No. 08-17115

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,

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., 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
Cause Nos. CV06-01268-PHX-ROS and CV06-01362-PHX-ROS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

LEGISLATIVE MATERIALS

INTRODUCTION

The District Court's grant of summary judgment was clear error, and this Court should reverse and direct the District Court to enjoin the enforcement of Proposition 200's voting related provisions for two fundamental reasons – the Arizona law imposes an unconstitutional poll tax and violates the National Voter Registration Act.

First, the Supreme Court's decision in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610, 1620-21 (2008), is clear – requiring a voter to pay for an identification document as a prerequisite to voting violates the Fourteenth and Twenty-fourth Amendments. In his Answering Brief, the Arizona Secretary of State (the "Secretary" or the "State") did not directly address this fundamental defect. Indeed, the Secretary hardly referenced the Court's statement in *Crawford* that "[t]he fact that most voters already possess a . . . form of acceptable identification would not save the statute under our reasoning in *Harper* [*v. Virginia State Board of Elections*, 383 U.S. 663 (1966)], if the State required voters to pay a tax or a fee to obtain a new photo identification." *Crawford*, 128 S. Ct. at 1620-21. Arizona does not provide a cost-free means to obtain the documents required by Proposition 200, and therefore imposes an unconstitutional poll tax.

Second, in the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* (the "NVRA"), Congress exercised its broad power under the United States

Constitution's Elections Clause to override conflicting state election regulations. Arizona's rejection of all Federal Mail Voter Registration Forms (the "Federal Form") not accompanied by the "satisfactory evidence of citizenship" required by Proposition 200 conflicts with the NVRA's requirement that it accept and use the Federal Form promulgated by the Election Assistance Commission. As such, the NVRA overrides Proposition 200 with respect to Federal Form registrations.

The State's Brief ignored Congress' plenary constitutional power to override state election law. Indeed, when it quoted the Elections Clause, the State included the portion concerning state power to regulate elections, but simply left out the part that says "but the Congress may at any time by law make or alter such regulations . . . ." U.S. Const. art. I, § 4, cl. 1. Instead of confronting the real issues in this case, the Secretary tried to obscure them by arguing about state interests in preserving election integrity. While the Supreme Court has recognized as proper the interest in preventing election fraud, that interest does not overcome the statutory bar to enforcement of Proposition 200. Indeed, Congress considered the election integrity concern, and concluded that there is a superseding federal interest in a uniform national procedure for voter registration, unencumbered by a state-imposed citizenship documentation requirement.

In short, by requiring applicants for voter registration to provide documentary evidence of citizenship ("Registration Documents"), and by requiring

in-person election day voters to provide one form of photo identification or two forms of non-photo identification ("Polling Place ID"), but failing to provide a cost-free means to obtain those documents, Proposition 200 imposes an unconstitutional poll tax. In addition, the State's wholesale rejection of Federal Forms completed in accordance with the Election Assistance Commission's instructions, but submitted without a Registration Document, violates the NVRA. The District Court's grant of summary judgment was clearly erroneous and should be reversed.

ARGUMENT

I. Proposition 200 Imposes a Poll Tax Prohibited by the Fourteenth and Twenty-fourth Amendments Because Arizonans Who Lack Registration Documents or Polling Place ID Cannot Obtain Those Documents Without Paying a Fee.

A. As the Supreme Court Made Clear in *Crawford*, a Voter Identification Requirement Without a Means to Secure Identification for Free Imposes an Unconstitutional Poll Tax.

