

Nos. 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.

KEN BENNETT, in his official capacity as
SECRETARY OF STATE OF ARIZONA.

Defendant-Appellee.

On appeal from the United States
District Court for the District of Arizona

No. CV06-01268-PHX-ROS
CV06-01362-PHX-ROS

**ANSWERING BRIEF OF DEFENDANT-APPELLEE
ARIZONA SECRETARY OF STATE KEN BENNETT**

Terry Goddard
Attorney General
Mary R. O'Grady
Solicitor General
Barbara A. Bailey
Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007
(602) 542-3333 (Phone)
(602) 542-8308 (Fax)
Attorneys for Defendant-Appellee
Arizona Secretary of State Ken
Bennett

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JURISDICTIONAL STATEMENT

Defendant-Appellee agrees with Plaintiffs' Statement of Jurisdiction as set forth in their opening brief.

ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly hold that Arizona's identification requirements for voting and registering to vote are not a poll tax in light of both this Court's previous determination of that issue in this case and Plaintiffs' failure to show either that Arizona requires the payment of any "tax" or that any person actually must pay a fee to vote?

2. Did the district court correctly hold that Arizona's evidence of citizenship requirement to register to vote does not violate the National Voter Registration Act ("NVRA") based upon this Court's previous and explicit holding on that issue in the first appeal of this matter?

STATEMENT OF THE CASE

Plaintiffs brought their action on May 24, 2006, to challenge two state voting provisions that were adopted by a majority of Arizona's voters in the 2004 general election. [ER tab 10] Those laws require, respectively, that individuals provide evidence of their U.S. citizenship when registering to vote and that individuals present identification to be permitted to cast a ballot in person at the polls on election day.

Plaintiffs were comprised of six organizations and one individual. [ER tab 10 ¶¶ 1-7] The plaintiff organizations included one Native American tribe, the Inter Tribal Council of Arizona, and organizations that assist with voter registration efforts in Arizona. [ER tab 10 ¶¶ 1-6] The individual plaintiff was Steve Gallardo, who was a member of the Arizona House of Representatives at the time the complaint was filed. [ER tab 10 ¶ 7] Plaintiffs sued the Arizona Secretary of State Janice Brewer in her official capacity as the chief election officer for Arizona. [ER tab 10 ¶ 9]¹

Plaintiffs asserted in their complaint that the voting requirements of Proposition 200 resulted in: (1) an undue burden on the right to vote; (2) an unconstitutional poll tax; (3) a violation of the Civil Rights Act, 42 U.S.C. § 1971(a)(2)(A); (4) a violation of the Civil Rights Act, 42 U.S.C. § 1971(a)(2)(B); (5) a violation of section two of the Voting Rights Act; and (6) a violation of the National Voter Registration Act (“NVRA”). [ER tab 10 ¶¶ 62-83]

Plaintiffs sought preliminary and permanent injunctive relief and a declaration that Arizona’s voting requirements are “unconstitutional, unlawful, null and void.” [ER tab 10, p. 36 ¶ (a)] Plaintiffs’ action was consolidated with two

¹ Janice Brewer was named in this action in her official capacity as Secretary of State. Secretary Brewer was sworn in as Governor on January 21, 2009, and was succeeded as Secretary of State by Ken Bennett. Pursuant to Fed. R. App. P. 43(c), Secretary Bennett is automatically substituted as the Defendant-Appellee in this matter.

other actions in the District of Arizona, which had been filed contemporaneously. [See dkt. 33 (Case No. CV 06-1268)]² One of those actions was brought by five individuals and five organizations (collectively, “Gonzalez Plaintiffs”) against the Secretary, the State of Arizona and the recorders and election directors of Arizona’s fifteen counties. [See dkt. 1 (Case No. CV 06-1268)]

The other action was brought by an individual and the Navajo Nation (collectively, “Navajo Plaintiffs”) against the Secretary and the recorders and election directors of three northern Arizona counties. [See dkt. 1 (Case No. CV 06-1575)] The Gonzalez and Navajo Plaintiffs asserted similar legal challenges as those asserted by the ITCA Plaintiffs, and also sought declaratory and preliminary injunctive relief.³

After briefing on the motions for a temporary restraining order and preliminary injunction, and after a two-day evidentiary hearing, the district court denied the preliminary injunction in September 2006. [See dkt. 183 (Case No. CV 06-1268)]⁴ The ITCA and Gonzalez Plaintiffs appealed the district court’s ruling with regard only to the evidence of citizenship requirement. [See dkt. 184 (Case

² Unless otherwise noted, “dkt.” refers to the district court docket in the appropriate action below.

