No. 12-71

In The
Supreme Court of the United States

STATE OF ARIZONA, et al.,

Petitioners,

v.

INTER TRIBAL COUNCIL OF ARIZONA, INC., et al., and JESUS M. GONZALEZ, et al.,

Respondents.

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

BRIEF FOR RESPONDENTS INTER TRIBAL COUNCIL OF ARIZONA, INC., LEAGUE OF WOMEN VOTERS OF ARIZONA, ARIZONA ADVOCACY NETWORK, STEVE M. GALLARDO, LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA, AND HOPI TRIBE

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CORPORATE DISCLOSURE STATEMENT

The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; League of United Latin American Citizens Arizona; and League of Women Voters of Arizona are nongovernmental corporations. They have no parent organizations and no stock.

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INTRODUCTION

The Elections Clause of the Constitution (Art. I, sec. 4, cl. 1) grants Congress plenary authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives." In 1993, Congress concluded that action was necessary to address a national problem regarding a complicated and restrictive maze of State voter registration laws for Federal elections, and so enacted the National Voter Registration Act ("NVRA"). 42 U.S.C. § 1973gg *et seq*. Congress' object was to reduce the obstacles to voter registration to a minimum, while protecting the integrity of the election process.

The NVRA establishes, *inter alia*, a mail-in system of voter registration for Federal elections. The NVRA charges a Federal agency, the United States Election Assistance Commission ("EAC"), with the responsibility to "develop" a uniform, national mail-in registration form ("Federal Form" or "Form"). 42 U.S.C. § 1973gg-7(a)(2). The EAC is to undertake this task "in consultation with" the States, *id.*, but the States may not alter the Form once prescribed. With regard to verification of voting eligibility, the NVRA provides that Federal Form applicants must attest, under oath, to their voting qualifications, including U.S. citizenship. The NVRA further requires the States to "accept and use" the EAC-prescribed Form. 42 U.S.C. § 1973gg-4(a)(1).

This case concerns an Arizona law, adopted in 2004, which requires election officials to "reject" all voter registration applications, including Federal

Forms, not accompanied by the newly-defined "satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). The State-mandated "evidence" is more than that required by the Federal Form. Applicants who do not comply with this procedure must file an entirely new registration application, providing the "satisfactory evidence," before they are registered to vote. Arizona asked the EAC to revise the Federal Form (for use in the State) to incorporate the new procedure. The EAC declined. Arizona, however, continued to routinely reject fully-completed Federal Forms which did not satisfy the State's supplemental verification provision.

The Arizona law, insofar as it is applied to Federal Form applicants, conflicts with the NVRA and, under this Court's Elections Clause jurisprudence, is void to that extent. Neither Arizona nor the other States may unilaterally supplement the Federal Form requirements established by the EAC by refusing to "accept and use" the EAC-prescribed Form. Arizona, however, seeks to do precisely that. This conduct, if allowed, would substantially eviscerate the mail-in registration system established by Congress since that system, in significant part, relies upon the establishment and use of a national, uniform registration form.

STATEMENT OF THE CASE

I. The National Voter Registration Act Of 1993, And The Help America Vote Act Of 2002

A. Overview of the NVRA

Congress enacted the NVRA to "establish procedures to increase the number of eligible citizens who register to vote," while "ensur[ing] that accurate and current voter registration rolls are maintained" and "protect[ing] the integrity of the electoral process." 42 U.S.C. § 1973gg(b). The NVRA expands the methods by which persons may register to vote in Federal elections, and also specifies procedures to ensure that citizens have full access to the new registration methods. In particular, the NVRA mandates three registration methods – registration by mail, registration through motor vehicle offices, and registration at other governmental offices (including public assistance and disability offices), 42 U.S.C. § 1973gg-2(a) – and provides specific procedures for implementation of each of these registration methods.[1] 42 U.S.C. §§ 1973gg-3 to -5.

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[1] Congress exempted from NVRA coverage certain States that do not employ a voter registration system or that allow so-called "same-day" voter registration when individuals appear to vote at an election. 42 U.S.C. § 1973gg-2(b). As a result, the NVRA does not apply to six States: Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. U.S. Dept. of Justice, The National Voter Registration Act of 1993 (NVRA), http://www.justice.gov/crt/about/vot/nvra/nvra_faq.php (last visited Jan. 11, 2013).

Congress premised the NVRA on three findings: first, "the right of citizens of the United States to vote is a fundamental right"; second, governments at all levels have "the duty . . . to promote the exercise of that right"; and, third, "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 42 U.S.C. § 1973gg(a).[2] With regard to the latter of these findings, Congress explained that it sought to remedy the "complicated maze of local [registration] laws and procedures, in some cases as restrictive as the . . . practices [outlawed by the Voting Rights Act] . . . to reduce these obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9, at 3 (1993),

[2] The district court below found that American Indians have suffered from a history of discrimination in voting in Arizona, citing the State's denial of the right to vote to American Indian citizens between 1924 and 1948, the State's use of a literacy test from 1909 until it was banned by the Voting Rights Act Amendments of 1970, and the State's use of English-only elections until Arizona was covered by the language minority provisions of the Voting Rights Act. App. 316-317. *See Porter v. Hall*, 34 Ariz. 308, 271 P. 411, 419 (1928) (holding American Indians residing on reservations are "not entitled to vote"), *overruled by Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948). *See also Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975) (county supervisorial districts discriminated against Navajo citizens); *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972) (state redistricting plan intentionally discriminated against Navajo Nation).

reprinted in 1993 U.S.C.C.A.N. 105, 106-07 ("House Rep.").[3]

B. The National Mail-In Registration System

The integral components of the NVRA's mail-in registration system, as subsequently modified by the Help America Vote Act of 2002 ("HAVA"), include a national and uniform voter registration application prescribed by a Federal agency, 42 U.S.C. § 1973gg-7(a)(2), and the requirement that States "accept and use the mail voter registration form prescribed by the [agency]." 42 U.S.C. § 1973gg-4(a)(1).[4] In addition, States must "make [Federal Forms] available for distribution through governmental and private entities, with particular emphasis on making them

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[3] Previously, in 1975, Congress amended the Voting Rights Act to establish a permanent, nationwide ban on certain enumerated discriminatory "tests and devices" for conducting voter registration for Federal, State, and local elections. 42 U.S.C. § 1973aa.

[4] Congress explained the utility of the new national, uniform form as follows:

> The requirements that States use a uniform mail registration application form serves to augment the extensive outreach features of the "motor-voter" and agency-based registration procedures. Uniform mail forms will permit voter registration drives through a regional or national mailing, or for more than one State at a central location, such as a city where persons from a number of neighboring States work, shop or attend events.

House Rep. at 10, 1993 U.S.C.C.A.N. at 114; S. Rep. No. 103-6, at 26 (1993) (same).

available for organized voter registration programs." 42 U.S.C. § 1973gg-4(b).[5]

Congress adopted several measures to ensure that the new voter registration Form is (1) national and uniform, (2) harmonized with the pre-existing system whereby each State and the District of Columbia has its own voter registration form, and (3) simple and easy to use while allowing only eligible persons to register to vote.

First, to ensure that the Federal Form is national and uniform, the NVRA includes two complementary requirements. The statute delegates exclusive authority to "develop" the Federal Form to a Federal agency, acting pursuant to the content guidelines specified by Congress. 42 U.S.C. § 1973gg-7(a)(2) & (b). Specifically, the NVRA provides that: "The Election Assistance Commission – . . . shall develop a mail voter registration application form for elections for Federal office." *Id.*[6] In addition, the

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[5] The NVRA similarly mandates procedures for citizen access to the other two new registration methods. This includes the requirement that applications for a driver's license "serve as an application for voter registration . . . unless the applicant fails to sign the voter registration application," 42 U.S.C. § 1973gg-3(a)(1), and the requirement that the Federal Form or a State "equivalent" form be used for voter registration at other State and local offices where registration for Federal elections is required. 42 U.S.C. § 1973gg-5(a)(6).

[6] The NVRA originally granted this authority to the Federal Election Commission. Pub. L. No. 103-31, § 9, 107 Stat. 77, 87 (1993). In 2002, HAVA transferred this authority to a new agency created by that statute, the United States Election Assistance Commission. Pub. L. No. 107-252, § 802(b), 116 Stat. 1666, 1726, *amending* 42 U.S.C. § 1973gg-7(a).

NVRA mandates that States "shall *accept and use* the mail voter registration application form *prescribed by the [EAC]* . . . for registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1) (emphasis added).[7]

Second, to ensure coordination with the States, the NVRA gives States a voice in the process by which the Federal Form is developed, but not control over the Federal Form or authority to supplement the Federal Form requirements. The NVRA specifies that, in "develop[ing] a mail voter registration application form," the EAC shall act "in consultation with the chief election officers of the States." 42 U.S.C. § 1973gg-7(a). The NVRA also authorizes States to "develop and use [their own] mail voter registration form . . . for the registration of voters in elections for Federal office," subject to two conditions: States may use their own form only "[i]n addition to accepting and using" the Federal Form; and the State form must "meet[] all of the [content] criteria" the NVRA specifies for the Federal Form. 42 U.S.C. § 1973gg-4(a)(2).

Third, to ensure that the Federal Form is simple and easy to use, and to ensure that only eligible persons register to vote, the NVRA provides both general and specific directions to the EAC with regard to its development of the Form. The general directions are as follows:

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[7] 42 U.S.C. § 1973gg-4 and § 1973gg-7 are quoted in full in the Addendum to this brief, at 1a-4a.

> The mail voter registration form developed [by the EAC] – (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.