Last year, in *Crawford v. Marion County Election Board*, the Supreme Court addressed the very question presented here – whether a state voter identification law that lacks a means to secure the required identification for free, violates the Constitution. The Court clearly stated that any such law would not pass constitutional muster: "if the State [of Indiana] required voters to pay a tax or fee to obtain a new photo identification," necessary to cast a ballot at the polls, the Indiana voter identification law would have been unconstitutional "under our

reasoning in *Harper*." *Crawford*, 128 S. Ct. at 1620-21. In *Harper*, the Court held that the Fourteenth Amendment prohibits states from implementing any form of poll tax in elections for state office. The Twenty-fourth Amendment, ratified two years before *Harper*, prohibits states from implementing poll taxes in elections for federal office.[1]

For the vast majority of its citizens, Arizona does not provide any means to obtain the documents necessary to register to vote or to vote without paying a fee. The State requires that individuals registering to vote provide a Registration Document, which cannot be obtained without paying a fee.[2] The State also requires voters casting ballots at the polls on election day to provide Polling Place ID, which likewise is not necessarily provided free of charge.[3]

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[1] While the prohibitions against the use of a poll tax in federal and state elections originate in different constitutional provisions, the scope of the prohibitions is the same. *Compare Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (Twenty-fourth Amendment prohibits states from "condition[ing] the federal franchise upon payment of a poll tax") *with Harper*, 383 U.S. at 666 (Fourteenth Amendment prohibits requiring "payment of any fee" as a prerequisite to voting).

[2] *See* ER 5, CR 219, at 9; *see also* A.R.S. § 16-166(F) (listing the Registration Documents, but providing no free means to obtain one of the required documents).

[3] *See* A.R.S. § 16-579 (providing no cost-free means to obtain identification necessary to cast an in-person ballot on election day); ER 21, at 128 (listing the forms of Polling Place ID, which include only one document that the State must provide to voters for free – the voter registration card – but which alone is not sufficient Polling Place ID).

Instead of confronting these undisputed facts directly, the Secretary merely argues that the fees for such documents are not a "tax" that must be paid before registering or voting.[4] This argument, however, ignores the Court's rejection, first in *Harper* and more recently in *Crawford*, of any distinction between a tax and a fee, and also ignores the Court's recognition in *Crawford* that requiring voters to purchase a document to exercise the franchise is unconstitutional. 128 S. Ct. at 1620-21; *see also Harper*, 383 U.S. at 666 (holding that making the payment of "any fee an electoral standard" is unconstitutional).

Accordingly, the State has made payment of a fee an electoral standard. *See id.* Because the ability to pay such a fee has "no relation to voting qualifications," Proposition 200 imposes an unconstitutional poll tax. *Harper*, 383 U.S. at 670; *see Crawford*, 128 S. Ct. at 1620-21; *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1369 (N.D. Ga. 2005) ("[R]equiring . . . voters to purchase a Photo ID card effectively places a cost on the right to vote" and "runs afoul of the Twenty-fourth Amendment for federal elections and violates the Equal Protection Clause for State and municipal elections.").[5]

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[4] Answering Br. at 18.

[5] Specifically, Arizona has exceeded the constitutional limits by imposing a fee to register and vote on those individuals who have not and would not obtain the requisite documents for a non-voting related reason, *i.e.*, those individuals who must obtain the documents simply in order to register and vote.

B. Unlike Indiana's Law, Proposition 200 is Unconstitutional Because it Provides No Exception to the Payment of Fees for Registration Documents or Polling Place ID.

Contrary to the State's assertion, the Indiana law that survived a constitutional challenge in *Crawford* is less stringent than Proposition 200 in one key respect – Indiana provides cost-free means for voters to obtain the required identification or cast a ballot without that identification. *Crawford*, 128 S. Ct. at 1613-14. The Arizona law, on the other hand, does not provide any cost-free way to register or obtain a ballot on election day to those who lack Registration Documents or Polling Place ID. *See generally* A.R.S. §§ 16-166(F), 16-579(A). Indeed, the District Court found that "[o]btaining proper forms of identification for purposes of registering to vote will cost potential voters between 10 and 100 dollars" and "it is undisputed that some individuals will have to obtain a form of identification" to register to vote.[6]

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[6] ER 5, CR 219, at 9. After trial, the District Court recognized that the cost of Registration Documents could be as high as $380. ER 3, CR 1041, at 8-10. The State argues that this Court must confine review to the facts in the summary judgment record. Answering Br. at 6. However, the facts cited in support of the arguments in the Opening Brief represent further development of facts before the District Court on summary judgment. For example, in July 2007, the record showed that more than 20,000 registration forms had been rejected for failure to comply with Proposition 200. CR 296, ¶¶ 1-5. By July 2008, that number was larger, but its legal effect remains the same. *See* CR 1041, at 13.

