

Nos. 08-17094, 08-117115

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MARIA M. GONZALEZ, *et al.*
Appellants

v.

STATE OF ARIZONA, *et al.*
Petitioners/Appellees,

INTERTRIBAL COUNCIL OF ARIZONA, INC., *et al.*
Appellants

v.

STATE OF ARIZONA, *et al.*
Petitioners/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*
AMERICAN UNITY LEGAL DEFENSE FUND, INC.
IN SUPPORT OF THE PETITION FOR REHEARING *EN BANC***

Barnaby W. Zall
WEINBERG, JACOBS & TOLANI, LLP
11300 Rockville Pike, Suite 1200
Rockville, MD 20852
(301) 231-6943
bzall@aol.com
Counsel for *Amicus Curiae*

CORPORATE DISCLOSURE STATEMENT

Amicus American Unity Legal Defense Fund is not a publicly traded corporation. There are no parent corporations or other publicly held corporations that own 10% or more of *amicus*.

TABLE OF CONTENTS

Corporate Disclosure Statement	i
Table of Contents	ii
Table of Authorities	iii
Statement of Interest	1
Grounds for Rehearing En Banc	2
Statement	3
Summary of Argument	4
Argument	5
I. The Panel Majority’s Analysis Would Rewrite the Text of the NVRA	5
II. The Panel Majority’s Opinion Recognizes Only One of the Four Purposes of the NVRA, and Thus Misapprehends Congressional Intent	8
III. The Structure of the NVRA Does Not Support the Panel Majority’s Analysis	11
IV. The Panel Majority Opinion Conflicts with Supreme Court and Other Circuits’ Decisions	14
Conclusion	17
Statement of Related Cases.....	18
Certificate of Rule 32 Compliance	19
Certificate of Service	20

TABLE OF AUTHORITIES

ACLU of New Mexico v. Santillanes, 546 F.3d 1313 (10th Cir. 2008)2, 16

Altria Group, Inc. v. Good, __ U.S. __, __, 129 S.Ct. 538 (2008)13

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965)14

Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority,
464 U.S. 89 (1983)13

Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009)2, 15, 16

Crawford v. Marion County Election Board, 553 U.S. 181 (2008) *passim*

Fla. State Conference of the NAACP v. Browning, 569 F.Supp. 2d 1237 (N.D.Fla.
2008)16

Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007)2, 7

Gonzalez v. Arizona, __ F.3d __, 2010 WL 4192623 (9th Cir. Oct. 26, 2010) *passim*

John Doe No. 1 v. Reed, __ U.S. __, __, 130 S.Ct. 2811, __ (2010)10

NLRB v. Brown, 380 U.S. 278 (1965)14

Purcell v. Gonzalez, 549 U.S. 1 (2006)2, 10

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)13

Wyeth v. Levine, __ U.S. __, __, 129 S.Ct. 1187 (2009)13

Young v. Fordice, 520 U.S. 273 (1997)2, 6, 7, 13

Help America Vote Act of 2002, 116 Stat. 16664, 15

National Voter Registration Act of 1993, 107 Stat. 77, 42 U.S.C. § 1973gg *et seq*
..... *Passim*

42 U.S.C. § 1973gg(b)(1)9
 § 1973gg(b)(2)9, 10
 § 1973gg(b)(3)9
 § 1973gg(b)(4)9
 § 1973gg-7(a)12
 § 1973gg-7(b)(1)6

Ariz. Rev. Stat. §§ 16-1523
 16-1663
 16-5793

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.¹ www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including before the panel in this case, and in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), discussing, *inter alia*, the incidence and relevance of voter fraud to the challenged statute.

This brief does not discuss matters covered in Arizona’s Petition for Rehearing En Banc (“Petition” or “Pet.”), such as the law of the circuit; *amicus* AULDF agrees with the analysis in the Petition. The Petition, however, does not discuss several important points, including conflicting Supreme Court and Circuit decisions, which might affect whether the Court grants rehearing en banc.

All parties to this case, through counsel, have consented to the filing of this brief. Fed. R. App. P. 29(a); Circuit Rule 29-2(a).

¹ *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.

GROUNDS FOR REHEARING EN BANC

AULDF believes the following grounds for rehearing en banc exist:

- Consideration by the full Court is necessary to maintain uniformity of the Court's decisions (because of a conflict with a prior decision of the Court in this case: *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007) (“*Gonzalez I*”));
- The proceeding involves a question of exceptional importance (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (earlier review and remand of this case)); and,
- The panel majority opinion conflicts with existing opinions of other Circuits and the Supreme Court (including *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); *Young v. Fordice*, 520 U.S. 273 (1997); *ACLU of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008); *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009)).

