) and *Foster v. Love,* 522 U.S. 67 (1997). The Ninth Circuit examined the NVRA and Proposition 200 and concluded that the two statutes addressed the same subject of mail voter registration for federal elections and that they were in conflict. State App. C at 19c-20c.

The Ninth Circuit properly approached the preemption question by considering "the NVRA and Proposition 200's registration provision as if they comprise a single system of federal election procedures." State App. C at 29c. However, because under Proposition 200 county recorders reject every Federal Form that does not also satisfy the additional state law requirements, the Ninth Circuit concluded that "under a natural reading of the NVRA, Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." State App. C at 31c.

The Ninth Circuit correctly found three areas of conflict between Proposition 200 and the NVRA.

State App. C at 29c-30c. First, the NVRA's requirement that states "accept and use" the Federal Form is incompatible with Arizona's practice of rejecting the Federal Form when it is not supplemented with additional documentation. State App. C at 31c-32c. Second, Arizona's rejection of the Federal Form due to lack of additional documentation creates a conflict between state and federal registration procedures and is incompatible with the NVRA's delegation of authority to the EAC. State App. C at 34c. Third, the Ninth Circuit found that Proposition 200 conflicted with the NVRA by undermining the NVRA's goal of streamlining the registration process. State App. C at 36c. The Ninth Circuit concluded that "the NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" State App. C at 59c (emphasis added).

Chief Judge Kozinski concurred and joined the majority in concluding the "best construction of the statute" was the preemptive reading of the NVRA. State App. C at 95c. Chief Judge Kozinski did not adopt the novel preemption test urged by Arizona in its Petition but applied the traditional Elections Clause analysis. *Id.* He further explored whether the NVRA's requirement that Arizona "accept and use" the Federal Form should be construed to mean that states cannot impose additional requirements on registrants who submit the Federal Form. He reviewed the text of the NVRA, which he found "readily susceptible to the interpretation of the majority" and noted that requiring registrants to meet two sets of

proof requirements would be "redundant" and "secondary" and would "sacrific[e] national uniformity." State App. C at 89c.

Two dissenting judges wrote that because one section of the NVRA allows states the option, in addition to accepting and using the Federal Form, of creating a state form for voter registration in federal elections, Arizona may apply its state requirements to the Federal Form. The dissent concluded that its interpretation is "loyal to the wording" of the NVRA "because the Federal Form requirements must be met. State form requirements, constrained by § 1973gg-7(b), *are added to* the Federal Form requirements." State App. C at 111c (emphasis added).

REASONS FOR DENYING THE WRIT

The Ninth Circuit correctly applied the Court's well-established analysis in Elections Clause cases to conclude that Arizona may not reject Federal Forms that are sufficient under the NVRA but do not meet additional state documentation requirements. There is no conflict between the Ninth Circuit's decision and the decisions of other courts. In any event, review of that question would be premature because no other courts of appeals have considered whether states may condition acceptance of the Federal Form on the registrant's provision of additional documents. Furthermore, this case is a poor vehicle to address the issue because adopting the analysis urged by Arizona

will not change the outcome of the case. Finally, the district court has already implemented a remedy following issuance of the Ninth Circuit's mandate and further review will create voter confusion in the upcoming General Election process. This case does not warrant review by the Court.

I. The Ninth Circuit Applied Well-Established Rules For Elections Clause Preemption.

The Court's Elections Clause preemption analysis rests on the core concept that Congress has the power to regulate the broad scope of activities involved in federal elections:

> This Court has recognized the breadth of those powers: 'It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'

Roudebush v. Hartke, 405 U.S. 15, 24-25 (1972) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

The Ninth Circuit correctly noted that "the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections." State App. C at 16c (citing *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995)).

The Ninth Circuit properly concluded that "a state's role in the creation and implementation of federal election procedures under the Elections Clause is to administer the elections through its own procedures until Congress deems otherwise; if and when Congress does so, the states are obligated to conform to and carry out whatever procedures Congress requires." State App. C at 14c-15c (citing *Foster v. Love*, 522 U.S. 67, 69 (1997)). The Ninth Circuit also correctly observed that "[w]hile Congress may not always choose to exercise this power, '[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.'" State App. C at 13c-14c (citing *Ex Parte Siebold*, 100 U.S. 371, 384 (1879)). In its analysis, the Ninth Circuit followed an unbroken line of cases holding that Congressional enactments in the area of federal elections displace state laws. *See, e.g., Foster*, 522 U.S. at 69 (explaining that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices" (citation omitted)).

The Ninth Circuit properly rejected Arizona's attempt to impose a completely new preemption analysis that is inconsistent with the Court's

decisions in Elections Clause cases. As an initial matter, in its petition, Arizona is unable to identify a single Elections Clause case to support its contention that "this Court has consistently applied traditional preemption doctrine to its interpretation of the Elections Clause" including a "presumption against preemption." Petition for Writ of Certiorari at 16-17, *Arizona v. Gonzalez*, No. 12-71 (filed July 16, 2012) [hereinafter "Pet."].[8]

None of the cases on which Arizona relies examined whether a congressional enactment regulating federal elections preempted state law. *See, e.g., McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 101 (2003) *overruled by Citizens United v. Fed. Election Comm'n,* 130 S. Ct. 876 (2010) (declining to analyze whether the Bipartisan Campaign Reform Act exceeds Congress's Elections Clause authority because "Title I only regulates private parties' conduct, imposing no requirements upon States or state officials.");

[8] Arizona's reliance on *United States v. Classic* is unavailing. *Classic* and other cases hold that state election rules must yield to congressional enactments. *See United States v. Classic*, 313 U.S. 299, 315 (1941) ("While, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states, this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by s 2 of Art. I, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under s 4 and its more general power under Article I, s 8, clause 18 of the Constitution 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' " (internal citations omitted)).

see also Smiley v. Holm, 285 U.S. 355, 372-73 (1932) (concluding that "there is nothing in article 1, s 4" that precludes a state from using its normal legislative process to conduct congressional redistricting.).

The lack of cases supporting Arizona's position is not surprising given that "the Supreme Court has never articulated any doctrine giving deference to the states under the Elections Clause." State App. C at 91c (Kozinski, J., concurring). Specifically, Arizona can find no decision by the Court that supports its claim that Elections Clause cases start with the assumption that the "historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pet. at 16 (citing only *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), which is not an Elections Clause case). This is because the regulation of federal elections was never an historic power of the states. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995) (explaining that "the power to add qualifications [to serve in Congress] is not part of the original powers of sovereignty that the Tenth Amendment reserved to the States" because the states have no reserved powers related to the national government).

Arizona also offers no support for its argument that the Ninth Circuit departed from traditional Elections Clause analysis in concluding that Congress has the power to determine what information is sufficient to establish eligibility to vote in federal elections. Arizona contends that the Ninth Circuit

should have concluded that "Arizona law requiring prospective voters to provide sufficient evidence of citizenship and the NVRA's requirement that States accept and use the Federal Form can be enforced without conflict." Pet. at 13. However, this conclusion would have required the Ninth Circuit to make a dramatic departure from the established interpretation of the Elections Clause and limit Congressional authority to simply designing the Federal Form and nothing more. In essence, Arizona argues that there is no conflict because Congress can only create the Federal Form while Arizona decides what information is required to establish eligibility to vote in federal elections. Because the Ninth Circuit applied the traditional understanding of the scope of Congressional authority under the Elections Clause, it concluded that Congress may decide what information is necessary to register to vote in federal elections and that a law requiring more documentation from Federal Form applicants is preempted.

