

No. 12-71

---

In the  
**Supreme Court of the United States**

**STATE OF ARIZONA, *ET AL.***  
*PETITIONERS*

v.

**THE INTER TRIBAL COUNCIL OF ARIZONA,  
INC., *ET AL.***  
*RESPONDENTS*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**Brief of the  
American Unity Legal Defense Fund  
As *Amicus Curiae* Supporting Petitioners**

BARNABY W. ZALL  
*Counsel of Record for Amicus Curiae*  
Weinberg, Jacobs & Tolani, LLP  
7018 Tilden Lane  
Rockville, MD 20852  
(301) 231-6943  
[bzall@bzall.com](mailto:bzall@bzall.com)

## QUESTIONS 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?

**TABLE OF CONTENTS**

Questions Presented ..... i

Table of Contents ..... ii

Table of Authorities ..... iv

Statement of Interest .....1

Preliminary Statement .....2

Summary of Argument .....14

Argument.....17

I. The Decision Below Misunderstands the  
“Language and Structure” of the NVRA.....17

    A. The Ninth Circuit’s Analysis Would Rewrite  
    the Text of the NVRA .....19

    B. The Ninth Circuit Opinion Recognizes Only  
    One of the Four Purposes of the NVRA .....20

II. The Ninth Circuit Failed To Recognize Legitimate  
    State Interests In Protecting The Integrity Of  
    The Election System. ....24

Conclusion .....28

Appendix A: Voter Registration Card for “Buddy Tolbert,” A Dog.....App. 1

Appendix B: Voter Registration Card for “Susan” .....App. 2

Appendix C: Voter Registration Card for Male Non-Citizen Resident of Nambe, NM .....App. 3

## TABLE OF AUTHORITIES

<i>ACLU of New Mexico v. Santillanes</i> , 546 F.3d 1313 (10th Cir. 2008).....	27
<i>Altria Group, Inc. v. Good</i> , 555 U.S. 70 (2008) .....	18
<i>American Ship Building Co. v. NLRB</i> , 380 U.S. 300 (1965).....	18
<i>Arizona v. United States</i> , __ U.S. __, 132 S. Ct. 2492 (2012).....	1
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992). .....	27
<i>Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority</i> , 464 U.S. 89 (1983) ..	18
<i>Busefink v. Nevada</i> , 286 P.3d 599 (Nev. 2012).....	6
<i>Chamber of Commerce v. Whiting</i> , 563 U.S. __, 131 S.Ct. 1968 (2011).....	1
<i>Common Cause/Georgia v. Billups</i> , 554 F.3d 1340 (11th Cir. 2009).....	27
<i>Crawford v. Marion County Elections Bd.</i> , 553 U.S. 181 (2008).....	<i>passim</i>
<i>Disabled in Action of Metropolitan New York v. Hammons</i> , 202 F.3d 110 (2 <sup>nd</sup> Cir. 2000) .....	21, 22

<i>Gonzalez v. Arizona</i> , 485 F.3d 1041 (9 <sup>th</sup> Cir. 2007) .....	10, 20
<i>Gonzalez v. Arizona</i> , 677 F.3d 383 (9 <sup>th</sup> Cir. 2012).....	<i>passim</i>
<i>Horne v. Flores</i> , 557 U.S. 433 (2009) .....	1
<i>John Doe No.1 v. Reed</i> , ___ U.S. ___, 130 S.Ct. 2811 (2010).....	20, 23
<i>Lake v. Neal</i> , 585 F.3d 1059 (7 <sup>th</sup> Cir. 2009) .....	21
<i>Kimani v. Holder</i> , 695 F.3d 666 (7 <sup>th</sup> Cir. 2012)....	8, 11
<i>Keathley v. Holder</i> , 696 F.3d 644 (7 <sup>th</sup> Cir. 2012) .....	11
<i>McKay v. Thompson</i> , 226 F.3d 752 (6 <sup>th</sup> Cir. 2000) .	20
<i>Nat’l Ass’n of Home Builders v. Defenders of Wildlife</i> , 551 U.S. 644 (2007).....	18
<i>NLRB v. Brown</i> , 380 U.S. 278 (1965).....	19
<i>Project Vote/Voting for America v. Long</i> , 682 F.3d 331 (4 <sup>th</sup> Cir. 2012) .....	21, 25
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006) .....	<i>passim</i>
<i>Simmons v. Jones</i> , 838 S.W.2d 298 (Tex. App. 1992)	9
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2002) ..	17
<i>United States v. Knight</i> , 490 F.3d 1268 (11 <sup>th</sup> Cir. 2007).....	9

<i>U.S. Student Ass’n Foundation v. Land</i> , 546 F.3d 373 (6 <sup>th</sup> Cir. 2008) .....	21
<i>Voting Integrity Project v. Andrade</i> , No. 3:12-cv-00044, (S.D.Texas, August 2, 2012) .....	16, 17
<i>Young v. Fordice</i> , 520 U.S. 273 (1997) ..	13, 15, 19, 20
42 U.S.C. § 1973gg .....	<i>passim</i>
42 U.S.C. § 1973gg(b)(1) .....	14, 15, 18, 22
42 U.S.C. § 1973gg(b)(2) .....	14, 15, 18, 22, 23
42 U.S.C. § 1973gg(b)(3) .....	14, 15, 18, 22
42 U.S.C. § 1973gg(b)(4) .....	14, 15, 18, 22
42 U.S.C. § 1973gg-7(b)(1) .....	14, 19
H. Rpt. 105-416 (1998) .....	12
H.R. Rep. 110-101 (2007) .....	11
Robert Barnes, “In Ohio and elsewhere, battles over state voting laws head to court,” <i>The Washington Post</i> (Aug. 5, 2012), A1, available at <a href="http://www.washingtonpost.com/politics/in-ohio-and-elsewhere-battles-over-state-voting-laws-head-to-court/2012/08/05/a56b8ad6-dc19-11e1-8e43-4a3c4375504a_story.html?hpid=z4">http://www.washingtonpost.com/politics/in-ohio-and-elsewhere-battles-over-state-voting-laws-head-to-court/2012/08/05/a56b8ad6-dc19-11e1-8e43-4a3c4375504a_story.html?hpid=z4</a> .....	2