STATEMENT

The Petition describes the statute and procedural posture of this case. Pet., at 1-3. The panel unanimously upheld most of Arizona’s Proposition 200. *Gonzalez v. Arizona*, 2010 WL 4192623, Slip Op. at 17630. The panel majority, however, held that the National Voter Registration Act of 1993 (“NVRA”), 107 Stat. 77, 42 U.S.C. § 1973gg *et seq.*, preempted that portion of Arizona’s Proposition 200 which revised Ariz. Rev. Stat. §§ 16-152, 16-166, 16-579, *et alia*, to require photo identification or other evidence of citizenship for voter registration. “[W]e conclude that Proposition 200’s documentary proof of citizenship requirement conflicts with the NVRA’s **text, structure, and purpose.**” Slip Op. at 17652 (emphasis added).

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).

Slip Op. at 17671.

To come to this conclusion, however, the panel majority had to ignore or revise “the NVRA’s text, structure, and purpose”, as set out in the statutory text

and as interpreted in prior cases. This brief reviews that text and those precedents, which suggest that rehearing en banc is warranted.

SUMMARY OF ARGUMENT

Neither the text, structure nor purpose of the NVRA support the panel majority's preemption theory. The panel majority felt that the NVRA required Arizona to accept only a signature on a voter registration form as evidence of eligibility to vote, and preempted any photo identification requirement in addition to the signature.

The text of the NVRA does not support that interpretation, which requires overlooking several terms in the relevant passage. In addition, the Supreme Court, in two cases, expressly rejected both the letter and spirit of that textual analysis, finding, for example, that the NVRA does not list all the information that a State may require, *Young v. Fordice*, 520 U.S. 273, 286 (1997), and that the NVRA and the later Help America Vote Act of 2002 ("HAVA"), 116 Stat. 1666, "[b]oth contain provisions consistent with a State's choice to use government-issued photo identification as a relevant source of information concerning a citizen's eligibility to vote." *Crawford*, 553 U.S. at 192. "[T]hey do indicate that Congress believes that photo identification is one effective method of establishing a voter's

qualification to vote.” *Id.*, 553 U.S. at 193. Other decisions, including opinions from the Tenth and Eleventh Circuits, similarly reject this textual analysis.

Nor does the panel majority opinion adequately describe the “structure and purpose” of the NVRA. The opinion’s use of the singular term “purpose” is revealing. The panel majority ignored several of the express purposes Congress wrote into the NVRA, the most important of which was protecting the integrity of the election process by blocking the registration of those who were not eligible. The panel majority looked at only one important, but not exclusive, purpose: easing registration “burdens.” Because it did not recognize all of the purposes of the NVRA, the panel majority inflated the role and purpose of the federal Election Assistance Commission, in a manner which undercuts other sections of the NVRA and posits an inadequate and unsupported theory of preemption.

Thus, the panel majority’s opinion rests on a distorted analysis of the very factors it said demonstrated preemption under the Elections Clause. Looked at directly and in context, these factors indicate that reconsideration is warranted.

ARGUMENT

I. The Panel Majority’s Analysis Would Rewrite the Text of the NVRA.

The panel majority held 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.” Slip Op. at 17652. The panel majority felt that “requiring applicants to attest, under penalty of perjury, that they meet every eligibility requirement,” was sufficient to “account[] for eligibility concerns.” Slip Op. at 17653. Thus, “there is no room for Arizona to impose *sua sponte* an additional identification requirement as a prerequisite to federal voter registration.” *Id.*

The relevant 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 panel majority opinion would rewrite that provision to read: “may require only ... the signature of the applicant.” The panel majority 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 the Supreme Court’s analysis in *Young v. Fordice*, 520 U.S. 273 (1997), a Voting Rights Act pre-clearance case

examining voter registration procedures under the NVRA. 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 panel majority’s revision of the relevant sentence: “Nonetheless, implementation of the NVRA is not merely 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.” *Id.* The prior panel in this case (*i.e.*, *Gonzalez I*) 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.