Where a state law interferes with Congress's regulation of federal elections, it is preempted. *See, e.g., Ex Parte Siebold*, 100 U.S. 371, 384 (1879) (upholding Congressional authority to impose penalties for violating laws governing the election of congressional members and stating that "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them."); *Roudebush v. Hartke*, 405 U.S. 15 (1972) (concluding that the Elections Clause does not prohibit state election recounts because recounts do

not interfere with Congress's power to decide its membership); *Foster v. Love*, 522 U.S. 67, 69 (1997) (striking down a 1978 Louisiana law that set an open primary election in October because it conflicted with the federally-mandated election day in November) (citing *U.S. Term Limits,* 514 U.S. at 832-33).

Thus, the Ninth Circuit correctly applied this Court's long-standing precedent in Elections Clause preemption to conclude that the NVRA superseded that portion of Proposition 200's registration provision that interfered and conflicted with the requirement that states "accept and use" the Federal Form.

The Ninth Circuit also correctly rejected Arizona's argument that requiring Arizona to "accept and use" Federal Forms would frustrate enforcement of the Help America Vote Act ("HAVA"), 42 U.S.C. §§ 15301-15545. When it enacted HAVA in 2002, Congress again considered the contents of the Federal Form. The provisions of HAVA added several new check boxes to the Federal Form (one of which affirms U.S. citizenship). Nothing in HAVA authorizes states to impose their own documentation requirements onto the Federal Form.

HAVA's drafters anticipated that the statute might intersect with other related laws. Arizona simply cannot avoid HAVA's express language providing that HAVA does not "supersede, restrict or limit the application of NVRA." State App. C at 40c (quotations omitted) (citing 42 U.S.C. § 15545(a)). Although

Arizona suggests that HAVA reconsidered or superseded Congress's decision to allow a voter to register with the Federal Form without documentation of citizenship, the Ninth Circuit correctly found that the express language of HAVA provides otherwise.

II. There Is No Division Among The Circuits.

There is no basis for Arizona's claim that the Ninth Circuit's analysis "conflicts with the Elections Clause analysis of other federal circuit courts." Pet. at 13. On the contrary, the Ninth Circuit applied the same traditional Elections Clause preemption test as other circuits.

After passage of the NVRA, Illinois, California, and Michigan challenged the NVRA as unconstitutional because it infringed on state power, "conscripting state agencies, personnel, and funds to further a federal purpose, thereby impinging upon basic principles of federalism and violating the Tenth Amendment." *See Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997) (the NVRA "does not unconstitutionally impinge upon Michigan's sovereignty by affecting state election procedures"). Each time, however, the challenges failed. *ACORN*, 129 F.3d at 836; *see also Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (the alteration of state registration rules by the NVRA is "exactly what is contemplated by Article I section 4."); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995) *cert. denied*,

516 U.S. 1093 (1996). In each case, the courts of appeals relied on the Elections Clause to justify the extent and nature of Congressional regulation of various aspects of the election process. *See, e.g., ACORN*, 129 F.3d at 836 (holding passage of NVRA was proper exercise of Congressional power to regulate federal elections).

In later NVRA cases, the courts of appeals have consistently held that Congress has the authority to direct states to register individuals and to determine the process for registration. *See, e.g., Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (NVRA can hold state officials responsible for implementing the state's function under the NVRA and explaining that "the plain-statement rule does not apply to the NVRA."). In *United States v. Missouri*, the Eighth Circuit found that the NVRA's use of the word "shall" required states to carry out the NVRA's mandate to "conduct a general program" of voter registration, explaining "[w]e see no ambiguity in Congress's intent to place this additional requirement on the states in their conduct of federal elections." 535 F.3d 844, 850 (8th Cir. 2008). The Fourth Circuit also recently held that the NVRA overrides inconsistent state practices. *See Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331, 339 (4th Cir. 2012) (rejecting state's claim that privacy concerns justified withholding records made public by the NVRA, explaining "It is not the province of this court, however, to strike the proper balance between transparency and voter privacy. That is a policy question properly decided by

the legislature, not the courts, and Congress has already answered the question by enacting [the NVRA].").

The Ninth Circuit's decision here is also consistent with decisions of the other courts of appeals that have soundly rejected attempts by states to read the terms of the NVRA out of existence in order to allow states to impose policies inconsistent with the NVRA. For example, in *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 382-83 (6th Cir. 2008) the Sixth Circuit held that the NVRA preempted Michigan's practice of removing certain new voters from the rolls after they had registered. Michigan argued that it could remove these voters because it did not consider them "registrants" as that term is used in the NVRA. The Sixth Circuit rejected the state's attempt to re-define "registrant" in a way that allowed it to remove voters who are protected by the NVRA, reasoning:

> A federal statute cannot adequately protect the rights of individuals from actions of the state if the state is free to define the protected class as broadly or as narrowly as it chooses. If we were to adopt defendants' view, states could completely ignore the requirements of the NVRA, 42 U.S.C. § 1973gg-6(d). We refuse to import such a reading to this statute.

U.S. Student Ass'n Found. v. Land, 546 F.3d at 382-83.[9]

In *Charles H. Wesley Educ. Found., Inc. v. Cox*, the Eighth Circuit held that the NVRA preempted Georgia's policy of rejecting voter registration forms mailed in bulk, reasoning:

> In essence, [Georgia's] claim is that the NVRA only requires that mailed registration forms be accepted when delivered both in a timely fashion *and* pursuant to additional state requirements. *See* 42 U.S.C. § 1973gg-6(a)(1)(B),(D) . . . This argument is unpersuasive. By requiring the states to accept mail-in forms, the Act does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates.

Charles H. Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1354 (11th Cir. 2005). Similarly here, the Ninth Circuit correctly rejected the argument by Arizona that the NVRA's "accept and use" language is unclear. The Ninth Circuit rejected as "strain[ed]" Arizona's

---

[9] The Sixth Circuit's earlier decision in *McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000), did not employ a different preemption analysis. Pursuant to the NVRA, the Federal Form promulgated by the EAC includes a box in which the registrant writes an "ID Number." In *McKay*, the Sixth Circuit concluded that Tennessee was authorized by the federal Privacy Act to require its registrants to place their social security numbers in the box on the Federal Form and "Congress intended [the Privacy Act] to survive the more general provisions of the NVRA." *Id.* at 756 (6th Cir. 2000).

claim that it accepted and used the Federal Form, albeit only when the registrant also included documentation required by state law. State App. C at 31c-32c. The Ninth Circuit concluded, using an analysis similar to that of the Eighth and Sixth Circuits, that allowing Arizona to interpret "accept and use" the Federal Form to include automatically rejecting the Federal Form is not what Congress intended in enacting the NVRA.[10]

The cases relied upon by Arizona to claim that Proposition 200 does not interfere with the NVRA are easily distinguishable. In two cases, which dealt with the federal law establishing a federal election day in November, the courts of appeals concluded that the state early voting laws at issue were not inconsistent with federal law because the election is not decided, and thus candidates are not elected, until voters go to the polls on Election Day. *See Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773,

[10] Similarly, this Court in *Foster v. Love*, 522 U.S. 67, 69 (1997), rejected a claim by Louisiana that even though it elected most candidates for congressional offices in an October primary election, that did not run afoul of the congressional mandate that federal elections be held in November because the state law regulated the "manner" of the election and federal law regulated the "time" of the election. Refusing to accept the state's distorted interpretation of 2 U.S.C. § 7, and characterizing Louisiana's position as "merely wordplay," this Court concluded that "a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act or law in fact to take place on the date chosen by Congress, clearly violates [2 U.S.C.] § 7." *Id.* at 72-73.