³ The Navajo Plaintiffs challenged only the requirement of identification for voting at the polls on election day. Those plaintiffs did not challenge the evidence of citizenship requirement for registering to vote.

⁴ The district court reserved ruling on the Navajo Nation’s preliminary injunction motion until after additional evidence was heard in February 2007. The court subsequently denied that motion. [Dkt. 279 (Case No. CV 06-1268)]

No. CV 06-1268)] The Ninth Circuit affirmed the denial of the preliminary injunction. *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007).⁵

The Court held that Arizona's law requiring evidence of citizenship to register to vote did not constitute a poll tax. *Id.* at 1049. The Court further held that Arizona's evidence of citizenship requirement did not violate the NVRA. *Id.* at 1050-51.

Shortly after the Court issued its opinion affirming the district court's preliminary injunction ruling, the Secretary and other defendants moved for summary judgment on the poll tax and NVRA claims, as well as on seven other claims asserted, collectively, by the plaintiffs in the consolidated cases. [See dkt. 282 (Case No. CV 06-1268)] The parties submitted declarations and exhibits in support of and opposition to the defense motion for summary judgment, respectively. The district court granted that motion in its entirety. [See dkt. 330 (Case No. CV 06-1268)]

During the ensuing litigation of the remaining claims, the Navajo Plaintiffs dismissed their action on agreement with the Secretary to modify the polling place identification procedures with regard to Native American electors. [See dkt. 775

⁵ Before the Ninth Circuit's decision on the merits, the case reached the Supreme Court on a petition for certiorari to vacate an injunction entered earlier by the Ninth Circuit pending the appeal. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). The *Purcell* Court vacated that injunction order because the Court could not determine from the Court of Appeals' brief order whether due deference had been afforded to the district court's preliminary injunction ruling. *See id.* at 7-8.

(Case No. CV 06-1268)] In addition, several plaintiffs in the remaining two cases either were voluntarily dismissed or were dismissed on motion for lack of standing. [See dkt. 776 (Case No. CV 06-1268)]

Finally, after extensive discovery taken by the plaintiffs, the remaining claims, including some of those claims based on the Voting Rights Act and the Civil Rights Act, proceeded to trial in July 2008. The district court issued its decision on August 20, 2008, which granted judgment on all remaining claims in favor of the defendants. [See ER tab 3] Those claims did not include the poll tax or NVRA claims, which had been decided a year earlier on summary judgment based on the summary judgment record before the district court.

The Gonzalez Plaintiffs appealed on September 16, 2008. [See dkt. 1045 (Case No. CV 06-1268)] The ITCA Plaintiffs appealed on September 19, 2008. [See ER tab 1] The appeals were consolidated on motion by the Secretary and the State on November 5, 2008. [Ninth Cir. dkt. 6] Although the ITCA Plaintiffs stated in their notice of appeal that they appeal from the district court's August 20, 2008, judgment, they raise only their poll tax and NVRA claims on appeal. In addition, their appeals docketing statement form specified the issues to be raised on appeal as the poll tax and NVRA claims. [Dkt. 1047 (Case No. CV 06-1268)] Each of those claims was decided on summary judgment earlier in the case below but did not become appealable until the district court's final judgment in the case.