The case cited in the Answering Brief, *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496 (9th Cir. 1997), is inapposite. There, the court refused to

In contrast, Indiana law provides free photo identification to qualified voters who establish their residence and identity. *Crawford*, 128 S. Ct. at 1614 & n.4. Moreover, those who lack the financial means to secure the documents necessary to obtain an Indiana photo identification (or have a religious objection to being photographed) still may cast a ballot if they complete "an appropriate affidavit before the circuit court clerk within 10 days following the election." *Id.* at 1613-14 & n.2.[7]

As the Secretary notes, *Crawford* recognized that residents of Indiana may end up paying a fee, indirectly, to vote if they do not make use of the indigency affidavit, because to obtain the free photo identification provided by Indiana, a voter must present documents for which the voter must pay a fee. *Id.* at 1621 &

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consider an argument, based on facts available at the summary judgment stage, but not raised then. *Id.* at 500. Here, the ITCA Plaintiffs' arguments on appeal were raised in opposition to summary judgment. Accordingly, and consistent with this Court's obligation to view the facts in the ITCA Plaintiffs' favor, the Court can and should consider facts that were before the District Court on summary judgment, but further developed by the time of trial. Moreover, after trial, the ITCA Plaintiffs asked the District Court to reconsider the poll tax issue in light of *Crawford*, making consideration of facts found at trial appropriate. *See* CR 1024, at 16-17.

[7] The Secretary attempts to discount the significance of Indiana's affidavit option by changing the subject – arguing that the absence of any such system in Arizona does not matter because the ITCA Plaintiffs allegedly have not adequately identified Arizona residents who will be required to pay a fee to register and to vote. Answering Br. at 23-24. For the reasons discussed in section I.C *infra*, the number of Arizonans adversely affected by Proposition 200's document requirements is irrelevant to determining whether the law imposes an unconstitutional poll tax.

n.17. The Secretary, however, wrongly attempts to equate the fees for Registration Documents and Polling Place ID with the secondary fees required in Indiana.[8] This argument misses the crucial distinction made by the Court in *Crawford*. The Court clearly drew a line between documents that a state requires be presented to election officials to vote (in Indiana, state-issued photo identification) and documents that a voter secondarily may need to present to other state or local officials (in Indiana, the Bureau of Motor Vehicles) to obtain the documentation required by election officials. The former must be available for free to pass constitutional muster, but the latter may involve a cost without triggering constitutional concern. *Id.* at 1620-21. Here, the Arizona Registration Documents and Polling Place ID fall in the former category – they are documents that a voter must present to election officials to register and to vote. Consequently, the fees associated with these documents render Proposition 200 constitutionally defective.

Nor does the broad availability of early voting under Arizona law, which does not require presentation of Polling Place ID, make the Polling Place ID requirement constitutionally permissible.[9] In *Crawford*, the Supreme Court's conclusion that requiring payment of a fee for voter identification was impermissible was unaffected by the availability of absentee voting for some

[8] Answering Br. at 21-23.

[9] *Id.* at 23 n.17.

Indiana residents. Moreover, in *Harman v. Forssenius*, the Supreme Court rejected the notion that imposition of a poll tax is permissible so long as voters are offered an alternative means of voting that does not involve payment of a tax. 380 U.S. at 542. Furthermore, Georgia, like Arizona, permitted anyone to vote absentee after instituting its photo identification requirement for voting at the polls on election day. *See Common Cause/Ga.*, 406 F. Supp. 2d at 1332. That did not prevent the District Court from holding that the voter identification law imposed a poll tax. *See id.* at 1369.

C. The Poll Tax Inquiry Does Not Entail Weighing Interests and Burdens. Accordingly, the ITCA Plaintiffs' Evidence of Harm to Voters Was Sufficient to Establish a Constitutional Violation, and the State's Asserted Interests Cannot Save Proposition 200.