774 (5th Cir. 2000) (concluding that "[b]ecause the election of federal officials in Texas is not decided until Texas voters go to the polls on federal election day, we conclude that the Texas early voting scheme is not inconsistent with federal election laws.") and *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1170 (9th Cir. 2001) (concluding that "[w]ithout question, Congress has the authority to compel states to hold these elections on the dates it specifies," but there is no conflict "because in Oregon the 'final selection' cannot be made until the federal election day[.]"). An earlier Seventh Circuit case cited by Arizona similarly held that Congress has authority to impose its own rules for counting ballots in federal elections. *See McIntyre v. Fallahay*, 766 F.2d 1078, 1085 (7th Cir. 1985) (concluding "[a]lthough the rules for counting and not counting ballots therefore are presumptively rules of state law under Art. I, sec. 4, cl. 1, Congress may override these rules under its own power. [No federal law], however, so pervades the field that all competing principles of state law must yield.").

None of the cases cited by Arizona upheld state voter registration practices in the face of a claim that they were inconsistent with the NVRA and none of the cases cited by Arizona support its contention that courts must defer to state laws that are inconsistent with federal laws on the same subject.

Ultimately, the Ninth Circuit's Elections Clause preemption analysis is consistent with the other courts of appeals and particularly with their analysis

in NVRA cases. Not only must states comply with the NVRA's registration mandates, but where state practices conflict or are inconsistent with the NVRA state laws must yield. The Ninth Circuit rightly found no ambiguity in the NVRA's direction that "[e]ach State *shall* accept and use the mail voter registration application form prescribed by the Federal Election Commission. . . ." 42 U.S.C. § 1973gg-4(a)(1) (emphasis added).

III. The Question Presented Does Not Warrant This Court's Attention.

A. This Case Presents No Question Of National Importance And The Issue Raised By Arizona Does Not Require This Court's Immediate Attention.

Elections Clause preemption is conventional and well-established and is not an important, unsettled question of federal law. Because of the consistency with which this and other courts have analyzed preemption under the Elections Clause, there is no need for an immediate definitive interpretation of this NVRA provision, nor is there any reason to believe any court considering the challenge would decide the preemption issue differently. The Ninth Circuit's decision is well reasoned and commanded the en banc panel.

There is also nothing about the facts of this case that make it exceptional or important. Despite Arizona's efforts to portray the Ninth Circuit's decision

as unusual, enforcing the requirement that Arizona accept properly-completed Federal Forms is entirely consistent with other court decisions around the nation that require states to carry out the registration mandates of the NVRA.

Arizona argues that this ruling will "disrupt the delicate balance necessary to maintain federalism principles and interfere with the States' ability to protect the integrity of their elections." Pet. at 13. On the contrary, Elections Clause preemption has been in place for decades without triggering the dire consequences predicted by Arizona. The Ninth Circuit ruling has produced no instability because it was entirely conventional. It is Arizona's approach that would produce both uncertainty and further litigation because it would invite states to layer a myriad of requirements on top of the Federal Form, ostensibly to confirm eligibility, even extending to requirements that registrants submit official mail proving they live at their registration address, submit criminal background checks to confirm that they have no felony convictions and submit mental health evaluations to prove they are competent to vote.[11]

[11] Although the NVRA contemplates that state officials will reject Federal Forms when the applications are incomplete or when the information on the form reveals that the registrant is not eligible to register to vote, the NVRA does not permit states to reject all Federal Forms that fail to meet additional state requirements.

B. Arizona Has Failed To Show That Any Alleged Difference In The Tests For Elections Clause Preemption Has A Significant Practical Effect.

This case is a poor vehicle for reviewing the standard for Elections Clause preemption cases because the question presented is not outcome determinative. Even if Arizona secured the deferential preemption standard it seeks, the result of the case would be the same because the Ninth Circuit concluded that Proposition 200 was conflict preempted.

Arizona's argument in support of granting the Petition ignores the fact that even if the Court were to adopt a test for Elections Clause preemption that is more deferential to states, that test would still require invalidation of state statutes that conflict with federal law. The Court recently affirmed that even in the Supremacy Clause context, imposing state rules on top of federal rules can "conflict with the careful framework Congress adopted." *Arizona v. U.S.*, 132 S. Ct. 2492, 2502-03 (2012) (citing *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) and *Wisconsin Dept. of Indus. v. Gould Inc.*, 475 U.S. 282, 288 (1986)). The Court further noted that "a '[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy.'" *Arizona v. U.S.*, 132 S. Ct. at 2505 (quoting *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 287 (1971)).

Because the Ninth Circuit concluded that Proposition 200 conflicts with the NVRA, Proposition 200 would be invalidated on conflict preemption grounds even under the Supremacy Clause. *See* State App. C at 59c ("[T]he NVRA supersedes Proposition 200's *conflicting* registration requirement for federal elections[.]" (emphasis added)). The conflict that invalidates Proposition 200 does not disappear even if the Ninth Circuit were to give greater deference to Arizona under the Elections Clause.

To the extent that Arizona claims the Ninth Circuit made an error of fact, it is wrong. Arizona argues that as a matter of fact it does "accept and use" the Federal Form even when it rejects every Federal Form that does not meet additional state requirements. *See* Pet. at 4 ("Since the inception of the NVRA, Arizona has used and accepted the Federal Form for voter registration."). No previous court in this case has accepted Arizona's contorted definition of "accept and use." On the contrary, Arizona's contention was rejected by the district court as well as the Ninth Circuit panel and en banc court. *See* Gonzalez ER Tab 3 at 3-4 ("Without this proof, a person may not register to vote. This includes applicants that use the federal voter registration form or postcard but do not include proof of citizenship. . . . If an applicant does not provide proof of citizenship, the applicant is mailed a letter explaining why the application was rejected and instructing the applicant to submit a new registration form with proper proof of citizenship."); State App. A at 8a (noting that Proposition

200 provides that the County Recorder "shall reject any application for registration" that is not accompanied by the additional documentation under Proposition 200).[12] Sitting en banc, the Ninth Circuit found that "Arizona's rejection of every Federal Form submitted without proof of citizenship does not constitute 'accepting and using' the Federal Form." State App. C at 31c.[13] In any event, if Arizona claims that the Ninth Circuit erred in not accepting the fact that

---

[12] Notably, Justice Sandra Day O'Connor (sitting by designation on the Gonzalez II panel) commented during oral argument: "[T]he statute says 'each state shall accept and use' the federal form. Period. Then it says 'in addition to' accepting that form the state can go on and do certain other things. Now suppose we think that's pretty clear? Looks pretty clear to me." Oral Argument at 22:47-23:06, *Gonzalez v. Arizona*, 624 F.3d 1162 (No. 08-17094), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000004290.

[13] Conditioning acceptance of the Federal Form on submission of additional documents is not at all like state laws that require registrants to write a particular identification number in the Federal Form box for "ID Number." For this reason, the assertion of amici, that Proposition 200 is similar to requirements that registrants supply portions of their social security numbers or drivers license numbers (which are required by HAVA in any event) are factually untrue. The Ninth Circuit found that Proposition 200 requires many registrants to locate personal documents, photocopy them and then pay extra postage to mail the documents to the county recorders and that "much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." State App. C at 37c. The fact that tens of thousands of Arizona registrants were rejected after the law went into effect demonstrates that many registrants' drivers licenses alone do not satisfy Proposition 200 requirements.