- Jennifer Brooks, “Votes Miscast in House District 8B Election,” *Minneapolis Star-Tribune*, (Nov. 19, 2012, 4:46 PM), *available at* [www.startribune.com/politics/statelocal/179988481.html](http://www.startribune.com/politics/statelocal/179988481.html) .....5
- Glenn Cook, “How Many Noncitizens Are Registered to Vote?” *Las Vegas Review Journal*, (Nov. 4, 2012, 10:19 AM), *available at* <http://www.lvrj.com/opinion/how-many-noncitizens-are-registered-to-vote-177141441.html> .....3
- Dar Danielson, “DCI arrests 3 non-citizens for illegally voting in Pottawattamie County [Iowa],” *Radio Iowa*, (Sept. 20, 2012), *available at* [www.radioiowa.com/2012/09/20/dci-arrests-3-non-citizens-for-illegally-voting-in-pottawattamie-county/](http://www.radioiowa.com/2012/09/20/dci-arrests-3-non-citizens-for-illegally-voting-in-pottawattamie-county/) .....9
- Keith Ervin, “Three Plead Guilty in Fake Voter Scheme,” *Seattle Times*, (Oct. 30, 2007, 2:02 AM), *available at* [http://seattletimes.nwsourc.com/html/localnews/2003982533\\_acorn30m.html?syndication=rss](http://seattletimes.nwsourc.com/html/localnews/2003982533_acorn30m.html?syndication=rss).....6
- Michael Falcone, “Group’s Tally of New Voters Was Vastly Overstated,” *The New York Times*, (Oct. 23, 2008), A1, *available at* [www.nytimes.com/2008/10/24/us/politics/24acorn.html](http://www.nytimes.com/2008/10/24/us/politics/24acorn.html) .....7

- Julie Foster, “Non-citizens vote with ‘Clinton card?’”  
WorldNet Daily, (Nov. 7, 2000), *available at*  
[www.wnd.com/2000/11/4619/](http://www.wnd.com/2000/11/4619/). .....11
- Richard Hasen, “A Détente Before the Election,” *The New York Times*, (Aug 5, 2012, 9:13 PM),  
*available at*  
<http://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/?ref=opinion> .....8
- Sari Horowitz, “Eric Holder vows to aggressively challenge voter ID laws,” *The Washington Post*, (Jul. 10, 2012), A1, *available at*  
[http://www.washingtonpost.com/world/national-security/eric-holder-vows-to-aggressively-challenge-voter-id-laws/2012/07/10/gJQApOASbW\\_story.html](http://www.washingtonpost.com/world/national-security/eric-holder-vows-to-aggressively-challenge-voter-id-laws/2012/07/10/gJQApOASbW_story.html) .....2
- Joe Kimball, “Two non-citizens charged with voter fraud in Austin, Minn.,” *MinnPost*, (Dec. 4, 2012),  
*available at* [www.minnpost.com/political-agenda/2012/12/two-non-citizens-charged-voter-fraud-austin-minn](http://www.minnpost.com/political-agenda/2012/12/two-non-citizens-charged-voter-fraud-austin-minn) .....
- KMBC-TV, “ACORN Workers Indicted on Alleged Voter Fraud,” Kansas City, Missouri, (Nov. 1, 2006, 10:25 AM), *available at*  
<http://www.kmbc.com/politics/10214492/detail.html> .....7
- KOB-TV, “4 On Your Side exposes illegal voting in New Mexico,” (Nov. 6, 2012, 9:07 AM), *available at*  
<http://www.kob.com/article/stories/S2824713.shtml?cat=500> .....6, 9, 12

- KOB-TV, “Dog Voter Registration Form,” Albuquerque, New Mexico, *available at* <http://www.documentcloud.org/documents/502051-dog-voter-registration-form.html> (Last visited Dec. 6, 2012).....6, App. 1
- KOB-TV, “Female Non-Citizen Voter Info,” Albuquerque, New Mexico, *available at* <http://www.documentcloud.org/documents/502052-female-non-citizen-voter-info.html> (Last visited Dec. 6, 2012).....App. 2
- KOB-TV, “Male Non-Citizen Voter Info,” Albuquerque, New Mexico, *available at* <http://www.documentcloud.org/documents/502053-male-non-citizen-voter-info.html> (Last visited Dec. 6, 2012).....App. 3
- Le & Nicolosi, “Dead Voted in Governor's Race,” *Seattle Post-Intelligencer*, (Jan. 7, 2005, 10:00 PM) A1, *available at* <http://www.seattlepi.com/local/article/Dead-voted-in-governor-s-race-1163612.php>.....5
- Tony Lee, “Watchdog Group Calls on IRS to Investigate Re-Branded TX ACORN Branch,” *Breitbart.com*, (Jul. 20, 2012), *available at* <http://www.breitbart.com/Big-Government/2012/07/19/Taxpayer-Watchdog-Group-Calls-on-I-R-S-To-Investigate-Re-Branded-Texas-ACORN-Branch> .....7

- Letter, "Bill Clinton," WorldNet Daily, *available at* [http://www.worldnetdaily.com/images/20001106\\_Clintonltr.jpg](http://www.worldnetdaily.com/images/20001106_Clintonltr.jpg) (Last visited Dec. 6, 2012).....11
- Paula Mitchell Marks, AND DIE IN THE WEST, 1996 .9
- PBS Online Newshour, "Contested Contest," *Online Focus*, (Oct. 22, 1997), *available at* [www.pbs.org/newshour/bb/congress/july-dec97/dornan\\_10-22.html](http://www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html) .....12
- Dean Pretorius, "Dog Registered to Vote by Thomas Tolbert, New Mexico Man," *Huffington Post*, March 1, 2012, [www.huffingtonpost.com/2012/03/01/dog-registered-to-vote-thomas-tolbert\\_n\\_1314963.html](http://www.huffingtonpost.com/2012/03/01/dog-registered-to-vote-thomas-tolbert_n_1314963.html) (last visited Dec. 10, 2012). ..... App. 1
- Ryan J. Reilly, "Kris Kobach credits ACORN Hysteria With GOP-led Voter ID Renaissance," TPM, (Jul. 26, 2012, 6:40 PM), *available at* [http://tpmmuckraker.talkingpointsmemo.com/2012/07/kris\\_kobach\\_credits\\_acorn\\_coverage\\_for\\_voter\\_id\\_push\\_video.php](http://tpmmuckraker.talkingpointsmemo.com/2012/07/kris_kobach_credits_acorn_coverage_for_voter_id_push_video.php) .....7
- Eric Shawn, "ACORN Pleads Guilty to Voter Registration Fraud in Nevada," FoxNews.com, (Apr. 6, 2011), *available at* <http://www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/>...6
- Ian Urbina, "Voter ID Battle Shifts to Proof of Citizenship," *The New York Times*, (May 12, 2008), *available at*

www.nytimes.com/2008/05/12/us/politics/12vote.html .....	10
“Voter Identification Requirements,” National Conference of State Legislatures, <i>available at</i> <a href="http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx">http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx</a> (Last updated Oct. 24, 2012). .....	3

## STATEMENT OF INTEREST

*Amicus curiae* American Unity Legal Defense Fund (“AULDF”) is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.<sup>1</sup> www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Arizona v. United States* (“*Arizona*”), No. 11-182, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2492 (2012); *Chamber of Commerce v. Whiting*, No. 09-115, 563 U.S. \_\_\_, 131 S.Ct. 1968 (2011), *Horne v. Flores*, 557 U.S. 433, n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF’s *amici* brief), and *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008). AULDF filed *amicus* briefs in the Ninth Circuit panel and en banc proceedings in this case.

