

Nos. 08-17094, 08-17115
Oral Argument Scheduled For June 21, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ, *et al.*,

Plaintiffs-Appellants

v.

STATE OF ARIZONA, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING
APPELLANTS ON REHEARING EN BANC AND URGING REVERSAL

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

DIANA K. FLYNN
ERIN H. FLYNN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-5361

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUE.....	1
IDENTITY AND INTEREST OF THE AMICUS CURIAE AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT	12
ARGUMENT	
ARIZONA’S PROOF-OF-CITIZENSHIP REQUIREMENT IS PREEMPTED BY THE NVRA.....	14
A. <i>Proposition 200 Conflicts With The Text, Structure, And Purpose of the NVRA</i>	14
B. <i>The NVRA’s Legislative History Further Supports The Conclusion That Proposition 200’s Proof-Of-Citizenship Requirement Is Invalid</i>	22
CONCLUSION.....	28
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

CASES:	PAGE
<i>Association of Cmty. Orgs. for Reform Now (ACORN) v. Edgar</i> , 56 F.3d 791 (7th Cir. 1995)	14, 26
<i>Charles H. Wesley Educ. Found., Inc. v. Cox</i> , 324 F. Supp. 2d 1358 (N.D. Ga. 2004), aff'd, 408 F.3d 1349 (11th Cir. 2005)	16-17
<i>Cook v. Gralike</i> , 531 U.S. 510 (2001)	14
<i>Doe v. Chao</i> , 540 U.S. 614 (2004)	23
<i>Ex parte Siebold</i> , 100 U.S. 371 (1879)	15
<i>Foster v. Love</i> , 522 U.S. 67 (1997)	14-15
<i>Gonzalez v. Arizona</i> , 485 F.3d 1041 (9th Cir. 2007)	9, 16
<i>Gonzalez v. Arizona</i> , 624 F.3d 1162 (9th Cir. 2010), vacated on grant of reh'g en banc, Nos. 08-17094, 08-17115, 2011 WL 1651242 (9th Cir. Apr. 27, 2011)	10-12, 21
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006)	22, 25
<i>Harkless v. Brunner</i> , 545 F.3d 445 (6th Cir. 2008)	15
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	22
<i>Smiley v. Holm</i> , 285 U.S. 355 (1932)	14
<i>Voting Rights Coal. v. Wilson</i> , 60 F.3d 1411 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996)	14
<i>Young v. Fordice</i> , 520 U.S. 273 (1997)	3

CONSTITUTION:

PAGE

U.S. Const. Art. I, § 4, Cl. 1.....14

STATUTES:

42 U.S.C. 15483(a)(1)(A)6

42 U.S.C. 15483(a)(2)(B)6

42 U.S.C. 15483(a)(5).....6

42 U.S.C. 15483(a)(5)(A)21

42 U.S.C. 15483(a)(5)(D)21

42 U.S.C. 15483(b)(1).....27

42 U.S.C. 15483(b)(2).....27

42 U.S.C. 15483(b)(3).....27

42 U.S.C. 15483(b)(4)(A)6, 26

42 U.S.C. 155324

42 U.S.C. 15545(a)6, 22

National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.*.....1

42 U.S.C. 1973gg(a)3

42 U.S.C. 1973gg(b)..... 2-3, 20

42 U.S.C. 1973gg-23

42 U.S.C. 1973gg-2(a)..... 3, 11-12

42 U.S.C. 1973gg-2(b)3

42 U.S.C. 1973gg-3(c)(2)(B).....4, 20

42 U.S.C. 1973gg-3(c)(2)(C).....4

42 U.S.C. 1973gg-4(a)..... 11

42 U.S.C. 1973gg-4(a)(1)4, 15

42 U.S.C. 1973gg-4(a)(2)6, 16

42 U.S.C. 1973gg-4(c).....27

STATUTES (continued):

PAGE

42 U.S.C. 1973gg-5(a)(4)6
42 U.S.C. 1973gg-5(a)(4)(iii) 11
42 U.S.C. 1973gg-5(a)(6)6
42 U.S.C. 1973gg-5(a)(6)(A)(i)..... 15
42 U.S.C. 1973gg-63
42 U.S.C. 1973gg-6(a)(1)3
42 U.S.C. 1973gg-6(a)(1)(B)..... 16
42 U.S.C. 1973gg-6(a)(2)4, 20
42 U.S.C. 1973gg-7(a)(1)2
42 U.S.C. 1973gg-7(a)(2)2, 4, 18, 20
42 U.S.C. 1973gg-7(a)(4)2
42 U.S.C. 1973gg-7(b)5, 15, 17
42 U.S.C. 1973gg-7(b)(1)..... 17-18, 20
42 U.S.C. 1973gg-7(b)(2).....26
42 U.S.C. 1973gg-9(a).....2
42 U.S.C. 1973gg-10(2)4, 26