Arizona accepts and uses the Federal Form, this does not render the case worthy of review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Arizona's further argument that Proposition 200 cannot conflict with the NVRA because it shares the same goals is similarly misplaced. As an initial matter, the Ninth Circuit concluded that Proposition 200 thwarted Congress's purpose in enacting the Federal Form provision. *See* State App. C at 31c-32c ("In contrast, Proposition 200's registration provision directs county recorders to assess an applicant's eligibility based on proof of citizenship information that is *not* requested on the Federal Form, and to reject all Federal Forms that are submitted without such proof. Rejecting the Federal Form because the applicant failed to include information that is not required by that form is contrary to the form's intended use and purpose.").[14]

More importantly, Arizona cannot substitute its own judgment for that of Congress with respect to

[14] Arizona is not aided by claiming that the NVRA "bar[s Arizona] from properly assessing whether an applicant who registers to vote is eligible to vote." Pet. at 28. On the contrary, Congress decided what was necessary to establish eligibility to vote in federal elections and directed the states to "accept and use" Federal Forms and the information they contained for voter registration. *See* 42 U.S.C. § 1973gg-4.

balancing the goals of protecting the integrity of elections and facilitating the registration of eligible voters. Congress chose to balance ensuring election integrity with facilitating voter registration by requiring registrants to check a box asserting their U.S. citizenship on the Federal Form and swearing or affirming their U.S. citizenship under penalty of perjury. The Ninth Circuit correctly observed that "the Elections Clause gives Congress the last word on how this concern [regarding the possibility of registration fraud] will be addressed in the context of federal elections." State App. C at 41c. Arizona must follow the NVRA whether or not it would have balanced the goals differently.[15]

C. The Few Instances Of Non-Citizen Voter Registration In Arizona Do Not Provide A Compelling Reason To Grant The Petition.

Arizona claims an urgent need for this Court to reevaluate its Elections Clause preemption test so that states may prevent non-citizen fraud in voter registration but presents little evidence to support its

[15] Similarly, whether or not Arizona considers the additional requirements of Proposition 200 to be a "burden" or "obstacle" to voting is beside the point. Pet. at 29 (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008)). The Ninth Circuit invalidated Proposition 200's registration requirement as applied to the Federal Form because it conflicted with the NVRA, not because it placed an unconstitutional burden on the right to vote.

assertion. Contrary to Arizona's claim, the district court did not find that voter fraud was a significant problem. Pet. at 8. On the contrary, following trial the district court found that Arizona had produced only a handful of "instances" in which non-citizens had registered to vote and even fewer in which non-citizens cast a ballot. Gonzalez ER Tab 3 at 34. Importantly, the district court cited evidence that the small number of non-citizens who had registered to vote had done so mistakenly and without understanding that they were not eligible. Gonzalez ER Tab 3 at 15-17.

In all, the district court found that Arizona had provided evidence that ten non-citizens were proven to have registered to vote (four of whom had voted) in 2005 and nine non-citizens – were proven to have registered to vote (five of whom had voted) in 2007. Gonzalez ER Tab 3 at 15-17. The evidence amounts to nine voters having cast ballots out of 2,734,108 registered voters in Arizona during this same period.[16] The Ninth Circuit concluded, when denying the stay of its mandate, that "Arizona has not provided persuasive evidence that voter fraud in registration procedures is a significant problem in Arizona; moreover, the NVRA includes safeguards addressing

[16] Arizona Secretary of State, "State of Arizona Registration Report" (June 1, 2008), *available at* www.azsos.gov/election/voterreg/2008-06-01.pdf.

voter fraud." *Gonzalez v. Arizona*, No. 08-17094 at 8 (9th Cir. June 7, 2012) (order denying stay).[17]

The purpose of Proposition 200's registration requirement, as described in the statute, is to combat undocumented immigration. Gonzalez App. 13 ("This state further finds that illegal immigrants have been given a safe haven in this state . . . and that this conduct . . . undermines the security of our borders and demeans the value of citizenship."). However, Arizona can identify no instances in which undocumented immigrants registered or voted in Arizona. Much to the contrary, and as the Arizona Secretary of State's office wrote prior to the passage of Proposition 200, the "strong desire to remain in the United States and fear of deportation outweigh [noncitizen's] desire to deliberately register to vote before obtaining citizenship. Those who are in the county illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation." Gonzalez App. 9.

The scattered instances of non-citizen voter registration fail to establish any pattern of actual

[17] Of the prospective jurors who claimed not to be citizens (thereby avoiding jury duty) and had their registrations canceled, it is unknown whether any of them were actually noncitizens or if they voted. Gonzalez ER Tab 3 at 15-17. Election officials in Arizona's largest county testified that they believed some U.S. citizens claimed not to be citizens in order to avoid jury duty. Gonzalez Tr. Ex. 936, Dep. Karen Osborne, Jan. 14, 2008, at 91:4-9; Gonzalez Tr. Ex. 935, Dep. Jasper Altaha, Jan. 23, 2008, at 7:20-25, 8:1-14.

voter fraud in Arizona, much less that the use of the Federal Form has any relationship to voter fraud in the state.[18] Preserving the integrity of the electoral process is one of the stated purposes of the NVRA, and by all indications it has succeeded in fulfilling that purpose. State App. C at 41c-42c (citing 42 U.S.C. § 1973gg(b)(3)). The Federal Form has been used to register millions of voters nationwide over two decades without the alleged voter fraud problem its detractors feared ever coming to pass. Arizona has presented no evidence of voter fraud through use of the Federal Form, and twenty years of experience demonstrates that no such threat exists.

The EAC is statutorily required to report on the impact of the NVRA every two years and, in the two decades since enactment of the NVRA, it has not identified any election-related fraud associated with the Federal Form. In addition, there is not a single reported case in any state or federal court – in Arizona or anywhere else – where an election was alleged to be compromised by non-citizens improperly registering and voting under the NVRA. As the Ninth

[18] In its petition, Arizona tries to buttress its claims of non-citizen voter fraud by describing unrelated instances in which voter registrations were rejected for incompleteness, illegibility and mistakes in the address. *Compare* Pet. at 8 *with* Gonzalez Tr. Ex. 937, Dep. Karen Osborne, Jan. 23, 2008, at 11:9-17. However, Arizona's county recorders testified that missing names, addresses, and signatures on some registration forms rendered them impossible to process and also that such forms are immediately (and properly) rejected.

Circuit observed below, the NVRA contains numerous safeguards against fraud. *Id.* (citing various provisions of 42 U.S.C. § 1973gg); *see also* U.S. Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010, A Report to the 112th Congress, June 30, 2011* ("EAC Report 2009-2010"), *available at* http://www.eac.gov/registration-data/ (most recent periodic EAC report describing state-by-state registration and measures to maintain accuracy of voter rolls, and reporting no cases of fraud).

Because Arizona cannot demonstrate that its interest in protecting the integrity of elections is not met when registrants use the Federal Form, it cannot claim that the well-established Elections Clause preemption analysis employed by the Ninth Circuit requires alteration. *See Ass'n of Comm. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 795-96 (7th Cir. 1995) (noting that the NVRA contains safeguards against voter fraud and "it is entirely conjectural that they are inferior to the protections that [state] law offers").

IV. The Court Would Benefit From Consideration Of The Legal Issues Presented By Other Circuits.

Arizona's contention that Elections Clause preemption merits immediate review is without merit. In the absence of a circuit split over whether the NVRA preempts state laws adding documentation

requirements to the Federal Form, that issue is best left to percolate in the lower courts.

