

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 08-17094, 08-117115

MARIA M. GONZALEZ, *et al.*

Appellants

v.

STATE OF ARIZONA, *et al.*

Appellees,

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

Appellants

v.

STATE OF ARIZONA, *et al.*

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*
IMMIGRATION REFORM LAW INSTITUTE
IN SUPPORT OF APPELLANT'S REQUEST FOR
REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Amicus Immigration Reform Law Institute is not a publicly traded corporation. There are no parent corporations or other publicly held corporations that own 10% or more of *amicus*.

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STATEMENT OF INTEREST

Amicus curiae Immigration Reform Law Institute (“IRLI”) is the only public interest law organization working exclusively to protect the legal rights, privileges, and property of U.S. citizens and their communities from injuries and damages by unlawful immigration. IRLI believes that United States citizens’ interests are harmed when noncitizens register to vote because once noncitizens register and have state issued identification, it is effectively impossible for States to prevent them from casting a ballot, no matter what a State does at the polling place to prevent voter fraud. When States cannot prevent ineligible voters from registering to vote, U.S. citizens voting in federal elections effectively lose their Constitutional guarantee to “one person, one vote.” *See Bush v. Gore*, 531 U.S. 98, 107 (2000).

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

GROUND FOR REHEARING *EN BANC*

IRLI believes the following grounds for Rehearing *en banc* exist:

- A material fact of law was overlooked in the decision (the court did not apply the four statutory purposes listed in the National Voter Registration Act, 42 U.S.C. § 1973gg(b));

- Consideration by the full Court is necessary to maintain uniformity of the Court's decisions (conflict with prior decision of the Court, *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007)); and,
- The panel majority opinion conflicts with prior opinions of the Supreme Court and other Circuits (*Crawford v. Marion County Election Board*, 553 U.S. 181 (2008); *Young v. Fordice*, 520 U.S. 273, 286 (1997) *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000); *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008)).

STATEMENT

The panel majority held that the National Voter Registration Act of 1993 (“NVRA”), 107 Stat. 77, 42 U.S.C. § 1973gg *et seq.*, preempted a provision of Arizona’s Proposition 200 that requires individuals to provide proof of citizenship when registering to vote. “[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. The panel based its holding on a belief that Congress enacted the NVRA with a “central purpose” of increasing the number of registered voters. “[E]very court to have considered the [NVRA] has concluded, the NVRA’s central purpose is to increase voter registration by streamlining voter registration procedures.” Slip Op. at 17651 (citations omitted). However, to reach this conclusion, the panel majority ignored the other important purposes identified

in the NVRA, as well as other cases interpreting the NVRA differently than the panel majority. This opinion conflicts with other courts on the important question of what States may do to prevent ineligible voters from registering to vote.

SUMMARY OF ARGUMENT

The panel majority held that the NVRA required Arizona to accept only a signature on the “Federal Form” as evidence of voter eligibility, and held that any proof of citizenship requirement in addition to the Form was preempted. The panel majority’s preemption analysis is based on its belief that the NVRA was designed to increase the number of registered voters, without at the same time ensuring that those voters are eligible to vote. The panel ignored the text of the NVRA, as well as Supreme Court and Appellate Court decisions that recognize Congress’ concern with “eligible voters” and “accurate” registration rolls to reach this conclusion.

A previous opinion of this Circuit in this case already upheld Proposition 200’s “proof of citizenship” provision. *Gonzalez v. Arizona*, 485 F.3d 1041, 1050-51 (9th Cir. 2006). The Supreme Court has likewise rejected the panel majority’s belief that Arizona may not require any identification separate from the Federal Form. “[T]he NVRA does not list...all the other information the State may--or may not--provide or request.” *Young v. Fordice*, 520 U.S. 273, 286 (1997).

