

No. 08-17094, 08-17115

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

-----X		
MARIA M. GONZALEZ, et al.	:	On Appeal from the United
	:	States District Court for the
Plaintiffs-Appellants,	:	District of Arizona
	:	
- against-	:	No. CV-06-01268-PHX-ROS
	:	No. CV-06-01362-PHX-ROS
STATE OF ARIZONA, et al.	:	
	:	
Defendants-Appellees,	:	
	:	
	:	
-----X		
THE INTER TRIBAL COUNCIL OF	:	
ARIZONA, INC., et al.	:	
	:	
Plaintiffs-Appellants,	:	
	:	
- against-	:	
	:	
STATE OF ARIZONA, et al.	:	
	:	
Defendants-Appellees,	:	
	:	
	:	
-----X		

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* ASIAN
AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT
OF APPELLANTS FOR REVERSAL OF THE RULING OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA**

1. Asian American Legal Defense and Education Fund (“AALDEF”) is a national civil rights organization based in New York, New York. AALDEF promotes and protects the civil rights of Asian Americans through litigation, legal advocacy and community education. A significant component of AALDEF’s mission is to ensure that Asian Americans have an equal opportunity to participate in the voting process.

2. AALDEF requests leave to file the adjoining Brief of *Amicus Curiae* Asian American Legal Defense and Education Fund in Support of Appellants for Reversal of the Ruling of the United States District Court for the District of Arizona (the “Amicus Brief”) pursuant to Rule 29 of the Federal Rules of Appellate Procedure.¹

3. The “satisfactory evidence” of citizenship requirement of Arizona’s Proposition 200 presents a disproportionately high hurdle to naturalized United States citizens. Because approximately 40% of Arizona’s Asian American citizens are naturalized, Asian Americans are at risk of disenfranchisement through the implementation of Proposition 200. This Court’s determination will therefore have serious implications on new Asian American citizens wishing to exercise their rights to participate in the electoral process.

¹ Counsel for the State of Arizona and the Arizona Secretary of State, counsel for the Inter Tribal Council of Arizona, Inc., et al. and counsel for Maria Gonzalez, et al. have consented to the filing of an *amicus curiae* brief by AALDEF. AALDEF has not, however, obtained consent to file from the remaining defendants-appellees.

4. AALDEF requests leave to file the Amicus Brief for the following reasons: (i) to ensure that Asian American citizens, both native-born and naturalized, enjoy the same access to the polls as non-minority citizens and (ii) to draw this Court's attention to the hurdles Asian American and other potential minority voters will encounter as a result of Proposition 200—hurdles that conflict with the stated purpose of the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.*

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WHEREFORE, AALDEF respectfully requests that this Court grant this motion for leave and allow AALDEF to submit the adjoining Amicus Brief.

Dated: June 1, 2011

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No. 08-17094, 08-17115

**United States Court of Appeals
For the Ninth Circuit**

MARIA M. GONZALEZ, *ET AL.*

Plaintiffs-Appellants,

v.

STATE OF ARIZONA, *ET AL.*,

Defendants-Appellees.

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

Plaintiffs-Appellants,

v.

STATE OF ARIZONA, *ET AL.*,

Defendants-Appellees.

**On Appeal from the United States District Court
For the District of Arizona**

Nos. 06-cv-01268-PHX-ROS; 06-cv-01362-ROS

BRIEF OF *AMICUS CURIAE* ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN
SUPPORT OF APPELLANTS FOR REVERSAL OF THE RULING OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

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INTERESTS OF AMICUS CURIAE

Asian American Legal Defense and Education Fund (“AALDEF”) is a national civil rights organization based in New York, New York.¹ AALDEF promotes and protects the civil rights of Asian Americans through litigation, legal advocacy and community education. A significant component of AALDEF’s mission is to ensure that Asian Americans have an equal opportunity to participate in the voting process. To that end, AALDEF advocates on behalf of Asian American voters and conducts voter registration drives, voter education events and voter protection activities on election day.

AALDEF submits this brief in support of Appellants for two reasons: (i) to ensure that Asian American citizens, both native-born and naturalized, enjoy the same access to the polls as non-minority citizens and (ii) to draw this Court’s attention to the hurdles Asian American and other potential minority voters will encounter as a result of Proposition 200—hurdles that conflict with the stated purpose of the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* (the “NVRA”).