The State's arguments ignore an important distinction between the poll tax inquiry under *Harper* and *Harman*, and the analysis employed to determine if voting regulations unconstitutionally burden the fundamental right to vote. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (requiring a court to "weigh the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule'"). The correct inquiry when the state requirement is challenged as a poll tax does not permit balancing the harm to would-be voters against the interests put forth by the State. Rather, "[f]or federal elections the poll tax, *regardless of the services it performs*, was abolished by the Twenty-fourth Amendment." *Harman*, 380 U.S. at 544 (rejecting

Virginia's asserted interest in proving the residence of its voters) (emphasis added). The Supreme Court has held that for a poll tax, "the degree of the discrimination is irrelevant." *Harper*, 383 U.S. at 668. The Court's reliance on *Harper* in *Crawford* demonstrates that on poll tax questions, the *Burdick* balancing test has not replaced *Harper*. Consequently, it does not follow from *Crawford* and the appellate decisions cited by the State – involving voter identification laws that survived the *Burdick* balancing test – that Proposition 200 does not impose an unconstitutional poll tax.[10]

Under Supreme Court precedent, Plaintiffs were not required to demonstrate harm outweighing the State's interests. *See Harper*, 383 U.S. at 668; *Harman*, 380 U.S. at 544. As such, the Secretary's argument that the ITCA Plaintiffs failed to come forward with individuals who lacked Registration Documents or Polling Place ID misstates the showing required to establish that Proposition 200 constitutes a poll tax.[11] Even though none of the ITCA Plaintiffs are individuals who have been denied access to voter registration or a ballot because they lack the

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[10] Answering Br. at 24 & n.18 (citing *Common Cause/Ga. v. Billups,* 2009 WL 81326, at *10 (11th Cir. Jan. 14, 2009); *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008)).

[11] Answering Br. at 24-26. In fact, at the Preliminary Injunction stage, the ITCA Plaintiffs identified several individuals who lack Registration Documents and/or Polling Place ID and also lack the means to obtain such documents. *See* CR 149, 150, Ex. 33-36 (Declarations of Nicholas Fisher, Tara Hernandez, Eva Steele and Kenneth Totten).

necessary documents, the District Court found that some Arizonans lack the forms of identification needed to register and to vote.[12] This is more than sufficient to show that Arizona's documentation requirements are an unconstitutional poll tax.

Indeed, there was no greater evidence of affected individuals in *Crawford* – which involved a pre-enforcement challenge to Indiana's law – yet the Supreme Court still recognized that requiring voters to purchase identification necessary to vote is unconstitutional under *Harper*. *Crawford*, 128 S. Ct. at 1620-21. In other words, in *Crawford*, the proportionately small number of voters without photo identification was immaterial. The Court stated that "[t]he fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper* . . . ." *Id.* at 1620-21. At bottom, the Fourteenth and Twenty-fourth Amendments render unconstitutional the imposition of a fee as a prerequisite to voting, regardless of the

[12] ER 5, CR 219, at 9. The Secretary attempts to discredit this factual finding by asserting that preliminary injunction factual findings are not binding on the court for purposes of ruling on a motion for summary judgment. Answering Br. at 25, n.19. While that may be an accurate statement of law, it has no effect here, where the District Court never repudiated this finding. Indeed, the Order granting summary judgment did not state that the Court no longer relied on that fact and after trial, the District Court again noted that "some Arizonans may be required to spend money to obtain necessary documents." ER 3, CR 1041, at 33; ER 4, CR 330, at 3. Moreover, on review of the District Court's grant of summary judgment, this Court must view the facts in the light most favorable to the non-moving party – here the ITCA Plaintiffs. *E.g., Halicki Films, LLC v. v. Sanderson Sales & Marketing*, 547 F.3d 1213, 1220 (9th Cir. 2008).

number of voters who are subject to the fee. *See id.*, at 1620; *United States v. Texas*, 252 F. Supp. 234, 252 (W.D. Tex 1966) (holding unconstitutional a poll tax imposed only on "a portion of those qualified"); *United States v. Alabama*, 252 F. Supp. 95, 97 (M.D. Ala. 1966) (striking down poll tax that applied only to 21 to 45-year-olds and exempted most military veterans).