42 U.S.C. § 1973gg-7(b)(1).

The specific content-directions address the manner in which Federal Form applicants verify their qualifications to vote. The NVRA provides that the Form "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." 42 U.S.C. § 1973gg-7(b)(2). The NVRA further provides that the Federal Form "may not include any requirement for notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3).

Subsequently, in HAVA, Congress also required that the Federal Form include the questions, "'Are you a citizen of the United States of America?'" and "'Will you be 18 years of age on or before election day?'," along with "[t]he statement 'If you checked "no" in response to either of these questions, do not complete this form.'" 42 U.S.C. §

15483(b)(4)(A).[8] HAVA provides that if an applicant fails to answer the citizenship question, "the registrar shall notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law)." 42 U.S.C. § 15483(b)(4)(B).[9]

In sum, the NVRA and HAVA address the manner of conducting elections for Federal office insofar as use of the Federal Form for voter registration is concerned. In so doing, the statutes specifically recognize the States' universal requirement of United States citizenship as a

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[8] 42 U.S.C. § 15483(b)(4) also is quoted in the Addendum, at 4a-6a.

[9] HAVA provides an additional content requirement for registration applications for Federal elections, which applies to both the Federal Form and State registration forms, which is that applicants are to provide their driver's license number or the last four digits of their social security number, if available, or in certain States their full social security number, if available. 42 U.S.C. § 15483(a)(5). Also, HAVA specifies that individuals who register by mail, and who are registering for the first time in a State, must provide certain identification at the time of voting to verify their identity and, in the alternative, may provide this verification with their mail-in registration application. 42 U.S.C. § 15483(b)(1)-(3). The NVRA includes detailed provisions relating to the administration of voter registration lists for Federal elections, 42 U.S.C. § 1973gg-6, and HAVA requires States to implement computerized statewide lists of registered voters for Federal elections. 42 U.S.C. § 15483(a).

qualification for voting, while not prescribing the qualifications for voting in Federal elections.[10]

C. The Federal Form Prescribed by the EAC

The EAC has defined by regulation the requirements for applicants to successfully complete the Federal Form in order to register to vote. 11 C.F.R. § 9428.4.[11] The current version of the Federal Form is included in an appendix to the Ninth Circuit's *en banc* decision, Pet. App. 63c-64c, and is available on the EAC's website.[12]

The EAC regulations identify all items of information that an applicant may need to provide in order to register using the Federal Form. 11 C.F.R. § 9428.4(a). Consistent with the NVRA and HAVA, this does not include any requirement that individuals provide any evidence of their qualifications to vote beyond their attestation of eligibility, under penalty of perjury. *Id.* Specifically,

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[10] The NVRA further provides for criminal penalties for "knowingly and willfully" submitting a registration application that is "false, fictitious, or fraudulent under the laws of the State in which the election is held." 42 U.S.C. § 1973gg-10(2).

[11] The EAC regulations regarding the Federal Form are quoted in full in the Addendum to this brief, at 6a-11a.

[12] http://www.eac.gov (follow "National Voter Registration Act" hyperlink, then follow "National Mail Voter Registration Form"). In addition to English, the EAC makes the Form available in Spanish, Chinese, Japanese, Korean, Tagalog and Vietnamese. *Id.*

the EAC regulations address verification of voting eligibility as follows:

> The form shall . . . :
>
> (1) Specify each eligibility requirement (including citizenship). The application shall list U.S. Citizenship as a universal eligibility requirement and include a statement that incorporates by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompany[ing] state instructions; (2) Contain an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements.

11 C.F.R. § 9428.4(b).

The EAC regulations further identify three narrowly-defined items of applicant information which may vary by the applicant's State of residence. These are: the "[v]oter identification number"[13]; the voter's "[p]olitical party preference, for an applicant in a closed primary state"; and the voter's "[r]ace/ethnicity, if applicable for the applicant's state of residence." 11 C.F.R. § 9428.4(a)(6-8). To accommodate these variations, the regulations provide that the EAC shall incorporate State-specific instructions in the Federal Form to explain these

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[13] *See supra* note 9.

registration requirements. 11 C.F.R. § 9428.3(b); 11 C.F.R. § 9428.4(a). The State-specific instructions also serve to identify the voting eligibility requirements of each State. 11 C.F.R. § 9428.3(b). The EAC regulations do not allow for any variance in the procedures by which applicants verify their voting eligibility, and thus the State-specific instructions do not include any directions regarding such verification. 11 C.F.R. § 9428.4.[14] The EAC regulations also specify that the Form is to include general instructions, as well. 11 C.F.R. § 9428.3(a).

The Federal Form follows the format specified in the EAC's regulations. 11 C.F.R. § 9428.5. The Form has a postcard format with four sections that fold together, including a front section for the address and stamp, two sections for entry of information by the applicant, and one section reserved for potential use by registration officials. Pet. App. 63c-64c. The principal section for applicant-entry begins by asking whether the applicant is a citizen, and whether the applicant will be 18 years old on or before election day, and instructs persons who check "no" to either or both of these questions to not complete the Form. This section also provides for such information as name, address, and date of birth, and includes a place for the applicant to sign the Form to attest,

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[14] Consistent with these provisions, the regulations also require that States promptly inform the EAC of any change in their requirements concerning voting eligibility, voter identification number, statement of party preference, and statement of race/ethnicity, but do not require that States provide any information concerning verification of voting eligibility. 11 C.F.R. § 9428.6.

under penalty of perjury, to the accuracy of the information provided and to the individual's voting eligibility (including U.S. citizenship). The second applicant-entry section includes space for the applicant to potentially address several specialized circumstances (*e.g.*, a prior registration address).

The Federal Form includes general instructions, Pet. App. 61c-62c, and State-specific instructions, Pet. App. 67c-84c, prepared by the EAC. The general instructions walk applicants through the information to be provided on the Form that does not vary by State. The general instructions include, with regard to U.S. citizenship, an instruction that only individuals who are U.S. citizens may use the Form, Pet. App. 61c, an instruction to answer the questions at the top of the application with regard to U.S. citizenship and age-eligibility before filling out the form, Pet. App. 62c, and an instruction that applicants should make sure they meet their State's qualifications to vote before signing the Form. *Id.* The State-specific instructions for Arizona provide information about applicants entering an identification number and a choice of a political party, and specify that applicants should not provide race/ethnicity information. These instructions also identify the State's deadline for registering for an election, the State's qualifications for voting, and the mailing address for the Arizona Secretary of State. Pet. App. 67c-68c. Neither the general instructions nor the Arizona-specific instructions make any reference to the "evidence of citizenship" procedure Arizona enacted by Proposition 200.

II. Arizona's Supplemental Verification Of Citizenship Requirement

A. Arizona's Change in Procedures for Voter Registration Applicants to Verify U.S. Citizenship

In November 2004, Arizona voters amended the state election code by adopting Proposition 200, one portion of which added a new procedure by which voter registration applicants are to verify that they meet Arizona's pre-existing qualification of United States citizenship. Prior to the adoption of Proposition 200, applicants verified their citizenship (and compliance with Arizona's other voting qualifications) by signing the Federal Form, or by signing the State registration form which likewise required that applicants attest that the information provided was accurate, subject to potential felony prosecution for making a false statement. App. 165, 249.

Proposition 200 requires that applicants, in addition to attestation, verify their eligibility to vote by submitting "satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). Under Proposition 200, county election officials must "reject any application for registration that is not accompanied by [the required evidence of citizenship]." *Id.* Proposition 200 generally "grandfathered-in" all Arizona residents who were registered to vote on the law's effective date, *i.e.*, these individuals were "deemed to have provided satisfactory evidence of citizenship" by having complied with the former attestation procedure, and

were not required to comply with the new procedure. Ariz. Rev. Stat. § 16-166(G).[15]

Prior to the district court's entry of an injunction in these cases on August 15, 2012 (pursuant to the Ninth Circuit mandate), App. 381-84, Arizona required that applicants completing the Federal Form comply with Proposition 200's supplemental verification procedure. This meant that, if an applicant submitted the Federal Form without "satisfactory evidence" of citizenship, county election officials rejected the Form entirely, and the applicant was required to submit a new application, with the requisite evidence, in order to register to vote. App. 251 ("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").

The particular type of evidence required by Proposition 200 varies depending on the circumstances of individual citizens. Individuals possessing a driver's license or state identification card which "indicates . . . that the person has provided satisfactory proof of United States citizenship" (which includes those issued in Arizona after October 1, 2006) may comply by entering their

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[15] However, individuals registered on Proposition 200's effective date who subsequently "chang[e] voter registration from one county to another," Ariz. Rev. Stat. § 16-166(G), must comply with the new "evidence of citizenship" procedure. Ariz. Rev. Stat. § 16-166(F) & (G) are quoted in the Addendum, at 13a-14a.

license or identification card number on the application. Ariz. Rev. Stat. § 16-166(F)(1).

Proposition 200 states that applicants who are members of an Indian tribe may provide a "bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number." Ariz. Rev. Stat. § 16-166(F)(6). However, Bureau of Indian Affairs cards and tribal treaty cards are not in use in Arizona. App. 260. Moreover, the Havasupai Tribe and Navajo Nation do not issue tribal enrollment cards, and cards issued by the Hopi Tribe, Yavapai-Apache Nation, and Tonto Apache Tribe do not include enrollment numbers. *Id.*[16]

Applicants who are unable to satisfy the "evidence of citizenship" requirement by the preceding means must furnish documentation of citizenship, such as a copy of their birth certificate, a copy of their passport, or their naturalization documents, together with the voter registration application. Ariz. Rev. Stat. § 16-166(F)(2)-(5). Proposition 200 provides no exception for indigency or for reimbursement of costs incurred in obtaining the requisite documentation.[17]

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[16] Tribal enrollment cards are free for most tribes, but for the Hopi Tribe, the first card is free and an additional card is $15; for the Yavapai-Apache Nation, a card costs $5; and for the Colorado River Indian Tribe, the first card is free and an additional card is $12. App. 260.