Both the Sixth and Eleventh Circuits have expressly rejected the panel majority’s holding that States cannot require additional information to prove voter

eligibility. In *McKay v. Thomson*, 226 F.3d 752 (6th Cir. 2000), the Sixth Circuit rejected a preemption challenge to a Tennessee statute which required registration applicants to provide their Social Security Numbers at the time of registration. In *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), the Eleventh Circuit rejected a preemption challenge to a Florida statute which required applicants to provide identification information if an applicant's registration information could not be verified through a State "matching" process designed to ensure that only eligible voters registered to vote.

These facts warrant rehearing *en banc*.

ARGUMENT

I. The Panel's Majority Opinion Ignores the Text of the NVRA Which Identifies Multiple Purposes in the NVRA, Rather than a Single Purpose of Increased Voter Registration

The panel majority believed that the "thrust" and the "central purpose" of the National Voter Registration Act ("NVRA") was "to increase voter registration by streamlining the registration process." Slip Op. at 17651. However, the text of the NVRA does not support this holding. The NVRA identifies four purposes:

Purposes. The purposes of this Act are--

- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
- (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
- (3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b); *see* Kozinski dissent, Slip. Op. at 17703-17704.

Rather than a “central purpose” of increasing voter registration, Slip Op. at 17651, the plain text of the NVRA shows that Congress focused on increasing registration among “eligible citizens,” and wanted to “protect the integrity of the electoral process” while at the same time “ensure registration rolls are “accurate and current.” 42 U.S.C. § 1973gg(b). While the panel majority notes that these NVRA “purposes” exist, *see id.* 17647, it omits them from its analysis, beyond the cursory acknowledgment of a “balance” struck by Congress. *See id.* at 17655. Instead, the panel majority relies on its belief that the “thrust of the NVRA” was to “increase federal voter registration” as justification for rendering an opinion that conflicts with the Act’s plain text. *See* Slip Op. at 17651. A panel decision that conflicts with the plain language of the statute constitutes a question of exceptional importance warranting rehearing *en banc*. *See* Fed. R. App. 35(a)(2); *United States v. Leal-Felix*, 2010 U.S. App. LEXIS 22671, 23 (9th Cir. 2010) (“When the statutory language is plain, the sole function of the courts...is to enforce it according to its terms.”); *see also Ramadan v. Keisler*, 504 F.3d 973, 978 (9th Cir. 2007) (O’Scannlain, J. dissenting) (arguing that a decision that “defies the statutory text” warrants rehearing *en banc*).

II. The Panel’s Majority Opinion Conflicts with Supreme Court Precedent and Other Circuit Decisions Which Recognize the Multiple Purposes of the NVRA, Including Protecting the Integrity of the Voting Process

The panel majority’s claim that “every court” agrees that the “central purpose” of the NVRA is to increase voter registration ignores both Supreme Court precedent and other Circuits’ opinions which recognize the additional statutory purposes listed in the NVRA. Slip Op. at 17651 (citations omitted). In *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 192 (2008), the United States Supreme Court examined the purposes behind the NVRA when it reviewed an Indiana state law requiring voters to show identification at polling locations. *Crawford* rejected the single purpose view of the panel majority. “The [NVRA] ‘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 (internal citations omitted). In fact, the panel majority does not cite *Crawford* in its analysis of whether the NVRA preempts Arizona’s proof of citizenship provision.

Additionally, the panel majority overlooks that other Circuits recognize the multiple purposes listed in the NVRA as well as the NVRA’s focus on “eligible” voters, rather than just a “thrust” in increased voter registration. Slip Op. 17651. The panel majority’s opinion expressly conflicts with the Sixth and Second Circuits. *United States Student Ass’n Found. v. Land*, 546 F.3d 373, 390-91 (6th Cir. 2008) (quoting *Bell v. Marinko*, 367 F.3d 588, 592 (6th Cir. 2004) (The

NVRA sought to accomplish “dual roles” of “increase[ing] the number of eligible citizens who register to vote ... while also assuring that ‘*accurate and current* voter registration rolls are maintained.’”); *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 114 (2d Cir. 2000) (citing 42 U.S.C. § 1973gg(b)(1),(2)) (The NVRA was passed to “increase the number of eligible citizens who register to vote in elections for Federal office” and to “enhance[] the participation of eligible citizens as voters in elections for Federal office.”).