Lastly, the Secretary's attempt to justify Proposition 200 by asserting that the law was not racially motivated, but merely "requires individuals reasonably to establish their identity for purposes of voting" fails to show that the law does not impose an unconstitutional poll tax.[13] Indeed, the State's reasons for the law are immaterial to the poll tax question. *See Harman*, 380 U.S. at 544 (rejecting as irrelevant Virginia's purported interests in confirming the eligibility of voters and limiting the franchise to those with some measure of interest in elections).[14] As such, even though the State has legitimate interests in ensuring that non-citizens do not register to vote and preventing imposter voting at the polls, they cannot erect a poll tax like Proposition 200 to meet those goals.

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[13] Answering Br. at 18. While the ITCA Plaintiffs are not prepared to concede that the framers of Proposition 200 did not intend to disenfranchise minority voters, such an intent is not necessary to make a poll tax unconstitutional.

[14] Moreover, as noted by the Court in *Harman*, racial discrimination is just one of the several reasons why the poll tax has been deemed unacceptable. 380 U.S. at 539-40.

II. The NVRA Prohibits Arizona from Requiring Registrants Who Use the Federal Form to Provide Additional Documentary Evidence of Citizenship.

A. Congress Has Broad Authority to Supplant State Voter Registration Rules.

Congress enacted the NVRA pursuant to its power under Article I, § 4, cl. 1 of the United States Constitution (the "Elections Clause"). In full, the Elections Clause states: "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, except as to the places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. The Secretary's Answering Brief focused on state power to regulate elections, wholly ignoring Congress' plenary authority over federal election regulations. Indeed, the Secretary's Answering Brief quoted only the first half of the Elections Clause, simply omitting the concluding subclause that establishes Congress' unquestionable power to preempt state election regulations.[15]

The Elections Clause gives Congress far greater power to affect state legislation than other constitutional provisions. *E.g., Foster v. Love*, 522 U.S. 67, 69 (1997) (recognizing Congressional "'power to override state regulations' by establishing uniform rules for federal elections, binding on the States") (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 832-33 (1995)); *Ass'n of Cmty. Orgs.*

[15] Answering Br. at 34.

for Reform Now (ACORN) v. Edgar, 56 F.3d 791, 792-94 (7th Cir. 1995) (noting that through the Elections Clause, Congress may "intrude[ ] deeply into the operation of state government"; upholding the NVRA). Congress' exceptionally broad Elections Clause authority negates any general presumption that it "does not lightly displace state law."[16] *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (the Elections Clause gives "Congress plenary authority over federal elections but also explicitly ensure[s] that all conflicts with similar state laws w[ill] be resolved wholly in favor of the national government"). Rather, when Congress acts under the Elections Clause – as it did when enacting the NVRA – its regulations "are paramount" to state regulations, which "cease[ ] to be operative" to the extent they conflict with the federal law. *Foster*, 522 U.S. at 69 (quoting *Ex Parte Siebold*, 100 U.S. 371, 184 (1879)).

None of the cases the Secretary cites as supporting a presumption against preemption of state law involved an exercise of Congress' Elections Clause power.[17] Likewise, even the cited cases related to elections, *Storer*, *Roudebush* and

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[16] Answering Br. at 33.

[17] *Id.* at 33-35, 38, 43 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (discussing whether the Medical Device Amendments of 1976 preempted a state negligence action arising from an allegedly defective medical device); *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990) (considering whether an employee's state law tort claim against her employer was preempted by the Energy Reorganization Act); *Storer v. Brown*, 415 U.S. 724 (1974) (considering First and Fourteenth Amendment challenge to state laws governing ballot access for independent

Griffin, did not involve consideration of whether a Congressional enactment preempted state regulation of elections.[18]

Because the Elections Clause gives Congress broad power to override state election regulations, the NVRA's requirement that states "accept and use" the Federal Mail Voter Registration Form (the "Federal Form") overrides conflicting state law. 42 U.S.C. § 1973gg-4(a)(1). The Federal Form and its instructions do not require submission of a Registration Document, and Arizona therefore cannot reject Federal Forms submitted without the documents required by Proposition 200.

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candidates); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973) (addressing whether Securities Exchange Act required enforcement of arbitration provision in contract in view of contrary state law); *Roudebush v. Hartke*, 405 U.S. 15 (1971) (analyzing whether U.S. Const. art. 1, § 5 preempted state recount procedures in close election for Senate seat); *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004) (discussing whether the U.S. Constitution compelled state to provide absentee voting to those who claim in-person, election day voting is a hardship); *Malabed v. North Slope Borough*, 335 F.3d 864 (9th Cir. 2003) (determining whether Title VII's allowance for Indian preference in hiring preempts a state constitutional guarantee of equal protection); *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991) (considering whether Ports and Waterways Safety Act preempted local ordinance regarding mooring of boats)).

[18] *But see* Answering Br. at 35 (citing *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (considering, without mentioning the Elections Clause, whether state practices related to provisional ballots conflicted with HAVA)).

B. The EAC – *Not the State* – Decides the Content of the Federal Form and Instructions, and is Entitled to Deference.

The District Court clearly erred when it determined that the NVRA permits states to require additional documentary evidence of citizenship be submitted with the Federal Form. Regardless of whether state election officials claim that such information can be used to "determine eligibility,"[19] the decision as to the required contents of the Federal Form and its instructions, and therefore the information that "is necessary to enable the appropriate state election official to assess the eligibility of the applicant," is assigned solely to the Election Assistance Commission (the "EAC"), not to the states. 42 U.S.C. § 1973gg-7(a)(2), (b)(1). As required by the NVRA, the EAC consulted with the Secretary, but declined to include Proposition 200's Registration Document requirement on the Federal Form or in the state-specific instructions. *See* 42 U.S.C. § 1973gg-7(a)(2).[20]

Once the EAC has consulted with the states and promulgated the Federal Form and its instructions, the NVRA provides no waiver mechanism under which states may deviate from the Federal Form. They must "accept and use" that form. 42 U.S.C. § 1973gg-4(a)(1). Indeed, allowing states to modify the form or add to its contents would undermine the Congressional purpose in establishing uniform

[19] ER 7, CR 68, at 8-9.

[20] *See also* ER 18, at 1.

nationwide procedures for voter registration, among which the availability of the postcard Federal Form is a central component.

The Secretary's Answering Brief provides a lengthy, tangential exposition of the requirements of the Help America Vote Act ("HAVA"), implying that the State's HAVA obligations bear upon its power to demand additional documents not required by the NVRA.[21] HAVA, however, expressly does not "require conduct prohibited under . . . supersede, restrict or limit the application of [the NVRA]." 42 U.S.C. § 15545(a)(4). Consequently, HAVA does not permit Arizona to add requirements to the Federal Form not contemplated by the EAC.[22]

The EAC expressly advised the Secretary that Arizona's practice of rejecting Federal Forms not accompanied by a Registration Document is a violation of the NVRA's mandate that the State "accept and use" the Federal Form. 42 U.S.C. § 1973gg-4(a)(1).[23] Contrary to the Secretary's argument,[24] determining the contents

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[21] Answering Br. at 31-33.

[22] Moreover, the Secretary's post hoc reliance upon HAVA fails to recognize that Proposition 200, a citizens' initiative, was not enacted to fulfill the State's HAVA obligations.

[23] ER 18, at 3. The State complains that this document and others were not in the summary judgment record before the District Court. Answering Br. at 6. In fact, the ITCA Plaintiffs submitted a copy of the EAC's March 6, 2006 letter to District Court with their Joinder in Gonzalez Plaintiffs' Application for Temporary Restraining Order, which the ITCA Plaintiffs expressly incorporated into their Response in Opposition to the Motion for Partial Summary Judgment. *See* CR 295 at 2 n.1; CR 21, Declaration of C. Moeser, Ex. C.

of a properly completed Federal Form is squarely within the EAC's agency authority, as granted by the NVRA and HAVA. *See* 42 U.S.C. §§ 1973gg-7(a)(2) (directing the EAC to develop the Federal Form), 15329 (limiting the EAC's authority to "issue any rule, promulgate any regulation, or take any other action . . . except to the extent permitted under [42 U.S.C. §] 1973gg-7(a)). Accordingly, the EAC's position that Arizona is violating the NVRA is entitled to deference. *See Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (requiring deference to an agency construction of a statute when the "statute is silent . . . with respect to the specific issue").

C. Arizona's Automatic Rejection of All Federal Forms Not Accompanied by Registration Documents Violates the NVRA's Mandate that it "Accept and Use" the Federal Form.

The NVRA mandates that the State "accept and use" the Federal Form promulgated by the EAC. 42 U.S.C. § 1973gg-4(a)(1). Under the plain meaning of "accept and use," Arizona may not reject every Federal Form that is not accompanied by a Registration Document.

The Secretary is simply wrong to contend that the ITCA Plaintiffs have argued that the State must automatically add to the voter rolls any individual who submits a Federal Form.[25] Rather, if a Federal Form shows on its face that an

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[24] Answering Br. at 40-41.

[25] *Id.* at 37.

individual is eligible to vote – *i.e.*, the form is completed legibly, signed under penalty of perjury and states that the voter is a United States citizen, a resident of the state and meets the State's other eligibility requirements – then registration should follow. *See* A.R.S. § 16-101. The NVRA's notification procedures do not compel a different result. *See* 42 U.S.C. § 1973gg-6(a)(2). Those procedures permit state elections officials who receive a Federal Form that does not meet the foregoing criteria on its face to contact the applicant to obtain missing information or otherwise remedy the problem, if possible. What the NVRA does not permit is blanket rejection of Federal Forms when nothing on the form, or in the verification process mandated by HAVA, raises a question about the applicant's eligibility to register.

D. The NVRA's Legislative History Demonstrates that Proposition 200 Conflicts with the NVRA.

When the District Court stated that "there is no indication in the language of the NVRA itself that states are prohibited from requiring additional information, such as proof of citizenship, when processing voter registration forms," it drew an inference of Congressional intent from the *absence* of language in the NVRA.[26] In view of the statute's legislative history, that inference was clearly erroneous. Indeed, Congress considered and rejected an amendment that would allow states to

[26] ER 7, CR 68, at 8.

require "presentation of documentation relating to citizenship of an applicant for voter registration." H.R. Rep. No. 103-66, at 23 (1993). The Conference Committee that reconciled the House and Senate versions of the NVRA removed the amendment from the final version of the bill because "[i]t is not necessary or consistent with the purposes of this Act." *Id.* It was clear error for the District Court to read into the NVRA a provision that Congress had considered and declined to include. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).[27]

The Secretary attempts to discount the legislative history cited in the Opening Brief by arguing that Congressional committee reports do not reflect the intent of Congress as a whole.[28] The cited report, however, was Congress' Joint Explanatory Statement of the Committee of Conference, which this Circuit has recognized as "the most reliable evidence of congressional intent because it 'represents the final statement of the terms agreed to by both houses.'" *N.W. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996). Moreover, even the Congressional report cited by the State, though not as clear a statement of Congressional intent as the Conference Committee report, *supports* the position

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[27] The District Court also found that "changing what an individual must submit *in addition* to the federal form is at least within the spirit of the NVRA if not the letter." ER 7, CR 68, at 9 n.7. The legislative history demonstrates that requiring documentary evidence of citizenship is precisely contrary to the NVRA's spirit.

[28] Answering Br. at 42 (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 530 (1989) (Scalia, J., concurring)).

that the NVRA bars states from demanding documentary evidence of citizenship. The House Committee stated that it was "particularly interested in ensuring that election officials continue to make determinations as to applicant's eligibility, such as citizenship, as are made under current law and practice." H.R. Rep. No. 103-9, at 8 (1993). In 1993, Arizona did not demand a Registration Document from voter registration applicants. The House Committee report provides no endorsement of or support for later-enacted registration requirements, such as Proposition 200's Registration Document requirement.[29]

III. The Exceptions to the Law of the Case Doctrine Compel Different Conclusions on the Poll Tax and NVRA Claims from Those Reached in *Gonzalez I*.

The Secretary argues that this Court should affirm the District Court solely on the basis of the "law of the case" contained in *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) ("*Gonzalez I*").[30] This case, however, falls within several of the well-recognized exceptions to the practice of following previous appellate decisions in the same case. Importantly, the law of the case doctrine is "a rule of practice and not a limit on authority." *United States v. Miller*, 822 F.2d 828, 832 (9th Cir. 1987) (reconsidering the law of the case to prevent a manifest injustice);

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[29] The Brief *Amicus Curiae* of the League of Women Voters of the United States contains a thorough discussion of the NVRA's legislative history [at 24-28], which the ITCA Plaintiffs commend to the Court, but do not repeat here.

[30] Answering Br. at 13.

see also Mendenhall v. Nat'l Transp. Safety Bd., 213 F.3d 464, 469 (9th Cir. 2000) (finding law of the case not dispositive when earlier appellate decision was clearly erroneous). Accordingly, the law of the case presents no bar to reversing the District Court's decision for several reasons.

First, the *Gonzalez I* ruling involved Plaintiffs' appeal from denial of a preliminary injunction. The law of the case doctrine does not prohibit revisiting such rulings on preliminary matters. *See Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 69-70 (3d Cir. 1999) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)); *see also So. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004) (stating that a preliminary injunction ruling does not constitute law of the case, even when the ruling "involved primarily issues of law"). Second, only those issues actually decided are subject to treatment as law of the case. *See Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1093 (9th Cir. 1998). Plaintiffs did not appeal, nor did this Court decide in *Gonzalez I*, whether the Polling Place ID requirement constitutes a poll tax. Third, an appellate court should not follow the law of the case if, *inter alia*, "the first decision was clearly erroneous" or "an intervening change in the law has occurred." *Mendenhall*, 213 F.3d at 469. All of these reasons call for departing from the *Gonzalez I* decision here.

The Supreme Court's decision in *Crawford* is "controlling authority [that] has since made a contrary decision of the law applicable to" the poll tax claim. *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805, 810 (9th Cir. 1991); *see also Richardson v. United States*, 841 F.2d 993, 996 (1988) (applying exception to law of the case doctrine because intervening state appellate court decision changed controlling state law in tort case). In *Dean*, the district court had granted partial summary judgment for the plaintiff on his claim that he should not have been required to pay union dues in violation of his First Amendment rights. *Id.* at 808. Initially, this Court reversed the grant of partial summary judgment. *Id.* On remand, the trial court granted summary judgment for the employer and union. *Id.* In the second appeal, the Court declined to follow the law of the case, however, recognizing that an intervening Supreme Court decision clarified the procedures that the union should have used to protect dissenting employees' First Amendment rights. *Id.* at 810. As in *Dean*, an intervening Supreme Court decision has clarified the law here. Accordingly, this Court is not bound to follow its decision in *Gonzalez I*.

As sections I and II *supra* explain, the previous decisions in this case were also clearly erroneous on the poll tax and NVRA claims. In addition, intervening controlling authority made clear that, under *Harper*, the Fourteenth Amendment bars requiring voters to pay for identification needed to cast a ballot.

Consequently, the District Court's reliance on *Gonzalez I* in granting summary judgment was likewise clear error. *See Richardson*, 841 F.2d at 995 (holding that the District Court should not have relied on earlier appellate ruling due to an intervening change in controlling law).

CONCLUSION

For the foregoing reasons, the District Court's grant of summary judgment on the ITCA Plaintiffs' poll tax and NVRA claims should be reversed, and enforcement of Proposition 200 should be enjoined.

RESPECTFULLY SUBMITTED this 20th day of February, 2009.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Opening Brief of Appellants the Inter Tribal Council of Arizona, et al. complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,949 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using MS Word in 14-point Times New Roman.

DATED this 20th day of February, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2009, I electronically filed the Reply Brief of Appellants the Inter Tribal Council of Arizona, et al. 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 some of the participants in the case are not registered CM/ECF users. I have mailed a copy of the Reply Brief by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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