AULDF supports the Petitioners’ arguments and agrees with their reasons for requesting reversal of the decision below. AULDF writes separately to discuss “the prevalence and character of the fraudulent practices that allegedly justify those requirements.” *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (“*Purcell*”) (Stevens, J., concurring), and the effect the factual findings of the District Courts here,

---

<sup>1</sup> Pursuant to Rule 37.2(b), *amicus* certifies that counsel for State Petitioners have provided the Clerk with blanket consent to file *amicus* brief, and counsels of record for Petitioners County Recorders, *et al.*, and Respondents have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

and similar evidence of widespread voter registration fraud elsewhere, should have had on the lower court's analysis.

### PRELIMINARY STATEMENT

It is important at the outset to identify clearly what the Ninth Circuit held below:

Despite widespread evidence of voter registration fraud, a federal agency can require a State to “accept and use” a voter registration application whose sole protection against non-citizen registration is a signature on a postcard.<sup>2</sup>

In recent years, “voting rights lawsuits have become part of the landscape,”<sup>3</sup> many involving “voter I.D.” or requirements that prospective voters identify themselves.<sup>4</sup> This is a “voter I.D.” case, but

---

<sup>2</sup>“Once the [U.S. Elections Assistance Commission] 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.” *Gonzalez v. Arizona*, 677 F.3d 383, 400 (9<sup>th</sup> Cir. 2012) (en banc) (“*Gonzalez IV*”), Petition Appendix (“Pet. App.”) at 1c, 36c.

<sup>3</sup> Robert Barnes, “In Ohio and elsewhere, battles over state voting laws head to court,” *The Washington Post*, (Aug. 5, 2012), A1, available at: [http://www.washingtonpost.com/politics/in-ohio-and-elsewhere-battles-over-state-voting-laws-head-to-court/2012/08/05/a56b8ad6-dc19-11e1-8e43-4a3c4375504a\\_story.html?hpid=z4](http://www.washingtonpost.com/politics/in-ohio-and-elsewhere-battles-over-state-voting-laws-head-to-court/2012/08/05/a56b8ad6-dc19-11e1-8e43-4a3c4375504a_story.html?hpid=z4).

<sup>4</sup> “The controversy over voting rights is playing out against the backdrop of a growing national debate over the issue.” Sari Horowitz, “Eric Holder vows to aggressively challenge voter ID laws,” *The Washington Post*, (Jul. 10, 2012), A1, available at: <http://www.washingtonpost.com/world/national-security/eric>

looks at a different stage of the voting process from the cases that have attracted substantial media headlines. This appeal deals only with a “voter registration fraud” law. The Ninth Circuit prohibited the use of any identification in voter registration using a federal form except a signature. *Gonzalez v. Arizona*, 677 F.3d 383, 400 (9<sup>th</sup> Cir. 2012) (en banc) (“*Gonzalez IV*”); Pet. App. 33c.

The other cases often involved challenges to “voter impersonation fraud” laws that require voters to show identification at the polls.<sup>5</sup> Voter impersonation fraud laws were upheld in *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008), and Arizona’s requirement to require voter identification at the polls was upheld in this case. *Gonzalez IV*, 677 F.3d at 388; Pet. App. 6c (“We uphold Proposition 200’s requirement that voters show identification at the polling place”).

In contrast, this appeal involves voter registration fraud, which can be defined narrowly for this case as a non-citizen registering to vote.<sup>6</sup> The

---

holder-vows-to-aggressively-challenge-voter-id-laws/2012/07/10/gJQApOASbW\_story.html.

<sup>5</sup> “Thirty states presently have laws in place that will require all voters to show ID at the polls this November. That number could rise; a total of thirty-three states have passed voter ID laws.” “Voter Identification Requirements,” National Conference of State Legislatures, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (Last updated Oct. 24, 2012).

<sup>6</sup> *See, e.g.*, Glenn Cook, “How Many Noncitizens Are Registered to Vote?” *Las Vegas Review Journal*, (Nov. 4, 2012, 10:19 AM), <http://www.lvrj.com/opinion/how-many-noncitizens-are-registered-to-vote-177141441.html>.

Last week, I met with two immigrant noncitizens who are not eligible to vote, but who

distinction is critical because, as this Court recognized the last time this case came before it, the court must resolve, *inter alia*, “the prevalence and character of the fraudulent practices that allegedly justify those requirements.” *Purcell*, 549 U.S. at 6 (Stevens, J., concurring).

The contention in the voter impersonation cases was that such fraud “simply does not exist.”<sup>7</sup> Brief of the Indiana Democratic Party in *Crawford*,

---

nonetheless are active registered voters for Tuesday’s election. They said they were signed up by Culinary Local 226.

They speak and understand enough English to get by. But they don’t read English especially well. They say the Culinary official who registered them to vote didn’t tell them what they were signing and didn’t ask whether they were citizens. The immigrants said they trusted that the union official’s request was routine, thought nothing of it and went about their work.

Then the election drew closer. Then the Culinary canvassers started seeking them out and ordering them to go vote. One of the immigrants was visited at home by a Culinary representative and said the operative made threats of deportation if no ballot was cast. They didn’t understand how, as noncitizens, they could be registered to vote if it’s illegal for them to vote in a U.S. election. They didn’t understand that, upon being signed up, not only is their registration public record, but the record of whether they’ve voted is public as well.

<sup>7</sup>This contention is incorrect, as *amicus* AULDF demonstrated in its brief in *Crawford*. See, e.g., Brief of American Unity Legal Defense Fund as *Amicus Curiae* in *Crawford*, No. 07-21, 07-25, at 9-15 (documenting in detail several examples of in-person voter impersonation).

No. 07-21, 07-25, at 44. This Court rejected the “simply does not exist” theory, saying

It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation’s history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana’s own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

*Crawford*, 553 U.S. at 195-96 (footnotes omitted).

Thus, “the prevalence and character of the fraudulent practices” can be shown by examples of past fraud and by recent “occasional” examples. Under *Crawford*’s footnote 12, even a single incident would be sufficient. *Crawford*, 553 U.S. at 195 n. 12, *citing* Le & Nicolosi, “Dead Voted in Governor’s Race,” *Seattle Post-Intelligencer*, (Jan. 7, 2005, 10:00 PM), p. A1. Recent elections have been decided by only a few votes.<sup>8</sup>

But there are many more than a single example of voter registration fraud. Two dogs have been registered to vote in Bernalillo Country, New

---

<sup>8</sup> “The closest election in Minnesota this year was the House District 8B contest between incumbent Rep. Mary Franson, R-Alexandria, and Democratic challenger Bob Cunniff. Franson won by a single vote.” Jennifer Brooks, “Votes Miscast in House District 8B Election,” *Minneapolis Star-Tribune*, (Nov. 19, 2012, 4:46 PM), [www.startribune.com/politics/statelocal/179988481.html](http://www.startribune.com/politics/statelocal/179988481.html).