Kansas and Georgia have enacted registration laws similar to Proposition 200. *See* Ga. Code Ann. § 21-2-216 (2009) and Kan. Stat. Ann. § 25-2309(l)-(u) (2012). If those or later laws are challenged under the NVRA, these cases would allow the Court to wait and see whether a circuit split will ever develop. In the meantime, review in this Court is premature.

V. Granting The Petition Will Cause Voter Confusion In The Upcoming General Election.

On August 15, 2012, following issuance of the Ninth Circuit's mandate and briefing by the parties, the district court ordered Arizona to accept Federal Forms. *See* Gonzalez App. 11. Granting Arizona's Petition will cast doubt on the district court's remedy and introduce confusion into the election process because the newly-registered Federal Form voters, who will have recently become eligible to vote in the General Election (as well as county election officials) will be unsure whether the grant of the Petition invalidates their registrations or whether they may have to re-register in order to vote.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND
NINA PERALES
Counsel of Record
KAROLINA J. LYZNIK
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

ORTEGA LAW FIRM, PC
DANIEL R. ORTEGA, JR.
361 E. Coronado Rd.
Phoenix, AZ 85004

PERKINS COIE
KARL J. SANDSTROM
607 14th St. NW
Washington, DC 20005

Attorneys for Jesus M. Gonzalez; Bernie Abeytia; Debbie Lopez; Georgia Morrison Flores; Southwest Voter Registration Education Project; Valle Del Sol; Friendly House; Chicanos Por La Causa, Inc.; Arizona Hispanic Community Forum; Common Cause; Project Vote

[SEAL] U.S. ELECTION ASSISTANCE COMMISSION
1225 NEW YORK AVENUE, N.W., SUITE 1100
WASHINGTON, D.C. 20005

Tel: (202) 566-3100 www.eac.gov
Fax: (202) 566-3127 Toll free: 1 (866) 747-1471

March 6, 2006

Jan Brewer
Arizona Secretary of State
1700 West Washington Street, 7th Floor
Phoenix, AZ 85007-2888

Dear Secretary Brewer,

This letter responds to your office's December 12, 2005 e-mail to the U.S. Election Assistance Commission (EAC) requesting that the EAC apply Arizona state policy (derived from Proposition 200) to the Federal Mail Voter Registration Form ("Federal Registration Form" or "Federal Form"). Specifically, the inquiry sought to apply proof of citizenship requirements for Arizona voter registration to the Federal Form registration process. This request was sent by Robert A. Flores, Voter Outreach Coordinator in response to the EAC's requests for updates pertaining to the Federal Registration Form. As you may know, use and acceptance of the Federal Form are mandated by the National Voter Registration Act of 1993, 42 U.S.C. §1973gg *et seq.*, (NVRA). The EAC is the Federal agency charged with regulating the development and substance of the Federal Form. (42 U.S.C. §1973gg-7(a)). After review of your request, the EAC concludes that the policies you propose would effectively result in a refusal to accept and use the Federal

Registration Form in violation of Federal law (42 U.S.C. §1973gg-4(a)).

Arizona's Policy. On December 12, 2005, the office of the Arizona Secretary of State (Chief State Election Official) requested that the EAC apply new Arizona procedural requirements to the Federal Form. These new procedural requirements reflected proof of citizenship provisions recently adopted by the state in Proposition 200. Generally, proposition 200 requires Arizona registrants to submit additional proof of citizenship with their voter registration forms. This usually requires the individual to record, on the form, his or her driver's license number (or non-operating identification license) issued after October 1, 1996. If the registrant cannot provide this information (because they have no license or an older license) he or she will need to provide a copy of an alternative form of identification. These alternative forms include: a birth certificate, passport, certificate of naturalization number and other documents. This portion of Proposition 200 amended Arizona Revised Statute §§ 16-152 and 16-166, which set requirements for the State's registration form and verification of the form. The proposition did not amend Arizona's registration qualifications, found in Arizona Revised Statute §16-101. If Arizona were to apply this policy to its use and acceptance of the Federal Registration Form, the Federal Form's acceptance would be conditioned upon the receipt of supplemental documentation of citizenship. In this way, any registrant who failed to supplement their Federal Registration Form would have

their form rejected, resulting in the loss of voting rights.

Federal Authority To Regulate Elections. It is a well settled matter of Constitutional law that the United States Congress, pursuant to Article I, Section 4 and Article II, Section 1 of the U.S. Constitution, has the authority to pass laws regulating the manner in which Federal elections are held. This Federal authority has been broadly read by the Supreme Court to include the comprehensive Congressional regulation of a States' voter registration process for Federal elections. *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996) (citing, *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Association of Community Organizations for Reform Now v. Edgar*, 56 F.3d 791, 793-794 (7th Cir. 1995) (citing *Smiley*, 285 U.S. at 366, *Ex parte Siebold*, 100 U.S. 371 (1879) and *United States v. Original Knights of the Ku Klux Klan*, 250 F.Supp. 330, 351-355 (E.D.La 1965)); *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1995). The Constitution "explicitly grants Congress the authority either to 'make' laws regarding federal elections . . . or to 'alter' the laws initially promulgated by the states. Thus . . . article I, section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections." *Miller*, *129 F.3d at 836*.

In this way, while Article I, section 2 and the Seventeenth Amendment authorize States to set requirements regarding voter qualifications in a Federal

election (*Edgar* at 794), this does not limit the Federal authority to set voter registration procedures for such elections. *Voting Rights Coalition*, at 1413. This is true even where States have declared voter registration to be a voting qualification (*Wilson*, at 1414) or where Federal registration requirements may indirectly make it more difficult for a State to enforce qualification requirements (*Edgar* at 794-795).

National Voter Registration Act. Consistent with its authority to regulate voter registration in Federal elections, Congress passed the NVRA. The NVRA's regulation of the voter registration process has been specifically and consistently upheld as constitutional by the Courts. *Voting Rights Coalition*, 60 F.3d F.3d 1411; *Edgar*, 56 F.3d 791; *Miller*, 129 F.3d 833. The NVRA mandates that States "*shall accept and use the mail voter registration application proscribed by the U.S. Election Assistance Commission* pursuant to section 9(a)(2) for the registration of voters in elections for Federal office." 42 U.S.C. §1973gg-4(a) (emphasis added). The statute further allows States to create, use and accept their own form (in addition to the Federal form) if it meets the minimum NVRA criteria for the Federal form. 42 U.S.C. § 1973gg-4(b). The EAC is the Federal agency charged with creating and regulating the Federal Form.[1]

[1] The Help America Vote Act amended the National Voter Registration Act transferring regulatory authority over the Federal form to the EAC. (See 42 U.S.C. §15532 and 42 U.S.C. §1973gg-7(a)).

The NVRA requires the Federal Voter Registration Form to specify each voter eligibility requirement, contain an attestation that the applicant meets such requirements, and require the signature of the applicant. 42 U.S.C. §1973gg-7(b)(2), The Help America Vote Act (HAVA) has added the requirement that the Federal form include two check boxes for an applicant to affirm their citizenship and age. 42 U.S.C. §15483(b)(4).

Discussion. While Arizona has authority to determine registrant/voter qualifications, the manner in which it registers voters for Federal elections is subject to Federal regulation. The Federal Government, through the NVRA and the Federal Form has regulated the process of registering voters in Federal Elections. Acceptance of the Federal Form is mandated by the NVRA. The Federal Form sets the proof required to demonstrate voter qualification. No state may condition acceptance of the Federal Form upon receipt of additional proof.