The Supreme Court thus does not read the text of the NVRA the same way as did the panel majority here. The prior panel in *Gonzalez I* read the text the same way as the Supreme Court in *Fordice*. The panel majority found the prior panel’s analysis (and thus the Supreme Court’s) a “misreading” of the NVRA, sufficient to overcome the laws of the circuit and of the case. Slip Op. at 17664.

Reconsideration is warranted.

II. The Panel Majority’s Opinion Recognizes Only One of the Four Purposes of the NVRA, and Thus Misapprehends Congressional Intent.

The critical part of the panel majority’s opinion says: “[W]e conclude that Proposition 200’s documentary proof of citizenship requirement conflicts with the NVRA’s **text, structure, and purpose.**” Slip Op. at 17652 (emphasis added). The panel majority opinion’s use of the term “purpose” (instead of “purposes”) of the NVRA is revealing. The NVRA was a balance of interests with more than one purpose, but the panel majority did not recognize most of them.

The panel majority opinion says: “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.” Slip Op. at 17655.

This “single-purpose” view of the NVRA is inconsistent with the statutory language and has been rejected by the Supreme 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 v. Marion County Election Board*, 553 U.S. 181, 192 (2008) (emphasis added).

The four statutory purposes of the NVRA were to “increase the number of **eligible citizens** who register to vote”, 42 U.S.C. § 1973gg(b)(1) (emphasis added), to “enhance[] the participation of **eligible citizens** as voters”, § 1973gg(b)(2) (emphasis added), to “**protect the integrity** of the electoral process,” § 1973gg(b)(3) (emphasis added), and to “ensure that **accurate and current** voter registration rolls are maintained.” § 1973gg(b)(4) (emphasis added).

None of the highlighted terms fit into the panel majority’s description of the singular purpose of the NVRA. Each is inconsistent with an interpretation which permits only a signature requirement to “account[] for eligibility concerns.” Slip Op. at 17653. 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.” Slip Op. at 17655.

In *Crawford*, upholding Indiana’s photo identification requirement, the Supreme Court said “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 (emphasis 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 Supreme Court agreed with that approach: "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006); *see, also, John Doe No. 1 v. Reed*, ___ U.S. ___, ___, 130 S.Ct. 2811, ___ (2010) ("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).

The Supreme Court also rejected the argument that a photo identification requirement is a "hurdle to registration." Slip Op. at 17655. "[I]n recent years, an increasing number of States have relied primarily on photo identification. A photo identification requirement imposes some burdens on voters that other methods of

identification do not share.” *Crawford*, 553 U.S. at 197. “Burdens of that sort arising from life’s vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of” a photo identification requirement. 553 U.S. at 197-98. “For most voters who need them, the inconvenience ... surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.” 553 U.S. at 198. “The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting ‘the integrity and reliability of the electoral process.’” 553 U.S. at 204 (citation omitted).

By excising other purposes from the NVRA in favor of exclusivity which undercuts other purposes and does not match prior Supreme Court analysis, the panel majority opinion misapprehends the controlling congressional intent, and thus cannot accurately determine preemption. Reconsideration is warranted.

III. The Structure of the NVRA Does Not Support the Panel Majority’s Analysis.

Because it did not recognize all the purposes of the NVRA, the panel majority misapprehended the nature of the NVRA’s “structure” as well as its purposes. The panel majority opinion argues that “[s]tructurally, 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." Slip Op. at 17654. The panel majority opinion explains that it felt Congress had delegated all the authority to determine whether to accept photo identification to the Election Assistance Commission ("EAC"), established in 42 U.S.C. § 1973gg-7(a). Slip Op. at 17654. "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." Slip Op. at 17655.

This argument, however, is grounded on the panel majority's belief, contrary to controlling Supreme Court precedent, that the statutory text and "purpose" permit only a signature, and no other evidence of voter eligibility. This "structural" analysis undercuts the panel majority's preemption analysis.

The panel majority posits a difference between Supremacy Clause and Election Clause preemption analyses, but if there is such a difference, it is not in the controlling nature of Congressional intent. Conflict preemption exists "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress.” *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). “[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.” *Id.*, 537 U.S. at 62-63.

Under *Fordice*, the panel majority opinion seems to be incorrect about the nature of the statutory mandate. “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. If this is true, then, absent some indication of “clear and manifest”² congressional intent reversing the Supreme Court’s interpretation of the NVRA, an EAC ruling which suggests that the NVRA limits States to asking only for signatures is *ultra vires*, and cannot be the grounds for preemption. *Altria Group, Inc. v. Good*, ___ U.S. ___, ___, 129 S.Ct. 538, 550 (2008)(“agency nonenforcement of a federal statute is not the same as a policy of approval.”).