Mexico in the last five years;<sup>9</sup> a copy of a recent New Mexico voter registration form submitted for a dog named “Buddy Tolbert” is attached to this brief as Appendix A.<sup>10</sup> *Crawford*, for example, noted that the Brennan Center for Justice, a fraud denier, admitted that “much of the [in-person] fraud was actually absentee ballot fraud or voter registration fraud.” *Crawford*, 553 U.S. at 195 n. 12.

These are not isolated frauds, but are similar to allegations of fraudulent voter registration incidents nationwide. Some of these allegations are staggering in their magnitude, particularly those involving the now-defunct advocacy group, the Association of Community Organizations for Reform Now (“ACORN”).<sup>11</sup> Of 1.3 million voters ACORN

---

<sup>9</sup> KOB-TV, “4 On Your Side exposes illegal voting in New Mexico,” (Nov. 6, 2012, 9:07 AM), <http://www.kob.com/article/stories/S2824713.shtml?cat=500>.

<sup>10</sup>KOB-TV, Albuquerque, New Mexico, “Dog Voter Registration Form,” <http://www.documentcloud.org/documents/502051-dog-voter-registration-form.html> (Last visited Dec. 6, 2012).

<sup>11</sup> *See, e.g., Busefink v. Nevada*, 286 P.3d 599, 601-02 (Nev. 2012) (describing ACORN’s “blackjack” incentive program to pay for voter registrations in violation of state law); Eric Shawn, “ACORN Pleads Guilty to Voter Registration Fraud in Nevada,” FoxNews.com, (Apr. 6, 2011), [www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/](http://www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/); “Three of seven defendants in the biggest voter-registration fraud scheme in Washington history have pleaded guilty and one has been sentenced, prosecutors said Monday. . . . The defendants were all temporary employees of ACORN.” Keith Ervin, “Three Plead Guilty in Fake Voter Scheme,” *Seattle Times*, (Oct. 30, 2007, 2:02AM), *available at* [http://seattletimes.nwsourc.com/html/localnews/2003982533\\_acorn30m.html?syndication=rss](http://seattletimes.nwsourc.com/html/localnews/2003982533_acorn30m.html?syndication=rss). “Federal indictments allege the

claimed to have registered, only 450,000 were actually legitimate new voter registrations. Michael Falcone, "Group's Tally of New Voters Was Vastly Overstated," *The New York Times*, (Oct. 24, 2008), A1, *available at* [www.nytimes.com/2008/10/24/us/politics/24acorn.html](http://www.nytimes.com/2008/10/24/us/politics/24acorn.html). ACORN officials admitted that up to 30 percent of the registrations they submitted were "faulty." *Id.*

ACORN worked in Arizona and was an original plaintiff in this case. First Amended Complaint, ¶ 17. ACORN off-shoots are still conducting voter registration drives. *See, e.g.*, Tony Lee, "Watchdog Group Calls on IRS to Investigate Re-Branded TX ACORN Branch," *Breitbart.com*, (Jul. 20, 2012), <http://www.breitbart.com/Big-Government/2012/07/19/Taxpayer-Watchdog-Group-Calls-on-I-R-S-To-Investigate-Re-Branded-Texas-ACORN-Branch>.

Indeed, at least one expert, Kansas Secretary of State Kris Kobach, attributes the recent surge in state voter identification laws to widespread concern about ACORN and similar efforts. Ryan J. Reilly, "Kris Kobach credits ACORN Hysteria With GOP-led Voter ID Renaissance," *TPM*, (Jul. 26, 2012, 6:40 PM), [http://tpmmuckraker.talkingpointsmemo.com/2012/07/kris\\_kobach\\_credits\\_acorn\\_coverage\\_for\\_voter\\_id\\_push\\_video.php](http://tpmmuckraker.talkingpointsmemo.com/2012/07/kris_kobach_credits_acorn_coverage_for_voter_id_push_video.php).

---

four turned in false voter registration applications. Prosecutors said the indictments are part of a national investigation," *KMBC-TV*, "ACORN Workers Indicted on Alleged Voter Fraud," *Kansas City, Missouri*, (Nov. 1, 2006, 10:25 AM), *available at* <http://www.kmbc.com/politics/10214492/detail.html>.

Nor is there any real question about the existence of voter registration fraud involving non-citizens in particular.<sup>12</sup> Another prominent fraud denier, Prof. Richard Hasen, wrote recently: “Unlike impersonation fraud, noncitizen voting cannot be dismissed as a Republican fantasy.” Richard Hasen, “A Détente Before the Election,” *The New York Times*, (Aug 5, 2012, 9:13 PM), *available at* <http://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/?ref=opinion>.

It was a simple handwritten note left for the Sandoval County [New Mexico] clerk that read, “I would like to have my voter registration card cancelled, please and thank you.” The note was short and polite, but it immediately raised red flags about the woman who left it. It didn’t take long before election officials learned the reason for the request: The woman was not a United States citizen.

---

<sup>12</sup> See, e.g., *Kimani v. Holder*, 695 F.3d 666, 669 (7<sup>th</sup> Cir. 2012)(statute does not require non-citizen to have voted “knowingly”); *United States v. Knight*, 490 F.3d 1268, 1270 (11<sup>th</sup> Cir. 2007) (upholding conviction of a Jamaican citizen who voted in the 2000 Presidential election); *Simmons v. Jones*, 838 S.W.2d 298, 299 (Tex. App. 1992)(“Simmons lost one vote because one person voted for him who was not a citizen of the United States.”); Joe Kimball, “Two non-citizens charged with voter fraud in Austin, Minn.,” *MinnPost*, (Dec. 4, 2012), [www.minnpost.com/political-agenda/2012/12/two-non-citizens-charged-voter-fraud-austin-minn](http://www.minnpost.com/political-agenda/2012/12/two-non-citizens-charged-voter-fraud-austin-minn); Dar Danielson, “DCI arrests 3 non-citizens for illegally voting in Pottawattamie County [Iowa],” *Radio Iowa*, (Sept. 20, 2012), [www.radioiowa.com/2012/09/20/dci-arrests-3-non-citizens-for-illegally-voting-in-pottawattamie-county/](http://www.radioiowa.com/2012/09/20/dci-arrests-3-non-citizens-for-illegally-voting-in-pottawattamie-county/).

A review of the woman's voting record showed she had cast a ballot in nearly every election since registering as a Republican inside a Motor Vehicle Office in 2005. She is not alone. 4 On Your Side [KOB-TV, Albuquerque, NM] also tracked down a Mexican National who has been voting since 1998, casting his ballot a total of 26 times.