[17] The district court below found that, after Proposition 200 became effective on January 25, 2005, App. 248, and until September 2007, the new "evidence of citizenship" requirement resulted in the rejection of 31,550 registration applications (in the 14 of Arizona's 15 counties reporting data); this number

Proposition 200 did not alter the qualifications for voting in Arizona, which are specified by Article VII, section 2(A) of the Arizona Constitution (entitled "Qualifications of voters; disqualification"). In particular, the Arizona Constitution provides that each voter must "be a citizen of the United States."[18] This requirement has been part of the Arizona Constitution since Arizona gained statehood on February 14, 1912.[19]

Arizona does not require that registration applicants provide verification of compliance with the State's other voting qualifications beyond the attestation of eligibility under penalty of prosecution. Thus, the State does not require any documentation that applicants are 18 or older, or that those

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excluded forms where the applicant answered "no" to the U.S. citizenship question. App. 263. Only approximately 30% of the 31,550 applicants went on to successfully register as of the time of trial, in July 2008. App. 264.

[18] Article VII, section 2 is quoted in the Addendum, at 12a. In addition to U.S. citizenship, voters also must be at least 18 years old and satisfy any statutory durational residency requirement, may not be "adjudicated [as] incapacitated," and may not be "convicted of treason or felony, . . . unless restored to civil rights." The citizenship requirement, and the other qualifications set forth in Article VII, section 2 are repeated in the Arizona Elections and Electors Code, Ariz. Rev. Stat. § 16-101 (that section also defines what it means to be a resident of Arizona, provides for a general durational residency requirement of 29 days preceding an election, and specifies that a voter must be "able to write his name or make his mark, unless prevented from so doing by physical disability").

[19] Ariz. Const. art. VII, § 2 (1910) *available at* http://azmemory.azlibrary.gov/cdm/compoundobject/collection/archgov/id/218/rec/4, at p. 27.

individuals who were disqualified from voting because of a felony conviction have had their civil rights restored.[20]

The "Findings and declaration" section of Proposition 200[21] states that the initiative was placed on the ballot in 2004 as part of the ongoing debate in Arizona regarding the issue of persons residing in the State "who do not have a lawful right to be in this country." *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).[22] The ballot pamphlet prepared by the Secretary of State included arguments submitted by various individuals and organizations in support of and in opposition to the initiative.[23]

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[20] Arizona Secretary of State, Voter Registration and Education, http://www.azsos.gov/election/VoterRegistration.htm #How (last visited Jan. 11, 2013) (includes link to Arizona State registration form).

[21] Arizona Secretary of State, 2004 Ballot Propositions—Proposition 200, *available at* http://www.azsos.gov/election/2004/info/PubPamphlet/english/prop200.htm.

[22] That case dealt with a statute enacted by the Arizona Legislature in 2010 which sought to directly regulate immigration policy. The Court held that the law was preempted, in significant part, by Federal immigration law. 132 S. Ct. at 2510. The 2010 law did not deal with any issue relating to the regulation of elections for Federal office in Arizona.

[23] Proposition 200, *supra* note 20.

B. Arizona's Request That the EAC Incorporate the State's "Evidence of Citizenship" Procedure into the Federal Form

On December 12, 2005, over a year after Proposition 200 was passed and in response to an inquiry from the EAC, the Arizona Secretary of State sent an e-mail to the EAC asking the agency to alter the Federal Form, insofar as it is used in Arizona, to incorporate the State's new procedure. App. 181. On March 6, 2006, the EAC responded, in a multi-page letter written by its Executive Director, denying the Secretary's request and explaining the basis for the denial. App. 181-87. The EAC stated its conclusion as follows: "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." App. 187. The Arizona Secretary of State then wrote two letters to the EAC asking that this decision be reconsidered, App. 188-89 & 216-20, but the EAC declined. App. 225.

Despite the EAC's determination, Arizona employed the Proposition 200 verification procedure for individuals completing a Federal Form both before and after its request to the EAC. Arizona did not challenge, under the Administrative Procedure Act, 5 U.S.C. § 702, the EAC's determination not to alter the Federal Form.

III. Other States' Voter Registration Procedures For Verifying U.S. Citizenship

In addition to Arizona, three States recently have adopted "evidence of citizenship" procedures for registering to vote which go beyond the attestation procedure set forth by Congress for the Federal Form – Alabama (2011), Georgia (2009), and Kansas (2011). Brief of Alabama, Georgia, Kansas, Michigan, Oklahoma, and Texas as Amici Curiae Supporting Petitioners, at 20.[24] Arizona, however, is the only State which conducted the 2012 general election using the supplemental procedure.[25]

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[24] This *amicus* brief incorrectly advises that Tennessee also recently adopted such a provision. The Tennessee procedure does not govern the information that registration applicants must provide, and instead requires that the state coordinator of elections review the State registration list to identify individuals who are registered to vote and who potentially may not be U.S. citizens. Tenn. Code Ann. § 2-2-141.

[25] Neither Alabama nor Georgia has implemented its "evidence of citizenship" procedure. *See* State of Alabama Mail-in Voter Registration Form, *available at* http://www.sos.state.al.us/downloads/election/vr/nvra-2.pdf (does not mention the statutory "evidence of citizenship" procedure) (last visited Jan. 11, 2013); State of Georgia Application for Voter Registration, *available at* http://sos.georgia.gov/elections/voter_registration/GA%20VOTER%20REGISTRATION%20%20APP%28Fill_2007%29.pdf (likewise makes no mention of the applicant satisfying the statutory "evidence of citizenship" procedure) (last visited Jan. 11, 2013). (The Georgia procedure was administratively precleared under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, but the Alabama provision apparently has not. Br. of Ala. *et al.* at 20, n.10.) The Kansas provision did not become effective until January 1, 2013. Kan. Stat. Ann. § 25-2309(u).

Accordingly, the vast majority of the States to which the NVRA applies, and the District of Columbia, rely on the attestation procedure Congress set forth in the NVRA and HAVA for individuals to verify their U.S. citizenship (and their compliance with other voting eligibility requirements).

PROCEDURAL HISTORY

In May 2006, two groups of plaintiffs filed suit in the U.S. District Court for the District of Arizona challenging, *inter alia*, Arizona's refusal to "accept and use" the Federal Form, in violation of the NVRA, 42 U.S.C. § 1973gg-4(a). *ITCA, et al. v. Brewer*, no. 2:06-cv-1362, Complaint at ¶¶ 81-83 (May 24, 2006) (Docket 1); *Gonzalez, et al. v. Arizona, et al.*, no. 2:06-cv-1268, Complaint at ¶¶ 101-03 (May 9, 2006) (Docket 1). The cases were immediately consolidated by the district court.

The *ITCA* group includes: American Indian citizens represented by the Inter Tribal Council of Arizona, Inc. (a nonprofit corporation which advocates on behalf of its 20-member Indian Tribes) and the Hopi Tribe; three nonpartisan advocacy groups which seek to increase citizen participation in Arizona's electoral process (the League of Women Voters of Arizona, the League of United Latin American Citizens Arizona ("LULAC"), and the Arizona Advocacy Network, which is a coalition of nonprofit public interest organizations); and an individual member of the Arizona Legislature. *ITCA, et al. v. Brewer*, no. 2:06-cv-1362, Complaint at ¶¶ 1-

7.[26] The *ITCA* Complaint alleges that imposing the new "evidence of citizenship" procedure on persons using the Federal Form injures individual members of ITCA's constituent Tribes, the Hopi Tribe, and LULAC because of the difficulties many members face in obtaining the requisite evidence, and also injures the Hopi Tribe and the plaintiff organizations because it causes them to expend additional resources to carry out their voter registration programs. *Id.* at ¶¶ 27-32. The *Gonzalez* plaintiffs include several individuals and advocacy organizations (the Southwest Voter Registration Education Project, Valle Del Sol, Friendly House, Chicanos Por La Causa, Inc., and the Arizona Community Forum), who similarly allege that the supplemental procedure injures individuals and voter registration programs. *Gonzalez, et al. v. Arizona, et al.*, no. 2:06-cv-1268, Complaint at ¶¶ 5-14, 68-70.[27]

Defendants include the State of Arizona and the Arizona Secretary of State, sued in his official capacity (hereinafter, "Arizona"). Defendants also include Arizona County Recorders and Elections Directors for 13 of Arizona's 15 counties, also sued in their official capacities (hereinafter, "Arizona Counties" or "Counties").

Arizona and the Counties take the instant appeal from an *en banc* decision of the Ninth Circuit

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[26] One nonprofit organization that originally was named was voluntarily dismissed from the case.