Arizona's voting qualifications remain unchanged and are contained in Arizona Revised Statute §16-101.[2] These qualifications are presently reflected on the Federal Form. The statutory changes Arizona has

[2] These qualifications require a registrant to demonstrate that he or she is (1) a citizen of the United States, (2) at least 18 years of age before the date of the next general election, (3) a resident of Arizona for at least twenty-nine days, (4) has not been convicted of a felony unless restored to civil rights and (5) has not been determined mentally incapacitated.

initiated in Proposition 200, which require some residents to submit documentary evidence of citizenship, do not alter the state's voter qualifications. Rather, the statutory scheme is merely an additional means to document or prove the existing voter eligibility requirement of citizenship. As such, Arizona's statutory changes deal with the manner in which registration is conducted and are, therefore, preempted by Federal law. The NVRA, HAVA and the EAC have determined the manner in which voter eligibility shall be documented and communicated on the Federal form. State voter requirements are documented by the applicant via a signed attestation and, in the case of citizenship, a "checkbox." (42 U.S.C. §1973gg-7(b)(2) and 42 U.S.C. §15483(b)(4)). This Federal scheme has regulated the area and preempts state action. Congress specifically considered whether states should retain authority to require that registrants provide proof of citizenship, but rejected the idea as "not necessary or consistent with the purpose of [the NVRA]."[3] The state may not mandate additional registration procedures that condition the acceptance of the Federal Form. The NVRA requires States to both "accept" and "use" the Federal Form. Any Federal Registration Form that has been properly and completely filled-out by a qualified applicant and timely received by an election official must be accepted in full satisfaction of registration requirements. Such

[3] *Joint Conference Committee Report on the National Voter Registration Act of 1993*, H. Rept. 103-66 (April 28, 1993).

acceptance and use of the Federal Form is subject only to HAVA's verification mandate. (42 U.S.C. §15483).

Conclusion. While Arizona may apply Proposition 200 requirements to the use of its state registration form in Federal elections (if the form meets the minimum requirements of the NVRA), the state may not apply the scheme to registrants using the Federal Registration Form. Consistent with the above, Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form. If you have any questions, please contact the undersigned at (202) 566-3100.

/s/ [Illegible]
Thomas R. Wilkey
Executive Director

Office of the Secretary of State [SEAL]

State Capitol, West Wing, 1700 West
Washington, Phoenix, Arizona 85007-2808
Telephone: (602) 542-4285 or
Fax: (602) 542-1575 or 542-6172

July 18, 2001

Mr. Rick Cunnington
981 West Graythorn Place
Oro Valley, AZ 85737

Dear Mr. Cunnington:

Your letter has been referred to me for a response to your question about what is done by county recorders to deter non-citizens from registering to vote. The National Voter Registration Act of 1993 prohibits the states from requiring people who are registered to vote to prove that they are United States Citizens.

This office, in conjunction with the county recorders, re-designed the voter registration form to make it clear that falsely signing the form is a class 5 felony. The new form also asks the potential voters to check a box if they are a US Citizen and informs them that if they check the "No" box, they should not complete the form. These instructions are also in the Spanish language.

If it comes to the attention of the county recorders or this office that someone has fraudulently registered, the matter is referred to the county attorney where the registration occurred. There have been a some

prosecutions for false registration, which have resulted in convictions.

Federal law requires that a non-citizen must be deported for registering to vote. It is generally believed that the strong desire to remain in the United States and fear of deportation outweigh the desire to deliberately register to vote before obtaining citizenship. Those who are in the country illegally are especially fearful of registering their names and addresses with a government agency for fear of detection and deportation.

Thank you for your question and interest in the voter registration process.

Very truly yours,

/s/ Jessica Funkhauser
JESSICA FUNKHAUSER
State Election Director

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CV-06-1268-PHX-ROS **ORDER** (Filed Aug. 15, 2012)

On August 6, 2012, the Court issued its order regarding Defendants' handling of voter registrations using the National Voter Registration Form under the National Voter Registration Act (the "Federal Form"). The Court provided general guidance and directed the parties to attempt to reach an agreement on specific issues. The parties were not able to agree and have now submitted competing proposals. Defendants have also moved for reconsideration of certain aspects of the Court's August 6, 2012 Order. Having considered the parties' proposals, Defendants' motion for reconsideration, and the entire record, the Court enters the following Order.

IT IS ORDERED the Motion for Entry of Preliminary Order (Doc. 1071) is **DENIED AS MOOT**.

IT IS FURTHER ORDERED the Motion to Withdraw (Doc. 1072) is **DENIED** based on the failure to comply with Local Rule 83.3.

IT IS FURTHER ORDERED the Motion for Reconsideration (Doc. 1088) is **DENIED**.

IT IS FURTHER ORDERED AS FOLLOWS:

A. Defendants shall not reject Federal Forms from those who seek to register to vote for the reason that they have not provided proof of citizenship under A.R.S. § 16-166(F).

B. For the reasons explained in this Court's Order of August 6, 2012, the Ninth Circuit's decision is retroactive. (Doc. 1082). But in the interest of maintaining the accuracy of the voter registration database, and in the interest of avoiding the imposition of significant hardships on Defendants, retroactive registration of applicants using the Federal Form is limited to forms submitted on or after August 1, 2011.

C. For each voter registration applicant who applied to register to vote on or after August 1, 2011, and who used a Federal Form that was rejected solely due to A.R.S. § 16-166(F), Defendants shall determine whether the applicant was subsequently registered to vote. If not, Defendants shall create a new record for a successful registration of that individual and promptly notify that new registrant of his or her eligibility to vote for candidates for state and federal office.

D. Defendants shall complete the registration required by Paragraph C above on or before August 21, 2012.

E. As previously stated in this Court's order of August 6, 2012, Defendants shall ensure widespread distribution of the Federal Form through all reasonable channels, including channels the Secretary of State has identified as appropriate

for distribution of the State Form. Thus, no later than August 31, 2012 Defendants shall make the Federal. Form available where they make the State Form available, including websites.

F. Where Defendants provide paper copies of the State Form they must also provide paper copies of the Federal Form, in both Spanish and English, with the applicable instructions. Defendants need not provide the entire instruction booklet as large portions of that booklet do not apply to Arizona.

G. All state and local employees responsible for processing voter registrations must immediately be informed of the change in the law and instructed to comply with the new procedures.

H. Defendants have not presented the specific changes they propose making to the Secretary of State Election Procedures Manual but some of the changes proposed by Plaintiffs go beyond what is necessary to comply with the law. Defendants will be permitted to make the changes they deem appropriate but they must do so on an expedited basis. Therefore, within sixty days of this Order Defendants shall revise the Secretary of State Election Procedures Manual to reflect compliance with federal law.

DATED this 15th day of August, 2012.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

AN INITIATIVE MEASURE

AMENDING SECTIONS 16-152, 16-166 AND 16-579, ARIZONA REVISED STATUTES; AMENDING TITLE 46, CHAPTER 1, ARTICLE 3, ARIZONA REVISED STATUTES, BY ADDING SECTION 46-140.01; RELATING TO THE ARIZONA TAXPAYER AND CITIZEN PROTECTION ACT.

Be it enacted by the People of the State of Arizona:

Section 1. Short title

This act may be cited as the "Arizona Taxpayer and Citizen Protection Act".