KOB-TV, "4 On Your Side exposes illegal voting in New Mexico," *supra*. Copies of the voter registration forms for these two non-citizens are attached as appendices to this brief. App. 2, 3.

Arizona has a similar record: Even before Arizona became a State, newspapers reported non-citizen voter fraud: "In 1868, the *Arizona Miner* had reported 'hundreds of non-citizens of Mexican origin at Tucson, Tubac, and other places' voting for the same United States congressional candidate 'as many as three times in one day'". Paula Mitchell Marks, *AND DIE IN THE WEST*, 1996, P. 108.

In the District Court in this case, Chief Judge Silver issued findings of fact including referrals of 159 matters to the Maricopa County Attorney in 2005 "based on evidence that non-citizens had registered to vote." JA 267. Ten non-citizens were charged "for falsely filing voter registration forms claiming they were in fact United States citizens, four of which [*sic*] had voted in an election." *Id.* Exhibits 1108 and 1351 showed that "208 individuals had their voter registrations cancelled after they swore under oath to the Jury Commissioner that they were not citizens, 56 of whom are alleged to have voted in an election." *Id.* Exhibit 1349 showed "five of the nine [persons

prosecuted for illegal voting] were alleged to be non-citizens that had in fact voted . . . Of the five, four pleaded guilty.” JA 268. *See also, Gonzalez v. Arizona*, 485 F.3d 1041, 1048 (9<sup>th</sup> Cir. 2007) (“*Gonzalez I*”) (“between 1996 and [2006], as many as 232 non-citizens tried to register to vote and that the State prosecuted ten of those 232 alleged non-citizens.”).

The New York Times estimated in 2008 that thousands of non-citizens tried to register to vote in Arizona in the prior five years. Ian Urbina, “Voter ID Battle Shifts to Proof of Citizenship,” *The New York Times*, (May 12, 2008), [www.nytimes.com/2008/05/12/us/politics/12vote.htm](http://www.nytimes.com/2008/05/12/us/politics/12vote.htm).

And a congressional committee reported:

The [Maricopa] county recorder [Helen Purcell] has received inquiries from people seeking to become U.S. citizens who have been told by Immigration and Customs Enforcement to obtain a letter from her office confirming they have neither registered to vote nor voted. To date, a review of these matters has turned up 37 non-citizens who have registered to vote. Fifteen of these individuals have voted.

Committee on the Judiciary, “The Deceptive Practices and Voter Intimidation Prevention Act of 2007,” H. R. Rep. 110-101 (2007), at 12.

Some of the confusion about the existence of voter registration fraud may stem from a belief that, since the non-citizens did not intend to commit fraud, their voter registrations are not fraudulent. As shown by the New Mexico and Nevada examples, *supra*, this evidence of non-citizen voter participation does not necessarily mean that there is

criminal intent.<sup>13</sup> In some cases, the non-citizens are aware that they should not register, but are encouraged or misled by others who should know better:<sup>14</sup>

On the last day to register to vote this year, Four On Your Side secretly recorded several third party agents to find out how familiar they are with the law. At a Walmart in Albuquerque, two registration agents seemed confused about immigration issues. Our producer told them he was from Canada, but living here legally. “I don’t know the immigration stuff,” a registrar told him. “You said you’re here legally?” Eventually, after re-reading the form, our producer was told he should not register.

---

<sup>13</sup> See, *Keathley v. Holder*, 696 F.3d 644 (7<sup>th</sup> Cir. 2012)(Illinois Dept. of Motor Vehicles official’s mistake in registering non-citizen may excuse her violation of voter registration prohibition because she was misled), distinguishing *Kimani*, where the alien attempted subterfuge.

<sup>14</sup> On the weekend before the November 2000 elections, the California Democratic Party mailed hundreds of thousands of fake “Voter Identification Cards” to lists which included non-citizens. Julie Foster, “Non-citizens vote with ‘Clinton card?’” *WorldNet Daily*, (Nov. 7, 2000), available at [www.wnd.com/2000/11/4619/](http://www.wnd.com/2000/11/4619/). The cards were accompanied by a letter signed by then-President Bill Clinton, who exhorted recipients to vote. *Id.*

The Clinton letter included a postscript, just below President Clinton’s signature, which read: “Here is your personal Voter Identification Card. Sign your name, then detach your card. Bring your card with you to your polling place on Election Day. It will help your voting go more smoothly.” *Id.* A copy of the Clinton letter can be found at: [http://www.worldnetdaily.com/images/20001106\\_Clintonltr.jpg](http://www.worldnetdaily.com/images/20001106_Clintonltr.jpg) (Last visited Dec. 10, 2012).

KOB-TV, “4 On Your Side exposes illegal voting in New Mexico,” *supra*.

The Findings of Fact in this case indicate that voter registration organizations were “misleading non-citizen residents into registering to vote.” JA 267, 268. “After talking with this woman, [Yuma County Voter Registration Coordinator Krysty] Marin believes she was a victim of an unscrupulous voter registration organization.” JA 268.

A more contentious example of non-citizen voter registration fraud was in the 1996 election in California’s 46<sup>th</sup> Congressional District. Comm. on House Oversight, “Dismissing the Election Contest Against Loretta Sanchez,” H. Rpt. 105-416. In that election, Loretta Sanchez defeated incumbent Robert Dornan by only 979 votes. *Id.*, at 15. A congressional investigation found “significant vote fraud and vote irregularities.”<sup>15</sup> *Id.*, at 16.

An advocacy group, Hermandad Mexicano Nacional, was alleged to have encouraged illegal voter registration and voting. *Id.*, at 3. The Orange County, California, District Attorney found that 61% of the voter registrations by the advocacy group were illegal. *Id.*, at 337. In addition, the California Secretary of State determined that 303 non-citizens registered by the group had voted in the disputed election. *Id.*, at 19, 337.

The organization admitted having registered illegal immigrants. PBS Online Newshour, “Contested Contest,” *Online Focus*, (Oct. 22, 1997),

---

<sup>15</sup> The Committee nevertheless determined that the number of non-citizen and other illegal votes uncovered by the investigation was not as large as Sanchez’s margin of victory, so the election challenge was dismissed. *Id.*

*available at* [www.pbs.org/newshour/bb/congress/july-dec97/dornan\\_10-22.html](http://www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html) (“And Lopez of Hermandad Mexicana admits his group registered non-citizens.”). There was no prosecution.

The context of this case is that voter registration fraud is a known, widespread danger. Whether or not voter impersonation fraud exists, it has not been reported to be as prevalent as voter registration fraud. Courts, following *Crawford*, routinely uphold the use of identification to prevent the less-likely voter impersonation fraud, as did the Ninth Circuit below. *Gonzalez IV*, 677 F.3d at 388; Pet. App. 31c. But, despite the higher likelihood of voter registration fraud, the decision below prevents Arizona from asking for anything more from voter registration applicants using the “Federal Form” than a signature on a postcard. *Gonzalez IV*, 677 F.3d at 398, 400; Pet. App. 32c-33c.