A.R.S. 16-152(A)(23)7, 17

A.R.S. 16-579(A) 7

A.R.S. 16-166(F) 7-8

A.R.S. 16-166(G)8

REGULATION:

59 Fed. Reg. 32,316 (June 23, 1994) 18

LEGISLATIVE HISTORY:

H.R. Rep. No. 9, 103d Cong., 1st Sess. (1993) 24-26

H.R. Rep. No. 66, 103d Cong., 1st Sess. (1993)25

S. Rep. No. 6, 103d Cong., 1st Sess. (1993).....*passim*

MISCELLANEOUS:

PAGE

Federal Form Application Instructions,
available at <http://www.eac.gov/assets/1/Documents/national%20mail%20voter%20registration%20form%20english%20February%202015%202011.pdf>22

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 08-17094, 08-17115

MARIA M. GONZALEZ, *et al.*,

Plaintiffs-Appellants

v.

STATE OF ARIZONA, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING
APPELLANTS ON REHEARING EN BANC AND URGING REVERSAL

STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether Arizona Proposition 200, which requires documentary proof of citizenship to register to vote in a federal election, is preempted by the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.*, which requires only an attestation and signature under penalty of perjury that the voter applicant is a United States citizen.

**IDENTITY AND INTEREST OF THE AMICUS CURIAE AND THE
SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF**

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rules 29-2(a) and 29-2(e)(2).

Congress enacted the NVRA to increase the number of eligible citizens who register to vote in federal elections, to enhance the participation of eligible citizens in federal elections, to protect the integrity of the electoral process, and to ensure that accurate and current voter registration rolls are maintained. See 42 U.S.C. 1973gg(b). This case presents a question of statutory interpretation – namely, whether the NVRA precludes States from requiring documentary proof of citizenship before registering a voter who completes the federal voter registration application (the Federal Form), a uniform application available nationwide for simplified federal voter registration.

The Election Assistance Commission (EAC) is the agency charged with developing the Federal Form and with providing information to States regarding their responsibilities under the NVRA. See 42 U.S.C. 1973gg-7(a)(2) and (4). It also prescribes such regulations as are necessary to develop the Form and report biannually to Congress as required under the Act. 42 U.S.C. 1973gg-7(a)(1). The Attorney General is charged with enforcement of the NVRA. See 42 U.S.C. 1973gg-9(a). The United States thus has a significant interest in how the statute is interpreted.

STATEMENT OF THE CASE

1. The NVRA was enacted pursuant to Congress's Elections Clause authority and, by its terms, governs only federal elections. See 42 U.S.C. 1973gg(b), 1973gg-2, 1973gg-6. The legislation flowed from congressional findings that the right to vote is a fundamental right, the exercise of which federal, state, and local governments have a duty to promote, and that discriminatory and unfair registration laws and procedures can have a damaging effect on voter participation. See 42 U.S.C. 1973gg(a).

Under the NVRA, States must provide three methods of voter registration for federal elections: (1) registration as part of a driver's license application; (2) mail registration using the form prescribed by the Federal Election Commission; and (3) registration at a state-designated voter registration agency. See 42 U.S.C. 1973gg-2; *Young v. Fordice*, 520 U.S. 273, 275 (1997).¹ These methods of voter registration must be provided "notwithstanding any other Federal or State law, [and] in addition to any other method of voter registration provided for under State law." 42 U.S.C. 1973gg-2(a). For all three types of voter registration, States must ensure that "any eligible applicant is registered to vote in an election," 42 U.S.C. 1973gg-6(a)(1), and must "send notice to each applicant of the disposition of [his

¹ Certain States are exempt from these requirements, see 42 U.S.C. 1973gg-2(b), but Arizona is not one of them.

or her voter registration] application,” 42 U.S.C. 1973gg-6(a)(2). The NVRA imposes criminal penalties for voter fraud. See 42 U.S.C. 1973gg-10(2).

When a voter registers at the same time as applying for a driver’s license, the State “may require only the minimum amount of information necessary to – (i) prevent duplicate voter registrations; and (ii) enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.” 42 U.S.C. 1973gg-3(c)(2)(B). The motor-voter application must “state[] each eligibility requirement (including citizenship),” “contain[] an attestation that the applicant meets each such requirement,” and “require[] the signature of the applicant, under penalty of perjury.” 42 U.S.C. 1973gg-3(c)(2)(C).

For registration by mail, the NVRA requires that every State “*shall accept and use*” the Federal Form. 42 U.S.C. 1973gg-4(a)(1) (emphasis added).