Sec. 2. Findings and declaration

This state finds that illegal immigration is causing economic hardship to this state and that illegal immigration is encouraged by public agencies within this state that provide public benefits without verifying immigration status. This state further finds that illegal immigrants have been given a safe haven in this state with the aid of identification cards that are issued without verifying immigration status, and that this conduct contradicts federal immigration policy, undermines the security of our borders and demeans the value of citizenship. Therefore, the people of this state declare that the public interest of this state requires all public agencies within this state to cooperate with federal immigration authorities to discourage illegal immigration.

Sec. 3. Section 16-152, Arizona Revised Statutes, is amended to read:

16-152. Registration form

A. The form used for the registration of electors shall contain:

1. The date the registrant signed the form.

2. The given name of the registrant, middle name, if any, and surname.

3. Complete address of actual place of residence, including street name and number, apartment or space number, city or town and zip code, or such description of the location of the residence that it can be readily ascertained or identified.

4. Complete mailing address, if different from residence address, including post office address, city or town, zip code or other designation used by the registrant for receiving mail.

5. Party preference.

6. Telephone number, unless unlisted.

7. State or country of birth.

8. Date of birth.

9. Occupation.

10. Indian census number (optional to registrant).

11. Father's name or mother's maiden name.

12. The last four digits of the registrant's social security number (optional to registrant).

13. A statement as to whether or not the registrant is currently registered in another state, county or precinct, and if so, the name, address, county and state of previous registration.

14. A statement that the registrant is a citizen of the United States.

15. A statement that the registrant will be eighteen years of age on or before the date of the next general election.

16. A statement that the registrant has not been convicted of treason or a felony, or if so, that the registrant's civil rights have been restored.

17. A statement that the registrant is a resident of this state and of the county in which the registrant is registering.

18. A statement that executing a false registration is a class 6 felony.

19. The signature of the registrant.

20. If the registrant is unable to sign the form, a statement that the affidavit was completed according to the registrant's direction.

21. A statement that if an applicant declines to register to vote, the fact that the applicant has declined to register will remain confidential and will be used only for voter registration purposes.

22. A statement that if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes.

23. A STATEMENT THAT THE APPLICANT SHALL SUBMIT EVIDENCE OF UNITED STATES CITIZENSHIP WITH THE APPLICATION AND THAT THE REGISTRAR SHALL REJECT THE APPLICATION IF NO EVIDENCE OF CITIZENSHIP IS ATTACHED.

B. A duplicate voter receipt shall be provided with the form that provides space for the name, street address and city of residence of the applicant, party preference and the date of signing. The voter receipt is evidence of valid registration for the purpose of casting a ballot to be verified as prescribed in section 16-584, subsection B.

C. The state voter registration form shall be printed in a form prescribed by the secretary of state.

D. The county recorder may establish procedures to verify whether a registrant has successfully petitioned the court for an injunction against harassment pursuant to section 12-1809 or an order of protection pursuant to section ~~12-1810 or~~ 13-3602 and, if verified,

to protect the registrant's residence address, telephone number or voting precinct number, if appropriate, from public disclosure.

Sec. 4. Section 16-166, Arizona Revised Statutes, is amended to read:

16-166. Verification of registration

A. Except for the mailing of sample ballots, a county recorder who mails an item to any elector shall send the mailing by nonforwardable first class mail marked with the statement required by the postmaster to receive an address correction notification. If the item is returned undelivered, the county recorder shall send a follow-up notice to that elector within three weeks of receipt of the returned notice. The county recorder shall send the follow-up notice to the address that appears on the general county register or to the forwarding address provided by the United States postal service. The follow-up notice shall include a registration form and the information prescribed by section 16-131, subsection C and shall state that if the elector does not complete and return a new registration form with current information to the county recorder within thirty-five days, the name of the elector will be removed from the general register and transferred to the inactive voter list.

B. If the elector provides the county recorder with a new registration form, the county

recorder shall change the general register to reflect the changes indicated on the new registration. If the elector indicates a new residence address outside that county, the county recorder shall forward the voter registration form to the county recorder of the county in which the elector's address is located. If the elector provides a new residence address that is located outside this state, the county recorder shall cancel the elector's registration.

C. The county recorder shall maintain on the inactive voter list the names of electors who have been removed from the general register pursuant to subsection A or E of this section for a period of four years or through the date of the second general election for federal office following the date of the notice from the county recorder that is sent pursuant to subsection E of this section.

D. On notice that a government agency has changed the name of any street, route number, post office box number or other address designation, the county recorder shall revise the registration records and shall send a new verification of registration notice to the electors whose records were changed.

E. The county recorder on or before May 1 of each year preceding a state primary and general election or more frequently as the recorder deems necessary may use the change of address information supplied by the postal service through its licensees to identify registrants whose addresses may have changed. If

it appears from information provided by the postal service that a registrant has moved to a different residence address in the same county, the county recorder shall change the registration records to reflect the new address and shall send the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the registration information. If the registrant fails to return the form postmarked not later than twenty-nine days before the next election, the elector shall be removed from the general register and transferred to the inactive voter list. If the notice sent by the recorder is not returned, the registrant may be required to provide affirmation or confirmation of the registrant's address in order to vote. If the registrant does not vote in an election during the period after the date of the notice from the recorder through the date of the second general election for federal office following the date of that notice, the registrant's name shall be removed from the list of inactive voters. If the registrant has changed residence to a new county, the county recorder shall provide information on how the registrant can continue to be eligible to vote.

F. THE COUNTY RECORDER SHALL REJECT ANY APPLICATION FOR REGISTRATION THAT IS NOT ACCOMPANIED BY SATISFACTORY EVIDENCE OF UNITED STATES CITIZENSHIP. SATISFACTORY

EVIDENCE OF CITIZENSHIP SHALL INCLUDE ANY OF THE FOLLOWING:

1. THE NUMBER OF THE APPLICANT'S DRIVER LICENSE OR NONOPERATING IDENTIFICATION LICENSE ISSUED AFTER OCTOBER 1, 1996 BY THE DEPARTMENT OF TRANSPORTATION OR THE EQUIVALENT GOVERNMENTAL AGENCY OF ANOTHER STATE WITHIN THE UNITED STATES IF THE AGENCY INDICATES ON THE APPLICANT'S DRIVER LICENSE OR NONOPERATING IDENTIFICATION LICENSE THAT THE PERSON HAS PROVIDED SATISFACTORY PROOF OF UNITED STATES CITIZENSHIP.

2. A LEGIBLE PHOTOCOPY OF THE APPLICANT'S BIRTH CERTIFICATE THAT VERIFIES CITIZENSHIP TO THE SATISFACTION OF THE COUNTY RECORDER.

3. A LEGIBLE PHOTOCOPY OF PERTINENT PAGES OF THE APPLICANT'S UNITED STATES PASSPORT IDENTIFYING THE APPLICANT AND THE APPLICANT'S PASSPORT NUMBER OR PRESENTATION TO THE COUNTY RECORDER OF THE APPLICANT'S UNITED STATES PASSPORT.

4. A PRESENTATION TO THE COUNTY RECORDER OF THE APPLICANT'S UNITED STATES NATURALIZATION DOCUMENTS OR THE NUMBER OF THE CERTIFICATE OF NATURALIZATION. IF ONLY THE NUMBER OF THE CERTIFICATE OF NATURALIZATION IS PROVIDED, THE APPLICANT SHALL NOT BE INCLUDED IN THE REGISTRATION ROLLS UNTIL THE NUMBER OF THE CERTIFICATE OF NATURALIZATION IS VERIFIED WITH THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE BY THE COUNTY RECORDER.