The Court should not ratify an “unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress.” *Bureau of Alcohol*,

² *Wyeth v. Levine*, ___ U.S. ___, ___, 129 S.Ct. 1187, 1194-95 (2009) (“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”).

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 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).

The panel majority’s view of the “structure” of the NVRA does not appear to be supported by either the text of the statute or precedent. Reconsideration is warranted.

IV. The Panel Majority Opinion Conflicts with Supreme Court and Other Circuits’ Decisions.

The panel majority said “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.” Slip Op. at 17656. It held they were not harmonious. “Under Congress’s expansive Elections Clause power, we must hold Arizona’s documentary proof of citizenship requirement . . .

superseded by the NVRA.” *Id.* This holding conflicts with Supreme Court holdings and opinions of other Circuits.

In *Crawford*, the Court noted that the NVRA and the later Help America Vote Act of 2002, 116 Stat. 1666, “[b]oth contain provisions consistent with a State’s choice to use government-issued photo identification as a relevant source of information concerning a citizen’s eligibility to vote.” 553 U.S. at 192. “[T]hey do indicate that Congress believes that photo identification is one effective method of establishing a voter’s qualification to vote.” 553 U.S. at 193.

Even the principal dissents in *Crawford* supported the photo identification requirement if appropriate safeguards were included, quoting an op-ed in the *New York Times*. “By connecting ID’s to registration, voting participation will be expanded.” 553 U.S. at 232 (Souter, J., dissenting), *quoting* Carter & Baker, “Voting Reform Is In the Cards,” *The New York Times*, Sept. 23, 2005, p. A19; *see also*, 553 U.S. at 237-38 (Breyer, J., dissenting) (“I share the general view of the lead opinion insofar as it holds that the Constitution does not *automatically* forbid Indiana from enacting a photo ID requirement.”). No Justice in *Crawford* or any other case held that the NVRA preempts a state photo identification requirement.

Other Circuits have concluded that the NVRA permits photo identification requirements. In *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir.

2009), the Eleventh Circuit cited *Crawford* and *Purcell* in noting that “Georgia has an interest in preventing election fraud that ‘provides a sufficient justification for carefully identifying all voters participating in the election process.’” 554 F.3d at 1353, quoting *Crawford*, 553 U.S. at 196. “The legitimate state interest in preventing voter fraud, as recognized in *Crawford*, is more than sufficient to outweigh the limited burden of producing photo identification.” 554 F.3d at 1354-55 (citation omitted). “The interest of Georgia in detecting and deterring voter fraud is a ‘valid neutral justification[]’ that this Court cannot ignore.” 554 F.3d at 1355 (citation omitted).

In *American Civil Liberties Union of New Mexico v. Santillanes*, 546 F.3d 1313 (10th Cir. 2008), the Tenth Circuit also rejected similar challenges to a photo identification requirement. After analyzing *Crawford* and noting *Fla. State Conference of the NAACP v. Browning*, 569 F.Supp. 2d 1237, 1249-51 (N.D.Fla. 2008) (upholding photo identification requirement), the Tenth Circuit said: “Prevention of voter fraud and voting impersonation as urged by the City are sufficient justifications for a photo identification requirement for local elections.” 546 F.3d at 1323.

The panel majority's opinion strikes new ground in both preemption and substantive law. Because it conflicts with other courts' opinions, it warrants further consideration.

CONCLUSION

For the reasons stated above, *Amicus* respectfully requests this Court to grant the Petition for Rehearing En Banc.

/s Barnaby W. Zall

Barnaby W. Zall
WEINBERG, JACOBS & TOLANI, LLP
11300 Rockville Pike, Suite 1200
Rockville, MD 20852
(301) 231-6943
bzall@aol.com

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Amicus respectfully advises the Court that it is not aware of any related cases pending in the Ninth Circuit.

s/ Barnaby W. Zall

Barnaby W. Zall

CERTIFICATE OF RULE 32 COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29 and Circuit Rule 29-2(c)(2) because it contains 3,298 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to Microsoft Word 2003, the program which prepared the text.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in fourteen-point Times New Roman type style.

s/ Barnaby W. Zall

Barnaby W. Zall

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2010, I electronically filed the foregoing 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 all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Barnaby W. Zall

Barnaby W. Zall
Counsel for Amicus Curiae