Accordingly, the NVRA directs the Election Assistance Commission (EAC), in consultation with the chief election officers of the States, to “develop a mail voter registration application form for elections for Federal office.” 42 U.S.C. 1973gg-7(a)(2); see 42 U.S.C. 15532 (transferring the duties of the Federal Election Commission under Section 1973gg-7(a) to the EAC). Under the NVRA, the Federal Form

- (1) may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous

registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process;

(2) shall include a statement that –

- (A) specifies each eligibility requirement (including citizenship);
- (B) contains an attestation that the applicant meets each such requirement; and
- (C) requires the signature of the applicant, under penalty of perjury;

(3) may not include any requirement for notarization or other formal authentication; and

(4) shall include, in print that is identical to that used in the attestation portion of the application –

- (i) [voter eligibility requirements and the penalties provided by law for submission of a false voter registration application];
- (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.

42 U.S.C. 1973gg-7(b). Under the Help America Vote Act of 2002 (HAVA), the

Federal Form also must include two check boxes for the applicant to indicate

whether he or she is a United States citizen and of voting age. See 42 U.S.C.

15483(b)(4)(A).² “*In addition to accepting and using the [Federal Form], a State may develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b).*” 42 U.S.C. 1973gg-4(a)(2) (emphasis added).

Finally, State-designated voter registration agencies must have the Federal Form or its state law equivalent available for agency voter registration, and must accept completed forms for transmittal to the appropriate State election official. See 42 U.S.C. 1973gg-5(a)(4) and (6).

2. On November 2, 2004, Arizona voters approved Proposition 200. The citizen initiative amended Arizona voting law in two ways: (1) voter applicants are

² Among other things, HAVA requires States to maintain a “single, uniform, official, centralized, interactive computerized statewide voter registration list * * * that contains the name and registration information of every legally registered voter in the State and assigns a unique identifier to each legally registered voter in the State.” 42 U.S.C. 15483(a)(1)(A). HAVA also requires States to request certain identifying information from applicants and to attempt to verify the information provided. See 42 U.S.C. 15483(a)(5).

Consistent with these requirements, the Federal Form includes State-specific instructions for including certain identifying information – e.g., the applicant’s driver’s license number or the last four digits of the applicant’s social security number – that enables State election officials to maintain an official and accurate voter registration list for the conduct of all federal elections. See 42 U.S.C. 15483 (a)(1)(A), (a)(2)(B), (a)(5)(A). While HAVA requires States to attempt to verify applicant identity and ensure accurate voter registration lists, it does not grant States discretion to violate the requirements of the NVRA. See 42 U.S.C. 15545(a) (“Except as specifically provided * * * nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA].”).

now required to submit evidence of United States citizenship, see A.R.S. 16-152(A)(23), 16-166(F); and (2) voters who vote in-person at the polls on election day are required to present either one form of identification bearing their name, address, and photograph, or two different forms of identification bearing their name and address, see A.R.S. 16-579(A).

As relevant to the NVRA, Proposition 200 amended Section 16-152 to require that the state voter registration form “contain * * * [a] statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar shall reject the application if no evidence of citizenship is attached.” A.R.S. 16-152(A)(23). Proposition 200 also amended Section 16-166 to state that “[t]he County Recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship.” A.R.S. 16-166(F).³ All new voter applicants, and any voter who re-registers in another

³ “Satisfactory evidence of citizenship” includes:

- (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.

(continued...)

Arizona county, must provide proof of citizenship. See A.R.S. 16-166(G). Failure to provide proof of citizenship with either the Federal Form or the State-specific form precludes registration. See A.R.S. 16-166(F).

3. In May 2006, plaintiffs filed their complaints in the United States District Court for the District of Arizona, alleging, *inter alia*, that Proposition 200 violated the NVRA by requiring voter applicants to submit documentary proof of citizenship as a condition for federal voter registration. Plaintiffs moved for a temporary restraining order enjoining Arizona from failing to distribute, use, and accept the Federal Form. In June 2006, the district court denied the TRO after determining that the NVRA's voter registration requirements acted as the floor, not

(...continued)

- (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.

A.R.S. 16-166(F).

the ceiling, for voter registration. The district court reasoned that because there was no specific language in the NVRA prohibiting States from requiring proof of citizenship, and because State election officials had to ensure voter eligibility, Arizona could require proof of citizenship to assess the eligibility of all new applicants.

Plaintiffs also moved for a preliminary injunction barring the enforcement of Proposition 200 in advance of that fall's elections. In September 2006, the district court denied the motion, stating that plaintiffs would not succeed on their NVRA claim for the reasons set forth in the district court's denial of the TRO.