[27] Two of the original individual plaintiffs were voluntarily dismissed, and another organizational plaintiff, Project Vote, was added after suit was filed.

in which that court held, by a vote of eight to two, "that the NVRA supersedes Proposition 200's conflicting registration requirement for federal elections," as applied to the Federal Form. Pet. App. 59c.[28] The preceding Ninth Circuit panel also reached the same conclusion, Pet. App. 78a, in a decision authored by Circuit Judge Ikuta and joined by Justice O'Connor, sitting by designation. Pet. App. 5a.[29]

The *en banc* court, in an opinion by Judge Ikuta, undertook a three-step analysis of whether the NVRA supersedes the Arizona procedure, as applied to the Federal Form. The Ninth Circuit "first consider[ed] whether the framework of the Elections Clause or the Supremacy Clause [Art. VI, cl. 2] properly governed [the] question [presented]." Pet. App. 11c. The court undertook a detailed analysis of both clauses, Pet. App. 11c-17c, and concluded that the Elections Clause provided the proper basis for analysis. Pet. App. 17c. The court explained that the "Elections Clause affects . . . an area in which the states have no inherent or reserved power: the regulation of federal elections," Pet. App. 16c; States lack such power since "federal elections did not exist prior to the formation of the federal government." *Id.* The Ninth Circuit contrasted the Elections Clause

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[28] The *en banc* court affirmed the district court's ruling that another provision of Proposition 200, concerning voter identification at the polls, is lawful. Pet. App. 59c. Plaintiffs did not petition this Court for a review of that ruling.

[29] Chief Judge Kozinski dissented from the panel decision. Pet. App. 79a. However, as discussed below, Judge Kozinski then joined in the *en banc* holding. Pet. App. 89c.

with the very different Supremacy Clause. Whereas the Elections Clause functions in the Federal sovereign's own particular realm, the Supremacy Clause functions in "our system of dual sovereignty," *id.*, to mediate the relationship between the Federal government and the States. Thus, "special guidelines" apply to addressing issues in that context, *id.*, but those guidelines do not apply to Elections Clause questions. Pet. App. 16c.

Second, the Ninth Circuit analyzed the "approach for determining whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections." Pet. App. 19c-20c. After reviewing this Court's decisions – particularly, *Ex Parte Siebold*, 100 U.S. 371 (1879), and *Foster v. Love*, 522 U.S. 67 (1997) – the Court identified the following governing principles: Federal and State laws should be understood to "comprise a single system of federal election procedures"; whether Federal law supersedes a particular State law should be "based on a natural reading of the two laws"; and Federal law supersedes in those instances where "the two statutes do not operate harmoniously in a single procedural scheme." Pet. App. 20c.

Finally, the Ninth Circuit applied this Elections Clause analysis to the NVRA and the Arizona procedure, and concluded that these provisions not only "do not operate harmoniously," they "are seriously out of tune with each other." Pet. App. 30c. In particular, the court held that, "under a natural reading of the NVRA," Pet. App. 31c, there was a "direct conflict" between the NVRA's mandate

that Arizona election officials "accept and use" the Federal Form, 42 U.S.C. § 1973gg-4(a)(1), and "Arizona's rejection of every Federal Form submitted without proof of citizenship." *Id.* Furthermore, "Arizona's insistence on engrafting an additional requirement on the Federal Form, even in the face of the EAC's rejection of its proposal, accentuates the conflict between the state and federal procedures." Pet. App. 34c. More broadly speaking, the court concluded that "Proposition 200's registration provision is discordant with the NVRA's goal of streamlining the registration process," Pet. App. 36c, because it "makes the Federal Form much more difficult to use. . . . [M]uch of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision." Pet. App. 36c-37c.[30]

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[30] The *en banc* court rejected the argument, relied upon heavily by the two dissenters, that Arizona may incorporate its supplemental procedure into the Federal Form because the NVRA allows States to implement their own mail-in form for Federal elections, and because the NVRA purportedly allows States to implement a supplemental verification procedure as part of such a form. The majority disagreed, citing the fact that the NVRA specifically provides that use of any State form must be "in addition to" the Federal Form, 42 U.S.C. § 1973gg-4(a)(2), Pet. App. 33c-34c, and that the NVRA "entrusted . . . to the EAC," not the States, the decision as to what provisions may be incorporated into the Federal Form. Pet. App. 35c-36c. The court also noted that it was not deciding whether the NVRA allows Arizona to incorporate its procedure into its State mail-in form for Federal elections, Pet. App. 35c, since neither group of plaintiffs "challenge[d] Proposition 200's registration provision as applied to Arizona's State Form." Pet. App. 29c n.24.

The Ninth Circuit recognized the validity of "Arizona's concern about fraudulent voter registration." Pet. App. 41c. As a factual matter, however, "Congress was well aware of the problem of voter fraud when it passed the [NVRA] and provided for numerous fraud protections in the [Act]." *Id.* The Ninth Circuit listed many of these protections, including the requirement that registration applications for Federal elections be signed under penalty of perjury. *Id.* n.28. As a legal matter, moreover, "the Elections Clause gives Congress the last word on how [the voter fraud] concern will be addressed" regarding elections for Federal office. Pet. App. 41c.

Chief Judge Kozinski filed a concurring opinion. He agreed that the result turned on the meaning of the NVRA's "accept and use" requirement as to the Federal Form. Pet. App. 89c. Unlike the other Ninth Circuit judges in the majority, however, he believed that this language, "as a linguistic matter," could be read either way, as precluding or not precluding Arizona from applying its supplemental procedure to the Federal Form. *Id.* He therefore proceeded to examine the NVRA's legislative history, and concluded that this history plainly demonstrates that Arizona was violating the "accept and use" requirement because "both chambers [of Congress had] affirmatively rejected efforts to authorize precisely what Arizona is seeking

to do." Pet. App. 94c. Accordingly, Judge Kozinski joined in the *en banc* ruling. Pet. App. 95c.[31]

Judge Rawlinson, joined by Judge N.R. Smith, dissented from the NVRA ruling. Pet. App. 100c.[32] They concluded that Arizona is allowed to apply Proposition 200 to the Federal Form under the NVRA's "accept and use" requirement, Pet. App. 105c-106c, and under the NVRA provision specifying that States may implement their own mail-in registration form for Federal elections "in addition to" the Federal Form. Pet. App. 102c-103c.

Arizona and the Arizona Counties sought a stay of the Ninth Circuit's mandate, which was denied by the *en banc* court and then by this Court. 133 S. Ct. 55 (2012). Arizona and the Counties petitioned for a writ of certiorari, which was granted.

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[31] Judge Kozinski explained that his *en banc* concurrence was consistent with his prior dissent as a member of the earlier three-judge panel because the two courts were called upon to decide different legal issues. The *en banc* court was required "to construe the [NVRA] de novo." Pet. App. 94c. On the other hand, the panel was "bound by the law of the circuit and the law of the case," Pet. App. 94c-95c, because an earlier Ninth Circuit panel had held (at the preliminary injunction stage of these cases) that the NVRA did not supersede Proposition 200 as to the Federal Form. Accordingly, in his panel dissent, Judge Kozinski simply "deferred to the earlier panel's construction." Pet. App. 95c. That, of course, was no longer a consideration once the cases were heard *en banc*. In their merits briefs, Arizona and the Counties repeatedly cite to Judge Kozinski's panel dissent rather than to his *en banc* concurrence.

[32] They concurred in the majority's decision upholding Proposition 200's voter identification requirement at the polls. Pet. App. 100c.

133 S. Ct. 476 (2012). While the petition was pending, the district court, pursuant to the Ninth Circuit mandate, entered an injunction on August 15, 2012 barring Arizona from applying the supplemental verification procedure to registration applicants using the Federal Form. App. 381-84.[33]

SUMMARY OF ARGUMENT

Congress has plenary authority under the Elections Clause to make or alter the procedures for conducting elections for Federal office, including the procedures for voter registration. The Constitution grants this authority to Congress in order to advance the unique interest of the Federal government in regulating the manner by which its officials are selected.

The Arizona "evidence of citizenship" procedure conflicts with the NVRA insofar as Arizona conditions its acceptance of completed Federal Forms upon compliance with that procedure. The NVRA requires the State to "accept and use" the Federal Form as prescribed by the EAC, and the Arizona procedure is not incorporated into the Federal Form. Nonetheless, Arizona law requires that election

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[33] As detailed by Arizona and the Arizona Counties in their briefs, the procedural history of these consolidated cases also includes rulings by the district court and several earlier rulings by the Ninth Circuit, as well as a decision by this Court. State Br. at 21-22; County Br. at 25-27. In *Purcell v. Gonzalez*, 549 U.S. 1 (2006), this Court vacated a preliminary injunction entered by a motions panel of the Ninth Circuit shortly before the 2006 general election. The Court in *Purcell* did not address the Elections Clause and NVRA issues presented here.

officials "reject" Federal Forms not accompanied by the State-defined "satisfactory evidence" of citizenship, thus rendering inoperable in Arizona the Federal Form prescribed by the EAC. This usurps the EAC's authority and conflicts with a natural reading of the NVRA's "accept and use" mandate, and thus is void under the Elections Clause.

This conflict in the respective statutory provisions is sufficient to resolve the instant dispute. However, an examination of Congress' object in enacting the NVRA further confirms the existence of the conflict. Arizona's claim to a supervening State authority over the Federal Form directly contravenes Congress' purpose to create a single, national, and uniform voter registration form for Federal elections. Moreover, Congress specifically considered and rejected a provision that would have allowed States to do precisely what Arizona has proposed, *i.e.*, Congress rejected an amendment to the NVRA that would have permitted States to incorporate an "evidence of citizenship" procedure into the Federal Form that goes beyond the attestation procedure.

The NVRA's supersession of the Arizona procedure presents no constitutional concern. Under the Elections Clause, Congress indisputably has the authority to regulate voter registration for Federal elections, and the Arizona provision at issue here is, by its terms, a voter registration procedure. While the Constitution grants States the authority generally to prescribe voter qualifications for Federal elections, neither the NVRA nor the Arizona procedure alters Arizona's voting qualifications. Preemption of the Arizona procedure likewise would

not alter that State's voting qualifications or prevent their enforcement. In short, NVRA preemption in these cases involves an unremarkable application of Congress' Elections Clause authority.