5. OTHER DOCUMENTS OR METHODS OF PROOF THAT ARE ESTABLISHED PURSUANT TO THE IMMIGRATION REFORM AND CONTROL ACT OF 1986.

6. THE APPLICANT'S BUREAU OF INDIAN AFFAIRS CARD NUMBER, TRIBAL TREATY CARD NUMBER OR TRIBAL ENROLLMENT NUMBER.

G. NOTWITHSTANDING SUBSECTION F OF THIS SECTION, ANY PERSON WHO IS REGISTERED IN THIS STATE ON THE EFFECTIVE DATE OF THIS AMENDMENT TO THIS SECTION IS DEEMED TO HAVE PROVIDED SATISFACTORY EVIDENCE OF CITIZENSHIP AND SHALL NOT BE REQUIRED TO RESUBMIT

EVIDENCE OF CITIZENSHIP UNLESS THE PERSON IS CHANGING VOTER REGISTRATION FROM ONE COUNTY TO ANOTHER.

H. FOR THE PURPOSES OF THIS SECTION, PROOF OF VOTER REGISTRATION FROM ANOTHER STATE OR COUNTY IS NOT SATISFACTORY EVIDENCE OF CITIZENSHIP.

I. A PERSON WHO MODIFIES VOTER REGISTRATION RECORDS WITH A NEW RESIDENCE BALLOT SHALL NOT BE REQUIRED TO SUBMIT EVIDENCE OF CITIZENSHIP. AFTER CITIZENSHIP HAS BEEN DEMONSTRATED TO THE COUNTY RECORDER, THE PERSON IS NOT REQUIRED TO RESUBMIT SATISFACTORY EVIDENCE OF CITIZENSHIP IN THAT COUNTY.

J. AFTER A PERSON HAS SUBMITTED SATISFACTORY EVIDENCE OF CITIZENSHIP, THE COUNTY RECORDER SHALL INDICATE THIS INFORMATION IN THE PERSON'S PERMANENT VOTER FILE. AFTER TWO YEARS THE COUNTY RECORDER MAY DESTROY ALL DOCUMENTS THAT WERE SUBMITTED AS EVIDENCE OF CITIZENSHIP.

Sec. 5. Section 16-579, Arizona Revised Statutes, is amended to read:

16-579. Procedure for obtaining ballot by elector

A. Every qualified elector, before receiving his ballot, shall announce his name and place of residence in a clear, audible tone of voice to the election official in charge of the signature roster or present his name and residence in writing AND SHALL PRESENT ONE FORM OF IDENTIFICATION THAT BEARS THE NAME, ADDRESS AND PHOTOGRAPH OF THE ELECTOR OR TWO DIFFERENT FORMS OF IDENTIFICATION THAT BEAR THE NAME AND ADDRESS OF THE ELECTOR. If the name is found upon the precinct register by the election officer having charge thereof, or the qualified elector presents a certificate from the county recorder showing that he is entitled by law to vote in the precinct, the election official in charge of the signature roster shall repeat the name and the qualified elector shall be allowed within the voting area.

B. Any qualified elector who is listed as having applied for an early ballot but who states that he has not voted and will not vote an early ballot for this election or surrenders the early ballot to the precinct inspector on election day shall be allowed to vote pursuant to the procedure set forth in section 16-584.

C. Each qualified elector's name shall be numbered consecutively by the clerks, with the number upon the stub of the ballot delivered to him, and in the order of applications for ballots. The election judge having charge of the ballots shall also write his initials upon the stub and the number of the qualified elector as it appears upon the precinct register. The judge shall give the qualified elector only one ballot, and his name shall be immediately checked on the precinct register.

D. Each qualified elector shall sign his name in the signature roster prior to receiving his ballot, but an inspector or judge may sign the roster for an elector who is unable to sign because of physical disability, and in that event the name of the elector shall be written with red ink, and no attestation or other proof shall be necessary. The provisions of this subsection relating to signing the signature roster shall not apply to electors casting a ballot using early voting procedures.

E. A person offering to vote at a special district election for which no special district register has been supplied shall sign an affidavit stating his address and that he resides within the district boundaries or proposed district boundaries and swearing that he is a qualified elector and has not already voted at the election being held.

Sec. 6. Title 46, chapter 1, article 3, Arizona Revised Statutes, is amended by adding section 46-140.01, to read:

46-140.01. Verifying applicants for public benefits; violation; classification; citizen suits

A. AN AGENCY OF THIS STATE AND ALL OF ITS POLITICAL SUBDIVISIONS, INCLUDING LOCAL GOVERNMENTS, THAT ARE RESPONSIBLE FOR THE ADMINISTRATION OF STATE AND LOCAL PUBLIC BENEFITS THAT ARE NOT FEDERALLY MANDATED SHALL DO ALL OF THE FOLLOWING:

1. VERIFY THE IDENTITY OF EACH APPLICANT FOR THOSE BENEFITS AND VERIFY THAT THE APPLICANT IS ELIGIBLE FOR BENEFITS AS PRESCRIBED BY THIS SECTION.

2. PROVIDE ANY OTHER EMPLOYEE OF THIS STATE OR ANY OF ITS POLITICAL SUBDIVISIONS WITH INFORMATION TO VERIFY THE IMMIGRATION STATUS OF ANY APPLICANT FOR THOSE BENEFITS AND ASSIST THE EMPLOYEE IN OBTAINING THAT INFORMATION FROM FEDERAL IMMIGRATION AUTHORITIES.

3. REFUSE TO ACCEPT ANY IDENTIFICATION CARD ISSUED BY THE STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE, INCLUDING A

DRIVER LICENSE, TO ESTABLISH IDENTITY OR DETERMINE ELIGIBILITY FOR THOSE BENEFITS UNLESS THE ISSUING AUTHORITY HAS VERIFIED THE IMMIGRATION STATUS OF THE APPLICANT.

4. REQUIRE ALL EMPLOYEES OF THE STATE AND ITS POLITICAL SUBDIVISIONS TO MAKE A WRITTEN REPORT TO FEDERAL IMMIGRATION AUTHORITIES FOR ANY VIOLATION OF FEDERAL IMMIGRATION LAW BY ANY APPLICANT FOR BENEFITS AND THAT IS DISCOVERED BY THE EMPLOYEE.

B. FAILURE TO REPORT DISCOVERED VIOLATIONS OF FEDERAL IMMIGRATION LAW BY AN EMPLOYEE IS A CLASS 2 MISDEMEANOR. IF THAT EMPLOYEE'S SUPERVISOR KNEW OF THE FAILURE TO REPORT AND FAILED TO DIRECT THE EMPLOYEE TO MAKE THE REPORT, THE SUPERVISOR IS GUILTY OF A CLASS 2 MISDEMEANOR.

C. THIS SECTION SHALL BE ENFORCED WITHOUT REGARD TO RACE, RELIGION, GENDER, ETHNICITY OR NATIONAL ORIGIN. ANY PERSON WHO IS A RESIDENT OF THIS STATE SHALL HAVE STANDING IN ANY COURT OF RECORD TO BRING SUIT AGAINST ANY AGENT OR AGENCY OF THIS STATE OR ITS POLITICAL SUBDIVISIONS TO REMEDY

ANY VIOLATION OF ANY PROVISION OF THIS SECTION, INCLUDING AN ACTION FOR MANDAMUS. COURTS SHALL GIVE PREFERENCE TO ACTIONS BROUGHT UNDER THIS SECTION OVER OTHER CIVIL ACTIONS OR PROCEEDING PENDING IN THE COURT.

Sec. 7. Severability

If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.