The panel majority’s reliance on *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008) for the proposition that “every court” agrees that increased voter registration was the NVRA’s “central purpose,” is in error. *Harkless* actually states that the NVRA has multiple purposes: “Congress enacted the NVRA...to ‘increase the number of eligible citizens who register to vote in elections for Federal office,’ to ‘protect the integrity of the electoral process,’ and to ‘ensure that accurate and current voter registration rolls are maintained.’” *Id.* at 449 (citations omitted).

Because the panel majority’s opinion conflicts with Supreme Court precedent and other Circuits’ decisions, rehearing *en banc* is necessary. Fed. R. App. P. 35(a)(1), (2).

III. The Panel Majority’s Holding Conflicts With a Previous Ninth Circuit Panel in the Same Case

A previous Ninth Circuit panel has already upheld Proposition 200’s proof of citizenship requirement. “[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 v. Arizona*, 485 F.3d 1041, 1050-51 (9th Cir. 2007). The panel majority acknowledges that it overturned the previous panel’s opinion. *See* Slip Op. 17663-64 (“[T]he prior panel’s conclusion that the NVRA permits state-imposed documentary proof of citizenship requirements...was rooted in a fundamental misreading of the statute.”). Rehearing *en banc* is warranted to maintain uniformity within the Circuit. Fed. R. App. 35(a)(1).¹

IV. The Panel Majority’s Holding that States May Not Require Additional Identification Conflicts with the Supreme Court and Other Appellate Court Opinions

The Panel’s ultimate holding, that states must accept the Federal Form and may not require additional information beyond an applicant’s signature attesting to his or her eligibility to vote, *see* Slip Op. at 17655, conflicts with Supreme Court doctrine and with both the Sixth and the Eleventh Circuit.

The Supreme Court has stated, “The NVRA does not list...all the other information the State may--or may not--provide or request.” *Young v. Fordice*, 520 U.S. 273, 286 (1997). In contrast, the panel majority held that, “there is no

¹ Additionally, rehearing *en banc* may be necessary to confirm or deny whether the panel majority even had the authority to overturn the previous panel under Ninth Circuit doctrine. *See* Appellants’ Mtn. for Rehearing *En Banc* at 7-10; Slip Op. at 17684-96 (Kozinski, J. dissenting).

room for Arizona to impose sua sponte an additional identification requirement as a prerequisite to federal voter registration.” Slip Op. at 17653.

Additionally, the Sixth and Eleventh Circuits have upheld State statutes that allow election officials to require additional information than that required on the Federal Form and allow officials to reject a voter’s registration as a result. In *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000), the Sixth Circuit reviewed whether a Tennessee statute requiring citizens to provide their Social Security numbers at the time of registration violated the NVRA. *Id.* at 755-56. The plaintiff argued that requiring the disclosure of one’s Social Security number as a pre-condition to voter registration violated the NVRA because a “social security number is not essential to accomplishing the limited permissible purposes identified in 42 U.S.C. § 1973gg-3(c)(2)(B).” *Id.* at 755. The plaintiff argued that Tennessee could only “‘require the minimum amount of information necessary’ to prevent duplicate voter registration and determine whether he is eligible to vote.” *Id.* at 755-56. The Sixth Circuit rejected that argument, explaining that “[t]he NVRA does not specifically forbid use of social security numbers.” *Id.* at 756.

Arizona made a similar argument in this case, which the panel majority rejected. “Arizona argues that...the NVRA nowhere expressly precludes states from imposing requirements in addition to those of the Federal Form.” Slip Op. 17655. Instead, the panel majority believed that under the NVRA, a State must

accept the “Federal Form” and not require anything more than a registrant’s attestation of voter eligibility, which contradicts the Sixth Circuit. *Compare id.* at 17655-17656 with *McKay*, 226 F.3d at 756.