¹ No party to this litigation, nor their counsel, either authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. Also, no person—other than the amicus curiae, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

At issue here is whether Arizona may enact a law that requires prospective voters in federal elections to provide documentary proof of United States citizenship where Congress has already created a comprehensive statutory scheme governing eligibility to vote in federal elections. The answer is no, especially where, as here, the Arizona law is in direct conflict with the text and purpose of the federal statute.

Under the Elections Clause of the United States Constitution, States may enact legislation that governs the time, place and manner of federal elections, but only to the extent that Congress declines to preempt state legislative choices. *See* U.S. Const. art. I, § 4, cl. 1. In enacting the NVRA, Congress found 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)(3). Accordingly, Congress prescribed in the NVRA that the Election Assistance Commission develop a voter-registration form for elections to federal office (the “Federal Form”) and that such Federal Form specify voter eligibility requirements, including citizenship and require the signature of the applicant under penalty of perjury. *See* 42 U.S.C. § 1973gg-7. The NVRA also requires that “[e]ach State shall and accept and use” the Federal

Form. 42 U.S.C. § 1973gg-4(a). Before the NVRA was passed, Congress specifically rejected an amendment that would have provided “[n]othing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship” on the ground, among others, that documentary proof was not consistent “with the purposes of the Act.” 139 Cong. Rec. S2897-04 (daily ed. Mar. 16, 1993); H.R. Rep. No. 103-66, at 23-24 (1993) (Conf. Rep.).

Pursuant to Proposition 200, Arizona’s local elections officials must reject new voter applications unless, in addition to completing the Federal Form, applicants provide additional documentary proof of citizenship. *See* Ariz. Rev. Stat. §§ 16-152, 16-166, 16-579 (LexisNexis 2011). This requirement is at odds with the NVRA’s requirement that States accept the Federal Form. It is also inconsistent with the legislative history of the NVRA. Moreover, because it is not possible for naturalized citizens to prove citizenship through some of the methods prescribed by Proposition 200, the Arizona initiative has a disproportionately negative impact on naturalized citizens, many of whom are minorities. Proposition 200’s “satisfactory evidence” of citizenship requirement is a particularly high hurdle for Asian American citizens of Arizona, approximately 40% of whom are naturalized. *See id.* § 16-166(F). In short, Proposition 200 has the very type of “direct and damaging effect on voter participation . . . including racial minorities” that the NVRA was designed to prevent.

Accordingly, AALDEF requests that this Court reverse the decision of the United States District Court of the District of Arizona which entered judgment against the plaintiffs-appellees on their NVRA claims and affirm the decision of the Ninth Circuit panel in *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010) (“Gonzalez II”).

STATEMENT OF THE CASE²

I. The NVRA’s Registration Provisions

Congress enacted the NVRA “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” and “to protect the integrity of the electoral process,” among other things. *See* 42 U.S.C. § 1973gg(b). The NVRA states that “the right of citizens of the United States to vote is a fundamental right” and “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.” *See id.* § 1973gg(a).

Section 4 of the NVRA requires that States accept and use the Federal Form. *Id.* § 1973gg-4(a)(1). The NVRA also dictates the contents of the Federal Form, which:

² AALDEF adopts the statement of the case set forth in the Opening Brief of Appellants Maria Gonzalez, et al. (the “Gonzalez Opening Brief”), but provides this additional statement of the case for context to the particular arguments set forth herein.

- (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.

Id. § 1973gg-7(b). Thus, pursuant to section 7 of the NVRA, 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 applicant meets each requirement.” *Gonzalez II*, 624 F.3d at 1179-80.

II. Proposition 200

Proposition 200 requires that the County recorder reject any voter registration application where the applicant has not provided “satisfactory evidence of citizenship.” *See* Ariz. Rev. Stat. § 16-166(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 may be established by providing one of the following:

- The number of the applicant’s Arizona driver’s license or state identification card, if the card is issued after October 1996, or the number of a license or an identification card from another State if the card states that the holder has provided satisfactory evidence of U.S. citizenship;
- A copy of the applicant’s U.S. birth certificate;
- A copy of the applicant’s U.S. Passport;
- A presentation to the County recorder of the applicant’s U.S. naturalization documents;
- The number of the certificate of naturalization (the “Naturalization Number”)—the applicant will not be included in registration rolls until the number of the certificate is verified with the United States Immigration and Naturalization Service³ by the County recorder;
- Other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986; or
- The applicant’s Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number.

³ The United States Immigration and Naturalization Service is now known as the United States Citizenship and Immigration Services (“USCIS”).