ARGUMENT

I. The Elections Clause, Not The Supremacy Clause, Governs Whether The Arizona Supplemental Verification Procedure Is Superseded By The NVRA

The Elections Clause provides that "the Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations." Art. I, sec. 4, cl. 1. Accordingly, under the Elections Clause, State law controls in the absence of Congressional regulation of the "Times, Places, and Manner" of Federal elections. But when Congress acts in this arena, "[t]he regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative." *Ex parte Siebold,* 100 U.S. at 384. *Accord*, *Foster v. Love*, 552 U.S. at 69; *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 832-833 (1995); *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932).

As this Court explained in *U.S. Term Limits v. Thornton*, the Elections Clause was a central component of the Framers' conception of a "revolutionary . . . [new] Government," 514 U.S. at 803: "the Framers envisioned a uniform national system, rejecting the notion that the Nation was a

collection of States, and instead creat[ed] a direct link between the National Government and the people of the United States." *Id.* The Framers concluded that one defect of the Articles of Confederation was that the States had full authority to refuse to conduct Federal elections, and thus could frustrate the operation of the national government. *Id.* at 808-09. To guard against potential abuse, the Framers gave Congress paramount authority to prescribe national election procedures. *Id*. at 809, *citing* The Federalist No. 59, at 363 (Alexander Hamilton).

The Court in *U.S. Term Limits* held that "[t]he Tenth Amendment," with its reservation of powers to the States, "provides no basis for concluding that the States possess reserved power to add [Federal election provisions] to those that are fixed in the Constitution," because "electing representatives to the National Legislature was a new right, arising from the Constitution itself." *Id.* at 805. As Justice Kennedy similarly observed in his concurring opinion in that case, the election of Federal officials is a "sovereign federal province," *id.* at 841, and "[n]othing in the Constitution . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." *Id.* at 842.

Thus, in its most recent Elections Clause decision, *Foster v. Love*, *supra*, the Court summarily rejected the claim that state sovereignty is a factor in an Elections Clause analysis when Congress acts within the "ample limits of the Elections Clause's

grant of authority." 522 U.S. at 71. *Foster* held that Congress' fixing of a date for Federal elections in 2 U.S.C. § 7 superseded a Louisiana "open primary" law that allowed Senators and Representatives to be elected on a different date. Simply put, the State law "conflict[ed] with federal law and to that extent [was] void." 522 U.S. at 74. The Court's holding that the State law had to give way to the Federal law turned entirely on a comparison of the two measures. *Id.* at 71. Louisiana's "invocations of state sovereignty" in support of its election date law presented "no colorable argument" under the Elections Clause. *Id.*[34]

This is a different analysis than under the Supremacy Clause. The Supremacy Clause embodies the Framers' vision of "a system of dual sovereignty between the States and the Federal Government" regarding the exercise of governmental police powers. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, "[t]he Constitution created a Federal Government of limited powers," *id.*, where, as specified by the Tenth Amendment, the national government's powers are those "'delegated to [it] by the Constitution,'" and authority otherwise is "'reserved to the States . . . or to the people.'" *Id.* (quoting the Tenth Amendment). In light of this constitutional design, respect for state sovereignty and a reluctance to intrude upon the exercise of a

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[34] The Court's conclusion in *Foster* that the State law conflicted with the Federal law did "not depend on discerning the intent behind the federal statute," although the conclusion that the State and Federal statutes conflicted was "buttressed by an appreciation of Congress's object." *Foster*, 522 U.S. at 74.

State's police powers long have animated the Court's Supremacy Clause jurisprudence. See *Rice v. Santa Fe Elec. Corp*. 331 U.S. 218, 230 (1947).

As the Ninth Circuit observed, Pet. App. 16c-17c, this Court has never relied upon Supremacy Clause principles in its Elections Clause decisions. That is as it should be. This Court has recognized, for example, a presumption against preemption under the Supremacy Clause in light of the sovereignty concerns that arise under that Clause. *E.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). But "invocations of state sovereignty" have no place under the Elections Clause. *Foster*, 522 U.S. at 71. The only question under the Elections Clause, as *Foster* shows, is whether the State and Federal statutes, naturally construed, conflict with one another.[35] Arizona is thus wrong to ask the Court to import the more elaborate Supremacy Clause preemption analysis into the straightforward conflict analysis that the Elections Clause demands.[36] The

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[35] This also is how the Ninth Circuit analyzed the preemption question, Pet. App. 20c, in concluding that the Arizona law conflicts with the NVRA. Pet. App. 31c, 34c, 59c.

[36] Nonetheless, Arizona claims that the Court "applied Supremacy Clause preemption principles in *Foster*." State Br. at 32. The State claims to detect the Supremacy Clause at work in *Foster* based upon the Court's statement that "[t]he Fifth Circuit's conception of the issue here . . . [was] exactly right," 522 U.S. at 71, and the fact that the Fifth Circuit discussed the Supremacy Clause in its *Foster* opinion, 90 F.3d 1026, 1031 (1996). State Br. at 32-33. However, what the Court said the Fifth Circuit got "exactly right" was not its Supremacy Clause analysis, but only that "the issue here [was] a narrow one turning entirely on the meaning of the state and federal

Court should reject Arizona's attempt to conflate these distinct provisions of the Constitution.[37]

II. Arizona's Supplemental "Evidence Of Citizenship" Procedure, As Applied To The Federal Form, Conflicts With The NVRA, And Therefore Is Superseded Under The Elections Clause

A. Arizona Does Not "Accept and Use" the Federal Form Within the Meaning of the NVRA

The NVRA gives the EAC responsibility and authority to "develop" a uniform Federal Form for the registration of voters in elections for Federal office. 42 U.S.C. § 1973gg-7(a)(2). The EAC must "consult[]" with the States in developing the Federal Form, *id.*, but final authority to determine the contents of the application, including the Form's instructions, belongs to the EAC alone. As defined by the EAC,

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statutes," 522 U.S. at 71; the Court did not refer to the Fifth Circuit's mode of analysis at all. Arizona also argues that the *Foster* Court did not mention the Supremacy Clause's "presumption against preemption or the plain statement rule" because the Court "did not need to." State Br. at 33 n.6. Be that as it may, it is plainly the case that this Court would have included at least a general discussion of Supremacy Clause principles in *Foster* if the Supremacy Clause had been the basis for, or otherwise bore upon, its decision.

[37] In any event, Arizona concedes that if there is a conflict between the NVRA and the Arizona procedure, the State procedure is preempted regardless of whether the Elections Clause is read in light of this Court's Supremacy Clause jurisprudence. State Br. at 31-34.

the Federal Form "consist[s]" of the portion that registrants fill out, and also "general instructions" and "state-specific" instructions. 11 C.F.R. § 9428.3(a). The NVRA commands that "[e]ach State shall accept and use the mail voter registration application prescribed by the [EAC] . . . for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1).

As provided by the NVRA and HAVA, the Federal Form "prescribed" by the EAC, for use by Arizona and the other covered States in conducting Federal elections, requires that registration applicants attest to their U.S. citizenship under penalty of perjury. The Form does not require that applicants provide any additional evidence of citizenship, and does not reference the Arizona supplemental procedure in any manner.

Arizona claims that rejecting every fully-completed Federal Form that does not provide "satisfactory evidence of United States citizenship," as defined by Ariz. Rev. Stat. § 16-166(F), is consistent with the NVRA's "accept and use" requirement. The *en banc* Ninth Circuit disagreed, concluding 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." Pet. App. 31c. That reading is compelled by the statutory text, its context and structure, and the foundational legislative purpose and intent.

1. The NVRA, by its terms, precludes Arizona from implementing its supplemental verification procedure for Federal Form applicants.

The straightforward provisions of the NVRA demonstrate the conflict between the registration procedure mandated by Congress and Arizona's supplemental verification procedure. It is a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). Accordingly, this Court should look to what Congress meant when it commanded the States to "accept and use" a specified voter registration form for Federal elections. What the words "accept and use" might mean in the abstract is not what is at issue in these cases.

The natural way for election officials to "accept and use [a specified form] for . . . registration," 42 U.S.C. § 1973gg-4(a)(1), which has been fully and correctly filled out according to the instructions that accompany the form, is to register the applicant without requiring anything more from that individual. That is what Congress commanded the States to do with the Federal Form "develop[ed]" by the EAC.

In administrative practice, it is standard for a form with its instructions to constitute a complete package, with nothing else required. *Cf. Sims v.*

Apfel, 530 U.S. 103, 111–12 (2000) (finding no exhaustion requirement where form provided to Social Security claimants required only the identification of a grievance). This practice also is commonplace in judicial procedure. For example, the instructions to a jury must correctly and fully tell the jury how to fill out the verdict form. *See, e.g.*, *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (vacating and remanding judgment imposing death penalty on grounds there was "a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance."). Similarly, if the Court were to direct its clerk to "accept and use" a particular form, with prescribed instructions, for parties seeking membership in the Court's bar, the Court would be justifiably frustrated if the Clerk then rejected applicants based on additional criteria not included in the form or disclosed in the instructions that the Court had prescribed.[38]

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[38] This is all quite different from the analog suggested by Judge Rawlinson below and those included in Arizona's brief. Judge Rawlinson, for example, notes that "merchants may accept and use credit cards, but a customer's production of a credit card in and of itself may not be sufficient. The customer must sign and may have to provide photo identification to verify that the customer is eligible to use the credit card." Pet. App. 105c. Those examples, however, avoid the issue here, which is the sufficiency of a stand-alone *form*.