4. In April 2007, this Court affirmed the denial of the preliminary injunction, holding (as relevant here) that plaintiffs had failed to demonstrate a likelihood of success on their claim that Arizona's proof-of-citizenship requirement is preempted by the NVRA. The Court emphasized that the NVRA charged States with assessing voter eligibility, including United States citizenship, and allowed States to develop their own form so long as it did not require notarization or authentication. The Court thus reasoned that the NVRA "plainly allow[ed] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Gonzalez v. Arizona*, 485 F.3d 1041, 1050-1051 (9th Cir. 2007) (*Gonzalez I*).

5. In August 2007, the district court granted summary judgment to Arizona on plaintiffs' NVRA claim. Following entry of final judgment, plaintiffs appealed. In October 2010, a divided panel of this Court reversed the district court's judgment as to the NVRA, holding that "the NVRA supersedes Proposition 200's voter registration procedures, and that Arizona's documentary proof of citizenship requirement for registration is therefore invalid." *Gonzalez v. Arizona*, 624 F.3d 1162, 1169 (9th Cir. 2010) (*Gonzalez II*), vacated on grant of reh'g en banc, Nos. 08-17094, 08-17115, 2011 WL 1651242 (9th Cir. Apr. 27, 2011).

The majority explained that Congress enacted the NVRA to increase voter turnout in federal elections, remove barriers to voter registration imposed by state governments, and simplify systems for voter registration in federal elections. It stated the NVRA sought to accomplish these changes by establishing a standard form for registering federal voters and by requiring States to implement three prescribed methods of voter registration. After examining each of the NVRA's provisions, the majority determined that "the NVRA's central purpose is to increase voter registration by streamlining voter registration procedures." *Gonzalez II*, 624 F.3d at 1180-1181 (collecting circuit court cases).

The majority noted that the Federal Form "accounts for eligibility concerns by requiring applicants to attest, under penalty of perjury, that they meet every eligibility requirement." *Gonzalez II*, 624 F.3d at 1181 (citing Section 1973gg-

7(b)(2)). Thus, it concluded that while States may provide input to the EAC regarding the contents of the Federal Form, “[g]iven the NVRA’s comprehensive regulation of the development of the Federal Form, there is no room for Arizona to impose sua sponte an additional identification requirement as a prerequisite to federal voter registration for registrants using that form.” *Ibid.* According to the majority, “the value of the Federal Form (and hence a centerpiece of the NVRA) would be lost [if] * * * states could add any requirements they saw fit to registration for federal elections through the Federal Form.” *Ibid.*

The majority also concluded that Proposition 200 contradicted the statutory language of the NVRA, which directs States to “accept and use” the Federal Form for mail registration and to “accept[]” the Federal Form at designated agencies for transmittal to the appropriate State election officials, “notwithstanding any other Federal or state law.” *Gonzalez II*, 624 F.3d at 1182 (quoting 42 U.S.C. 1973gg-2(a), 4(a), and 5(a)(4)(iii)). To permit States to impose their own requirements on applicants using the Federal Form, the majority explained, would “nullify the NVRA’s procedure for soliciting state input, and aggrandize the states’ role in direct contravention of the lines of authority prescribed by Section 7 [of the NVRA].” *Ibid.* Thus, it held that the NVRA preempted Arizona’s proof-of-citizenship requirement, because “allowing Arizona to impose Proposition 200’s registration provisions on top of the Federal Form conflicts with the NVRA’s

purpose, procedural framework, and the specific requirement that states use the Federal Form or its equivalent, ‘notwithstanding any other state or federal law.’”

Id. at 1183 (quoting Section 1973gg-2(a)).

Chief Judge Kozinski dissented. He argued that Arizona would accept and use the Federal Form, but subject to its receipt of proof of citizenship. He also reasoned that proof of citizenship may be “necessary to enable” Arizona to assess the eligibility of the voter registrant. He thus stated that “Arizona gladly accepts and uses the federal form, it just asks that voters also provide some proof of citizenship.” *Gonzalez II*, 624 F.3d at 1207-1208 (Kozinski, J., dissenting). Accordingly, Chief Judge Kozinski concluded that “[i]t’s perfectly plausible that the NVRA would have set the minimum information states must require, prohibited one specific type of requirement (formal authentication) and established a consultative process for developing a national form.” *Id.* at 1209.

SUMMARY OF THE ARGUMENT

Arizona’s proof-of-citizenship requirement conflicts with the NVRA, as the text, structure, purpose, and legislative history of the federal statute demonstrate.

In enacting the NVRA, Congress established three simplified methods of voter registration with the goal of increasing citizen registration for, and participation in, federal elections. Two of these methods rely on States’ acceptance and use of the Federal Form. Congress delegated the development of

this form exclusively to the EAC, subject to certain statutory requirements and the EAC's consultation with State election officials.