In *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153 (11th Cir. 2008), the Eleventh Circuit upheld a Florida statute which required the State to match a voter’s identifying information with state and federal databases as a “precondition for voter registration.” *Id.* at 1156-1158, 1168. This Florida law was drafted to bring the State into compliance with the Help America Vote Act (“HAVA”), which “directs each state to determine according to its own laws whether the information provided by the registrant ‘is sufficient to meet the [federal] requirements.’” *Id.* at 1155-56 (citing 42 U.S.C. § 15483(a)(5)(A)(iii)).² The Florida law created a state matching process which allowed State officials to match the identifying information provided by a registration applicant with state and federal databases as a precondition to registering to vote. *Id.* at 1155-57.

² While the *Browning* case involves a preemption challenge brought under HAVA, rather than under the NVRA, *Browning* illustrates another mistake made by the majority panel in this case. The majority panel relied on the NVRA to the exclusion of HAVA because, “[t]he NVRA and HAVA operate in separate spheres: while the NVRA regulates voter registration, HAVA is concerned with updating election technologies and other election-day issues at polling places.” Slip Op. at 17658. HAVA actually requires the inclusion of identifying information of applicants, such as a driver’s license number or the last four digits of one’s Social Security Number, as a “precondition to registering to vote,” as well providing that the State may verify that information pursuant to State law. *Browning*, 522 F.3d at 1555-56, 1168 (citing 42 U.S.C. § 15483(a)(5)).

Under the Florida statute, if a registrant's identification information could not be matched, "the registration [would] not be completed and the applicant [would] receive a brief and generic notification through the mail to that effect." *Id.* at 1156-57. Following a non-match, Florida required a voter to correct any mistake in the registration process in one of two ways, depending on who made the mistake. First, if the mistake was made by the Florida Department of State, the voter had to provide "documentary proof, like a copy of her driver's license or Social Security card . . . showing that the identification information she submitted...was correct." *Id.* at 1157 (citing Fla. Stat. §§ 97.053(6), 101.048). Second, if the error was made by the applicant herself, she could only "cure the defect and be eligible to vote" by filing a new application with the correct information by a date certain. *Id.* at 1157-58 (citing F§§ 97.052(6), 101.048(2)(b)). Both of these processes would be unlawful under the panel majority's opinion.

According to the panel majority, "HAVA requires states to assign each registrant a 'unique identifier'" which could be a "driver's license number or the last four digits of the applicant's social security number . . . [and] nothing in HAVA allows the state to require these forms of identification as a prerequisite to registration." Slip Op. at 17655. Thus, according to the panel majority, a State must simply accept the Federal Form. *Id.* at 17659. However, *Browning* rejected

that same argument, stating that HAVA “does not seem to prohibit states from implementing [a matching process as a precondition to registration]” and that the plaintiffs “failed to show how [Florida’s decision to] make matching a *prerequisite* to registration” violates HAVA. *Browning*, 522 F.3d at 1168. (emphasis added). In other words, the Eleventh Circuit held that simply because the NVRA and HAVA do not require registration applicants to provide additional information establishing their eligibility to vote does not mean that States are prohibited from doing so.

The conflict between *Browning* and the panel majority becomes increasingly clear when one reviews the two “mistakes” contemplated under the Florida statute. Under the first *Browning* scenario, where an applicant correctly supplied his or her voting information to State officials and the officials made a mistake, the Eleventh Circuit upheld the requirement that the applicant present “her driver’s license or Social Security card” to Florida officials to cure the defect. *Browning*, 522 F.3d at 1157. If the State had to accept the Federal Form, and could not “require...forms of identification as a prerequisite to registration,” Slip Op. at 17655, 17659, that provision in the Florida statute would have been unlawful. Under the second *Browning* scenario, the applicant would not even be registered to vote, and could only be registered if he or she cured the defect twenty-nine days prior to the federal election. *Browning*, 522 F.3d at 1156-58. Again, the Court did not require that the State official merely accept the Federal Form, Slip Op. at 17655, 17659, but