Congress decided to delegate to the EAC – and not to the individual States – the ultimate authority to "develop" the Form, and thus decide what information was "necessary" to assess eligibility in using the Federal Form. 42 U.S.C. § 1973gg-7(a)(2) & (b)(1). Congress could have elected to give the States the power to dictate their own State-specific instructions for use of the Federal Form. In that regard, the statute, 42 U.S.C. § 1973gg-4(a)(2), authorizes States to use their own mail-in forms for Federal elections but only "[i]n addition to" the Federal Form. Accordingly, it would render Section 4(a)(1) superfluous to construe it as doing no more than allowing States to implement a derivative mail-in registration form to the exclusion of the Federal Form prescribed by the EAC.

2. Other provisions of the NVRA confirm the conflict between the statute and Arizona's supplemental procedure.

The NVRA as a whole reinforces the conflict. As Arizona acknowledges, this Court construes a "particular clause" of a statute, not on its own, but by "tak[ing] in connection with it the whole statute." State Br. at 40 (quoting *Coit Independence Joint Venture v. Fed. Savings & Loan Ins. Corp.*, 489 U.S. 561, 573 (1989)).

The NVRA contemplates that the Federal Form – which Arizona has never challenged – is sufficient to allow election officials to assess eligibility. As the text of the statute indicates, the EAC is to include "such identifying information . . .

and other information . . . necessary to enable the appropriate State election official to assess the eligibility of the applicant," 42 U.S.C. §1973gg-7(b)(1); and the EAC shall "specif[y] each eligibility requirement (including citizenship)," and include "an attestation that the applicant meets each such requirement." 42 U.S.C. §1973gg-7(b)(2).

The statute also requires each State, "[i]n the administration of voter registration for elections for Federal office," to "ensure that any eligible applicant is registered to vote in an election . . . in the case of registration by mail under section 1973gg-4 of this title, if the valid voter registration form of the applicant is [timely] postmarked." 42 U.S.C. 1973gg-6(a)(1)(B). The statute provides that the Federal Form is "valid" and the Form includes the procedures mandated by Congress for applicants to verify that they are "eligible," and so States generally must "ensure" that persons properly and fully completing the Federal Form are registered.[39]

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[39] None of this suggests that a State would be forced to register a person even if it had "absolute documented proof," extrinsic to the Federal Form, that an applicant was not a citizen (or was otherwise eligible). *Contra* State Br. at 2-3. The NVRA addresses what may be demanded *from an applicant* in order to decide if the applicant is eligible. If the State has "absolute" extrinsic evidence that shows that an applicant is not eligible, nothing in the statute bars the State from using it.

3. The conflict between the NVRA and the Arizona procedure is further shown by Congress' purpose in enacting the NVRA and by the statute's legislative history.

Because the text of the NVRA reveals that the Arizona procedure conflicts, the Court need not "discern[] the intent behind the federal statute." *Foster*, 522 U.S. at 73. However, the conclusion that that the NVRA and Arizona law conflict "is buttressed by an appreciation of Congress's object." *Id.*

In order to "increase the number of eligible citizens who register to vote in elections for Federal office," 42 U.S.C. § 1973gg(b)(1), Congress concluded that an integral component of by-mail registration is the development and use of a uniform, national registration form. Arizona's construction of the phrase "accept and use" frustrates that congressional purpose. As Chief Judge Kozinski explained, Arizona's "construction defers to state and local interests while sacrificing national uniformity." Pet. App. 89c. It thus would reinstate the status quo that Congress sought to replace: a disharmonious array of State registration forms and procedural requirements with no national and uniform alternative method of voter registration for elections for Federal office.

Moreover, Congress was fully cognizant of the fact that citizenship is a universal qualification for voting, provided specific citizenship verification

procedures for the Federal Form in the NVRA and HAVA, and affirmatively rejected a proposal to allow for the type of "evidence of citizenship" procedure enacted by Arizona. *See John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 101 (1993) (this Court is "directed by th[e] words" Congress enacted, "not by the discarded draft.").

As described by Chief Judge Kozinski, the Senate version of the legislation that became the NVRA included a provision specifically allowing States to implement a citizenship verification procedure beyond attestation of voting eligibility, while the House version did not. H.R. Rep. No. 103-66, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148-49. Specifically, the Senate would have provided that "[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration." *Id.* at 23, 1993 U.S.C.C.A.N. at 148. The Conference Committee rejected the Senate provision, explaining that not only was it "not necessary," it was "not . . . consistent with the purposes of this Act." *Id.* The Conference Committee was "concern[ed]" that the Senate's provision "could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act," and worried that it would "adversely affect the administration of the other registration programs as well." *Id.* The House and Senate then adopted the Conference Committee's version of the legislation. 139 Cong. Rec. H2276 (daily ed. May 5, 1993); 139 Cong. Rec. S5747-48 (daily ed. May 11, 1993).

Arizona and the Counties, as well as those filing *amicus* briefs on their behalf, contend that Proposition 200 is not superseded by the NVRA because one of Congress' purposes was "to protect the integrity of the electoral process." 42 U.S.C. § 1973gg(b)(3), which also is the given rationale for Proposition 200. However, Arizona's unilateral implementation of its "evidence of citizenship" procedure is not consistent with Congress' object since it directly undermines Congress' desire to establish a national, uniform, simple, and easy-to-use by-mail system for registering for Federal elections. Furthermore, Congress did enact specific procedures in both the NVRA and HAVA, "to protect the integrity of the electoral process" – including specifying procedures for verification of voting eligibility, and providing substantial criminal penalties for making false or fraudulent statements in connection with voter registration (42 U.S.C. § 1973gg-10) – and, as just discussed, Congress explicitly rejected the type of supplemental verification procedure adopted by Arizona.

Finally, Arizona's and the Counties' reliance on *Purcell v. Gonzalez*, 549 U.S. 1 (2006), is misplaced. To be sure, the Court there said that States, including Arizona, have a "compelling interest in preserving the integrity of [their] election process." *Id.* at 4 (internal quotation marks omitted). The Court's decision, however, was a limited one. The question presented was only whether a two-judge motions panel of the Ninth Circuit, earlier in the instant cases, properly entered an interlocutory injunction (on appeal from the district court's denial of motions for a preliminary injunction). This Court

evaluated the propriety of preliminary relief in terms of the district court's analysis, and cautioned that it "express[ed] no opinion . . . on the ultimate resolution of these cases." *Id.* at 5. In particular, the Court did not discuss, or indeed make any reference to, the NVRA or the Elections Clause. Accordingly, the Court's decision in *Purcell* does not speak to the preemption issue now before the Court.[40]

B. Arizona's Criticisms of the EAC's Decisionmaking Are Misplaced

Arizona attempts to impugn the decision of EAC to deny Arizona's request to incorporate the Proposition 200 procedure into the Federal Form. These criticisms do not defeat the textual conflict between the NVRA and the Arizona procedure.

First, Arizona contends that the EAC has "extremely limited powers." State Br. at 44. This is beside the point, however, since it is undisputed that Congress specifically delegated to the EAC, and not to the States, the authority to "develop" the Federal Form.

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[40] The Counties also cite to this Court's decision in *Crawford v. Marion County*, 553 U.S. 181 (2008), in support of their argument that the Arizona procedure is consistent with Congress' policy goals in enacting the NVRA. County Br. at 31-33. However, *Crawford* also neither addressed Congress' authority under the Elections Clause nor the validity of the NVRA, and instead dealt with the entirely distinct legal issue of whether a State election procedure (concerning voter identification at the polls, and not voter registration) imposed a facially unconstitutional burden on the right to vote.

Second, Arizona faults the internal procedures followed by the EAC in denying its request to incorporate the Proposition 200 procedure into the Federal Form. *Id.* at 45-46. But this fails to address the textual conflict since the NVRA allows Arizona to apply its procedure to the Federal Form only with the EAC's approval, and there is no dispute that the EAC has not granted the requisite approval. Furthermore, as detailed above, the EAC regulations – whose adoption Arizona does not question – specifically limit State discretion to vary the procedural requirements for registration applicants to successfully complete the Federal Form, and that discretion does not include any State authority to change the procedure by which applicants verify their eligibility to vote. 11 C.F.R. § 9428.4(a).[41]

Third, Arizona argues that this Court should not defer to the EAC's conclusion that the Arizona procedure is incompatible with the NVRA. State Br. at 46. The issue here, however, is not the EAC's conclusion *per se* or any deferral to it, but rather the NVRA's allocation of control over the Federal Form to a Federal agency, and not to the States.

Finally, Arizona never has sought to challenge either the EAC's initial rulemaking, which omitted citizenship verification procedures from the Federal Form procedures States may alter, or the EAC's specific denial of Arizona's request concerning the

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[41] Neither Arizona nor the Counties include any citation in their briefs to the principal EAC regulation governing the requirements for completing the Federal Form, 11 C.F.R. § 9428.4 (entitled "Contents" of the Federal Form).

Proposition 200 procedure. This case is not a proper forum for Arizona to indirectly challenge the EAC's decisions regarding the Federal Form, particularly since the EAC is not a party and Arizona has not given any reason why it could not have raised any such challenge directly in a lawsuit brought under the Administrative Procedure Act, 5 U.S.C. § 702. *See Gonzales v. Oregon*, 546 U.S. 243 (2006) (in response to U.S. Attorney General's interpretive rule under federal Controlled Substances Act, which would have negated the newly-enacted Oregon Death with Dignity Act, Oregon sought declaratory and injunctive relief under the Administrative Procedure Act and the Declaratory Judgment Act on grounds that the interpretive rule exceeded delegated authority and infringed upon state sovereignty). Rather than pursue the avenue of relief available to it, Arizona resorted to an inappropriate self-help remedy: it simply forged ahead and used the version of the Federal Form that it had lobbied for but that the EAC had rejected. Because Arizona failed to utilize the channels of the Administrative Procedure Act to make its case against the EAC's decision, it should not be heard now to argue that the agency's decision was wrong.