Id. §§ 16-152, 16-166.

III. Asian Americans in Arizona

In Arizona, Asian Americans make up approximately 2.4% of the population, but approximately 18.1% of the number of foreign-born naturalized citizens. In other words, of the approximately 126,497 Asian Americans living in Arizona, 51,370 or 40.6% are foreign-born naturalized citizens. On the other hand, White Americans make up 77.4% or approximately 4,895,446 of the population and only 172,842, or 3.5%, are foreign-born naturalized citizens. *See* U.S. Census Bureau, American FactFinder; 2005-2009 American Community Survey, 5-Year Estimates S0501, Selected Characteristics of the Native and Foreign-Born Populations, Arizona, 2005-2009 (the “U.S. Census Native and Foreign-Born Populations Data”). Given these statistics, Asian Americans are at a disproportionate risk of disenfranchisement through the implementation of Proposition 200. Thus, this Court’s determination will have serious implications on new Asian citizens wishing to exercise their rights to participate in the electoral process.

ARGUMENT⁴

I. The NVRA Preempts Proposition 200 Pursuant to the Elections Clause of the United States Constitution

A. Laws Enacted by Congress Supersede Conflicting State Laws Governing Registration in Federal Elections

The Elections Clause of the United States Constitution, Art. I § 4, cl. 1, provides that “[t]he 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.” The Elections Clause invests the States with responsibility “for the mechanics of congressional elections . . . but only so far as Congress declines to pre-empt state legislative choices.” *See Foster v. Love*, 522 U.S. 67, 69 (1997) (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Thus, through the Elections Clause, Congress is empowered to override state regulations by establishing uniform rules for federal elections that are binding on the States. *See Foster*, 522 U.S. at 69.

The United States Supreme Court likens this power to regulate elections to Congress’ ability to regulate foreign and inter-state commerce:

The regulation of foreign and inter-state commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the States. But where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. . . . Here, then, [the Elections

⁴ This amicus brief does not address issues regarding law of the case and law of the circuit.

Clause] is a case of concurrent authority of the State and national governments, in which that of the latter is paramount.

Ex parte Siebold, 100 U.S. 371, 385-86 (1880). As with the regulation of foreign and inter-state commerce, laws enacted by Congress pursuant to the Elections Clause are of “national character” requiring “a uniform rule.” *See id.* at 385. Thus, “[t]he paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther.” *See id.* at 386. To the extent a conflict exists between congressional and state regulations, “the latter . . . ceases to be operative.” *See id.* at 384.

B. Proposition 200 Directly Conflicts With the Text, Underlying Policy and Legislative History of the NVRA

The NVRA and Proposition 200 address the same issue: what information is needed when registering to vote in federal elections. Pursuant to Section 7, the Federal Form “may require only such identifying information . . . 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” *See* 42 U.S.C. § 1973gg-7(b)(1). Specifically, the Federal Form must specify each eligibility requirement, including citizenship and persons wishing to register must (i) attest that they have met each of these requirements and (ii) provide a signature under penalty of perjury. The NVRA is so averse to placing

additional barriers to registration that it forbids States from including requirements like notarization or “other formal authentication.” *See id.* § 1973gg-7(b)(3). The States must accept and use the Federal Form. *See id.* § 1973gg-4(a).

Proposition 200 prescribes requirements in addition to those contained on the Federal Form before an individual may vote in a federal election.

Proposition 200 requires documentary evidence of citizenship, which may be established by providing the number of the applicant’s driver’s license, a copy of the applicant’s U.S. birth certificate, a copy of the applicant’s U.S. passport, the applicant’s Naturalization Number or presenting the applicant’s naturalization documents, among other things. *See Ariz. Rev. Stat.* §§ 16-152, 16-166, 16-579.

Congress enacted the NVRA “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” and “to protect the integrity of the electoral process,” among other things. 42 U.S.C. § 1973gg(b). The NVRA makes plain that “the right of citizens of the United States to vote is a fundamental right” and “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.” *See id.* § 1973gg(a). In essence, the purpose of the NVRA was to increase access to the polling booth in a manner that maintained the integrity of the electoral process. The legislative

history of the NVRA makes clear that allowing a State to require documentary proof of citizenship is contrary to the purpose of the NVRA. Indeed, before the NVRA was passed by Congress, the Senate passed an amendment to the NVRA that provided “[n]othing in this Act shall prevent a State from requiring presentation of documentation relating to citizenship.” 139 Cong. Rec. S2897-04 (daily ed. Mar. 16, 1993). The amendment was ultimately rejected on the basis that the amendment “is not necessary or consistent with the purposes of the Act.” H.R. Rep. No. 103-66, at 23-24 (1993) (Conf. Rep.).