instead, allowed the official to reject the voter's application and require the applicant to reapply with his correct information by a certain date. *Browning*, 522 F.3d at 1157-58. The Eleventh Circuit upheld Florida's system because HAVA "requires the state to verify this number on new voter registration applications in accordance with a procedure of the state's choosing." *Browning*, 522 F.3d at 1168 (citing 42 U.S.C. § 15483(a)(5)). While Florida chose to "verify" the number through an electronic matching process that could prevent ineligible voters from being registered to vote, *id.* at 1156-58, Arizona has chosen to "verify" the number through documentary proof at the time of registration.

The panel majority's opinion that States must accept the Federal Form and may not request any additional identification to ensure voter eligibility conflicts with two Federal Courts of Appeals. Rehearing *en banc* is warranted. Fed. R. App. P. 35(b)(1)(B).

V. The Panel's Holding that the NVRA is so "Comprehensive" so as to Prevent Arizona from Requiring Additional Identity Information at the Time of Registration Conflicts with the Eleventh Circuit

The panel's belief that "there is no room for Arizona to impose sua sponte an additional identification requirement as a prerequisite to federal voter registration," was also rejected by the Eleventh Circuit in *Browning*, 522 F.3d 1153. Slip Op. at 17653; *see also* Slip Op. at 17671 ("[T]he 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)). The *Browning* court gave three reasons for rejecting the almost identical claim that, “HAVA presents a fixed federal standard for the identification requirements that states may impose on individual voters, and that any state standard more demanding or burdensome must give way.” *Browning*, 522 F.3d at 1171. First, HAVA “incorporates state law requirements instead of promulgating national standards.” *Id.* at 1172 (citing 42 U.S.C. §§ 15482(a)(4); 15583(a)(5)(A)(iii); 15484; 15485). Second, “HAVA explicitly states that “[t]he requirements established by this subchapter are minimum requirements.”” *Id.* (quoting § 15484). Third, HAVA does not provide a “comprehensive regulation of voter registration and identification[,]” but instead contains “nothing...that discusses the requirements and procedures for establishing eligibility and identity of in-person registrants[,]” meaning that “Congress left it entirely up to the states to prescribe the requirements for in-person registrants” *Id.*

As the panel majority notes, “HAVA expressly provides that ‘nothing [in HAVA] may be construed to authorize or require conduct prohibited under [the NVRA].’” Slip. Op. at 17660 (*quoting* 42 U.S.C. § 15545(a)(4)). Therefore, the Eleventh Circuit necessarily rejected the panel majority’s belief that the NVRA is so pervasive that a State cannot impose its own identification requirements as a “prerequisite to voting,” because HAVA does not allow conduct which is

prohibited by the NVRA. Slip Op. at 17653. In other words, the Eleventh Circuit necessarily concluded that the NVRA permits states to require additional identification than the Federal Form requires as a prerequisite to registration because HAVA does not authorize conduct by otherwise prohibited by the NVRA.³

Because the panel majority's ruling that the comprehensive nature of the NVRA precludes States from requiring additional identification directly conflicts with the Eleventh Circuit, Rehearing *en banc* is warranted. Fed. R. App. P. 35(a)(2).

CONCLUSION

For the reasons stated above, *Amicus* respectfully requests this Court to grant rehearing *en banc* and affirm the decisions below.

Respectfully Submitted on November 24, 2010,

/s/ Kris W. Kobach
Kris W. Kobach
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³ The NVRA was before the *Browning* Court as well. *See Browning*, 522 F.3d at 1159 (reviewing the preliminary injunction issued by the District Court which found the Florida statute preempted by the NVRA).

STATEMENT OF RELATED CASES

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

/s/ Kris W. Kobach
Kris W. Kobach

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 does not exceed 15 pages.

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/ Kris W. Kobach
Kris W. Kobach

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 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 participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kris W. Kobach
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