C. The NVRA Provisions Addressing the Role of the States in Conducting Voter Registration for Federal Elections Do Not Authorize States to Add a Citizenship Verification Procedure to the Federal Form

As noted by Arizona, the NVRA confers certain voter registration powers for Federal elections on the States, but those powers do not include the right to override the EAC determination regarding what is necessary for a registration applicant to complete the Federal Form.

Arizona points to a provision of the NVRA which says that the Federal Form "develop[ed]" by the EAC shall include "information 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," 42 U.S.C. § 1973gg-7(b)(1). State Br. at 35, 38. Arizona further notes that, as provided by the NVRA, the EAC has acted "in consultation with . . . the States," 42 U.S.C. § 1973gg-7(a)(2), by including State-specific instructions with the Federal Form. State Br. at 35-37; see also County Br. at 33.

These provisions unquestionably show that the NVRA mandates that the *EAC* address State-specific qualifications by requiring applicants to provide the information "necessary" to assess compliance, but they provide no textual authorization for Arizona to supplement the EAC-prescribed Federal Form by

insisting upon its own verification procedure. Moreover, in requiring that "necessary" information be included in the Federal Form, the NVRA and HAVA go on to identify specific procedures for verifying applicants' citizenship, which do not include the Proposition 200 procedure. Likewise, with regard to the Federal Form's State-specific instructions, the EAC regulations specifically limit those instructions to issues other than verification of voting eligibility. 11 C.F.R. § 9428.4

Additionally, Arizona and the Counties cite to the NVRA provision that allows States to implement their own mail-in registration form for Federal elections "[i]n addition to accepting and using" the Federal Form, so long as the State form "meets all the criteria stated in 42 U.S.C. § 1973gg-7(b)]" regarding the contents of the Federal Form. 42 U.S.C. § 1973gg-4(a)(2). State Br. at 39; County Br. at 35. Arizona contends that this provision means that it may incorporate its "evidence of citizenship" procedure into its State mail-in registration form for Federal elections, and that this, in turn, should logically mean that Arizona may incorporate that procedure into the Federal Form as well. State Br. at 39.

This argument ignores the plain language of the NVRA, which specifies that States only may implement a State form "in addition to" the Federal Form, and not "instead of" that Form. Furthermore, the State form provisions cannot determine what may be incorporated into the Federal Form, since the NVRA specifically provides that States are limited to

a "consultation" role in the development of the Federal Form.[42]

III. The Elections Clause Gives Congress Power Over "Registration" Of Federal Voters, So The NVRA's Supersession Of The Arizona Procedure Presents No Constitutional Concern

The NVRA properly regulates the "Manner" in which Federal elections are conducted, as this Court has construed that term. Accordingly, the NVRA's supersession of Arizona's supplemental verification procedure for Federal Form applicants does not present any constitutional concern.

The Court long has recognized that the "ample limits of the Elections Clause's grant of authority to Congress," *Foster v. Love*, 522 U.S. at 71, include the authority to establish voter registration procedures for Federal elections. As explained in *Smiley v. Holm*, 285 U.S. at 366, "[i]t cannot be

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[42] Both Arizona and the Counties cite to this Court's decision in *Young v. Fordice*, 520 U.S. 273 (1997). State Br. at 38-39; County Br. at 34-35. But that decision is inapposite. It dealt with the application of the preclearance requirement of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to measures adopted by the State of Mississippi to implement the NVRA. The Court did not address Congress' authority under the Elections Clause, the EAC's authority to "develop" the Federal Form, or States' obligation to "accept and use" the Form. Also, as the Ninth Circuit noted, Pet. App. 29c n.24, the instant cases do not present the question whether Arizona may implement its "evidence of citizenship" procedure for persons who apply to register for Federal elections using the State of Arizona's mail-in registration form.

doubted that [the Election Clause's] comprehensive words embrace authority to provide a complete code for congressional elections." *Smiley* set forth a non-exhaustive list of the "Manner" regulations which Congress may prescribe, including, notably, voter registration:

> 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, . . . the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

Id. (emphasis added).

In *Siebold*, the Court rejected a challenge to the constitutionality under the Elections Clause of a Federal law that included comprehensive provisions relating to voter registration. That law provided for appointment of Federal officials to oversee (in person) the voter registration process for Federal elections, authorizing such officials to review the registration rolls prepared by local officials, and to directly undertake voter registration for such elections. *Siebold*, 100 U.S. at 379-80 (""The [officials] are authorized and required to attend all times and places fixed for registration of voters to challenge such as they deem proper; to cause such names to be registered as they may think proper to be so marked;

[and] to inspect and scrutinize such register of voters'")(quoting Section 2016 Revised Statutes).

In light of these precedents, the lower courts uniformly have upheld the NVRA's constitutionality under the Elections Clause. *ACORN v. Miller*, 129 F.3d 833 (6th Cir. 1997); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996); *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Condon v. Reno*, 913 F. Supp. 946 (D. S.C. 1995).

Arizona does not dispute these fundamental propositions. It neither claims that Congress lacks the authority under the Elections Clause to regulate voter registration for Federal elections, nor that the NVRA is unconstitutional on its face. State Br. at 50. Nonetheless, it urges this Court – for the first time in this case – to avoid a supposed constitutional concern by narrowly construing the statute's "accept and use" mandate.[43]

The State argues that the Elections Clause "does not authorize Congress here to evade the restraints of the Voter Qualifications Clauses." State Br. at 50 (referring to the Constitution's delegation of authority to the States to set voting qualifications for Federal elections, in Article I, section 2, clause 1, and the Seventeenth Amendment). The suggestion

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[43] Because Arizona has not previously raised any constitutional issue in these cases, it is precluded from now challenging the NVRA's constitutionality directly. *See Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2351 (2011); *United States v. Williams*, 504 U.S. 36, 41 (1992).

apparently is that Arizona's "sufficient evidence" provision is a "voter qualification" rather than a matter of registration procedure and hence does not collide with Congress' authority to regulate the manner of Federal elections. State Br. at 53 (referring to the State's "evidence-of-citizenship qualification for voting in federal elections").

But Proposition 200, by its terms, did not alter the qualifications for individuals to vote in elections in Arizona. The Arizona Constitution (art. VII, § 2) specifies the State's voting qualifications, including U.S. citizenship, and Proposition 200 did not amend the State constitutional provisions. Instead, it amended the Arizona Elections and Electors Code to alter the manner in which the voter registration system operates with regard to applicants verifying their U.S. citizenship. Accordingly, it is a misnomer for Arizona to contend that NVRA supersession of Proposition 200 involves anything other than Congress regulating the "Manner of holding [Federal] Elections." *See Foster v. Love*, 522 U.S. at 72 (Louisiana's claim that its "open primary" law did not prescribe the times for conducting Federal elections "is merely wordplay, and wordplay just as much at odds with the Louisiana statute as that law is at odds with [the Federal statute].").

The State likens the instant cases to *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). But there is no resemblance. *U.S. Term Limits* dealt with an Arkansas law that sought to prescribe the qualifications for membership in Congress, by imposing term limits, and did not concern the "Manner" in which Senators and Representatives are

elected. *Id.* at 783. The asserted conflict with the Constitution, accordingly, was not with the authority delegated by the Elections Clause, but rather with Article I, section 2, clause 2 and Article I, section 3, clause 3, which prescribe the qualifications for serving in Congress. *Id.* at 782-83.

Arizona also claims that the NVRA "intrudes" on its voting qualifications, although it does not explain how this purported "intrusion" is constitutionally significant. State Br. at 50. The State cites to dicta in the Seventh Circuit's *ACORN v. Edgar* opinion (upholding the constitutionality of the NVRA) that, if Congress had "'designed [the NVRA] with devilish cunning to make it impossible for [a] state to enforce its voter qualifications,'" then perhaps a colorable claim might exist that Congress exceeded its authority under the Elections Clause. *Id. citing* 56 F.3d at 795.

But even if that were the law, the NVRA does not make it "impossible" for States to verify that registration applicants are U.S. citizens, and Arizona makes no such claim here. State Br. at 50. The detailed procedures included in the Federal Form to exclude non-citizens from registering to vote are essentially the same as those which Arizona relied upon for decades prior to Proposition 200 for verifying the citizenship of registration applicants. Arizona, moreover, continues to rely upon these procedures today for those persons whose voter registrations were "grandfathered-in" by Proposition

200 based on their compliance with the verification procedure in use prior to Proposition 200.[44]

At most, the NVRA may have the "[i]ndirect effect[]" of "mak[ing] it more difficult to enforce some of the qualifications" to vote, which *ACORN* expressly held posed no constitutional problem. 56 F.3d at 794. As Judge Posner explained in *ACORN*, "[s]uch effects are bound to follow from any effort to make or alter state regulations of the times, places, and manner of conducting elections, including the registration phase." *Id.* at 794-95. Since such effects are necessarily permitted by the Elections Clause's grant of authority to Congress, they are not a reason to discard a Congressional statute.

In sum, the NVRA falls within Congress' Elections Clause authority to prescribe voter registration procedures for Federal elections. Thus, no constitutional concern is presented here that would warrant departing from a proper interpretation of the NVRA, as enacted by Congress.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be affirmed.

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[44] The record shows that, prior to the enactment of Proposition 200, election officials were able to identify individuals who falsely registered to vote as non-citizens and referred them for potential prosecution. App. 321-26.