The NVRA requires States to "accept and use" the Federal Form. Moreover, the statute directs State election officials to register eligible voter applicants who timely submit a properly completed Federal Form. The NVRA ensures citizenship eligibility by requiring an applicant to attest and sign under penalty of perjury that he or she is a United States citizen. States may not contravene the text and purpose of the NVRA by requiring documentary proof of citizenship; such a requirement complicates rather than simplifies the federal voter registration process and is unnecessary to protect against voter fraud given other provisions of the NVRA.

While resort to the NVRA's legislative history is unnecessary given States' clear obligations under the statutory text, the legislative history further confirms Congress's intent to preclude States from conditioning federal voter registration on the receipt of documentary proof of citizenship. Congress considered the effect of the Federal Form on the integrity of the electoral process and expressly rejected an amendment that would permit States to confirm independently an applicant's eligibility. Permitting States to graft additional requirements onto the Federal Form would upset the delicate balance Congress achieved under the NVRA.

ARGUMENT

ARIZONA'S PROOF-OF-CITIZENSHIP REQUIREMENT IS PREEMPTED BY THE NVRA

A. *Proposition 200 Conflicts With The Text, Structure, And Purpose Of The NVRA*

1. Congress enacted the NVRA pursuant to the Elections Clause, which grants state legislatures authority to prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” but specifies that Congress may at any time “make or alter such Regulations.” U.S. Const. Art. I, § 4, Cl. 1. Although the Elections Clause does not specifically mention voter registration, it is well settled that the Clause gives Congress authority to regulate registration procedures that affect federal elections. See *Cook v. Gralike*, 531 U.S. 510, 523-524 (2001); *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1413-1414 (9th Cir. 1995), cert. denied, 516 U.S. 1093 (1996); *Association of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 793-794 (7th Cir. 1995).

“The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.” *Foster v. Love*, 522 U.S. 67, 69 (1997) (citations omitted). “In ratifying Article I, Section 4, the states not only gave Congress plenary authority over federal elections but also explicitly ensured that

all conflicts with similar state laws would be resolved wholly in favor of the national government.” *Harkless v. Brunner*, 545 F.3d 445, 454-455 (6th Cir. 2008). Where Congress exercises its authority to override state regulations and establish uniform rules for federal elections, those rules are binding on the States. See *Foster*, 522 U.S. at 69; *Ex parte Siebold*, 100 U.S. 371, 384 (1879) (“When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. * * * No clashing can possibly arise.”); *id.* at 387 (“Congress, by its power to make or alter [election] regulations, has a general supervisory power over the whole subject.”).

Thus, where state law conflicts with an act of Congress pursuant to the Elections Clause, state law is preempted. Here, Congress acted to regulate voter registration procedures for federal elections; under the NVRA’s language, States must implement and comply with that comprehensive voter registration scheme.

2. To ensure a simplified national registration system, Congress provided that States “shall accept and use” the Federal Form for registration by mail, 42 U.S.C. 1973gg-4(a)(1), as well as for registration at state-designated voter registration agencies, see 42 U.S.C. 1973gg-5(a)(6)(A)(i). Although a State may develop its own form that complies with 42 U.S.C. 1973gg-7(b), the NVRA specifically provides that the State may accept that form “[i]n addition to” – and not in lieu of – “accepting and using the [Federal Form].” 42 U.S.C. 1973gg-

4(a)(2). Whether or not it develops its own form, the State's acceptance and use of the Federal Form is mandatory. *Gonzalez I*, 485 F.3d 1041, 1050 (9th Cir. 2007), was therefore incorrect to say that the State may choose *either* to accept and use the Federal Form *or* to use its own form. See S. Rep. No. 6, 103d Cong., 1st Sess. 12 (1993) ("A registrant is permitted to use either the Federal form or the appropriate State form and the States would be required to accept either form.").

The State argues that it does "accept and use" the Federal Form, because it will register any voter who files that form along with "satisfactory evidence of citizenship." See Pet. for Reh'g 14.⁴ But the statute itself makes clear that a State may not require information beyond the form in order to accept it. Rather, the statute provides that each State "shall * * * ensure that any eligible applicant is registered to vote in an election * * * in the case of registration by mail * * * if the *valid voter registration form* of the applicant is postmarked not later than the lesser of 30 days, or the period provided by State law, before the date of the election." 42 U.S.C. 1973gg-6(a)(1)(B) (emphasis added).⁵ While States may reject voters

⁴ "Pet. for Reh'g ___" refers to Appellees State of Arizona and Secretary of State's Petition for Rehearing En Banc, filed with this Court on November 16, 2010.