On its face, Proposition 200 may seem to provide additional safeguards to voting, but, in reality, it presents barriers to minority citizens—including Asian American naturalized citizens—wishing to participate in federal elections. Rather than safeguarding the right to vote, it deprives persons who may rightfully exercise their right to vote from doing so. Proposition 200 supplants the NVRA by mandating more arduous and burdensome voting requirements. For example, under Proposition 200, native-born citizens may mail copies of their U.S. birth certificates to the County recorder, but naturalized citizens have no such option since they do not possess a United States birth certificate. Instead, in order to register, a naturalized citizen may provide a naturalization certificate in person (but not by mail) to the County recorder. *See* Ariz. Rev. Stat. § 16-166(F)(4). In the alternative, a naturalized citizen can register to vote in federal elections in

Arizona by supplying their Naturalization Number. It appears that the parties do not dispute, however, that such number cannot be verified with the federal government and, therefore, any application that furnishes only the Naturalization Number would be automatically rejected. *See* Gonzalez Opening Brief at 9-10.

Any requirement for documentary proof of citizenship—including requiring a naturalized applicant to supply a Naturalization Number or present naturalization documents in person—is in direct conflict with the aforementioned purposes and provisions of the NVRA. Proof of citizenship and identification requirements diminish voter turnout and oftentimes result in apathy. *See* Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 Harv. L. & Pol’y Rev. 185, 193 (2009). This is particularly true for Asian Americans, a very high percentage of whom are naturalized citizens. Of the approximately 126,497 Asian Americans living in Arizona, approximately 51,370, or 40.6%, are foreign-born naturalized citizens. *See* U.S. Census Native and Foreign-Born Populations Data. Thus, approximately 40% of the Asian American community may encounter the challenges erected by Proposition 200 when attempting to register to vote.

Once eligible to vote, Asian Americans often have difficulty adjusting to the American political system because it differs substantially from their previous system. *See* Glenn Magpantay & Nancy W. Yu, *Asian Americans and*

Reauthorization of the Voting Rights Act, 19 Nat'l Black L.J. 1, 2 (2005) (“Because Asian Americans are often newly naturalized immigrants, they are typically ‘unfamiliar with the American electoral process, having come from Asian countries with political systems very different from [that of] the United States and which may even lack a tradition of voting.’”) (quoting *Language Assistance Provisions of the Voting Rights Act: Hearing on S. 2236 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102nd Cong. 286 (1992) (statement of Margaret Fung, Executive Director of the Asian American Legal Defense and Education Fund, on file with author)). Thus, Asian Americans are often more vulnerable to obstacles to voter registration. The procedures established under Proposition 200 are not only overly burdensome, but confusing. Persons who have limited knowledge of the electoral system may have difficulty understanding the requirements—for example, as discussed above, simply following Proposition 200’s requirements and providing a Naturalization Number can result in automatic rejection. Naturalized citizens would find these provisions both overly taxing and contradictory.

As noted by Justice O’Connor, “[t]he Constitution places the recently naturalized immigrant from a foreign land on an equal footing with those citizens of a State who are able to trace their lineage back for many generations within the State’s borders.” *See Zobel v. Williams*, 457 U.S. 55, 68-

69 (1982) (O'Connor, J. concurring). All eligible citizens, either naturalized or native-born, should have equal access to the electoral process. The barriers naturalized citizens encounter as a result of Proposition 200 run contrary to the the NVRA, which seeks to eliminate such barriers to voting. The NVRA, an act of Congress, promulgated under its Elections Clause powers, is the supreme law of the land. Proposition 200 must yield to it.

CONCLUSION

For the foregoing reasons, this Court should: (i) reverse the decision of the United States District Court for the District of Arizona; (ii) affirm the decision of the Ninth Circuit panel in *Gonzalez II*; and (iii) find Proposition 200 invalid.

Dated: June 1, 2011

Respectfully,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,145 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) because it has typeface of 14 points in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2011, I caused the foregoing brief and adjoining motion for leave to file to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the following participants in this case, who are not registered as CM/ECF users, were served by first-class U.S. Mail, postage prepaid, on the 1st day of June, 2011:

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