Respectfully submitted,

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ADDENDUM

NATIONAL VOTER REGISTRATION ACT (selected provisions)

42 USC § 1973gg-4 Mail registration

(a) Form

(1) Each State shall accept and use the mail voter registration application form prescribed by the Federal Election Commission pursuant to section 1973gg–7 (a)(2) of this title for the registration of voters in elections for Federal office.

(2) In addition to accepting and using the form described in paragraph (1), a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg–7 (b) of this title for the registration of voters in elections for Federal office.

(3) A form described in paragraph (1) or (2) shall be accepted and used for notification of a registrant's change of address.

(b) Availability of forms

The chief State election official of a State shall make the forms described in subsection (a) of this section available for distribution through governmental and private entities, with particular emphasis on making them available for organized voter registration programs.

(c) First-time voters

(1) Subject to paragraph (2), a State may by law require a person to vote in person if—

(A) the person was registered to vote in a jurisdiction by mail; and

(B) the person has not previously voted in that jurisdiction.

(2) Paragraph (1) does not apply in the case of a person—

(A) who is entitled to vote by absentee ballot under the Uniformed and Overseas Citizens Absentee Voting Act [42 U.S.C. 1973ff et seq.];

(B) who is provided the right to vote otherwise than in person under section 1973ee–1 (b)(2)(B)(ii) of this title; or

(C) who is entitled to vote otherwise than in person under any other Federal law.

(d) Undelivered notices

If a notice of the disposition of a mail voter registration application under section 1973gg–6 (a)(2) of this title is sent by nonforwardable mail and is returned undelivered, the registrar may proceed in accordance with section 1973gg–6 (d) of this title.

42 USC § 1973gg-7 Federal coordination and regulations

(a) In general

The Election Assistance Commission—

(1) in consultation with the chief election officers of the States, shall prescribe such regulations as are necessary to carry out paragraphs (2) and (3);

(2) in consultation with the chief election officers of the States, shall develop a mail voter registration application form for elections for Federal office;

(3) not later than June 30 of each odd-numbered year, shall submit to the Congress a report assessing the impact of this subchapter on the administration of elections for Federal office during the preceding 2-year period and including recommendations for improvements in Federal and State procedures, forms, and other matters affected by this subchapter; and

(4) shall provide information to the States with respect to the responsibilities of the States under this subchapter.

(b) Contents of mail voter registration form

The mail voter registration form developed 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) the information required in section 1973gg–6 (a)(5)(A) and (B) of this title;

(ii) 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; and

(iii) 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.

HELP AMERICA VOTE ACT (selected provision)

42 U.S.C. § 15483

. . . .

(b) Requirements for voters who register by mail

. . . .

4) Contents of mail-in registration

(A) In general

The mail voter registration form developed under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg–4) shall include the following:

(i) The question "Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States.

(ii) The question "Will you be 18 years of age on or before election day?" and boxes for the applicant to check to indicate whether or not the applicant will be 18 years of age or older on election day.

(iii) The statement "If you checked 'no' in response to either of these questions, do not complete this form.".

(iv) A statement informing the individual that if the form is submitted by mail and the individual is registering for the first time, the appropriate information required under this section must be submitted with the mail-in registration form in order to avoid the additional identification requirements upon voting for the first time.

(B) Incomplete forms

If an applicant for voter registration fails to answer the question included on the mail voter registration form pursuant to subparagraph (A)(i), the registrar shall notify the applicant of the failure and provide

the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office (subject to State law).

. . . .

EAC REGULATONS

11 CFR § 9428, Subpart B – National Voter Registration Form

§ 9428.3 General information.

(a) The national mail voter registration form shall consist of three components: An application, which shall contain appropriate fields for the applicant to provide all of the information required or requested under 11 CFR 9428.4; general instructions for completing the application; and accompanying state-specific instructions.

(b) The state-specific instructions shall contain the following information for each state, arranged by state: the address where the application should be mailed and information regarding the state's specific voter eligibility and registration requirements.

(c) States shall accept, use, and make available the form described in this section.

§ 9428.4 Contents.

(a) Information about the applicant. The application shall provide appropriate fields for the applicant's:

(1) Last, first, and middle name, any suffix, and (optional) any prefix;

(2) Address where the applicant lives including: street number and street name, or rural route with a box number; apartment or unit number; city, town, or village name; state; and zip code; with instructions to draw a locational map if the applicant lives in a rural district or has a non-traditional residence, and directions not to use a post office box or rural route without a box number;

(3) Mailing address if different from the address where the applicant lives, such as a post office box, rural route without a box number, or other street address; city, town, or village name; state; and zip code;

(4) Month, day, and year of birth;

(5) Telephone number (optional); and

(6) Voter identification number as required or requested by the applicant's state of residence for election administration purposes.

(i) The application shall direct the applicant to consult the accompanying state-specific instructions to determine what type of voter identification number, if any, is required or requested by the applicant's state.

(ii) For each state that requires the applicant's full social security number as its voter identification number, the state's Privacy Act notice required at 11 CFR 9428.6(c) shall be reprinted with the instructions for that state.

(7) Political party preference, for an applicant in a closed primary state.

(i) The application shall direct the applicant to consult the accompanying state-specific instructions to determine if the applicant's state is a closed primary state.

(ii) The accompanying instructions shall state that if the applicant is registering in a state that requires the declaration of party affiliation, then failure to indicate a political party preference, indicating "none", or selecting a party that is not recognized under state law may prevent the applicant from voting in partisan races in primary elections and participating in political party caucuses or conventions, but will not bar an applicant from voting in other elections.

(8) Race/ethnicity, if applicable for the applicant's state of residence. The application shall direct the applicant to consult the state-specific instructions to determine whether race/ethnicity is required or requested by the applicant's state.

(b) Additional information required by the Act. (42 U.S.C. 1973gg-7(b) (2) and (4)). The form shall also:

(1) Specify each eligibility requirement (including citizenship). The application shall list U.S. Citizenship as a universal eligibility requirement and include a statement that incorporates by reference each state's specific additional eligibility requirements (including any special pledges) as set forth in the accompany state instructions;

(2) Contain an attestation on the application that the applicant, to the best of his or her knowledge and belief, meets each of his or her state's specific eligibility requirements;

(3) Provide a field on the application for the signature of the applicant, under penalty of perjury, and the date of the applicant's signature;

(4) Inform an applicant on the application of the penalties provided by law for submitting a false voter registration application;

(5) Provide a field on the application for the name, address, and (optional) telephone number of the person who assisted the applicant in completing the form if the applicant is unable to sign the application without assistance;

(6) State 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; and

(7) State 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.

(c) Other information. The form will, if appropriate, require an applicant's former address or former name or request a drawing of the area where the applicant lives in relation to local landmarks.

§ 9428.5 Format.

(a) The application shall conform to the technical specifications described in the Commission's National Mail Voter Registration Form Technical Specifications.

(b) Size. The application shall consist of a 5" by 8" application card of sufficient stock and weight to satisfy postal regulations. The application card shall be attached by a perforated fold to another 5" by 8" card that contains space for the information set forth at 11 CFR 9428.4(c).

(c) Layout. (1) The application shall be sealable.

(2) The outside of the application shall contain an appropriate number of address lines to be completed by the applicant using the state information provided.

(3) Both sides of the application card shall contain space designated "For Official Use Only."

(d) Color. The application shall be of ink and paper colors of sufficient contrast to permit for optical scanning capabilities.

(e) Signature field. The application shall contain a signature field in lieu of a signature line.

(f) Type size. (1) All print on the form shall be of the largest practicable type size.

(2) The requirements on the form specified in 11 CFR 9428.4(b)(1), (6), and (7) shall be in print identical to that used in the attestation portion of the application required by 11 CFR 9428.4(b)(2).

§ 9428.6 Chief state election official.

(a) Each chief state election official shall certify to the Commission within 30 days after July 25, 1994:

(1) All voter registration eligibility requirements of that state and their corresponding state constitution or statutory citations, including but not limited to the specific state requirements, if any, relating to minimum age, length of residence, reasons to disenfranchise such as criminal conviction or mental incompetence, and whether the state is a closed primary state.

(2) Any voter identification number that the state requires or requests; and

(3) Whether the state requires or requests a declaration of race/ethnicity;

(4) The state's deadline for accepting voter registration applications; and

(5) The state election office address where the application shall be mailed.

(b) If a state, in accordance with 11 CFR 9428.4(a)(2), requires the applicant's full social security number, the chief state election official shall provide the Commission with the text of the state's privacy statement required under the Privacy Act of 1974 (5 U.S.C. 552a note).

(c) Each chief state election official shall notify the Commission, in writing, within 30 days of any change to the state's voter eligibility requirements or other information reported under this section.

ARIZONA CONSTITUTIONAL AND STATUTORY PROVISIONS

Ariz. Const. art. VII, § 2 Qualifications of voters; disqualification

A. No person shall be entitled to vote at any general election, or for any office that now is, or hereafter may be, elective by the people, or upon any question which may be submitted to a vote of the people, unless such person be a citizen of the United States of the age of eighteen years or over, and shall have resided in the state for the period of time preceding such election as prescribed by law, provided that qualifications for voters at a general election for the purpose of electing presidential electors shall be as prescribed by law. The word "citizen" shall include persons of the male and female sex.

B. The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to register, to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike.

C. No person who is adjudicated an incapacitated person shall be qualified to vote at any election, nor shall any person convicted of treason or felony, be qualified to vote at any election unless restored to civil rights.

Ariz. Rev. Stat. § 16-166 Verification of registration

. . . .

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.