⁵ See also *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1367 (N.D. Ga. 2004) ("By making acceptance of the voter registration application mandatory when postmarked by the correct date, Congress simply did not allow the states to impose restrictions that would permit denial of an

(continued...)

whose forms are incomplete, illegible, or show that they are not qualified, the NVRA mandates that the States otherwise register an eligible applicant who completes a valid Federal Form. To refuse to register an eligible applicant who completes a valid Federal Form – as Arizona will do unless the applicant submits documentary proof of citizenship – is not to “accept” the form at all. It is instead best described as *rejecting* the form, as the State’s own statute makes clear. See A.R.S. 16-152(A)(23) (“[T]he registrar shall reject the application if no evidence of citizenship is attached.”).

The State also argues that the NVRA permits it to ask – beyond the Federal Form – for “identifying information * * * necessary * * * to assess the eligibility.” Pet. for Reh’g 14 (quoting 42 U.S.C. 1973gg-7(b)(1)). The quoted provision, however, does not purport to authorize States to require additional information beyond what is on the Federal Form. That provision simply describes what the *Federal Form* (“[t]he mail voter registration form developed under subsection (a)(2) of this section,” 42 U.S.C. 1973gg-7(b)) may contain. In particular, it provides that the Federal Form may not ask for *more* information than is necessary to assess eligibility. See 42 U.S.C. 1973gg-7(b)(1) (Federal Form “may require

(...continued)

application that otherwise satisfies the federal requirements.”), *aff’d*, 408 F.3d 1349 (11th Cir. 2005).

only such identifying information * * * as is necessary”) (emphasis added). And the statute makes clear that it is the EAC that is the sole authority that develops and finalizes the Federal Form, though the Commission must do so “in consultation with the chief election officers of the States.” 42 U.S.C. 1973gg-7(a)(2). While States may make suggestions regarding the contents of the Federal Form, the NVRA vests the EAC – *not* State election officials – with the final authority to determine the minimum “identifying information * * * and other information * * * 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). These provisions foreclose States from requiring documentary proof of citizenship before registering an eligible individual who otherwise completes a valid Federal Form as prescribed by the EAC.

Under the authority delegated to it by Congress, the FEC and EAC have determined that an attestation and signature under penalty of perjury that the applicant is a United States citizen suffices to determine citizenship eligibility for purposes of federal voter registration. See 59 Fed. Reg. 32,316 (June 23, 1994) (FEC, prior to creation of the EAC, noting the oath, signature under penalty of perjury, and words “For U.S. Citizens” on the cover of the Federal Form suffice to ensure an applicant’s United States citizenship). HAVA’s addition of a check box indicating that the applicant is a United States citizen also enables State election

officials to readily determine voter eligibility from the face of the Form while providing further protection against voter fraud and mistaken registration.

Permitting States to impose requirements in addition to the information required under the Federal Form conflicts with the NVRA's streamlined registration procedures, the centralized authority delegated to the EAC, and the statutory directive to "accept and use" the Federal Form.

3. A contrary holding that disregards the NVRA's statutory text would eviscerate the simplified system of voter registration that Congress intended. The creation of a universal Federal Form that relies on the minimum amount of information necessary to enable State election officials to assess voter eligibility and administer voter registration promotes the exercise of the right to vote. The Federal Form is integral to accomplishing the NVRA's central purpose – that is, increased voter registration and participation in federal elections through streamlined registration procedures. Under the NVRA, an eligible voter need only complete and submit the one-page Federal Form to ensure his or her federal voter registration. See S. Rep. No. 6, at 11 (describing the second method of registration as "uniform mail registration" based on a "universal mail registration form").

Arizona's contrary interpretation of the NVRA as permitting States to impose their own voter registration requirements in addition to those required under the Federal Form frustrates the central purpose of the NVRA by

complicating, not simplifying, the voter registration process. It also disregards the statutory text instructing the EAC – *not* each individual State – to determine the minimum amount of information necessary to enable State election officials to assess an applicant’s voter eligibility. See 42 U.S.C. 1973gg-7(a)(2) and (b)(1). The NVRA’s emphasis on standardized and streamlined procedures is likewise evident in the motor-voter registration provision, which permits States to require “only the minimum amount of information necessary * * * to assess the eligibility of the applicant.” 42 U.S.C. 1973gg-3(c)(2)(B).

Arizona’s contrary interpretation of the NVRA also finds no support in the NVRA’s requirement that States notify applicants of the disposition of their voter registration applications. See 42 U.S.C. 1973gg-6(a)(2). Indeed, the NVRA’s notification requirement is consistent with the statutory purposes of increasing eligible voter registration, enhancing voter turnout for federal elections, and protecting the integrity of the electoral process. See 42 U.S.C. 1973gg(b). When a voter is notified of his or her successful registration, that individual is more likely to cast a ballot. Moreover, if an otherwise eligible voter receives notification that he or she incorrectly completed the Federal Form, the applicant can re-submit the Form in advance of the voter registration deadline. Even where the deadline has passed, the applicant can ensure his or her registration for the next federal election by resubmitting a corrected Form. Finally, where an ineligible voter is notified of

his or her failed registration in advance of an election, it protects against voter confusion and chaos at the polls.