STATEMENT OF FACTS

A. The Applicable Record on Appeal.

Because the claims appealed by Plaintiffs were decided on summary judgment below, the Court should review those claims based on that same record.⁶ Plaintiffs' arguments and submission to the Court, however, contain many citations to documents that were not part of the summary judgment record below.⁷ Specifically, the documents under tabs 11-19, 22-26, 29, and 31-34 of Plaintiffs' excerpts of record were not part of the summary judgment record and therefore should not be considered by the Court. The Secretary's statement of facts is based on the record before the district court on summary judgment.⁸

⁶ *E.g.*, *Nat'l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 500 (9th Cir. 1997) (stating that "Ninth Circuit appellate review is limited to the record presented to the district court at the time of summary judgment.").

⁷ It is not clear from Plaintiffs' brief whether they contend that the district court failed to grant summary judgment on Plaintiffs' poll tax claim based on both the evidence of citizenship and voting identification requirements. [*See* Pls.' Br. at 24 n.49] Plaintiffs would be mistaken in any such contention. The district court granted Defendant-Appellee's motion in its entirety. [ER tab 4, p. 7] That motion expressly requested summary judgment on Plaintiffs' poll tax claim with regard to both the evidence of citizenship and voting identification requirements. [Defendant-Appellee's Supplemental Excerpts of Record 6-10]

⁸ ITCA Plaintiffs assert (at 23 n.48) that in their post-trial brief they "not[ed] the Supreme Court's *Crawford* decision" and requested that the district court reconsider its summary judgment ruling on the poll tax claim. Plaintiffs did not purport to offer any "new facts" that "could not have been brought" to the district court's attention earlier with reasonable diligence. *See* Ariz. Local R. 7.2(g). Thus, even if their citation to *Crawford* had provided a basis for reconsideration of the summary judgment ruling (an argument contested by the Secretary), the summary judgment record remained (and remains) the same as that presented to

B. Background of Proposition 200.

On November 2, 2004, Arizona voters adopted by ballot initiative Proposition 200. [SER 12]⁹ As explained in detail below, sections three, four and five of that initiative amended Arizona’s voting laws in two substantive ways: (1) applicants to register to vote would be required to submit evidence of U.S. citizenship; and (2) voters who choose to vote in-person at the polls on election day (as opposed to early voters) would be required to present identification. [SER 12; *see* A.R.S. § 16-166(F) (as added by Proposition 200); A.R.S. § 16-152(A)(23) (as added by Proposition 200); A.R.S. § 16-579(A) (as amended by Proposition 200)]

The new law prospectively required that individuals registering to vote must provide satisfactory evidence of citizenship.

“Satisfactory evidence of citizenship” may be shown by including, with the voter registration form, any of the following: the number of an Arizona driver’s license or non-operating identification license issued after October 1, 1996 (the date Arizona began requiring proof of lawful presence in the United States to obtain a license); a legible copy of a birth certificate; a legible copy of a United States passport; United States naturalization documents or the number of the certificate of naturalization; “other documents or methods of proof that [may be] established pursuant to” federal immigration law.

the district court in 2007.

⁹ “SER” refers to Defendant-Appellee’s Supplemental Excerpts of Record, which is filed herewith.

Gonzalez v. Arizona, 485 F.3d 1041, 1047 (9th Cir. 2007) (*quoting* A.R.S. § 16-166(F)) (alteration in original).

Proposition 200 also amended Arizona law to require that individuals voting in person at the polls on election day provide either one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector. *See* A.R.S. § 16-579(A) (as amended by Proposition 200). Proposition 200 did not specify the particular forms of photo or non-photo identification that could meet the requirements of the statute. Under her statutory authority, however, Secretary Brewer promulgated a procedure specifying acceptable forms of identification for voting at the polls on election day. *See* A.R.S. §16-452(A), (B) (providing that the Secretary shall prepare a procedures manual to include the prescribed rules and procedures governing elections).

Under the Secretary's procedure, which has the force and effect of law, voters may provide any of the following forms of *photo identification* at the polls on election day:

Valid Arizona driver license;

Valid Arizona non-operating identification license;

Tribal enrollment card or other form of tribal identification; and

Valid United States federal, state, or local government issued identification.