This Court, in a Voting Rights Act pre-clearance decision, seemed to view the statute differently:

Nonetheless, implementation of the NVRA<sup>16</sup> is not purely ministerial. The NVRA still leaves room for policy choice. The NVRA does not list, for example, all the other information the State may – or may not – provide or request.

*Young v. Fordice*, 520 U.S. 273, 286 (1997).

Thus, at a time when advocacy organizations admit that they have submitted hundreds of thousands of “faulty” voter registration applications, the Ninth Circuit suggests that the only protection

---

<sup>16</sup> National Voter Registration Act of 1993 (“NVRA”), 42 U.S.C. §§ 1973gg *et seq.*

against fraud a State is permitted to use on a federal form that must be accepted is whether the applicants “attested to being U.S. citizens.” *Gonzalez IV*, 677 F.3d at 398-99 (emphasis added); Pet. App. 31c. This willful blindness toward fraud cannot be consistent with the “language and structure” of the NVRA, whose four express purposes include “increas[ing] the number of eligible citizens who register to vote,” “enhanc[ing] the participation of eligible citizens as voters,” “protect[ing] the integrity of the electoral process” and “ensur[ing] that accurate and current voter registration rolls are maintained.” 42 U.S.C. § 1973gg(b)(1), (2), (3), and (4).

#### **SUMMARY OF ARGUMENT**

The Petitioners’ Opening Briefs describe several reasons for reversal. In the context of the widespread existence of voter registration fraud, as shown above, the lower court should be reversed because it misunderstood the “language and structure” of the NVRA, and it failed to give due regard to the State’s important interests in protecting the integrity of its elections.

First, the decision below rewrote the text of the statute, changing the limitation that a State “may require only such identifying information (including the signature of the applicant) and other information ... as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process,” 42 U.S.C. § 1973gg-7(b)(1), to a more restrictive limit that a State “may require only ... the signature of the applicant.” This is inconsistent with this Court’s

position in *Fordice* that “The NVRA does not list, for example, all the other information the State may – or may not – provide or request.” 520 U.S. at 286. By requiring a State to accept only a signature as evidence of citizenship, the court below ignored the statutory language, and failed to realize that its interpretation is unreasonable in light of widespread voter registration fraud.

Second, the court below may have believed, as it indicated, that Congress intended the NVRA only (or principally) to streamline voter registration, but this, too, ignores the statutory language and is unreasonable in current circumstances. The NVRA contains four specific goals: “increas[ing] the number of eligible citizens who register to vote,” “enhanc[ing] the participation of eligible citizens as voters,” “protect[ing] the integrity of the electoral process” and “ensur[ing] that accurate and current voter registration rolls are maintained.” 42 U.S.C. § 1973gg(b)(1), (2), (3), and (4). Each of these four goals recognizes the need to keep non-citizens from registering to vote. There is no indication in the legislative history or in this Court’s interpretations, that making voter registration easier trumps those other goals of protecting the integrity of the voter rolls. “In the ... NVRA ... Congress established procedures that would **both** increase the number of registered voters **and** protect the integrity of the electoral process.” *Crawford*, 553 U.S. at 192 (emphasis added). In light of the evidence of widespread voter registration fraud, the Ninth Circuit’s approach not only does not serve the purposes of the NVRA, it actively undermines them, driving “honest citizens out of the democratic process.” *Purcell*, 549 U.S. at 4. In other words, by

“streamlining” for a few, the Ninth Circuit undercuts all the others.

Finally, in setting out its new Elections Clause preemption analysis, the Ninth Circuit minimized or ignored important State interests recognized in previous decisions by this and other Courts. “There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.” *Crawford*, 553 U.S. at 196. Yet, despite this Court’s direction in an earlier stage of this case that the lower courts engage in a factual investigation of, *inter alia*, “the prevalence and character of the fraudulent practices”, *Purcell*, 549 U.S. at 6, the Ninth Circuit did not mention or apparently consider the direct or public confidence implications of the fraud found in the case record or in other sources used by this Court in its reviews. As a result, the lower court’s Elections Clause analysis may have downplayed legitimate State interests recognized by other courts.

In this hyper-politicized environment, the lower courts are struggling to determine challenges to voter identification laws.<sup>17</sup> The decision below will

---

<sup>17</sup> See, e.g., *Voting Integrity Project v. Andrade*, No. 3:12-cv-00044, (S.D.Texas, August 2, 2012), Opinion And Order Granting In Part And Denying In Part Plaintiffs’ Motion For A Preliminary Injunction, Pp. 37-41. “Although it is clear that the Elections Clause grants Congress the power to override state election laws regulating federal elections, case law says little about the proper standard to apply when analyzing Elections

only confuse and mislead the other courts. The Court should assist the lower courts in understanding how to analyze voter registration fraud laws by reversing the decision below.

## ARGUMENT

### I. THE DECISION BELOW MISUNDERSTANDS THE “LANGUAGE AND STRUCTURE” OF THE NVRA.

The initial question is whether the Ninth Circuit correctly assessed the “language and structure” of the NVRA. *Gonzalez IV*, 677 F.3d at 403 n. 29; Pet. App. 41c. Whether or not, as the Ninth Circuit asserts, there is a difference between Supremacy Clause and Election Clause preemption analyses, the difference is likely not in the controlling nature of Congressional intent. “[O]ur task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-63 (2002).

The Ninth Circuit, in its analysis, deflected this question to an agency’s interpretation and “balance” of legislative purposes:

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

---

Clause preemption.” *Id.*, at 38. The lower court there adopted the Ninth Circuit’s analysis. *Id.*, at 40.

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.

*Gonzalez IV*, 677 F.3d at 403; Pet. App. 42c.

Leaving such a decision to a federal agency means that a decision not to enforce the statute displaces State law in the same way as an affirmative act by Congress, but this conflicts with decisions such as *Altria Group, Inc. v. Good*, 555 U.S. 70, 89-90 (2008) (“agency nonenforcement of a federal statute is not the same as a policy of approval.”).<sup>18</sup>

The Court should not ratify an “unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress.” *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), quoting, *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965). Similarly, while reviewing courts should uphold an agency’s reasonable and defensible

---

<sup>18</sup> Such an interpretation also raises questions about implied repeals. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-64 (2007) (“repeals by implication are not favored” and will not be presumed unless “the intention of the legislature to repeal [is] clear and manifest.” (internal quotation omitted)). If the Elections Clause treats the NVRA as a later enactment by the same “legislature” that passed Arizona’s Proposition 200, *Gonzalez IV*, 677 F.3d at 395, Pet. App. 20c, then any repeal that is not express would necessarily be implied. And it likely could not be said that the Arizona provision is a “positive repugnancy” to the federal act, *Home Builders*, 551 U.S. at 664 n. 8, perhaps justifying implied repeal, since it seems to support the statutory purposes of the NVRA. 42 U.S.C. § 1973gg-b(1)-(4).

constructions of its enabling statute, they must not “rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” *Id.*, quoting *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

Leaving aside these questions, however, the Ninth Circuit’s analysis ignores statutory interpretation principles as described in other decisions.