As the majority correctly recognized in *Gonzalez II*, States are not required to register every applicant who submits a Federal Form. See 624 F.3d 1162, 1183-1184 (9th Cir. 2010). Rather, applicants may be rejected where they are ineligible to vote, or where they have submitted an inaccurate, incomplete, or illegible voter registration application. Whether read alone or as part of the statute as a whole, the NVRA's notification provision simply does not support the interpretation that a State may refuse to register an otherwise eligible voter merely because he or she fails to comply with the State's additional proof-of-citizenship requirement.

Finally, the state-by-state variations that exist in the Federal Form do not support permitting Arizona to unilaterally impose a proof-of-citizenship requirement. Cf. Pet. for Reh'g 15. Under HAVA, Congress decided that an applicant's driver's license number or social security number should be required to enable States to attempt to verify an applicant's identity and to avoid duplicate voter registrations. See 42 U.S.C. 15483(a)(5)(A). HAVA specifically grandfathered in States that previously relied upon an applicant's full social security number rather than the last four digits of the number. See 42 U.S.C. 15483(a)(5)(D). Consistent with HAVA, the EAC has accommodated state-by-state variations in the identification numbers to be provided in Box 6 of the Federal

Form. See Federal Form Application Instructions 2, available at <http://www.eac.gov/assets/1/Documents/national%20mail%20voter%20registration%20form%20english%20February%202015%202011.pdf> (“Federal law requires that states collect from each registrant an identification number. You must refer to your state’s specific instructions for item 6 regarding information on what number is acceptable for your state.”). Thus, Congress and the EAC have decided which state-by-state variations are permissible; subject to the statutory mechanisms for incorporating appropriate variations into the Federal Form, every State must “accept and use” the Form. Neither the NVRA nor HAVA grants States any authority to require documentation that the Federal Form omits. See 42 U.S.C. 15545(a) (“Except as specifically provided * * * nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA].”).

B. The NVRA’s Legislative History Further Supports The Conclusion That Proposition 200’s Proof-Of-Citizenship Requirement Is Invalid

1. “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 579-580 (2006) (“Congress’ rejection of the very language that would have achieved

the result the Government urges here weighs heavily against the Government's interpretation.") (citing *Doe v. Chao*, 540 U.S. 614, 621-623 (2004)).

Here, the legislative history demonstrates that Congress (a) sought to enhance voter registration and participation in federal elections, (b) weighed that interest against the interest in protecting against voter fraud, (c) understood the NVRA to preclude a proof-of-citizenship requirement, and (d) rejected an amendment that would have authorized States to require proof of citizenship as a condition for voter registration. This history confirms what is evident from the statute's plain text: Congress intended to prevent States from conditioning federal voter registration on the successful presentation of documentary evidence of United States citizenship beyond what is required on the Federal Form.

2. Both houses of Congress considered the issue of citizenship and voter fraud under the NVRA. The Senate Committee Report stated that the "legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act." S. Rep. No. 6, at 3. The Committee recognized the "legitimate administrative concerns of election officials" in detecting and preventing voter fraud, and stated that "[e]very effort has been made to produce a bill that balances the legitimate administrative concerns of the election administrators and the objectives of this legislation." S. Rep. No. 6, at 3.

The Senate Committee further stated that mail registration “is an effective means for increasing the voter rolls” and “is convenient for the voter, for registration drive organizers and for voter registrars as well”; it also noted the concern, however, that mail registration would increase the potential for fraud. S. Rep. No. 6, at 12. In response, the Committee stated that the bill had sufficient safeguards to prevent fraud, including a provision that permitted States to require in-person appearance by first-time voters who registered by mail, a statement of voting qualifications and an attestation of citizenship signed by the applicant under penalty of perjury, and information regarding the penalties provided by law for false voter registration. See S. Rep. No. 6, at 13, 20-21, 26-27. Dissenting Committee members expressed their concern that the NVRA “forbids precautions states may take to reduce the chance of the unscrupulous taking advantage of the system,” such as “asking applicants to supply identification to determine that persons registering are who they claim to be or live where they say they do.” S. Rep. No. 6, at 52-53. Thus, these members readily understood the NVRA to preclude States from requiring proof of citizenship in an attempt to combat voter fraud. See S. Rep. No. 6, at 55.

The House Committee Report similarly recognized the potential for fraud in mail registration, but stated that the NVRA had sufficient safeguards to deter fraudulent registrations. See H.R. Rep. No. 9, 103d Cong., 1st Sess. 10 (1993).