[SER 1]¹⁰

Valid forms of *non-photo identification* include:

Utility bill of the elector that is dated within 90 days of the date of the election (electric, gas, water, solid waste, sewer, telephone, cellular phone, or cable television);

Bank or credit union statement that is dated within 90 days of the date of the election;

Valid Arizona vehicle registration;

Indian census card;

Property tax statement of the elector's residence;

Tribal enrollment card or other form of tribal identification;

Vehicle insurance card;

Recorder's certificate; and

Valid United States federal, state, or local government issued identification, including a voter registration card issued by the County Recorder.

[SER 1]¹¹

¹⁰ “An identification is ‘valid’ unless it can be determined on its face that it has expired.” [SER 2]

¹¹ The Secretary's procedure also contained a special procedure for Native American voters, which permitted such voters to present tribal identification to comply with the identification requirement for voting in person at the polls on election day. [SER 4] Since the district court's summary judgment, that procedure was revised to clarify the forms of tribal identification that could be used by Native American voters. Such revision resulted in the dismissal of the Navajo Nation case that had been consolidated in the litigation below. [See *dk. 775* (Case No. CV 06-1268)]

On December 9, 2004, the Arizona Attorney General submitted to the U.S. Department of Justice (“DOJ”) a request for preclearance of sections three, four and five of Proposition 200. [SER 12-17] That request expressly stated, among other things, that Proposition 200’s amendments would “require applicants registering to vote to provide evidence of United States citizenship with the application.” [SER 12]

The request also included an analysis by the Arizona Legislative Council of Proposition 200’s amendments to Arizona’s voting laws. [SER 13-14] That analysis expressly stated, among other things, that the amendments “would require that evidence of United States citizenship be presented by every person to register to vote.” [SER 13] The submission package to the DOJ comprised many pages and attached exhibits of information about Proposition 200, including copies of the initiative, the laws to be amended by Proposition 200, and articles and other public information relating to its passage. [SER 12-21] The DOJ precleared Proposition 200’s voting-related amendments on January 24, 2005. [SER 22]¹²

¹² The Secretary’s procedure setting forth acceptable forms of identification for voting at the polls was not promulgated until after the adoption of Proposition 200 and therefore was submitted for preclearance after the submission was made for Proposition 200’s provisions. The Department of Justice precleared the procedure on October 7, 2005. *See Arizona Attorney General, 2005 Legislation and Other Changes Affecting Voting*, at p. 3, *available at* <http://www.azag.gov/Preclearances/Preclearance2005.pdf>.

C. The Summary Judgment Record and Arizona's Election Procedures.

Most individuals who are eligible to register to vote in Arizona already possess a driver's license or non-operating identification card, and thus do not require any other identification either to vote or to register to vote. [SER 31] Indeed, the evidence before the district court demonstrated that more than eighty-seven percent of those eligible to register to vote in Arizona possessed a valid Arizona driver's license or non-operating license as of 2006, the year after Arizona's identification requirements became effective. [SER 31] In addition, with regard to identification for voting at the polls, many Arizona counties send official election mail and voter registration cards and inform voters that they may use those items as identification at the polls. [SER 32-45] Those items are free. [SER 48-50, 54, 57-59]

In Arizona, early voting in the State's elections must be made available to every registered voter. A.R.S. § 16-542(A), (E). Indeed, legislation (sponsored by plaintiff Gallardo) enacted in 2007 requires that Arizona election officials establish a permanent early voting list, on which any Arizona voter may request to be placed. Voters whose names are on that list automatically receive early ballots for each election. *Id.* § 16-544(A).

To vote an early ballot, a voter is not required to provide identification as otherwise required for voting. Instead, once early ballots are received by election

officials, the signature on the envelope containing such ballots is matched to the signature on file for the respective registered voter before that ballot is counted. *Id.* § 16-550(A).

Early voting begins approximately one month before an election. *Id.* § 16-545(B). Voters can vote an early ballot by mailing or taking it to the appropriate county recorder's office or by taking the ballot to any polling place within the voter's county by 7 p.m. on the day of the election. *Id.* §§ 16-548(A), 16-551(C). In addition, voters may go to an early voting site in their county and cast a ballot in person. *Id.* § 16-542(A), (E). As with the voters by mail, such early in-person voters need not provide any identification. Instead, the signatures on those voters' ballot envelopes are matched with voter registration records by election officials before the ballot is counted. *Id.* § 16-550(A).

Since the inception of the National Voter Registration Act, Arizona has used and accepted for voter registration the Federal Mail Voter Registration Form ("federal form"), which was developed by the U.S. Election Assistance Commission ("EAC"). [SER 23 ¶ 2; *see* 42 U.S.C. § 1973gg-7(a)(2)] Following the implementation of Proposition 200, Arizona has continued to accept both the federal form and Arizona's form for voter registration purposes, although the State requires submission of evidence of U.S. citizenship along with whichever application form the registrant submits. [SER 23-24 ¶¶ 2-3, 7] The Arizona

Secretary of State makes the federal form available to anyone who requests it. [SER 23 ¶ 4] In addition, that form is publicly available for downloading and printing on the EAC's website. [SER 23 ¶ 4]

SUMMARY OF THE ARGUMENT

The same two claims that are the subject of this appeal previously were decided in this case by this Court as a matter of law. *Gonzalez v. Arizona*, 485 F.3d 1041 (9th Cir. 2007). Plaintiffs in this and a consolidated case below presented the same arguments and authorities on their poll tax and NVRA claims that Plaintiffs assert in this second appeal. Because the Court already considered and decided those claims, the district court properly granted summary judgment.

Plaintiffs offer no proper basis upon which this Court should revisit its legal rulings in this case. Indeed, even though Plaintiffs concede that there has been no intervening change in the law or facts with regard to their NVRA claim, they nonetheless press the same arguments on that claim previously rejected by the Court. Under Circuit law, the Court should decline to reconsider Plaintiffs' arguments.

To the extent the Court reconsiders Plaintiffs' NVRA claim, however, the Court should affirm the district court's judgment for the same reasons explained in *Gonzalez*: Arizona does not violate the NVRA by requiring individuals to provide evidence of their eligibility to vote as U.S. citizens.

Nothing in the NVRA prohibits states from acting within their constitutional authority to regulate elections by implementing regulations that permit states to assess voter eligibility. To the contrary, the Act itself refers to states' ability to require identifying information sufficient to assess such eligibility. Notwithstanding Plaintiffs' assertions to the contrary, Arizona indeed uses and accepts the federal voter registration form. Voter registration applicants may conveniently use the federal form to register to vote. They simply must provide evidence of their U.S. citizenship, as do any other voter registration applicants.

The Court also should decline to reconsider Plaintiffs' poll tax claim. Although the Court's previous ruling on that claim pertained only to Arizona's evidence of citizenship requirement, the Court's legal holding and analysis apply with equal force to Plaintiffs' poll tax challenge of the State's voting identification requirement. Plaintiffs offer no argument to the contrary.

Instead, Plaintiffs mischaracterize the Supreme Court's recent decision in *Crawford v. Marion County Elections Board*, 128 S. Ct. 1610 (2008), as intervening authority that requires reversal of the Court's poll tax ruling. *Crawford*, however, did not even involve a poll tax claim. Moreover, the *Crawford* Court resoundingly affirmed States' ability to require identification to assess voter eligibility. In so doing, the Court upheld a voter identification law similar to Arizona's.

Finally, nowhere in Plaintiffs’ brief or (more importantly) the summary judgment record, has any showing been made of any instance in which an Arizona citizen was required to pay a fee either to vote or to register to vote. Plaintiffs had the burden on summary judgment of coming forward with admissible evidence of a “poll tax.” They did not do so and instead relied (and rely) on speculation about what some unknown individuals may have to do to register or vote. Such a “showing” is plainly insufficient under the standards for summary judgment. Accordingly, the Court should affirm the district court’s judgment.

ARGUMENT

Standard of review: The Court reviews *de novo* a district court’s summary judgment ruling. *E.g., Nat’l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 500 (9th Cir. 1997) (affirming summary judgment based on the correct interpretation of the applicable law).

I. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS’ POLL TAX CLAIM FAILS AS A MATTER OF LAW.