**A. The Ninth Circuit’s Analysis Would Rewrite the Text of the NVRA.**

The relevant statutory provision says that a State:

may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process.

42 U.S.C. § 1973gg-7(b)(1).

The Ninth Circuit would rewrite that provision to read: “may require only ... the signature of the applicant.” This would, in effect, delete the remainder of the sentence so as not to suggest that information other than the signature might be requested.

That revision would be inconsistent with *Fordice*. The Court “recognize[d] that the NVRA imposes certain mandates on States, describing those mandates in detail.” 520 U.S. at 286. But the *Fordice* Court disagreed with the Ninth Circuit’s

revision of the relevant sentence: “The NVRA does not list, for example, all the other information the State may – or may not – provide or request.” *Id.* The original panel in this case similarly analyzed this requirement and determined 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.” *Gonzalez I*, 485 F.3d at 1050-51. *See also, McKay v. Thompson*, 226 F.3d 752 (6<sup>th</sup> Cir. 2000) (upholding requirement that voter registration applicants provide valid social security numbers to register). “The NVRA does not specifically forbid use of social security numbers.” *Id.*, 226 F.3d at 755.

This Court has recently found that signature verification, at least in ballot initiative circulation, is an inadequate sole safeguard for election integrity: “But the secretary's verification and canvassing will not catch all invalid signatures: The job is large and difficult (the secretary ordinarily checks “only 3 to 5% of signatures,” ...), and the secretary can make mistakes, too.” *John Doe No.1 v. Reed*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2811, 2820 (2010). In light of the evidence of widespread voter registration fraud found in the record here and in numerous official and media reports elsewhere, as shown above, the Ninth Circuit’s position is not only inconsistent with the statute, it is unreasonable.

**B. The Ninth Circuit Opinion Recognizes Only One of the Four Purposes of the NVRA.**

The Ninth Circuit mentioned in passing that the NVRA has “four articulated purposes,” *Gonzalez*, 677 F.3d at 403; Pet. App. 41c, but saw only one as controlling: “Proposition 200’s registration provision is discordant with **the NVRA’s goal** of streamlining

the registration process.” *Gonzalez IV*, 677 F.3d at 400 (emphasis added); Pet. App. 36c.

The use of the term “goal” (instead of “goals”) of the NVRA is revealing. The NVRA was a balance of interests with four enumerated purposes, but the Ninth Circuit ignored three of them.

The Ninth Circuit’s “single-purpose” view of the NVRA is inconsistent with the statutory language and has been rejected by this Court. “In the ... NVRA ... Congress established procedures that would **both** increase the number of registered voters **and** protect the integrity of the electoral process.” *Crawford*, 553 U.S. at 192 (emphasis added). *See, also, Project Vote/Voting for America v. Long*, 682 F.3d 331, 334 (4<sup>th</sup> Cir. 2012)(“Congress enacted the NVRA in order to ‘increase the number of eligible citizens who register to vote’ in federal elections, ‘enhance[ ] the participation of eligible citizens as voters,’ ‘protect the integrity of the electoral process,’ and ‘ensure that accurate and current voter registration rolls are maintained.’”); *Lake v. Neal*, 585 F.3d 1059, 1060 (7<sup>th</sup> Cir. 2009) (“Congress passed the NVRA to (1) make it easier to register to vote and (2) to help protect the integrity of the process by ensuring that accurate voter registration rolls are maintained.”); *U.S. Student Ass’n Foundation v. Land*, 546 F.3d 373, 391 (6<sup>th</sup> Cir. 2008) (NVRA has “dual objectives” of “increas[ing] the number of eligible citizens who register to vote in elections for federal office,’ while also assuring that ‘*accurate and current* voter registration rolls are maintained.” Emphasis in original.); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 114 (2<sup>nd</sup> Cir. 2000).

Each of the four statutory purposes of the NVRA includes a reference to eligibility, integrity or accuracy:

- to “increase the number of **eligible citizens** who register to vote”;<sup>19</sup>
- to “enhance[] the participation of **eligible citizens** as voters”;<sup>20</sup>
- to “**protect the integrity** of the electoral process”;<sup>21</sup> and,
- to “ensure that **accurate and current** voter registration rolls are maintained.”<sup>22</sup>

None of the highlighted terms fit into a singular “goal” of the NVRA, solely to “streamline” registration. The Second Circuit, for example, rejected an argument that defeat of an amendment by the NVRA conference committee was effective, in the face of statutory text, to show the controlling nature of the purpose of increasing voter registration opportunities. *Disabled in Action*, 202 F.3d at 127. The Ninth Circuit here accepted that argument. *Gonzalez IV*, 677 F.3d at 403, n. 29.

Each statutory purpose is inconsistent with an interpretation which permits only a signature requirement to account for eligibility concerns. Congress was apparently as interested in “protect[ing] the integrity of the electoral process,” § 1973gg(b)(3), as in reduc[ing] state-imposed obstacles to federal registration.

---

<sup>19</sup> 42 U.S.C. § 1973gg(b)(1) (emphasis added).

<sup>20</sup> 42 U.S.C. § 1973gg(b)(2) (emphasis added).

<sup>21</sup> 42 U.S.C. § 1973gg(b)(3) (emphasis added).

<sup>22</sup> 42 U.S.C. § 1973gg(b)(4) (emphasis added).

“There is no question about the legitimacy or importance of the State's interest in counting **only the votes of eligible voters**. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for **carefully identifying all voters participating in the election process**.” *Crawford*, 553 U.S. at 196 (emphases added). The *Crawford* analysis of the state's interests was not confined to the polling places, but seems to encompass the “election process.” *Id.*

Protecting the integrity of the electoral process is necessary to the achievement of the other purposes. For example, Congress recognized that the integrity of the electoral process was crucial to “enhanc[ing] the participation of eligible citizens as voters.” § 1973gg(b)(2). In an earlier proceeding in this case, the Court agreed with that approach: “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell*, 549 U.S. at 4; *see, also, Doe*, \_\_\_ U.S. at \_\_\_, 130 S.Ct. at 2819 (“The State’s interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It ‘drives honest citizens out of the democratic process and breeds distrust of our government’”, *citing, Purcell*, 549 U.S. at 4, and *Crawford*, 553 U.S. at 196).

By focusing solely on a singular “goal” of the NVRA, the Ninth Circuit’s view does not appear to be supported by either the text of the statute or precedent. Nor is it a reasonable position, since, in light of the evidence of widespread voter registration fraud, the achievement of the Ninth Circuit’s sole NVRA “goal” of “streamlining” voter registration

would appear to undercut the four statutory purposes, all of which protect both the voting power of “eligible citizens” and the integrity of the electoral process. In other words, by “streamlining” for a few, the Ninth Circuit undercuts all the others, driving “honest citizens out of the democratic process.” The Ninth Circuit’s conclusion about Congressional intent is tainted by its failure to accept all four purposes of the statute; it should be reversed.

## **II. THE NINTH CIRCUIT FAILED TO RECOGNIZE LEGITIMATE STATE INTERESTS IN PROTECTING THE INTEGRITY OF THE ELECTION SYSTEM.**

This Court, in *Purcell* and *Crawford*, established standards for reviewing the state interests underlying voter identification laws. The Ninth Circuit, on the other hand, simply announced, as part of its Elections Clause analysis, that “the Elections Clause affects only an area in which the states have no inherent or reserved power.” *Gonzalez IV*, 677 F.3d at 392; Pet. App. 16c.

It is true that the Elections Clause looks to the Constitution to find state interests, *id.*, but that does not necessarily mean that the States have no interests to consider. The Ninth Circuit simply ignored the legitimate State interests long recognized by this Court, saying “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”. *Gonzalez IV*, 677 F.3d at 392; Pet. App. 16c.

The States have long been viewed as having inherent rights to protect against voter fraud. “There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process.” *Crawford*, 553 U.S. at 196; *see also*, *Project Vote/Voting for America*, 682 F.3d at 340 (“State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible.”).

Similarly, the State has a substantial interest in protecting voter confidence:

Finally, the State contends that it has an interest in protecting public confidence “in the integrity and legitimacy of representative government.” Brief for State Respondents, No. 07-25, p. 53. While that interest is closely related to the State’s interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the “electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters.”

*Crawford*, 553 U.S. at 197.

There are thus three specific state interests at stake, two involving prevention of voter fraud (“counting only the votes of eligible voters” and “orderly administration and accurate

recordkeeping”), and one involving the protection of public confidence in the integrity of the voting process by deterring fraud and “confirm[ing] the identity of voters.” *Id.* Each of these three interests is implicated in this case and protected by the Arizona identification requirement.

As shown *supra*, each of the *Crawford* sources of evidence of voter fraud, 553 U.S. at 195, is present here: historical accounts, recent examples, and Arizona’s own evidence of fraud significant enough to affect close elections. That evidence shows that Arizona’s interest in preventing voter fraud is strong.

Arizona’s separate, though related, concern about public confidence in the electoral system is also strong. In *Purcell*, an earlier part of this case, this Court, per curiam, said:

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.

*Purcell*, 549 U.S. at 4.

Arizona has perhaps one of the strongest indications that the public lacked confidence in the electoral system: Arizona’s voters overwhelmingly voted to change the system and replace it with one in which they had more confidence. In response to increasing concerns about the level of voter fraud in Arizona and elsewhere, in 2004, the voters of Arizona adopted Proposition 200. “The measure sought to combat voter fraud by requiring voters to

present proof of citizenship when they register to vote and to present identification when they vote on election day.” *Purcell*, 549 U.S. at 2; *see also*, *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008)(“The resolution submitting this measure to the voters echoes those [fraud] concerns.”).

Yet, despite this Court’s admonition that the lower courts engage in a factual investigation of, *inter alia*, “the prevalence and character of the fraudulent practices”, the Ninth Circuit did not mention or apparently consider the direct or public confidence implications of the fraud found in the case record or in other sources used by this Court in its reviews. As a result, the lower court’s Elections Clause analysis may have downplayed legitimate State interests recognized by other courts.

At a minimum, such an analysis seems to ignore the interests recognized in *Purcell* and *Crawford*. *See, also*, *Common Cause/Georgia*, 554 F.3d at 1354-55, *quoting* *Burdick v. Takushi*, 504 U.S. 428, 440 (1992). “The legitimate state interest in preventing voter fraud, as recognized in *Crawford*, is more than ‘sufficient to outweigh the limited burden’ of producing [citizenship] identification.” *Id.*

These State interests are significant enough to be considered in any review of voter registration procedures, and the Ninth Circuit erred in overlooking or minimizing them. If the Court wishes to preserve these State interests, it should reverse this decision.

**CONCLUSION**

For the foregoing reasons, *Amicus Curiae* American Unity Legal Defense Fund respectfully requests this Court to reverse the decision below.

BARNABY W. ZALL  
*Counsel of Record for Amicus Curiae*  
Weinberg, Jacobs & Tolani, LLP  
7018 Tilden Lane  
Rockville, MD 20852  
(301) 231-6943  
bzall@bzall.com

## **APPENDIX**



Appendix B: Voter Registration Card for "Susan"<sup>24</sup>

**PERSONAL INFORMATION**

1 NAME Last First Middle Name or Initial Gender Birth Date Social Security Number  
 [REDACTED] SUSAN [REDACTED] F [REDACTED] 1955 [REDACTED]

2 ADDRESS WHERE YOU LIVE NOW  
 Street Address [REDACTED] City Zip  
 [REDACTED] RIO RANCHO 87144

3 ADDRESS WHERE YOU GET YOUR MAIL  
 Address [REDACTED] City Zip  
 [REDACTED] RIO RANCHO 87144

4 POLITICAL PARTY  
 Party: *Republican* In your district, do you prefer this party? YES  NO   
 May the county clerk make this information public for election purposes? YES  NO

5 I hereby authorize you to cancel my previous registration in the following county and state.  
 County: *7-13-13* State: *OK*  
**CANCELLED** *to Voters Request*

6 ATTESTATION OF QUALIFICATION  
 I swear/affirm that I am a citizen of the United States and a resident of the state of New Mexico; that I have not been denied the right to vote by a court of law by reason of mental incapacity; that I am, or will be at the time of the next election, 18 years of age and, if I have been convicted of a felony, I have completed all conditions of probation or parole; served the sentence of a sentence or have been granted a pardon by the governor; further swear/affirm that I am authorizing cancellation of any prior registration to vote in the jurisdiction of my prior residence.  
 SIGN YOUR FULL NAME OR MARK ON THE RED LINE BELOW:  
*Susan*

7 DATE: *1 24 05* Month Day Year  
 Name of person who assigned you in filling out this form: *MWD*

Accepted for filing in County Registration Book: *10-8-05 / Susan* Date  
 REP-44 SEN-22 REP SCH-340-03  
 RIO RANCHO--IN-88

<sup>24</sup> KOB-TV, Albuquerque, New Mexico, "Female Non-Citizen Voter Info," <http://www.documentcloud.org/documents/502052-female-non-citizen-voter-info.html> (Last visited Dec. 6, 2012).