The House Committee's minority members likewise objected to the streamlined registration process because it "limit[ed] the state's ability to confirm independently the information contained in voter registration applications." H.R. Rep. No. 9, at 35. Thus, there was a common understanding throughout Congress that the NVRA precluded States from grafting their own registration requirements to those established by Congress under the newly-crafted voter registration scheme.

While the House passed the NVRA without any allowance for proof of citizenship, the Senate passed an amendment providing that "nothing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship of an applicant for voter registration." H.R. Rep. No. 66, 103d Cong., 1st Sess. 23 (1993). The Conference Committee that reconciled the House and Senate versions of the NVRA rejected the Senate Amendment, stating it was "not necessary or consistent with the purposes of this Act" and "could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program." H.R. Rep. No. 66, at 23. The final version of the NVRA passed by Congress did not include any provision allowing States to require documentary proof of citizenship. Congress thus rejected "the very language that would have achieved the result the [State] urges here." *Hamdan*, 548 U.S. at 579-580.

3. In rejecting States' ability to require proof of citizenship, Congress appropriately balanced the interest in increased voter registration and turnout for federal elections against the interest in protecting against voter fraud. As such, the NVRA created a streamlined process for federal voter registration while ensuring that the Federal Form the EAC ultimately developed protected against voter fraud by (a) specifying voter eligibility requirements (including citizenship), (b) containing an attestation that the voter is a United States citizen, and (c) requiring the signature of the applicant, under penalty of perjury. See 42 U.S.C. 1973gg-7(b)(2). See also H.R. Rep. No. 9, at 10 (finding the NVRA's provisions "sufficient to deter fraudulent registrations"); S. Rep. No. 6, at 13 (finding the NVRA provides "sufficient safeguards to prevent an abuse of the system with fraudulent registrations"). Congress likewise included a provision imposing criminal penalties for voter fraud. See 42 U.S.C. 1973gg-10(2); *Edgar*, 56 F.3d at 795-796 (recognizing that the NVRA "contains a number of safeguards against vote fraud" and that it is "entirely conjectural that [those safeguards] are inferior to the protections" offered under state law).⁶

⁶ HAVA has added further protections to the Federal Form by requiring applicants to check a box indicating whether the applicant is or is not a United States citizen and by including a statement on the Form that applicants should not complete the form if they checked "no." See 42 U.S.C. 15483(b)(4)(A)(i), (iii). In addition, while the NVRA permitted states to require first-time voters who

(continued...)

The NVRA's legislative history, like the statute's text, demonstrates Congress's vision for a uniform system of mail registration. In accordance with the NVRA's purpose of increasing voter registration and voter participation, Congress delegated to the EAC the ultimate authority to develop a Federal Form that would simplify registration procedures nationwide. At the same time, Congress incorporated multiple safeguards against voter fraud. But Congress specifically declined to permit States to seek documentary proof of citizenship beyond what is required by the Federal Form.

* * * * *

In enacting the NVRA, Congress exercised its plenary authority under the Elections Clause in order to standardize and simplify federal voter registration procedures nationwide. Proposition 200's proof-of-citizenship requirement conflicts with the text, structure, and purpose of the NVRA and therefore is invalid.

(...continued)

registered by mail to vote in person, subject to certain exceptions, see 42 U.S.C. 1973gg-4(c), HAVA requires certain first-time voters who register by mail to present, either in person or by mail, a current and valid photo identification or a copy of one of a number of enumerated documents that show the name and address of the voter, or other information to verify identity, such as a driver's license number, see 42 U.S.C. 15483(b)(1)-(3). Just as with the NVRA, Congress did not include a proof-of-citizenship requirement under HAVA.

CONCLUSION

This Court should reverse the district court's judgment and declare Arizona's proof-of-citizenship requirement for federal voter registration invalid.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

s/ Erin H. Flynn

DIANA K. FLYNN

ERIN H. FLYNN

Attorneys

U.S. Department of Justice

Civil Rights Division

Appellate Section

Ben Franklin Station

P.O. Box 14403

Washington, D.C. 20044-4403

(202) 514-5361

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d) and Ninth Circuit Rule 29-2(c)(3). The brief was prepared using Microsoft Word 2007 and contains 6139 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2011, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the Appellate CM/ECF system.

I further certify that on June 3, 2011, I served a copy of the foregoing brief on the following parties or their counsel of record by First Class Mail:

Charles E. Borden
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, DC 20006

Karl J. Sandstrom
Perkins Coie LLP
700 Thirteenth Street N.W.
Washington, DC 20005-3960

Chris M. Roll
Pinal County Attorney
30 N. Florence St.
Building D
Florence, AZ 85232

James P. Walsh, Jr.
Pinal County Attorney
30 N. Florence St.
Building D
Florence, AZ 85232

Melvin R. Bowers, Jr.
Navajo County Attorney's Office
P.O. Box 668
Holbrook, AZ 86025

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney