No. 12-71

In The Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the court of appeals err 1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and 2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

PARTIES TO THE PROCEEDINGS

Petitioners, who were Defendants-Appellees below, are the State of Arizona, Ken Bennett in his official capacity as Arizona Secretary of State; Shelly Baker, in her official capacity as La Paz County Recorder; Berta Manuz, in her official capacity as Greenlee County Recorder; Lynn Constable, in her official capacity as Yavapai County Election Director; Laura Dean-Lytle, in her official capacity as Pinal County Recorder; Judy Dickerson, in her official capacity as Graham County Election Director; Donna Hale, in her official capacity as La Paz County Election Director; Robyn S. Pouquette, in her official capacity as Yuma County Recorder; Steve Kizer, in his official capacity as Pinal County Election Director; Christine Rhodes, in her official capacity as Cochise County Recorder; Linda Haught Ortega, in her official capacity as Gila County Recorder; Sadie Jo Tomerlin, in her official capacity as Gila County Election Director; Brad Nelson, in his official capacity as Pima County Election Director; Karen Osborne, in her official capacity as Maricopa County Election Director; Yvonne Pearson, in her official capacity as Greenlee County Election Director; Angela Romero, in her official capacity as Apache County Election Director; Helen Purcell, in her official capacity as Maricopa County Recorder; F. Ann Rodriguez, in her official capacity as Pima County Recorder; Lenora Fulton, in her official capacity as Apache County Recorder; Juanita Simmons, in her official capacity as

PARTIES TO THE PROCEEDINGS – Continued

Cochise County Election Director; Wendy John, in her official capacity as Graham County Recorder; Carol Meier, in her official capacity as Mohave County Recorder; Allen Tempert, in his official capacity as Mohave County Elections Director; Suzanne "Susie" Sainz, in her official capacity as Santa Cruz County Recorder; Melinda Meek, in her official capacity as Santa Cruz County Election Director; Leslie Hoffman, in her official capacity as Yavapai County Recorder; and Sue Reynolds, in her official capacity as Yuma County Election Director. Other parties who have been replaced by succession in office are: Janice K. Brewer, now Governor of Arizona, who was replaced by Ken Bennett; Thomas Schelling, who was replaced by Juanita Simmons; Joan McCall, who was replaced by Carol Meier; Ana Wayman-Trujillo, who was replaced by Leslie Hoffman; Patti Madril, who was replaced by Sue Reynolds; Susan Hightower Marler, who was replaced by Robyn S. Poucette; Gilberto Hoyos, who was replaced by Steve Kizer; Linda Haught Ortega, who was replaced by Sadie Tomerlin; Dixie Mundy, who was replaced by Linda Eastlick; and Penny Pew, who was replaced by Angela Romero.

Respondents, who were Plaintiffs-Appellants below, are The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; People for the American Way Foundation; Hopi Tribe; Bernie

PARTIES TO THE PROCEEDINGS – Continued

Abeytia; Luciano Valencia; Arizona Hispanic Community Forum; Chicanos Por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Valle Del Sol; Project Vote; Common Cause; and Georgia Morrison-Flores.

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

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona, Secretary of State Ken Bennett, and thirteen Arizona Counties (collectively referred to as "the State" or "Arizona") respectfully petition for a writ of certiorari to review the U.S. Court of Appeals for the Ninth Circuit's judgment in this case.

OPINION BELOW

The merits decision of the en banc panel of the Ninth Circuit Court of Appeals is reported at 677 F.3d 383 (9th Cir. 2012) (Pet. App. 1c-122c.) The order of the U.S. District Court for the District of Arizona is included in the Appendix at 1e to 10e.

JURISDICTION

The court of appeals entered judgment on April 17, 2012. (Pet. App. 4c.) This petition has been filed within ninety days of April 17, 2012. Accordingly, the Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 4, Clause 1 of the U.S. Constitution provides as follows:

> 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.

This case also involves the National Voter Registration Act, 42 U.S.C. §§ 1973gg to 1973gg-7, which is reproduced in the Appendix at 1h-28h.

The case also involves Arizona Revised Statutes ("A.R.S.") Section 16-166. Section 16-166(F) provides as follows:

> 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.

(The complete text of A.R.S. § 16-166 is reproduced in the Appendix at 46h-50h.)

STATEMENT OF THE CASE

A. The National Voter Registration Act.

Congress enacted the National Voter Registration Act ("the NVRA") in 1993 to "establish procedures that will increase the number of eligible citizens who register to vote for Federal office," "make it possible for Federal, State, and local governments to implement [it] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office," "to protect the integrity of the electoral process," and "to ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1)-(4) (Pet. App. 2h.)

The NVRA required the U.S. Election Assistance Commission ("EAC") to develop the Federal Mail Voter Registration Form ("Federal Form") in consultation with the States. *See* 42 U.S.C. § 1973gg-7(a)(2) (Pet. App. 25h-27h). The NVRA directs the States to "accept and use" the Federal Form when submitted by mail. 42 U.S.C. § 1973gg-4(a)(1), (2) (Pet. App. 7h.) Since the inception of the NVRA, Arizona has used and accepted the Federal Form for voter registration. (Appellees' Supplemental Excerpt of Record in Nos. 08-17094 and 08-17115, filed in the Ninth Circuit Court of Appeals [SER] 23, ¶ 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) of this title for the registration

of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(2). Included in the § 1973gg-7(b) criteria, the NVRA provides that a mail voter registration form "may require . . . identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (Pet. App. 26h). Section 1973gg-7(b)(2) specifies that citizenship is a necessary eligibility requirement. (*Id.*)

B. The Passage and Implementation of Proposition 200.

Arizona voters passed Proposition 200 in 2004. One of Proposition 200's provisions required prospective voters to provide satisfactory evidence of U.S. citizenship in order to register to vote (codified at A.R.S. § 16-166(F)). (Pet. App. 49h-50h.)

Proposition 200 permits a variety of documents and identification numbers to be used as evidence of citizenship. (*Id.*) For example, an Arizona driver's license or nonoperating identification number issued after October 1, 1996, may be used. Approximately ninety percent of voting age Arizonans have driver's licenses. (Appellant Gonzalez Excerpts of Record in the Ninth Circuit Court of Appeals [Gonzalez ER] Tab 3 at 9.) Similarly, naturalized citizens have certificates of naturalization, and they need only provide an identification number from that certificate on the form in order to register. (*Id.* at 4.) If a person has none of these numbers to provide, he or she can

provide copies of other documents such as birth certificates, passports, naturalization documents, or "other documents that are meant as proof that [may be] established pursuant to" federal immigration law. (Pet. App. 9d (quoting A.R.S. § 16-166(F)(5)).)

Following approval of the measure by Arizona voters, the Arizona Attorney General submitted it to the U.S. Department of Justice for preclearance under Section 5 of the Voting Rights Act. (SER 12-17.) Arizona specifically stated that the measure would "require applicants registering to vote to provide evidence of United States citizenship with the application." (*Id.*) The Department of Justice precleared the measure on January 24, 2005. (*Id.*)

Following the implementation of Proposition 200, Arizona has continued to accept both the Federal Form and Arizona's form for voter registration purposes, although the State requires submission of evidence of U.S. citizenship along with whichever application form the applicant submits. (SER 23-24, ¶¶ 2-3, 7.) The Arizona Secretary of State makes the Federal Form available to anyone who requests it. (SER 23, ¶ 4.) In addition, that form is publicly available for downloading and printing on the EAC's website. (SER 23, ¶ 4.)

C. Procedural History.

After the voters passed Proposition 200, several Plaintiffs brought overlapping Complaints to prevent its implementation. (Pet. App. 7c.) The district court

consolidated the actions and, following briefing and an evidentiary hearing, denied preliminary relief. (Pet. App. 1f-3f.) A two-judge motions panel of the Ninth Circuit reversed the district court and granted Plaintiffs' Emergency Motion for Injunction Pending Interlocutory Appeal. *Gonzalez v. Arizona*, Nos. 06-16702, 06-16706 (9th Cir. Oct. 5, 2006).

This Court granted the State's petition for certiorari and vacated the court of appeals' order. *Purcell v. Gonzalez,* 549 U.S. 1, 8 (2006). However, this Court noted the following important policy considerations:

> A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id. at 7 (internal citations, quotation marks, and brackets omitted). This Court also recognized the Plaintiffs' interest in exercising the right to vote. *Id.* The Court did not, however, express an opinion on the correct disposition of the ultimate issues. *Id.* at 8.

Justice Stevens noted two factual resolutions as key in resolving this case: (1) The scope of the disenfranchisement that the evidence requirements will produce, and (2) the prevalence and the character of the fraudulent practices that allegedly justify those requirements. *Id.* (Stevens, J., concurring).

Following a trial on the remaining claims, including Equal Protection, the district court granted judgment in favor of the State. (Pet. App. 8c-9c.) The district court found that the burdens on potential registrants were not excessive. (Gonzalez ER Tab 3 at 32.) Plaintiffs were able to produce only "one person . . . who is unable to register to vote due to Proposition 200's proof of citizenship requirement" and did not "demonstrate[ ] that . . . persons rejected are in fact eligible to register to vote." (*Id.*) The district court also found that voter fraud was a significant problem. For example, in 2005, in two counties, about 200 individuals' voter registrations were cancelled after they swore to the jury commission they were not U.S. citizens. (*Id.* at 16) Additionally, election officials testified that some voter-registration organizations, such as the Association of Community Organizations for Reform Now ("ACORN") submitted "garbage" voter-registration forms and had misled noncitizens into registering to vote. (*Id.*; *see also* Appellees' Supplemental Excerpt of Record in No. 08-17094 filed in the Ninth Circuit Court of Appeals at 209-10.)

Following remand, a panel of the court of appeals affirmed the district court's denial of the preliminary injunction in a published opinion, finding that the NVRA did not prohibit the State from requiring

evidence of citizenship. (Pet. App. 16d-17d) (*Gonzalez v. Arizona I*). Shortly after the Ninth Circuit affirmed the district court's preliminary injunction ruling, the district court granted the State's motion for summary judgment on the NVRA claim. (Pet. App. 3e.)

Plaintiffs appealed. (Pet. App. 9c.) A divided second panel of the Ninth Circuit Court of Appeals reversed the district court's summary judgment ruling on the NVRA claim and reversed *Gonzalez I*. (Pet. App. 1a-96a) (*Gonzalez v. Arizona II*). The State petitioned for rehearing en banc and the court granted rehearing. (Pet. App. 1b-6b.)

In another divided opinion, the en banc court concluded that the NVRA preempts Proposition 200 with regard to federal elections. (Pet. App. 1c-122c) (*Gonzalez v. Arizona III*). The majority reasoned that the Elections Clause "empowers both the federal and state governments to enact laws governing the mechanics of federal elections." (*Id.* at 13c.) The majority determined that because the Election Clause permits Congress to "'conscript state agencies to carry out' federal mandates," it "operates quite differently from the Supremacy Clause." (*Id.* at 14c-15c (quoting *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1415 (9th Cir. 1995)).) The majority concluded that it "need not be concerned with preserving a 'delicate balance' between [the States and the Federal Government]." (*Id.* at 16c (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).) Instead, the majority determined that the Election Clause "establishes its own balance" and that the "'presumption against preemption' and [the]

'plain statement rule' that guide Supremacy Clause analysis are not transferable to the Elections Clause context." (*Id.*)

Applying its newly created preemption analysis, the court determined that the state statute is superseded "[i]f the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration." (*Id.* at 20c.) The court concluded that because of the evidence-of-citizenship requirement, Arizona did not "'accept[] and us[e]' the Federal Form," and therefore Arizona's requirement was preempted "when applied to the Federal Form." (*Id.* at 31c, 43c.)

Chief Judge Kozinski concurred, but observed the following:

> The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation confirming what's in the form.

(Pet. App. 89c.) Chief Judge Kozinski also noted that although this Court "has never articulated any doctrine

giving deference to the states under the Elections Clause," this case, "where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests." (*Id.* at 91c.) He then concluded that only this Court "can adopt such a doctrine." (*Id.*) Chief Judge Kozinski stated, in effect, that although he joined the majority, he also believed that this case was appropriate for review.

Judges Rawlinson and Smith dissented from the majority's holding that the "application of Proposition 200's proof-of-citizenship provision to prospective voters using the [Federal Form] is precluded by the . . . NVRA." (Pet. App. 100c.) The dissent disagreed with the majority opinion's interpretation of the Elections Clause, finding that it was not supported by this Court's decisions. (Pet. App. 116c-121c.) According to the dissent, this Court's Elections Clause decisions "emphasize the respect that should be accorded the procedures implemented by states," clarify that "preemption extend[s] only as far as a conflict exists," and hold that "a conflict exists only if the [state and federal] regulations cannot co-exist." (*Id.* at 116c, 121c.) The dissent therefore concluded that "[b]ecause the requirements of both the NVRA and Proposition 200 may be met without conflict, they can easily co-exist under the Election Clause." (*Id.* at 121c.)

The dissent articulated several reasons, supported by the NVRA itself, that there was no conflict. For

example, drawing on an analogy first articulated by Chief Judge Kozinski in an earlier opinion in this case (Pet. App. at 96a-97a), the dissent observed:

> [A]ccepting and using something does not mean that it is necessarily sufficient. For example, 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. at 105c.)

The dissent further found that § 1973-7(b) expressly "permits states to 'require . . . such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant.'" (*Id.* at 107c (quoting 42 U.S.C. § 1973gg-7(b)(1)).) This showed Congress's intent that state officials should be able to require evidence of citizenship. (*Id.*) The dissent concluded that Congress could not have intended that the States could not deviate from the Federal Form because the NVRA expressly allows the States to develop their own form as long as it complies with 42 U.S.C. § 1973gg-7(b). (*Id.* at 109c-110c.) Consequently, the dissent concluded that Arizona did not defy "the demand to accept and use the Federal Form by not finding voter registration wholly sufficient based solely on the Federal Form." (*Id.* at 106c.)

REASONS WHY THE PETITION SHOULD BE GRANTED

The Court should grant review because the court of appeals' newly created Elections Clause preemption analysis is contrary to this Court's precedent and conflicts with the Elections Clause analysis of other federal circuit courts. The Court should resolve the conflict among the circuit courts about the correct analysis to be used when analyzing challenges to state laws under the Elections Clause.

The court of appeals' use of the incorrect preemption analysis is important because it resulted in a hypertechnical interpretation of a single provision of the NVRA, while ignoring the NVRA's plain language and the NVRA's stated purpose. The court of appeals' interpretation of the NVRA is also inconsistent with the recognition of this Court and another federal court of appeals that the NVRA does not limit the information that the State may request in the registration process.

The court of appeals' heightened Elections Clause analysis and its interpretation of the NVRA disrupt the delicate balance necessary to maintain federalism principles and interfere with the States' ability to protect the integrity of their elections. Because both Arizona law requiring prospective voters to provide sufficient evidence of citizenship and the NVRA's requirement that States accept and use the Federal Form can be enforced without conflict, the NVRA does not preempt the Arizona law. Moreover, the Arizona

law does not interfere with Congress's objectives in enacting the NVRA because requiring evidence of citizenship imposes a minimal burden on a limited number of persons and furthers the federal government's and the States' broad interest in protecting election integrity. *Cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 199-200 (2008) (plurality opinion) (upholding state law requiring photo identification against a facial attack because the "State's interest in protecting election integrity" outweighed the burdens on a small number of voters).

This Court should accept review here to clarify that like this Court's Supremacy Clause preemption analysis, the Elections Clause preemption analysis must take into account federalism principles. (*See* Pet. App. 91c) (Kozinski, J., concurring) (observing that this case is suitable for addressing whether the Court defers to the compelling state interest in "avoiding fraudulent voting by large numbers of unqualified electors.")

I. The Court of Appeals' Holding that Traditional Preemption Doctrines Do Not Apply to Preemption Analysis Under the Elections Clause Is Contrary to This Court's Precedent and Conflicts with Other Federal Circuit Court Decisions.

A. This Court's Cases Apply State-Deferential Preemption Principles in the Elections Clause Context and in Other Contexts in Which the Federal Government Has Constitutional Authority.

The court of appeals concluded that the "presumption against preemption" and the "plain statement rule," which apply to preemption analysis under the Supremacy Clause, did not apply to preemption analysis under the Elections Clause because the States "have no reserved authority over the domain of federal elections." (Pet. App. at 16c.) But this conclusion is contrary to this Court's Elections Clause precedent and ignores the fact that the Elections Clause expressly gives the States authority to act. And the court of appeals' reasoning is inconsistent with the Court's application of state-deferential preemption principles even in areas in which Congress has broad constitutional authority.

Since this country's founding, States have administered federal elections. The Elections Clause "grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 511 (2001) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208,

217 (1986)). Accordingly, States have express authority to promulgate election codes, to regulate registrations, to prevent election fraud, and to supervise voting. *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972); *see also Purcell*, 549 U.S. at 4 (explaining that States enact comprehensive election codes that apply to both state and federal elections for the purpose of ensuring the "[c]onfidence in the integrity of our electoral processes [that] is essential to the functioning of our participatory democracy"); *United States v. Classic*, 313 U.S. 299, 311, 315 (1941) (stating that "the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of the representative in Congress" and that this discretion is limited only to the extent that Congress has "restricted state action by the exercise of its powers to regulate elections under [the Elections Clause].").

"In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . [the Court] 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Because of the States' constitutional role in the regulation of elections for federal office, this Court has consistently applied traditional preemption doctrine to its interpretation of the Elections Clause.

Consistent with the presumption against preemption, the Court has held that an Election Clause challenge fails where the congressional act at issue "does not expressly pre-empt state legislation," thus leaving the State free to enforce its law. *McConnell v. Fed. Elections Comm'n*, 540 U.S. 93, 186 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010). Similarly, to the extent that Congress does legislate pursuant to the Elections Clause, a conflict extends "only so far as the two [provisions] are inconsistent and no farther." *Ex Parte Siebold*, 100 U.S. 371, 386 (1879); *see also Smiley v. Holm*, 285 U.S. 355, 369-72 (1932) (evaluating state procedures for enacting congressional districts to determine if there was a conflict with the Elections Clause or federal statute and concluding that no conflict existed). The Ninth Circuit's decision in this case, which makes no finding of express preemption and does not find a conflict between the NVRA and Proposition 200, is directly contrary to these two holdings by this Court.

The court of appeals relied on *Siebold* and *Foster v. Love*, 522 U.S. 67 (1997), to conclude that no presumption against preemption applies under the Elections Clause. (Pet. App. 17c-20c.) But neither of those cases supports the court of appeals' conclusion that the Court disregarded state-deferential preemption principles or warrants striking down a state law that does not conflict with any federal statute and that expressly furthers a federal objective (that is, ensuring

the registration of eligible voters). The Ninth Circuit's decision is therefore without supporting authority.

In *Siebold*, the petitioners challenged their prosecution for violations of a federal statute that criminalized conduct in federal elections. 100 U.S. at 378-82. The petitioners argued that if Congress chose to regulate congressional elections, it must do so comprehensively rather than partially. *Id.* at 382-83. The Court rejected this proposition, concluding that Congress may alter the law respecting state practices "either wholly or partially" under the Elections Clause. *Id.* at 383. Although "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them," *id.* at 383-84, the conflict extends only "so far as the two are inconsistent, and no farther," *id.* at 386. A conflict arises "if both cannot be performed." *Id.* The Court explained that it was "bound to presume that Congress has [legislated] in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations." *Id.* at 393. *Siebold*'s conclusion "does not derogate from the power of the State to execute its laws at the same time and in the same places . . . [unless] both cannot be executed at the same time." *Id.* at 395; *cf. Roudebush*, 405 U.S. at 25-26 (holding that state election procedure "usurp[s]" federal law regarding qualification of members "only if it frustrates" Congress's "ability to make an independent final judgment" on qualifications).

The analysis in *Foster* is consistent with the analysis in *Siebold*. At issue in *Foster* was the validity of the Louisiana open primary statute that could determine who would fill the offices of U.S. Senator and Representative a month before the election date set by federal statute, 2 U.S.C. § 7. *Foster,* 522 U.S. at 68-69. The Court found that the state law was invalid because there was an irreconcilable conflict between the federal statute and the state law:

> Without paring the term "election" in § 7 down to the definition bone, it is enough to resolve this case to say that a contested selection of candidates for a congressional office that is concluded as a matter of law before the federal election day, with no act or law in fact to take place on the date chosen by Congress, clearly violates § 7.

Id. at 72. This Court noted that it was issuing a very narrow opinion that would not unduly interfere with state election procedures: "This case thus does not present the question whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to federal election day." *Id.* at 72 n.4.

In contrast to the Court's broad definition of "election" in *Foster* that avoided creating an unforeseen conflict with state law, the court of appeals here construed the phrase "'accept and use' the federal form" narrowly or hypertechnically. (*See* Pet. App. 89c) (Kozinski, J., concurring) (stating that construing the

phrase "'accept and use' the federal form" to mean that the State "must employ the form as a complete registration package" would construe the phrase "narrowly or exclusively," whereas giving the phrase "a broad or inclusive construction," would allow States to "'accept and use' the federal form while also requiring registrants to provide documentation confirming what's in the form.") As will be discussed in Section I(B) *infra,* the court of appeals' interpretation of *Foster* is contrary to the Fifth Circuit Court of Appeals' interpretation of *Foster* in *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000), and is at the least inconsistent with another Ninth Circuit panel's interpretation of *Foster* in *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001).

In addition to the decisions in *Siebold* and *Foster*, the Court's use of state-deferential preemption principles even in areas in which Congress possesses broad constitutional powers, such as immigration, indicates that the Court would not abandon those principles when analyzing state statutes under the Elections Clause.

In *Arizona v. United States*, No. 11-182, 2012 WL 2368661, at *4 (U.S. June 25, 2012), the Court addressed whether federal law preempted four provisions of Arizona law that concerned illegal aliens within Arizona's borders. At the outset, the Court noted the federal government's "broad, undoubted power over the subject of immigration and the status of aliens." *Id.* at *5 (citing U.S. Const. art. I, § 8, cl. 4 and *Toll v. Moreno*, 458 U.S. 1, 10 (1982)). But the

Court noted that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States" and examined the four provisions of Arizona law under traditional preemption principles. *Id.* at *7-8. The Court noted that federal law preempts state law where there is an express preemption provision, where Congress has indicated "its intent to displace state law altogether, and where state law conflicts with federal law." *Id.* And the Court instructed that "[i]n preemption analysis, courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Id.* at *8 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Applying the traditional preemption principles, the Court found that federal law preempted one provision of Arizona law because Congress intended to preclude all state regulation on the subject of alien registration, *id.* at *10, and two other provisions because they were inconsistent with federal policy and objectives, *id.* at *12, *14. But the Court held that it was improper to enjoin enforcement of one Arizona provision "without some showing that enforcement of the provision *in fact* conflicts with federal immigration law and its objectives." *Id.* at *18 (emphasis added).

If the court of appeals had applied traditional preemption principles in the present case, it would have found that Proposition 200's evidence-of-citizenship requirement was consistent with the

language and purpose of the NVRA as well as other federal laws. *See* Section II *infra*; *see also* (Pet. App. 90c) (Kozinski, J., concurring) (noting that there would be "ample justification" for adopting "the Clear Statement Rule or the Presumption Against Preemption" for Election Clause Preemption given the States' vital interest in making sure that qualified electors choose their federal representatives).

B. The Circuit Courts of Appeals Are Split Concerning the Appropriate Preemption Analysis for Challenges to State Laws Under the Elections Clause.

In finding that the "presumption against preemption" and the "plain statement rule" are not transferable to the Elections Clause context, the court of appeals relied on *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008). But *Harkless* is not a preemption case and other circuit court decisions apply traditional preemption principles to Elections Clause challenges.

In *Bomer*, 199 F.3d at 774, the Fifth Circuit addressed whether federal election statutes that require that the election of members of Congress and presidential electors occur on federal election day preempted provisions of the Texas Election Code that permitted unrestricted early voting in federal elections. The court relied on *Foster*, 522 U.S. at 68, and *Classic*, 313 U.S. at 311, to determine the governing preemption analysis: "Thus, a state's discretion and flexibility in establishing the time, place and manner

of electing its federal representatives has only one limitation: the state system cannot *directly conflict* with federal election laws on the same subject." *Bomer*, 199 F.3d at 775 (emphasis added); *see also McIntyre v. Fallahay*, 766 F.2d 1078, 1085 (7th Cir. 1985) (holding in the context of a different Elections Clause issue that "[a] federal law preempts state law only when the two inevitably *conflict* or the law contains an *explicit* preemption clause") (emphasis added) (citing *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), and *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), which the Court decided under the Supremacy Clause).

The *Bomer* court relied on this Court's definition of "election" in *Foster* to conclude that the state statutes allowing early voting did not contravene federal election statutes "because the final selection [was] not made before the federal election day." 199 F.3d at 776. The court reasoned that its "conclusion [was] consistent with the Supreme Court's refusal to give a hyper-technical meaning to 'election' and its refusal to '[pare] the term "election" in § 7 to the definitional bone.'" *Id.* (quoting *Foster*, 522 U.S. at 72).

In *Keisling*, 259 F.3d at 1176, the Ninth Circuit upheld an Oregon statute that allowed early voting by mail. Although the court noted that the text and history of the federal election day statutes seemed to imply that multiday elections were not permitted, it concluded that "[t]he *Foster* definition of 'election' implie[d] that there [was] only a single election day in

Oregon, when the election [was] 'consummated,' even though there [were] prior voting days." *Id.* at 1175.

The Fifth Circuit in *Bomer* and the Seventh Circuit in *McIntyre* determined that an actual conflict must exist for a federal law to preempt a state law under the Elections Clause. In contrast to the conflict preemption analysis that the *Bomer* and *McIntyre* courts applied, the court of appeals here applied a newly created test that did not require an actual contradiction between the federal law and the state law. (Pet. App. 20c.) As shown above, the Court's reliance on *Foster* for its new theory is incorrect.

The court of appeals' analysis is also inconsistent with the analysis in *Bomer* and *Keisling*. Those courts recognized that this Court had defined "election" broadly to accommodate state election procedures and upheld state election laws that could have been interpreted to conflict with federal law. In contrast to *Bomer* and *Keisling*, the court of appeals here narrowly defined "accept and use the Federal Form" to invalidate Arizona's evidence-of-citizenship requirement even though it does not directly conflict with the NVRA and it is consistent with the NVRA's overall statutory scheme and purposes.

While the Sixth Circuit determined that the plain statement rule did not apply to the NVRA in *Harkless,* 545 F.3d at 454-55, the case addressed whether the Ohio Secretary of State could be sued for

failure to comply with the NVRA and not whether the NVRA preempted state law.[1] *Harkless* provides no support for the court of appeals' newly created preemption test.

The Court should grant review to resolve the conflicts among circuits and between the Ninth Circuit and this Court and to clarify that traditional preemption principles apply to challenges to state law under the Elections Clause.

II. The NVRA Does Not Preempt Proposition 200 as to the Federal Form or Otherwise.

If the court of appeals had applied traditional preemption principles, it would have found that Proposition 200's evidence-of-citizenship requirement was valid. (*See* Pet. App. 90c) (Kozinski, J., concurring) (noting that traditional rules of preemption would be useful to resolve case); (*see also id.* at 31c) (majority opinion) (applying court's own Elections

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[1] In contrast to the Sixth Circuit Court of Appeals in *Harkless,* the Eighth Circuit Court of Appeals recognized that the plain statement rule is likely to be appropriate under the Elections Clause in *United States v. Missouri*, 535 F.3d 844, 850 n.2 (8th Cir. 2008). Although ultimately avoiding the issue, the Eighth Circuit explained that while the Elections Clause does not speak in terms of reserved powers, that is really only a logical extension of the fact that federal elections post-date the federal government. *Id.* Accordingly, there is no functional difference between Elections Clause regulation and other federal impositions upon the States. *Id.*

Clause analysis).[2] Conflict preemption arises where "compliance with both federal and state regulations is a physical impossibility," or where a "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 2012 WL 2368661 *8 (quoting *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), and *Hines v. Davidowitz*, 312 U.S. 52 (1941), respectively). This Court "assume[s] that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230). Under these principles, the court of appeals should have found that Proposition 200 was valid.

A. Proposition 200 Does Not Conflict with the NVRA.

"Impossibility pre-emption is a demanding defense." *Wyeth*, 555 U.S. at 573. Nothing in the court of appeals' opinion suggests that it is impossible for persons who register to vote to use the Federal Form and provide sufficient evidence of citizenship. After trial on other counts, the district court found that there was no excessive burden on persons seeking to register. (Gonzalez ER Tab 3 at 33.) The court of

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[2] The court of appeals did not find that Congress had expressly preempted Proposition 200 or that Congress had occupied the field concerning voter registration. There would be no basis for such a finding because the NVRA expressly requires state involve-ment in the registration process. *See, e.g.*, 42 U.S.C. § 1973gg-2(a)(3)(B) (Pet. App. 3h.)

appeals acknowledged as much, dispatching Arizona's argument regarding the NVRA's burden on the basis of interference with the NVRA, rather than on the basis of impossibility. (Pet. App. 30c-31c.)

Congress enacted the NVRA to achieve four goals:

> 1) To establish procedures that will increase the number of *eligible* citizens who register to vote in elections for Federal office;
>
> 2) To make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of *eligible* citizens as voters in elections for Federal office;
>
> 3) To protect the *integrity of the electoral process*; and
>
> 4) To ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b) (emphasis added) (Pet. App. 2h.) While the NVRA's goals indicate Congress's intent to increase voter registration, they also emphasize Congress's concern with the integrity of the electoral process, including ensuring that only eligible voters are registered. Because only U.S. citizens are eligible to vote, Proposition 200's evidence-of-citizenship requirement is consistent with the NVRA's express goals.

The court of appeals did not consider whether Proposition 200 was an obstacle to Congress's

purposes and objectives in enacting the NVRA because it rejected preemption principles. (*See* Pet. App. 16c.) Had the court addressed Congress's express purposes for enacting the NVRA and its objectives in light of the entire statutory scheme, it would have concluded that Congress did not intend the NVRA to bar States from properly assessing whether an applicant who registers to vote is eligible to vote. Rather, the opposite is true.

The NVRA builds upon the States' role in administering federal elections by providing certain requirements (and barring others, such as notarization) while "still leav[ing] room for policy choice" including what information to require from applicants. *Young v. Fordice*, 520 U.S. 273, 286 (1997) ("The NVRA does not list . . . all the other information the State may – or may not – provide or request.").

The Sixth Circuit's decision in *McKay v. Thompson* is illustrative and conflicts, at least in principle, with the Ninth Circuit's approach here. 226 F.3d 752, 755-56 (6th Cir. 2000). In that case, a plaintiff challenged a state requirement that people provide their social security numbers when registering to vote, claiming that this requirement violated the NVRA. *Id.* The requirement of a social security number is not authorized expressly by the NVRA. As with Arizona's requirements, the NVRA neither expressly authorizes nor expressly forbids the additional information being required of the applicant. Therefore, the Sixth Circuit concluded that the NVRA did not preclude the use of the numbers. *Id.* Indeed, as Judge Rawlison explained,

"the NVRA itself . . . expressly authorizes a state . . . to require additional information outside of the Federal Form for voter registration." (Pet. App. 102c) (Rawlinson, J., dissenting). The majority attempted to distinguish *McKay* by suggesting that because the United States Election Assistance Commission accepted the state requirement on the Federal Form, there was no conflict with that decision. (Pet. App. 34c.) That misses the point. The NVRA itself nowhere authorizes the use of social security numbers, and the Sixth Circuit expressly based its decision on the lack of a prohibition in the *statute*: "The NVRA does not specifically forbid use of social security numbers." 226 F.3d at 755-56. Similarly, in this case, the NVRA does not "specifically forbid" a request for evidence of citizenship. Therefore, under the Sixth Circuit rule, Arizona is not prevented by the NVRA from requesting evidence of citizenship.

Nor could the conclusion that Proposition 200 presents an obstacle to the NVRA be squared with this Court's decision in *Crawford*. In *Crawford*, the Court explained that certain burdens may arise where a photo identification is required in order to vote, such as the loss of the identification, but "[b]urdens of that sort, arising from life's vagaries . . . are neither so serious nor so frequent as to raise any question" about the Indiana law requiring voters to provide photo identification. *Id.* at 197. Even if the burden may be "somewhat heavier . . . on a limited number of persons" this is not sufficient to sustain a "broad attack" on a state statute. *Id.* at 199-200.

Indeed, the NVRA itself does not suggest that Proposition 200 is an obstacle. The NVRA does not mandate the exclusive use of the Federal Form, but expressly authorizes States to develop and use their own form if the form meets the criteria in § 1973gg-7(b). 42 U.S.C. § 1973gg-4(a)(2) (Pet. App. 8h.) The state form "may require . . . indentifying information . . . as is necessary to enable the appropriate State election official to *assess the eligibility* of the applicant." 42 U.S.C. § 1973gg-7(b)(1) (emphasis added) (Pet. App. 26h.) Citizenship is a necessary eligibility requirement. 42 U.S.C. § 1973gg-7(b)(2) (Pet. App. 26h.) Therefore, the state form may require evidence of citizenship. If Congress had intended to preclude States from requiring evidence of citizenship, it would not have allowed States to develop and use their own form that requires such evidence. *Cf.* 42 U.S.C. § 1973gg-7(b)(3) (barring the States from requiring notarization) (Pet. App. 26h.) Instead, reading the NVRA provisions as a whole, it is logical to conclude that Congress intended that the Federal Form would set the minimum requirements and would allow a State to impose additional requirements, such as evidence of citizenship, that enable it to assess the applicant's eligibility to vote. *See Samanter v. Yosuf*, ___ U.S. ___, 130 S. Ct. 2278, 2289 (2010) (stating that the Court does not "'construe statutory phrases in isolation; [it] read[s] statutes as a whole'") (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984)); *see also La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 370 (1986) ("Where possible, provisions of a statute should be read so as not to create a conflict.").

Congress's concern that only *eligible* voters register is evidenced throughout the NVRA. For example, the NVRA requires administrators of federal elections to "ensure that any *eligible* applicant is registered to vote in an election." 42 U.S.C. § 1973gg-6(a)(1) (emphasis added) (Pet. App. 15h.) It also requires election administrators to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters" under certain circumstances. 42 U.S.C. § 1973gg-6(a)(4) (Pet. App. 16h.) "Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place." *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004) (explaining that the NVRA "protects only 'eligible' voters from unauthorized removal"). "[E]ligibility is the definitive criterion for registration and list maintenance obligations" and as a result, "States must strive to add eligible voters to their lists and to remove ineligible ones." *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1275-76 (D. Colo. 2010) (rejecting argument that the NVRA precluded a State from sending an address confirmation to a mail-in voter registrant). These NVRA provisions confirm that Congress wanted the States to register eligible voters and that Proposition 200 does not stand as an obstacle to the accomplishment and execution of Congress's purposes in enacting the NVRA.

Without the Arizona provision that was stricken by the Ninth Circuit, Arizona is forced to accept what

amounts to an honors system as to whether applicants are citizens or not. Although the applicant is required to sign a statement under oath that he is a citizen, someone willing to commit voter fraud will be willing to sign that statement. Only by requiring evidence of citizenship can the State screen out non-citizens who are attempting to vote. This is consistent with the purposes of the NVRA and is nowhere prohibited in the NVRA.

B. Because There Are Two Possible Interpretations of the Term "Accept and Use the Federal Form," the Court of Appeals Erred in Choosing the Interpretation that Is Contrary to the Plain Statement Rule and the Presumption Against Preemption.

The history of this case demonstrates that multiple federal judges have interpreted the phrase "accept and use the Federal Form" to allow States to require additional information to enable them to assess an applicant's eligibility. (Pet. App. 122c, 16d-17d, 3e; *cf. id.* at 97a-99a.) If the court of appeals had applied the plain statement rule or the presumption against preemption, it would have adopted an interpretation of the NVRA that avoided invalidating Proposition 200. *See Medtronic*, 518 U.S. at 485 ("In all preemption cases . . . [this Court] start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress.") (internal

citations and quotation marks omitted); *DeCanas v. Bica*, 424 U.S. 351, 357-58 (1976) (stating that even in areas where Congress possesses broad authority, such as immigration, the Court will not presume that Congress intended to "preclude even harmonious regulation touching on aliens in general, or the employment of illegal aliens in particular"). The court of appeals erred in adopting an interpretation of the NVRA that ignores the plain statement rule and the presumption against preemption.

CONCLUSION

For the forgoing reasons, the State requests that the Court grant the Petition for Writ of Certiorari.

DATED: July 16, 2012

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ,; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; JAN BREWER, in her official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder;

CANDACE OWENS, Coconino County Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees,

YES ON PROPOSITION 200,

Defendant-intervenor-Appellee,

No. 08-17094
D.C. Nos.
2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE,

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; JAN BREWER, in her official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; Patty Hansen, Coconino County Election Director; KELLY DASTRUP, Navajo County

Election Director; LYNN CONSTABLE, Yavapai County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees,

YES ON PROPOSITION 200,

Defendant-intervenor-Appellee,

No. 08-17115
D.C. No.
2:06-cv-01268-ROS
OPINION

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
October 20, 2009 – Tucson, Arizona

Filed October 26, 2010

Before: Sandra Day O'Connor, Associate Justice,*
Alex Kozinski, Chief Judge, and Sandra S. Ikuta,
Circuit Judge.

Opinion by Judge Ikuta;
Dissent by Chief Judge Kozinski

COUNSEL

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* The Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).

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Joel M. Spector, Mountain States Legal Foundation, Lakewood, Colorado, on behalf of Amicus Curiae Mountain States Legal Foundation.

Michael J. Reitz, Evergreen Freedom Foundation, Olympia, Washington, on behalf of Amicus Curiae Evergreen Freedom Foundation.

Brian D. Netter, Mayer Brown LLP, Washington, D.C., on behalf of Amici Curiae Congressman Robert A. Brady, Congresswoman Zoe Lofgren, Congressman Charles A. Gonzalez, Congressman Raul M. Grijalva, and Congressman Jose E. Serrano.

Richard A. Samp, Washington Legal Foundation, Washington, D.C., on behalf of Amici Curiae Protect Arizona Now, Washington Legal Foundation, and Allied Educational Foundation.

OPINION

IKUTA, Circuit Judge:

Proposition 200 requires prospective voters in Arizona to present documentary proof of citizenship in order to register to vote, Ariz. Rev. Stat. §§ 16-152, 16-166, and requires registered voters to present proof of identification in order to cast a ballot at the polls, Ariz. Rev. Stat. § 16-579. This appeal raises the questions whether Proposition 200 violates the Voting Rights Act § 2, 42 U.S.C. § 1973, is unconstitutional under the Fourteenth or Twenty-fourth Amendments of the Constitution, or is void as inconsistent with the National Voter Registration Act (NVRA), 42 U.S.C. § 1973gg *et seq.* We hold that the NVRA supersedes Proposition 200's voter registration procedures, and that Arizona's documentary proof of citizenship requirement for registration is therefore invalid. We reject the remainder of Appellants' arguments.

I

On November 2, 2004, Arizona voters passed a state initiative, Proposition 200, which (upon proclamation of the Governor) enacted various revisions to the state's election laws. Among other changes, Proposition 200 amended the procedures for voter registration and for checking voters' identification at polling places in both state and federal elections. With respect to voter registration procedures, Proposition 200 amended two state statutes. First, it added the following requirement to section 16-152 of the Arizona Revised Statutes, which lists the contents of the state voter registration form:

> The form used for the registration of electors shall 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.

Ariz. Rev. Stat. § 16-152(A)(23). Second, it amended section 16-166 of the Arizona Revised Statutes to state that: "The County Recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship," and defined satisfactory evidence of citizenship to include a driver's license or similar identification license issued by a motor vehicle agency, a birth certificate, passport, naturalization documents or other specified immigration documents, or specified cards

relating to Native American tribal status. *See* Ariz. Rev. Stat. § 16-166(F).[1]

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[1] Section 16-166(F) provides the following list of approved identification documents:

> 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.

Proposition 200 also addressed identification procedures at polling places. Specifically, Proposition 200 amended section 16-579 of the Arizona Revised Statutes to provide that voters "shall present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector." Ariz. Rev. Stat. § 16-579(A) (2004). The Secretary of State, acting under statutory authority, *see* Ariz. Rev. Stat. § 16-452(A), (B), promulgated a procedure specifying the "forms of identification" accepted under the statute, which included photograph-bearing documents such as driver's licenses and non-photograph-bearing documents such as utility bills or bank statements. In 2009, the state legislature amended section 16-579 to codify that procedure.[2]

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[2] As of 2009, section 16-579(A)(1) provides:

(a) A valid form of identification that bears the photograph, name and address of the elector that reasonably appears to be the same as the name and address of the precinct register, including an Arizona driver license, an Arizona nonoperating identification license, a tribal enrollment card or other form of tribal identification or a United States federal, state or local government issued identification. Identification is deemed valid unless it can be determined on its face that it has expired.

(b) Two different items that contain the name and address of the elector that reasonably appears to be the same as the name and address in the precinct register, including a utility bill, a bank or credit union

(Continued on following page)

Shortly after Proposition 200's passage, various plaintiffs filed a complaint against Arizona to prevent the implementation of these changes. Two groups of plaintiffs are relevant to this appeal. Jesus Gonzalez, representing individual Arizona residents and organizational plaintiffs, claimed that Proposition 200 violated the NVRA (to the extent the Arizona enactment regulated federal registration procedures), was a poll tax under the Twenty-fourth Amendment, burdened naturalized citizens in violation of the Equal Protection Clause of the Fourteenth Amendment, and disparately impacted Latino voters and diluted Latino voting power in violation of § 2 of the Voting Rights Act. The Inter Tribal Council of Arizona (ITCA), a non-profit organization representing twenty

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statement that is dated within ninety days of the date of the election, a valid Arizona vehicle registration, an Arizona vehicle insurance card, Indian census card, tribal enrollment card or other form of tribal identification, a property tax statement, a recorder's certificate, a voter registration card, a valid United States federal, state or local government issued identification or any mailing that is "official election material." Identification is deemed valid unless it can be determined on its face that it has expired.

(c) A valid form of identification that bears the photograph, name and address of the elector except that if the address on the identification does not reasonably appear to be the same as the address in the precinct register or the identification is a valid United States Military identification card or a valid United States passport and does not bear an address, the identification must be accompanied by one of the items listed in subdivision (b) of this paragraph.

Arizona tribes, filed a complaint along with various other organizations,[3] the Hopi Tribe, and Representative Steve Gallardo from the Arizona State House of Representatives.[4] Like Gonzalez, ITCA claimed that Proposition 200 violated the NVRA (to the extent it regulated federal registration procedures), and constituted a poll tax under the Twenty-fourth Amendment. ITCA also separately claimed that Proposition 200 was a poll tax under the Fourteenth Amendment. The district court consolidated Gonzalez and ITCA's complaints.

Gonzalez and ITCA moved for a preliminary injunction to enjoin application of Proposition 200's requirements in the 2006 general election, *Gonzalez v. Arizona* (*Gonzalez I*), 485 F.3d 1041, 1047 (9th Cir. 2007). The district court denied their motion, but a motions panel of this court reversed and granted the injunction pending disposition of the merits on appeal. *Id.* The Supreme Court vacated the injunction,

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[3] ITCA's action was joined by the League of Women Voters of Arizona, the League of United Latin American Citizens, the Arizona Advocacy Network, and People For the American Way Foundation, as well as the claimants listed above.

[4] We refer to named plaintiffs Gonzalez and ITCA as representing all plaintiffs associated in their respective actions. Where appropriate, we refer to Gonzalez and ITCA individually; however, because Gonzalez and ITCA bring the same NVRA and Twenty-fourth Amendment claims, we refer to both collectively as "Gonzalez" in the sections discussing these two claims. We refer to the defendants collectively as "Arizona," even though Arizona county recorders were also named as defendants in these consolidated actions.

and remanded for clarification whether this court had given due deference to the district court's findings of fact. *Id.* at 1048; *see Purcell v. Gonzalez,* 549 U.S. 1, 5 (2006). On remand, Gonzalez and ITCA chose to pursue injunctive relief with respect only to Proposition 200's registration requirement. *Gonzalez I,* 485 F.3d at 1048. The *Gonzalez I* panel thereafter affirmed the district court's denial of the preliminary injunction, holding that Proposition 200's registration requirement was not a poll tax, *id.* at 1049, and was not a violation of the NVRA, *id.* at 1050-51. The district court subsequently granted Arizona's motion for summary judgment, relying on *Gonzalez I* to rule that Proposition 200 was not an unconstitutional poll tax and was not invalid as conflicting with the NVRA. After trial, the district court resolved all other claims in favor of Arizona, holding that Proposition 200 did not violate § 2 of the Voting Rights Act and did not discriminate against naturalized citizens or burden the fundamental right to vote in violation of the Fourteenth Amendment's Equal Protection Clause.

On appeal, Gonzalez and ITCA challenge the district court's rulings on the NVRA and the Twenty-fourth Amendment. In addition, ITCA claims that Proposition 200 is an invalid poll tax under the Fourteenth Amendment, and Gonzalez challenges the district court's decisions on both the Voting Rights Act claim and the equal protection challenge for discrimination based on national origin and undue burden on the fundamental right to vote. We consider each of these claims in turn.

II

We begin with Gonzalez's claim that Proposition 200's documentary proof of citizenship requirement for registration is superseded by the NVRA's comprehensive procedure for registering voters in federal elections. Gonzalez argues that the NVRA preempts Arizona law under both the Supremacy Clause and the Elections Clause of the U.S. Constitution. In response, Arizona relies on the Supremacy Clause's "presumption against preemption," *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996), to argue that the NVRA did not expressly or impliedly preempt state voter registration laws. Before addressing the parties' arguments, we first consider whether the framework of the Elections Clause or the Supremacy Clause guides our analysis here.

A

The Elections Clause establishes a unique relationship between the state and federal governments. It provides:

> The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.

U.S. Const. art. I, § 4, cl. 1. In a nutshell, the Elections Clause gives state governments initial responsibility to regulate the mechanics of national elections,

"but only so far as Congress declines to preempt state legislative choices." *Foster v. Love,* 522 U.S. 67, 69 (1997).

The history of the Elections Clause reveals the reasoning behind this unusual delegation of power. Under the Articles of Confederation, the states had full authority to maintain, appoint, or recall congressional delegates.[5] At the Philadelphia Convention, delegates expressed concern that, if left unfettered, states could use this power to frustrate the creation of the national government, most obviously by neglecting to hold federal elections.[6] The Framers decided that Congress should be given the authority to oversee the states' procedures related to national elections as a safeguard against potential state abuse. *See U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 808-09 (1995); *see also* The Federalist No. 59 (Alexander Hamilton) (Ron P. Fairfield 1981 ed., 2d ed.) (explaining that "[n]othing can be more evident, than that an

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[5] *See* Articles of Confederation of 1781, art. V ("[D]elegates shall be annually appointed in such manner as the legislature of each state shall direct . . . with a power, reserved to each state, to recall its delegates. . . . Each state shall maintain its own delegates in a meeting of the states. . . .").

[6] *See* 1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates's Minutes, Congressional Opinions, Virginia & Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution 225 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1901) [hereinafter Elliot's Debates].

exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy"). Over the protest of some Southern delegates,[7] the Framers approved language giving Congress power to "make or alter" the states' regulations. *See* 5 Elliot's Debates 401-02 (statement of James Madison). As subsequently modified to give Congress supervisory power, this language became the Elections Clause.[8]

As indicated by this historical context, the Elections Clause empowers both the federal and state governments to enact laws governing the mechanics of federal elections. By its plain language, the Clause delegates default authority to the states to prescribe the "Times, Places, and Manner" of conducting national elections in the first instance. U.S. Const. art. I,

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[7] South Carolinian delegates Charles Pinckney and John Rutledge moved to exclude the language giving Congress this supervisory power over the states. 5 Elliot's Debates at 401. "The states, they contended, could and must be relied on" to regulate legislative appointments. *Id. See also Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004).

[8] Alexander Hamilton described the need for congressional oversight of the states as follows: "[The Framers] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety." The Federalist No. 59.

§ 4, cl. 1. The states would not possess this authority but for the Clause: As the Supreme Court has noted, the authority to regulate national elections "aris[es] from the Constitution itself," and is therefore "not a reserved power of the States." *U.S. Term Limits,* 514 U.S. at 805. Because federal elections did not come into being until the federal government was formed, individual states have no inherent or preexisting authority over this domain. *See id.* at 804-05.

While the states have default responsibility over the mechanics of federal elections, because Congress "may at any time by Law make or alter such Regulations" passed by the state, U.S. Const. art. I, § 4, cl. 1, power over federal election procedures has been described by the Supreme Court as ultimately "committed to the exclusive control of Congress." *Colegrove v. Green,* 328 U.S. 549, 554 (1946).[9] Accordingly, "the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to

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[9] The Court has generally construed Congress's exclusive authority under the Elections Clause expansively. *See, e.g., United States v. Gradwell,* 243 U.S. 476, 483 (1917) (authority over federal election process, from registration to certification of results); *United States v. Mosley,* 238 U.S. 383, 386 (1915) (authority to enforce the right of an eligible voter to cast ballot and have ballot counted); *Ex Parte Coy,* 127 U.S. 731, 752-53 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte Yarbrough* (*The Ku-Klux Cases*), 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte Clarke,* 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis Congressional elections).

exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold,* 100 U.S. 371, 384 (1879); *see also Foster,* 522 U.S. at 69.

Not only does the Elections Clause grant Congress authority to supersede state election laws, but we have interpreted the Clause to require states to affirmatively implement Congress's superseding regulations, without compensation from the federal government. *Voting Rights Coalition v. Wilson,* 60 F.3d 1411, 1415 (9th Cir. 1995). Put another way, the Elections Clause gives Congress the power to "conscript state agencies to carry out [federal] voter" procedures in accordance with Congress's own mandates. *Id.* This makes the Clause unique among virtually all other provisions in the Constitution, which "mostly tell [states] not what they must do but what they can or cannot do." *ACORN v. Edgar,* 56 F.3d 791, 794 (7th Cir. 1995).

In sum, a state's role in the creation and implementation of federal election procedures under the Elections Clause is to administer the elections through its own procedures until Congress deems otherwise; if and when Congress acts, the states are obligated to conform to and carry out whatever procedures Congress requires. *See Foster,* 522 U.S. at 69.

As should be clear from this overview, the Elections Clause operates quite differently from the Supremacy Clause. The Supremacy Clause provides

that the law of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments." *White Mountain Apache Tribe v. Williams,* 810 F.2d 844, 848 (9th Cir. 1985).

In our system of dual sovereignty, when deciding under the Supremacy Clause whether a particular state law is preempted by a federal enactment, courts strive to maintain the "delicate balance" between the States and the Federal Government. *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991); *see Medtronic,* 518 U.S. at 485. Courts thus endeavor to preserve the states' authority when possible, *see Gregory,* 501 U.S. at 460, particularly where a congressional enactment threatens to preempt a state law regulating matters of its residents' health and safety, an area to which "[s]tates traditionally have had great latitude . . . to legislate" as a matter of local concern, *Metro. Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985). *See also Altria Group, Inc. v. Good,* 129 S. Ct. 538, 543 (2008); *Medtronic,* 518 U.S. at 485. Only where no reconciliation between state and federal enactments may be reached do courts hold that Congress's enactments must prevail, *e.g., Altria,* 129 S. Ct. at 543, with the understanding, however, that "the individual States . . . retain [their] independent

and uncontrollable authority . . . to any extent" that Congress has not interfered, *see* The Federalist No. 33 (Alexander Hamilton).

In light of the different history and purpose of these constitutional provisions, it is not surprising that the preemption analysis for the Supremacy Clause differs from that of the Elections Clause. In its Supremacy Clause jurisprudence, the Supreme Court has crafted special guidelines to assist courts in striking the correct balance between federal and state power. First, in examining claims that a federal law preempts a state statute through the Supremacy Clause, the Supreme Court instructs courts to begin with a "presumption against preemption." *E.g., Altria Group,* 129 S. Ct. at 543; *Medtronic,* 518 U.S. at 485. This principle applies because, as the Court has recently noted, "respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly pre-empt state-law causes of action." *Wyeth v. Levine,* 129 S. Ct. 1187, 1195 n.3 (2009) (internal quotation marks omitted). Second, the Court has adopted a "plain statement rule," holding that a federal statute preempts a state statute only when it is the "clear and manifest purpose of Congress" to do so. *Gregory,* 501 U.S. at 461 (internal quotation marks omitted); *see also Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 516 (1992) ("Consideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by . . . Federal Act, unless that is the clear and manifest

purpose of Congress.") (internal quotation marks and brackets omitted)). Like the presumption against preemption, this rule "is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory,* 501 U.S. at 461.

This jurisprudence, which is motivated in large part by federalism concerns, is unsuited to analyzing the preemptive effect of a congressional enactment under the Elections Clause. Because the states' sole power over national election procedures is that delegated by the Elections Clause, *U.S. Term Limits,* 514 U.S. at 805, and states otherwise have no reserved authority over this domain, *id.,* courts deciding issues raised under the Elections Clause need not strike any balance between competing sovereigns. Instead, the Elections Clause, as a standalone preemption provision, establishes its own balance, resolving all conflicts in favor of the federal government. *See, e.g., Foster,* 522 U.S. at 71 (stating that "the Constitution explicitly gives Congress the final say" on matters related to federal election procedures). For this reason, the "presumption against preemption" and "plain statement rule" that guide courts' analysis of preemption under the Supremacy Clause are not transferable to the Elections Clause context. *Cf. Gregory,* 501 U.S. at 460-61. Indeed, the Supreme Court has suggested as much. In *Foster,* the Court upheld the Fifth Circuit's determination that a state election law was voided by a federal election law; however, instead of

adopting the Fifth Circuit's Supremacy Clause analysis, the Supreme Court analyzed the claim under the Elections Clause, without ever mentioning any presumption against preemption or requirement of a plain statement of congressional intent to preempt. *See Foster,* 522 U.S. 67; *Love v. Foster,* 90 F.3d 1026 (5th Cir. 1996), *cert. granted* in 522 U.S. 67 (1997). In fact, our survey of Supreme Court opinions deciding issues under the Elections Clause reveals no case where the Court relied on or even discussed Supremacy Clause principles.

Because the Elections Clause empowered Congress to enact the NVRA, *Wilson,* 60 F.3d at 1414, the preemption analysis under that Clause is applicable here. We begin our analysis as the Court did in *Foster,* guided by Election Clause preemption principles. *Accord Harkless v. Brunner,* 545 F.3d 445, 454 (6th Cir. 2008) (declining to apply Supremacy Clause preemption principles in analyzing the preemptive effect of the NVRA).

B

The Supreme Court first explained the principles of Elections Clause preemption in *Siebold,* 100 U.S. 371. In that case, the Court likened the relationship between the laws passed by Congress and the state legislatures under the Elections Clause to "prior and subsequent enactments of the same legislature." *Id.* at 384. "The State laws which Congress sees no occasion to alter, but which it allows to stand, are in

effect adopted by Congress." *Id.* at 388. By this token, just as a subsequent legislature is not required to make an "entirely new set" of laws when modifying those of a prior legislature, neither is Congress required to wholly take over the regulation of federal election procedures when choosing to "make or alter" certain of the states' rules. *Id.* at 384. According to the Court, there is no "intrinsic difficulty in such co-operation" between the state and national legislatures because the two governments do not possess an "equality of jurisdiction" with respect to federal elections. *Id.* at 392. While Congress may override state enactments, the state may not vitiate an action of Congress by adopting a system of regulations to undo congressional efforts. *See id.* at 393, 397. In all instances, "the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws." *Id.* at 397.

Over a century later, the Supreme Court clarified what constitutes a conflict under the Elections Clause's single system of federal election procedures. *See Foster*, 522 U.S. 67. *Foster* considered whether a congressional enactment superseded a Louisiana statute regulating the same federal election procedure. *Id.* at 68-69. Specifically, sections 1 and 7 of Title 7 of the U.S. Code established the date for federal congressional elections as the Tuesday after the first Monday in November. *Id.* at 69-70. A Louisiana statute established an open primary in October where state voters could elect the candidate who would fill the offices of United States Senator and

Representative. *Id.* at 70. Only if the open primary failed to result in a majority candidate would a run off election between the top two candidates be held on Congress's specified election day. *Id.* In response to a challenge by Louisiana voters, the Court unanimously held that the state and federal acts conflicted, and thus invalidated the Louisiana law. *Id.* at 74.

In concluding that Congress's power to preclude the state statute was beyond argument, the Court rejected the state's claim that its statute and the federal enactment could be construed harmoniously. *Id.* at 73. Louisiana asserted that "the open primary system concern[ed] only the 'manner' of electing federal officials, not the 'time' at which the elections will take place." *Id.* at 72. The Court discarded this "attempt to draw this time-manner line" as "merely wordplay" and an "imaginative characterization" of the statutes. *Id.* at 72-73. Building upon the principles from *Siebold,* the Court declined to adopt a strained interpretation of the statutes to reconcile a potential disagreement. *See id.* Rather, the Court emphasized Congress's unique plenary authority not only to supplant state rules but to conscript states to carry out federal enactments under the Elections Clause, and found it enough that, under a natural reading, the state and federal enactments addressed the same procedures and were in conflict. *Id.* (noting that the Louisiana's regulation addressed the timing of elections "quite as obviously" as the federal one). Refusing to "par[e] [the statute] down to the

definitional bone," the Court held that the state enactment was void. *Id.* at 72, 74.

Reading *Siebold* and *Foster* together, we derive the following approach for considering whether federal enactments under the Elections Clause displace a state's procedures for conducting federal elections. First, as suggested in *Siebold,* we consider the state and federal laws as if they comprise a single system of federal election procedures. *Siebold,* 100 U.S. at 384. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. *See id.* If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. *Foster,* 522 U.S. at 74. With this approach in mind, we consider whether the NVRA and Proposition 200 operate harmoniously in a single procedural scheme for federal voter registration.

C

To resolve the question here, we must first understand both the federal and state voter registration procedures at issue. We earlier explained the changes to Arizona's registration statutes under Proposition 200, which incorporated a requirement that registrants submit documentary proof of citizenship in order to register to vote. *See supra* Part I; Ariz. Rev.

Stat. §§ 16-152, 16-166. Our next step is to examine the scope of the NVRA.

1

Congress enacted the NVRA because, among other reasons, it determined that "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).

Initially, Congress attempted to address this problem by enacting legislation that permitted the government and prospective voters to challenge discriminatory practices in the courts. *See South Carolina v. Katzenbach,* 383 U.S. 301, 313 (1966) (discussing the Civil Rights Act of 1957, which "authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds," and the Civil Rights Act of 1964, which "expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics" used to disqualify African Americans from voting in federal elections).[10] The elimination of discriminatory voting practices through litigation, however, was "slow and

[10] Neither of these Acts were passed under the substantive authority of the Elections Clause, and therefore the Elections Clause analysis is not applicable to cases considering these enactments.

expensive, and [meanwhile] the States were creative in contriving new rules to continue violating the Fifteenth [and Fourteenth] Amendment[s] in the face of adverse federal court decrees." *Nw. Austin. Mun. Utility Dis. No. One v. Holder* (*NAMUDNO*), 129 S. Ct. 2504, 2508-09 (2009) (internal quotation marks omitted). To limit voter registration, some local officials defied court edicts or "simply closed their registration offices to freeze the voting rolls." *Katzenbach,* 383 U.S. at 314. Congress's attempts to "authoriz[e] registration by federal officers . . . had little impact on local maladministration." *Id.* Nearly a century after the Civil War, registration of eligible African American voters in some states was still fifty percentage points lower than that of eligible white voters. *Shaw v. Reno,* 509 U.S. 630, 640 (1993).

Congress tried a different approach to addressing this problem by passing the Voting Rights Act of 1965 (VRA), Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § 1973 *et seq.*). The VRA, enacted under the authority of Congress's Fifteenth Amendment enforcement powers, is "a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant." *Katzenbach,* 383 U.S. at 308, 315. As enacted, the VRA suspended the use of literacy tests, § 4(a)-(d), required covered jurisdictions to pre-clear changes in voting procedures and practices, § 5, and provided for the appointment of federal examiners to assist in registering qualified citizens to vote, §§ 6, 7, 9, 13. Section 2 of the VRA also permits actions to be brought to void voting

qualifications or prerequisites "resulting in the denial or abridgement of the right of any citizen of the United States to vote on account or race or color."

While considered on the whole to be a successful tool in eliminating the more obvious discriminatory voting procedures, *see NAMUDNO,* 129 S.Ct. at 2511, the VRA failed to address voter registration procedures, which imposed a "complicated maze of local laws and procedures, in some cases as restrictive as the out-lawed practices, through which eligible citizens had to navigate in order to exercise their right to vote," H.R. Rep. No. 103-9, at 3 (1993). Between 1988 and 1993, Congress held a series of hearings focused on reforming the voter registration process to address the increasingly pressing issue of low voter turnout in federal elections. *Condon v. Reno,* 913 F. Supp. 946, 949 n.2 (D.S.C. 1995). Congress found that, while over eighty percent of registered citizens voted in Presidential elections, only sixty percent of eligible voters were registered. H.R. Rep. No. 103-9, at 3. Public opinion polls showed that the primary reason eligible citizens were not voting was the failure to register. *Id.* While acknowledging that this failure was attributable to many factors outside its control, Congress enacted the NVRA to address the problems within its control, namely those barriers to registration that were imposed by state governments. *See id.* Under the Elections Clause, Congress had the power "to provide a complete code for congressional elections, not only as to times and places, but in relation to . . . registration." *Smiley v. Holm,* 285 U.S.

355, 366 (1932). Through this authority, Congress enacted the NVRA to remove these obstacles and "to provide simplified systems for registering to vote in federal elections." *Young v. Fordice,* 520 U.S. 273, 275 (1997) (emphasis omitted).

2

The NVRA is a comprehensive scheme enacting three significant changes to federal election registration procedures nationwide: (1) it creates a standard "Federal Form" (described below) for registering federal voters; (2) it requires states to establish procedures to register voters for federal elections according to three prescribed methods; and (3) it regulates maintenance of voting lists. *See* 42 U.S.C. § 1973gg *et seq.*

Section 1973gg, setting forth the act's "Findings and Purposes," provides an overview of the NVRA. The "findings" subsection, § 1973gg(a), articulates Congress's intent to promote voter registration and to address "discriminatory and unfair registration laws." The "purposes" subsection, § 1973gg(b), provides a preview of the operative sections of the NVRA, listing Congress's goals of increasing voter registration and enhancing the participation of eligible voters (relating to Sections 2 through 5, § 1973gg-2-§ 1973gg-5) and the goals of ensuring the accuracy of registration rolls and protecting the integrity of the electoral process (relating to Section 6, § 1973gg-6).

Section 2, § 1973gg-2, sets forth the scope and applicability of the act.[11] Each state (except for those that do not require voter registration as a prerequisite to voting) "shall establish procedures to register" voters for federal elections according to the NVRA's three methods "notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law." § 1973gg-2(a).

The first method of voter registration is described in Section 3, § 1973gg-3. This section provides that any application for a driver's license submitted to a state motor vehicle authority "shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." § 1973gg-3(a)(1). This provision earned the statute its informal title, the "Motor Voter Law." *United States v. Lara,* 181 F.3d 183, 191 (1st Cir. 1999). Under the statute, the voter registration form must be part of the driver's license application, and generally "may not require any information that duplicates information required in the driver's license portion of the form." § 1973gg-3(c)(2)(A). Section 3 also limits the content of the form to the minimum necessary to prevent

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[11] Section 1 of the NVRA defines terms used in the statute. § 1973gg-1.

duplicate voter registrations and to enable the state to assess the eligibility of the applicant.[12]

The second method of voter registration, set forth in Section 4, § 1973gg-4, requires states to register federal voters by mail using the Federal Form. Section 4(a)(1) states that "[e]ach State shall accept and use the [Federal Form] for the registration of voters in elections for Federal office." Section 4(a)(2) provides that, "[i]n addition to accepting and using [the Federal Form], a State may develop and use a mail voter registration form that meets all the criteria" of the Federal Form. Section 4(b) discusses the availability of the Federal Form and the state equivalent: States must make the mail registration form "available for distribution through governmental and private entities, with particular emphasis on making

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[12] Section 1973gg-3(c) provides, in pertinent part:

> The combined motor vehicle-voter registration form:
>
> (B) may require only the minimum amount of information necessary to –
>
> (I) prevent duplicative 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;
>
> (C) shall include a statement that –
>
> (I) states each eligibility requirement (including citizenship)
>
> (ii) contains an attestation that the applicant meets each such requirement; and
>
> (iii) requires the signature of the applicant under penalty of perjury[.]

them available for organized voter registration programs." § 1973gg-4(b). With certain exceptions not pertinent here, the statute permits states to require citizens who register by mail to vote in person if they have not previously voted in the jurisdiction. § 1973gg-4(c).

The third method of federal voter registration is mandated by Section 5, § 1973gg-5, which requires states to designate certain state offices for voter registration. Targeting "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with" motor vehicle agencies, H.R. Rep. No. 103-55, at 19 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 140, 144, this section requires states to provide for federal registration at "all offices in the State that provide public assistance," § 1973gg-5(a)(2)(A), and "all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities," § 1973gg-5(a)(2)(B). The state may also designate additional government offices such as "public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and [other offices] that provides services to persons with disabilities" as voter registration agencies. § 1973gg-5(a)(3).

Section 5 requires each designated agency to provide applicants with the Federal Form, help them complete it, and mandates "[a]cceptance of completed voter registration application forms for transmittal to

the appropriate State election official." § 1973gg-5(a)(4)(A). As in Section 4, the designated state agency may also distribute a state form, but only "if it is equivalent" to the Federal Form. § 1973gg-5(a)(6)(A)(ii).

Section 6, § 1973gg-6, establishes procedures to enhance the accuracy and integrity of the official voting lists both by removing ineligible voters and preventing the mistaken removal of eligible voters.

Section 7, § 1973gg-7, describes how the federal and state governments will determine the contents of the Federal Form, and otherwise coordinate administration of the NVRA's procedures. This section delegates the creation of the Federal Form to the federal Election Assistance Commission (EAC).[13] § 1973gg-7(a). The section requires the EAC to work "in consultation with the chief election officers of the States" in crafting the Form's contents. *Id.*

Section 7 also sets out parameters for what the Federal Form may, shall, and cannot include.[14] Among

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[13] The responsibilities of the EAC were formerly held by the Federal Election Commission (FEC). When Congress passed the Help America Vote Act (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, in 2002, it created the EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA.

[14] 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

(Continued on following page)

other things, the Federal Form "may require only such identifying information" as is necessary to allow the state to determine the eligibility of the applicant and to administer the voter registration and election process. § 1973gg-7(b)(1). The Federal Form must inform the applicant as to every eligibility requirement "including citizenship" and require the applicant to attest, under penalty of perjury, that the

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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 penalties for false applications, § 1973gg-6(a)(5)]

(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 not 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.

§ 1973gg-7(b).

applicant meets each requirement. § 1973gg-7(b)(2). The form "may not include any requirement for notarization or other formal authentication." § 1973gg-7(b)(3).

Section 8, § 1973gg-8, requires states to designate an officer to serve as chief election official. Section 9, § 1973gg-9, regulates civil enforcement of the NVRA's provisions and designates a private right of action under the statute. Section 10, § 1973gg-10, sets forth the criminal penalties for election fraud or other non-compliance with the statute.

As this overview indicates, the thrust of the NVRA is to increase federal voter registration by streamlining the registration process. In this vein, the NVRA requires states to make registration opportunities widely available, at the motor vehicle bureau, § 1973gg-3, by mail, § 1973gg-4, and at public assistance, disability service, and other designated state offices, § 1973gg-5. Along with increasing the opportunities for registration, the NVRA eases the burdens of completing registration forms. At the motor vehicle authority, for instance, voter registration must be included as part of the driver's license application and the combined form cannot require duplicative information. § 1973gg-3(c)(2)(A). The NVRA also regulates the Federal Form to meet its goal of eliminating obstacles to voter registration. *See* § 1973gg(b)(1)-(2). Thus, the NVRA forbids the EAC from including any identifying information beyond that "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." § 1973gg-7(b)(1). In sum, as every court to have considered the act has concluded, the NVRA's central purpose is to increase voter registration by streamlining voter registration procedures. *See, e.g., Harkless,* 545 F.3d at 449; *Welker v. Clarke,* 239 F.3d 596, 598-99 (3d Cir. 2001) ("One of the NVRA's central purposes was to dramatically expand opportunities for voter registration. . . ."); *Disabled in Action of Metro. N.Y. v. Hammons,* 202 F.3d 110, 114 (2d Cir. 2000); *Lara,* 181 F.3d at 192 ("The NVRA is addressed to heightening overall popular participation in federal elections. . . ."); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen,* 152 F.3d 283, 285 (4th Cir. 1998) ("Congress passed the NVRA . . . to encourage increased voter registration for elections involving federal offices" and "to make it easier to register to vote."); *ACORN v. Miller,* 129 F.3d 833, 835 (6th Cir. 1997) ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA].").

3

Turning now to our Elections Clause analysis, we consider whether Proposition 200's documentary proof of citizenship requirement is superseded by the NVRA. As indicated by the approach derived from *Siebold* and *Foster, see supra* Part II.B, we consider the state and federal enactments together as if they composed a single system of federal election

procedures. Next, we consider whether, read naturally, the NVRA provisions complement Proposition 200's voter registration requirements or supersede them. If a natural interpretation of the language of the two enactments leads to the conclusion that the state law does not function consistently and harmoniously with the overriding federal scheme, then it is replaced by the federal statute.

Applying this framework, we conclude that Proposition 200's documentary proof of citizenship requirement conflicts with the NVRA's text, structure, and purpose. First, the NVRA addresses precisely the same topic as Proposition 200 in greater specificity, namely, the information that will be required to ensure that an applicant is eligible to vote in federal elections. *See Foster,* 522 U.S. at 73. Section 7 of the NVRA, § 1973gg-7, both spells out the information that an applicant must provide in order to register to vote in a federal election and limits what the Federal Form can require. It "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." § 1973gg-7(b)(1). The Federal Form accounts for eligibility concerns by requiring applicants to attest, under penalty of perjury, that they meet every eligibility requirement. § 1973gg-7(b)(2). Acknowledging the states' interests in ensuring voter eligibility, Congress allowed states to give their input on the contents of the

Federal Form in an advisory capacity to the EAC. § 1973gg-7(a)(2). Given 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. If viewed as a second enactment by the same legislature, the NVRA clearly subsumes Proposition 200's additional documentary requirement on registrants using the Federal Form. *See Siebold,* 100 U.S. at 384.

Further supporting this conclusion, the value of the Federal Form (and hence a centerpiece of the NVRA) would be lost, and Congress's goal to eliminate states' discriminatory or onerous registration requirements vitiated, if we were to agree with Arizona that states could add any requirements they saw fit to registration for federal elections through the Federal Form. For instance, the NVRA prohibits the Federal Form from requiring notarization or other such formal authentication. § 1973gg-7(b)(3). If the NVRA did not supersede additional state requirements on registrants using the Federal Form, as Arizona asserts, then states would be free to impose a notarization requirement as a prerequisite to their "accept[ance] and use" of the form, *see* § 1973gg-4(a)(1), even though such a requirement would directly contradict Congress's intent in prohibiting such a requirement in the form itself.

Moreover, specific statutory language in the NVRA, when read in an unstrained and natural

manner, is inconsistent with the state enactment. The NVRA mandates that states "shall accept and use" the Federal Form when applicants register by mail. § 1973gg-4(a). It likewise requires "acceptance" of the completed Federal Form at state office buildings, which must be transmitted to the appropriate State election officials. § 1973gg-5(a)(4)(iii). The state must implement these methods of registering voters, as well as the combined motor vehicle-voter registration form, § 1973gg-3(c)(1), "notwithstanding any other Federal or state law," § 1973gg-2(a). By contrast, Proposition 200 precludes the state from registering applicants who have completed and submitted the Federal Form unless such applicants also mail in, or submit at the designated state office building, documentary proof of citizenship. Ariz. Rev. Stat. §§ 16-152, 16-166. Such a requirement falls under the umbrella of laws displaced by the NVRA's "notwithstanding" language.

Structurally, allowing states to impose their own requirements for federal voter registration on registrants using the Federal Form 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. The NVRA permits states to suggest changes to the Federal Form, but gives the EAC ultimate authority to adopt or reject those suggestions. § 1973gg-7(a). Here, for example, before enacting Proposition 200, Arizona petitioned the EAC to include a requirement in the Federal Form that the applicant present documentary

proof of citizenship analogous to what is required by Proposition 200. Pursuant to the procedure set forth in the NVRA, the EAC denied the suggestion and warned that Arizona "may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form." Faced with this denial, Arizona proceeded to implement the requirement in Proposition 200 as a separate state condition to voter registration, which was imposed even on those registering to vote in federal elections with the Federal Form. If the NVRA did not supersede state-imposed requirements for federal voter registration, this type of end-run around the EAC's consultative process would become the norm, and Congress's control over the requirements of federal registration would be crippled. Given that the Elections Clause gives Congress ultimate authority over the federal voter registration process, *Colegrove,* 328 U.S. at 554, such a reading of the NVRA is untenable.

More broadly, Proposition 200 is not in harmony with the intent behind the NVRA, which is to reduce state-imposed obstacles to federal registration. It is indisputable that by requiring documentary proof of citizenship, Proposition 200 creates an additional state hurdle to registration. As indicated in our overview, *supra* Part C.2, the NVRA was sensitive to the multiple purposes of a federal voter registration scheme, including the need "to establish procedures that [would] increase the number of eligible citizens

who register to vote in elections for Federal office" and the need to protect "the integrity of the electoral process." § 1973gg(b). The balance struck by the EAC pursuant to § 1973gg-7(a) was to require applicants to attest to their citizenship under penalty of perjury, but not to require the presentation of documentary proof. *Id.* Proposition 200's additional requirement is not consistent with this balance.

Arizona argues that Proposition 200 does not conflict with the NVRA because the NVRA nowhere expressly precludes states from imposing requirements in addition to those of the Federal Form. Focusing on the phrase in the NVRA Section 4 which requires states to "accept and use" the Federal Form to register mail applicants, *see* § 1973gg-4(a)(1), Arizona argues that its registration process complies with the NVRA because the state makes the Federal Form available to applicants, and will accept the Form so long as it is accompanied by documentary proof of citizenship.

Like the petitioners in *Foster,* Arizona has offered a creative interpretation of the state and federal statutes to avoid a direct conflict. *See Foster,* 522 U.S. at 72. But as *Foster* counsels, we do not strain to reconcile the state's federal election regulations with those of Congress under the Elections Clause; rather, we consider whether the additional registration requirement mandated by Proposition 200 is harmonious with the procedures mandated by Congress under a natural reading of the statutes. *See id.* at 74; *Siebold,* 100 U.S. at 384. As explained above, 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," § 1973gg-2(a). Under Congress's expansive Elections Clause power, we must hold Arizona's documentary proof of citizenship requirement, Ariz. Rev. Stat. §§ 16-152(A)(23), 16-166(F), superseded by the NVRA.[15]

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[15] Because we reach our conclusion based on the language and structure of the statute, we do not rely on the EAC's interpretation of the NVRA or the NVRA's legislative history. Because the parties argue the import of these sources, we merely note that both are consistent with our holding. As discussed *supra* page 17654, the EAC construes the NVRA as not permitting states to "condition acceptance of the Federal Form upon receipt of additional proof." With respect to legislative history, the NVRA's Conference Report, which we have held is the most authoritative and reliable legislative material, *see, e.g., Nw. Forest Res. Council v. Glickman,* 82 F.3d 825, 835 (9th Cir. 1996), shows that Congress rejected an amendment to the NVRA which would have provided 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. 103-66, at 23 (1993). The conferees explained that the amendment was not "consistent with the purposes of" the NVRA and "could effectively eliminate, or seriously interfere with, the mail registration program of the Act." *Id.*

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Arizona's remaining arguments do not persuade us to reach a different conclusion. First, Arizona contends that an interpretation of the NVRA that precludes states from imposing additional voter registration requirements for federal elections is unreasonable because Congress could not have intended states to register "any and all" applicants who submit the Federal Form without any outlet for the states to check those applicants' qualifications. Arizona asserts that because the act contemplates that some applications will be rejected, *see* § 1973gg-6(a)(2) (which requires states to notify "each applicant of the disposition of the application"), the NVRA cannot require states to automatically register every individual using the Federal Form.

This argument reflects a misunderstanding of the NVRA. As Section 6 demonstrates, states need not register every applicant who completes and submits the Federal Form. *See* § 1973gg-6(a)(2). Voters still have to prove their eligibility pursuant to the Federal Form. Contrary to Arizona's assertion, the NVRA does not require states to register applicants who are ineligible, or whose forms are incomplete, inaccurate, or illegible.

Second, Arizona argues that states must have freedom to exercise their own methods for determining voter eligibility as a protection against voter fraud. In *ACORN v. Edgar,* the Seventh Circuit considered and discarded a similar argument. In that

case, the state claimed that the "Motor Voter" component of the NVRA "opens the door to voter fraud." 56 F.3d at 795. The court rejected the argument in part because "federal law contains a number of safeguards against vote fraud, and it is entirely conjectural that they are inferior to the protections that [state] law offers." *Id.* at 795-96 (citation omitted).

We reach the same conclusion here. Congress was well aware of the problem of voter fraud when it passed the NVRA, as evidenced by the numerous fraud protections built into the act. For one, Section 10 applies federal criminal penalties to persons who knowingly and willingly engage in fraudulent registration tactics. § 1973gg-10(2). Second, Sections 3 and 7 require the Federal Form and the combined motor vehicle-voter registration form to contain an attestation clause that sets out the requirements for voter eligibility. §§ 1973gg-3(c)(2)(C)(i)-(ii), 1973gg-7(b)(2)(A)-(B). Applicants are required to sign these forms under penalty of perjury. §§ 1973gg-3(c)(2)(C)(iii), 1973gg-7(b)(2)(C). Third, Section 4 permits states to verify the eligibility and identity of voters by requiring first-time voters who register by mail to appear at the polling place in person, where the voter's identity can be confirmed. § 1973gg-4(c). Last, Section 6 requires states to give notice to applicants of the disposition of their registration, which states may use as a means to detect fraudulent registrations. *See* § 1973gg-6(a)(2). Because Congress dealt with the issue of voter fraud in the NVRA, we are not persuaded by Arizona's

claim that states must be permitted to impose additional requirements to address the same issue.

Third, Arizona suggests that Congress's enactment of HAVA, 42 U.S.C. § 15301 *et seq.*, which Congress passed after the NVRA, provides a gloss on the NVRA's meaning. According to Arizona, HAVA demonstrated Congress's intent to permit states to ensure the eligibility of voter registrants, and made clear that states could exceed the minimum requirements of the NVRA in carrying out their registration functions.

We disagree. Congress enacted HAVA in reaction to the 2000 Presidential election and the ensuing controversial Florida recount. *Fla. State Conference of NAACP v. Browning,* 522 F.3d 1153, 1155 (11th Cir. 2008). The NVRA and HAVA operate in separate spheres: while the NVRA regulates voter registration, HAVA is concerned with updating election technologies and other election-day issues at polling places.

As relevant here, HAVA interacts with the NVRA only on a few discrete issues. First, HAVA added two check-boxes to the Federal Form, requiring applicants to check off whether they are citizens of the United States and whether they are old enough to vote. 42 U.S.C. § 15483(b)(4).

Second, HAVA permits mail registrants who have not previously voted in a federal election to submit documents verifying their identity along with the Federal Form. § 15483(b)(3). First-time voters who take advantage of this provision do not have to show

their identification when they arrive at the polling place, *id.*, a step that the states may otherwise require under the NVRA, *see* § 1973gg-4(c). This option is not, however, a prerequisite to successful registration, as applicants who choose not to submit documentation may still be registered.

Third, HAVA requires states to assign each registrant a "unique identifier" capable of being cross-checked against voters' identities at the polls. § 15483(a)(1)(A). HAVA provides that the unique identifier may be the applicant's driver's license number or the last four digits of the applicant's social security number. *See* § 15483(a)(5)(A). But nothing in HAVA allows the state to require these forms of identification as a prerequisite to registration. Rather, if the applicant possesses neither a driver's license nor social security card, HAVA requires the state to assign the applicant "a number which will serve to identify the applicant for voter registration purposes." § 15483(a)(5)(A)(ii). The unique identifier is not used to check the citizenship of the registrant, but rather to ensure that the voter who appears at the polls is the same person who registered to vote.

Nor does HAVA allow states to exceed the voter registration requirements set forth in the NVRA. In making this argument, Arizona points to the provision in HAVA stating that:

> The requirements established by this title are minimum requirements and nothing in this title shall be construed to prevent a

> State from establishing election technology and administration requirements that are more strict than the requirements so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law [including the NVRA and other federal voting regulations, § 15545].

§ 15484. But the "election technology and administration requirements" referenced in this section refer to HAVA's requirements that states update election equipment (such as by replacing punch card voting systems) and meet other voting system standards. While § 15484 permits states to institute their own technological and administrative improvements, it does not allow them to impose additional requirements on the voter registration process established by the NVRA. Indeed, the section itself precludes states from adding requirements "inconsistent with the Federal requirements under" the NVRA. § 15484. Moreover, HAVA expressly provides that "nothing [in HAVA] may be construed to authorize or require conduct prohibited under [the NVRA]." § 15545(a)(4). This language indicates Congress's intent was to prevent HAVA from interfering with NVRA's comprehensive voter registration system. Accordingly, Arizona's reliance on HAVA is unavailing.

D

Finally, Arizona argues that we are foreclosed from reviewing Gonzalez's NVRA claim because the prior panel's ruling in *Gonzalez I,* which occurred at

the preliminary injunction phase of this case, already decided that the NVRA does not supersede the changes to Arizona's registration system under Proposition 200. *See Gonzalez I,* 485 F.3d at 1050-51. Arizona asserts that this prior ruling is dispositive, and there is no ground for the court to reconsider the issue here.

Addressing this argument requires us to review the applicability of our law of the case doctrine.[16] Under this doctrine, "one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case." *Hegler v. Borg,* 50 F.3d 1472, 1475 (9th Cir. 1995) (citation and internal quotation marks omitted). The doctrine applies to prior decisions based on pure issues of law, even those made, as here, in the preliminary stages of review of the same case. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.,* 499 F.3d 1108, 1114 (9th Cir. 2007).

"The effect of the doctrine is not dispositive, particularly when a court is reconsidering its own

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[16] Law of the case is part of a related set of preclusion principles that includes stare decisis, res judicata, and collateral estoppel. 3 James Wm. Moore et al., Moore's Manual: Federal Practice & Procedure, § 30.01. Though linked by the general animating purpose of judicial efficiency, these principles are distinguished by the type or stage of litigation in which they separately apply, and as a consequence each has its own policy considerations. *Id.*

makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Jeffries V,* 114 F.3d at 1489 (internal quotation marks and footnote omitted). Here, Gonzalez argues that the first exception applies. We agree.

The prior panel's conclusion that the NVRA permits state-imposed documentary proof of citizenship requirements on registrants using the Federal Form was based on three provisions of the statute. First, the panel indicated that under the NVRA states must "either 'accept and use the mail voter registration form prescribed by the Federal Election Commission' or, in the alternative, 'develop and use [their own] form,' as long as the latter conforms to the federal guidelines." *Gonzalez I,* 485 F.3d at 1050 (second alteration in original) (citations omitted). Second, the panel asserted that the NVRA "prohibits states from requiring the form to be notarized or otherwise formally authenticated." *Id.* Last, the panel described the NVRA as "permit[ting] states to 'require[ ] such identifying information . . . as is necessary to

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injustice.' In contrast, the second formulation states that a court may decline to follow the law of the case if 'the first decision was clearly erroneous' *or* 'a manifest injustice would otherwise result.' " *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Planning Agency,* 216 F.3d 764, 787 n.43 (9th Cir. 2000) (citations and brackets omitted), *aff'd on other grounds,* 535 U.S. 302 (2002); *see also Mendenhall,* 213 F.3d at 469 & n.2. As in the other cases noting but not resolving this apparent conflict, we need not settle this issue in the present case, because there are grounds to satisfy the exception under either formulation of the standard.

enable . . . election official[s] to assess the eligibility of the applicant.'" *Id.* (alterations in original). Construing these provisions together, the panel concluded that the statute plainly contemplates allowing states to require voters to present at least some evidence of citizenship at the time of registration. *Id.* at 1050-51.

As may be apparent from our NVRA analysis *supra,* the prior panel's conclusion was rooted in a fundamental misreading of the statute. As the dissent acknowledges, *see* Dissent at 17694-95, the NVRA does not give states freedom "either" to accept and use the Federal Form "or, in the alternative," develop their own form. *See id.* Rather, the NVRA commands without exception that states "shall" accept and use the Federal Form, and if they develop their own form, it can be used only "in addition to" accepting and using the Federal Form, and still must meet all of the criteria of Section 7. *See* § 1973gg-4(a). Thus, while Section 4 of the NVRA applies the limitations of Section 7(b) to the states with respect to the creation of their own state forms, nothing in the text or structure of either provision supports reading Section 7(b) as giving the states any authority over or discretion to modify the Federal Form. Insofar as the prior panel referred to portions of the NVRA that relate to the Federal Form, *see Gonzalez I,* 485 F.3d at 1050, those excerpts are directed solely at the EAC, not the states. *See* § 1973gg-7(a)-(b). These provisions cannot be said to "plainly allow states . . . to require their citizens to present evidence of citizenship when

registering to vote" for federal elections via the Federal Form. *Id.* at 1050-51.

The dissent takes issue with our analysis of the prior panel's opinion, suggesting that the panel may have been using "either . . . or, in the alternative" in a conjunctive sense. Dissent at 17693-95. We disagree. The prior panel's statement that states can *"either* accept and use" the Federal Form *"or, in the alternative"* develop and use their own form cannot reasonably be interpreted to mean that states can *both* accept and use the Federal Form *and also* develop and use their own form. Indeed, such an interpretation would be contrary to the prior panel's logic; the prior panel based its conclusion that states could require registrants using the Federal Form to show additional identification on the ground that states could require use of their own forms in lieu of the Federal Form.

As another basis for upholding the prior panel's opinion, the dissent suggests that the prior panel's conclusion was correct although its reasoning was erroneous, because "accept and use" in § 1973gg-4(a)(1) can be read to mean "accept . . . for a particular purpose [but] not have it be sufficient to satisfy that purpose." Dissent at 17697. In other words, the dissent argues that although states are required to "accept and use" the Federal Form, the NVRA leaves them free to require prospective voters to comply with additional registration requirements beyond those mandated by the Federal Form. As noted above, Arizona makes a similar argument. This argument is

inconsistent with the language and structure of the NVRA. The dissent's strained interpretation would make the EAC's procedure for consultation and development of the Federal Form under Section 7(a) an empty exercise, because any state could require registrants to comply with additional state requirements even if they register with the Federal Form. As discussed above, under an Elections Clause framework, we do not strain the language of the NVRA to render it harmonious with Proposition 200. In the context of the NVRA, "accept and use" can mean only one thing: the states must "accept and use" the Federal Form as a fully sufficient means of registering to vote in federal elections.

Reasoning from a fundamental misreading of the statute, the prior panel reached a conclusion that was clear error. *See Jeffries V,* 114 F.3d at 1489. The text, structure, and purpose of the NVRA simply cannot bear the prior panel's interpretation. Moreover, this case represents an "exceptional circumstance," where the effect of the erroneous decision, were it to stand, would result in a manifest injustice. *Id.* at 1489, 1492. Not only does the erroneous conclusion impede the implementation of a major congressional enactment, but it poses a significant inequity to citizens who are required under the state law to navigate obstacles that do not exist under federal law in pursuit of their fundamental right to vote. *See id.* at 1492 (stating that manifest injustice may be found where the challenged decision involves a "significant inequity"). Though we are sensitive to the cautious

approach courts should take in deciding to alter an earlier panel's decision, because the prior decision in this case not only reached a clearly erroneous result, but reached that result on the basis of a misconstruction of the statute, we are convinced that there are appropriately exceptional circumstances to review the decision here.

The fact that the prior panel's decision was contained in a published opinion does not strip us of our discretion to review its conclusions, because no subsequent published decision has relied upon the prior panel's decision for the proposition to be overturned. *See, e.g., Mendenhall,* 213 F.3d at 469 (reversing a prior published appellate opinion as clearly erroneous under the exceptions to the law of the case); *Tahoe-Sierra,* 216 F.3d at 786-87 (same). Under such circumstances, the law of the circuit doctrine does not preclude us from revising prior decisions in the same case under the established exceptions to the law of the case. *See Jeffries V,* 114 F.3d 1484.

This conclusion was made clear in *Jeffries V,* an en banc decision highlighting the workings of our law of the case doctrine. Although the procedural history of the *Jeffries* decisions is complex,[18] the central

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[18] The *Jeffries* decisions were a series of five opinions in response to a habeas petition by Patrick Jeffries. Jeffries had been sentenced to death by a jury, but petitioned for relief on the ground of juror misconduct (he claimed that one juror had informed other jurors that Jeffries was a convicted armed robber). The district court rejected this claim on the ground that even if

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question addressed in *Jeffries V* was whether *Jeffries IV,* 75 F.3d 491, erred in its application of an exception to the law of the case. The *Jeffries IV* panel held that it could reverse its prior holding in *Jeffries III,* 5 F.3d 1180, under the first exception to the law of the case, because *Jeffries III* was "clearly erroneous and would work a manifest injustice." *Jeffries IV,* 75 F.3d at 494. In *Jeffries V,* we rejected the state's argument that we should avoid reaching the law of the case issue and instead decide the case on the merits, due to the importance of the law of the case doctrine to our jurisprudence. *See* 114 F.3d at 1492. After a careful review of the law of the case doctrine, we

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true, this fact would not have affected the verdict. On appeal, a panel of this court initially upheld the district court's conclusion, *Jeffries v. Blodgett* (*Jeffries I*), 974 F.2d 1179 (9th Cir. 1992), but then granted Jeffries's petition for rehearing and reversed itself on the ground that *Jeffries I* conflicted with precedent. *Jeffries v. Blodgett* (*Jeffries II*), 988 F.2d 923 (9th Cir. 1993). The panel then rejected the state's petition for rehearing, but amended *Jeffries II* to make clear that the claim of juror misconduct, if true, would have had a "substantial and injurious effect" on the verdict. *Jeffries v. Blodgett* (*Jeffries III*), 5 F.3d 1180 (9th Cir. 1993). On remand, the district court held that juror misconduct had in fact occurred and granted Jeffries's petition. *See Jeffries V,* 114 F.3d at 1488. After the state appealed this ruling, the panel again reversed itself, holding that it had interpreted precedent too broadly in *Jeffries III,* and that the law of the case did not prevent reversal of *Jeffries III* because that decision was "clearly erroneous and would work a manifest injustice." *See Jeffries v. Wood* (*Jeffries IV*), 75 F.3d 491 (9th Cir. 1996). Accordingly, the panel reinstated its denial of Jeffries's habeas petition. Jeffries petitioned for rehearing en banc, which we granted to determine, among other things, whether *Jeffries IV* had erred in reversing *Jeffries III. See Jeffries V,* 114 F.3d at 1488.

concluded in *Jeffries V* that the *Jeffries IV* panel had erred in overturning *Jeffries III,* because none of the exceptions to the law of the case were applicable. *Id.* at 1489. Focusing on the first exception, *see id.* at 1489 n.2, we concluded that *Jeffries III* was not clearly erroneous, and would not work a manifest injustice, and accordingly *Jeffries IV* had erred in reversing it. *Id.* at 1489.

The decision in *Jeffries V* was also supported on stare decisis grounds. Noting that two Ninth Circuit panels had already relied on *Jeffries III* at the time *Jeffries IV* was decided, *see Thompson v. Borg,* 74 F.3d 1571, 1575 n.1 (9th Cir. 1996); *Lawson v. Borg,* 60 F.3d 608, 612 (9th Cir. 1995), we stated that a panel "must be exceedingly careful in altering the law of its earlier opinion" in circumstances "when subsequent panels have relied on the initial decision" because "[o]therwise, intra-circuit conflict may arise, posing serious difficulties." *Jeffries V,* 114 F.3d at 1492. Moreover, we noted that "to reach its decision properly, the *Jeffries IV* panel would have had to reverse *Lawson,*" which could not properly be done by a three-judge panel. *Id.* In explaining the effect of prior published opinions on the applicability of our exceptions to the law of the case, the en banc court in *Jeffries V* notably did not adopt the view of the dissent in that case that "no three-judge panel may reconsider a rule of law embodied in a prior published opinion," even one in the same case, *Jeffries V,* 114 F.3d at 1511 (Kozinski, J., dissenting). In sum, under our en banc decision in *Jeffries V*, though a panel

cannot overturn prior published opinions in different cases, it may overturn a prior published opinion in the same case if the exceptions to the law of the case are applicable.

In this case, no other panel of this court has relied upon the prior panel's decision for the proposition that the NVRA does not supersede additional state requirements for federal voter registration. Where no subsequent opinion has relied on the prior published opinion for the proposition to be overturned, there is no *stare decisis* problem and consequently the law of the circuit doctrine does not prohibit revising the prior opinion.

Despite our decision in *Jeffries V,* the dissent argues that we are bound by a rule that we can never reverse a prior published opinion, even one in the same case. Dissent at 17684-85. On its face, this is the same rule that was proposed in the *Jeffries V* dissent and rejected by the majority. To overcome this obstacle, the dissent claims that a footnote in *United States v. Washington (Washington IV),* 593 F.3d 790 (9th Cir. 2010) (en banc), overruled *Jeffries V* on this issue. Dissent at 17685.

We disagree. *Washington IV* was heard en banc to resolve an inconsistency between two conflicting lines of precedent on the question whether federal recognition of a tribe has a bearing on that tribe's entitlement to fishing rights under a specific treaty. *See* 593 F.3d at 792-93, 798. In *United States v. Washington* (*Washington III*), 394 F.3d 1152 (9th Cir.

2005), we held that the intervening federal recognition of a tribe "was a *sufficient* condition for the establishment of treaty fishing rights." *Id.* at 1158. But in *Greene v. United States (Greene I),* 996 F.2d 973, 976-77 (9th Cir. 1993), and *Greene v. Babbitt (Greene II),* 64 F.3d 1266, 1270-71 (9th Cir. 1995), we held that federal recognition of a tribe could have no effect on treaty fishing rights. On appeal from the district court's decision following *Washington III,* we explained that "the conflict in our precedent led us to rehear the matter en banc without awaiting a three-judge decision." *Washington IV,* 593 F.3d at 798 n.9. This is correct: a three-judge panel could not have resolved the split between *Washington III* and *Greene I* and *II.* The footnote on which the dissent relies further explained that en banc review was necessary because, "[e]ven if the panel could have revisited *Washington III* under one of the exceptions to the law of the case, it still would have been bound by that published opinion as the law of the circuit . . . '[W]e have no discretion to depart from precedential aspects of our prior decision . . . under the general law-of-the-circuit rule.'" *Washington IV,* 593 F.3d at 798 n.9 (citations omitted) (quoting *Old Person v. Brown,* 312 F.3d 1036, 1039 (9th Cir. 2002)).

In light of the detailed discussion in *Jeffries V* regarding exceptions to the law of the case doctrine, we cannot read this sentence as overruling this longstanding doctrine. While *Jeffries V* was expressly decided on the law-of-the-case ground, nothing in *Washington IV* turned on the law of the case doctrine.

Nor did *Washington IV* expressly consider or overrule our en banc decision in *Jeffries V.* "In our circuit, statements made in passing, without analysis, are not binding precedent." *Thacker v. FCC (In re Magnacom Wireless, LLC),* 503 F.3d 984, 993-94 (9th Cir. 2007); *see also United States v. Johnson,* 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) ("Of course, not every statement of law in every opinion is binding on later panels. Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case."). The *Washington IV* footnote on which the dissent relies neither exhibits "reasoned consideration" of our law of the case doctrine, *Johnson,* 256 F.3d at 914, nor discusses an issue "germane," *id.*, to the resolution of *Washington IV.* In fact, it can more accurately be described as informational, "casual[,] and without analysis," *id.* at 915. Moreover, the *Washington IV* footnote is silent on the question whether subsequent published opinions had relied on *Washington III,* which *Jeffries V* held could preclude an application of the exceptions to the law of the case. *Jeffries V,* 114 F.3d at 1489. Accordingly, we decline to hold that this footnote overruled *sub silentio* the reasoned analysis of the en banc court in *Jeffries V.*[19]

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[19] The other cases cited by the dissent in support of its version of the law of the circuit doctrine were decided by three-judge

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judgment, for the law of the case 'directs a court's discretion, it does not limit the tribunal's power.'" *Mendenhall v. Nat'l Transp. Safety Bd.,* 213 F.3d 464, 469 (9th Cir. 2000) (quoting *Arizona v. California,* 460 U.S. 605, 618 (1983)). In other words, "there is nothing in the Constitution of the United States to require [invocation of the doctrine], or to prevent a [court] from allowing a past action to be modified while a case remains in court." *King v. West Virginia,* 216 U.S. 92, 101 (1910). Instead, the doctrine's utility is typically prudential: "it's a courteous and efficient way for a court to say 'enough's enough' when litigants seek reconsideration of prior interlocutory decisions." *Jeffries v. Wood* (*Jeffries V*), 114 F.3d 1484, 1509 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) (citing cases), *overruled on other grounds by Lindh v. Murphy,* 521 U.S. 320 (1997).

That said, the policies animating the law of the case doctrine are undeniably fundamental. The doctrine "promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816 (1988) (internal quotation marks omitted). These are paramount concerns to sound judicial administration, as "[a]n appellate court cannot efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal." *Kimball v. Callahan,* 590 F.2d 768, 771 (9th Cir. 1979) (internal quotation marks omitted).

Balanced against these valid concerns, however, are equally strong considerations that occasionally pull in the opposite direction. We have held that the "[l]aw of the case should not be applied woodenly in a way inconsistent with substantial justice." *United States v. Miller,* 822 F.2d 828, 832 (9th Cir. 1987); *see also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.,* 944 F.2d 597, 602 (9th Cir. 1991) ("[T]he law of the case is an equitable doctrine that should not be applied if it would be unfair."); *Loumar, Inc. v. Smith,* 698 F.2d 759, 762 (5th Cir. 1983) ("The law of the case doctrine is not . . . a barrier to correction of judicial error. It is a rule of convenience and utility and yields to adequate reason. . . ."). Interests of efficiency and finality clash with the responsibility of the court to not issue judgments known to be wrong on the facts or law.

As a compromise between these sometimes countervailing interests, we have identified three exceptional circumstances in which, on balance, we deem the concerns of finality and efficiency outweighed. Law of the case should not operate as a constraint on judicial review where "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice,[17] (2) intervening controlling authority

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[17] As has been noted in prior cases, "[f]or some time, there have existed in the Ninth Circuit two different formulations of the set of circumstances in which a court may decline to follow the law of the case. The first formulation . . . states that a court may depart from the law of the case if 'the previous decision is clearly erroneous and its enforcement would work a manifest

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Because, as set forth above, the prior panel's decision on the NVRA issue meets the standard of a recognized law of the case exception, we have discretion to review that decision, and we have chosen to exercise that discretion here.

E

Perhaps the instructions to the Federal Form put it best in stating: "you can use the application in this booklet to: Register to vote in your State." Under the NVRA, prospective voters seeking to register in federal elections need only complete and submit the Federal Form. If this sounds simple, it is by design. Congress enacted the NVRA to increase federal registration by streamlining the registration process and eliminating complicated state-imposed hurdles to registration, which it determined were driving down voter turnout rates. Proposition 200 imposes such a hurdle. In light of Congress's paramount authority to "make or alter" state procedures for federal elections, *see Foster,* 522 U.S. at 69; *Siebold,* 100 U.S. at 371, we hold that the NVRA's comprehensive regulation of federal election registration supersedes Arizona's documentary proof of citizenship requirement, Ariz. Rev. Stat. §§ 16-152(A)(23), 16-166(F).

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panels and thus could not have overruled *Jeffries V. See Minidoka Irrigation Dist. v. Dep't of Interior,* 406 F.3d 567 (9th Cir. 2005); *Old Person,* 312 F.3d 1036; *Hilao v. Estate of Marcos,* 103 F.3d 767 (9th Cir. 1996). One of these cases also pre-dated *Jeffries. See Hilao,* 103 F.3d 767.

Because we hold Arizona's registration requirement void under the NVRA, we need not reach Gonzalez's claim that the documentary proof of citizenship requirement imposes greater burdens of registration on naturalized citizens than on non-naturalized citizens and burdens the fundamental right to vote in violation of the Fourteenth Amendment's Equal Protection Clause.

III

The remainder of our analysis focuses solely on the validity of Arizona's polling place provision, Ariz. Rev. Stat. § 16-579.[20] That statute requires voters to show proof of identification before voting at the polls. *Id.* We first consider Gonzalez's appeal from the district court's decision that Proposition 200 does not violate § 2 of the VRA, 42 U.S.C. § 1973.

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[20] Because Congress's authority under the Elections Clause is limited to preempting regulations related to federal elections, our holding invalidating Proposition 200's registration requirement does not prevent Arizona from applying its requirement in state election registrations. However, Arizona has presented its system of voter registration under Proposition 200 as concurrently registering voters for state and federal elections, and has not indicated that, in the event Gonzalez prevails on the NVRA claim, it plans to establish a separate state registration system. We therefore do not consider whether Proposition 200's registration requirement, as applied only to state registrations, is valid under Gonzalez and ITCA's remaining claims.

A

Section 2(a) of the VRA prohibits states from imposing voting qualifications that result in the "denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation of § 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of a protected class "in that its members have less opportunity than other members of the electorate [1] to participate in the political process and [2] to elect representatives of their choice." § 1973(b). Said otherwise, a plaintiff can prevail in a § 2 claim only if, "based on the totality of the circumstances, the challenged voting practice results in discrimination on account of race."[21] *Farrakhan v. Washington,* 338 F.3d 1009, 1015 (9th Cir. 2003); *see also United States v. Blaine Cnty., Mont.,* 363 F.3d 897, 903 (9th Cir. 2004). A violation of section 2 does not require a showing of discriminatory intent, only discriminatory results. *See Chisom v. Roemer,* 501 U.S. 380, 383 (1991); *Ruiz v. City of Santa Maria,* 160 F.3d 543, 557 (9th Cir. 1998).

In applying the totality of the circumstances test, "a court must assess the impact of the contested

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[21] This approach applies both to claims of vote denial and of vote dilution. *Smith v. Salt River Project Agric. Improvement & Power Dist.,* 109 F.3d 586, 596 n.8 (9th Cir. 1997).

structure or practice on minority electoral opportunities on the basis of objective factors." *Thornburg v. Gingles,* 478 U.S. 30, 44 (1986) (internal quotation marks omitted). In conducting a § 2 analysis, courts are required to make a "searching inquiry" into "how the challenged [state] practice interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by" minorities in the electoral process. *Farrakhan,* 338 F.3d at 1016, 1020 (internal quotation marks omitted). In *Gingles,* the Supreme Court cited a non-exhaustive list of nine factors (generally referred to as the "Senate Factors" because they were discussed in the Senate Report on the 1982 amendments to the VRA) that courts should consider in making this totality of the circumstances assessment. 478 U.S. at 44-45. Relevant here, the factors direct courts to consider the history of official state discrimination against the minority with respect to voting, the extent to which voting in the state is racially polarized, and "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Id.* at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206-07). "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Farrakhan v. Gregoire,* 590 F.3d 989, 999 (9th Cir. 2010) (internal quotation marks omitted).

Gonzalez alleges that Proposition 200's registration and polling place identification requirements violate § 2 by disparately affecting Latino voters, unlawfully diluting their right to vote and providing them with less opportunity than other members of the electorate to participate in the political process. Considering statistical evidence on the existence of disparate impact on Latino registrants and voters, the district court determined that the limited statistical disparity between Latinos' registration and voting as compared to the rest of the electorate was not statistically significant. Turning to the Senate Factors listed above, the district court found that Latinos had suffered a history of discrimination in Arizona that hindered their ability to participate in the political process fully, that there were socioeconomic disparities between Latinos and whites in Arizona, and that Arizona continues to have some degree of racially polarized voting.

Despite the presence of limited statistical disparity and some of the Senate Factors, however, the district court concluded that Gonzalez's claim failed because there was no proof of a causal relationship between Proposition 200 and any alleged discriminatory impact on Latinos. The district court noted that not a single expert testified to a connection between the requirement that Latinos show identification under Proposition 200 and the observed difference in voter registration and voting rates of Latinos. Furthermore, the district court held that Gonzalez failed to explain how Proposition 200's requirements

interact with the social and historical climate of discrimination to impact Latino voting in Arizona. Without a causal link between the voting practice and prohibited discriminatory result, the district court concluded that Gonzalez had not proven that Proposition 200 results in discrimination "on account of race or color," and that the claim must therefore be denied.

B

Because a § 2 analysis requires the district court to engage in a "searching practical evaluation of the past and present reality," *Gingles,* 478 U.S. at 45 (internal quotation marks omitted), a district court's examination is "intensely fact-based and localized," *Salt River,* 109 F.3d at 591. We therefore "[d]efer[ ] to the district court's superior fact-finding capabilities," *id.,* and review for clear error the district court's findings of fact, including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2, *Old Person v. Cooney,* 230 F.3d 1113, 1119 (9th Cir. 2000) (citing *Gingles,* 478 U.S. at 78-79). We review de novo the district court's legal determinations and mixed findings of law and fact. *Salt River,* 109 F.3d at 591. Again, because we have held that Proposition 200's voter registration requirements are superseded by the NVRA, *supra* Part II, we consider only Proposition 200's requirement that voters show identification at the polls, Ariz. Rev. Stat. § 16-579.

The district court did not clearly err in concluding that Gonzalez failed to establish that Proposition 200's requirements caused any disparate impact on Latinos. To prevail under § 2, a plaintiff must prove "a causal connection between the challenged voting practice and a prohibited discriminatory result." *Salt River,* 109 F.3d at 595 (alteration omitted). "[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry." *Id.* at 595 (emphasis in original) (collecting cases). To prove that such a causal relationship exists, a plaintiff need not show that the challenged voting practice caused the disparate impact by itself. *See Farrakhan,* 338 F.3d at 1018-19. Rather, pursuant to a totality of the circumstances analysis, the plaintiff may prove causation by pointing to the interaction between the challenged practice and external factors such as surrounding racial discrimination, and by showing how that interaction results in the discriminatory impact. *Id.* at 1019. But even under this broad totality of the circumstances analysis, the causation requirement is crucial: a court may not enjoin a voting practice under § 2 unless there is evidence that the practice results in a denial or abridgement of the rights of a citizen on account of race or color. § 1973(a). If there is no evidence that the voting practice resulted in any such disparate impact, there is no violation and thus no basis for injunctive relief.

The district court correctly applied this standard here. The challenged practice at issue is Proposition

200's requirement that voters show identification at the polls. To prove causation, Gonzalez had to establish that Proposition 200's requirement that voters must produce forms of identification, as applied to Latinos, resulted in a prohibited discriminatory result. Here, Gonzalez alleged in his complaint that "Latinos, among other ethnic groups, are less likely to possess the forms of identification required under Proposition 200 to . . . cast a ballot," but produced no evidence supporting this allegation. The record does include evidence of Arizona's general history of discrimination against Latinos and the existence of racially polarized voting. But Gonzalez adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice. Without such evidence, we cannot say that the district court's finding that Gonzalez failed to prove causation was clearly erroneous. Therefore we affirm the district court's denial of this claim.[22]

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[22] Gonzalez also argues that the district court erred in evaluating one of the Senate Factors and in concluding that the disparate impact on Latinos was statistically insignificant. Because Gonzalez's failure to show causation is dispositive, however, we need not reach these issues.

IV

Gonzalez I, which considered Gonzalez and ITCA's appeal from the district court's denial of a preliminary injunction, concluded that Arizona's registration identification requirement was not a poll tax. *See* 485 F.3d at 1049. We held that the registration requirement did not (1) force voters "to choose between paying a poll tax and providing proof of citizenship when they register to vote," the standard set forth in *Harman v. Forssenius,* 380 U.S. 528, 541-42 (1965); and did not (2) "make[ ] the affluence of the voter or payment of any fee an electoral standard," as was held impermissible under the Fourteenth Amendment in *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 666 (1966). *Gonzalez I,* 485 F.3d at 1049 (internal quotation marks omitted) (brackets in original).

Here, Gonzalez and ITCA argue that Proposition 200 imposes an unconstitutional poll tax in violation of the Twenty-fourth Amendment. Separately, ITCA asserts that Proposition 200 is also a poll tax under the Fourteenth Amendment. Guided by the analysis in *Gonzalez I,* we conclude that Proposition 200's polling place identification requirement is not a poll tax under either constitutional provision.

A

The Twenty-fourth Amendment provides that:

> The right of citizens of the United States to vote in any primary or other election for

> President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States for or any State by reason of failure to pay any poll tax or other tax.

U.S. Const. amend. XXIV.

Gonzalez does not argue that requiring voters to show identification at the polls is itself a poll tax. Rather, Gonzalez argues that, because some voters do not possess the identification required under Proposition 200, those voters will be required to spend money to obtain the requisite documentation, and that this payment is indirectly equivalent to a tax on the right to vote.

This analysis is incorrect. Although obtaining identification required under Arizona's statute may have a cost, it is neither a poll tax itself (it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax. *Cf. Harman,* 380 U.S. at 541-42.

Our conclusion is consistent with *Harman,* the only Supreme Court case considering the Twenty-fourth Amendment's ban on poll taxes. In that case, the Court considered a state statute that required voters to either pay a $1.50 poll tax on an annual basis or go through "a plainly cumbersome procedure," *id.* at 541, for filing an annual certificate of residence. *Id.* at 530-32. There was no dispute that the $1.50 fee was a poll tax barred by the Twenty-Fourth Amendment. *See id.*

at 540. Accordingly, the only question before the Court was whether the state "may constitutionally confront the federal voter with a requirement that he either pay the customary poll taxes as required for state elections or file a certificate of residence." *Id.* at 538. The Court enunciated the rule that a state may not impose "a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 542. Applying this rule, the Court determined that the state's certificate of residence requirement was a material burden: among other things, the procedure for filing the certificate was unclear, the requirement that the certificate be filed six months before the election "perpetuat[ed] one of the disenfranchising characteristics of the poll tax which the Twenty-fourth Amendment was designed to eliminate," and the state had other alternatives to establish that voters were residents, including "registration, use of criminal sanction[s], purging of registration lists, [and] challenges and oaths." *Id.* at 541-43. Accordingly, the Court concluded that "[w]e are thus constrained to hold that the requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax." *Id.* at 542.

Arizona's polling place requirement is not analogous. Proposition 200's requirement that voters identify themselves at the polling place is not a poll tax, as stated in *Gonzalez I.* 485 F.3d at 1049. Voters have only to verify their eligibility by showing identification at

the polls,[23] which does not constitute a tax, a point which Gonzalez does not dispute. Nor does Proposition 200's identification requirement place a material burden on voters "solely because of their refusal to waive the constitutional immunity" to a poll tax. *Harman,* 380 U.S. at 542. Voters are not given the choice between paying a poll tax or obtaining identification; all voters are required to present identification at the polling place. *See Gonzalez I,* 485 F.3d at 1049. *Cf. Harman,* 380 U.S. at 541-42. Because "Arizona's system does not, as a matter of law, qualify as a poll tax," the district court was correct in concluding that Proposition 200's requirement of identification at the polling place did not violate the Twenty-fourth Amendment. *See Gonzalez I,* 485 F.3d at 1049.

B

Nor is Proposition 200's requirement that voters show identification at the polling place a poll tax under the Fourteenth Amendment's Equal Protection Clause.[24] *Harper* is the leading Supreme Court case

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[23] Voters who use an early ballot to vote do not even have to show identification. Ariz. Rev. Stat. § 16-550(A) (for early ballots, elector identity is verified by signature comparison alone).

[24] ITCA's briefing collapses the Twenty-fourth Amendment and Fourteenth Amendment poll tax claims into a single argument. But these are different claims that arise under different constitutional amendments. The Twenty-fourth Amendment extends only to federal elections, *see Harman,* 380 U.S. at 540 (holding that "the Twenty-fourth Amendment abolish[ed] the

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considering whether a state law is a poll tax under the Equal Protection Clause. In *Harper,* the Supreme Court held that a state law levying an annual $1.50 poll tax on individuals exercising their right to vote in the state was unconstitutional under the Equal Protection Clause. *Id.* at 665-66 & n.1. The Court held that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications," *id.* at 668, and that the imposition of poll taxes fell outside this power because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process," *id.* Because the state's poll tax made affluence of the voter an electoral standard, and such a standard is irrelevant to permissible voter qualifications, the Court concluded that the tax was invidiously discriminatory and a per se violation of the Equal Protection Clause. *Id.* at 666-67.

Arizona's polling place identification requirement falls outside of *Harper*'s rule that "restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford v. Marion Cnty. Election Bd.,* 128 S. Ct. 1610, 1616 (2008) (plurality opinion). The requirement that individuals show documents proving their identity is not an invidious classification based on impermissible standards of wealth or

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poll tax as a requirement for voting in federal elections"), while the Fourteenth Amendment also invalidates restrictions on the right to vote in state elections, *see Harper,* 383 U.S. at 666. Therefore, we have addressed these claims separately.

affluence, even if some individuals have to pay for them. On the contrary, requiring individuals to show identification falls squarely within the state's power to fix core voter qualifications. Photo identification addresses the most basic voter criterion: that individuals seeking to cast a ballot are who they purport to be and are in fact eligible to vote. Even ITCA admits that this is a valid state interest.

ITCA argues that the Court's more recent decision in *Crawford,* 128 S.Ct. 1610,[25] extended *Harper*'s holding to include a prohibition on indirect fees, such as fees or costs necessary to obtain required identification documents. ITCA seeks the benefit of *Harper*'s per se rule that such an electoral standard is invidiously discriminatory, and thus violates the Equal Protection Clause.

This argument is not consistent with *Crawford.* *Crawford* involved an Indiana state requirement that a citizen voting in person or at the office of the circuit court clerk before election day present a photo identification card issued by the government. *Id.* at 1613. The state would provide a free photo identification to

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[25] *Crawford* was decided by the Supreme Court after this court's holding in *Gonzalez I.* ITCA frames *Crawford* as an "intervening controlling authority" that provides a basis for this court to reconsider its decision in *Gonzalez I* that Arizona's registration requirement is not a poll tax. Because *Gonzalez I* did not address whether the polling place identification requirement constituted a poll tax, see 485 F.3d at 1048-49, we need not address this argument.

"qualified voters able to establish their residence and identity." *Id.* at 1614. A number of plaintiffs challenged this requirement on the ground that the "new law substantially burdens the right to vote in violation of the Fourteenth Amendment." *Id.*

Although the Court was unable to agree on the rationale for upholding Indiana's photo identification requirement,[26] neither the lead opinion nor the concurrence held that *Harper*'s per se rule applied to Indiana's photo identification requirement. *See id.* at 1624. The lead opinion, upon which ITCA relies, explained that *Harper*'s "litmus test" made "even rational restrictions on the right to vote . . . invidious if they are unrelated to voter qualifications." *Id.* at 1616. But according to the lead opinion, later election cases had moved away from *Harper* to apply a balancing test to state-imposed burdens on the voting process. *Id.* Under these later cases, a court "must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* The lead opinion then proceeded to apply this balancing test to the Indiana photo identification requirement. *Id. Crawford* did not purport to overrule *Harper,* however, which remains as an example of an electoral standard for

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[26] The lead opinion authored by Justice Stevens was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia filed a concurring opinion joined by Justices Thomas and Alito. The other three justices dissented.

which a state would never have sufficiently weighty interests to justify the requirement that a fee be paid in order to vote. *Id.* Because *Crawford* did not extend *Harper*'s per se rule to other burdens imposed on voters, but left it applicable only to poll tax requirements, *Crawford* does not support ITCA's argument that Proposition 200's identification requirement is per se invalid under *Harper*.

Although ITCA's reliance on *Crawford* is not entirely clear, ITCA does not appear to argue that Proposition 200's identification requirement is invalid under *Crawford*'s balancing test. ITCA does not, for example, claim that the burden imposed by the photo identification was impermissibly heavy in light of Arizona's legitimate interests. Such an argument would be unavailing in any event. The lead opinion in *Crawford* held that the burden imposed on citizens who must obtain a photo identification document was not sufficiently heavy to support a facial attack on the constitutionality of the state law, in light of the state's legitimate interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence. *Id.* at 1617, 1623. The same reasoning is applicable here. While the lead opinion noted that photo identification cards were provided free by Indiana, the lead opinion also recognized that to obtain Indiana's free photo identification cards, individuals were required to "present at least one 'primary' document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport." *Id.* at 1621 n.17. Obtaining these

primary documents, the Supreme Court acknowledged, may require payment of a fee. *Id.* Because Proposition 200 identification requirements include these same sorts of primary documents, Proposition 200's requirements are no more burdensome than those upheld by *Crawford.* ITCA does not argue that Arizona's interests in imposing a photo identification requirement are any less weighty than Indiana's interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence. Therefore, even under the balancing test set forth in the *Crawford* lead opinion, we would uphold Proposition 200's polling place identification requirement against a facial challenge.

In sum, because any payment associated with obtaining the documents required under Proposition 200's photo identification provision is related to the state's legitimate interest in assessing the eligibility and qualifications of voters, the photo identification requirement is not an invidious restriction under *Harper,* and the burden is minimal under *Crawford.* As such, Arizona's polling place photo identification requirement does not violate the Fourteenth Amendment's Equal Protection Clause.

V

Our system of dual sovereignty, which gives the state and federal governments the authority to operate within their separate spheres, "is one of the Constitution's structural protections of liberty." *Printz v.*

United States, 521 U.S. 898, 921 (1997). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (quoting *Gregory,* 501 U.S. at 458). Despite our respect for the state's exercise of its sovereign authority, however, the Constitution's text requires us to enforce the specific enumerated powers that are bestowed on the federal government and denied to the states. The authority granted to Congress under the Elections Clause to "make or alter" state law regulating procedures for federal elections is one such power. The Framers of the Constitution were clear that the states' authority to regulate extends only so far as Congress declines to intervene. U.S. Const. art. 1, § 4, cl. 1; *e.g., Foster,* 522 U.S. at 69. Given the paramount authority delegated to Congress by the Elections Clause, we conclude that the NVRA, which implemented a comprehensive national system for registering federal voters, supersedes Arizona's conflicting voter registration requirement for federal elections. We uphold Arizona's polling place identification requirement with respect to all other claims.[27]

AFFIRMED in part and REVERSED in part.

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[27] Each party will bear its own costs on appeal.

Chief Judge KOZINSKI, dissenting in large part:*

As the majority belatedly acknowledges 47 pages into its opinion, we don't come to this case with a blank slate. A prior panel has already held in a published opinion that Proposition 200 isn't preempted because the National Voter Registration Act ("NVRA") "plainly allow[s] 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, 1050-51 (9th Cir. 2007) ("*Gonzalez I*"). That is law of the circuit and therefore binding on us. *See, e.g., Miller v. Gammie,* 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). Even if it weren't, it's law of the case and can't be lightly disregarded for that reason. *See, e.g., Merritt v. Mackey,* 932 F.2d 1317, 1322 (9th Cir. 1991). The majority refuses to accept the consequences of this reality. First, it evades law of the circuit by creating an exception that is squarely foreclosed by a recent unanimous en banc opinion. The majority then weakens our rules governing law of the case by declaring that *Gonzalez I*'s interpretation of the NVRA is "clearly erroneous" when it's clearly not. Because I believe that we must take precedent seriously and that *Gonzalez I* was correctly

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* I concur in the portion of the judgment upholding Proposition 200's polling place provision, Ariz. Rev. Stat. § 16-579. For the reasons articulated by the district court in its thorough decision, I would affirm its ruling in favor of Arizona on the equal protection and Voting Rights Act challenges to Proposition 200's voter registration requirement.

decided, I dissent from the majority's conclusion that the NVRA preempts Arizona's voter registration requirement.

I.

The fundamental rule of circuit law is that once a panel decides a legal issue in a published opinion, that ruling binds subsequent three-judge panels. The only instance when a three-judge panel may depart from a prior published opinion is if there has been "intervening" higher authority that is "clearly irreconcilable with our prior circuit authority." *Miller,* 335 F.3d at 900. And this instance is not truly an exception to the rule because it's the intervening higher authority, not the three-judge panel, that overrules the earlier opinion. There are in fact *no* exceptions to law of the circuit, or at least there weren't until today.

The majority holds that, although a published opinion is binding generally, it doesn't bind later panels in the same case. For those panels, "[w]here no subsequent opinion has relied on the prior published opinion for the proposition to be overturned, . . . the law of the circuit doctrine does not prohibit revising the prior opinion." Maj. at 17668.

This exception to the published opinion rule is irreconcilable with our recent en banc opinion in *United States v. Washington,* 593 F.3d 790 (9th Cir. 2010) (en banc) ("*Washington IV*"). In that case, the three-judge panel was confronted with a conflict between a prior opinion in the same case and another

panel's opinion in a different case. Because it lacked the power to resolve the conflict, the three-judge panel had to call the case en banc sua sponte. Sitting en banc, we held:

> This appeal was initially argued to a three-judge panel, but the conflict in our precedent led us to rehear the matter en banc without awaiting a three-judge decision. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc). This step was necessary because, even if the panel could have revisited *Washington III* under one of the exceptions to law of the case, *see Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc), it still would have been bound by that published opinion as the law of the circuit, *see, e.g., Old Person v. Brown*, 312 F.3d 1036, 1039 (9th Cir. 2002) ("[W]e have no discretion to depart from precedential aspects of our prior decision in *Old Person I*, under the general law-of-the-circuit rule.").

Washington IV, 593 F.3d at 798 n.9.

Applying the *Washington IV* rule to this case is simple. "*[E]ven if*" our three-judge panel were permitted to revisit the prior panel's opinion "under one of the exceptions to law of the case," we are "*still* . . . bound by that published opinion *as the law of the circuit*" and have "*no discretion* to depart from [it]." *Id.* (emphasis added). *Washington IV* – which clearly holds that law of the circuit trumps law of the case – forecloses the majority's theory.

The majority brushes aside *Washington IV,* relying instead on three earlier cases, foremost *Jeffries v. Wood,* 114 F.3d 1484 (9th Cir. 1997) (en banc) ("*Jeffries V*"). There are two problems with the majority's reliance on *Jeffries V,* both of which are fatal to the majority's new rule. First, *Jeffries V* was about law of the case, not law of the circuit. *Jeffries V* held that the three-judge panel in *Jeffries IV* erred by failing to follow *Jeffries III,* and based this conclusion on law of the case. 114 F.3d at 1492-93. The majority makes much of the fact that the dissent in *Jeffries V* would have resolved the case on law of the circuit grounds. Maj. at 17668. But it is peculiar indeed to impute a *holding* to the majority on an issue it never addressed, because it chose not to follow the contrary reasoning of the dissent. A dissent has no precedential value, *United States v. Ameline,* 409 F.3d 1073, 1083 n.5 (9th Cir. 2005) (en banc), and the majority is surely not obligated to address every argument made there. It is obviously dangerous to infer that the majority ruled on a matter as to which it never expressed an opinion. By that peculiar reasoning, a majority can be held to have decided an issue – and made it law of the circuit – when it never said a word on the subject.

The *Jeffries V* majority had very little to say about law of the circuit, and what it did say totally undermines the majority here: "The dissent seems to acknowledge that [the] law of the circuit doctrine would preclude the *Jeffries IV* panel from contradicting the *Jeffries III* opinion, thus reaching the same

result as the majority." *Id.* at 1493 n.12. The majority somehow manages to squeeze blood from a turnip.

Second, to the extent *Washington IV* says something different from *Jeffries V,* it is the most recent en banc opinion and therefore clearly controls. *See United States v. Heredia,* 483 F.3d 913, 918-19 (9th Cir. 2007) (en banc) (recognizing that a later en banc court may overrule an earlier en banc opinion). The majority objects that *Washington IV* couldn't have overruled the "longstanding doctrine" that a three-judge panel may overturn a prior panel's published opinion under an exception to the law of the case, maj. at 17669, but the doctrine in fact never existed until today. It has no support in *Jeffries V* or any other published opinion in our circuit.

Take the other two cases the majority cites. *See* Maj. at 17666 (citing *Mendenhall v. NTSB,* 213 F.3d 464, 469 (9th Cir. 2000) ("*Mendenhall II*"); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 216 F.3d 764, 786-87 (9th Cir. 2000) ("*Tahoe IV*")). The majority claims these cases support its new rule because both reversed "a prior published appellate opinion as clearly erroneous under the exceptions to the law of the case" doctrine. Maj. at 17666. But neither case contradicted the prior panel's legal ruling and therefore never disturbed the law of the circuit. *See United States v. Johnson,* 256 F.3d 895, 916 (9th Cir. 2001) (en banc) (Kozinski, J., concurring) (a legal statement isn't law of the circuit unless "it is clear that a majority of the panel has focused

on the legal issue presented by the case before it and made a deliberate decision to resolve the issue").[1]

The later *Mendenhall* panel reversed an award of market-rate attorney's fees, *Mendenhall II,* 213 F.3d at 469 & n.3, but didn't overturn the prior panel's statement that "a request [for] attorneys' fees at a reasonable market rate. . . . is appropriate where there is a showing of bad faith," *Mendenhall v. NTSB,* 92 F.3d 871, 876 (9th Cir. 1996). Rather, it realized that the prior panel had mistakenly applied a statute awarding attorney's fees to litigants who prevailed in court to someone who had prevailed in an administrative

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[1] While the majority ignores *Johnson* when exaggerating the precedential effect of two cases that didn't alter the law of the circuit, it relies on the *Johnson* concurrence in an attempt to characterize *Washington IV*'s rule as the sort of "casual[]" statement "uttered in passing" that isn't binding on later panels. Maj. at 17669-70. But the statement in *Washington IV* was necessary to explain why the three-judge panel had to make a sua sponte en banc call. 593 F.3d at 798 n.9. In any event, statements in en banc opinions, as in Supreme Court opinions, must be taken far more seriously than statements in three-judge panel opinions, even if they are not strictly necessary to the result. *See United States v. Baird,* 85 F.3d 450, 453 (9th Cir. 1996) ("[W]e treat Supreme Court dicta with due deference. . . . "). That's because, like *Washington IV*'s rule, a statement in an en banc opinion that's not necessary to resolve the merits of the case often "provides a supervisory function" to "three-judge panels and district courts. . . . [and] thus constitutes authoritative circuit law." *Barapind v. Enomoto,* 400 F.3d 744, 751 n.8 (9th Cir. 2005) (en banc); *see, e.g., Miller,* 335 F.3d at 900; *United States v. Hardesty,* 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam); *Atonio v. Wards Cove Packing Co.,* 810 F.2d 1477, 1478-79 (9th Cir. 1987) (en banc).

proceeding. *Mendenhall II,* 213 F.3d at 469. Because the later panel applied the correct statute, it had no occasion to disturb the prior panel's construction of the other statute.

In *Tahoe,* both the earlier panel and the later panel applied the rule that, in general, defendants must affirmatively plead the statute of limitations in a filing with the court. *See Levald, Inc. v. City of Palm Desert,* 998 F.2d 680, 686-87 (9th Cir. 1993). The prior panel had held that the plaintiffs' claims weren't time-barred because, by "[f]ailing to plead affirmatively" any statute of limitations other than an irrelevant one, the defendants couldn't then "rely on any other." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 34 F.3d 753, 756 (9th Cir. 1994) (*"Tahoe III"*). On remand, the defendants filed an answer that pled the correct statute of limitations, and the later panel held that the claims were therefore time-barred. *Tahoe IV,* 216 F.3d at 788-89. Like *Mendenhall,* the later panel's putative reversal of a prior panel didn't alter a binding statement of circuit law.[2]

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[2] *Tahoe IV* said that it overturned *Tahoe III*'s "bare legal holding . . . that the defendants forfeited the correct statute of limitations defense." *Tahoe IV,* 216 F.3d at 788. If that were truly *Tahoe III*'s holding, then the subsequent panel would have overturned law of the circuit. But it wasn't. *Tahoe III* said only that the defendants couldn't rely on a statute of limitations they hadn't pled. Because the defendants hadn't filed their answer, *Tahoe III* couldn't have considered whether they waived their statute of limitations defense.

Nor are *Mendenhall* and *Tahoe* the only cases on point. A number of panel opinions hold that law of the circuit applies to later panels in the same case. *Old Person v. Brown,* 312 F.3d 1036, 1039 (9th Cir. 2002), which *Washington IV* quotes, is a good example. The *Old Person* panel explained that it was bound by a prior opinion because "none of the three exceptions" to law of the case applied, but it was careful to point out that it also had "no discretion to depart from precedential aspects of our prior decision in *Old Person I,* under the general law of the circuit rule." *Id.*; *see also Minidoka Irrigation Dist. v. Dep't of Interior,* 406 F.3d 567, 574 (9th Cir. 2005) ("[W]e are 'bound by the opinion of the prior panel as the law of the case. Also we have no discretion to depart from precedential aspects of our prior decision in [*Minidoka I*], under the general law-of-the circuit rule.'" (second alteration in original)); *accord Hilao v. Estate of Marcos,* 103 F.3d 767, 772 (9th Cir. 1996) ("This court has twice rejected these arguments in *Estate I* and *Estate II.* The published decisions in those cases are both the controlling law of the circuit and the law of this case." (citations omitted)).

Like *Washington IV,* these opinions explain that three-judge panels are bound by prior panel opinions as law of the circuit even if they're not bound by those decisions as law of the case. They also reconcile *Mendenhall II* and *Tahoe IV* with our law of the circuit rule, for neither of those cases departed from "precedential aspects" of the prior panel opinions. But even if *Mendenhall* and *Tahoe* stood for what the

majority claims, our three-judge panel doesn't have the power to elevate them above *Old Person*, *Minidoka* or *Hilao*. If "faced with such a conflict," we "*must* call for en banc review, which the court will normally grant unless the prior decisions can be distinguished." *Atonio*, 810 F.2d at 1479 (emphasis added).[3]

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[3] We're not alone. Most of our sister circuits agree that three-judge panels must follow prior published opinions in the same case as law of the circuit. *See, e.g., Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1292 (11th Cir. 2005) ("Because our previous decision was published, the prior panel precedent rule also applies to any holdings reached in the earlier appeal."); *Swipies v. Kofka*, 419 F.3d 709, 714 (8th Cir. 2005) ("[W]e held in an earlier appeal in this case that Mr. Swipies possessed such an interest. We are bound to follow this holding. It is not only the law of the case, but the law of the circuit, *i.e.*, a decision of another panel which only the court *en banc* may overturn." (citations omitted)); *Af-Cap Inc. v. Republic of Congo*, 383 F.3d 361, 367 n.6 (5th Cir. 2004) ("The subsequent panel would not only have to forego application of the law of the case doctrine, but would also have to discard the well-established rule that circuit panels are 'bound by the precedent of previous panels absent an intervening . . . case explicitly or implicitly overruling that prior precedent.'" (alteration in original)); *United States v. Alaw*, 327 F.3d 1217, 1220 (D.C. Cir. 2003) ("[T]hose issues are barred by law of the case doctrine. . . . In addition, the law of the circuit doctrine applicable here prevents a new appellate panel from declining to follow the legal rulings of the panel in a prior appeal."); *Craft v. United States*, 233 F.3d 358, 369 (6th Cir. 2000) ("Our decisions in *Craft I* and in *Cole* are also law of the circuit. As we recently stated, 'One panel of this court may not overturn the decision of another panel of this court – that may only be accomplished through an en banc consideration of the argument.'"), *overruled on other grounds* by *United States v. Craft*, 535 U.S. 274 (2002); *Irving v. United States*, 162

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Ultimately, this is all academic. There's just no getting around *Washington IV*'s holding that "even if" we were permitted to revisit the prior panel's opinion "under one of the exceptions to law of the case," we are "still . . . bound by that published opinion as the law of the circuit" and have "no discretion to depart from [it]." 593 F.3d at 798 n.9. We can debate the meaning of *Jeffries* all we want, but a unanimous en banc court in *Washington IV* just resolved this very issue against the majority's position. The majority here audaciously contradicts this en banc opinion.[4]

F.3d 154, 160 (1st Cir. 1998) (en banc) ("In *Irving I*, a panel of this court expressly defined the contours of the discretionary function exception. From then on, that methodology represented both the law of the case and the law of this circuit regarding the due application of the discretionary function exception. . . . Indeed, when the United States asserted the discretionary function defense in *Irving II*, the panel . . . took refuge in the law of the circuit doctrine to dispense the argument. . . ." (citation omitted)); *Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998) ("Absent any intervening Supreme Court decisions, *Curtis* and *South-Suburban* would be binding precedent on this issue, and *Curtis* would also be the law of the case."). Such a lopsided verdict from our peers provides yet another reason to question the wisdom of departing from our circuit's well-settled published opinion rule.

[4] To the extent the majority suggests a three-judge panel can overrule published opinions because they're "clearly erroneous," it also conflicts with *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010) (en banc). *Contreras* reversed the portion of a panel opinion that had purported to overrule several clearly erroneous published opinions because the panel lacked authority to do so – even though the en banc court then adopted the panel's legal analysis. *Id.* at 1136; *cf. State Oil Co. v. Khan*, 522

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II.

Even if the majority were right that law of the circuit doesn't apply, *Gonzalez I* undisputedly binds us as law of the case. The majority tries in vain to wriggle out from under *Gonzalez I*'s conclusion that the NVRA doesn't preempt Proposition 200 by invoking the "clearly erroneous" exception to the law of the case. Maj. at 17665-66. But the clearly erroneous bar is a tall one to hurdle: If "it is plausible to find that" the NVRA doesn't preempt Proposition 200, "the holding in [*Gonzalez I*] cannot be deemed clearly erroneous." *Leslie Salt Co. v. United States,* 55 F.3d 1388, 1394 (9th Cir. 1995). "[I]t is incumbent upon [plaintiffs] to convince us not only that the majority decision in [*Gonzalez I*] was wrong, but that it was clearly wrong." *Merritt,* 932 F.2d at 1322; *see also Jeffries V,* 114 F.3d at 1489. The majority fails to carry this heavy burden and materially weakens the standard for all future cases by pretending that it does.

A.

According to the majority, the *Gonzalez I* panel's "conclusion was rooted in a *fundamental misreading* of the statute." Maj. at 17664 (emphasis added). "*Reasoning* from a fundamental misreading of the statute, the prior panel reached a conclusion that was clear

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U.S. 3, 20 (1997) (court of appeals was correct not to overrule an "infirm[ ]" Supreme Court decision that it rightly predicted would be overturned by the Supreme Court).

error." *Id.* at 17665 (emphasis added). But we don't examine prior panels' *reasoning*. We must follow *Gonzalez I* unless the "*decision* . . . is so clearly incorrect that we are justified in refusing to regard it as law of the case." *Merritt,* 932 F.2d at 1321 (emphasis altered); *see Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988) ("[T]he law of the case turns on whether a court previously 'decide[d] upon a rule of law' . . . not on whether, or how well, it explained the decision." (second alteration in original)).

We might "scrutinize the merits . . . with greater care" if *Gonzalez I* lacked any "analysis reflecting the authorities or argument which led [it] to the rule [it reached]." *United States v. Houser,* 804 F.2d 565, 568 (9th Cir. 1986). But the law of the case doctrine doesn't allow us to assume that poor reasoning begets clear error. Indeed, we've held that a panel's failure to "expressly address [a] claim in its opinion" – and corresponding failure to offer any reasons for its resolution of that claim – *isn't* clearly erroneous. *Leslie Salt,* 55 F.3d at 1393.

A panel's faulty reasoning doesn't necessarily consign its conclusion to the trash heap; most conclusions can be arrived at through multiple chains of reasoning. And, although "panels will *occasionally* find it appropriate to offer alternative rationales," *Johnson,* 256 F.3d at 914 (emphasis added), they're not required to do so. Thus, the existence of perceived holes in a prior panel's stated rationale doesn't preclude the possibility that the panel had unstated reasons leading it to the same conclusion. It certainly doesn't mean that the result the panel reached is

incorrect, as it may have reached the correct result for the wrong reason.[5] When we say that a panel's holding is clearly wrong, what we're talking about is the rule of law it announces, not the method by which it adopts that rule.[6]

This distinction doesn't matter here because *Gonzalez I* wasn't clearly erroneous in either reasoning or result. Let's start with *Gonzalez I*'s statement that "[t]he NVRA mandates that states either 'accept and use the mail voter registration form prescribed by the [Election Assistance Commission,]' or, in the alternative, 'develop and use [their own] form,' as long as the latter conforms to the federal guidelines." *Gonzalez I,* 485 F.3d at 1050 (third alteration in

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[5] This principle also informs our review of district court judgments. "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica,* 614 F.2d 1247, 1256 (9th Cir. 1980).

[6] Focusing on a panel's reasoning defeats the fundamental purpose of law of the case doctrine – protecting the court and the parties from the burden of repeated argument by pertinacious litigants – by encouraging the parties to relitigate their case. *See* 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 at 667 (2d ed. 2002). Such relitigation can slow decisionmaking to a glacial pace, which is what happened to administrative agencies when judges began to allow litigants to challenge the reasons the agencies gave for the new regulations they proposed. *See, e.g.,* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process,* 41 Duke L.J. 1385, 1385-86, 1400-03 (1992); M. Elizabeth Magill, *Agency Choice of Policymaking Form,* 71 U. Chi. L. Rev. 1383, 1390-91 & n.17 (2004).

original) (citations omitted). The majority takes issue with this passage because the NVRA requires states to accept and use *both* the federal and state forms; ergo, *Gonzalez I* misconstrued the statute. Maj. at 17664. But "the word 'or' is often used as a careless substitute for the word 'and'; that is, it is often used in phrases where 'and' would express the thought with greater clarity." *De Sylva v. Ballentine,* 351 U.S. 570, 573 (1956). Indeed, it is well recognized that "or" can have multiple meanings, with the "exclusive or" – meaning one or the other but not both – being largely useful in symbolic logic rather than common parlance. Wikipedia, Exclusive or, http://en.wikipedia.org/wiki/Exclusive_or (last visited Aug. 21, 2010).[7]

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[7] Wikipedia gives the following example to illustrate the difference between the exclusive and the inclusive "or":

> [I]t might be argued that the normal intention of a statement like "You may have coffee, or you may have tea" is to stipulate that exactly one of the conditions can be true. Certainly under many circumstances a sentence like this example should be taken as forbidding the possibility of one's accepting both options. Even so, there is good reason to suppose that this sort of sentence is not disjunctive at all. If all we know about some disjunction is that it is true overall, we cannot be sure that either of its disjuncts is true. For example, if a woman has been told that her friend is either at the snack bar or on the tennis court, she cannot validly infer that he is on the tennis court. But if her waiter tells her that she may have coffee or she may have tea, she can validly infer that she may have tea. Nothing classically thought of as a disjunction has this property. This is so even given that she might

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Legislatures – which presumably choose statutory language with care – have used "or" conjunctively instead of as a disjunctive, exclusive "or." *See, e.g., Chemehuevi Tribe of Indians v. Fed. Power Comm'n,* 420 U.S. 395, 417-18 (1975) ("utilizing the surplus water or water power"); *Swearingen v. United States,* 161 U.S. 446, 450 (1896) ("obscene, lewd or lascivious"); *see also* Steven Wisotsky, *How To Interpret Statutes – Or Not: Plain Meaning and Other Phantoms,* 10 J. App. Prac. & Process 321, 326-27 (2009). And phrases that seem obviously disjunctive like "or, in the alternative" are sometimes used conjunctively. *See* H.W. Fowler, *A Dictionary of Modern English Usage* 147 (2d ed. 1965). Thus, the *Gonzalez I* panel could have meant that a state may rely exclusively on the federal form or, in the alternative, also develop a state form.[8] This is a perfectly accurate description of the NVRA.

> reasonably take her waiter as having denied her the possibility of having both coffee and tea.
>
> . . . .
>
> There are also good general reasons to suppose that no word in any natural language could be adequately represented by the binary exclusive "or" of formal logic.

Wikipedia, Exclusive or, http://en.wikipedia.org/wiki/Exclusive_or (last visited Aug. 21, 2010).

[8] Our own precedent shows that "and" and "or" can sometimes be used interchangeably. For example, in *MacDonald v. Pan American World Airways, Inc.*, the majority construed "and" in a contract as "or" despite a particularly eloquent dissent. 859 F.2d 742, 744-45 (9th Cir. 1988); *see id.* at 746 (Kozinski, J.,

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The majority protests that *Gonzalez I* couldn't have used "or" conjunctively because "such an interpretation would be contrary to the prior panel's logic." Maj. at 17664. But it's only contrary to the *majority*'s *interpretation* of the prior panel's logic – and the majority begins its interpretation by assuming *Gonzalez I* misread the statute. This is known as begging the question. If we begin with the presumption that unanimous three-judge panels don't misread statutes, the "or" can easily be construed conjunctively, to support the conclusion that *Gonzalez I* interpreted the NVRA correctly. *Cf. United States v. Brown,* 459 F.3d 509, 525 (5th Cir. 2006) ("[I]f we begin with the assumption that [the defendant] is guilty, the documents can be read to support that assumption. But if we begin with the proper presumption that [he] is not guilty . . . , we must conclude the evidence is insufficient. . . .").

The other two quotes to which the majority points support its argument even less. *Gonzalez I* states that section 1973gg-7(b) of the NVRA "prohibits states from requiring that [their] form be notarized or otherwise formally authenticated," and "permits states to 'require[ ] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant.'" 485 F.3d at 1050 (alterations in original). The majority argues that

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dissenting). *MacDonald* is law of the circuit as to the "and" versus "or" issue and stands in the way of the majority's claim that the *Gonzalez I* panel somehow misread the statute.

Gonzalez I "misread" the statute because the "portions of the NVRA that relate to the Federal Form . . . are directed solely at the [Election Assistance Commission], not the states." Maj. at 17664. But these instructions to the Commission *do* apply to the states through section 1973gg-4(a)(2), which allows states to "develop and use" their own form if it "meets all of the criteria stated in section 1973gg-7(b)." *Gonzalez I* reads the statute correctly; it is the majority here that is mistaken.

B.

Even if the majority's reasoning is wrong, its conclusion that *Gonzalez I* clearly erred could still be correct if the NVRA *must* be read to preempt state law. But it's not enough for the majority to find a construction of the statute it likes better. After all, many statutes can plausibly be construed two different ways, neither of which can be said to be clearly wrong. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." (emphasis added)). To be clearly erroneous, the prior panel's construction must be so flawed that it could not pass the second step of the *Chevron* test, had that construction been adopted by an administrative agency. *See id.* at 844 ("[A] court may not substitute its own construction of a statutory

provision for a *reasonable* interpretation made by the administrator of an agency." (emphasis added)).

In this case, the text of the NVRA doesn't "directly address[ ] the precise question at issue," *id.* at 843, namely whether states can ask for supplemental proof of citizenship. The statute says that "[e]ach State shall accept and use the mail voter registration application form prescribed by the [Election Assistance Commission]." 42 U.S.C. § 1973gg-4(a)(1). It likewise requires "[a]cceptance of completed voter registration application forms" at state and local government offices, which must be transmitted "to the appropriate State election official." 42 U.S.C. § 1973gg-5(a)(4)(iii). The statute doesn't obviously prohibit supplemental state requirements, and both preemptive and non-preemptive constructions of "accept" and "use" are plausible. The prior panel's construction thus easily passes the *Chevron* test.

The majority believes that, by requiring states to "accept and use" the federal form "for the registration of voters in elections for Federal office," 42 U.S.C. § 1973gg-4(a)(1), the NVRA precludes states from imposing additional requirements. Maj. at 17654, 17665. But neither "accept" nor "use" has such a preclusive meaning; it's entirely possible to accept and use something for a particular purpose, yet not have it be sufficient to satisfy that purpose. Just go to any liquor store that takes personal checks: They will happily accept and use your check, but only after you provide ID showing that you're authorized to write it. A minute's thought comes up with endless such

examples: passport and visa; car registration and proof of insurance; boarding pass and picture ID; eggs and ham. Those who accept and use the former often also require the latter.

The majority's contention that "accept and use" must be read preclusively "[i]n the context of the NVRA," or "under an Elections Clause framework," Maj. at 17665, is unconvincing because its understanding of "use" conflicts with that word's plain English meaning. As the Supreme Court has observed,

> Webster's defines "to use" as "[t]o convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1950). Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Black's Law Dictionary 1541 (6th ed. 1990). Indeed, over 100 years ago we gave the word "use" the same gloss, indicating that it means "'to employ'" or "'to derive service from.'" *Astor v. Merritt,* 111 U.S. 202, 213 (1884).

Smith v. United States, 508 U.S. 223, 228-29 (1993) (alterations in original). To "use" an object is simply to derive service from or utilize it. The NVRA doesn't say that states must treat the federal form as a complete application. It might preclude a state from requiring an applicant to provide yet again the information that is already on the federal form, but that's

not the case here. There's no question that Arizona accepts and uses the federal form for the information contained in it. Arizona only asks for proof of citizenship *in addition* to the form in order to complete the registration process.

Nor is the "accept and use" requirement necessarily converted into a broad preemption provision by the NVRA's general statement that "notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office." 42 U.S.C. § 1973gg-2(a); *see* Maj. at 17654. That provision merely requires states to implement the NVRA regardless of any contrary legal authority. It doesn't alter the substantive scope of the statute.

The *only* thing the NVRA expressly prohibits states from requiring is "notarization or other formal authentication." 42 U.S.C. § 1973gg-7(b)(3). The inclusion of a specific prohibition is a strong indication that other prohibitions weren't intended. *See United States v. Cabaccang,* 332 F.3d 622, 630 (9th Cir. 2003); *see also U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 793 n.9 (1995).

Moreover, the NVRA expressly authorizes states to require "such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). This provision can plausibly be read as authorizing the type of "identifying information"

that Arizona requires. The majority holds that this passage is part of a comprehensive framework preventing states from requiring proof of citizenship, but overlooks the possibility that such proof may be "necessary to enable" Arizona to assess eligibility. *See* Maj. at 17652-53.

Other states also require supplemental information and the current National Voter Registration Form available at http://www.eac.gov/assets/1/page/NationalMailVoterRegistrationForm-English.pdf ("Registration Form") seamlessly accommodates them. The current form includes a box labeled "ID Number" that directs applicants to "[s]ee item 6 in the instructions for your state." Item 6, in turn, catalogs the state-by-state requirements each applicant must satisfy before the state will "accept and use" the federal form. Just like Arizona, many states require applicants to include proof of eligibility. In Alabama, "[y]our social security number is requested." Registration Form at 3. Connecticut requires a "Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number." *Id.* at 5. Hawaii tells applicants that "[y]our full social security number is required. It is used to prevent fraudulent registration and voting. Failure to furnish this information will prevent acceptance of this application." *Id.* at 7. There's more, but you get the idea. The majority's reading of the NVRA casts doubt on the voter registration procedures of many states in addition to Arizona.

The simple truth is that *nothing* in the NVRA clearly supersedes Arizona's supplemental registration

requirements. To get its way, the majority invents a broad rule of same-subject-matter preemption, arguing that the NVRA "addresses precisely the same topic as Proposition 200 in greater specificity, namely, the information that will be required to ensure that an applicant is eligible to vote in federal elections," such that its "comprehensive regulation" of the voter registration procedure "clearly subsumes Proposition 200's additional documentary requirement." Maj. at 17652-53. But, as the majority acknowledges earlier in its opinion, the question under the Elections Clause isn't whether the two laws address "the same topic," but whether Arizona's law "complements" rather than conflicts with "the congressional procedural scheme." Maj. at 17643 (citing *Ex parte Siebold,* 100 U.S. 371, 384 (1879)); *see also Foster v. Love,* 522 U.S. 67, 74 (1997) (state's election law is preempted "to [the] extent [that] it conflicts with federal law"). There's no conflict based on the text of the statutes. Arizona gladly accepts and uses the federal form, it just asks that voters also provide some proof of citizenship.

Had Congress meant to enact a comprehensive code of voter registration, it could have said so in the NVRA, but it didn't. Congress may have had the more modest goal of balancing ease of registration against each state's interest in protecting its voting system. Had Congress explicitly prohibited states from imposing additional requirements, then we could plausibly conclude that *Gonzalez I* is clearly wrong. But it didn't, and therefore the majority has no authority

under the law of the case doctrine to "depart from [the] prior decision." *Jeffries V,* 114 F.3d at 1493.

C.

The majority offers several of its own reasons for why the NVRA preempts Arizona's law. "If this court were considering the issue for the first time, [these] arguments might well deserve closer consideration." *Leslie Salt,* 55 F.3d at 1395. But "at this point in the proceedings, [we] may address the merits of [the] claims only so far as necessary to determine whether the [*Gonzalez I*] court was clearly wrong." *Id.* at 1394. None of the majority's reasons meet this exacting standard.

1. The majority claims that "allowing states to impose their own requirements for federal voter registration . . . 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." Maj. at 17654. But Congress never granted much authority to the Election Assistance Commission. The Commission can't write many regulations, 42 U.S.C. § 15329, can't enforce the NVRA or the regulations it writes, *id.* § 1973gg-9, and has no investigative powers. That's not the profile of an agency in charge of a comprehensive regulatory scheme. *Cf. CFTC v. Schor,* 478 U.S. 833, 842 (1986) (O'Connor, J.) ("Congress empowered the CFTC 'to make and promulgate such rules and regulations as . . . are reasonably necessary *to effectuate any of the*

provisions or to accomplish any of the purposes of [the CEA].'" (alteration in original)). And Section 7 of the NVRA doesn't even prescribe lines of authority; it orders the Commission to consult with the states when developing the federal form. *See id.* § 1973gg-7(a). If anything, this indicates that Congress didn't want to aggrandize the Commission's power over the states. It certainly doesn't "demonstrate a legislative intent to limit States to a purely advisory role." *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 584 (1987) (O'Connor, J.); *see also Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 347 (1984) (O'Connor, J.).

Nor is the majority right to rely on the letter from the Election Assistance Commission telling Arizona that its proof-of-citizenship requirement violates the NVRA. Maj. at 17654. We don't give deference to administrative agencies on the question of preemption. *See Wyeth v. Levine,* 129 S. Ct. 1187, 1200-01 (2009) ("In such cases, the Court has performed its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption."). Even if we did, we wouldn't defer in this case, because an informal letter clearly lacks "the force of law." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Determining whether the NVRA preempts Arizona's proof-of-citizenship requirement begins and ends with the statute.

For the same reason, the majority's claims that states shouldn't be able to make an "end-run around

the [Election Assistance Commission]'s consultative process," Maj. at 17665, and that allowing states to supplement the federal form "would make the [Commission's] procedure for consultation . . . an empty exercise," *id.* at 17665, beg the question of whether the Commission can bind the states. Congress may have intended to grant states the power to supplement federal rules despite the Commission's objection. *Cf. Cuomo v. Clearing House Ass'n,* 129 S. Ct. 2710, 2717 (2009) (states can enforce state fair-lending laws that OCC tried to preempt). If Congress intended to give states this power to disagree, then Arizona hasn't made an end-run at all.

2. The majority relies on the fact that the NVRA "addresses precisely the same topic as Proposition 200 in greater specificity, namely, the information that will be required to ensure that an applicant is eligible to vote in federal elections." Maj. at 17652. But the NVRA's text never states that it's the exclusive authority on this issue, or that the federal form must be "a fully sufficient means of registering to vote in federal elections." Maj. at 17665. It'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. Such broad, flexible guidance is far from a definitive regulatory scheme. Moreover, if the statute permits zero deviation from the federal form, why permit states to develop their own forms at all?

The only development needed would be photocopying the federal form.

Relatedly, the majority claims that because the NVRA prohibits requiring "notarization or other formal authentication," 42 U.S.C. § 1973gg-7(b)(3), Congress must have intended to prohibit states from imposing *any* supplemental requirements. Maj. at 17653. But Congress doesn't disguise general proscriptions of everything as specific proscriptions of one narrow thing. *See Whitman v. Am. Trucking Ass'n,* 531 U.S. 457, 468 (2001) ("Congress . . . [doesn't] hide elephants in mouse-holes."). Nor would permitting Arizona to require proof of citizenship free it to violate the NVRA's ban on requiring formal notarization. Maj. at 17654. Refusing to enforce an *unwritten* ban hardly weakens the force of an *express* prohibition.

3. The majority devotes much time to making the case that "the thrust of the NVRA is to increase federal voter registration by streamlining the registration process." Maj. at 17651; *see id.* at 17644-45. It spends endless pages reviewing the history of voting laws, *id.* at 17644-46, discussing congressional hearings on the general problem of voter participation, *id.* at 17646, and reviewing the many operative parts of the NVRA, Maj. at 17646-52. But the majority's lengthy disquisition on history and purpose only highlights the absence of *any* textual support for its conclusion that Congress meant to increase voter registration by prohibiting state-imposed supplemental requirements. To the extent we rely on purpose at all,

we should focus on the purposes codified in the statute rather than our guesses based on reading the tea leaves of history and context. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 568 (2005).

> The NVRA's four purposes are:
>
> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of *eligible* citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b) (emphasis added). Congress thus told us that it was concerned with maximizing the registration of "eligible" voters, in addition "to protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." *Id. None* of these purposes is served when individuals who are not citizens register to vote. *See John v. United States,* 247 F.3d 1032, 1036-37 (9th Cir. 2001) ("We must not 'interpret federal statutes to negate their own stated purposes.'"). The majority never explains why a statute enacted to "protect the integrity of the electoral process" and "ensure" that voter rolls are "accurate" must preclude

states from confirming that those who wish to register are, in fact, eligible to vote.

* * *

The majority distorts two major areas of law before it even reaches the merits. It creates an unprecedented exception to our law of the circuit rule, trampling underfoot a newly minted en banc opinion. The majority also makes a mess of the law of the case analysis by taking issue with a prior panel's *reasoning,* not its conclusion. And, as to the merits, the panel comes nowhere close to proving that *Gonzalez I*'s interpretation of the National Voter Registration Act was wrong, much less clearly wrong. Few panels are able to upset quite so many apple carts all at once. Count me out.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT;

No. 08-17094

D.C. Nos.
2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

ORDER

(Filed Apr. 27, 2011)

VALLE DEL SOL; PROJECT VOTE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; KEN BENNETT, in his official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES,

Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees.

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL; PEOPLE

No. 08-17115

D.C. No. 2:06-cv-01268-ROS

FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; KEN BENNETT, in his official capacity as Secretary of State of Arizona; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; PATTY HANSEN, Coconino County Election Director; KELLY DASTRUP, Navajo County Election Director; LYNN CONSTABLE, Yavapai County Election

Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees.

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARIA M. GONZALEZ,; LUCIANO VALENCIA; THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; PEOPLE FOR THE AMERICAN WAY FOUNDATION; HOPI TRIBE,

Plaintiffs,

and

BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; VALLE DEL SOL; PROJECT VOTE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County

Recorder; LYNN CONSTABLE, Yavapai County Election Director; KELLY DASTRUP, Navajo County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder; JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; PATTY HANSEN, Coconino County Election Director; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder, KEN BENNETT,

Defendants-Appellees,

No. 08-17094
D.C. Nos.
2:06-cv-01268-ROS
06-cv-01362-PCT-JAT
06-cv-01575-PHX-EHC

MARIA M. GONZALEZ; BERNIE ABEYTIA; ARIZONA HISPANIC COMMUNITY FORUM; CHICANOS POR LA CAUSA; FRIENDLY HOUSE; JESUS GONZALEZ; DEBBIE LOPEZ; SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; LUCIANO VALENCIA; VALLE DEL SOL; PEOPLE FOR THE AMERICAN WAY FOUNDATION; PROJECT VOTE,

Plaintiffs,

and

THE INTER TRIBAL COUNCIL OF ARIZONA, INC.; ARIZONA ADVOCACY NETWORK; STEVE M. GALLARDO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS ARIZONA; LEAGUE OF WOMEN VOTERS OF ARIZONA; HOPI TRIBE,

Plaintiffs-Appellants,

v.

STATE OF ARIZONA; KEN BENNETT; SHELLY BAKER, La Paz County Recorder; BERTA MANUZ, Greenlee County Recorder; CANDACE OWENS, Coconino County Recorder; Patty Hansen, Coconino County Election Director; KELLY DASTRUP, Navajo County Election Director; LYNN CONSTABLE, Yavapai County Election Director; LAURA DEAN-LYTLE, Pinal County Recorder;

JUDY DICKERSON, Graham County Election Director; DONNA HALE, La Paz County Election Director; SUSAN HIGHTOWER MARLAR, Yuma County Recorder; GILBERTO HOYOS, Pinal County Election Director; LAURETTE JUSTMAN, Navajo County Recorder; CHRISTINE RHODES, Cochise County Recorder; LINDA HAUGHT ORTEGA, Gila County Recorder; DIXIE MUNDY, Gila County Election Director; BRAD NELSON, Pima County Election Director; KAREN OSBORNE, Maricopa County Election Director; YVONNE PEARSON, Greenlee County Election Director; PENNY PEW, Apache County Election Director; HELEN PURCELL, Maricopa County Recorder; F. ANN RODRIGUEZ, Pima County Recorder,

Defendants-Appellees,

No. 08-17115
D.C. No.
2:06-cv-01268-ROS
OPINION

Appeals from the United States District Court
for the District of Arizona
Roslyn O. Silver, Chief District Judge, Presiding

Argued and Submitted
June 21, 2011 – Pasadena, California

Filed April 17, 2012

Before: Alex Kozinski, Chief Judge, Harry Pregerson, Pamela Ann Rymer, Susan P. Graber, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton, Jay S. Bybee, Sandra S. Ikuta, N. Randy Smith, and Mary H. Murguia, Circuit Judges.[1]

Opinion by Judge Ikuta;
Concurrence by Chief Judge Kozinski;
Concurrence by Judge Berzon;
Partial Concurrence and Partial Dissent by Judge Pregerson; Partial Concurrence and Partial Dissent by Judge Rawlinson

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COUNSEL

Nina Perales, Esq. (argued), Mexican American Legal Defense and Educational Fund, San Antonio, Texas, for plaintiffs-appellants Jesus Gonzalez, et al.

Jon M. Greenbaum, Esq. (argued), Robert A. Kengle, Lawyers' Committee for Civil Rights Under Law, Washington, D.C., David J. Bodney, Esq., Steptoe & Johnson, LLP, Phoenix, AZ, David B. Rosenbaum, Esq., Thomas L. Hudson, Esq., Osborn Maledon, P.A., Phoenix, AZ, Joe P. Sparks, Esq., The Sparks Law Firm, Scottsdale, Arizona, Daniel B. Kohrman, Esq., AARP, Washington, D.C., for plaintiffs-appellants The Inter Tribal Council of Arizona, et al.

Samuel R. Bagenstos (argued), DOJ, Washington, D.C., for amicus curiae United States.

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[1] Judge Rymer participated in oral argument and deliberations but passed away before joining any opinion.

Thomas C. Horne (argued), Attorney General, Phoenix, Arizona, Mary O'Grady, Solicitor General, Phoenix, Arizona, for defendant-appellee Ken Bennett.

OPINION

IKUTA, Circuit Judge:

Proposition 200 requires prospective voters in Arizona to provide proof of U.S. citizenship in order to register to vote, *see* Ariz. Rev. Stat. § 16-166(F) (the "registration provision"), and requires registered voters to show identification to cast a ballot at the polls, *see* Ariz. Rev. Stat. § 16-579(A) (the "polling place provision"). This appeal raises the questions whether Proposition 200 violates § 2 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973, is unconstitutional under the Fourteenth or Twenty-fourth Amendments to the Constitution, or is void as inconsistent with the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. §§ 1973gg *et seq.* We uphold Proposition 200's requirement that voters show identification at the polling place, but conclude that the NVRA supersedes Proposition 200's registration provision as that provision is applied to applicants using the National Mail Voter Registration Form (the "Federal Form") to register to vote in federal elections.

I

On November 2, 2004, Arizona voters passed a state initiative, Proposition 200, which (upon

proclamation of the Governor) enacted various revisions to the state's election laws. As explained in more detail below, Proposition 200's registration provision amended Arizona's voter registration procedures to require the County Recorder to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). Proposition 200's polling place provision amended Arizona's election day procedures to require voters to present specified forms of identification at the polls. *See id.* § 16-579(A).

Shortly after Proposition 200's passage, a number of plaintiffs filed lawsuits against Arizona[2] to enjoin these changes. Two groups of plaintiffs are relevant to this appeal: the Gonzalez plaintiffs (Gonzalez) and the Inter Tribal Council of Arizona plaintiffs (ITCA).[3]

The district court consolidated the various complaints. After the district court denied the plaintiffs' motion for a preliminary injunction, Gonzalez and

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[2] We refer to the defendants collectively as "Arizona," even though Arizona county recorders were also named as individual defendants.

[3] Jesus Gonzalez represented one group of plaintiffs, which consisted of individual Arizona residents and organizational plaintiffs. The Inter Tribal Council of Arizona, a non-profit organization of twenty Arizona tribes, represented another group of plaintiffs, which included the Hopi Tribe, Representative Steve Gallardo from the Arizona State House of Representatives, the League of Women Voters of Arizona, the League of United Latin American Citizens, the Arizona Advocacy Network, and People For the American Way Foundation.

ITCA appealed. *See Gonzalez v. Arizona* (*Gonzalez I*), 485 F.3d 1041, 1046 (9th Cir. 2007). Because the briefing schedule for the appeal extended beyond the 2006 election, Gonzalez and ITCA moved for an emergency interlocutory injunction (which would prevent the implementation of Proposition 200 pending the disposition of the appeal of the district court's denial of a preliminary injunction), which we granted. *See id.* After Arizona petitioned for certiorari, the Supreme Court vacated the emergency injunction and remanded the case to this court for a determination of the merits of the appeal. *See Purcell v. Gonzalez,* 549 U.S. 1, 5-6 (2006) (per curiam).

On remand, Gonzalez and ITCA pursued their claim for preliminary injunctive relief only with respect to Proposition 200's registration requirement. *Gonzalez I,* 485 F.3d at 1048. The panel in *Gonzalez I* affirmed the district court's denial of the preliminary injunction, holding that Proposition 200's registration provision was not an unconstitutional poll tax and was not superseded by the NVRA. *See id.* at 1049, 1050-51.

On remand, the district court held that Proposition 200's polling place provision was not a poll tax under the Twenty-fourth Amendment and its registration provision did not conflict with the NVRA, and granted summary judgment to Arizona on these claims. After trial, the district court resolved all other claims in favor of Arizona, holding that Proposition 200 did not violate § 2 of the VRA or the Equal Protection Clause of the Fourteenth Amendment and did

not constitute a poll tax under the Fourteenth Amendment.

Gonzalez and ITCA appealed the district court's rulings on the NVRA and Twenty-fourth Amendment claims. In addition, ITCA challenged the court's determination that Proposition 200 was not a poll tax under the Fourteenth Amendment, and Gonzalez challenged the court's determinations on the Voting Rights Act and Equal Protection Clause claims. A three-judge panel affirmed in part and reversed in part, holding that Proposition 200's polling place provision did not violate the VRA or the Fourteenth and Twenty-fourth Amendments, but that Proposition 200's registration provision was superseded by the NVRA. *Gonzalez v. Arizona* (*Gonzalez II*), 624 F.3d 1162 (9th Cir. 2010). In deciding Gonzalez and ITCA's challenge to the registration provision, the panel overruled the contrary holding of *Gonzalez I* on the ground that an exception to the law of the case rule applied.[4] *See id.* at 1185-91. A majority of the active judges of the court voted to rehear the case en banc.

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[4] Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case. *See Jeffries v. Wood,* 114 F.3d 1484, 1488-89 (9th Cir. 1997) (en banc). We have recognized exceptions to the law of the case doctrine, however, where "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Id.* at 1489 (footnote omitted) (quoting *Caldwell v. Unified Capital*

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II

We first consider Proposition 200's registration provision. *See* Ariz. Rev. Stat. § 16-166(F). Gonzalez and ITCA contend that this provision is preempted by

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Corp. (*In re Rainbow Magazine, Inc.*), 77 F.3d 278, 281 (9th Cir. 1996)) (internal quotation marks omitted). Some of our cases indicated that a three-judge panel could rely on these exceptions to overrule the law of an earlier published opinion, so long as no subsequent panel had yet relied on it. *See id.* at 1492-93; *see also Mendenhall v. NTSB,* 213 F.3d 464, 469 n.3 (9th Cir. 2000); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 216 F.3d 764, 786-88 (9th Cir. 2000).

We now hold that the exceptions to the law of the case doctrine are not exceptions to our general "law of the circuit" rule, i.e., the rule that a published decision of this court constitutes binding authority which "must be followed unless and until overruled by a body competent to do so," *Hart v. Massanari,* 266 F.3d 1155, 1170 (9th Cir. 2001). To the extent that our prior cases suggested otherwise, *see Jeffries,* 114 F.3d at 1492-93; *Mendenhall,* 213 F.3d at 469 n.3; *Tahoe-Sierra Pres. Council, Inc.,* 216 F.3d at 786-88, they are overruled. This determination, however, does not affect other recognized exceptions to the law of the circuit rule. *See Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that where "the relevant court of last resort" has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," then "a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled"); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 982 (2005) (holding that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

the NVRA under both the Supremacy Clause and the Elections Clause of the U.S. Constitution. In response, Arizona relies on the Supremacy Clause's "presumption against preemption," *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), to argue that the NVRA neither expressly nor impliedly preempts state voter registration laws. Before addressing the parties' arguments, we first consider whether the framework of the Elections Clause or the Supremacy Clause properly governs this question.

A

The Elections Clause establishes a unique relationship between the state and federal governments. It provides:

> 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. In a nutshell, state governments are given the initial responsibility for regulating the mechanics of federal elections, but Congress is given the authority to "make or alter" the states' regulations.

The history of the Elections Clause reveals the reasoning behind its unusual delegation of power. Under the Articles of Confederation, the states had

full authority to maintain, appoint, or recall congressional delegates.[5] At the Philadelphia Convention, delegates expressed concern that, if left unfettered, states could use this power to frustrate the creation of the national government, *see U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 808-09 (1995), most obviously by neglecting to hold federal elections. The Framers decided that Congress should be given the authority to oversee the states' procedures related to national elections as a safeguard against potential state abuse. *See id.*; *see also* The Federalist No. 59, at 168 (Alexander Hamilton) (Ron P. Fairfield ed., 2d ed. 1981) (explaining that "[n]othing can be more evident, than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy"). Over the protest of some Southern delegates,[6] the Framers approved language

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[5] *See* Articles of Confederation of 1781, art. V ("[D]elegates shall be annually appointed in such manner as the legislature of each State shall direct . . . with a power reserved to each state, to recall its delegates. . . .").

[6] South Carolinian delegates Charles Pinckney and John Rutledge moved to exclude the language giving Congress this supervisory power over the states. 5 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787.* Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates's Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution 401 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1901) [hereinafter Elliot's Debates]. "The states, they contended, could and must be relied on" to

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giving Congress power to "make or alter" the states' regulations. *See* 5 Elliot's Debates 401-02 (statement of James Madison). As modified to give Congress this supervisory power, this language became the Elections Clause.[7]

Thus, the Elections Clause empowers both the federal and state governments to enact laws governing the mechanics of federal elections. The clause gives states the default authority to prescribe the "Times, Places and Manner" of conducting federal elections. Nevertheless, because Congress "may at any time by Law make or alter" the regulations passed by the state, power over federal election procedures is ultimately "committed to the exclusive control of Congress." *Colegrove v. Green,* 328 U.S. 549, 554 (1946).[8] While Congress may not always choose to

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regulate legislative appointments. *Id.*; *see also Vieth v. Jubelirer,* 541 U.S. 267, 275-76 (2004).

[7] Alexander Hamilton described the need for congressional oversight of the states as follows:

> [The Framers] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.

The Federalist No. 59, at 168.

[8] The Court has generally construed Congress's authority under the Elections Clause expansively. *See, e.g., United States v. Mosley,* 238 U.S. 383, 386 (1915) (authority to enforce the

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exercise this power, "[w]hen exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold,* 100 U.S. 371, 384 (1879); *see also Foster v. Love,* 522 U.S. 67, 69 (1997) (stating that the Elections Clause "is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices" (citation omitted)). Moreover, we have held that the Elections Clause requires states to implement Congress's superseding regulations without compensation from the federal government. *See Voting Rights Coal. v. Wilson,* 60 F.3d 1411, 1415 (9th Cir. 1995). Thus, unlike virtually all other provisions of the Constitution, the Elections Clause gives Congress the power to "conscript state agencies to carry out" federal mandates. *Id.* In sum, a state's role in the creation and implementation of federal election procedures under the Elections Clause is to administer the elections through its own procedures until Congress deems otherwise; if and when Congress does so, the states are obligated to conform to and carry out

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right of an eligible voter to cast ballot and have ballot counted); *Ex Parte Coy,* 127 U.S. 731, 753-54 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte Yarbrough* (*The Ku-Klux Cases*), 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte Clarke,* 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis congressional elections).

whatever procedures Congress requires. *See Foster,* 522 U.S. at 69.

As should be clear from this overview, the Elections Clause operates quite differently from the Supremacy Clause. The Supremacy Clause provides that the laws of the United States "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under our system of dual sovereignty, courts deciding whether a particular state law is preempted under the Supremacy Clause must strive to maintain the "delicate balance" between the States and the Federal Government, *Gregory v. Ashcroft,* 501 U.S. 452, 460 (1991); *see Medtronic,* 518 U.S. at 485, especially when Congress is regulating in an area "traditionally occupied by the States," *United States v. Locke,* 529 U.S. 89, 108 (2000) (internal quotation marks omitted); *see also Cipollone v. Liggett Grp.,* 505 U.S. 504, 516 (1992). The Supreme Court has crafted special guidelines to assist courts in striking this balance. First, courts applying the Supremacy Clause are to begin with a presumption against preemption. *E.g., Altria Grp. v. Good,* 555 U.S. 70, 77 (2008); *Medtronic,* 518 U.S. at 485. This principle applies because, as the Court has recently noted, "respect for the States as independent sovereigns in our federal system leads us to assume that Congress does not cavalierly preempt state-law causes of action." *Wyeth v. Levine,* 129 S. Ct. 1187, 1195 n.3 (2009) (internal quotation marks omitted). Second, the Court has adopted a "plain

statement rule," holding that a federal statute preempts a state law only when it is the "clear and manifest" purpose of Congress to do so. *Gregory,* 501 U.S. at 461 (internal quotation marks omitted). Only where the state and federal laws cannot be reconciled do courts hold that Congress's enactments must prevail. *See, e.g., Altria,* 555 U.S. at 76-77.

In contrast to the Supremacy Clause, which addresses preemption in areas within the states' historic police powers, the Elections Clause affects only an area in which the states have no inherent or reserved power: the regulation of federal elections. *See U.S. Term Limits,* 514 U.S. at 804-05. As the Supreme Court has explained, because federal elections did not exist prior to the formation of the federal government, the states' sole authority to regulate such elections "aris[es] from the Constitution itself," *id.* at 805. Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a "delicate balance" between competing sovereigns. Instead, the Elections Clause, as a standalone preemption provision, establishes its own balance. For this reason, the "presumption against preemption" and "plain statement rule" that guide Supremacy Clause analysis are not transferable to the Elections Clause context. *See Harkless v. Brunner,* 545 F.3d 445, 454 (6th Cir. 2008) (declining to apply Supremacy Clause preemption principles in analyzing the preemptive effect of the NVRA). Indeed, the Supreme Court has suggested as much.

In *Foster,* the Supreme Court upheld the Fifth Circuit's determination that a state election law was voided by a federal election law; however, instead of adopting the Fifth Circuit's Supremacy Clause analysis, the Court analyzed the claim under the Elections Clause, without ever mentioning a presumption against preemption or plain statement rule. *See Foster,* 522 U.S. 67, *aff'g* 90 F.3d 1026 (5th Cir. 1996). In fact, our survey of Supreme Court opinions deciding issues under the Elections Clause reveals no case where the Court relied on or even discussed Supremacy Clause principles. Because the Elections Clause empowered Congress to enact the NVRA, *see Wilson,* 60 F.3d at 1413-14, the preemption analysis under that Clause applies here.

B

The Supreme Court first explained the principles of Elections Clause preemption in *Siebold,* 100 U.S. 371. In that case, the Court likened the relationship between laws passed by state legislatures and those enacted by Congress under the Elections Clause to "prior and subsequent enactments of the same legislature." *Id.* at 384. "The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress." *Id.* at 388. Just as a subsequent legislature is not required to make an "entirely new set" of laws when modifying those of a prior legislature, neither is Congress required to wholly take over the regulation of federal election procedures when choosing to "make or alter" certain

of the states' rules. *Id.* at 384. There is no "intrinsic difficulty in such cooperation" between the state and national legislatures because the two governments do not possess an "equality of jurisdiction" with respect to federal elections. *Id.* at 392. In all instances, "the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws." *Id.* at 397.

Over a century later, the Supreme Court clarified what constitutes a conflict under an Elections Clause analysis. *See Foster,* 522 U.S. 67. *Foster* considered whether a congressional enactment superseded a Louisiana statute regulating the same federal election procedure. *Id.* at 68-69. Specifically, federal law set the date for congressional elections as the Tuesday after the first Monday in November. *Id.* at 68. A Louisiana statute established an open primary in October for the offices of United States Senator and Representative. *Id.* at 70. Only if the open primary failed to result in a majority candidate would a run off election between the top two candidates be held on Congress's specified election day. *Id.* In response to a challenge by Louisiana voters, the Court unanimously held that the state and federal acts conflicted and thus that the federal statute superseded the Louisiana law. *Id.* at 74.

The Court rejected the state's claim that its statute and the federal enactment could be construed harmoniously. *Id.* at 72-73. Louisiana asserted that "the open primary system concern[ed] only the 'manner' of electing federal officials, not the 'time' at which

the elections will take place." *Id.* at 72. The Court discarded the state's "attempt to draw this time-manner line" as "merely wordplay" and an "imaginative characterization" of the statutes. *Id.* at 72-73. Building upon the principles from *Siebold,* the Court declined to adopt a strained interpretation of the statutes to reconcile a potential disagreement.[9] *See id.* Rather, the Court emphasized Congress's plenary authority not only to supplant state rules but to conscript states to carry out federal enactments under the Elections Clause, and found it enough that, under a natural reading, the state and federal enactments addressed the same procedures and were in conflict. *Id.* Refusing to pare the statute "down to the definitional bone," the Court held that the state enactment was void. *Id.* at 72, 74.

Reading *Siebold* and *Foster* together, we derive the following approach for determining whether federal enactments under the Elections Clause displace

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[9] The dissent's claim that in *Foster* there was a "blatant conflict" between the state and federal election laws, dis. op. at 4213, is incorrect. Rather, the petitioners in *Foster* proffered a reading of the state and federal statutes that at least technically avoided a conflict. *See Foster,* 522 U.S. at 72 (arguing that "because Louisiana law provides for a 'general election' on federal election day in those unusual instances when one is needed, the open primary system concerns only the 'manner' of electing federal officials, not the 'time' at which the elections will take place"). The Court rejected this reading as "merely wordplay." *Id.* The dissent provides a similarly strained reading of the NVRA and Proposition 200, *see* dis. op. at 4203-04, 4206-07 which likewise falls short, *see infra* at 4138-43.

a state's procedures for conducting federal elections. First, as suggested in *Siebold,* we consider the state and federal laws as if they comprise a single system of federal election procedures. *Siebold,* 100 U.S. at 384. If the state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme. *See id.* If Congress addressed the same subject as the state law, we consider whether the federal act has superseded the state act, based on a natural reading of the two laws and viewing the federal act as if it were a subsequent enactment by the same legislature. *Foster,* 522 U.S. at 74; *see id.* at 72-73. If the two statutes do not operate harmoniously in a single procedural scheme for federal voter registration, then Congress has exercised its power to "alter" the state's regulation, and that regulation is superseded.

C

Before applying this Elections Clause analysis here, we must understand the scope and application of the federal and state statutes at issue, namely the NVRA and Proposition 200's registration provision.

The NVRA prescribes three methods for registering voters for federal elections. 42 U.S.C. § 1973gg-2(a). These methods are: (1) "by application made simultaneously with an application for a motor

vehicle driver's license," *id.* § 1973gg-2(a)(1);[10] (2) "by mail application" using the Federal Form prescribed by the Election Assistance Commission (EAC),[11] *id.* §§ 1973gg-2(a)(2), 1973gg-4; and (3) "by application in person" at sites designated in accordance with state law or state voter registration agencies, *id.* § 1973gg-2(a)(3). States must "establish procedures to register" voters through all three methods "notwithstanding any other Federal or State law" and "in addition to any other method of voter registration provided for under State law." *Id.* § 1973gg-2(a).[12]

In connection with prescribing these three methods of voter registration, the NVRA mandates the creation of two new voter registration applications. First, the NVRA requires states to create a combined driver's license and voter registration application

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[10] Under this method, any application for a driver's license submitted to a state motor vehicle authority "shall serve as an application for voter registration with respect to elections for Federal office unless the applicant fails to sign the voter registration application." § 1973gg-3(a)(1). This provision earned the statute its informal name: the "Motor Voter Law."

[11] The responsibilities of the EAC were formerly held by the Federal Election Commission (FEC). When Congress passed the Help America Vote Act or 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666, it created the EAC, 42 U.S.C. § 15321, which eventually absorbed the FEC's duties under the NVRA, *see* 42 U.S.C. § 15532. In this opinion, we refer to both entities as the EAC.

[12] States that do not require registration to vote or allow election-day registration at polling places are exempt from the NVRA. *See* § 1973gg-2(b). These states are Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. *See* 75 Fed. Reg. 47,729-01, 47,730 (Aug. 9, 2010).

form (the "Motor Voter Form") pursuant to certain criteria set out in the statute. *See id.* § 1973gg-3. The NVRA also requires the EAC to create the Federal Form, a nationally uniform voter application that applicants can use to register by mail and in person at designated locations. *See id.* §§ 1973gg-4, 1973gg-7(a)(2). In addition, states may (but are not required to) create their own state mail voter registration forms for federal elections (the "State Form"), so long as these forms meet certain criteria in the NVRA. *See id.* § 1973gg-4(a)(2).

The NVRA sets out a broad framework for the contents of the Federal Form, including specifying certain items that must be included on the form, along with other items that cannot be. *See id.* § 1973gg-7(b). Among other things, *id.* § 1973gg-7(b) provides that the Federal Form "may require only such identifying 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." *Id.* § 1973gg-7(b)(1). Further, the Federal Form must include a statement specifying "each eligibility requirement (including citizenship)" for voting along with an "attestation that the applicant meets each such requirement," *id.* § 1973gg-7(b)(2)(A)-(B), and must require "the signature of the applicant, under penalty of perjury," *id.* § 1973gg-7(b)(2)(C). In addition, the NVRA provides that the Federal Form

cannot include "any requirement for notarization or other formal authentication," *id.* § 1973gg-7(b)(3).[13]

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[13] In full, section 1973-gg7(b) states that 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) the voter eligibility requirements and penalties for false applications set forth in § 1973gg-6(a)(5);

(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.

Id. § 1973gg-7(b).

The NVRA directs the EAC, in consultation with "the chief election officers of the States," to develop the Federal Form in a manner consistent with these broad guidelines. *Id.* § 1973gg-7(a)(2). The EAC discharged this statutory requirement by designing a Federal Form that met the criteria set forth in section 1973gg-7(b). *See* 59 Fed. Reg. 32,311-01 (June 23, 1994), codified at 11 C.F.R., pt. 9428. As designed by the EAC (and subsequently modified by HAVA, 42 U.S.C. §§ 15301 *et seq.*), the Federal Form is a postcard.[14] *See* 11 C.F.R. § 9428.5. The top of the form asks "Are you a citizen of the United States of America?" and "Will you be 18 years old on or before election day?" with boxes for the applicant to check yes or no.[15] Applicants who check "no" to either of these questions are instructed not to complete the form. If the applicant checks "yes" to both questions, the form then requests the applicant's name, address, date of birth, telephone number (optional), choice of party,[16] race or ethnic group,[17] and "ID number."[18] It also

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[14] The Federal Form is set forth in Appendix A.

[15] These two questions and the associated instructions were added to the Federal Form by HAVA. 42 U.S.C. § 15483(b)(4)(A)(i)-(ii).

[16] "Choice of party" is required in some states for voters who wish to participate in closed primaries. It is not required to register to vote in general elections. *See* 59 Fed. Reg. at 32,314.

[17] This box was included on the Federal Form to assist certain states in their data collection efforts pursuant to § 5 of the VRA. *Id.* at 32,315-16.

[18] The "ID number" is used for "election administration purposes." 11 C.F.R. § 9428.4(a)(6), *see* 59 Fed. Reg. at 32,314

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requires the applicant to attest (with a signature or mark) that he or she is a U.S. citizen, meets his or her state's voting eligibility requirements, and has provided information that is "true to the best of [his or her] knowledge under penalty of perjury." No other proof of U.S. citizenship is required. The Federal Form postcard may be dropped into the mail or delivered in person to one of the designated offices.

As noted above, in addition to mandating the creation and use of the Federal Form, the NVRA allows states to develop and use an optional State Form for registering voters for federal elections. *See* 42 U.S.C. § 1973gg-4(a)(2). If a state chooses to create a State Form, that form must conform to the broad framework for the contents of the Federal Form set forth in section 1973gg-7(b). *See id.* Arizona chose to create a State Form[19] that is similar to the Federal Form but requires that first-time voters and persons who have moved between Arizona counties "also include proof of citizenship or the form will be rejected." According to the State Form instructions, an

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(explaining that ID numbers "are not necessary for determining the eligibility of the applicant," but rather are for assisting the states in administering the registration process). The Federal Form's instruction booklet provides state-specific instructions for the "ID number" box: for Arizona, applicants must provide a driver's license, non-operating identification license number, the last four digits of a social security number, or write "None." These instructions are consistent with Arizona's election administration obligations under HAVA. *See infra* at pp. 401-02.

[19] The Arizona State Form is set forth in Appendix B.

applicant can satisfy this proof of citizenship requirement by writing in a designated box on the State Form the number of the applicant's Arizona driver's license or nonoperating identification license issued after October 1, 1996,[20] alien registration number, or specified tribal identification number (as relevant). If the applicant lacks such a number, the applicant must include a photocopy of one of the acceptable documents listed on the State Form (such as a birth certificate, U.S. passport, tribal document, or the like) along with the form itself.

While the NVRA permits states to use their own State Forms to register voters for federal elections, the NVRA still requires every state to "accept and use" the Federal Form developed by the EAC. *See id.* § 1973gg-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) of this title for the registration of voters in elections for Federal office." (emphasis added)). In this way, the NVRA guarantees that an applicant in any state seeking to register to vote in federal elections may do so using the Federal Form.

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[20] Arizona started requiring applicants to provide documentation of their lawful status as U.S. residents as a condition of receiving a driver's license or non-operating identification license after October 1, 1996.

D

Having reviewed the relevant provisions of the NVRA, we now turn to Proposition 200's registration provision, which states: "The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Ariz. Rev. Stat. § 16-166(F). The statute defines satisfactory evidence of U.S. citizenship to include the number of the applicant's driver's license or nonoperating identification license, certain numbers associated with Native American tribal status, the number of a certificate of naturalization (or the in-person presentation of naturalization documents), or a legible photocopy of a U.S. birth certificate or passport.[21] *See id.*

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[21] Section 16-166(F) provides the following list of approved identification documents:

> 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

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By its terms, this proof of citizenship requirement applies to the Federal Form as well as to Arizona's State Form.[22] In other words, Proposition 200's registration provision directs Arizona county recorders to reject every Federal Form that is submitted without the specified evidence of citizenship. According to the Arizona Election Procedures Manual, which has the force and effect of law, *see* Ariz. Rev. Stat. § 16-452, if a rejected applicant wants to make a second attempt to provide evidence of citizenship, he

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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.

[22] Proposition 200 also amended state law to require Arizona's State Form to "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." Ariz. Rev. Stat. § 16-152(A)(23). Because this provision does not affect the Federal Form, we do not consider it here.

or she must submit an entirely new voter registration form in order to do so.[23]

E

We now turn to Gonzalez and ITCA's contention that the NVRA's requirement that states "accept and use" the Federal Form supersedes Proposition 200's registration provision as applied to applicants using the Federal Form.[24]

In assessing this argument, we apply the Elections Clause framework we derived from *Siebold* and *Foster* and consider the NVRA and Proposition 200's registration provision as if they comprise a single system of federal election procedures. With respect to mail voter registration, the NVRA provides that "[e]ach State shall accept and use" the Federal Form "for the registration of voters in elections for Federal office." 42 U.S.C. § 1973gg-4(a)(1). By contrast,

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[23] The manual instructs county recorders:

> If [a voter registration] form is not accompanied by proper proof of citizenship, the voter registration form is not valid and either will not be entered into the system or if it was entered into the system, the record shall be canceled. If the registrant subsequently provides proof of citizenship, it must be accompanied by a new voter registration form and a new registration date.

Arizona Secretary of State Elections Procedures Manual (Oct. 2007).

[24] Gonzalez and ITCA do not challenge Proposition 200's registration provision as applied to Arizona's State Form.

Proposition 200's registration provision directs county recorders to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship," as defined by Arizona law. Ariz. Rev. Stat. § 16-166(F). When read together, the federal and state enactments treat the same subject matter, namely, the procedure for registering by mail to vote in federal elections using the Federal Form, but they do not operate harmoniously. In fact, these procedures are seriously out of tune with each other in several ways.

First, the NVRA requires a county recorder to accept and use the Federal Form to register voters for federal elections, whereas the registration provision requires the same county recorder to reject the Federal Form as insufficient for voter registration if the form does not include proof of U.S. citizenship. Arizona attempts to harmonize these procedures, arguing that because the county recorder will accept the Federal Form for voter registration so long as it includes satisfactory evidence of citizenship, the county recorder is in fact complying with the NVRA's mandate to "accept and use" the Federal Form, per 42 U.S.C. § 1973gg-4(a)(1). Rejection of the Federal Form in certain circumstances, Arizona argues, does not in itself mean that the state is failing to accept and use the form. Indeed, Arizona asserts, Congress must have contemplated that some applicants using the Federal Form would be rejected, because the NVRA directs states to notify "each applicant of the

disposition of [his or her] application." *Id.* § 1973gg-6(a)(2).

We disagree. Although Arizona has offered a creative interpretation of the state and federal statutes in an effort to avoid a direct conflict, we do not strain to reconcile a state's federal election regulations with those of Congress, but consider whether the state and federal procedures operate harmoniously when read together naturally. *See Foster,* 522 U.S. at 72-74; *Siebold,* 100 U.S. at 384. Here, 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. Arizona cannot cast doubt on this conclusion by pointing out that the NVRA allows states to reject applicants who fail to demonstrate their eligibility pursuant to the Federal Form. Congress clearly anticipated that states would reject applicants whose responses to the Federal Form indicate they are too young to vote, do not live within the state, or have not attested to being U.S. citizens. Indeed, the NVRA instructs the EAC to request information on the Federal Form for the precise purpose of "enabl[ing] the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1). Thus, a state that assesses an applicant's eligibility based on the information requested on the Federal Form is "accepting and using" the form in exactly the way it was meant to be used. In contrast, Proposition 200's registration provision directs county recorders to assess an

applicant's eligibility based on proof of citizenship information that is *not* requested on the Federal Form, and to reject all Federal Forms that are submitted without such proof. Rejecting the Federal Form because the applicant failed to include information that is not required by that form is contrary to the form's intended use and purpose.

The dissent likewise attempts to justify Arizona's rejection of the Federal Form, but rests its arguments almost exclusively on the fact that § 1973gg-4(a)(2) allows states to develop and use a State Form, which may include requirements that are not included in the Federal Form. *See* dis. op. at 4200-03, 4204-06. According to the dissent, because states may impose additional proof-of-citizenship requirements on applicants using the State Form, it necessarily follows that states may impose the same proof-of-citizenship requirements on applicants using the Federal Form; that is, that they may reject Federal Forms that do not include the additional proof of citizenship. *See* dis. op. at 4203-06. But there is no logical connection between the dissent's premise and its conclusion, which is contrary to the text of the statute. The NVRA clearly requires states to accept and use the Federal Form (as designed by the EAC) "[i]n addition to" the State Form.

The NVRA's State Form provision, § 1973gg-4(a)(2), merely gives a state more options. Congress could have required all states to use *only* the Federal Form, as designed by the EAC, for federal elections. If Congress had done so, then states could not use their

state registration forms to register applicants for federal elections. Instead, Congress allowed States to use their state registration forms to register applicants for both state and federal elections (provided the state form complies with § 1973gg-7(b)).[25] But states cannot reject applicants who register for federal elections who use the Federal Form. There is nothing illogical or inconsistent about requiring states to accept the federal registration form in addition to their own state form.

In order to avoid the clear import of the NVRA's text, the dissent argues that the Federal Form merely establishes the default minimum or baseline registration requirements. *See* dis. op. at 4203-04, 4209. In effect, the dissent wants to replace the words "in addition to" with the words "instead of," so that "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" *instead of* "accepting and using" the Federal Form. We have no authority to rewrite the statute, however, and reject the dissent's interpretation as being inconsistent with the plain language. *See id.* ("*In addition to* accepting and using

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[25] The dissent therefore has it exactly backwards in asserting that, under our interpretation of § 1973gg-4(a)(2), states may not use their state registration forms to register "voters in elections for Federal office." Dis. op. at 4208. States *may* use their state registration forms to register voters in elections for federal office; they simply may not *require* registrants to use the State Form (or the equivalent of the State Form, namely, the Federal Form altered to include additional state requirements).

[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) of this title for the registration of voters in elections for Federal office." (emphasis added)).

Second, Proposition 200's registration provision clashes with the NVRA's delegation of authority to the EAC (not the states) to determine the contents of the Federal Form. *See id.* § 1973gg-7(a)(2). While states may suggest changes to the Federal Form, the EAC has the ultimate authority to adopt or reject those suggestions. *See id.* § 1973gg-7(a). Here the EAC sent Arizona a letter rejecting its proposal to modify the Federal Form to require applicants to present documentary proof of citizenship in order to register, *see infra* p. 4148 n.29, but Arizona nevertheless proceeded to impose this additional requirement on applicants using the Federal Form. 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.[26]

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[26] Arizona argues that *McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000), supports its conclusion that states may add requirements to the Federal Form, so long as the NVRA does not expressly forbid those requirements. Arizona is misreading McKay. In that case, the court rejected a prospective voter's objection to Tennessee's practice of requiring a full social security number as a precondition to successful registration, *see id.* at 754, stating that "[t]he NVRA does not specifically forbid use of social security numbers." *Id.* at 756. But this holding does

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Arizona attempts to minimize the clash between the NVRA and Proposition 200 by noting that a proof of citizenship requirement is consistent with the broad framework set out by Congress in section 1973gg-7(b); specifically, Arizona notes that the NVRA permits the Federal Form to seek such information as is necessary to "assess the eligibility of the applicant," *id.* § 1973gg-7(b)(1), and does not expressly preclude a requirement that applicants provide proof of citizenship. Further, Arizona asserts that although Congress provided that the mail voter registration form "may not include any requirement for notarization or other formal authentication," *id.* § 1973gg-7(b)(3), Arizona's demand for proof of citizenship does not amount to such a requirement. This argument misses the point. Even assuming, without deciding, that Arizona is correct in its interpretation of section 1973gg-7(b), this would mean only that the NVRA allows Arizona to include a proof of citizenship requirement on its State Form. *See id.* § 1973gg-4(a)(2) (allowing a state to "develop and use a mail voter registration form that meets all of the criteria stated in section 1973gg-7(b)"). It would not mean that Arizona has authority to add this requirement to

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not help Arizona because the Federal Form allows states to instruct applicants to provide their full social security numbers in the "ID number" box on the Federal Form (and Tennessee's instructions do so). *See supra* p. 4135 & n.18. *McKay* therefore does not support the proposition that a state may condition registration on an applicant's provision of information that is *not* requested on the Federal Form.

the Federal Form. Congress entrusted that decision to the EAC. Once the EAC determined the contents of the Federal Form, Arizona's only role was to make that form available to applicants and to "accept and use" it for the registration of voters.

Third, Proposition 200's registration provision is discordant with the NVRA's goal of streamlining the registration process. *See, e.g., Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen,* 152 F.3d 283, 285 (4th Cir. 1998) ("Congress passed the NVRA . . . to make it easier to register to vote. . . ."); *ACORN v. Miller,* 129 F.3d 833, 835 (6th Cir. 1997) ("In an attempt to reinforce the right of qualified citizens to vote by reducing the restrictive nature of voter registration requirements, Congress passed the [NVRA]."). While the EAC chose to design the Federal Form as a postcard, which could be easily filled out and mailed on its own, Proposition 200's registration provision makes the Federal Form much more difficult to use. For example, nothing on the face of the Federal Form or in the state-specific instructions for Arizona indicates that some applicants may need to provide a full social security number, a tribal identification number, or an alien registration number, as Proposition 200 requires.[27] Nor does the

[27] Because the Federal Form can be used as a mail-in postcard, the dissent's credit card analogy, *see* dis. op. at 4204, is not on point. A consumer would rightly cry foul if a merchant claimed it would "accept and use" mailed-in credit card information for a purchase, but then refused to complete the transaction because the consumer failed to include additional

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Federal Form instruct that additional documents, such as birth certificates or passports, must be provided by some applicants. Even if an applicant were aware of Arizona's requirement to provide documentary proof of citizenship with the Federal Form, the applicant would have to locate the required document, photocopy it, and enclose the photocopy with the form in an envelope for mailing. In short, much of the value of the Federal Form in removing obstacles to the voter registration process is lost under Proposition 200's registration provision.

Notwithstanding these concerns, Arizona asserts that Proposition 200's registration provision imposes little additional burden on applicants, because only a small minority of applicants lack a driver's license number, tribal identification number, or alien registration number, all of which could suffice to show citizenship and can easily be written on the Federal Form. For this reason, Arizona contends, its proof of citizenship requirement is not excessively burdensome under the standard set forth in *Crawford v. Marion County Election Board,* 553 U.S. 181, 199-200 (2008) (Stevens, J., announcing the judgment of the Court). This argument misses the mark. The goal of the NVRA was to streamline the registration process

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information that the merchant had not requested. By the same token, the Federal Form does not request documentary proof of citizenship. Because a state must "accept and use" this form it cannot reject it merely because an applicant has mailed it in without including information that is not expressly required.

for all applicants; the fact that Proposition 200's registration provision only *partially* undermines this goal does not make it harmonious with the NVRA. Nor does *Crawford* provide support for Arizona's argument. In *Crawford,* the Court considered whether a polling place requirement imposed a substantial burden on the right to vote, in violation of the Fourteenth Amendment. *See id.* at 187. Even if Arizona is correct that Proposition 200's registration provision does not impose such a burden, this conclusion sheds no light on the question before us here: whether the registration provision is displaced by the NVRA under an Elections Clause analysis.

F

Because on its face the NVRA does not give states room to add their own requirements to the Federal Form, Arizona suggests that Congress's subsequent enactment of HAVA permits us to reinterpret the NVRA to allow states to impose additional requirements on applicants for voter registration. Again, we disagree, because by its terms HAVA precludes such an interpretation.

Congress enacted HAVA in response to the 2000 Presidential election and the ensuing controversial Florida recount. *See Fla. State Conference of NAACP v. Browning,* 522 F.3d 1153, 1155 (11th Cir. 2008). For the most part, the NVRA and HAVA operate in separate spheres: the NVRA regulates voter registration, whereas HAVA is concerned with updating election

technologies and other election-day issues at polling places. However, a handful of provisions in HAVA relate to the voter registration process, primarily by creating mechanisms through which states can ensure that the person who appears to cast a ballot at the polls is the same person who registered to vote. Relevant here, HAVA requires states to obtain (or assign) unique identification numbers for all registered voters: each applicant must provide his or her driver's license number or the last four digits of his or her social security number on the voter registration form, or if the applicant lacks such a number, the state must assign the applicant a number "which will serve to identify the applicant for voter registration purposes." 42 U.S.C. § 15483(a)(5)(A)(i)-(ii). In addition, states are to take steps to verify that the applicant's claimed identity matches the identification number he or she provided. *See id.* § 15483(a)(5)(A)(iii) (requiring states to "determine whether the [identification] information provided by an individual is sufficient to meet the requirements" of HAVA); *see also Crawford,* 553 U.S. at 192.

HAVA also includes language limiting its scope. It clarifies that "[t]he requirements established by [HAVA] are minimum requirements and nothing in [HAVA] shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under [HAVA] so long as such State requirements are not inconsistent with the Federal requirements under [HAVA] or any law described

in section 15545 of this title." *Id.* § 15484. Section 15545 is HAVA's savings clause: it provides that except for the changes to the NVRA specified in HAVA, "nothing in this Act may be construed to authorize or require conduct prohibited under [a number of federal laws, including the NVRA], or to supersede, restrict, or limit the application of [those federal laws]." *Id.* § 15545(a).

Arizona argues that HAVA gives it the authority to impose additional requirements on applicants using the Federal Form for two reasons. First, Arizona contends that because HAVA directs states to verify the accuracy of the driver's license or social security numbers provided on the Federal Form, *see id.* § 15483(a)(5)(A)(iii), Arizona must likewise have the authority to verify the accuracy of other information on the Federal Form, including an applicant's claim of citizenship. Second, Arizona asserts that because HAVA establishes only "minimum requirements," and authorizes states to develop "election technology and administration requirements that are more strict than [HAVA's] requirements," *id.* § 15484, HAVA gives states a green light to impose stricter requirements on voter registration.

Both of these arguments fail in light of HAVA's savings clause, which makes clear that Congress intended to preserve the NVRA except as to the specific changes it enacted in HAVA. While HAVA made a handful of changes to the NVRA, it did not add a proof of citizenship requirement to the Federal Form and did not authorize states to do so. For the

reasons explained above, an interpretation of HAVA that allows states to override the EAC's authority in designing the Federal Form would "supersede, restrict, or limit the application of" the NVRA. *Id.* § 15545(a). Because the savings clause precludes such an interpretation, we decline to adopt one. Therefore, HAVA does not provide Arizona the authorization it seeks.

G

We recognize Arizona's concern about fraudulent voter registration. Nevertheless, the Elections Clause gives Congress the last word on how this concern will be addressed in the context of federal elections. As is evidenced by one of the four articulated purposes of the NVRA, which is "to protect the integrity of the electoral process," *id.* § 1973gg(b)(3), Congress was well aware of the problem of voter fraud when it passed the act and provided for numerous fraud protections in the NVRA.[28]

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[28] These safeguards include the NVRA's requirement that the Federal Form, the State Forms, and the Motor Voter Forms contain an attestation clause that sets out the requirements for voter eligibility. *Id.* §§ 1973gg-3(c)(2)(C)(i)-(ii), 1973gg-7(b)(2)(A)-(B). Applicants are required to sign these forms under penalty of perjury, *id.* §§ 1973gg-3(c)(2)(C)(iii), 1973gg-7(b)(2)(C), and persons who knowingly and willfully engage in fraudulent registration practices are subject to criminal penalties, *id.* § 1973gg-10(2). In addition, the NVRA allows states to require first-time voters who register by mail to vote in person at the polling place, where the voter's identity can be confirmed. *See id.*

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With respect to the Federal Form, Congress delegated to the EAC the decision of how to balance the need "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and the need to protect "the integrity of the electoral process," *id.* § 1973gg(b)(1), (3). The EAC struck this balance by requiring applicants to attest to their citizenship under penalty of perjury, but not requiring other proof of citizenship. *See* 59 Fed. Reg. at 32,316 ("The issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury. To further emphasize this prerequisite to the applicant, the words 'For U.S. Citizens Only' will appear in prominent type on the front cover of the national mail voter registration form."). Though Arizona has eloquently expressed its reasons for striking the balance differently, the federal determination controls in this context. *See ACORN v. Edgar*, 56 F.3d 791, 795-96 (7th Cir. 1995) (rejecting Illinois's argument that because the "motor voter" component of the NVRA "opens the door to voter fraud," the state was entitled to refuse to comply with the law).

In sum, the NVRA and Proposition 200's registration provision, when interpreted naturally, do not

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§ 1973gg-4(c). Finally, section 1973gg-6 requires states to give notice to applicants of the disposition of their applications, which states may use as a means to detect fraudulent registrations. *See id.* § 1973gg-6(a)(2).

operate harmoniously as a single procedural scheme for the registration of voters for federal elections. Therefore, under Congress's expansive Elections Clause power, we must hold that the registration provision, when applied to the Federal Form, is preempted by the NVRA.[29]

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[29] We reach our conclusion based on the language and structure of the statute, and therefore do not rely on the EAC's interpretation of the NVRA or the NVRA's legislative history. While ITCA maintains that the EAC's view is entitled to some level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), Arizona argues that Congress did not delegate any authority to the EAC to interpret the NVRA, *see* 42 U.S.C. § 15329, and thus deference is not appropriate. We need not resolve this dispute, but merely note that both the EAC's view and the NVRA's legislative history are consistent with our holding. In its letter to Arizona, the EAC construed the NVRA as not permitting states to "condition acceptance of the Federal Form upon receipt of additional proof." With respect to the legislative history, the NVRA's Conference Report, which we have held is the most authoritative and reliable legislative material, *see, e.g., Nw. Forest Res. Council v. Glickman,* 82 F.3d 825, 835 (9th Cir. 1996), shows that Congress rejected an amendment to the NVRA which would have provided 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. 103-66, at 23 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148. The conferees explained that the amendment was not "consistent with the purposes of" the NVRA and "could effectively eliminate, or seriously interfere with, the mail registration program of the Act." *Id.*

III

Because we hold that the NVRA supersedes Proposition 200's registration provision,[30] the remainder of our analysis focuses solely on the validity of Proposition 200's polling place provision. Proposition 200 amended section 16-579 of the Arizona Revised Statutes to require that a voter "present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector" as a prerequisite to receiving a ballot. Ariz. Rev. Stat. § 16-579(A) (2005). The Secretary of State, acting under statutory authority, *see* Ariz. Rev. Stat. § 16-452(A), (B), promulgated a procedure specifying the "forms of identification" accepted under the statute, which included photograph-bearing documents such as driver's licenses as well as non-photograph-bearing documents such as utility bills or

[30] Congress's authority under the Elections Clause is limited to preempting state regulations as they relate to federal elections. Therefore, our holding invalidating Proposition 200's registration provision does not prevent Arizona from applying a proof of citizenship requirement to voter registrations for state elections. However, because Arizona has presented its system of voter registration as concurrently registering voters for state and federal elections, we do not consider whether Proposition 200's registration provision, as applied only to voter registrations for state elections, is valid under Gonzalez and ITCA's remaining claims.

bank statements. In 2009, the state legislature amended section 16-579 to codify that procedure.[31]

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[31] Section 16-579(A)(1) now provides that a voter must "present any of the following" before being permitted to vote:

> (a) A valid form of identification that bears the photograph, name and address of the elector that reasonably appear to be the same as the name and address in the precinct register, including an Arizona driver license, an Arizona nonoperating identification license, a tribal enrollment card or other form of tribal identification or a United States federal, state or local government issued identification. Identification is deemed valid unless it can be determined on its face that it has expired.
>
> (b) Two different items that contain the name and address of the elector that reasonably appear to be the same as the name and address in the precinct register, including a utility bill, a bank or credit union statement that is dated within ninety days of the date of the election, a valid Arizona vehicle registration, an Arizona vehicle insurance card, an Indian census card, tribal enrollment card or other form of tribal identification, a property tax statement, a recorder's certificate, a voter registration card, a valid United States federal, state or local government issued identification or any mailing that is labeled as "official election material." Identification is deemed valid unless it can be determined on its face that it has expired.
>
> (c) A valid form of identification that bears the photograph, name and address of the elector except that if the address on the identification does not reasonably appear to be the same as the address in the precinct register or the identification is a valid United States Military identification card or a valid United States passport and does not bear an address, the

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Gonzalez and ITCA challenge Proposition 200's polling place provision on three grounds: that it is a prohibited voting qualification under section 2 of the VRA, an unconstitutional poll tax under the Twenty-fourth Amendment, and a violation of the Fourteenth Amendment's Equal Protection Clause. We first consider Gonzalez's argument that Proposition 200's polling place provision violates section 2 of the VRA.

A

Section 2(a) of the VRA prohibits states from imposing any voting qualification that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). A violation of section 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of a protected class, "in that its members have less opportunity than other members of the electorate [1] to participate in the political process and [2] to elect representatives of their choice." *Id.* § 1973(b). Said otherwise, a plaintiff can prevail in a section 2 claim only if, "based on the totality of the circumstances, . . . the challenged voting practice results in discrimination on account of race." *Farrakhan v. Washington,*

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identification must be accompanied by one of the items listed in subdivision (b) of this paragraph.

338 F.3d 1009, 1017 (9th Cir. 2003) (emphasis omitted); *see also United States v. Blaine Cnty.,* 363 F.3d 897, 903 (9th Cir. 2004). Although proving a violation of § 2 does not require a showing of discriminatory intent, only discriminatory results, *see Chisom v. Roemer,* 501 U.S. 380, 383-84 (1991); *Ruiz v. City of Santa Maria,* 160 F.3d 543, 557 (9th Cir. 1998) (per curiam), proof of "causal connection between the challenged voting practice and a prohibited discriminatory result" is crucial, *Smith v. Salt River Project Agric. Improvement & Power Dist.,* 109 F.3d 586, 595 (9th Cir. 1997) (internal quotation marks and brackets omitted); *see also id.* ("[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry."). Said otherwise, a § 2 challenge "based purely on a showing of some relevant statistical disparity between minorities and whites," without any evidence that the challenged voting qualification causes that disparity, will be rejected. *Id.*[32]

In applying the totality of the circumstances test, "a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'" *Thornburg v. Gingles,* 478 U.S. 30, 44 (1986) (quoting S. Rep. No. 97-417, at 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205). In *Gingles,* the Supreme Court cited a non-exhaustive list of nine factors (generally referred to

[32] This approach applies both to claims of vote denial and of vote dilution. *Id.* at 596 n.8.

as the "Senate Factors" because they were discussed in the Senate Report on the 1982 amendments to the VRA) that courts should consider in making this totality of the circumstances assessment. *Id.* at 44-45. Relevant here, the factors direct courts to consider the history of official state discrimination against the minority with respect to voting, the extent to which voting in the state is racially polarized, and "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Id.* at 36-37 (quoting S. Rep. No. 97-417, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07); *see Farrakhan,* 338 F.3d at 1016, 1020. "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Gingles,* 478 U.S. at 45 (quoting S. Rep. No. 97-417, at 29, *reprinted in* 1982 U.S.C.C.A.N. at 209) (internal quotation marks omitted).

Gonzalez argues that Proposition 200 disparately impacts Latino voters, unlawfully diluting their right to vote and denying them the right to vote by providing them with less opportunity than other members of the electorate to participate in the political process. Considering both Proposition 200's registration requirement and its requirement that voters who cast ballots at the polls present specified identification, the district court determined, after "examining the facts as a whole, [that] Proposition 200 does not have

a statistically significant disparate impact on Latino voters."[33] In considering the Senate Factors listed above, the district court found that Latinos had suffered a history of discrimination in Arizona that hindered their ability to participate in the political process fully, that there were socioeconomic disparities between Latinos and whites in Arizona, and that Arizona continues to have some degree of racially polarized voting. Nevertheless, the district court concluded that Gonzalez's claim failed because there was no proof of a causal relationship between Proposition 200 and any alleged discriminatory impact on Latinos. The district court noted that not a single expert testified to a causal connection between Proposition 200's requirements and the observed difference in the voting rates of Latinos, and that Gonzalez had failed to explain how Proposition 200's requirements interact with the social and historical climate of discrimination to impact Latino voting in Arizona. Therefore, the district court concluded that Gonzalez

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[33] Judge Pregerson's dissent relies heavily on statistical analysis prepared by the plaintiffs' expert, Dr. Louis Lanier. Dis. op. at 4197-98. The state's expert, however, testified that Lanier's results were unreliable in light of several factors, including the absence of evidence that the Latinos whose votes went uncounted were qualified to vote. In holding that the plaintiffs had not shown that Proposition 200 had a statistically significant impact on Latino voters, the district court implicitly rejected Lanier's testimony, a conclusion that is "plausible in light of the record viewed in its entirety." *Anderson v. Bessemer City,* 470 U.S. 564, 573-74 (1985).

had not proved that Proposition 200 results in discrimination "on account of race or color."

Because a § 2 analysis requires the district court to engage in a "searching practical evaluation of the 'past and present reality,'" *Gingles,* 478 U.S. at 45 (quoting S. Rep. 97-417, at 30, *reprinted in* 1982 U.S.C.C.A.N. at 208), a district court's examination in such a case is "intensely fact-based and localized," *Salt River,* 109 F.3d at 591. We therefore "[d]efer[ ] to the district court's superior fact-finding capabilities," *id.,* and review for clear error the district court's findings of fact, including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2, *Old Person v. Cooney,* 230 F.3d 1113, 1119 (9th Cir. 2000) (citing *Gingles,* 478 U.S. at 78-79). We review de novo the district court's legal determinations and mixed findings of law and fact. *Salt River,* 109 F.3d at 591.

The district court did not clearly err in concluding that Gonzalez failed to establish that Proposition 200's polling place provision, *see* Ariz. Rev. Stat. § 16-579, had a disparate impact on Latinos. To prove a § 2 violation, Gonzalez had to establish that this requirement, as applied to Latinos, caused a prohibited discriminatory result. Here, Gonzalez alleged that "Latinos, among other ethnic groups, are less likely to possess the forms of identification required under Proposition 200 to . . . cast a ballot," but produced no

evidence supporting this allegation.[34] The record does include evidence of Arizona's general history of discrimination against Latinos and the existence of racially polarized voting. But Gonzalez adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice. Without such evidence, we cannot say that the district court's finding that Gonzalez failed to prove causation was clearly erroneous. Therefore we affirm the district court's denial of Gonzalez's VRA claim.[35]

B

We next consider Gonzalez and ITCA's claim that Proposition 200's polling place provision violates the Twenty-fourth Amendment to the U.S. Constitution.[36]

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[34] The dissent likewise fails to cite any evidence to support the theory that Proposition 200's polling place provision "has the effect of keeping Latino voters away from the polls" because it "evokes fear of discrimination." Dis. op. at 4200.

[35] Gonzalez also argues that the district court erred in evaluating one of the Senate Factors and in concluding that the disparate impact on Latinos was statistically insignificant. Because the failure to show causation is dispositive, however, we need not reach these issues.

[36] Although ITCA's briefing collapses the Twenty-fourth and Fourteenth Amendment poll tax claims into a single argument, these are different claims that arise under different constitutional

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The Twenty-fourth Amendment provides:

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

U.S. Const. amend. XXIV, § 1. Gonzalez and ITCA do not argue that requiring voters to show identification at the polls is itself a poll tax. Rather, they argue that, because some voters do not possess the identification required under Proposition 200, those voters will be required to spend money to obtain the requisite documentation, and that this payment is indirectly equivalent to a tax on the right to vote.

This analysis is incorrect. Although obtaining the identification required under § 16-579 may have a cost, it is neither a poll tax itself (that is, it is not a fee imposed on voters as a prerequisite for voting), nor is it a burden imposed on voters who refuse to pay a poll tax. *Cf. Harman,* 380 U.S. at 541-42.

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amendments. The Twenty-fourth Amendment extends only to federal elections, *see Harman v. Forssenius,* 380 U.S. 528, 540 (1965), whereas the Fourteenth Amendment can also invalidate restrictions on the right to vote in state elections, *see Harper v. Va. State Bd. of Elections,* 383 U.S. 663, 666 (1966). We will therefore address these two claims separately.

Our conclusion is consistent with *Harman,* the only Supreme Court case considering the Twenty-fourth Amendment's ban on poll taxes. In that case, the Court considered a state statute that required voters to either pay a $1.50 poll tax on an annual basis or go through a "cumbersome procedure," *id.* at 541, for filing an annual certificate of residence, *id.* at 530-32. There was no dispute that the $1.50 fee, if it were a freestanding prerequisite for voting, would constitute a poll tax barred by the Twenty-fourth Amendment. *See id.* at 540. Accordingly, the only question before the Court was whether the state "may constitutionally confront the federal voter with a requirement that he either pay the customary poll taxes as required for state elections or file a certificate of residence." *Id.* at 538. The Court enunciated the rule that a state may not impose "a material requirement solely upon those who refuse to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541. Applying this rule, the Court determined that the state's certificate of residence requirement was a material burden: among other things, the procedure for filing the certificate was unclear, the requirement that the certificate be filed six months before the election "perpetuat[ed] one of the disenfranchising characteristics of the poll tax which the Twenty-fourth Amendment was designed to eliminate," and the state had other alternatives to establish that voters were residents, including "registration, use of the criminal sanction, purging of registration lists, [and] challenges and oaths." *Id.* at 541-43. Accordingly, the

Court concluded that it was "constrained to hold that the requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax." *Id.* at 542.

Proposition 200's polling place provision is not a poll tax under *Harman.* Requiring voters to show identification at the polls does not constitute a tax.[37] Nor does the identification requirement place a material burden on a voter "solely because of his refusal to waive [his] constitutional immunity" to a poll tax, *id.;* rather, under Proposition 200, all voters are required to present identification at the polls. Because Arizona's system does not, as a matter of law, qualify as a poll tax, we affirm the district court's conclusion that Proposition 200's polling place provision does not violate the Twenty-fourth Amendment.

C

Nor is Proposition 200's polling place provision an unconstitutional poll tax under the Fourteenth Amendment's Equal Protection Clause. *Harper* is the leading Supreme Court case considering whether a state law is a poll tax under the Fourteenth Amendment. In *Harper,* the Supreme Court held that a state law levying an annual $1.50 poll tax on individuals

[37] Voters who use an early ballot to vote do not even have to show identification. Ariz. Rev. Stat. § 16-550(A) (for early ballots, elector identity is verified by signature comparison alone).

exercising their right to vote was unconstitutional under the Equal Protection Clause. 383 U.S. at 664-66 & n.1. The Court held that "the interest of the State, when it comes to voting, is limited to the power to fix qualifications," and that the imposition of poll taxes fell outside this power because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668. Because the state's poll tax made affluence of the voter an electoral standard, and such a standard is irrelevant to permissible voter qualifications, the Court concluded that the tax was invidiously discriminatory and a per se violation of the Equal Protection Clause. *Id.* at 666-67.

Proposition 200's polling place provision falls outside of *Harper*'s rule that "restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford,* 553 U.S. at 189 (Stevens, J., announcing the judgment of the Court). Requiring voters to provide documents proving their identity is not an invidious classification based on impermissible standards of wealth or affluence, even if some individuals have to pay to obtain the documents. On the contrary, such a requirement falls squarely within the state's power to fix core voter qualifications. Nevertheless, ITCA argues that the Court's more recent decision in *Crawford,* 553 U.S. 181, extended *Harper*'s holding that an electoral standard based on voter affluence is invidiously discriminatory (and thus a per se violation of the Equal Protection Clause) to

encompass indirect fees, such as the fees or costs necessary to obtain identification documents.

ITCA's argument is based on a misreading of *Crawford*. *Crawford* involved an Indiana state requirement that a citizen voting in person or at the office of the circuit court clerk before election day present a photo identification card issued by the government. *Id.* at 185. The state would provide a free photo identification to "qualified voters able to establish their residence and identity." *Id.* at 186. A number of plaintiffs challenged this requirement on the ground that the "new law substantially burden[ed] the right to vote in violation of the Fourteenth Amendment." *Id.* at 187. Although the Court was unable to agree on the rationale for upholding Indiana's photo identification requirement,[38] neither the lead opinion nor the concurrence held that *Harper*'s per se rule applied. *See id.* at 203-04. The lead opinion, upon which ITCA relies, explained that *Harper*'s "litmus test" made "even rational restrictions on the right to vote . . . invidious if they are unrelated to voter qualifications." *Id.* at 189-90. But according to the lead opinion, later election cases had moved away from *Harper* to apply a balancing test to state-imposed burdens on the voting process. *Id.* Under these later cases, a court "must identify and

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[38] The lead opinion authored by Justice Stevens was joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia filed a concurring opinion joined by Justices Thomas and Alito. Justices Ginsburg, Souter, and Breyer dissented.

evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands." *Id.* at 190. The lead opinion then proceeded to apply this balancing test to the Indiana photo identification requirement. *Id.* at 191-200. Because *Crawford* did not extend *Harper*'s per se rule to other burdens imposed on voters, it does not support ITCA's argument that Proposition 200's identification requirement is per se invalid.

Although ITCA's reliance on *Crawford* is not entirely clear, ITCA does not appear to argue that Proposition 200's polling place provision is invalid under *Crawford*'s balancing test. Such an argument would be unavailing in any event. The lead opinion in *Crawford* held that the burden imposed on citizens who must obtain a photo identification document was not sufficiently heavy to support a facial attack on the constitutionality of the state law, in light of the state's legitimate interests in deterring and detecting voter fraud, modernizing election procedures, and safeguarding voter confidence. *Id.* at 191, 202-03. The same reasoning is applicable here. While the lead opinion noted that photo identification cards were provided for free by Indiana, it also recognized that to obtain these free cards, prospective voters needed to "present at least one 'primary' document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport." *Id.* at 198 n.17. Obtaining these primary documents, the

Supreme Court acknowledged, may require payment of a fee. *Id.* Because Proposition 200's polling place provision allows voters to present these same sorts of primary documents, Proposition 200 is no more burdensome than the identification requirement upheld in *Crawford.* Nor has ITCA suggested any reason why Arizona's interests in imposing a photo identification requirement would be less weighty than the state interests at issue in *Crawford.* Therefore, even under the balancing test set forth in *Crawford*'s lead opinion, we would uphold Proposition 200's polling place identification requirement against a facial challenge.

In sum, because any payment associated with obtaining the documents required under Proposition 200's polling place provision is related to the state's legitimate interest in assessing the eligibility and qualifications of voters, the photo identification requirement is not an invidious restriction under *Harper,* and the burden is minimal under *Crawford.* As such, the polling place provision does not violate the Fourteenth Amendment's Equal Protection Clause.

IV

Our system of dual sovereignty, which gives the state and federal governments the authority to operate within their separate spheres, "is one of the Constitution's structural protections of liberty." *Printz v. United States,* 521 U.S. 898, 921 (1997). "Just as

the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Id.* (internal quotation marks omitted). Despite our respect for the state's exercise of its sovereign authority, however, the Constitution's text requires us to safeguard the specific enumerated powers that are bestowed on the federal government. The authority granted to Congress under the Elections Clause to "make or alter" state law regulating procedures for federal elections is one such power. The Framers of the Constitution were clear that the states' authority to regulate federal elections extends only so far as Congress declines to intervene. *See* U.S. Const. art. 1, § 4, cl. 1; *Foster,* 522 U.S. at 69. Given the paramount authority delegated to Congress by the Elections Clause, we conclude that the NVRA supersedes Proposition 200's conflicting registration requirement for federal elections, Ariz. Rev. Stat. § 16-166(F). We uphold Proposition 200's polling place provision with respect to all other claims.[39]

AFFIRMED in part and REVERSED in part.

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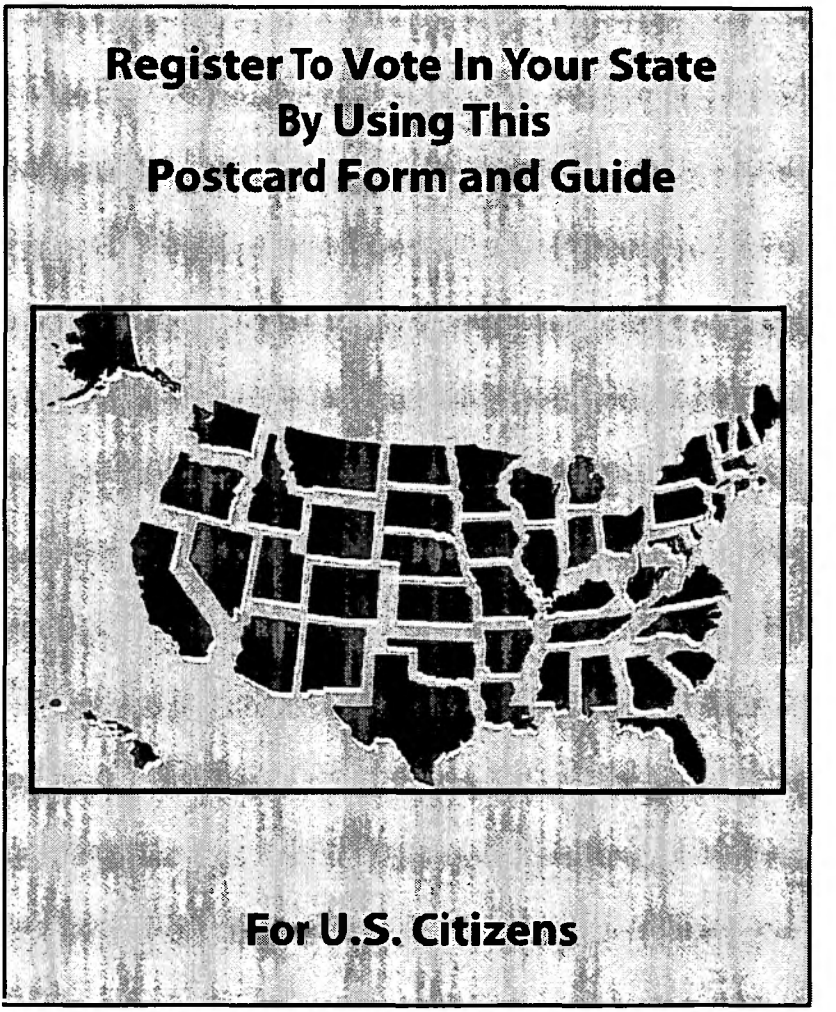
[39] Each party shall bear its own costs on appeal.

APPENDIX TO THE OPINION



General Instructions

Who Can Use this Application
If you are a U.S. citizen who lives or has an address within the United States, you can use the application in this booklet to:

- Register to vote in your State,
- Report a change of name to your voter registration office,
- Report a change of address to your voter registration office, or
- Register with a political party.

Exceptions
Please do not use this application if you live outside the United States and its territories and have no home (legal) address in this country, *or* if you are in the military stationed away from home. Use the Federal Postcard Application available to you from military bases, American embassies, or consular offices.

New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form.
North Dakota does not have voter registration.
Wyoming law does not permit mail registration.

How to Find Out If You Are Eligible to Register to Vote in Your State
Each State has its own laws about who may register and vote. Check the information under your State in the State Instructions. All States require that you be a United States citizen by birth or naturalization to register to vote in federal and State elections. Federal law makes it illegal to falsely claim U.S. citizenship to register to vote in any federal, State, or local election. You **cannot** be registered to vote in more than one place at a time.

How to Fill Out this Application
Use both the Application Instructions and State Instructions to guide you in filling out the application.

- First, read the Application Instructions. These instructions will give you important information that applies to everyone using this application.
- Next, find your State under the State Instructions. Use these instructions to fill out Boxes 6, 7, and 8. Also refer to these instructions for information about voter eligibility and any oath required for Box 9.

When to Register to Vote
Each State has its own deadline for registering to vote. Check the deadline for your State on the last page of this booklet.

How to Submit Your Application
Mail your application to the address listed under your State in the State Instructions. Or, deliver the application in person to your local voter registration office. The States that are required to accept the national form will accept copies of the application printed from the computer image on regular paper stock, signed by the applicant, and mailed in an envelope with the correct postage.

First Time Voters Who Register by Mail
If you are registering to vote for the first time in your jurisdiction and are mailing this registration application, Federal law requires you to show proof of identification the first time you vote. Proof of identification includes:

- A current and valid photo identification or
- A current utility bill, bank statement, government check, paycheck or government document that shows your name and address.

Voters may be exempt from this requirement if they submit a **COPY** of this identification with their mail in voter registration form. If you wish to submit a **COPY**, please keep the following in mind:

- Your state may have additional identification requirements which may mandate you show identification at the polling place even if you meet the Federal proof of identification.
- Do not submit original documents with this application, only **COPIES**.

If You Were Given this Application in a State Agency or Public Office
If you have been given this application in a State agency or public office, it is your choice to use the application. If you decide to use this application to register to vote, you can fill it out and leave it with the State agency or public office. The application will be submitted for you. Or, you can take it with you to mail to the address listed under your State in the State Instructions. You also may take it with you to deliver in person to your local voter registration office.
Note: The name and location of the State agency or public office where you received the application will remain confidential. It will not appear on your application. Also, if you decide not to use this application to register to vote, that decision will remain confidential. It will not affect the service you receive from the agency or office.

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Application Instructions

Before filling out the body of the form, please answer the questions on the top of the form as to whether you are a United States citizen and whether you will be 18 years old on or before Election Day. If you answer no to either of these questions, you may not use this form to register to vote. However, state specific instructions may provide additional information on eligibility to register to vote prior to age 18.

Box 1 — Name
Put in this box your full name in this order — Last, First, Middle. Do not use nicknames or initials.
Note: If this application is for a change of name, please tell us in **Box A** *(on the bottom half of the form)* your full name before you changed it.

Box 2 — Home Address
Put in this box your home address (legal address). Do **not** put your mailing address here if it is different from your home address. Do **not** use a post office box or rural route without a box number. Refer to state-specific instructions for rules regarding use of route numbers.

Note: If you were registered before *but* this is the first time you are registering from the address in Box 2, please tell us in **Box B** *(on the bottom half of the form)* the address where you were registered before. Please give us as much of the address as you can remember.

Also Note: If you live in a rural area but do not have a street address, *or* if you have no address, please show where you live using the map in **Box C** *(at the bottom of the form).*

Box 3 — Mailing Address
If you get your mail at an address that is different from the address in Box 2, put your mailing address in this box. If you have no address in Box 2, you **must** write in Box 3 an address where you can be reached by mail.

Box 4 — Date of Birth
Put in this box your date of birth in this order — Month, Day, Year. *Be careful not to use today's date!*

Box 5 — Telephone Number
Most States ask for your telephone number in case there are questions about your application. However, you do **not** have to fill in this box.

Box 6 — ID Number
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. If you have neither a drivers license nor a social security number, please indicate this on the form and a number will be assigned to you by your state.

Box 7 — Choice of Party
In some States, you must register with a party if you want to take part in that party's primary election, caucus, or convention. To find out if your State requires this, see item 7 in the instructions under your State.

If you want to register with a party, print in the box the full name of the party of your choice.

If you do **not** want to register with a party, write "no party" or leave the box blank. Do **not** write in the word "independent" if you mean "no party," because this might be confused with the name of a political party in your State.
Note: If you do not register with a party, you can still vote in general elections and nonpartisan (nonparty) primary elections.

Box 8 — Race or Ethnic Group
A few States ask for your race or ethnic group, in order to administer the Federal Voting Rights Act. To find out if your State asks for this information, see item 8 in the instructions under your State. If so, put in Box 8 the choice that best describes you from the list below:

- American Indian *or* Alaskan Native
- Asian or Pacific Islander
- Black, *not of* Hispanic Origin
- Hispanic
- Multi-racial
- White, *not of* Hispanic Origin
- Other

Box 9 — Signature
Review the information in item 9 in the instructions under your State. Before you sign or make your mark, make sure that:

(1) You meet your State's requirements, and
(2) You understand all of Box 9.

Finally, sign your **full** name or make your mark, and print today's date in this order — Month, Day, Year.
If the applicant is unable to sign, put in **Box D** the name, address, and telephone number (optional) of the person who helped the applicant.

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Voter Registration Application

Before completing this form, review the General, Application, and State specific instructions.

Are you a citizen of the United States of America? Will you be 18 years old on or before election day? **If you checked "No" in response to either of these questions, do not complete form.** (Please see state-specific instructions for rules regarding eligibility to register prior to age 18.)				This space for office use only.	
1		Last Name	First Name	Middle Name(s)	
2	Home Address		Apt. or Lot #	City/Town	State / Zip Code
3	Address Where You Get Your Mail If Different From Above			City/Town	State / Zip Code
4	Date of Birth Month Day Year	**5**	Telephone Number (optional)	**6**	ID Number - (See Item 6 in the Instructions for your state)
7	Choice of Party (see Item 7 in the Instructions foy your State)	**8**	Race or Ethnic Group (see Item 8 in the Instructions for your State)		
9	I have reviewed my state's instructions and I swear/affirm that: ■ I am a United States citizen ■ I meet the eligibility requirements of my state and subscribe to any oath required. ■ The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.			Please sign full name (or put mark) ▲ Date: / / Month Day Year	

If you are registering to vote for the first time: please refer to the application instructions for information on submitting copies of valid identification documents with this form.

Please fill out the sections below if they apply to you.

If this application is for a **change of name**, what was your name before you changed it?

A	Last Name	First Name	Middle Name(s)	

If you were **registered before but this is the first time you are registering from the address in Box 2**, what was your address where you were registered before?

B	Street (or route and box number)	Apt. or Lot #	City/Town/County	State	Zip Code

If you live in a rural area but do not have a street number, or if you have no address, please show on the map where you live.

C

- Write in the names of the crossroads (or streets) nearest to where you live.
- Draw an X to show where you live.
- Use a dot to show any schools, churches, stores, or other landmarks near where you live, and write the name of the landmark.

Example

Public School ●

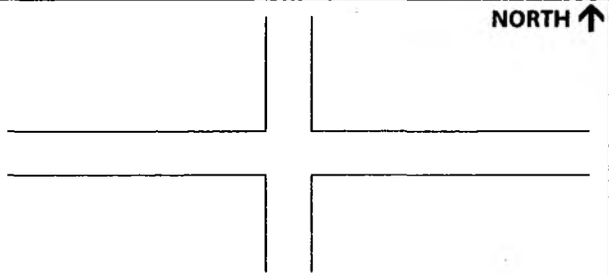
Route #2

● Grocery Store

Woodchuck Road

X

NORTH ↑



If the applicant is unable to sign, who helped the applicant fill out this application? Give name, address and phone number (phone number optional).

D

Mail this application to the address provided for your State.

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FOR OFFICIAL USE ONLY

FIRST CLASS STAMP NECESSARY FOR MAILING

Print Application

Voter Registration Application

Before completing this form, review the General, Application, and State specific instructions.

Are you a citizen of the United States of America? ☐ Yes ☐ No Will you be 18 years old on or before election day? ☐ Yes ☐ No **If you checked "No" in response to either of these questions, do not complete form.** (Please see state-specific instructions for rules regarding eligibility to register prior to age 18.)					This space for office use only.
1	(Circle one) Mr. Mrs. Miss Ms.	Last Name	First Name	Middle Name(s)	(Circle one) Jr Sr II III IV
2	Home Address		Apt. or Lot #	City/Town	State / Zip Code
3	Address Where You Get Your Mail If Different From Above			City/Town	State / Zip Code
4	Date of Birth Month Day Year	**5**	Telephone Number (optional)	**6**	ID Number - (See item 6 in the instructions for your state)
7	Choice of Party (see Item 7 in the instructions foy your State)	**8**	Race or Ethnic Group (see item 8 in the instructions for your State)		
9	I have reviewed my state's instructions and I swear/affirm that: ■ I am a United States citizen ■ I meet the eligibility requirements of my state and subscribe to any oath required. ■ The information I have provided is true to the best of my knowledge under penalty of perjury. If I have provided false information, I may be fined, imprisoned, or (if not a U.S. citizen) deported from or refused entry to the United States.		Please sign full name (or put mark) ▲ Date: / / (Month Day Year)		

If you are registering to vote for the first time: please refer to the application instructions for information on submitting copies of valid identification documents with this form.

Please fill out the sections below if they apply to you.

If this application is for a **change of name**, what was your name before you changed it?

A	Mr. Mrs. Miss Ms.	Last Name	First Name	Middle Name(s)	(Circle one) Jr Sr II III IV

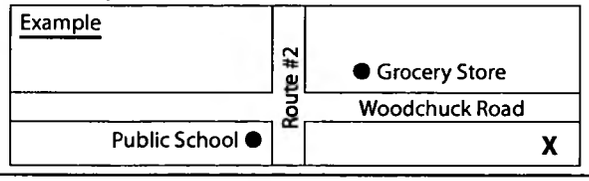
If you were **registered before but this is the first time you are registering from the address in Box 2**, what was your address where you were registered before?

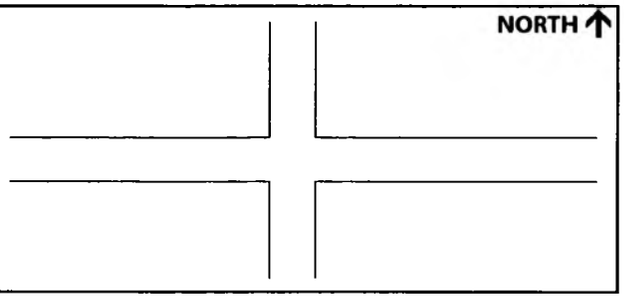
B	Street (or route and box number)	Apt. or Lot #	City/Town/County	State	Zip Code

If you live in a rural area but do not have a street number, or if you have no address, please show on the map where you live.

C

- Write in the names of the crossroads (or streets) nearest to where you live.
- Draw an X to show where you live.
- Use a dot to show any schools, churches, stores, or other landmarks near where you live, and write the name of the landmark.





If the applicant is unable to sign, who helped the applicant fill out this application? Give name, address and phone number (phone number optional).

D

Mail this application to the address provided for your State.

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FOR OFFICIAL USE ONLY

FIRST CLASS STAMP NECESSARY FOR MAILING

Print Application

State Instructions

[redacted]

Updated: 03-01-2006

Registration Deadline — Voter registration is closed during the ten days preceding an election. Applications must be postmarked or delivered by the eleventh day prior to the election.

6. ID Number. Your social security number is requested (by authority of the Alabama Supreme Court, 17-4-122).
7. Choice of Party. Optional: You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are required to fill in this box; however, your application will not be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Alabama you must:
- be a citizen of the United States
- be a resident of Alabama and your county at the time of registration
- be 18 years old before any election
- not have been convicted of a felony punishable by imprisonment in the penitentiary (or have had your civil and political rights restored)
- not currently be declared mentally incompetent through a competency hearing
- swear or affirm to "support and defend the Constitution of the U.S. and the State of Alabama and further disavow any belief or affiliation with any group which advocates the overthrow of the governments of the U.S. or the State of Alabama by unlawful means and that the information contained herein is true, so help me God"

Mailing address:
Office of the Secretary of State
P.O. Box 5616
Montgomery, AL 36103-5616

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide one of the following identification numbers; Alaska Driver's License or Alaska State Identification Card Number. If you do not have an Alaska Driver's License or Alaska State Identification Card, you must provide the last four digits of your Social Security Number. If you do not have any of these identification numbers, please write "NONE" on the form. A unique identifying number will be assigned to you for voter registration purposes. This information is kept confidential. Having this information assists in maintaining your voter record and may assist in verifying your identity (Title 15 of the Alaska Statutes).
7. Choice of Party. You do not have to declare a party affiliation when registering to vote. If you do not choose a party, you will be registered as Undeclared. Alaska has a closed primary election system. Each recognized political party has a separate ballot listing only candidates from that political party. Voters registered as a member of a political party may only vote that party's ballot. Voters registered as undeclared or non-partisan may choose one ballot from the ballots available.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Alaska you must:
- be a citizen of the United States
- be at least 18 years old within 90 days of completing this registration
- be a resident of Alaska
- not be a convicted felon (unless unconditionally discharged)
- not be registered to vote in another State

Mailing address:
Division of Elections
State of Alaska
PO Box 110017
Juneau, AK 99811-0017

[redacted]

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your completed voter registration form must contain the number of your Arizona driver license, or non-operating identification license issued pursuant to A.R.S. § 28-3165, if the license is current and valid. If you *do not have* a current and valid Arizona driver license or non-operating identification license, you must include the last four digits of your social security number if one has been issued to you. If you do not have a current and valid driver license or non-operating identification license or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the Secretary of State.

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State Instructions

7. Choice of Party. If you are registered in a political party which has qualified for ballot recognition, you will be permitted to vote the primary election ballot for that party. If you are registered as an independent, no party preference or as a member of a party which is not qualified for ballot recognition, you may select and vote one primary election ballot for one of the recognized political parties.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Arizona you must:
• be a citizen of the United States
• be a resident of Arizona and your county at least 29 days preceding the next election
• be 18 years old on or before the next general election
• not have been convicted of treason or a felony (or have had your civil rights restored)
• not currently be declared an incapacitated person by a court of law

Mailing address:
Secretary of State/Elections
1700 W. Washington, 7th Floor
Phoenix, AZ 85007-2888

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. Optional. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Arkansas you must:
• be a citizen of the United States
• live in Arkansas at the address in Box 2 on the application
• be at least 18 years old before the next election
• not be a convicted felon (or have completely discharged your sentence or been pardoned)
• not claim the right to vote in any other jurisdiction
• not previously be adjudged mentally incompetent by a court of competent jurisdiction

Mailing address:
Secretary of State
Voter Services
P.O. Box 8111
Little Rock, AR 72203-8111

[redacted]

Updated: 03-01-2006

Registration Deadline — 15 days before the election.

6. ID Number. When you register to vote, you must provide your California driver's license or California identification card number, if you have one. If you do not have a driver's license or ID card, you must provide the last four digits of your Social Security Number (SSN). If you do not include this information, you will be required to provide identification when you vote.
7. Choice of Party. Please enter the name of the political party with which you wish to register. If you do not wish to register with any party, enter "Decline to State" in the space provided.
California law allows voters who "decline to state" an affiliation with a qualified political party or who affiliate with a nonqualified political party to vote in the primary election of any qualified political party that files a notice with the Secretary of State allowing them to do so. You can call 1-800-345-VOTE or visit www.ss.ca.gov to learn which political parties are allowing nonaffiliated voters to participate in their primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in California you must:
• be a citizen of the United States
• be a resident of California
• be at least 18 years of age at the time of the next election
• not be imprisoned or on parole for the conviction of a felony
• not currently be judged mentally incompetent by a court of law
Signature is required. If you meet the requirements listed above, please sign and date the registration card in the space provided.

Mailing address:
Secretary of State
Elections Division
1500 11th Street
Sacramento, CA 95814

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State Instructions

[redacted]

Updated: 03-28-2008

Registration Deadline — 29 days before the election. If the application is received in the mails without a postmark, it must be received within 5 days of the close of registration.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or identification number. If you do not have a driver's license or state issued identification, you must include the last four digits of your social security number. If you do not have a driver's license or a state issued identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Colorado you must:
• be a citizen of the United States
• be a resident of Colorado 30 days prior to the election
• be 18 years old on or before election day
• not be confined as a prisoner or serving any part of a sentence under mandate

Mailing address:
Colorado Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 80290

[redacted]

Updated: 03-01-2006

Registration Deadline — 14 days before the election.

6. ID Number. Connecticut Driver's License Number, or if none, the last four digits of your Social Security Number.
7. Choice of Party. This is optional, but you must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Connecticut you must:
• be a citizen of the United States
• be a resident of Connecticut and of the town in which you wish to vote
• be 17 years old. You can vote when you turn 18
• have completed confinement and parole if previously convicted of a felony, and have had your voting rights restored by Registrars of Voters.
• not currently be declared mentally incompetent to vote by a court of law

Mailing address:
Secretary of State
Elections Division
30 Trinity Street
Hartford, CT 06106

[redacted]

Updated: 03-28-2008

Registration Deadline — The 4th Saturday before a primary or general election, and 10 days before a special election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Delaware you must:
• be a citizen of the United States
• be a permanent resident of Delaware
• be at least 18 years old on the date of the next general election
• felons are eligible to vote if certain requirements are met: fines and sentence completed at least five years prior to application date; felony convictions can not be disqualifying felonies, which are murder, sexual offenses, or crimes against public administration involving bribery or improper influence or abuse of office.
• not be mentally incompetent

Mailing address:
Commissioner of Elections
111 S. West St., Suite 10
Dover, DE 19904

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State Instructions

[redacted]

Updated: 10-29-2003

Registration Deadline — 30 days before the election.

6. ID Number. Federal law now requires that all voter registration applications must include either the applicant's driver's license number or the last four digits of the applicant's social security number in order to be processed.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in the District of Columbia you must:
• be a citizen of the United States
• be a District of Columbia resident at least 30 days preceding the next election
• be at least 18 years old on or preceding the next election
• not be in jail for a felony conviction
• not have been judged "mentally incompetent" by a court of law
• not claim the right to vote anywhere outside D.C.

Mailing address:
District of Columbia Board of Elections & Ethics
441 4th Street, NW, Suite 250
Washington, DC 20001-2745

[redacted]

Updated: 09-12-2006

Registration Deadline — 29 days before the election.

6. ID Number. If you have one, you must provide your Florida driver's license number or Florida identification card number. If you do not have a Florida driver's license or identification card, you must provide the last four digits of your social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Florida you must:
• be a citizen of the United States
• be a legal resident of both the State of Florida and of the county in which you seek to be registered
• be 18 years old (you may pre-register if you are 17)
• not now be adjudicated mentally incapacitated with respect to voting in Florida or any other State
• not have been convicted of a felony without your civil rights having been restored pursuant to law
• not claim the right to vote in another county or state
• swear or affirm the following: "I will protect and defend the Constitution of the United States and the Constitution of the State of Florida, that I am qualified to register as an elector under the Constitution and laws of the State of Florida, and that I am a citizen of the United States and a legal resident of Florida"

Mailing address:
State of Florida
Department of State
Division of Elections
The R.A. Gray Building
500 South Bronough St, Rm 316
Tallahassee, Florida 32399-0250

[redacted]

Updated: 03-28-2008

Registration Deadline — The fifth Monday before any general primary, general election, or presidential preference primary, or regularly scheduled special election pursuant to the Georgia Election Code. In the event that a special election is scheduled on a date other that those dates prescribed by the Georgia Election Code, registration would close on the 5th day after the call.

6. ID Number. Federal law requires you to provide your full GA Drivers License number or GA State issued ID number. If you do not have a GA Drivers License or GA ID you must provide the last 4 digits of your Social Security number. Providing your full Social Security number is optional. Your Social Security number will be kept confidential and may be used for comparison with other state agency databases for voter registration identification purposes. If you do not possess a GA Drivers License or Social Security number, a unique identifier will be provided for you.
7. Choice of Party. You do not have to register with a party to take part in that party's primary, caucus or convention.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Georgia you must:
• be a citizen of the United States
• be a legal resident of Georgia and of the county in which you want to vote

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State Instructions

• be 18 years old within six months after the day of registration, and be 18 years old to vote
• not be serving a sentence for having been convicted of a felony
• not have been judicially determined to be mentally incompetent, unless the disability has been removed

Mailing address:
Elections Division
Office of the Secretary of State
1104 West Tower
2 Martin Luther King, Jr. Dr. SE
Atlanta, GA 30334-1505

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. It is used to prevent fraudulent registration and voting. Failure to furnish this information will prevent acceptance of this application (Hawaii Revised Statutes, Section 11-15).
7. Choice of Party. A "choice of party" is not required for voter registration.
8. Race or Ethnic Group. Race or ethnic group information is not required for voter registration.
9. Signature. To register in Hawaii you must:
• be a citizen of the United States
• be a resident of the State of Hawaii
• be at least 16 years old (you must be 18 years old by election day in order to vote)
• not be incarcerated for a felony conviction
• not be adjudicated by a court as "non compos mentis"

Mailing address:
Office of Elections
State of Hawaii
802 Lehua Avenue
Pearl City, HI 96782

[redacted]

Updated: 03-01-2006

Registration Deadline — 25 days before the election.
6. ID Number. Enter your driver's license number. If you have no driver's license, enter the last 4 digits of your social security number.
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Idaho you must:
• be a citizen of the United States
• have resided in Idaho and in the county for 30 days prior to the day of election
• be at least 18 years old
• not have been convicted of a felony, and without having been restored to the rights of citizenship, or confined in prison on conviction of a criminal offense

Mailing address:
Secretary of State
P.O. Box 83720
State Capitol Bldg.
Boise, ID 83720-0080

[redacted]

Updated: 03-01-2006

Registration Deadline — 28 days prior to each election.

6. ID Number. Your driver's license number is required to register to vote. If you do not have a driver's license, at least the last four digits of your social security number are required. If you have neither, please write "NONE" on the form. A unique identifier will be assigned to you by the State.
7. Choice of Party. Party registration or preference is not required for voter registration. However, when you apply for a primary ballot, you must indicate your party preference for that election.
8. Race or Ethnic Group. Leave blank.
9. Signature. A signature is required. If signature is missing from registration form, you will be notified your registration is incomplete.
To register in Illinois you must:
• be a citizen of the United States
• be a resident of Illinois and of your election precinct at least 30 days before the next election
• be at least 18 years old on or before the next election
• not be in jail for a felony conviction
• not claim the right to vote anywhere else

Mailing address:
State Board of Elections
1020 S. Spring Street
Springfield, IL 62704

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State Instructions

[redacted]

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your state voter ID number is your ten digit Indiana issued driver's license number. If you do not possess an Indiana driver's license then provide the last four digits of your social security number. Please indicate which number was provided. (Indiana Code 3-7-13-13)
7. Choice of Party. Leave blank.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Indiana you must:
- be a citizen of the United States
- have resided in the precinct at least 30 days before the next election
- be at least 18 years of age on the day of the next general election
- not currently be in jail for a criminal conviction

Mailing address:
Election Division
Office of the Secretary of State
302 West Washington Street,
Room E-204
Indianapolis, IN 46204-2743

[redacted]

Updated: 03-28-2008

Registration Deadline — Must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election; 11 days before all others.* Registration forms which are postmarked 15 or more days before an election are considered on time even if received after the deadline.

*If you fail to meet the voter registration deadlines above you can register and vote by following the guidelines for election day registration. You can find these on the Iowa Secretary of State's website: http://www.sos.state.ia.us/pdfs/elections/EDRbrochure.pdf.

6. ID Number. Your ID number is your Iowa driver's license number (or Iowa non-driver identification number) if you have one, if not then the last four digits of your social security number. The ID number you provide will be verified with the Iowa Department of Transportation or the Social Security Administration.
7. Choice of Party. You may, but do not have to, register with a party in advance if you want to take part in that party's primary election. You may change or declare a party affiliation at the polls on primary election day.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Iowa you must:
- be a citizen of the United States
- be a resident of Iowa
- be at least 17-1/2 years old (you must be 18 to vote)
- not have been convicted of a felony (or have had your rights restored)
- not currently be judged by a court to be "incompetent to vote"
- not claim the right to vote in more than one place
- give up your right to vote in any other place

Mailing address:
Elections Division
Office of the Secretary of State
Lucas Building-1st Floor
321 E. 12th Street
Des Moines, IA 50319

[redacted]

Updated: 03-01-2006

Registration Deadline — Postmarked or delivered 15 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nondriver's identification card number. If you do not have a driver's license or nondriver's identification card, you must include the last four digits of your social security number. If you do not have a driver's license or a nondriver's identification card or social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State. The number you provide will be used for administrative purposes only and will not be disclosed to the public. (KSA 25-2309).
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Kansas you must:
- be a citizen of the United States
- be a resident of Kansas
- be 18 by the next election
- have completed the terms of your sentence if convicted of a felony; a person serving a sentence for a felony conviction is ineligible to vote
- not claim the right to vote in any other location or under any other name
- not be excluded from voting for mental incompetence by a court of competent jurisdiction

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State Instructions

Mailing address:
Secretary of State
1st Floor, Memorial Hall
120 SW 10th Ave.
Topeka, KS 66612-1594

[redacted]

Updated: 03-01-2006

Registration Deadline — 29 days before the election.

6. ID Number. Your full social security number is required. It is used for administrative purposes only and is not released to the public (KRS 116.155). No person shall be denied the right to register because of failure to include social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Kentucky you must:
• be a citizen of the United States
• be a resident of Kentucky
• be a resident of the county for at least 28 days prior to the election date
• be 18 years of age on or before the next general election
• not be a convicted felon or if you have been convicted of a felony, your civil rights must have been restored by executive pardon
• not have been judged "mentally incompetent" in a court of law
• not claim the right to vote anywhere outside Kentucky

Mailing address:
State Board of Elections
140 Walnut Street
Frankfort, KY 40601-3240

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your Louisiana driver's license number, if issued. If not issued, you must provide at least the last four digits of your social security number, if issued. The full social security number may be provided on a voluntary basis. Neither the registrar nor the Department of State shall disclose the social security number of a registered voter or circulate the social security numbers of registered voters on commercial lists (R.S. 18:104 and 154; 42 U.S.C. 405).
7. Choice of Party. If you do not list a party affiliation, you cannot vote in the Presidential Preference Primary and party committee elections. Political party affiliation is not required for any other election.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Louisiana you must:
• be a citizen of the United States
• be a resident of Louisiana. Residence address must be address where you claim homestead exemption, if any.
• be at least 17 years old, and be 18 years old prior to the next election to vote
• not currently be under an order of imprisonment for conviction of a felony
• not currently be under a judgment of interdiction for mental incompetence

Mailing address:
Secretary of State
Attention: Voter Registration
P.O. Box 94125
Baton Rouge, LA 70804-9125

[redacted]

Updated: 03-01-2006

Registration Deadline — Delivered 10 business days before the election (or a voter may register *in-person* up to and including election day).

6. ID Number. You must list your valid Maine driver's license number. If you don't have a valid Maine driver's license, then you must provide the last four digits of your Social Security Number. Voters who don't have either of these forms of ID must write "NONE" in this space.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless otherwise permitted by a political party).
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Maine you must:
• be a citizen of the United States
• be a resident of Maine and the municipality in which you want to vote
• be at least 17 years old (you must be 18 years old to vote)

Mailing address:
Elections Division
Bureau of Corporations,
Elections and Commissions
101 State House Station
Augusta, ME 04333-0101

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State Instructions

[redacted]

Updated: 06-26-2008

Registration Deadline — 9:00 p.m. 21 days before the election.

6. ID Number. If you have a current, valid Maryland driver's license or a Motor Vehicle Administration identification card, you must enter the driver's license or identification number. If you do not have a current, valid Maryland driver's license or Motor Vehicle Administration identification card, you must enter at least the last 4 digits of your social security number. However, please note, the disclosure of your full Social Security number is voluntary. The statutory authority allowing election officials to request your full Social Security number is Election Law Article, Section 3-202, Annotated Code of Maryland. The number will be used only for registration and other administrative purposes. It will be kept confidential.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Maryland you must:
- be a U.S. citizen
- be a Maryland resident
- be at least 18 years old by the next general election
- not be under guardianship for mental disability
- not have been convicted of buying or selling votes
- not have been convicted of a felony, or if you have, you have completed serving a court ordered sentence of imprisonment, including any term of parole or probation for the conviction.

Mailing address:
State Board of Elections
P.O. Box 6486
Annapolis, MD 21401-0486

[redacted]

Updated: 03-01-2006

Registration Deadline — 20 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a current and valid Massachusetts' driver's license then you must provide the last four (4) digits of your social security number. If you have neither, you must write "NONE" in the box and a unique identifying number will be assigned to you.
7. Choice of Party. If you do not designate a party of political designation in this box, you will be registered as unenrolled. Unenrolled voters may participate in party primaries. However, an unenrolled voter must enroll in a party on the day of the Presidential Preference Primary in order to participate in that primary.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Massachusetts you must:
- be a citizen of the United States
- be a resident of Massachusetts
- be 18 years old on or before the next election
- not have been convicted of corrupt practices in respect to elections
- not be under guardianship with respect to voting
- not be currently incarcerated for a felony conviction

Mailing address:
Secretary of the Commonwealth
Elections Division, Room 1705
One Ashburton Place
Boston, MA 02108

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[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or state issued personal identification card number. If you do not have a driver's license or state issued personal identification card, you must include the last four digits of your social security number. If you do not have a driver's license or a state issued personal identification card or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. A "choice of party" is not required for voter registration.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Michigan you must:
- be a citizen of the United States
- be 18 years old by the next election
- be a resident of Michigan and at least a 30 day resident of your city or township by election day
- not be confined in a jail after being convicted and sentenced

State Instructions

Notice: Michigan law requires that the same address be used for voter registration and driver license purposes. Therefore, if the residence address you provide on this form differs from the address shown on a driver license or personal identification card issued by the State of Michigan, the Secretary of State will automatically change your driver license or personal identification card address to match the residence address entered on this form. If an address change is made, the Secretary of State will mail you an address update sticker for your driver license or personal identification card.
Caution: If you register by mail, you must vote in person at your assigned precinct the first time you vote, unless you are:

- disabled as defined by state law;
- 60 years of age or older; or
- temporarily residing overseas.

Mailing address:
Michigan Department of State
Bureau of Elections
P.O. Box 20126
Lansing, MI 48901-0726

[redacted]

Updated: 12-31-2008

Registration Deadline — Delivered by 5:00 p.m. 21 days before the election (there is also election day registration at polling places).

6. ID Number. You are required to provide your Minnesota driver's license or state ID number to register to Vote. If you do not have a Minnesota driver's license or state ID then you will have to provide the last four digits of your social security number. If you have neither, please write "none" on the form.
7. Choice of Party. Leave blank.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Minnesota you must:
- be a citizen of the United States
- be a resident of Minnesota for 20 days before the next election
- maintain residence at the address given on the registration form
- be at least 18 years old on election day
- if previously convicted of a felony, your felony sentence has expired or been completed, or you have been discharged from the sentence
- not be under a court-ordered guardianship in which the right to vote has been revoked
- not be found by a court to be legally incompetent to vote.

Mailing address:
Secretary of State
60 Empire Drive, Suite 100
St. Paul, MN 55103-1855

[redacted]

Updated: 05-07-2010

Registration Deadline — 30 days before the election.

6. ID Number. You are required to provide your current and valid driver's license number or, if you don't have one, the last four digits of your social security number.
7. Choice of Party. Mississippi does not have party registration. Therefore, you do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Mississippi you must:
- be a citizen of the United States
- have lived in Mississippi and in your county (and city, if applicable) 30 days before the election in which you want to vote
- be 18 years old by the time of the general election in which you want to vote
- have not been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement, armed robbery, extortion, felony bad check, felony shoplifting, larceny, receiving stolen property, robbery, timber larceny, unlawful taking of a motor vehicle, statutory rape, carjacking, or bigamy, or have had your rights restored as required by law
- not have been declared mentally incompetent by a court

Note: State law changed by federal court order in 1998 and by state legislation in 2000. We now accept the form as registration for voting for all state and federal offices.

Mailing address:
Secretary of State
P.O. Box 136
Jackson, MS 39205-0136

Local county addresses:
You also may return completed applications to the county circuit clerk/registrar where you reside. A complete list of county circuit clerk/registrars is available on Mississippi's website at www.sos.ms.gov.

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State Instructions

[redacted]

Updated: 09-12-2006

Registration Deadline — 28 days before the election.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number. Your completed voter registration form must also include the last four digits of your social security number. (Section 115.155, RSMo). If you do not have a driver's license or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State. Any electronic media, printouts or mailing labels provided under this section shall not include telephone numbers and social security numbers of voters. (Section 115.157, RSMo).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To vote in Missouri you must:
- isang mamamayan ng Estados Unidos
- be a citizen of the United States
- be a resident of Missouri
- be at least 17-1/2 years of age (you must be 18 to vote)
- not be on probation or parole after conviction of a felony, until finally discharged from such probation or parole
- not be convicted of a felony or misdemeanor connected with the right of suffrage
- not be adjudged incapacitated by any court of law
- not be confined under a sentence of imprisonment

Mailing address:
Secretary of State
P.O. Box 1767
Jefferson City, MO 65102-1767

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your Montana driver's license number. If you do not have a Montana driver's license number then you must list the LAST FOUR DIGITS OF YOUR SOCIAL SECURITY NUMBER. If you have neither a driver's license, nor a social security number, please write "NONE" on the form. The state of Montana will assign to you a unique identifying number.
7. Choice of Party. Montana does not require party registration to participate in any election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Montana you must:
- be a citizen of the United States
- be at least 18 years old on or before the election
- be a resident of Montana and of the county in which you want to vote for at least 30 days before the next election
- not be in a penal institution for a felony conviction
- not currently be determined by a court to be of unsound mind
- meet these qualifications by the next election day if you do not currently meet them

Mailing address:
Secretary of State's Office
P.O. Box 202801
State Capitol
Helena, MT 59620-2801

[redacted]

Updated: 03-01-2006

Registration Deadline — The third Friday before the election (or delivered by 6 p.m. on the second Friday before the election).

6. ID Number. You must provide your Nebraska driver's license number. If you do not have a Nebraska driver's license number then you must list the last four digits of your social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Nebraska you must:
- be a citizen of the United States
- be a resident of Nebraska
- be at least 18 years of age or will be 18 years of age on or before the first Tuesday after the first Monday of November
- not have been convicted of a felony, or if convicted, have had your civil rights restored
- not have been officially found to be mentally incompetent

Mailing address:
Nebraska Secretary of State
Suite 2300, State Capitol Bldg.
Lincoln, NE 68509-4608

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State Instructions

[redacted]

Updated: 05-07-2010

Registration Deadline — The deadline for mail-in registration is the fifth Saturday before any primary or general election. In person registration remains available until 9:00 p.m. on the third Tuesday preceding any primary or general election. You may register to vote in person only by appearing at the office of the County Clerk/Registrar of Voters.

6. ID Number. You must supply a Nevada's Driver's License Number or Nevada ID Card Number if you have been issued one. If you do not have a Driver's License Number or Nevada ID Card Number, you must supply the last four digits of your Social Security Number. If you do not have a Social Security Number, please contact your County Clerk/Registrar of Voters to be assigned a unique identifier.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention. If you register with a minor political party, or as a Nonpartisan you will receive a Nonpartisan Ballot for the Primary Election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Nevada you must:
- be a citizen of the United States
- have attained the age of 18 years on the date of the next election
- have continuously resided in the State of Nevada, in your county, at least 30 days and in your precinct at least 10 days before the next election
- have your civil rights restored if you were convicted of a felony
- not be determined by a court of law to be mentally incompetent
- claim no other place as your legal residence

Mailing address:
Secretary of State
Elections Division
101 North Carson Street
Suite 3
Carson City, NV 89701-4786

Applications may be returned to the Secretary of State's office at the address above, but to avoid possible delays, you are advised to return your completed voter registration applications directly to your local county election official.

Local county addresses:
To meet registration deadlines, especially during the two weeks before the close of the mail-in registration deadline, return completed applications to your respective County Clerk/ Registrar of Voters. A complete list of County Clerk/Registrar of Voters and registration deadlines is available on Nevada's website: www.nvsos.gov.

[redacted]

Updated: 03-01-2006

Registration Deadline — New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form, which must be received by your city or town clerk by 10 days before the election.

New Hampshire town and city clerks will accept this application only as a request for their own absentee voter mail-in registration form. You need to fill in only Box 1 and Box 2 or 3.

The application should be mailed to your town or city clerk at your zip code. These addresses are listed on the Secretary of State web site at **http://www.state.nh.us/sos/clerks.htm**

It should be mailed in plenty of time for your town or city clerk to mail you their own form and for you to return that form to them by 10 days before the election.

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[redacted]

Updated: 03-28-2008

Registration Deadline — 21 days before the election.

6. ID Number. The last four digits of your Social Security number OR your New Jersey Driver's License number is required for voter registration. If you do not possess either of these identifications, please write "NONE" on the form. The State will assign a number that will serve to identify you for voter registration purposes.
7. Choice of Party. New Jersey's voter registration form does not provide a check-off for political party affiliation. A newly registered voter or voter who has never voted in a political party primary election can declare party affiliation at the polling place on the day of a primary election. In New Jersey, a primary election is only held for the Democratic and Republican parties. A voter may also file a

political party declaration form to become a member of a political party. If a declared voter wished to change party affiliation he or she must file a declaration form 50 days before the primary election, in order to vote.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in New Jersey you must:

- be a citizen of the United States
- be at least 18 years of age by the time of the next election
- be a resident of this State and county at your address at least 30 days before the next election
- not be serving a sentence or on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States

Mailing address:

New Jersey Department of Law
and Public Safety
Division of Elections
PO BOX 304
Trenton, NJ 08625-0304

[redacted]

Updated: 03-01-2006

Registration Deadline — 28 days before the election.

6. ID Number. Your full social security number is required. This registration card containing your social security number will become part of the permanent voter registration records of your locality, which are open to inspection by the public in the office of the county clerk. However, your social security number and date of birth will remain confidential and will not be disclosed to the public. Computerized listings of limited voter registration information (without social security number or birth date) are available to the general public, and are furnished upon request to incumbent election officeholders, candidates, political parties, courts and non-profit organizations promoting voter participation and registration, for political purposes only (§1-5-19B, NMSA 1978).

7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in New Mexico you must:

- be a citizen of the United States
- be a resident of the State of New Mexico
- be 18 years of age at the time of the next election
- not have been denied the right to vote by a court of law by reason of mental incapacity and, if I have been convicted of a felony, I have completed all conditions of probation or parole, served the entirety of a sentence or have been granted a pardon by the Governor.

Mailing address:

Bureau of Elections
325 Don Gaspar, Suite 300
Santa Fe, NM 87503

[redacted]

Updated: 03-01-2006

Registration Deadline — 25 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will be assigned to you by your State.

7. Choice of Party. You must enroll with a party if you want to vote in that party's primary election or caucus.

8. Race or Ethnic Group. Leave blank.

9. Signature. To register in New York you must:

- be a citizen of the United States
- be a resident of the county, or of the City of New York, at least 30 days before an election
- be 18 years old by December 31 of the year in which you file this form (*Note:* You must be 18 years old by the date of the general, primary, or other election in which you want to vote)
- not be in jail or on parole for a felony conviction
- not currently be judged incompetent by order of a court of competent judicial authority
- not claim the right to vote elsewhere

Mailing address:

NYS Board of Elections
40 Steuben Street
Albany, NY 12207-2108

[redacted]

Updated: 03-01-2006

Registration Deadline — Postmarked 25 days before the election or received in the elections office or designated voter registration agency site by 5:00 p.m. 25 days before the election.

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State Instructions

6. ID Number. Provide your North Carolina driver's license number, or North Carolina Department of Motor Vehicles ID number. If you do not have a driver's license, then list the last four digits of your social security number.
7. Choice of Party. You must register with a party to vote in that party's primary unless that party allows unaffiliated voters to vote in its primary. If you indicate a political party that is not a qualified party, or indicate no party, you will be listed as "Unaffiliated".
8. Race or Ethnic Group. You are required to fill in this box. However, your application will not be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in North Carolina you must:
- be a citizen of the United States
- be a resident of North Carolina and the county in which you live for at least 30 days prior to the election
- be 18 years of age by the day of the next general election
- have your rights of citizenship restored if you have been convicted of a felony
- not be registered or vote in any other county or state

Mailing address:
State Board of Elections
P.O. Box 27255
Raleigh, NC 27611-7255

[redacted]

Updated: 03-01-2006

North Dakota does not have voter registration.

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your social security number is requested. Providing this number is voluntary. This information allows the Board of Elections to verify your registration if necessary (O.R.C. 3503.14). [Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you don't have either number you will have to write "NONE" on the form and the State will assign you a number.]
7. Choice of Party. You do not register with a party if you want to take part in that party's primary election. Party affiliation is established by voting at a primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Ohio you must:
- be a citizen of the United States
- be a resident of Ohio
- be 18 years old on or before election day. If you will be 18 on or before the day of the general election, you may vote in the primary election for candidates only.
- not be convicted of a felony and currently incarcerated
- not be found incompetent by a court for purposes of voting

Mailing address:
Secretary of State of Ohio
Elections Division
180 E. Broad Street — 15th Floor
Columbus, OH 43215

[redacted]

Updated: 10-29-2003

Registration Deadline — 25 days before the election.

6. ID Number. The last four digits of your social security number are required. (Oklahoma Title 26, Section 4-112) In addition, your Oklahoma driver's license number is requested.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Oklahoma you must:
- be a citizen of the United States and a resident of the State of Oklahoma
- be 18 years old on or before the date of the next election
- have not been convicted of a felony, for which a period of time equal to the original sentence has not expired, or for which you have not been pardoned
- not now be under judgment as an incapacitated person, or a partially incapacitated person prohibited from registering to vote

Mailing address:
Oklahoma State Election Board
Box 528800
Oklahoma City, OK 73152-8800

State Instructions

[redacted]

Updated: 03-01-2006

Registration Deadline — 21 days before the election.

6. ID Number. Federal law requires that you provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, you will need to write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Oregon you must:
• be a citizen of the United States
• be a resident of Oregon
• be at least 18 years old by election day

Mailing address:
Secretary of State
Elections Division
141 State Capitol
Salem, OR 97310-0722

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before an election or primary.

6. ID Number. You must supply a Driver's License Number, if you have one. If you do not have a Driver's License Number, you must supply the last four digits of your social Security Number. If you do not have a Social Security Number, please write "NONE" in the box.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election.
8. Race or Ethnic Group. You are requested to fill in this box. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in Pennsylvania you must:
• be a citizen of the United States at least one month before the next election
• be a resident of Pennsylvania and your election district at least 30 days before the election
• be at least 18 years of age on the day of the next election

Mailing address:
Office of the Secretary of the Commonwealth
210 North Office Bldg.
Harrisburg, PA 17120-0029

[redacted]

Updated: 03-28-2008

Registration Deadline — 30 days before the election.

6. ID Number. The applicant shall be required to provide his/her Rhode Island driver's license number if the applicant has been issued a current and valid Rhode Island driver's license. In the case of an applicant who has not been issued a current and valid driver's license he/she must provide the last four (4) digits of his/her social security number. An applicant, who has neither, will be assigned a unique identifying number by the State of Rhode Island.
7. Choice of Party. In Rhode Island, a person must register with a party if he/she wishes to take part in that party's primary election. A person who fails to register with a party at the time of registration may, if he/she chooses, register with a party on the day of that party's primary and take part in that party's primary election. If a person does not register with a party, he/she can still vote in general elections and non-partisan primary elections.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Rhode Island you must:
• be a citizen of the United States
• be a resident of Rhode Island for 30 days preceding the next election
• be 18 years old by election day
• not be currently incarcerated in a correctional facility due to a felony conviction
• not have been lawfully judged to be mentally incompetent

Mailing address:
Rhode Island State Board of Elections
50 Branch Ave.
Providence, RI 02904-2790

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. It is required by the South Carolina Code of Laws and is used for internal purposes only. Social security number does not appear on any report produced by the State Election Commission nor is it released to any unauthorized

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State Instructions

individual. (South Carolina Title 7-5-170)
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. You are required to fill in this box. Your application may be rejected if you fail to do so. See the list of choices under the Application Instructions for Box 8 (on page 2).
9. Signature. To register in South Carolina you must:
- be a citizen of the United States
- be at least 18 years old on or before the next election
- be a resident of South Carolina, your county and precinct
- not be confined in any public prison resulting from a conviction of a crime
- never have been convicted of a felony or offense against the election laws, or if previously convicted, have served your entire sentence, including probation or parole, or have received a pardon for the conviction
- not be under a court order declaring you mentally incompetent
- claim the address on the application as your only legal place of residence and claim no other place as your legal residence

Mailing address:
State Election Commission
P.O. Box 5987
Columbia, SC 29250-5987

[redacted]

Updated: 03-01-2006

Registration Deadline — Received 15 days before the election.

6. ID Number. Your driver's license number is requested. If you do not have a valid driver's license, you must provide the last four digits of your social security number.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in South Dakota you must:
- be a citizen of the United States
- reside in South Dakota
- be 18 years old by the next election
- not be currently serving a sentence for a felony conviction which included imprisonment, served or suspended, in an adult penitentiary system
- not have been adjudged mentally incompetent by a court

Mailing address:
Elections, Secretary of State
500 E. Capitol
Pierre, SD 57501-5070

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. Your full social security number is required. Social security number, if any, is required for purposes of identification and to avoid duplicate registration (TCA 2.2.116).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Optional.
9. Signature. To register in Tennessee you must:
- be a citizen of the United States
- be a resident of Tennessee
- be at least 18 years old on or before the next election
- not have been convicted of a felony, or if convicted, have had your full rights of citizenship restored (or have received a pardon)
- not be adjudicated incompetent by a court of competent jurisdiction (or have been restored to legal capacity)

Mailing address:
Coordinator of Elections
Tennessee Tower, Ninth Floor
312 Eighth Avenue, North
Nashville, TN 37243

[redacted]

Updated: 03-01-2006

Registration Deadline — 30 days before the election.

6. ID Number. You must provide your driver's license number to register to vote. If you do not have a driver's license then you will have to provide at least the last four digits of your social security number. If you have neither, please write "NONE" on the form. A unique identifying number will instead be assigned to you by your State.
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Texas you must:
- be a citizen of the United States

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• be a resident of the county in which the application for registration is made
• be at least 17 years and 10 months old (you must be 18 to vote)
• not be finally convicted of a felony, or if a convicted felon, you must have fully discharged your punishment, including any incarceration, parole, supervision, period of probation or be pardoned.
• have not been declared mentally incompetent by final judgment of a court of law

Mailing address:
Office of the Secretary of State
Elections Division
P.O. Box 12060
Austin, TX 78711-2060

[redacted]

Updated: 03-28-2008

Registration Deadline — 30 days before the election for mail-in applications; 15 days before the election for walk-in registrations at the county clerk's office.

6. ID Number. Your completed voter registration form must contain your state issued driver's license number or nonoperating identification number. If you do not have a driver's license or nonoperating identification, you must include the last four digits of your social security number. If you do not have a driver's license or a nonoperating identification or a social security number, please write "NONE" on the form. A unique identifying number will be assigned by the State.
7. Choice of Party. Declaring a party is not required in order to register to vote. However, Utah's election law allows each political party to choose whom it will allow to vote in its primary election. If you do not affiliate with a party, you may be restricted from voting in the primary.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Utah you must:
• be a citizen of the United States
• have resided in Utah for 30 days immediately before the next election
• be at least 18 years old on or before the next election
• not be a convicted felon currently incarcerated for commission of a felony
• not be convicted of treason or crime against the elective franchise, unless restored to civil rights
• not be found to be mentally incompetent by a court of law

Mailing address:
Office of the Lieutenant Governor
P.O. Box 142325
Salt Lake City, UT 84114

[redacted]

Updated: 07-29-2008

Registration Deadline — Delivered to the town clerk before 5:00 PM on the Wednesday before the election.

6. ID Number. You must provide your Vermont Driver's license number, or if none, the last 4 digits of your Social Security number. If you do not have a Vermont Driver's license or a Social Security number, please write "NONE" on the form. The Secretary of State's office will assign you a unique identifying number.
7. Choice of Party. Vermont does not require party registration to participate in any election.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Vermont you must:
• be a citizen of the United States
• be a resident of Vermont
• be 18 years of age on or before election day
• have taken the following Oath: You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the state of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person [Voter's Oath, Vermont Constitution, Chapter II, Section 42]
By signing in Box 9, you are attesting that you have sworn or affirmed the Vermont voter's oath as printed above.

Mailing address:
Office of the Secretary of State
Director of Elections
26 Terrace Street
Montpelier, VT 05609-1101

[redacted]

Updated: 11-10-2010

Registration Deadline — Delivered 29 days before the election.

6. ID Number. Your full social security number is required. Your social security number will appear on reports produced only for official use by voter registration and election officials and, for jury selection purposes, by courts.

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State Instructions

Article II, §2, Constitution of Virginia (1971).
7. Choice of Party. You do not have to register with a party if you want to take part in that party's primary election, caucus, or convention.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Virginia you must:
• be a citizen of the United States
• be a resident of Virginia and of the precinct in which you want to vote
• be 18 years old by the next May or November general election
• not have been convicted of a felony, or have had your civil rights restored
• not currently be declared mentally incompetent by a court of law

Mailing address:
State Board of Elections
1100 Bank Street, 1st Floor
Richmond, VA 23219

[redacted]

Updated: 10-29-2003

Registration Deadline — 30 days before the election (or delivered in-person to the local voter registration office 15 days before the election).

6. ID Number. You must provide your driver's license number. If you do not have a Washington driver's license, you must provide the last four digits of your Social Security Number. Failure to provide this information may prevent your registration from being processed.
7. Choice of Party. You are not required to designate your party affiliation to register in Washington.
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in Washington you must:
• be a citizen of the United States
• be a legal resident of Washington State, your county and precinct for 30 days immediately preceding the election in which you want to vote
• be at least 18 years old by election day
• not be convicted of infamous crime, unless restored to civil rights

Mailing address:
Secretary of State
Voter Registration by Mail
P.O. Box 40230
Olympia, WA 98504-0230

[redacted]

Updated: 09-12-2006

Registration Deadline — 21 days before the election.

6. ID Number. Enter your driver's license number. If you do not have a driver's license number, enter the last four numbers of your social security number. If you do not have a driver's license number or a social security number, an identification number will be assigned to you.
7. Choice of Party. You must register with a party if you want to take part in that party's primary election, caucus, or convention (unless you request the ballot of a party which allows independents to vote)
8. Race or Ethnic Group. Leave blank.
9. Signature. To register in West Virginia you must:
• be a citizen of the United States
• live in West Virginia at the above address
• be 18 years old, or to vote in the primary be 17 years old and turning 18 before the general election
• not be under conviction, probation, or parole for a felony, treason or election bribery
• not have been judged "mentally incompetent" in a court of competent jurisdiction

Mailing address:
Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd. East
Charleston, WV 25305-0770

[redacted]

Updated: 09-12-2006

Registration Deadline — Twenty (20) days before the election (or completed in the local voter registration office up to 5:00 pm. 1 day before the election, or completed at the polling place on election day).

6. ID Number. Provide your driver's license number, if you have no current and valid driver's license, the last 4 digits of your social security number or DOT-issued ID card number.
7. Choice of Party. Not required.
8. Race or Ethnic Group. Not required.
9. Signature. To register in Wisconsin you must:
• be a citizen of the United States
• be a resident of Wisconsin for at least 10 days
• be 18 years old
• not have been convicted of treason, felony or bribery, or if you have, your civil rights have been restored

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• not have been found by a court to be incapable of understanding the objective of the electoral process
• not make or benefit from a bet or wage depending on the result of an election
• not have voted at any other location, if registering on election day

Mailing address:
State Elections Board
17 West Main Street, Suite 310
P.O. Box 2973
Madison, WI 53701-2973

[redacted]

Updated: 03-01-2006

Wyoming by law, cannot accept this form unless State law is changed.

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ARIZONA VOTER REGISTRATION FORM
FORMULARIO DE INSCRIPCIÓN DE VOTANTE EN ARIZONA
INSTRUCCIONES EN ESPAÑOL SE ENCUENTRAN AL REVERSO

Questions? For questions regarding voter registration, call your County Recorder listed on the back of the form

You Can Use This Form To:
- Register to vote in the state of Arizona
- Let us know that your name, address or party affiliation has changed

To Register To Vote In Arizona You Must (Qualifications):
- Be a **United States citizen** (see citizenship requirements on back)
- Be a **resident** of Arizona and the county listed on your registration
- Be **18 years** of age or more on or before the day of the next regular General Election

WARNING: Executing a false registration is a **class 6 felony**

You Cannot Register To Vote In Arizona If:
- You have been convicted of a felony and have not yet had your civil rights restored
- You have been adjudicated incompetent

How To Register To Vote:
- You can mail or hand deliver your completed form to your County Recorder's office
- Your County Recorder's office will mail you a proof of registration within 4 – 6 weeks
- Your decision to register to vote or not, and where you submitted your registration, will remain confidential

Registrations Received By Mail:
- In the case of registration by mail, a voter registration is valid if it complies with either of the following:
  1. The registration is dated 29 days or more before an election and is received by the County Recorder by first class mail within 5 days after the last day to register to vote in that election.
  2. The form is postmarked 29 days or more before an election and is received by the County Recorder by 7 p.m. on the day of that election.

NEW REGISTRATION REQUIREMENTS

1. Your completed voter registration form must contain your Arizona driver license or nonoperating identification license number.
   If you do not have either of these licenses, you must include the last four digits of your social security number.
   If you do not have a driver license or nonoperating identification license or a social security number, a unique identifying number will be assigned by the Secretary of State.

2. A complete voter registration form must also contain proof of citizenship or the form will be rejected.
   If you have an Arizona driver license or nonoperating identification license issued after October 1, 1996, this will serve as proof of citizenship. If not, you must enclose proof of citizenship with the form.
   The back of the form contains a list of acceptable documents to establish your citizenship and instructions on how to include copies of the documents with the voter registration form.

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Citizens With Disabilities May:
- Contact the County Recorder/Elections Department for information about early voting or any voting accommodations.

If you are not a citizen of the United States or will not be 18 by the next General Election, do not complete this form.

<Fold Line---------- *USE BLACK PEN ~ COMPLETELY FILL OUT FORM *USE PLUMA DE TINTA NEGRA ~ LLENE EL FORMULARIO COMPLETAMENTE ----------Fold Line>

[1] Are you registered to vote at another address? Yes☐ No☐ Not Sure☐ List the former address, including county and state			**BOX FOR OFFICE USE ONLY** **S**
[2] Last Name	**First Name**	**Middle Name**	**Jr./Sr./III**
[3] Address where you live – If no street address, describe residence location using mileage, cross streets, parcel #, subdivision name and lot, or landmarks. Do not use post office box or business address. Draw a map below if located in rural area.			**[4] Apt./ Unit/Space No.**
[5] City	**[6] County**	**[7] Zip**	**[8]** Address where you get your mail *if mail is not delivered to your home*
[9] Birth Date (Month/Day/Year)	**[10]** State or Country of Birth	**[11]** Telephone number	**[12]** Father's name or mother's maiden name
[13] AZ Driver license number or AZ Nonoperating license number	**[14] Last four digits of social security number**	**[15]** Optional Tribal Identification Number	
[16] Specify Party Preference	**[17]** Occupation	**[18]** If your name was different the last time you registered, list former name	**[19]** Alien Registration Number

[20] Will you be willing to work at a polling place on election day? Yes☐ No☐

[21]
- **Are you a citizen of the United States of America?** Yes☐ No☐
- **Will you be 18 years of age on or before election day?** Yes☐ No☐

If you checked "No" to either one of these questions, do not submit this form.

VOTER DECLARATION – By signing below, I swear or affirm that the above information is true, that I am a RESIDENT of Arizona, I am NOT a convicted FELON or my civil rights are restored, and I have NOT been adjudicated INCOMPETENT.

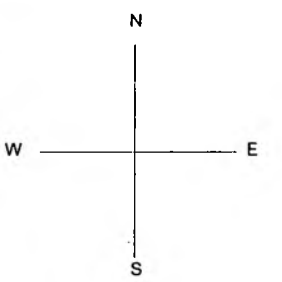
X

SIGN HERE **DATE**

[23] If you are unable to sign the form, the form can be completed at your direction. The person who assisted you must sign here.

SIGNATURE OF PERSON ASSISTING **DATE**

[22] If no street address draw a map here:



<Remove tape and fold to mail ---------- Remove tape and fold to mail>

ARIZONA VOTER REGISTRATION FORM (Translation)
FORMULARIO DE INSCRIPCIÓN DE VOTANTE EN ARIZONA

¿Preguntas? Para preguntas con respecto a la inscripción de votante, llame a su Registrador del Condado indicado al reverso del formulario

Usted puede usar este formulario para:
- Inscribirse para votar en Arizona
- Informarnos que su nombre, dirección o afiliación de partido ha cambiado

Para inscribirse para votar en Arizona, usted tiene que (Requisitos):
- Ser **ciudadano de los Estados Unidos** (vea los requisitos de la prueba de ciudadanía al revés)
- Ser **residente** de Arizona y del condado indicado en su inscripción
- Tener **18 años** o más en o antes del día de la próxima Elección General normal

ADVERTENCIA: El ejecutar una inscripción falsa es un **delito grave de clase 6**

Usted no puede inscribirse para votar en Arizona si:
- Usted ha sido condenado de un delito grave y todavía no se le han restituido sus derechos civiles
- Usted ha sido juzgado incompetente

Cómo inscribirse para votar:
- Usted puede enviar por correo su formulario llenado a la oficina de su Registrador del Condado o entregarlo personalmente
- La oficina de su Registrador del Condado le enviará por correo una prueba de inscripción dentro de 4 a 6 semanas
- Su decisión de inscribirse para votar o no inscribirse, y donde usted presentó su inscripción, se quedará confidencial

Inscripciones recibidas por correo:
- En caso de inscripción por correo, una inscripción de votante es válida si cumple con cualquiera de los siguientes:
  1. El formulario de registro está fechado 29 ó más días antes de una elección, y es recibido por el Registrador del Condado por correo de primera clase dentro de cinco días después del último día para registrarse para votar en esa elección.
  2. El formulario tiene la fecha de matasellos de 29 días o más antes de una elección y es recibido por el Registrador del Condado para las 7 p.m. del día de esa elección.

NUEVOS REQUISITOS DE INSCRIPCIÓN

1. Su formulario lleno de registro electoral debe contar con su número de licencia de manejo o de identificación (no de manejo) de Arizona.
   Si no tiene ninguna de estas licencias, tiene que incluir las últimas cuatro cifras de su número de seguro social.
   Si no tiene una licencia de manejar ni una licencia de identificación no de manejar ni un número de seguro social, se le asignará un número único de identificación por la Secretaria de Estado.

2. Un formulario llenado de inscripción de votante también tiene que contener prueba de ciudadanía o se rechazará el formulario.
   Si usted tiene una licencia de manejar o una licencia de identificación no de manejar expedida después del 1 de octubre de 1996, ésta servirá como prueba de ciudadanía. Si no, tiene que adjuntar prueba de ciudadanía con el formulario.
   El reverso del formulario contiene una lista de documentos aceptables para establecer su ciudadanía e instrucciones sobre cómo incluir copias de los documentos con el formulario de registro electoral.

Los ciudadanos con discapacidades pueden:
- Comuníquese con el Registrador del Condado/Departamento Electoral para información sobre la votación temprana o cualquier adaptación para votar.

Si usted no es ciudadano de los Estados Unidos o no tendrá 18 años para la próxima Elección General, no llene este formulario.

PLACE STAMP HERE

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<Línea de doble----------Línea de doble>

~ USE ESTA SECCIÓN COMO EJEMPLO, LLENE LA CARA DEL FORMULARIO ~

[1] ¿Está usted inscrito para votar en otra dirección? SI☐ No☐ No sé☐
Escriba la dirección anterior, incluyendo el condado y el estado

CASILLA SÓLO PARA EL USO DE LA OFICINA
S

[2] Apellido	**Nombre de pila**	**Segundo nombre**	Jr./Sr./III

[3] Si no hay calle en el domicilio, describa la ubicación de la residencia usando millaje, cruceros de calles, # de parcela, nombre de la subdivisión y lote, o detalles específicos de referencia. No use un apartado postal ni dirección de negocio. Dibuje un mapa abajo si está ubicado en una zona rural.

[4] Dpto./ Unidad/ No.de espacio

[5] Ciudad	**[6] Condado**	**[7] Código postal**	**[8]** Dirección en la cual Ud. recibe su correspondencia. *si no se entrega la correspondencia a su casa*

[9] Fecha de nacimiento (Mes/Día/ Año)	**[10]** Estado o País de nacimiento	**[11]** Número de teléfono	**[12]** Nombre de su padre o nombre de soltera de su madre

[13] Número de su licencia de manejar de AZ o número de su licencia de identificación no de manejar de AZ	**[14] Las últimas cuatro cifras de su número de seguro social**	**[15]** Número opcional de Identificación Tribal

[16] Especifique su Partido de Preferencia	**[17]** Ocupación	**[18]** Si su nombre ha cambiado desde la última vez que se inscribió, escriba su nombre anterior	**[19]** Número de Registro de Extranjero

[20] ¿Estará usted dispuesto a trabajar en un lugar de votación el día de la elección? SI☐ No☐

[21] ● **Es usted ciudadano de los Estados Unidos de América?** SI☐ No☐
● **Tendrá usted 18 años de edad en o antes del día de la Elección?** SI☐ No☐
Si marcó "No" a cualquiera de estas preguntas, no presente el formulario.

DECLARACIÓN DE VOTANTE – Al firmar abajo, juro o afirmo que la información más arriba es verdad, que soy RESIDENTE de Arizona, que NO soy un CRIMINAL convicto, o mis derechos civiles están restituidos y no se me ha juzgado INCOMPETENTE.

X _____ _____
FIRME AQUÍ **FECHA**

[23] Si usted no puede firmar el formulario, se puede llenar bajo su dirección. La persona que le ayudó tiene que firmar aquí.

FIRMA DE LA PERSONA QUE AYUDA _____ **FECHA** _____

[22] Si no hay una dirección de calle, dibuje un mapa aquí:

N
O E
S

EJEMPLAR

<DESPEGUE LA CINTA ADHESIVA Y DOBLE PARA ENVIAR POR CORREO ---------- DESPEGUE LA CINTA ADHESIVA Y DOBLE PARA ENVIAR POR CORREO>
<Fold Line----------Fold Line>

***USE BLACK PEN ~ COMPLETELY FILL OUT FORM *USE PLUMA DE TINTA NEGRA ~ LLENE EL FORMULARIO COMPLETAMENTE**

[1] Are you registered to vote at another address? Yes☐ No☐ Not Sure☐
List the former address, including county and state

BOX FOR OFFICE USE ONLY
S

[2] Last Name	**First Name**	**Middle Name**	Jr./Sr./III

[3] Address where you live – If no street address, describe residence location using mileage, cross streets, parcel #, subdivision name and lot, or landmarks. Do not use post office box or business address. Draw a map below if located in rural area.

[4] Apt./ Unit/Space No.

[5] City	**[6] County**	**[7] Zip**	**[8]** Address where you get your mail *if mail is not delivered to your home*

[9] Birth Date (Month/Day/Year)	**[10]** State or Country of Birth	**[11]** Telephone number	**[12]** Father's name or mother's maiden name

[13] AZ Driver license number or AZ Nonoperating license number	**[14]** Last four digits of social security number	**[15]** Optional Tribal Identification Number

[16] Specify Party Preference	**[17]** Occupation	**[18]** If your name was different the last time you registered, list former name	**[19]** Alien Registration Number

[20] Will you be willing to work at a polling place on election day? Yes☐ No☐

[21] ● **Are you a citizen of the United States of America?** Yes☐ No☐
● **Will you be 18 years of age on or before election day?** Yes☐ No☐
If you checked "No" to either one of these questions, do not submit this form.

VOTER DECLARATION – By signing below, I swear or affirm that the above information is true, that I am a RESIDENT of Arizona, I am NOT a convicted FELON or my civil rights are restored, and I have NOT been adjudicated INCOMPETENT.

X _____
SIGN HERE **DATE**

[23] If you are unable to sign the form, the form can be completed at your direction. The person who assisted you must sign here.

_____
SIGNATURE OF PERSON ASSISTING **DATE**

[22] If no street address draw a map here:

N
W E
S

Voter Receipt
Recibo del
Votante

<Remove tape and fold to mail ----------Remove tape and fold to mail>

87c

VOTER REGISTRATION FORM - FORMULARIO DE INSCRIPCIÓN DE VOTANTE

VOTER REGISTRATION INFORMATION

If you meet the qualifications listed on the front of this form, complete, sign and return the attached registration form to the County Recorder for your county listed below. The form may be mailed or returned to a person designated to receive voter registration forms. Call your County Recorder for more information.

NEW REGISTRATION REQUIREMENTS

If this is your first time registering to vote in Arizona or you have moved to another county in Arizona, your voter registration form must also include proof of citizenship or the form will be rejected. If you have an Arizona driver license or nonoperating identification license issued after October 1, 1996, write the number in box 13 on the front of this form. This will serve as proof of citizenship and no additional documents are needed. If not, you must include proof of citizenship with the form. Only one form of proof is needed to register to vote.

The following is a list of acceptable documents to establish your citizenship:

- **A legible photocopy of a birth certificate that verifies citizenship and supporting legal documentation (i.e. marriage certificate) if the name on the birth certificate is not the same as your current legal name**
- A legible photocopy of the pertinent pages of your passport
- Presentation to the County Recorder of U.S. naturalization documents or fill in your Alien Registration Number in box 19
- **Your Indian Census Number, Bureau of Indian Affairs Card Number, Tribal Treaty Card Number, or Tribal Enrollment Number in box 15**
- **A legible photocopy of your Tribal Certificate of Indian Blood or Tribal or Bureau of Indian Affairs Affidavit of Birth.**

If you need to include a photocopy of proof of citizenship, please fold the proof along with the voter registration form and place both items in an envelope and mail them to your County Recorder listed below. Do not send original documents. Photocopies will not be returned to you. Please visit www.azsos.gov if you have any questions regarding acceptable types of proof of citizenship.

If you are registered in Arizona and use this registration form because you moved within a county, changed your name, or changed your political party affiliation, you do not need to provide photocopies of proof of citizenship. If you move to a different Arizona county, you will need to provide proof of citizenship.

ACCOMMODATIONS FOR INDIVIDUALS WITH DISABILITIES

Alternative format materials, sign language interpretation, and assistive listening devices are available upon 72 hours advance notice to your County Recorder. To the extent possible, additional reasonable accommodations will be made available within the time constraints of the request.

GENERAL INFORMATION

1. **You must re-register whenever you move, change your name, or change your political party affiliation.**
2. Early ballots may be requested from the County Recorder of your county of residence.
3. Keep this copy as your receipt. After the County Recorder receives your registration and places it in the county general register, a notice will be sent to you within 4–6 weeks indicating that your name appears on the register. If you do not receive your notice contact your County Recorder.
4. Fill in your political party preference in box 16. If you leave this box blank as a first time registrant in your county, your party preference will be "Party Not Designated". If you leave this box blank and you are already registered in the county, your current party preference will be retained. Please write full name of party preference in box.

INFORMACIÓN PARA LA INSCRIPCIÓN DE VOTANTE

"Si usted satisface los requisitos indicados en la cara de este formulario, llene, firme y regrese la forma adjunta de registro al Registrador del Condado de su condado listado abajo. La forma puede enviarse por correo o regresarse a una persona designada para recibir formas de registro electoral. Llame al Registrador de su Condado para más información".

REQUISITOS DE UNA NUEVA INSCRIPCIÓN

Si esto es su primera vez de inscribirse para votar en Arizona, o si se ha mudado a otro condado, su formulario de inscripción de votante también tiene que incluir prueba de ciudadanía o se rechazará el formulario. Si usted tiene una licencia de manejar de Arizona, o una licencia de identificación no de manejar de Arizona, expedida después del 1 de octubre de 1996, escriba el número en la casilla 13 en la cara de este formulario. Esto servirá como prueba de ciudadanía y no se necesitan ningunos otros documentos. Si no, usted debe incluir prueba de ciudadanía con la forma. Sólo se necesita una forma de comprobación para registrarse para votar.

Lo siguiente es una lista de los documentos aceptables para establecer su ciudadanía:

- **Una fotocopia legible de un acta de nacimiento que verifica la ciudadanía y la documentación legal acreditativa (ej. Acta de Matrimonio) si el nombre en el acta de nacimiento no es el mismo como su nombre legal actual**
- Una fotocopia legible de las páginas pertinentes de su pasaporte
- Presentación al Registrador del Condado de documentos de naturalización de los Estados Unidos o anote su Número de Registro de Extranjero en la casilla 19
- **Su Número de Tarjeta de la Oficina de Asuntos de Nativo Americanos, Número de Tarjeta de Tratado Tribal, o Número de Matricula Tribal en la casilla 15**
- **Una fotocopia legible de su Certificado Tribal de Sangre Nativo Americana o affidávit de Nacimiento de la Oficina de Asuntos de Nativo Americanos.**

Si usted necesita incluir una fotocopia de prueba de ciudadanía, por favor doble la prueba junto con la forma de registro electoral, coloque ambos artículos en un sobre, y envíelos a su Registrador del Condado listado abajo. No envíe documentos originales. Las fotocopias no se le regresarán. Por favor visite www.azsos.gov si tiene usted cualquier pregunta relacionada con tipos aceptables para comprobar su ciudadanía.

Si usted está registrado en Arizona y usa el formulario de registro debido a que se mudó dentro de un condado, cambió su nombre, o cambió su afiliación de partido político, no necesita proveer fotocopias de su comprobación de ciudadanía. Si usted se muda a un condado distinto en Arizona, necesitará proveer prueba de ciudadanía.

PARA ACOMODAR A LAS NECESIDADES DE LAS PERSONAS CON DISCAPACIDADES

Los materiales en formatos alternativos, interpretación por señas y dispositivos de audición asistida están disponibles al dar aviso previo de 72 horas a su Registrador del Condado. Al punto posible, se harán disponibles más acomodamientos razonables dentro de las limitaciones de tiempo de la solicitud.

INFORMACIÓN GENERAL

1. **Usted debe volver a registrarse cuando se mude, cambie su nombre, o cambie de afiliación de partido político.**
2. Se puede solicitar boletas electorales tempranas del Registrador del Condado del condado de su residencia.
3. Conserve esta copia como su recibo. Después de que el Registrador del Condado reciba su inscripción y la anote en el registro general del condado, se le enviará un aviso dentro de 4 a 6 semanas que indica que su nombre aparece en el registro. Si usted no recibe su aviso, póngase en contacto con su Registrador del Condado.
4. Anote su preferencia de partido político en la casilla 16. Si usted deja esta casilla en blanco al registrarse por primera vez en su condado, su preferencia de partido será "No Designó Partido". Si usted deja esta casilla en bianco y ya se registró en el condado, se retendrá su preferencia actual de partido. Por favor anote el nombre completo del partido político en la casilla.

Apache County Recorder
St. Johns, AZ 85936
(928) 337-7516 (TDD# 337-4402)

Cochise County Recorder
Bisbee, AZ 85603
(520) 432-8354 (TDD# 432-8360)

Coconino County Recorder
Flagstaff, AZ 86001
(928) 779-6589 (TDD# 226-6073)

Gila County Recorder
Globe, AZ 85501
(928) 425-3231 (TDD# 425-0839)

Graham County Recorder
Safford, AZ 85546
(928) 428-3560 (TDD# 428-3562)

Greenlee County Recorder
Clifton, AZ 85533
(928) 865-2632 (TDD# 865-2632)

La Paz County Recorder
Parker, AZ 85344
(928) 669-6136 (TDD# 669-8400)

Maricopa County Recorder
Phoenix, AZ 85003
(602) 506-1511 (TDD# 506-2348)

Mohave County Recorder
Kingman, AZ 86402
(928) 753-0767 (TDD# 753-0769)

Navajo County Recorder
Holbrook, AZ 86025
(928) 524-4192 (TDD# 524-4294)

Pima County Recorder
Tucson, AZ 85701
(520) 740-4330 (TDD# 740-4320)

Pinal County Recorder
Florence, AZ 85232
(520) 866-6850 (TDD# 866-6851)

Santa Cruz County Recorder
Nogales, AZ 85621
(520) 375-7990 (TDD# 761-7816)

Yavapai County Recorder
Prescott, AZ 86305
(928) 771-3248 (TDD# 771-3530)

Yuma County Recorder
Yuma, AZ 85364
(928) 373-6034 (TDD# 373-6033)

State of Arizona
Secretary of State
Rev. 09/20/2007

Chief Judge KOZINSKI, concurring:

I find this a difficult and perplexing case. The statutory language we must apply is readily susceptible to the interpretation of the majority, but also that of the dissent. For a state to "accept and use" the federal form could mean that it must employ the form as a complete registration package, to the exclusion of other materials. This would construe the phrase "accept and use" narrowly or exclusively. But if we were to give the phrase a broad or inclusive construction, states could "accept and use" the federal form while also requiring registrants to provide documentation confirming what's in the form. This wouldn't render the federal form superfluous, just as redundant braking systems on cars and secondary power supplies on computers aren't superfluous. This is known colloquially as wearing a belt and suspenders, and is widely used to safeguard against failure of critical systems (i.e., getting caught with your pants down). *See Redundancy (engineering),* Wikipedia, http://goo.gl/ce8il (last visited Jan. 9, 2012).

The two constructions embody different, and somewhat antithetical, policies. The narrow construction maximizes federal control and national uniformity at the expense of state autonomy and local control. The broad construction defers to state and local interests while sacrificing national uniformity. As a linguistic matter, neither construction of "accept and use" strikes me as superior.

If Congress had made it clear that states must accept the federal form as a complete application, or that they need not, I would cheerfully enforce either command. But Congress used tantalizingly vague language, which would make it very useful to fall back on a rule of construction, such as the Clear Statement Rule or the Presumption Against Preemption. Judge Ikuta is right, however, that the Supreme Court has so far adopted such rules only for Supremacy Clause cases, not for those arising under the Elections Clause. *See* maj. op. at 4127-29.

There would, I believe, be ample justification for adopting such rules for Elections Clause preemption. While the federal government has an interest in how elections for federal office are conducted, the states are not disinterested bystanders. Federal elections determine who will represent the state and its citizens in Congress, the White House and, indirectly, the federal courts. Making sure that those representatives are chosen by the state's qualified electors is of vital significance to the state and its people. Moreover, the federal government is commandeering the state's resources, giving states a significant stake in ensuring that the process is conducted efficiently and fairly. Rightly or wrongly, many still blame (or credit) voting irregularities in Illinois for John F. Kennedy's election as President in 1960, and in Texas for Lyndon Johnson's election to the Senate in 1948. States have an interest in ensuring that their reputations aren't soiled in this fashion for decades, maybe longer. The risk of fraud and other malfeasance may

depend on local conditions and thus differ from state to state. States with a tradition of electoral chicanery, or with large transient populations, may need to impose stricter controls to ensure the integrity of their voting processes.

The fact remains that the Supreme Court has never articulated any doctrine giving deference to the states under the Elections Clause. This may be because it hasn't had occasion to do so in modern times. *Foster v. Love,* 522 U.S. 67 (1997), was an easy case where the state's election scheme directly contradicted the constitutional text, while the state's interest in avoiding a general election on the same day as the rest of the country was slight. A case such as ours, where the statutory language is unclear and the state has a compelling interest in avoiding fraudulent voting by large numbers of unqualified electors, presents a far more suitable case for deciding whether we should defer to state interests. But only the Supreme Court can adopt such a doctrine.

In the absence of something better, I must resort to secondary aids to construction. In this case, we have legislative history that supports reading "accept and use" in the exclusive sense, which would preclude states from seeking additional documentation. Senator Simpson proposed amending the bill that eventually became the NVRA to provide 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." 139 Cong. Rec. 5098 (Mar. 16, 1993). He explained his

purpose: "It allows States to check documents to verify citizenship.... [I]t simply makes clear that this bill must not be interpreted to stop any particular State from requiring documents. This includes States which currently by State law check documents, as well as those who may wish to check documents in the future.... I offer my amendment to try to ensure that States will continue to have the right, if they wish, to require documents verifying citizenship...." *Id.* at 5098-99. Senator Simpson understood that "accept and use" could be read narrowly to preclude states from seeking documentation beyond the federal form, and offered his amendment to ensure that the phrase would be construed in the broad, inclusive sense.

Senator Ford, the NVRA's sponsor, responded: "[T]here is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship. I think basically this is redundant, even though you probably put it in a section. But there is nothing in there now that would preclude it." *Id.* at 5099. Senator Ford seemed to believe that "accept and use" was already being used in the inclusive sense, and was amenable to adding language that would confirm this.

The Senate adopted the Simpson amendment, but the House bill lacked a similar provision. The Conference Committee adopted the House version, explaining that "[t]he conferees agree with the House bill and do not include this provision from the Senate amendment. It is not necessary or consistent with the

purposes of this Act. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act. It could also adversely affect the administration of the other registration programs as well. . . . These concerns lead the conferees to conclude that this section should be deleted." H.R. Rep. No. 103-66, at 23-24 (1993), *reprinted in* 1993 U.S.C.C.A.N. 140, 148-49 (Conf. Rep.). The conferees thus rejected the Simpson amendment, not because they thought it superfluous (as did Senator Ford) but because the inclusive meaning of "accept and use" was inconsistent with their vision of how the Act should operate.

After the conference, the Senate re-passed the NVRA without the Simpson amendment. S. Rep. No. 103-6, at 12-13 (1993). A minority of senators opposed the bill in part because they thought "requiring proof of citizenship" would be helpful in combating fraud and worried that the bill "would preclude such corrective action." *Id.* at 50.

In the House, some members sought to recommit the bill in order to tack on a Simpson-like amendment. They argued that failure to do so would encourage voter fraud. *See* 139 Cong. Rec. at 9228 (May 5, 1993) (Rep. Livingson: "Without this provision, this bill is an auto-fraudo bill."); *id.* at 9229 (Rep. Cox: "Despite its benign name, this pernicious bill would make it nearly impossible to prevent ineligible people

– including illegal aliens – from voting."). Their arguments fell on deaf ears. *Id.* at 9231.

The Supreme Court has warned us time and again not to rely on legislative history in interpreting statutes, largely because of the ease with which floor statements and committee reports can be manipulated to create a false impression as to what the body as a whole meant. But the history here consists of actions taken by legislative bodies, not just words penned by staffers or lobbyists. The Court has recognized that such drafting history *can* offer interpretive insight: "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan v. Rumsfeld,* 548 U.S. 557, 579-80 (2006). While the dissenting Justices in *Hamdan* objected to the use of legislative history, their objection rested in large part on the fact that it was being used to defeat clear statutory language. *See id.* at 665-68 (Scalia, J., dissenting, joined by Thomas and Alito, JJ.). I'm not convinced they would object with equal vigor where, as here, the statutory language is in equipoise and both chambers affirmatively rejected efforts to authorize precisely what Arizona is seeking to do.

The dissent mistakenly sees some inconsistency between my conclusion today and that in my "well-drafted dissent to the original panel opinion." Dissent at 4211 n.1. But, as a member of a three-judge panel, I had no occasion to construe the statute de novo because we were bound by the law of the circuit and

the law of the case. *Gonzalez v. Arizona,* 624 F.3d 1162, 1198-99 (9th Cir. 2010) (Kozinski, C.J., dissenting in large part). To the extent I could reach the issue at all, it was only to determine whether "*Gonzalez I* is clearly wrong." *Id.* at 1208. Because I concluded then, as I do now, that "both preemptive and non-preemptive constructions of 'accept' and 'use' are plausible," I deferred to the earlier panel's construction. *Id.* at 1206. As an en banc court, we cannot defer to *Gonzalez I.* Rather, we must come up with what we think is the best construction of the statute. For the reasons outlined above, and those in Judge Ikuta's very fine and thorough opinion, I believe the preemptive reading of the statute is somewhat better than the alternative.

BERZON, Circuit Judge, concurring, with whom MURGUIA, Circuit Judge, joins:

I fully concur in the majority opinion but note the following: With respect to whether Proposition 200's polling place provision "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" in violation of § 2(a) of the VRA, 42 U.S.C. § 1973(a), the court holds only that the *current record* is insufficient to show a "causal connection between the challenged voting practice and [a] prohibited discriminatory result," *Smith v. Salt River Project Agric. Improvement & Power Dist.,* 109 F.3d 586, 595 (9th Cir. 1997) (alteration in original) (internal quotation marks omitted). I concur in Section III.A of the majority

opinion with that understanding of its limited reach. A different record in a future case could produce a different outcome with regard to the § 2 causation question.

PREGERSON, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that Proposition 200's registration provision violates the National Voter Registration Act ("NVRA"). *See* Maj. Op. at 4148. I part ways with the majority, however, when it comes to Proposition 200's requirement that voters provide identification at the polls ("the polling place provision"). The majority concludes that Gonzalez's challenge to the polling place provision under Section 2 of the Voting Rights Act fails because Gonzalez has not established that the polling place provision "results in discrimination on account of race." Maj. Op. at 4151. I respectfully disagree with the majority, for two reasons.

First, in concluding that Proposition 200's polling place provision does not disparately impact Latino voters, the majority conflates statistics on Proposition 200's *registration provision* with Proposition 200's *polling place provision. See* Maj. Op. at 4152-53. A thorough review of the record reveals that Proposition 200's *polling place provision* has a significant disproportionate impact on Latino voters. In the 2006 general election, Latino voters comprised between 2.6% and 4.2% of the voters who turned out to vote,

but Latino voters cast 10.3% of the ballots that went uncounted because of insufficient identification. Latino voters were overrepresented by 200% to 500% in ballots that were uncounted because of insufficient identification.

Second, the majority mistakenly gives short shrift to the "Senate Factors" from *Thornburg v. Gingles,* 478 U.S. 30, 44 (1986).[1] In discussing these factors, the majority acknowledges that Latino voters have "suffered a history of discrimination in Arizona that hindered their ability to participate in the

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[1] In *Gingles* the Supreme Court held that a court should consider the following factors, commonly referred to as the "Senate Factors," in determining whether a plaintiff has established a violation of Section 2 of the Voting Rights Act:

> [T]he history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U.S. at 44-45.

political process fully, that there were socioeconomic disparities between Latinos and whites in Arizona, and that Arizona continues to have some degree of racially polarized voting." Maj. Op. at 4152. Despite acknowledging these facts, the majority concludes that Proposition 200's polling place provision does not result "in discrimination on account of race." Maj. Op. at 4151. But a proper Section 2 analysis requires that we "consider how the challenged practice 'interacts with social and historical conditions'" to cause an inequality in the opportunities of Latino voters to cast their ballots. *Farrakhan v. Washington,* 338 F.3d 1009, 1016 (9th Cir. 2003) (quoting *Gingles,* 478 U.S. at 47).

Indeed, as the district court recounted in much detail, *de jure* discrimination against Latinos in Arizona existed during most of the twentieth century. Just prior to 1910, Arizona voters passed a literacy law that explicitly targeted Mexicans and disqualified non-English speakers from voting in state elections. As late as the 1960s, these literacy requirements were a precondition for voting in Arizona.

After Arizona attained statehood in 1912, the new state government engaged in an anti-immigrant campaign characterized by a series of proposals aimed at restricting the political rights of Mexican immigrants' and limiting their right to work. The new Arizona constitution restricted non-citizens from working on public projects. In 1914, the Arizona legislature enacted the "eighty percent law," which stated that eighty percent of the employees in businesses

that had five or more employees had to be "native-born citizens of the United States."

Segregation of Latinos in housing and public accommodations was also common in Arizona during most of the twentieth century. In the years immediately following World War II, the city of Phoenix segregated Latino veterans in separate housing units. Movie theaters, restaurants, and stores frequently excluded Latinos or required Latinos to sit in segregated areas. Public parks and swimming pools were also segregated. A particularly notorious example of this segregation occurred in Tempe, where Latinos were only permitted to use the public swimming pool the day before the pool was drained.

In my view, statistics showing that Proposition 200's polling place provision disparately impact Latino voters, when coupled with Arizona's long history of discrimination against Latinos, current socio-economic disparities between Latinos and whites in Arizona, and racially polarized voting in Arizona, establish that Proposition 200's polling place provision results in discrimination on account of race.

History has also shown that when a Latino voter approaches the polling place but is stopped by a person perceived to be an authority figure checking for identification, there's something intimidating about that experience that evokes fear of discrimination. This intimidation has the effect of keeping Latino voters away from the polls.

In sum, I would hold that Proposition 200's polling place provision results in discrimination on account of race, in violation of Section 2 of the Voting Rights Act.

RAWLINSON, Circuit Judge, joined by Judge N.R. SMITH, concurring in part and dissenting in part:

I concur in the majority's conclusion that Arizona's Proposition 200, which amended Ariz. Rev. Stat. § 16-579 to require proof of identification prior to receiving a ballot, does not violate the Voting Rights Act or the Equal Protection Clause of the Fourteenth Amendment. I also agree that the statutory amendment did not constitute a poll tax as proscribed in the Twenty-fourth Amendment to the United States Constitution. As a result, I join Part III of the majority opinion.

I respectfully dissent from the balance of the majority opinion, because I am not persuaded that application of Proposition 200's proof-of-citizenship provision to prospective voters using the National Mail Voter Registration Form (the Federal Form) is precluded by the National Voting Rights Act (NVRA). In my view, there is no conflict between the NVRA and Arizona's proof-of-citizenship requirement. In fact, the plain text of the NVRA validates Arizona's proof-of-citizenship requirement, even while recognizing that Arizona must "accept and use" the Federal Form.

The text of the NVRA allows for Arizona's proof-of-citizenship requirement, notwithstanding whether a presumption against preemption generally exists under the Election Clause, as it does under the Supremacy Clause. The NVRA states the following:

> 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) of this title for the registration of voters in elections for Federal office.

42 U.S.C. § 1973gg-4(a)(2). Therefore, the plain text of the NVRA authorizes a state to "develop and use a mail voter registration form . . . for the registration of voters in elections for Federal office," in addition to the Federal Form if it "meets all of the criteria stated in section 1973gg-7(b)." As part of such criteria, the NVRA provides that a mail voter registration form "may require only such identifying information . . . as is necessary to enable the appropriate State election official to *assess the eligibility* of the applicant . . . " 42 U.S.C. § 1973gg-7(b)(1) (emphasis added). Section 1973gg-7(b)(2) then specifies that citizenship is a necessary eligibility requirement. Thus, the NVRA expressly allows Arizona to require proof of eligibility, such as proof of citizenship, because "it is identifying information . . . necessary to enable the . . . State election official to assess eligibility," and Arizona accepts and uses the Federal Form. *See* 42 U.S.C. § 1973gg-7(b)(1).

I emphasize the point that the NVRA itself expressly, not merely implicitly, authorizes a state to "develop and use" its own form "'for the registration of voters in elections for Federal office,' in addition to accepting and using the [Federal Form]." 42 U.S.C. § 1973gg-4(a)(2). Because a state must accept and use the Federal Form but is also expressly authorized to develop and use its own form that meets the criteria in § 1973gg-7(b), the plain text creates a minimum standard through the Federal Form and allows a state to require more as long as it is within the bounds of § 1973gg-7(b). *See Hui v. Castaneda,* 130 S. Ct. 1845, 1855 (2010) ("We are required, however, to read the statute according to its text. . . ."); *Arkansas v. Farm Credit Servs. of Cent. Ark.,* 520 U.S. 821, 827 (1997) (noting that it is a "basic principle that statutory language is to be enforced according to its terms"). While state forms must comply with the same general standards as the Federal Form, there is no mandate that states must use only the information included in the Federal Form or that the Federal Form is a complete application. *See* 42 U.S.C. § 1973gg-4(a)(2). States have the same discretion to decide the contents of the form they develop and use, when drafted in accordance with § 1973gg-7(b), as the Election Assistance Commission (EAC) had for the Federal Form's requirements. *See* 42 U.S.C. §§ 1973gg-4(a)(2), 1973gg-7(b). Thus, the statute expressly authorizes a state, as long as it complies with the standards set forth in § 1973gg-7(b), to require additional information outside of the Federal Form for voter registration. I do not know how to more

clearly and emphatically stress the point that the plain text of the statute allows Arizona to require proof-of-citizenship in elections for federal office.

The majority argues that the NVRA preempts the proof-of-citizenship requirement, because the NVRA requires that states to "accept and use" the Federal Form and Proposition 200's requirement to "'reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship' . . . do not operate harmoniously. . . ." *Majority Opinion,* p. 4138-39 (citing Ariz. Rev. Stat. § 16-166(F)). The majority rejects Arizona's argument that the statutes are harmonious, because Arizona is accepting and using the Federal Form for voter registration as long as evidence of citizenship is provided pursuant to the state form requirement. *See id.* at 4139-40. The majority reasons that rejecting voter registration based on anything outside the Federal Form is inappropriate because it "is contrary to the form's intended use and purpose." *Id.* at 4140. Further, the majority opines that its reading is consistent with the "natural reading of the NVRA." *Id.* I disagree.

The terms of the statute trump the intended use and purpose of the Federal Form. *See Lockhart v. United States,* 546 U.S. 142, 146 (2005) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.") (citation omitted); *see also Siripongs v. Davis,* 282 F.3d 755, 758 (9th Cir. 2002) ("In interpreting the statute we look to general principles of statutory

construction and begin with the language of the statute itself." If the "language is clear on its face, the sole function of the court is to enforce it according to its terms. . . .") (citation, alteration and internal quotation marks omitted). Further, the "accept and use" provisions of the NVRA do not establish a conflict between Proposition 200 and the NVRA where one is not otherwise present in the *text* of the statutes. Reading the requirement to "accept and use" the Federal Form in § 1973gg-4(a)(1) along with § 1973gg-4(a)(2) does not naturally lead to the conclusion that no requirement outside the Federal Form may disallow a voter's registration. The relevance and importance of § 1973gg-4(a)(2) is paramount. Invalidating the registration provision ignores § 1973gg-4(a)(2), which qualifies the extent to which a state must depend on the Federal Form for federal voter registration – i.e., the Federal Form is not the exclusive form.

The majority seems to read § 1973gg-4(a)(2) in such a way as to acknowledge a state's right to develop and use its own form (if compliant with § 1973gg-7(b)), but that a state form cannot require anything more than the Federal Form or cause a voter to be ineligible to register to vote in federal elections. However, a more logical and appropriate reading is that the Federal Form acts as the default – setting minimum requirements – , and a state may require additional requirements for federal elections through its own form if the requirements comply with the criteria of the statute (essentially setting the maximum

available requirements that may be used in the state form). *See La. Pub. Serv. Comm'n v. F.C.C.,* 476 U.S. 355, 370 (1986) ("[W]here possible, provisions of a statute should be read so as not to create a conflict. . . ."). Therefore, there is flexibility while providing for control through the standards in § 1973gg-7(b). The Federal Form acts as a baseline while the criteria in § 1973gg-7(b) act as outer limits.

The requirement to "accept and use" the Federal Form does not preclude states from imposing additional requirements. First, accepting and using something does not mean that it is necessarily sufficient. For example, 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. Second, the ordinary and natural meaning of the word "use" is "to employ" or "derive service from . . . ". *Smith v. United States,* 508 U.S. 223, 228-29 (1993) (citation omitted). The word "accepts" means "to adopt, to agree to carry out provisions, to keep and retain." *Worden v. SunTrust Banks, Inc.,* 549 F.3d 334, 344 (4th Cir. 2008) (citing Black's Law Dictionary 12 (5th ed.1979)). It is undisputed that Arizona has employed and derived service from the Federal Form and adopted its use for the registration of voters in federal elections. The only real issue is whether Proposition 200's requirement of proof of citizenship so conflicts with the use of the Federal

Form that the requirement of proof of citizenship should be voided.

I realize that the majority's argument that "rejecting" necessarily counters "accepting" has some superficial appeal. *See Majority Opinion,* p. 4139. However, what is being argued is whether states must accept and use the Federal Form in their federal election procedures as a whole, or whether they must accept the Federal Form as completely sufficient and the *sole* requirement for voter registration. Thus, the point of contention is whether Arizona defies the demand to accept and use the Federal Form by not finding voter registration wholly sufficient based solely on the Federal Form. The answer cannot be that the Federal Form is the end-all-be-all. Section 1973gg-4(a)(2) clarifies that "accept and use" cannot mean that a state must allow a voter to register solely on the basis of the Federal Form, because it specifically allows a state to develop and use a state form, in addition to the Federal Form, for federal elections. It is beyond my understanding how the Federal Form can be considered "the end" when the NVRA explicitly allows states to develop and use a form "*[i]n addition* to accepting and using the [Federal Form]." 42 U.S.C. § 1973gg-4(a)(2) (emphasis added).

No provision of the NVRA expressly forbids states from requiring additional identifying documents to verify a voter's eligibility. The NVRA only expressly prohibits states from requiring "notarization or other formal authentication." 42 U.S.C.

§ 1973gg-7(b)(3). "We . . . read the enumeration of one case to exclude another [if] it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it. . . ." *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 168 (2003) (citation omitted). Here, Congress prohibited requiring notarization or other formal authentication but failed to prohibit proof-of-citizenship, while expressly recognizing its importance in voter registration. *See* 42 U.S.C. § 1973gg-7(b); *see also Kucana v. Holder,* 130 S. Ct. 827, 838 (2010) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration and citation omitted)). Nor does the NVRA state that it is the *exclusive* authority on eligibility verification or that "Arizona's *only* role was to make [the Federal] [F]orm available to applicants and to 'accept and use' it for the registration of voters." *Majority Opinion,* p. 4143 (emphasis added). The language of the statute not only does *not* prohibit additional documentation requirements, it permits states to "require . . . such identifying information . . . as is necessary to enable the appropriate State election official to assess the eligibility of the applicant . . . " 42 U.S.C. § 1973gg-7(b)(1).

If, as the majority believes, the requirement to accept and use the Federal Form and the express allowance for a state to develop and use a form that complies with the set criteria of the statute are contradictory, *see Majority Opinion,* pp. 4139-43, then

the court "must interpret the statute to give effect to both provisions where possible." *See Ricci v. DeStefano,* 129 S. Ct. 2658, 2674 (2009) (citation omitted). Here, it is possible and necessary to interpret the statute as requiring states to accept and use the Federal Form, while allowing states to demand adherence to their form and specific requirements for federal voter registration if in compliance with § 1973gg-7(b).

Reading the statute as a whole solidifies my conclusion that Arizona's registration provision is valid. *See Samantar v. Yousuf,* 130 S. Ct. 2278, 2289 (2010) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole." (citation and alteration omitted)); *see also, K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. . . .") (citation omitted). Besides the express authorization for a state to "develop and use" a form compliant with the statute's criteria, 42 U.S.C. § 1973gg-4(a)(2), the NVRA also provides that "each State shall establish procedures to register to vote in elections for Federal office . . . (2) by mail application pursuant to section 1973gg-4 of this title, . . . *in addition to any other method of voter registration provided for under State law,*" *id.* § 1973gg-2(a) (emphasis added). Although the NVRA requires that states "accept and use" the Federal Form, *id.* § 1973gg-4(a)(2), the NVRA does not foreclose states from using

other methods for registering voters, *id.* § 1973gg-2(a), and allows states to develop and use state specific forms, if those forms fit within set criteria, *id.* § 1973gg-4(a)(2). Therefore, Congress did not "assume exclusive control of the *whole* subject. . . ." *Ex Parte Siebold,* 100 U.S. 371, 383 (1879) (emphasis in the original). Arizona is allowed to require proof of citizenship for federal voter registration because of its expressly granted authority to develop and use a form complying with § 1973gg-7(b), and may deny voter registration for federal office for lack of such proof. *See id.* at 392 ("[W]e think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such cooperation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. . . .").

The majority notes that, if Arizona is correct that §§ 1973gg-4(a)(2) and 1973gg-7(b) allow the registration provision, "this would mean only that the NVRA allows Arizona to include a proof of citizenship requirement on its State Form." *Majority Opinion,* p. 4143 (citation omitted). "It would not mean that Arizona has authority to add this requirement to the Federal Form . . . " *Id.* However, this conclusion ignores the specific language of § 1973gg-4(a)(2). That language allows states to develop and use a state form complying with the statute's criteria for federal elections.

The majority also asserts that, even if the NVRA allows a state form to include additional conditions

within the parameters of § 1973gg-7(b) (like proof-of-citizenship), a state may not decline an applicant's voter registration for federal elections because of the applicant's failure to satisfy the additional conditions. *See Majority Opinion,* pp. 4140-41. According to the majority,

> [t]he NVRA's State Form provision, § 1973gg-4(a)(2), merely gives a state more options [and] Congress could have required all states to use *only* the Federal Form . . . Instead, Congress allowed States to use their state registration forms to register applicants for both state and federal elections (provided the state form complies with § 1973gg-7(b)). But states cannot reject applicants who register for federal elections who use the Federal Form. . . . *Majority Opinion,* pp. 4140-41 (emphasis by the majority).

Again, the majority's attempt to rebut Arizona's arguments and this dissent contradicts the language of the NVRA and leads to an absurd result. Under the majority's argument, the state form (and the additional conditions allowed in the state form) have no real effect, because the applicant must only meet the Federal Form requirements in order to register for federal elections. Thus, Arizona must allow an applicant, satisfying all but the proof-of-citizenship requirement, to be registered to vote in federal elections, while not allowing the applicant to be registered for state elections. This faulty interpretation contradicts the NVRA's plain language that "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." 42 U.S.C. § 1973gg-4(a)(2) (emphasis added). Put differently, under the majority's view, a state "registration form that meets all the criteria stated in section 1973gg-7(b)" but that includes an additional condition beyond the Federal Form requirements may not be used to register "voters in elections for Federal office," although the state form is specifically allowed by the language in § 1973gg-4(a)(2).

In addition, the majority believes that my interpretation of § 1973gg-4(a)(2) substitutes "instead of" for "[i]n addition to." *Majority Opinion,* p. 4141. However, my interpretation is loyal to the wording "[i]n addition to," because the Federal Form requirements must be met. State form requirements, constrained by § 1973-gg-7(b), are added to the Federal Form requirements. In contrast, the majority's view of § 1973gg-4(a)(2) basically strikes the statute's text allowing state forms to be used "[i]n addition to" the Federal Form "for the registration of voters in elections for Federal office."

The majority's view makes voter registration burdensome for states. For example, an Arizona applicant meeting the Federal Form requirements, but lacking proof-of-citizenship, would have to be allowed to vote for federal officials but could not vote for state officials. States that desire a proof-of-citizenship requirement in their state forms (as the majority suggests is allowed by the NVRA), would be forced to

track whether their residents are registered to vote for federal elections, state elections, or both. In essence, the majority's alteration of the statute imposes an unnecessary burden on the states. Although "it is not our task to assess the consequences of each approach and adopt one that produces the least mischief[,]" *Lewis v. City of Chi., Ill.*, 130 S. Ct. 2191, 2200 (2010), the majority's view, ignoring the plain meaning of the NVRA, cannot be what Congress intended. This is especially true when one considers that the statutory allowance for a state form does not displace the importance of the Federal Form or the delegated authority to the EAC to determine the contents of the Federal Form. The Federal Form maintains its importance, because its use is required in all states. The Federal Form, therefore, establishes a minimum set of requirements. The EAC's rejection of Arizona's request to include a proof-of-citizenship requirement demonstrates that the EAC served its purpose of establishing a minimum (not a maximum) set of requirements for all states. Then, states individually are allowed to impose additional requirements within the strict bounds of § 1973gg-7(b).

The majority believes that the proof-of-citizenship requirement disrupts the goal of the NVRA – to streamline the registration process. *See Majority Opinion,* pp. 4142-44. Although the NVRA seeks to simplify and harmonize registration procedures, the statute also identifies "protect[ing] the *integrity* of the electoral process" and "enhanc[ing] the participation of *eligible* citizens as voters in elections for Federal

office" as guiding purposes of the statute. 42 U.S.C. § 1973gg(b) (emphasis added). Even under the majority's complementary analysis conducted pursuant to *Siebold* and *Foster v. Love,* 522 U.S. 67 (1997), *see Majority Opinion,* p. 4131, Arizona's proof-of-citizenship procedure complements – rather than conflicts with – these important purposes. *See Siebold,* 100 U.S. at 384; *Foster,* 522 U.S. at 74 (holding that a state election law is preempted only "to [the] extent [that] it conflicts with federal law"). The stated harmonious purposes are not served if ineligible voters are allowed to register.

Finally, even though allowing states to "develop and use" their own forms (if compliant with § 1973gg-7(b)) may decrease the efficiency of a Federal Form, this policy consideration cannot overrule the express terms of the statute. *DePierre v. United States,* 131 S. Ct. 2225, 2233 (2011) ("That we may rue inartful legislative drafting, however, does not excuse us from the responsibility of construing a statute as faithfully as possible to its actual text. . . .") (footnote reference omitted); *Lewis,* 130 S. Ct. at 2200 ("Truth to tell, however, both readings of the statute produce puzzling results. . . . In all events, it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted. . . ."); *cf. United States v. Kennedy,* 643 F.3d 1251, 1266 (9th Cir. 2011) (Ikuta, J.) (determining that a statute compensating victims of child pornography was "a poor fit for these types of offenses[,]" but acknowledging that

"the responsibility lies with Congress, not the courts, to develop a scheme to ensure that defendants . . . are held liable . . . ").

In sum, the majority's holding hinges on § 1973gg-4(a)(1)'s requirement that states "accept and use" the Federal Form. However, § 1973gg-4(a)(2) also allows a state to "develop and use" its own form if it complies with the broad standards in § 1973gg-7(b). Therefore, I am unable to see how Arizona's registration provision squarely conflicts with the NVRA or that the NVRA "assume[s] exclusive control of the *whole* subject. . . ." *Siebold,* 100 U.S. at 383 (emphasis in the original).[1]

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[1] Chief Judge Kozinski describes the NVRA as "readily susceptible to the interpretation of the majority, but also that of the dissent. . . ." *Concurring Opinion,* p. 4192. His well-drafted dissent to the original panel opinion said it better. *See Gonzalez v. Arizona (Gonzalez II),* 624 F.3d 1162, 1206 (9th Cir. 2010) (Kozinski, J., dissenting) ("The NVRA doesn't say that states must treat the federal form as a complete application. . . . There's no question that Arizona accepts and uses the federal form for the information contained in it. Arizona only asks for proof of citizenship in addition to the form in order to complete the registration process."), *reh'g en banc granted & opinion withdrawn,* 649 F.3d 953 (9th Cir. 2011). This en banc concurrence discusses the statutory language "accept and use" in isolation, with no reference to the "[i]n addition" language in 42 U.S.C. § 1973gg-4(a)(2), *see Concurring Opinion,* again diverging from his prior dissent, where he noted: "[S]ection 1973gg-4(a)(2) . . . allows states to 'develop and use' their own form if it 'meets all of the criteria stated in section 1973gg-7(b).' [*Gonzalez v. Arizona (Gonzalez I),* 485 F.3d 1041 (9th Cir. 2007),] reads the statute correctly; it is the majority here that is mistaken."

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Gonzalez II, 624 F.3d at 1205. In fact, Chief Judge Kozinski previously identified a basic problem with the majority's view via a single question: "[I]f the statute permits zero deviation from the federal form, why permit states to develop their forms at all? The only development needed would be photocopying the federal form." *Id.* at 1209.

To determine its meaning, all of the NVRA's language must be read together and not in isolation. *See Samantar,* 130 S. Ct. at 2289 ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole. . . .") (citation and alteration omitted). When read together, the meaning is clear. States must accept and use the Federal Form for registering voters for federal elections, but may also develop and use a state form with additional conditions if they comply with § 1973gg-7(b). When the meaning of the statute is clear, reverting to legislative history is inappropriate. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 567 (2005); *see also Hamdan v. Rumsfeld,* 548 U.S. 557, 665-68 (2006) (Scalia, J., dissenting) ("We have repeatedly held that . . . reliance [on legislative history] is impermissible where, as here, the statutory language is unambiguous. . . .").

The legislative history is also unhelpful here because it is unreliable. "[L]egislative history is itself often murky, ambiguous, and contradictory." *Exxon Mobil,* 545 U.S. at 568; *see also Conroy v. Aniskoff,* 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: 'The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself. . . .*'") (quoting *Aldridge v. Williams,* 44 U.S. 9, 24 (1845) (emphasis in the original)). In fact, this case is a glaring example of the flaws of using legislative history. Although the legislative history cited by Chief Judge Kozinski supports his reasonable argument, the original view of the NVRA's sponsor casts doubt on the clarity of that legislative history. Senator Ford, the sponsor of the bill, thought that "there is nothing in the bill now that would preclude the State's requiring presentation of documentary evidence of citizenship."

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Siebold meticulously outlined the interplay between election regulations promulgated by a state government and Congress respectively. In the process, the United States Supreme Court took care to emphasize the respect that should be accorded the procedures implemented by states. *See Siebold,* 100 U.S. at 394 ("State rights and the rights of the United States should be equally respected. *Both are essential* to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate

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139 Cong. Rec. S2897-4, at S2902 (Mar. 16, 1993). He thought that an amendment specifying that a state could require proof-of-citizenship was redundant. *See id.* Therefore, even though the Conference Committee opined that the unamended NVRA disallowed proof-of-citizenship, H.R. Rep. No. 103-66, at 20 (1993), reprinted in 1993 U.S.C.C.A.N. 140, 148-49 (Conf. Rep.), it is unclear how many of the members of Congress who voted for the NVRA agreed with Senator Ford. *See Exxon Mobil,* 545 U.S. at 570 ("The utility of either can extend no further than the light it sheds on how the enacting Legislature understood the statutory text. Trying to figure out how to square the Subcommittee Working Paper's understanding with the House Report's understanding, or which is more reflective of the understanding of the enacting legislators, is a hopeless task."); *cf. Hamdan,* 548 U.S. at 666 (Scalia, J., dissenting) ("Whether the floor statements are spoken where no Senator hears, or written where no Senator reads, they represent at most the views of a single Senator. . . ."). As has been previously said, "[j]udicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil,* 545 U.S. at 568 (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 Iowa L. Rev. 195, 214 (1983)).

the one, we should not allow our zeal to nullify or impair the other.") (emphasis added).

The Supreme Court recognized the right of Congress to exercise its power to enact voting regulations that would supersede regulations promulgated by a state. *See id.* at 393. However, the Supreme Court also noted that "we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations . . . " *Id.*

The Supreme Court further reasoned that the power of Congress to enact statutes governing state matters "does not derogate from the power of the State to execute its laws *at the same time and in the same places*. . . ." *Id.* at 395 (emphasis added). The laws of the state are preempted if, and only if, "*both cannot be executed* at the same time. . . ." *Id.* (emphasis added).

In *Siebold,* there was no dispute regarding a conflict between the state and federal regulations. Rather, the question raised was whether Congress may enact partial regulations to be implemented together with state regulations governing election procedures. *See id.* at 382. Having answered that question in the affirmative, the Supreme Court denied the writ of habeas corpus filed by defendants who were convicted of violating the federal laws. *See id.* at 374, 399.

Foster, the more recent case, addressed an actual conflict between a state law and a federal law. Indeed, in *Foster* a blatant conflict existed between federal statutes requiring Congressional elections to be held "the Tuesday after the first Monday in November in an even-numbered year" and a state statutory scheme under which no election was held on the date designated by Congress if a candidate received a majority of the votes during an earlier "open primary" election. 522 U.S. at 68-69.

The Supreme Court explained that the issue to be decided was "a narrow one *turning entirely* on the meaning of the state and federal statutes . . . " *Id.* at 71 (emphasis added). The Court defined election as encompassing "the combined actions of voters and officials meant to make a final selection of an office-holder . . . " *Id.* The Court noted that Congress had established the Tuesday following the first Monday in November as "the day" for electing members of Congress. *Id.* Because the system in Louisiana was "concluded as a matter of law before the federal election day, with no act in law or in fact to take place on the date chosen by Congress," the Louisiana statute conflicted with 2 U.S.C. § 7, and was preempted. *Id.* at 73.

Because no Congressional election was to be held on the date Congress explicitly designated as "the day" for holding Congressional elections, the Louisiana statutory scheme clearly and directly conflicted with § 7. Reiterating that federal law "mandates holding all elections for Congress . . . on a single day

throughout the Union," *id.* at 70, the Court voided Louisiana's statutory scheme. *See id.* at 74.

Unlike the statutory scheme voided in *Foster,* Proposition 200's proof-of-citizenship provision does not present the blatant conflict addressed by the Supreme Court in that case. Indeed, the majority rests its analysis on what it perceives to be the "expansive" sweep of the Elections Clause. *Majority Opinion,* p. 4126-27 n.8. However, the message from *Siebold* is to the opposite effect. After taking great pains to emphasize the equal role of the states in preserving the integrity of federal elections, the Supreme Court counseled that we should not hasten to declare preemption of a state statutory scheme. Indeed, *Siebold* expressly held that the paramountcy of federal law extends only "so far as the two are inconsistent, and no farther. . . ." *Siebold,* 100 U.S. at 386. The Court clarified that state and federal enactments conflict only "[i]f both cannot be performed . . . " *Id.*

Foster couched its holding in similar fashion, clarifying that the preeminence of federal statutes over state statutes applies only to the extent that the two conflict, and only "so far as the conflict extends . . . " *Foster,* 522 U.S. at 69, (*quoting Siebold,* 100 U.S. at 384).

In making the determination whether the Louisiana statutory scheme violated 2 U.S.C. § 7, the Supreme Court focused on the word "election" as used in § 7. *Id.* at 71. The Court consulted a dictionary for

the definition of "election" to determine if a conflict existed between Louisiana's statutory scheme and § 7.

It is important to remember that the Supreme Court opined that State enactments are superseded by Federal enactments only "[i]f both cannot be performed . . . " *Siebold,* 100 U.S. at 386. As applied in *Foster,* the state statutory scheme was voided because it was impossible to hold a Congressional election on the designated day if the election was in fact completed on an earlier date. *See Foster,* 522 U.S. at 73.

In my view, the majority opinion has stretched the principle established in *Siebold* and applied in *Foster* beyond its intended bounds.[2]

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[2] I do not agree that the cases cited on pages 4126-27 n.8 of the majority opinion establish that the Supreme Court has "construed Congress's authority under the Election Clause expansively." Rather, in the earlier years of this nation's existence, when many states resisted the notion of a centralized government, these cases served to emphasize that federal elections conducted in the various states were subject to federal regulation. *See, e.g., The Ku Klux Cases,* 110 U.S. 651, 657-58 (1884) ("If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends, from violence and corruption. . . ."); *id.* at 662 ("This proposition answers, also, another objection to the constitutionality of the laws under consideration, namely, that the right to vote for a member of congress . . . is governed by the law of each state respectively. . . .").

Indeed, both *Siebold* and *Foster* took care to delineate that preemption extended only as far as a conflict exists, and no farther. *See Siebold,* 100 U.S. at 386; *Foster,* 522 U.S. at 69. And a conflict exists only if the two regulations cannot coexist. *See Siebold,* 100 U.S. at 386. As discussed above, such is not the case for Proposition 200's requirement that a prospective voter present proof of citizenship, when considered with the contents of the Federal Form.

The fact that the NVRA contains a provision precluding the requirement of "notarization of other formal authentication" in no way conflicts with Proposition 200's proof-of-citizenship requirement. Notarization and authentication are concerned with the genuineness of an executed document. *See, e.g.,* Federal Rule of Evidence 901(a) ("The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."); *see also In re Big River Grain, Inc.,* 718 F.2d 968, 971 (9th Cir. 1983) (noting that "the notary's function is to protect against recording false instruments . . . "). In contrast, Proposition 200's proof-of-citizenship requirement has nothing to do with notarization or authentication and everything to do with affirming eligibility for registration. Because the requirements of both the NVRA and Proposition 200 may be met without conflict, they can easily co-exist under the Election Clause. *See Siebold,* 100 U.S. at 386; *Foster,* 522 U.S. at 69. As both statutes may be enforced with no conflict, the NVRA does not pre-empt Proposition 200. *See id.* For

that reason, I would affirm the district court's grant of summary judgment to the State of Arizona. I respectfully dissent from the majority's conclusion to the contrary.

APPENDIX D

485 F.3d 1041

United States Court of Appeals,
Ninth Circuit.

Maria M. GONZALEZ; Bernie Abeytia; Arizona Hispanic Community Forum; Chicanos por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Luciano Valencia; Valle del Sol; The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; People for the American Way Foundation; Hopi Tribe, Plaintiffs-Appellees,

v.

State of ARIZONA; Jan Brewer, in her official capacity as Secretary of State of Arizona; Shelly Baker, La Paz County Recorder; Berta Manuz, Greenlee County Recorder; Lynn Constable, Yavapai County Election Director; Kelly Dastrup, Navajo County Election Director; Laura Dean-Lytle, Pinal County Recorder; Judy Dickerson, Graham County Election Director; Donna Hale, La Paz County Election Director; Susan Hightower Marlar, Yuma County Recorder; Gilberto Hoyos, Pinal County Election Director; Laurette Justman, Navajo County Recorder; Lenora Johnson, Apache County Recorder; Patti Madrill, Yuma County Election Director; Joan McCall, Mohave County Recorder; Melinda Meek, Santa Cruz County Election Director; Suzie Sainz, Santa Cruz County Recorder; Thomas Schelling, Cochise County Election Director; Allen Tempert, Mohave County Election Director; Ann Wayman-Trujillo, Yavapai County Recorder;

Wendy John, Graham County Recorder; Candace Owens, Coconino County Recorder; Patty Hansen, Coconino County Election Director; Christine Rhodes, Cochise County Recorder; Linda Haught Ortega, Gila County Recorder; Dixie Mundy, Gila County Election Director; Brad Nelson, Pima County Election Director; Karen Osborne, Maricopa County Election Director; Yvonne Pearson, Greenlee County Election Director; Penny Pew, Apache County Election Director; Helen Purcell; F. Ann Rodriguez, Pima County Recorder, Defendants,

and

Yes on Proposition 200, Defendant-Intervenor-Appellant.

Maria M. Gonzalez; Bernie Abeytia; Arizona Hispanic Community Forum; Chicanos por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Luciano Valencia; Valle del Sol, Plaintiffs-Appellants,

and

The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; People for the American Way Foundation; Hopi Tribe, Plaintiffs,

v.

State of Arizona; Jan Brewer, in her official capacity as Secretary of State of Arizona; Shelly Baker, La Paz County Recorder; Berta Manuz, Greenlee County Recorder; Lynn Constable, Yavapai County Election Director; Kelly Dastrup, Navajo County Election Director; Laura Dean-Lytle, Pinal County Recorder;

Judy Dickerson, Graham County Election Director; Donna Hale, La Paz County Election Director; Susan Hightower Marlar, Yuma County Recorder; Gilberto Hoyos, Pinal County Election Director; Laurette Justman, Navajo County Recorder; Lenora Johnson, Apache County Recorder; Patti Madrill, Yuma County Election Director; Joan McCall, Mohave County Recorder; Melinda Meek, Santa Cruz County Election Director; Suzie Sainz, Santa Cruz County Recorder; Thomas Schelling, Cochise County Election Director; Allen Tempert, Mohave County Election Director; Ann Wayman-Trujillo, Yavapai County Recorder; Wendy John, Graham County Recorder; Candace Owens, Coconino County Recorder; Patty Hansen, Coconino County Election Director; Christine Rhodes, Cochise County Recorder; Linda Haught Ortega, Gila County Recorder; Dixie Mundy, Gila County Election Director; Brad Nelson, Pima County Election Director; Karen Osborne, Maricopa County Election Director; Yvonne Pearson, Greenlee County Election Director; Penny Pew, Apache County Election Director; Helen Purcell, Maricopa County Recorder; F. Ann Rodriguez, Pima County Recorder, Defendants-Appellees,

and

Yes on Proposition 200, Defendant-Intervenor.

Maria M. Gonzalez; Bernie Abeytia; Arizona Hispanic Community Forum; Chicanos por La Causa; Friendly House; Jesus Gonzalez; Debbie Lopez; Southwest Voter Registration Education Project; Luciano Valencia; Valle del Sol, Plaintiffs,

and

The Inter Tribal Council of Arizona, Inc.; Arizona Advocacy Network; Steve M. Gallardo; League of United Latin American Citizens Arizona; League of Women Voters of Arizona; People for the American Way Foundation; Hopi Tribe, Plaintiffs-Appellants,

v.

State of Arizona; Jan Brewer, in her official capacity as Secretary of State of Arizona; Shelly Baker, La Paz County Recorder; Berta Manuz, Greenlee County Recorder; Lynn Constable, Yavapai County Election Director; Kelly Dastrup, Navajo County Election Director; Laura Dean-Lytle, Pinal County Recorder; Judy Dickerson, Graham County Election Director; Donna Hale, La Paz County Election Director; Susan Hightower Marlar, Yuma County Recorder; Gilberto Hoyos, Pinal County Election Director; Laurette Justman, Navajo County Recorder; Lenora Johnson, Apache County Recorder; Patti Madrill, Yuma County Election Director; Joan McCall, Mohave County Recorder; Melinda Meek, Santa Cruz County Election Director; Suzie Sainz, Santa Cruz County Recorder; Thomas Schelling, Cochise County Election Director; Allen Tempert, Mohave County Election Director; Ann Wayman-Trujillo, Yavapai County Recorder; Wendy John, Graham County Recorder; Candace Owens, Coconino County Recorder; Patty Hansen, Coconino County Election Director; Christine Rhodes, Cochise County Recorder; Linda Haught Ortega, Gila County Recorder; Dixie Mundy, Gila County Election Director; Brad Nelson, Pima County Election Director; Karen Osborne, Maricopa County Election Director; Yvonne Pearson, Greenlee County Election Director; Penny Pew, Apache County Election

Director; Helen Purcell, Maricopa County Recorder; F. Ann Rodriguez, Pima County Recorder, Defendants-Appellees,

and

Yes on Proposition 200, Defendant-Intervenor.

Nos. 06-16521, 06-16702, 06-16706.
Argued and Submitted Jan. 8, 2007.
Filed April 20, 2007.

Joel M. Spector, Lakewood, CO, for defendant-intervener/appellant Yes on Proposition 200.

Nina Perales, San Antonio, TX, for plaintiffs-appellees/appellants Gonzalez, et al.

Thomas L. Hudson, Phoenix, Arizona, for ITCA plaintiffs.

Mary O'Grady, Assistant Attorney General, Phoenix, Arizona, for defendants/appellees, State of Arizona, et al.

Appeal from the United States District Court for the District of Arizona; Roslyn O. Silver, District Judge, Presiding. D.C. No. CV-06-01268-ROS.

Before MARY M. SCHROEDER, Chief Circuit Judge, JOHN T. NOONAN, Circuit Judge, and GEORGE P. SCHIAVELLI,* District Judge.

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* The Honorable George P. Schiavelli, United States District Judge for the Central District of California, sitting by designation.

SCHROEDER, Chief Judge.

This litigation involves Proposition 200, enacted pursuant to Arizona voter initiative in 2004. The Proposition amended Arizona law to require persons wishing to register to vote for the first time in Arizona to present proof of citizenship, and to require all Arizona voters to present identification when they vote in person at the polls.

Plaintiffs are Arizona residents, Indian tribes and various community organizations. They filed this action in district court, challenging the validity of the Proposition on six asserted grounds: (1) that it is an unconstitutional poll tax, in violation of the Twenty-fourth Amendment to the United States Constitution; (2) that it violates the Equal Protection Clause of the Fourteenth Amendment because it imposes a disproportionate burden on naturalized citizens; (3) that it impedes the Fourteenth Amendment's guarantee of the fundamental right to vote; (4) that it violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a); (5) that it violates the Civil Rights Act, 42 U.S.C. §§ 1971(a)(2)(A) and (B); and (6) that it violates the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* ("NVRA").

Plaintiffs filed their complaint in May 2006, seeking an injunction, pending trial, against the operation of both the registration and the voting provisions of the Proposition. On September 11, 2006, the district court denied a preliminary injunction. Shortly before the November 2006 general election, plaintiffs filed

their notice of appeal and also sought, from a motions panel of this Court, an emergency interlocutory injunction. Time was of the essence to plaintiffs because the 2006 general election was imminent. A regular two-judge motions panel of this court granted the requested relief and, in a brief order, enjoined enforcement of the Proposition's provisions.

On the application of the State and four counties, the Supreme Court vacated the emergency injunction because the motions panel gave no reasons for its action. *See Purcell v. Gonzalez,* 549 U.S. 1, 127 S.Ct. 5, 166 L.Ed.2d 1 (2006). The Supreme Court explained that, because the motions panel had not provided any reasoning, it could not determine whether the panel had given appropriate deference to the district court's denial of the requested relief. *Id.* at 5. In a separate opinion, Justice Stevens stressed that the case would benefit from the development of a full record regarding both the scope of voter disenfranchisement resulting from enforcement of the Proposition and the "prevalence and character" of the ostensible voter fraud that the Proposition was intended to counter. *Id.* at 5-6 (opinion of Stevens, J., concurring).

In the wake of the Supreme Court's opinion, plaintiffs chose not to continue to seek injunctive relief with respect to the in-person voting identification requirement. Before us now, on the same underlying record that was before the motions panel, is plaintiffs' appeal of the district court's denial of preliminary injunctive relief with respect only to the

voter registration requirement. We conclude that the district court did not abuse its discretion in denying injunctive relief with respect to this requirement, because the limited record before us does not establish that the balance of hardships and likelihood of success on the merits of plaintiffs' claims justify an injunction at this stage of the proceedings. The litigation remains pending in the district court. There, final resolution of the scope of any appropriate permanent relief can be determined on the basis of a fully developed record, and well before the next general election in 2008.

BACKGROUND

Voters approved Proposition 200 in the 2004 general election, and it was enacted on December 8, 2004. *See* A.R.S. § 16-166. In relevant part, Proposition 200 amended Arizona law to direct registering voters to "submit evidence of United States citizenship with the application and the registrar [to] reject the application if no evidence of citizenship is attached." A.R.S. § 16-152(A)(23). "Satisfactory evidence of citizenship" may be shown by including, with the voter registration form, any of the following: the number of an Arizona driver's license or nonoperating identification license issued after October 1, 1996 (the date Arizona began requiring proof of lawful presence in the United States to obtain a license); a legible copy of a birth certificate; a legible copy of a United States passport; United States naturalization documents or the number of the certificate

of naturalization; "other documents or methods of proof that [may be] established pursuant to" federal immigration law. A.R.S. § 16-166(F). The law applies to voters registered in Arizona before its effective date only if they seek to change registration from one county to another. A.R.S. § 16-166(G).

The 2006 election was the first general election to which Proposition 200 applied. Plaintiffs filed their challenges to it on May 9, 2006 and immediately moved for a preliminary injunction against both the proof of citizenship requirement and the in-person voter identification requirement. On September 11, 2006, the district court denied plaintiffs' motion but did not issue Findings of Fact and Conclusions of Law at that time.

Plaintiffs appealed the denial to this Court and the Clerk set a briefing schedule that concluded on November 21, 2006 – two weeks after the 2006 general election. Plaintiffs therefore requested an injunction pending appeal that, pursuant to this Court's rules then in effect, was heard by a two-judge motions panel. *See* 9th Cir. R. 3-3 (2006). On October 5, 2006, the motions panel issued an order granting plaintiffs' emergency request for an injunction pending appeal, retaining the briefing schedule, and stating: "The court enjoins implementation of Proposition 200's voting identification requirement in connection with Arizona's November 7, 2006 general election; and enjoins Proposition 200's registration proof of citizenship requirements so that voters can register before the October 9, 2006 registration deadline. This injunction shall remain in effect pending disposition of

the merits of these appeals." Order in Nos. 06-16702, 06-16706 (filed Oct. 5, 2006), at 1-2.

Four days later, the motions panel denied defendants' request for reconsideration. The district court had not yet entered Findings of Fact and Conclusions of Law. The State and four counties then sought relief from the injunction in the United States Supreme Court. On October 12, 2006, while review by the Supreme Court was still pending, the district court issued the Findings of Fact and Conclusions of Law explaining its denial of the preliminary injunction. The Findings stated that, although plaintiffs had shown some likelihood of success on the merits of some of their claims, the court could not conclude "at this stage [that] they have shown a strong likelihood of success" on any of the claims. It further concluded that the balance of hardships tipped sharply in favor of defendants, the state and counties that were all fully prepared to enforce the Proposition's provisions.

On October 20, 2006, the Supreme Court issued its opinion in which it construed the State's filing as a petition for certiorari, granted the petition, and vacated the motions panel's injunction. *See Purcell*, 127 S.Ct. at 5. The opinion did not affect plaintiffs' underlying appeal of the district court's denial of preliminary injunctive relief, which remained pending in this Court. Following the Supreme Court's order vacating the emergency injunction pending appeal, the parties proceeded to brief the merits of the appeal. Plaintiffs-appellants at that point elected to limit their appeal to the registration identification

requirement. The voter identification requirement therefore is not before us.

Because appellants moved for a preliminary injunction before any evidentiary proceedings could occur, the information in the record regarding Proposition 200's effect on voter registration is not extensive. It contains affidavits from four individuals who claim the new law burdens their right to vote. All four lack a driver's license, a birth certificate or any other document sufficient to register to vote. It also indicates that, between 1996 and the present, as many as 232 non-citizens tried to register to vote and that the State prosecuted ten of those 232 alleged non-citizens. The record is silent, however, as to how many non-citizens illegally registered to vote without detection, and also as to how many Arizona citizens lack all of the documents for registration the State will accept. According to data extrapolated from population estimates and voter registration rolls, voter registration in Arizona appears to have declined since January 2005, but this data provides no enlightenment as to the extent or cause of the registration decline.

In its Findings of Fact and Conclusions of Law, the district court found that, while plaintiffs had shown "a possibility of success" on the merits of some of their claims, they had not shown a strong likelihood of success on any of them. Indeed, the district court expressed its "reservations regarding the reliability" of some of the record evidence and noted that it had "no other reliable evidence" with which to

compare it. Furthermore, in concluding that the balance of the hardships tipped sharply in favor of defendants, the district court found that plaintiffs' delay in filing their complaint undermined the contention that immediate relief was necessary. It also emphasized that the State had invested significant time and effort in preparing to enforce the new requirements and that an order reinstituting the prior procedures likely would confuse voters.

ANALYSIS

Appellants here make four arguments to support a grant of injunctive relief, all of which the district court rejected. We deal with each in turn.

I. Poll Tax

Appellants contend that Proposition 200's registration identification requirement amounts to an unconstitutional poll tax in violation of the Twenty-fourth Amendment because some Arizona citizens possess none of the documents sufficient for successful registration. As a result, appellants say, these citizens will be required to spend money to obtain documents necessary to register to vote and, therefore, are being taxed to vote.

The Twenty-fourth Amendment proscribes any denial or abridgement of the right to vote for "failure to pay any poll tax or other tax." U.S. Const. amend. XXIV. The Amendment was passed in order to combat

the "disenfranchisement of the poor[,]" which was the intention of the early poll taxes. *Harman v. Forssenius,* 380 U.S. 528, 539, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965). Appellants assert that Proposition 200 effects exactly this result in Ariand thus is unconstitutional.

Arizona's new law, however, is not like the system found unconstitutional in *Harman.* That case examined a Virginia provision that required voters to pay a poll tax, but allowed those who were unwilling or unable to pay the tax to file a certificate of residency. *Id.* at 530-31, 85 S.Ct. 1177. The Supreme Court struck down the Virginia system specifically because it was premised on the requirement that some voters pay a poll tax. *Id.* The Court emphasized that the issue was not whether Virginia could require all voters to file a certificate of residency each year, but that voters were required to file such certificate only if they refused to pay a poll tax. *Id.* at 542, 85 S.Ct. 1177. Thus, their right to vote was "abridged . . . by reason of failure to pay the poll tax." *Id.*

Here, voters do not have to choose between paying a poll tax and providing proof of citizenship when they register to vote. They have only to provide the proof of citizenship. Nor does Arizona's new law "make[ ] the affluence of the voter or payment of any fee an electoral standard." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (holding that a state may not condition voting in state elections on payment of a tax). Plaintiffs have demonstrated little likelihood of

success of proving that Arizona's registration identification requirement is a poll tax.

II. Severe Burden on the Fundamental Right to Vote

Appellants argue that Proposition 200 imposes an undue burden on the right to vote in Arizona and the State therefore was required to demonstrate to the district court that the law would survive strict scrutiny. *See Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). In *Burdick,* the Supreme Court determined that laws that burden the right to vote only incidentally need not be strictly scrutinized. *Id.* at 433, 112 S.Ct. 2059. Only "severe" restrictions "must be narrowly drawn to advance a state interest of compelling importance." *Id.* at 434, 112 S.Ct. 2059. State election laws that impose "reasonable, nondiscriminatory restrictions . . . [on] the rights of voters" need be supported only by "important regulatory interest[s]." *Id.*

Burdick upheld a Hawaii prohibition on write-in candidates against a challenge that the ban severely burdened voters' right to vote for the candidate of their choice. Appellants have not demonstrated that Proposition 200's identification requirement imposes any more severe burden. In this Circuit, courts "uphold as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process." *Rubin v. City of Santa Monica,* 308

F.3d 1008, 1014 (9th Cir.2002). Proposition 200 applies to all Arizonans. At this stage of the proceedings, appellants have not shown that it is anything other than an even-handed and politically neutral law.

The evidence that Arizona citizens may be burdened by the new law consists of four declarations from individuals who are not parties to the litigation. These declarants object that obtaining the documentation sufficient to register would be "a burden." Because the vast majority of Arizona citizens in all likelihood already possess at least one of the documents sufficient for registration, whether the law severely burdens anyone, as the district court observed, is an "intense[ly] factual inquiry[,]" requiring development of a full record. *Gonzalez v. State of Arizona,* Nos. CV-06-1268, -1362, -1575, slip op. at 9 (Oct. 11, 2006). We therefore agree with the district court that, at this stage in the proceedings, appellants have not raised serious questions going to the merits of this argument.

III. Disproportionate Burden on Naturalized Citizens

Appellants argue that Proposition 200 imposes a disproportionate burden on naturalized citizens because it singles them out for more onerous documentation rules. Unlike native-born citizens, appellants contend, naturalized citizens who do not have a driver's or non-operating identification license, or a

passport, must present naturalization information to the county recorder to register to vote. These citizens may not submit photocopies of their naturalization certificates, as native-born citizens may do with birth certificates, because naturalization certificates may not be photocopied without lawful authority. *Compare* A.R.S. § 16-166(F)(2) *with* A.R.S. § 16-166(F)(4). This limitation, appellants argue, amounts to a disproportionate burden on naturalized citizens in violation of the Equal Protection Clause.

The record before us, however, contains no affidavits or declarations from naturalized citizens. Therefore, we do not know the extent to which this requirement may burden or inconvenience any such citizen. Furthermore, the statute appears to permit naturalized citizens to use the number of the certificate of naturalization on their registration forms. A.R.S. § 16-166(F)(4). Appellants present statistics suggesting that use of this number may result in the return of some registration forms for correction, which requires naturalized citizens to submit registration forms twice. There is no evidence in the record, however, to support this conclusion. Therefore, plaintiffs have not demonstrated a likelihood of success on this point.

IV. Violation of the NVRA

Appellants next claim that Proposition 200 is preempted by the NVRA because, they say, the NVRA prohibits states from requiring that registrants

submit proof of citizenship when registering to vote. The NVRA mandates that states either "accept and use the mail voter registration form prescribed by the Federal Election Commission[,]" 42 U.S.C. § 1973gg-4(a)(1), or, in the alternative, "develop and use [their own] form," as long as the latter conforms to the federal guidelines. *Id.* at § 1973gg-7(b).

The NVRA also prohibits states from requiring that the form be notarized or otherwise formally authenticated. *Id.* Appellants interpret this as a proscription against states requiring documentary proof of citizenship. The language of the statute does not prohibit documentation requirements. Indeed, the statute permits states to "require[ ] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant." *Id.* at § 1973gg-7(b)(1). The NVRA clearly conditions eligibility to vote on United States citizenship. *See* 42 U.S.C. §§ 1973gg, 1973gg-7(b)(2)(A). Read together, these two provisions plainly allow states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote. Thus, again plaintiffs have not demonstrated a likelihood of succeeding on the merits of this claim.

V. The Balance of Hardships

Appellants finally urge that the district court erred in finding that the balance of hardships tipped sharply in favor of appellees. In cases impacting elections, if a plaintiff seeking injunctive relief does

not show a strong likelihood of success on the merits, the court examines whether the plaintiff will be irreparably harmed by denial of an injunction, whether or not the balance of hardships favors the plaintiff, and whether the public interest will be advanced by injunctive relief. *Southwest Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 917 (9th Cir.2003) (internal quotation marks omitted). "[T]he less certain the district court is of the likelihood of success on the merits" of the claims, the greater the burden on the plaintiff to "convince [it] that the public interest and the balance of hardships tips in [plaintiffs'] favor." *Id.*

The district court determined that the balance of hardships tipped sharply in favor of defendants-appellees because plaintiffs-appellants waited well over a year to file suit and the State was irretrievably committed to enforcing the new law. The district court said that by the time plaintiffs filed suit, on May 9, 2006, the State had "invested enormous resources in preparing to apply Proposition 200[,]" and reinstituting the prior procedures "would undoubtedly cause confusion among election officials, boardworkers, and voters." *Gonzalez v. State of Arizona,* Nos. CV 06-1268, -1362, -1575, slip op. at 16-17 (Oct. 12, 2006). In claiming that the balance of hardships and the public interest favor injunctive relief, appellants present the same evidence the district court found insufficient to raise serious questions on the merits of their claims. This evidence does not

support the conclusion that the balance of hardships favors appellants.

Because the record before us shows neither that appellants raise serious questions going to the merits of their arguments nor that the balance of hardships tips in their favor, we agree with the district court that injunctive relief at this stage of the proceedings is not warranted.

VI. Intervention by "Yes on Proposition 200"

Under Federal Rule of Civil Procedure 24(a)(2), a party is entitled to intervene where "(1) the intervention is timely; (2) the applicant has a 'significant protectable interest relating to the property or transaction that is the subject of the action'; (3) 'the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest'; and (4) 'the existing parties may not adequately represent the applicant's interest.'" *Prete v. Bradbury,* 438 F.3d 949, 954 (9th Cir.2006) (quoting *United States v. Alisal Water Corp.,* 370 F.3d 915, 919 (9th Cir.2004) (internal citations omitted)).

Here, the citizen group that put forth significant effort to ensure the passage of Proposition 200, Yes on Proposition 200 ("Intervenor"), is not a party to this action. It sought permission from the district court to intervene pursuant to Rule 24(b), and also argued that it met the requirements for intervention as of right under Rule 24(a)(2). The district court ruled that Intervenor did not meet all of Rule 24(a)(2)'s

requirements and also refused to grant it permission to intervene. Intervenor appeals only the district court's ruling regarding Rule 24(a)(2).

In its denial, the district court found that Intervenor satisfied the first three parts of the Rule 24(a)(2) test, but that it had failed to show that "the existing parties may not adequately represent the applicant's interest." Fed.R.Civ.P. 24(a)(2). Where "the government is acting on behalf of a constituency it represents," as it is here, this court assumes that the government will adequately represent that constituency. *Prete,* 438 F.3d at 956; *see also Arakaki v. Cayetano,* 324 F.3d 1078, 1086 (9th Cir.2003). In order to overcome this presumption, the would-be intervenor must make a "very compelling showing" that the government will not adequately represent its interest. *Id.* at 1086.

Intervenor contends that the district court relied on the wrong precedent in requiring it to make a "very compelling showing." It urges that the court should have followed *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d 525 (9th Cir.1983), rather than *Prete.* But *Sagebrush Rebellion* is not analogous to this case.

Sagebrush Rebellion turns on the lack of any real adversarial relationship between the plaintiffs and the defendants. That is not the situation here. Nothing in the record before us suggests that defendants are unwilling or unable to defend Proposition 200. Indeed, they have done so at every level of the federal courts. The district court applied the correct precedent

and did not err in denying Yes on Proposition 200's motion to intervene as of right.

The order of the district court denying preliminary injunctive relief and denying the motion to intervene is AFFIRMED.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CV 06-1268-PHX-ROS **ORDER** (Filed Aug. 28, 2007)

The State of Arizona, the Arizona Secretary of State, and the majority of the county defendants, seek partial summary judgment.[1] For the following reasons, the motion will be granted.

On September 11, 2006, Plaintiffs appealed the Court's denial of their request for a preliminary injunction. On April 20, 2007, the Ninth Circuit issued an opinion affirming the denial of the preliminary injunction. The Ninth Circuit decision includes discussion of some of the legal issues still pending before this Court. Based on this Court's prior rulings, as well as the Ninth Circuit's opinion, Defendants are entitled to summary judgment on nine of Plaintiffs' claims.

[1] The only defendants that did not join the motion for summary judgment are the Coconino and Navajo county defendants.

I. Summary Judgment Standard

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). Substantive law determines which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

When a party seeks summary judgment early in the litigation, the opposing party may request additional time for discovery. According to Federal Rule of Civil Procedure 56(f), "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court . . . may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had." A continuance is proper only if the opposing party "shows, among other things, that the discovery would uncover specific facts which would preclude summary judgment." *United States Cellular Inv. Co. v. GTE Mobilnet, Inc.,* 281 F.3d 929, 939 (9th Cir. 2002). A Rule 56(f) continuance need not be granted if the claims fail as a matter of law. *Id.* at 939-40.

II. Plaintiffs' Claims

Defendants seek summary judgment on nine of Plaintiffs' claims. Each claim will be addressed separately.

A. National Voter Registration Act

Defendants seek summary judgment on Plaintiffs' claim that the National Voter Registration Act ("NVRA") prohibits the State of Arizona from requiring individuals from submitting proof of citizenship when registering to vote. The Ninth Circuit found that the language of the NVRA "does not prohibit documentation requirements." *Gonzalez v. Arizona,* 485 F.3d 1041,1050 (9th Cir. 2007). In fact, the Ninth Circuit found that the NVRA "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Id.* at 1050-51. The NVRA does not prohibit the State of Arizona's actions and Defendants are entitled to judgment as a matter of law on this issue.

B. Supremacy Clause

Plaintiffs' claim pursuant to the Supremacy Clause is premised on their belief that Prop. 200 and the NVRA are in conflict. (Doc. 300 p.21) Because Prop. 200 and the NVRA do not conflict, Plaintiffs have no cause of action pursuant to the Supremacy Clause and summary judgment will be granted on this claim.

C. Poll Tax

Defendants seek summary judgment on Plaintiffs' claim that Prop. 200's registration identification requirement amounts to an unconstitutional poll tax in violation of the Twenty-fourth Amendment. In resolving this issue, the Ninth Circuit found that Arizona's system "is not like the system found unconstitutional" by the Supreme Court in *Harman v. Forssenius,* 380 U.S. 528 (1965). *Id.* at 1049. In Arizona, "voters do not have to choose between paying a poll tax and providing proof of citizenship when they register to vote. They have only to provide the proof of citizenship." *Id.* Arizona's system does not, as a matter of law, qualify as a poll tax. Thus, Defendants are entitled to summary judgment on this issue.

D. 42 U.S.C. § 1971(a)(2)(A)

Section 1971(a)(2)(A) prohibits a person acting under color of law from "apply[ing] any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." Plaintiffs believe Prop. 200 conflicts with this section because Prop. 200 "creates two classes of voters: those who vote early and those who vote at the polls on election day." (Doc. 295 p.13) According to Plaintiffs, voters that choose to vote early are not subject to Prop. 200's identification requirements but voters

that vote at the polls on election day are subject to the requirements. Early voting "is an *inherently* different procedure from voting in person." *Indiana Democratic Party v. Rokita,* 458 F. Supp. 2d 775, 840 (S.D. Ind. 2006). Because early voting and voting at the polls are different types of voting, it is not a violation of § 1971(a)(2)(A) for Arizona to employ different "standards, practices, or procedures" to these two types of voting. 42 U.S.C. § 1971(a)(2)(A). Defendants are entitled to summary judgment on this claim.

E. 42 U.S.C. § 1971(a)(2)(B)

Section 1971(a)(2)(B) prohibits any person acting under color of law from "deny[ing] the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election." Plaintiffs believe that Prop. 200 violates this statute in two ways. First, the failure to provide valid identification at the polls is "an error or omission on any record or paper relating to any application, registrations, or other act requisite to voting." And second, proof of citizenship is not material for determining an individual's eligibility to vote. Neither argument is convincing.

The Court agrees with the analysis in *Rokita* that "the act of presenting photo identification in order to prove one's identity is by definition not an 'error or omission on any record or paper.'" *Rokita,* 458 F. Supp. 2d at 841. Thus, Prop. 200 does not violate the first portion of § 1971(a)(2)(B). Also, only citizens may vote. Requiring an individual to present proof of citizenship allows the State to determine if that individual is qualified to vote. Citizenship is material in determining whether an individual may vote and Arizona's decision to require more proof than simply affirmation by the voter is not prohibited. Thus, Prop. 200 does not violate the second portion of § 1971(a)(2)(B). Defendants are entitled to summary judgment on this claim.

F. Voting Rights Act

Before implementing any legislative or other changes affecting voting, Arizona is required to obtain federal approval of those changes. Plaintiffs believe that Arizona "did not comply with the federal requirement to describe its proposed election changes with 'sufficient particularity' to allow the Department of Justice to evaluate their impact on minority voters." (Doc. 297 p.14) Specifically, Plaintiffs believe that Arizona's submission to the Department of Justice was insufficient because it did not include a copy of A.R.S. § 16-121.01. It is undisputed, however, that Prop. 200 did not change A.R.S. § 16-121.01. Prop. 200 did change A.R.S. § 16-152 (requirements for voter registration) but that statute *was* submitted

to the Department of Justice in the preclearance submission. There is no issue of material fact regarding Arizona's preclearance of Prop. 200 and Defendants are entitled to summary judgment on this claim.

G. A.R.S. § 16-151(B)

Pursuant to A.R.S. § 16-151(B), "[t]he secretary of state shall make available for distribution through governmental and private entities the voter registration forms that are prescribed by the federal election commission." Plaintiffs claim that the Secretary of State is violating this statute by failing to make available the federal registration forms.

According to evidence submitted by Defendants, "[t]he Secretary of State's Office makes the Federal Form available to anyone who requests it." (Doc. 282-4 p.9) Also, the form is "available on the Election Assistance Commission's website . . . and can be easily printed or downloaded." (Id.) *See also* Maricopa County Election Director's deposition testimony (the form is available "on-line and . . . [they] have them on-line if somebody came in." (Doc. 308-2 p.3)). Plaintiffs have not presented any evidence that the form is not available or that any individual has been unable to obtain the form from the Secretary of State. Defendants are entitled to summary judgment on this claim.

H. A.R.S. § 16-121.01

Plaintiffs believe A.R.S. § 16-121.01 "provides that a person is presumed to be properly registered to vote on completion of a registration form . . . without the submission of further documentary proof of citizenship." (Doc. 1-2 p.7) Requiring any submission of proof of citizenship, according to Plaintiffs, is in direct conflict with § 16-121.01. Plaintiffs arrive at their conclusion by construing the statute in an overly strict manner.

Section 16-121.01 states "[a] person is presumed to be properly registered to vote on completion of a registration form as prescribed by § 16-152." Pursuant to § 16-152, voter registration forms must include "[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." Reading these statutes together, § 16-121.01 requires a prospective voter to complete a registration form and § 16-152 requires registration forms to alert prospective voters to the requirement that they submit proof of citizenship. These statutes do not conflict. An individual that *properly* completes a registration form as set forth in A.R.S. § 16-152 will be presumed to be properly registered pursuant to A.R.S. § 16-121.01. Plaintiffs have not shown that requiring a properly completed registration form violates the presumption set forth in A.R.S. § 16-121.01. Defendants are entitled to summary judgment on this claim.

I. Mandamus

In their response to the Motion for Summary Judgment, the Navajo Plaintiffs agreed "that the Court should grant summary judgment in favor of the State on the mandamus claim." (Doc. 292 p.2) Based on this statement, summary judgment on this claim will be granted.

Accordingly,

IT IS ORDERED Defendants' Motion for Summary Judgment (Doc. 282) is **GRANTED**.

IT IS FURTHER ORDERED the Motion for Summary Judgment Joinder (Doc. 283) is **GRANTED**.

IT IS FURTHER ORDERED a hearing on the parties' discovery dispute is set for August 30, 2007 at 1:30 p.m.

IT IS FURTHER ORDERED the parties shall submit a revised case management plan and proposed scheduling order. These revised documents should reflect the changes due to the granting of the summary judgment motion. The revised case management plan and proposed scheduling order shall be submitted by September 14, 2007.

IT IS FURTHER ORDERED a Rule 16 Scheduling Conference is set for September 28, 2007 at 10:30 a.m.

IT IS FURTHER ORDERED the Motion to Withdraw (Doc. 326) is **GRANTED**.

DATED this 28th day of August, 2007.

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

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CV 06-1268-PHX-ROS No. CV 06-1362-PHX-ROS (cons) No. CV 06-1575-PHX-ROS (cons) **ORDER** (Filed Sep. 11, 2006)

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

the public interest would not be advanced by granting the injunction. The Motions for Preliminary Injunction will be denied. Detailed findings of fact and conclusions of law will follow.

Accordingly,

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

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

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

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

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

DATED this 11th day of September, 2006.

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

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al., Plaintiffs, vs. State of Arizona, et al., Defendants.	No. CV 06-1268-PHX-ROS No. CV 06-1362-PHX-ROS (cons) No. CV 06-1575-PHX-ROS (cons) **ORDER** (Filed Oct. 12, 2006)

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

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

I. Proposition 200

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

A. Identification for Registration

After passage of Proposition 200, individuals wishing to register to vote must present "satisfactory evidence of United States citizenship" at the time they register. Arizona Revised Statutes ("A.R.S.") section 16-166. Satisfactory evidence of citizenship includes one of the following: "[t]he number of the applicant's driver license or nonoperating identification license issued after October 1, 1996"; "[a] legible photocopy of the applicant's birth certificate"; "[a] legible photocopy of pertinent pages of the applicant's United States passport"; "[a] presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization"; "[o]ther documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986"; or "[t]he applicant's bureau of Indian affairs card number,

tribal treaty card number or tribal enrollment number." *Id.* If an individual does not present such evidence, his or her registration will be rejected, often with instructions how the registration should be resubmitted. (Doc. 175, Ex. 1, p.30) (deposition of Karen Osborne stating rejected registrations are sent back to applicant with instructions on how to cure deficiencies and a stamped envelope for return to County Recorder).

B. Identification for Voting

Registered voters wishing to vote in-person on election day must present some form of identification to the poll workers. A.R.S. § 16-579. Proposition 200 provides a list of acceptable forms of identification and the Secretary of State has promulgated regulations setting forth the specific types of identification that are acceptable. *Id.* (Doc. 150, Ex. 3.) A voter may present either one form of identification with her photograph, name, and address, or two forms of identification that bear her name and address. A voter may present one of the following: a valid driver license; nonoperating identification license; tribal enrollment card or other form of tribal identification; or some other federal, state, or local government issued identification. *Id.* (Doc. 150 Ex. 3) If a voter does not have or does not wish to present one of the forms listed above, two of the following types of identification may be presented: utility bill; bank or credit union statement; vehicle registration; Indian census card; property tax statement; tribal enrollment

card; vehicle insurance card; recorder's certificate; or federal, state, or local government issued identification, including a voter registration card issued by the county recorder. (Doc. 150 Ex. 3) Certain counties have also chosen to accept "election material" as a form of non-photographic identification. Such "election material" is "Official Election Mail" that includes the voter's name and address and is sent, free of charge, to registered voters. (Doc. 150 Ex. 18)

C. Early Voting

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

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

> Q. And can you describe the process that the voter goes through when he or she shows up at your office to vote at the early voting site?

(Continued on following page)

is required of early voters that wish to vote in-person and language assistance is available at certain early voting locations. (Transcript pp. 105-106)

A. Yes. If you're talking about if – if you're talking about the county elections office, that's one thing. It may be somewhere else, like we have a branch in Tuba City, so I'll use the county elections office. They come in, they identify who they are. They sign in. They're given a ballot to vote. They're shown, you know, there is both sides, giving some instructions. They are pointed over to the Votermatic to complete that ballot, to seal it, to sign it, and return it to us.

Q. So in effect, it's almost identical to what the voter goes through at the polling place?

A. Except there is no ID asked for.

Q. No identification?

A. No identification is asked for per statute. The idea is it's an early ballot, because we check the signature, so no ID is asked for.

Q. So to vote early at one of these voting sites, a voter could show up, assuming there are no challenges, 33 days before the election –

A. That's correct.

Q. Vote a ballot, and not have to produce identification?

A. That's correct, because the ballots are all turned in back to us with their signatures on them, to compare to the rolls before they are determined if that ballot counts or doesn't count.

(8/30/06 Transcript pp. 106-107)

II. Procedural History

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

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

Maria M. Gonzalez, et al. ("Gonzalez Plaintiffs"), filed their complaint on May 9, 2006, requesting a temporary restraining order and a preliminary injunction that same day. (Case 06-1268, Doc. 1, 3, 7) The Gonzalez Plaintiffs filed on May 16, 2006 an

alternative application for a temporary restraining order focusing on a statutory argument. (Doc. 13) The Court held a status hearing on May 17, 2006 and set an expedited briefing schedule for the temporary restraining order issue. (Doc. 26) Oral argument solely on this issue was held on June 9, 2006. (Doc. 64) The Court denied the temporary restraining order ten days later. (Doc. 68) In the order denying the temporary restraining order, the Court set forth an expedited briefing schedule for the preliminary injunction. (Doc. 68)

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

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

The Inter Tribal Council of Arizona, Inc., et al. ("ITCA Plaintiffs"), filed their complaint on May 26, 2006 but did not file a separate motion or application for a temporary restraining order or preliminary injunction at the time the complaint was filed. (Case 06-1362, Doc. 1) The ITCA Plaintiffs sought consolidation with the *Gonzalez* case and consolidation was granted on June 6. (Doc. 13)

C. *Navajo Nation, et al. v. Jan Brewer et al.*, 06-1575

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

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

III. Standard for Preliminary Injunction

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

certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." *Id.*

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

IV. Plaintiffs' Arguments

All three Plaintiffs groups assert that Proposition 200 acts as an unconstitutional poll tax, violates the Equal Protection Clause of the Fourteenth Amendment, and impedes the fundamental right to vote. The Navajo Nation Plaintiffs raise claims pursuant to the Voting Rights Act and the Civil Rights Act. And the ITCA and Gonzalez Plaintiffs argue that Proposition 200 conflicts with the National Voter Registration Act of 1993 (the "NVRA"), the argument that was rejected by the Court in the Order denying the request for a temporary restraining order. After consideration of the parties' filings, the evidence presented

at the preliminary injunction hearing, and the additional briefing requested on the poll tax issue, the Court finds that "[P]laintiffs have shown a possibility of success on the merits" of some of their arguments but the Court "cannot say that at this stage they have shown a strong likelihood." *Southwest,* 344 F.3d at 919. Also, the balance of hardships and the public interest tips in favor of Defendants.

A. Poll Tax

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

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

The parties agree that the most instructive case is *Harman v. Forssenius,* 380 U.S. 528 (1965). There the Supreme Court addressed the constitutionality of Virginia's system. At the time, a Virginia statute required the payment of a $1.50 annual poll tax. Potential voters not wishing to pay the poll tax could file a certificate of residency each election year. According to *Harman,* the Twenty-fourth Amendment "nullifies sophisticated as well as simple-minded

modes of impairing the right guaranteed." *Id.* at 540-541. Therefore, the Court determined that Virginia's system would be invalid if it "impos[ed] a material requirement solely upon those who refuse[d] to surrender their constitutional right to vote in federal elections without paying a poll tax." *Id.* at 541. The Court concluded that the residency certificate was a "cumbersome procedure" and held that "the requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax." *Id.* at 542.

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

1. Registration Identification

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

The constructive poll tax at issue here does not fit within the traditional definition of a poll tax. Black's Law Dictionary defines a "poll tax" as a "fixed tax levied on *each person* within a jurisdiction." *Black's Law Dictionary* 1498 (8th ed. 2004) (emphasis added); *see also United States v. State of Texas,* 252

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

F. Supp. 234, 239 (W. D. Tex. 1966) ("The poll tax is imposed on all residents of the State. . . ."). The poll tax here will not have to be paid by approximately 98% of potential voters who already possess appropriate identification. The poll tax is only indirectly connected to the right to vote. Rather than paying a fee to be eligible to vote, Arizona voters must pay a fee for the issuance of a form of identification. Arizona does not bar from voting individuals who have not paid any voting fee to Arizona or completed any Arizona specific voting paperwork.[4] Finally, Proposition 200 could impose some burdens on the limited class of individuals that do not currently possess appropriate identification but "[e]lection laws will invariable impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). States have always "retain[ed] the power to regulate their own elections." *Id.* Arizona has chosen to require individuals prove they are eligible to participate in elections. Defining the fees some voters must pay to prove their eligibility (via proper identification) as "poll taxes" "would tie the hands of States seeking to assure that elections are operated equitably and

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

efficiently."[5] *Id.* Plaintiffs have not shown a strong likelihood of success on this issue.

2. Identification at the Polls

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

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

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

B. Equal Protection

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

In *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966), the Court found "that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666. That holding is premised on the finding that "the interest of the State, when it comes

to voting, *is limited to the power to fix qualifications.* Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." *Id.* at 668 (emphasis added). Accordingly, here Plaintiffs argue that the costs in obtaining proper identification result in making the affluence of the voter a relevant factor. Proposition 200 makes the affluence of the voter a relevant factor only in the same manner that a variety of other requirements do so as well.

The State of Arizona seeks to enforce the basic voter qualification of citizenship. The state does so by requiring individuals verify their identity when registering to vote and when voting in person.[6] These verification requirements understandably impose some cost on voters. The State of Arizona operates a limited number of polling locations. Travel to and from these polling locations imposes some cost on voters. A strict interpretation of Plaintiffs' argument would mean that requiring individuals to travel to the polls violates the Equal Protection Clause; voters with some financial means undoubtedly have an easier time traveling to the polls than poorer individuals. If states were barred from having any policies

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

that impose a disproportionate burden on voters based on their wealth, every election conducted in the United States would be conducted in violation of the Equal Protection Clause. This is not a finding the Court will make. The State is not distinguishing among voters based on wealth, rather it is distinguishing between individuals that are able to prove their eligibility to vote and those that are not.[7] Plaintiffs have not shown a likelihood of success on this issue.

C. Fundamental Right to Vote

All Plaintiffs argue that Proposition 200 infringes on the fundamental right to vote in violation of the Fourteenth Amendment. The parties agree that the appropriate framework for evaluating this claim comes from *Burdick v. Takushi,* 504 U.S. 428 (1992). There the Supreme Court specifically rejected the idea that "any burden upon the right to vote must be subject to strict scrutiny." *Id.* at 433. Instead of strict scrutiny, "[a] court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden

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

imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434. If a restriction is determined to be "severe," the restriction "must be narrowly drawn to advance a state interest of compelling importance." *Id.* (quotations omitted). If, however, "a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quotations omitted).

Supreme Court cases establish that there is "'[n]o bright line separat[ing] permissible election-related regulation from unconstitutional infringements.'" *Rubin v. City of Santa Monica,* 308 F.3d 1008, 1014 (9th Cir. 2002) (quoting *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359 (1997)). Often, "courts are required to make 'hard judgments' given the interests involved." *Id.* The Ninth Circuit has observed that "[c]ourts will uphold as 'not severe' restrictions that are generally applicable, even-handed, politically neutral, and which protect the reliability and integrity of the election process." *Id.* Also, regulations promoting traditional goals, such as "accurate and complete voter registration" do not qualify as severe. *Hussey v. City of Portland,* 64 F.3d 1260, 1265 (9th Cir. 1995).

Assessing the severity of the restrictions in this case requires an intense factual inquiry. Plaintiffs presented some evidence that hundreds, possibly

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

D. Voting Rights Act

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

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[8] The Navajo Nation Plaintiffs do not attack the identification for registration aspects of Proposition 200; they only take issue with the identification at the polls requirements. The Court ordered additional briefing on the Navajo Nation Plaintiffs'

(Continued on following page)

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

42 U.S.C. § 1973(a). This section allows disparate impact claims. *See Smith v. Salt River Project Agr. Imp. and Power Dist.,* 109 F.3d 586, 594 (9th Cir. 1997) ("Section 2 requires proof only of a discriminatory result, not of discriminatory intent."). Because disparate impact claims are cognizable, if Plaintiffs can show that Navajos will suffer disproportionate harm under Proposition 200, a preliminary injunction may be appropriate.

"In determining whether a challenged voting practice violates § 2, the district court must examine the totality of the circumstances and determine, based upon a searching practical evaluation of the past and present reality . . . whether the political process is equally open to minority voters. This examination is intensely fact-based and localized." *Smith v. Salt River Project Agr. Imp. and Power Dist.,* 109 F.3d 586, 591 (9th Cir. 1997) (citations and

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statutory claims. Because the statutory claims are "intensely fact-based and localized," a more detailed order addressing these claims will be issued after the conclusion of the hearing scheduled for October 19, 2006. *Smith v. Salt River Project Agr. Imp. and Power Dist.,* 109 F.3d 586, 591 (9th Cir. 1997) (citations and quotations omitted).

quotations omitted). There are a variety of factors a court may use when evaluating the totality of circumstances. *Id.* at 594 n.6 (listing factors contained in Senate Report). The Court was not presented with adequate evidence on any of these factors to enable an appropriate evaluation. Accordingly, the Navajo Nation Plaintiffs have not met their burden of showing a substantial likelihood of success.

E. Civil Rights Act

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

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

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

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

> in determining whether such individual is qualified under State law to vote in such election.

Relief does not appear appropriate under either of these subsections.

The Navajo Nation Plaintiffs argue that subsection (A) is implicated because Navajos tend to vote at the polls on election day and different standards are applied to early voters and voters at the polls.[9] Early voting "is an *inherently* different procedure from voting in person, requiring a state which allows both in-person and absentee voting to apply different 'standards, practices, or procedures' to these two groups of voters." *Indiana Democratic Party v. Rokita,* No. 1:05-CV-0634-SEB-VSS, 2006 WL 1005037, at *47 (S.D. Ind. April 14, 2006). It is not a violation of subsection (A) for a state to apply different standards to two inherently different procedures. Further, the Navajos have not sufficiently dealt with the reality that Navajos can appear, without identification, at the polls and present a previously completed early ballot. Plaintiffs have not shown a likelihood of success on this issue.

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

The second statutory argument is that subsection (B) prohibits Defendants from preventing someone from voting based on an "error or omission" that is "not material" for determining voter eligibility. Presenting "identification in order to prove one's identity is by definition not an 'error or omission on any record or paper' and, therefore, § 1971(a)(2)(B) does not apply to this case." *Common Cause/Georgia League of Women Voters of Georgia., Inc. v. Billups,* No. CIVA 4:05CV0201 HLM, 2006 WL 2089771, at *65 (N.D. Ga. July 14, 2006). Plaintiffs have not shown a likelihood of success on this issue.

F. NVRA

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

G. Balance of Hardships

Proposition 200 has been in effect since January 2005 and elections have been held after its adoption. Since its initiation, Defendants have invested "enormous resources" in preparing to apply Proposition 200 to this Fall's elections. *See Southwest Voter Registration Educ. Project v. Shelley,* 344 F.3d 914, 919 (9th Cir. 2003) (observing state of California and its citizens had already invested "enormous

resources" in upcoming election). In July 2005, the State revised the voter registration forms to highlight Proposition 200's identification requirements. (Doc. 158 Ex. 1) Elections workers throughout the state have "undergone extensive training . . . to ensure consistent application of the proof of citizenship for voter registration and identification at the polls." (Id.) This training includes "classroom-type training of more than 7,000 boardworkers." (Id.) In March 2006, the Maricopa County Recorder launched a public awareness campaign aimed at educating the public regarding Proposition 200's requirements. Maricopa County has sent a new voter registration card to each registered voter and that mailing includes information regarding Proposition 200's requirements. (Id.) An injunction would force Defendants to change their registration and voting procedures, retrain all poll workers, and attempt to communicate with eligible voters regarding the changes. This would undoubtedly cause confusion among election officials, boardworkers, and voters.[10] The balance of hardships tips in favor of Defendants.

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

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

Accordingly,

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

DATED this 11th day of October, 2006.

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

APPENDIX H

CONSTITUTIONAL PROVISIONS

Article I, Section 4. Clause 1. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators.

Article I, Section 2. Clause 1. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

NATIONAL VOTER REGISTRATION ACT

42 U.S.C. § 1973gg Findings and purposes

(a) Findings

The Congress finds that –

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

(3) 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.

(b) Purposes

The purposes of this subchapter are –

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg-1 Definitions

As used in this subchapter –

(1) the term "election" has the meaning stated in section 431(1) of title 2;

(2) the term "Federal office" has the meaning stated in section 431(3) of title 2;

(3) the term "motor vehicle driver's license" includes any personal identification document issued by a State motor vehicle authority;

(4) the term "State" means a State of the United States and the District of Columbia; and

(5) the term "voter registration agency" means an office designated under section 1973gg-5(a)(1) of this title to perform voter registration activities.

42 U.S.C. § 1973gg-2 National procedures for voter registration for elections for Federal office

(a) In general

Except as provided in subsection (b) of this section, notwithstanding any other Federal or State law, in addition to any other method of voter registration provided for under State law, each State shall establish procedures to register to vote in elections for Federal office –

(1) by application made simultaneously with an application for a motor vehicle driver's license pursuant to section 1973gg-3 of this title;

(2) by mail application pursuant to section 1973gg-4 of this title; and

(3) by application in person –

(A) at the appropriate registration site designated with respect to the residence of the applicant in accordance with State law; and

(B) at a Federal, State, or nongovernmental office designated under section 1973gg-5 of this title.

(b) Nonapplicability to certain States

This subchapter does not apply to a State described in either or both of the following paragraphs:

(1) A State in which, under law that is in effect continuously on and after August 1, 1994, there is no voter registration requirement for any voter in the State with respect to an election for Federal office.

(2) A State in which, under law that is in effect continuously on and after August 1, 1994, or that was enacted on or prior to August 1, 1994, and by its terms is to come into effect upon the enactment of this subchapter, so long as that law remains in effect, all voters in the State may register to vote at the polling place at the time of voting in a general election for Federal office.

42 U.S.C. § 1973gg-3 Simultaneous application for voter registration and application for motor vehicle driver's license

(a) In general

(1) Each State motor vehicle driver's license application (including any renewal application) submitted to the appropriate State motor vehicle authority under State law shall serve as an application for voter registration with respect to elections for Federal

office unless the applicant fails to sign the voter registration application.

(2) An application for voter registration submitted under paragraph (1) shall be considered as updating any previous voter registration by the applicant.

(b) Limitation on use of information

No information relating to the failure of an applicant for a State motor vehicle driver's license to sign a voter registration application may be used for any purpose other than voter registration.

(c) Forms and procedures

(1) Each State shall include a voter registration application form for elections for Federal office as part of an application for a State motor vehicle driver's license.

(2) The voter registration application portion of an application for a State motor vehicle driver's license –

(A) may not require any information that duplicates information required in the driver's license portion of the form (other than a second signature or other information necessary under subparagraph (C));

(B) 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;

(C) shall include a statement that –

(i) states each eligibility requirement (including citizenship);

(ii) contains an attestation that the applicant meets each such requirement; and

(iii) requires the signature of the applicant, under penalty of perjury;

(D) 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; and

(E) shall be made available (as submitted by the applicant, or in machine readable or other format) to the appropriate State election official as provided by State law.

(d) Change of address

Any change of address form submitted in accordance with State law for purposes of a State motor vehicle driver's license shall serve as notification of change of address for voter registration with respect to elections for Federal office for the registrant involved unless the registrant states on the form that the change of address is not for voter registration purposes.

(e) Transmittal deadline

(1) Subject to paragraph (2), a completed voter registration portion of an application for a State motor vehicle driver's license accepted at a State motor vehicle authority shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

42 U.S.C. § 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 U.S.C. § 1973gg-5 Voter registration agencies

(a) Designation

(1) Each State shall designate agencies for the registration of voters in elections for Federal office.

(2) Each State shall designate as voter registration agencies –

(A) all offices in the State that provide public assistance; and

(B) all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities.

(3)(A) In addition to voter registration agencies designated under paragraph (2), each State shall designate other offices within the State as voter registration agencies.

(B) Voter registration agencies designated under subparagraph (A) may include –

(i) State or local government offices such as public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices, and offices not described in paragraph (2)(B) that provide services to persons with disabilities; and

(ii) Federal and nongovernmental offices, with the agreement of such offices.

(4)(A) At each voter registration agency, the following services shall be made available:

(i) Distribution of mail voter registration application forms in accordance with paragraph (6).

(ii) Assistance to applicants in completing voter registration application forms, unless the applicant refuses such assistance.

(iii) Acceptance of completed voter registration application forms for transmittal to the appropriate State election official.

(B) If a voter registration agency designated under paragraph

(2)(B) provides services to a person with a disability at the person's home, the agency shall provide the services described in subparagraph (A) at the person's home.

(5) A person who provides service described in paragraph (4) shall not –

(A) seek to influence an applicant's political preference or party registration;

(B) display any such political preference or party allegiance;

(C) make any statement to an applicant or take any action the purpose or effect of which is to discourage the applicant from registering to vote; or

(D) make any statement to an applicant or take any action the purpose or effect of which is to lead the applicant to believe that a decision to register or not to register has any bearing on the availability of services or benefits.

(6) A voter registration agency that is an office that provides service or assistance in addition to conducting voter registration shall –

(A) distribute with each application for such service or assistance, and with each recertification, renewal, or change of address form relating to such service or assistance –

(i) the mail voter registration application form described in section 1973gg-7(a)(2) of this title, including a statement that –

(I) specifies each eligibility requirement (including citizenship);

(II) contains an attestation that the applicant meets each such requirement; and

(III) requires the signature of the applicant, under penalty of perjury; or

(ii) the office's own form if it is equivalent to the form described in section 1973gg-7(a)(2) of this title, unless the applicant, in writing, declines to register to vote;

(B) provide a form that includes –

(i) the question, "If you are not registered to vote where you live now, would you like to apply to register to vote here today?";

(ii) if the agency provides public assistance, the statement, "Applying to register or declining to register to vote will not affect the amount of assistance that you will be provided by this agency.";

(iii) boxes for the applicant to check to indicate whether the applicant would like to register or declines to register to vote (failure to check either box being deemed to constitute a declination to register for purposes of subparagraph (C)), together with the statement (in close proximity to the boxes and in prominent type), "IF YOU DO NOT CHECK EITHER BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT THIS TIME.";

(iv) the statement, "If you would like help in filling out the voter registration application form, we will help you. The decision whether to seek or accept help is yours. You may fill out the application form in private."; and

(v) the statement, "If you believe that someone has interfered with your right to register or to decline to register to vote, your right to privacy in deciding whether to register or in applying to register to vote, or your right to choose your own political party or other political preference, you may file a complaint with ___.___.___.___.___.", the blank being filled by the name, address, and telephone number of the appropriate official to whom such a complaint should be addressed; and

(C) provide to each applicant who does not decline to register to vote the same degree of assistance with regard to the completion of the registration application form as is provided by the office with regard to the completion of its own forms, unless the applicant refuses such assistance.

(7) No information relating to a declination to register to vote in connection with an application made at an office described in paragraph (6) may be used for any purpose other than voter registration.

(b) Federal Government and private sector cooperation

All departments, agencies, and other entities of the executive branch of the Federal Government shall, to

the greatest extent practicable, cooperate with the States in carrying out subsection (a) of this section, and all nongovernmental entities are encouraged to do so.

(c) Armed Forces recruitment offices

(1) Each State and the Secretary of Defense shall jointly develop and implement procedures for persons to apply to register to vote at recruitment offices of the Armed Forces of the United States.

(2) A recruitment office of the Armed Forces of the United States shall be considered to be a voter registration agency designated under subsection (a)(2) of this section for all purposes of this subchapter.

(d) Transmittal deadline

(1) Subject to paragraph (2), a completed registration application accepted at a voter registration agency shall be transmitted to the appropriate State election official not later than 10 days after the date of acceptance.

(2) If a registration application is accepted within 5 days before the last day for registration to vote in an election, the application shall be transmitted to the appropriate State election official not later than 5 days after the date of acceptance.

42 U.S.C. § 1973gg-6 Requirements with respect to administration of voter registration

(a) In general

In the administration of voter registration for elections for Federal office, each State shall –

(1) ensure that any eligible applicant is registered to vote in an election –

(A) in the case of registration with a motor vehicle application under section 1973gg-3 of this title, if the valid voter registration form of the applicant is submitted to the appropriate State motor vehicle authority not later than the lesser of 30 days, or the period provided by State law, before the date of the election;

(B) in the case of registration by mail under section 1973gg-4 of this title, 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;

(C) in the case of registration at a voter registration agency, if the valid voter registration form of the applicant is accepted at the voter registration agency not later than the lesser of 30 days, or the period provided by State law, before the date of the election; and

(D) in any other case, if the valid voter registration form of the applicant is received by the appropriate State election official not later than the lesser of 30

days, or the period provided by State law, before the date of the election;

(2) require the appropriate State election official to send notice to each applicant of the disposition of the application;

(3) provide that the name of a registrant may not be removed from the official list of eligible voters except –

(A) at the request of the registrant;

(B) as provided by State law, by reason of criminal conviction or mental incapacity; or

(C) as provided under paragraph (4);

(4) conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of –

(A) the death of the registrant; or

(B) a change in the residence of the registrant, in accordance with subsections (b), (c), and (d) of this section;

(5) inform applicants under sections 1973gg-3, 1973gg-4, and 1973gg-5 of this title of –

(A) voter eligibility requirements; and

(B) penalties provided by law for submission of a false voter registration application; and

(6) ensure that the identity of the voter registration agency through which any particular voter is registered is not disclosed to the public.

(b) Confirmation of voter registration

Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office –

(1) shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.); and

(2) shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) of this section to remove an individual from the official list of eligible voters if the individual – (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

(c) Voter removal programs

(1) A State may meet the requirement of subsection (a)(4) of this section by establishing a program under which –

(A) change-of-address information supplied by the Postal Service through its licensees is used to identify registrants whose addresses may have changed; and

(B) if it appears from information provided by the Postal Service that –

(i) a registrant has moved to a different residence address in the same registrar's jurisdiction in which the registrant is currently registered, the registrar changes the registration records to show the new address and sends the registrant a notice of the change by forwardable mail and a postage prepaid pre-addressed return form by which the registrant may verify or correct the address information; or

(ii) the registrant has moved to a different residence address not in the same registrar's jurisdiction, the registrar uses the notice procedure described in subsection (d)(2) of this section to confirm the change of address.

(2)(A) A State shall complete, not later than 90 days prior to the date of a primary or general election for Federal office, any program the purpose of which is to systematically remove the names of ineligible voters from the official lists of eligible voters.

(B) Subparagraph (A) shall not be construed to preclude –

(i) the removal of names from official lists of voters on a basis described in paragraph (3)(A) or (B) or (4)(A) of subsection (a) of this section; or

(ii) correction of registration records pursuant to this subchapter.

(d) Removal of names from voting rolls

(1) A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant –

(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or

(B)(i) has failed to respond to a notice described in paragraph (2); and

(ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

(2) A notice is described in this paragraph if it is a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice to the following effect:

(A) If the registrant did not change his or her residence, or changed residence but remained in the registrar's jurisdiction, the registrant should return the card not later than the time provided for mail

registration under subsection (a)(1)(B) of this section. If the card is not returned, affirmation or confirmation of the registrant's address may be required before the registrant is permitted to vote in a Federal election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice, and if the registrant does not vote in an election during that period the registrant's name will be removed from the list of eligible voters.

(B) If the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, information concerning how the registrant can continue to be eligible to vote.

(3) A voting registrar shall correct an official list of eligible voters in elections for Federal office in accordance with change of residence information obtained in conformance with this subsection.

(e) Procedure for voting following failure to return card

(1) A registrant who has moved from an address in the area covered by a polling place to an address in the same area shall, notwithstanding failure to notify the registrar of the change of address prior to the date of an election, be permitted to vote at that polling place upon oral or written affirmation by the registrant of the change of address before an election official at that polling place.

(2)(A) A registrant who has moved from an address in the area covered by one polling place to an address in an area covered by a second polling place within the same registrar's jurisdiction and the same congressional district and who has failed to notify the registrar of the change of address prior to the date of an election, at the option of the registrant –

(i) shall be permitted to correct the voting records and vote at the registrant's former polling place, upon oral or written affirmation by the registrant of the new address before an election official at that polling place; or

(ii)(I) shall be permitted to correct the voting records and vote at a central location within the same registrar's jurisdiction designated by the registrar where a list of eligible voters is maintained, upon written affirmation by the registrant of the new address on a standard form provided by the registrar at the central location; or

(II) shall be permitted to correct the voting records for purposes of voting in future elections at the appropriate polling place for the current address and, if permitted by State law, shall be permitted to vote in the present election, upon confirmation by the registrant of the new address by such means as are required by law.

(B) If State law permits the registrant to vote in the current election upon oral or written affirmation by the registrant of the new address at a polling place described in subparagraph (A)(i) or (A)(ii)(II), voting

at the other locations described in subparagraph (A) need not be provided as options.

(3) If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

(f) Change of voting address within a jurisdiction

In the case of a change of address, for voting purposes, of a registrant to another address within the same registrar's jurisdiction, the registrar shall correct the voting registration list accordingly, and the registrant's name may not be removed from the official list of eligible voters by reason of such a change of address except as provided in subsection (d) of this section.

(g) Conviction in Federal court

(1) On the conviction of a person of a felony in a district court of the United States, the United States attorney shall give written notice of the conviction to the chief State election official designated under section 1973gg-8 of this title of the State of the person's residence.

(2) A notice given pursuant to paragraph (1) shall include –

(A) the name of the offender;

(B) the offender's age and residence address;

(C) the date of entry of the judgment;

(D) a description of the offenses of which the offender was convicted; and

(E) the sentence imposed by the court.

(3) On request of the chief State election official of a State or other State official with responsibility for determining the effect that a conviction may have on an offender's qualification to vote, the United States attorney shall provide such additional information as the United States attorney may have concerning the offender and the offense of which the offender was convicted.

(4) If a conviction of which notice was given pursuant to paragraph (1) is overturned, the United States attorney shall give the official to whom the notice was given written notice of the vacation of the judgment.

(5) The chief State election official shall notify the voter registration officials of the local jurisdiction in which an offender resides of the information received under this subsection.

(h) Omitted

(i) Public disclosure of voter registration activities

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and,

where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

(j) "Registrar's jurisdiction" defined

For the purposes of this section, the term "registrar's jurisdiction" means –

(1) an incorporated city, town, borough, or other form of municipality;

(2) if voter registration is maintained by a county, parish, or other unit of government that governs a larger geographic area than a municipality, the geographic area governed by that unit of government; or

(3) if voter registration is maintained on a consolidated basis for more than one municipality or other unit of government by an office that performs all of the functions of a voting registrar, the geographic

area of the consolidated municipalities or other geographic units.

42 U.S.C. § 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.

42 U.S.C. § 1973gg-9 Civil enforcement and private right of action

(a) Attorney General

The Attorney General may bring a civil action in an appropriate district court for such declaratory or injunctive relief as is necessary to carry out this subchapter.

(b) Private right of action

(1) A person who is aggrieved by a violation of this subchapter may provide written notice of the violation to the chief election official of the State involved.

(2) If the violation is not corrected within 90 days after receipt of a notice under paragraph (1), or within 20 days after receipt of the notice if the violation occurred within 120 days before the date of an election for Federal office, the aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.

(3) If the violation occurred within 30 days before the date of an election for Federal office, the aggrieved person need not provide notice to the chief election official of the State under paragraph (1) before bringing a civil action under paragraph (2).

(c) Attorney's fees

In a civil action under this section, the court may allow the prevailing party (other than the United States) reasonable attorney fees, including litigation expenses, and costs.

(d) Relation to other laws

(1) The rights and remedies established by this section are in addition to all other rights and remedies provided by law, and neither the rights and remedies established by this section nor any other provision of this subchapter shall supersede, restrict, or limit the application of the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

(2) Nothing in this subchapter authorizes or requires conduct that is prohibited by the Voting Rights Act of 1965 (42 U.S.C. 1973 et seq.).

HELP AMERICA VOTE ACT

42 U.S.C. § 15329

The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 1973gg-7(a) of this title.

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42 U.S.C. § 15483

(a) Computerized statewide voter registration list requirements

(1) Implementation

(A) In general

Except as provided in subparagraph (B), each State, acting through the chief State election official, shall implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level 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 (in this subsection referred to as the "computerized list"), and includes the following:

(i) The computerized list shall serve as the single system for storing and managing the official list of registered voters throughout the State.

(ii) The computerized list contains the name and registration information of every legally registered voter in the State.

(iii) Under the computerized list, a unique identifier is assigned to each legally registered voter in the State.

(iv) The computerized list shall be coordinated with other agency databases within the State.

(v) Any election official in the State, including any local election official, may obtain immediate electronic access to the information contained in the computerized list.

(vi) All voter registration information obtained by any local election official in the State shall be electronically entered into the computerized list on an expedited basis at the time the information is provided to the local official.

(vii) The chief State election official shall provide such support as may be required so that local election officials are able to enter information as described in clause (vi).

(viii) The computerized list shall serve as the official voter registration list for the conduct of all elections for Federal office in the State.

(B) Exception

The requirement under subparagraph (A) shall not apply to a State in which, under a State law in effect continuously on and after October 29, 2002, there is no voter registration requirement for individuals in the State with respect to elections for Federal office.

(2) Computerized list maintenance

(A) In general

The appropriate State or local election official shall perform list maintenance with respect to the computerized list on a regular basis as follows:

(i) If an individual is to be removed from the computerized list, such individual shall be removed in accordance with the provisions of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), including subsections (a)(4), (c)(2), (d), and (e) of section 8 of such Act (42 U.S.C. 1973gg-6).

(ii) For purposes of removing names of ineligible voters from the official list of eligible voters –

(I) under section 8(a)(3)(B) of such Act (42 U.S.C. 1973gg-6(a)(3)(B)), the State shall coordinate the computerized list with State agency records on felony status; and

(II) by reason of the death of the registrant under section 8(a)(4)(A) of such Act (42 U.S.C. 1973gg-6(a)(4)(A)), the State shall coordinate the computerized list with State agency records on death.

(iii) Notwithstanding the preceding provisions of this subparagraph, if a State is described in section 4(b) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-2(b)), that State shall remove the names of ineligible voters from the computerized list in accordance with State law.

(B) Conduct

The list maintenance performed under subparagraph (A) shall be conducted in a manner that ensures that –

(i) the name of each registered voter appears in the computerized list;

(ii) only voters who are not registered or who are not eligible to vote are removed from the computerized list; and

(iii) duplicate names are eliminated from the computerized list.

(3) Technological security of computerized list

The appropriate State or local official shall provide adequate technological security measures to prevent the unauthorized access to the computerized list established under this section.

(4) Minimum standard for accuracy of State voter registration records

The State election system shall include provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:

(A) A system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.), registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

(B) Safeguards to ensure that eligible voters are not removed in error from the official list of eligible voters.

(5) Verification of voter registration information

(A) Requiring provision of certain information by applicants

(i) In general Except as provided in clause (ii), notwithstanding any other provision of law, an application for voter registration for an election for Federal office may not be accepted or processed by a State unless the application includes –

(I) in the case of an applicant who has been issued a current and valid driver's license, the applicant's driver's license number; or

(II) in the case of any other applicant (other than an applicant to whom clause (ii) applies), the last 4 digits of the applicant's social security number.

(ii) Special rule for applicants without driver's license or social security number If an applicant for voter registration for an election for Federal office has not been issued a current and valid driver's license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes. To the extent that the State has a computerized list in effect under this subsection and the list assigns unique identifying numbers to registrants, the number

assigned under this clause shall be the unique identifying number assigned under the list.

(iii) Determination of validity of numbers provided The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law.

(B) Requirements for State officials

(i) Sharing information in databases The chief State election official and the official responsible for the State motor vehicle authority of a State shall enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration.

(ii) Agreements with Commissioner of Social Security The official responsible for the State motor vehicle authority shall enter into an agreement with the Commissioner of Social Security under section 405(r)(8) of this title (as added by subparagraph (C)).

(C) Omitted

(D) Special rule for certain States

In the case of a State which is permitted to use social security numbers, and provides for the use of social security numbers, on applications for voter registration, in accordance with section 7 of the Privacy Act of

1974 (5 U.S.C. 552a note), the provisions of this paragraph shall be optional.

(b) Requirements for voters who register by mail

(1) In general

Notwithstanding section 6(c) of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4(c)) and subject to paragraph (3), a State shall, in a uniform and nondiscriminatory manner, require an individual to meet the requirements of paragraph (2) if –

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

(B)(i) the individual has not previously voted in an election for Federal office in the State; or

(ii) the individual has not previously voted in such an election in the jurisdiction and the jurisdiction is located in a State that does not have a computerized list that complies with the requirements of subsection (a) of this section.

(2) Requirements

(A) In general

An individual meets the requirements of this paragraph if the individual –

(i) in the case of an individual who votes in person –

(I) presents to the appropriate State or local election official a current and valid photo identification; or

(II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter; or

(ii) in the case of an individual who votes by mail, submits with the ballot –

(I) a copy of a current and valid photo identification; or

(II) a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

(B) Fail-safe voting

(i) In person An individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under section 15482(a) of this title.

(ii) By mail An individual who desires to vote by mail but who does not meet the requirements of subparagraph (A)(ii) may cast such a ballot by mail and the ballot shall be counted as a provisional ballot in accordance with section 15482(a) of this title.

(3) Inapplicability

Paragraph (1) shall not apply in the case of a person –

(A) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits as part of such registration either –

(i) a copy of a current and valid photo identification; or

(ii) a copy of a current utility bill, bank statement, government check, paycheck, or government document that shows the name and address of the voter;

(B)(i) who registers to vote by mail under section 6 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-4) and submits with such registration either –

(I) a driver's license number; or

(II) at least the last 4 digits of the individual's social security number; and

(ii) with respect to whom a State or local election official matches the information submitted under clause (i) with an existing State identification record bearing the same number, name and date of birth as provided in such registration; or

(C) who is –

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

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

(iii) entitled to vote otherwise than in person under any other Federal law.

(4) Contents of mail-in registration form

(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).

(5) Construction

Nothing in this subsection shall be construed to require a State that was not required to comply with a provision of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg et seq.) before October 29, 2002, to comply with such a provision after October 29, 2002.

(c) Permitted use of last 4 digits of social security numbers

The last 4 digits of a social security number described in subsections (a)(5)(A)(i)(II) and (b)(3)(B)(i)(II) of this section shall not be considered to be a social security number for purposes of section 7 of the Privacy Act of 1974 (5 U.S.C. 552a note).

(d) Effective date

(1) Computerized statewide voter registration list requirements

(A) In general

Except as provided in subparagraph (B), each State and jurisdiction shall be required to comply with the requirements of subsection (a) of this section on and after January 1, 2004.

(B) Waiver

If a State or jurisdiction certifies to the Commission not later than January 1, 2004, that the State or jurisdiction will not meet the deadline described in subparagraph (A) for good cause and includes in the certification the reasons for the failure to meet such deadline, subparagraph (A) shall apply to the State or jurisdiction as if the reference in such subparagraph to "January 1, 2004" were a reference to "January 1, 2006".

(2) Requirement for voters who register by mail

(A) In general

Each State and jurisdiction shall be required to comply with the requirements of subsection (b) of this section on and after January 1, 2004, and shall be prepared to receive registration materials submitted by individuals described in subparagraph (B) on and after the date described in such subparagraph.

(B) Applicability with respect to individuals

The provisions of subsection (b) of this section shall apply to any individual who registers to vote on or after January 1, 2003.

42 U.S.C. § 15484

The requirements established by this subchapter are minimum requirements and nothing in this subchapter shall be construed to prevent a State from establishing election technology and administration requirements that are more strict than the requirements established under this subchapter so long as such State requirements are not inconsistent with the Federal requirements under this subchapter or any law described in section 15545 of this title.

42 U.S.C. § 15485

The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State.

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42 U.S.C. § 15301

Pub. L. No. 107-252, 116 Stat. 166, preamble

To establish a program to provide funds to States to replace punch card voting systems, to establish the Election Assistance Commission to assist in the administration of Federal elections and to otherwise

provide assistance with the administration of certain Federal election laws and programs, to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections, and for other purposes.

EXCERPTS FROM PROPOSITION 200

16-152. *Registration form*

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

1. The date the registrant signed the form.

2. The registrant's given name, middle name, if any, and surname.

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

4. The registrant's complete mailing address, if different from the residence address, including post office address, city or town, zip code or other designation used by the registrant for receiving mail. The form shall also include a line for the registrant's e-mail address (optional to registrant).

5. The registrant's party preference. The two largest political parties that are entitled to continued representation on the ballot shall be listed on the form in the order determined by calculating which party has the highest number of registered voters at the close of registration for the most recent general election for governor, then the second highest. The form shall allow the registrant to circle, check or otherwise mark the party preference and shall include a blank line for other party preference options.

6. The registrant's telephone number, unless unlisted.

7. The registrant's state or country of birth.

8. The registrant's date of birth.

9. The registrant's occupation.

10. The registrant's Indian census number (optional to registrant).

11. The registrant's father's name or mother's maiden name.

12. One of the following identifiers for each registrant:

(a) The Arizona driver license number of the registrant or nonoperating identification license number of the registrant that is issued pursuant to section 28-3165.

(b) If the registrant does not have an Arizona driver license or nonoperating identification license, the last four digits of the registrant's social security number.

(c) If the registrant does not have an Arizona driver license or nonoperating identification license or a social security number and the registrant attests to that, a unique identifying number consisting of the registrant's unique identification number to be assigned by the secretary of state in the statewide electronic voter registration database.

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

14. The question to the registrant "Are you a citizen of the United States of America?", appropriate boxes for the registrant to check "yes" or "no" and a statement instructing the registrant not to complete the form if the registrant checked "no".

15. The question to the registrant "Will you be eighteen years of age on or before election day?", appropriate boxes for the registrant to check "yes" or "no" and a statement instructing the registrant not to complete the form if the registrant checked "no".

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

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

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

19. The signature of the registrant.

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

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

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

23. A statement that the applicant shall submit evidence of United States citizenship with the application and that the registrar shall reject the application if no evidence of citizenship is attached.

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

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

D. The county recorder may establish procedures to verify whether a registrant has successfully petitioned the court for an injunction against harassment pursuant to section 12-1809 or an order of protection pursuant to section 13-3602 and, if verified, to protect the registrant's residence address, telephone number or voting precinct number, if appropriate, from public disclosure.

E. Subsection A of this section does not apply to registrations received from the department of transportation pursuant to section 16-112.

16-166. *Verification of registration*

A. Except for the mailing of sample ballots, a county recorder who mails an item to any elector shall send the mailing by nonforwardable first class mail marked with the statement required by the postmaster to receive an address correction notification. If the item is returned undelivered, the county recorder shall send a follow-up notice to that elector within three weeks of receipt of the returned notice. The county recorder shall send the follow-up notice to the address that appears in the general county register or to the forwarding address provided by the United States postal service. The follow-up notice shall include a registration form and the information prescribed by section 16-131, subsection C and shall

state that if the elector does not complete and return a new registration form with current information to the county recorder within thirty-five days, the elector's registration status shall be changed from active to inactive.

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

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

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

E. The county recorder on or before May 1 of each year preceding a state primary and general election or more frequently as the recorder deems necessary may use the change of address information supplied by the postal service through its licensees to identify registrants whose addresses may have changed. If it appears from information provided by the postal service that a registrant has moved to a different residence address in the same county, the county recorder shall change the registration records to reflect the new address and shall send the registrant a notice of the change by forwardable mail and a postage prepaid preaddressed return form by which the registrant may verify or correct the registration information. If the registrant fails to return the form postmarked not later than thirty-five days after the mailing of the notice, the elector's registration status shall be changed from active to inactive. If the notice sent by the recorder is not returned, the registrant may be required to provide affirmation or confirmation of the registrant's address in order to vote. If the registrant does not vote in an election during the period after the date of the notice from the recorder through the date of the second general election for federal office following the date of that notice, the registrant's name shall be removed from the list of inactive voters. If the registrant has changed residence to a new county, the county recorder shall provide information on how the registrant can continue to be eligible to vote.

F. The county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. Satisfactory evidence of citizenship shall include any of the following:

1. The number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the department of transportation or the equivalent governmental agency of another state within the United States if the agency indicates on the applicant's driver license or nonoperating identification license that the person has provided satisfactory proof of United States citizenship.

2. A legible photocopy of the applicant's birth certificate that verifies citizenship to the satisfaction of the county recorder.

3. A legible photocopy of pertinent pages of the applicant's United States passport identifying the applicant and the applicant's passport number or presentation to the county recorder of the applicant's United States passport.

4. A presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization. If only the number of the certificate of naturalization is provided, the applicant shall not be included in the registration rolls until the number of the certificate of naturalization is verified with the United States immigration and naturalization service by the county recorder.

5. Other documents or methods of proof that are established pursuant to the immigration reform and control act of 1986.

6. The applicant's bureau of Indian affairs card number, tribal treaty card number or tribal enrollment number.

G. Notwithstanding subsection F of this section, any person who is registered in this state on the effective date of this amendment to this section is deemed to have provided satisfactory evidence of citizenship and shall not be required to resubmit evidence of citizenship unless the person is changing voter registration from one county to another.

H. For the purposes of this section, proof of voter registration from another state or county is not satisfactory evidence of citizenship.

I. A person who modifies voter registration records with a new residence ballot shall not be required to submit evidence of citizenship. After citizenship has been demonstrated to the county recorder, the person is not required to resubmit satisfactory evidence of citizenship in that county.

J. After a person has submitted satisfactory evidence of citizenship, the county recorder shall indicate this information in the person's permanent voter file. After two years the county recorder may destroy all documents that were submitted as evidence of citizenship.