A. An Identification Requirement Is Not a “Tax” for Purposes of the Twenty-Fourth Amendment.

Apart from their reliance on *Crawford*, which as explained below does not support their poll tax claim, Plaintiffs merely reassert (at 29-31) the same arguments made to the Court in the first appeal of that claim. *See Gonzalez*, 485 F.3d at 1048-49 (rejecting Plaintiffs’ poll tax argument that some citizens “will be

required to spend money to obtain documents necessary to register to vote”). The Court should reject those arguments for the same reasons it did so before.

In requiring evidence of citizenship to register to vote or identification to vote in person at the polls on election day, Arizona does not impose any “tax” on any individual and accordingly does not violate the Twenty-Fourth Amendment as interpreted in *Harman v. Forssenius*, 380 U.S. 528 (1965), and *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966). In each of those cases, the Supreme Court addressed Virginia’s attempts to require voters to pay a special tax to vote in federal and state elections, respectively.

As an initial matter, Virginia had implemented its poll tax intentionally to disenfranchise African-American voters. *Harman*, 380 U.S. at 543 (“The Virginia poll tax was born of a desire to disenfranchise the Negro.”) Following the passage of the Twenty-Fourth Amendment, Virginia attempted to circumvent the amendment’s prohibition on poll taxes by merely offering an “alternative” to voters’ paying the tax. Thus, in *Harman*, the state employed a scheme whereby voters for federal election purposes could either comply with a relatively simple process of paying a poll tax or alternatively could navigate through a more cumbersome process of filing a certificate of residence. *Id.* at 529, n.1, 541-42 (“In effect, it amounts to annual re-registration which Virginia officials have sharply contrasted with the ‘simple’ poll tax system.”).

Significantly, the Court emphasized the importance of distinguishing Virginia's scheme from a hypothetical state law solely requiring the filing of a residence certificate. *Id.* at 538 (“[I]t is important to emphasize that the question presented is not whether it would be within a State’s power to abolish entirely the poll tax and require all voters—state and federal—to file annually a certificate of residence.”). The implication of the Court’s distinction was that a law such as the latter may well have been upheld as long as it was reasonably related to voter qualifications. Virginia’s attempt to exact a poll tax by imposing some cumbersome alternative to payment of that tax, however, was impermissible. *Id.* at 544. Given that one could simply pay a fee in Virginia and dispense with filing the certificate, it is difficult to conceive that the filing of such certificate reasonably was directed to ensuring the eligibility of that state’s voters.

The following year in *Harper*, the Court addressed Virginia’s law imposing a \$1.50 tax on every voter in a state, as opposed to federal, election. *Harper*, 383 U.S. at 665. Thus, the question was whether the Twenty-Fourth Amendment applies to state elections as well as to federal elections. The Court answered in the affirmative and held as unconstitutional Virginia’s poll tax in state elections. *Id.* at 666.

In the first appeal of Plaintiffs’ poll tax claim, this Court considered both *Harman* and *Harper* and held that Arizona’s evidence of citizenship requirement

for registering to vote is not a poll tax. *Gonzalez*, 485 F.3d at 1049. Arizona does not attempt to impose any tax on any individual in exchange for the right to vote. Neither is there any allegation in this case that Arizona's requirement that individuals show identification to establish their eligibility to vote was racially motivated. Indeed, Plaintiffs concede (at 7) that Proposition 200 was directed toward individuals who not U.S. citizens and therefore are not qualified to vote.

The Arizona laws challenged in this appeal do not require the payment of any fee for anything. Neither does Arizona require the payment of a tax in exchange for an individual being released from some other obligation related to voting, as with the poll tax scheme struck down in *Harman*. Arizona requires individuals reasonably to establish their identity for purposes of voting. As previously recognized by this Court, nothing about that requirement is remotely similar to the poll taxes struck down in *Harman* and *Harper*.

B. *Crawford* Compels the Same Decision Previously Reached by this Court on Plaintiffs' Poll Tax Claim.

Plaintiffs do not argue that any facts in the record before the district court on summary judgment made the court's ruling improper. Neither did Plaintiffs at any time after summary judgment move the district court to reconsider or to reopen the summary judgment record to offer additional evidence on their poll tax claim. Instead, their argument in this second appeal on that same claim is based entirely

on their characterization (at 24) of *Crawford* as intervening controlling authority that “makes reconsideration appropriate.”

Crawford, however, does not support any reversal of this Court’s decision in *Gonzalez*. Instead, the Supreme Court’s decision in *Crawford* expressly and unambiguously affirmed states’ authority to require individuals to provide identification to establish their eligibility to vote. *Crawford* plainly forecloses any credible argument that Arizona’s voting-related identification requirements are unconstitutional based on the record before the Court.

As an initial matter, *Crawford* did not even address or decide a poll tax claim. Instead, the challengers in *Crawford* brought, and the Court decided, a Fourteenth Amendment challenge based on an alleged undue burden on the right to vote. *Crawford*, 128 S. Ct. at 1614 (stating that the complaints alleged substantial and unjustified burdens on the right to vote in violation of the Fourteenth Amendment).¹³ Although Plaintiffs here asserted a similar Fourteenth Amendment claim below, they did not appeal the district court’s judgment in favor of the Secretary on that claim.

In deciding the Fourteenth Amendment claim the *Crawford* Court referred to *Harper* and other jurisprudence in the area of elections. The Court explained why

¹³ Although the *Crawford* Court did not decide or address a poll tax claim, the district court in *Crawford* did consider and reject such a claim, among other claims asserted by the plaintiffs. See *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827 (S.D. Ind. 2006).

the Virginia state tax at issue in *Harper* was unconstitutional. In distinguishing *Harper* from the case at issue, the Court stated that “restrictions on the right to vote are invidious *if they are unrelated to voter qualifications.*” *Id.* at 1616 (emphasis added). The Court further stated, however, that it previously had “confirmed the general rule that ‘evenhanded restrictions that protect the integrity and reliability of the electoral process itself’ are not invidious and satisfy the standard set forth in *Harper.*” *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, n. 9 (1983)).

In analyzing Indiana’s voter identification law under the Fourteenth Amendment, the *Crawford* Court considered the burden shown by the challengers and the State’s justification for the requirement. *Id.* at 1617-23. The Court concluded that the State had legitimate interests, including ensuring integrity and public confidence in elections, that justified the identification requirement and that the plaintiffs had not shown that the requirement imposed a substantial burden on any class of voters. *Id.* at 1623.¹⁴

¹⁴ Significantly, the Court recognized those state interests even in the absence of a specific evidentiary showing by Indiana that the State ever had actually experienced any in-person voter fraud. *Crawford*, 128 S. Ct. at 1619 (“The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.”) *Crawford* recognized and affirmed states’ use of an identification requirement as a reasonable integrity-policing measure to ensure that only eligible individuals were permitted to vote. *See, e.g., id.* at 1624 (“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.’”).

Plaintiffs attempt to distinguish *Crawford* based on their assertion (at 21) that the Supreme Court upheld Indiana’s voter-identification law only because Indiana provided free government-issued identification to its voters. An examination of Indiana’s identification scheme and comparison to Arizona’s laws, however, demonstrates that Arizona’s evidence of citizenship and voting identification requirements are no more stringent than the law upheld in *Crawford*.

Although Indiana offered free photo identification, it did so only “*to qualified voters able to establish their residence and identity.*” *Crawford*, 128 S. Ct. at 1614 (emphasis added). Thus, to obtain such a card, “a person must present at least one ‘primary’ document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport.” *Id.* at 1621 n.17. The Court observed that Indiana, “like most states, charges a fee for obtaining a copy of one’s birth certificate,” which fee may range from \$3 to \$12. *Id.*

In addition, under the Indiana regulations in effect at the time *Crawford* was decided, the person was required to present a “secondary” document and a “proof of residency” document. 140 Ind. Admin. Code (“I.A.C.”) § 7-4-2(c) (2008).¹⁵ A secondary document could consist of other identification cards, licenses, permits,

¹⁵ 140 I.A.C. § 7-4-2(c) was amended by the Indiana Bureau of Motor Vehicles on October 7, 2008, and recodified at 140 I.A.C. § 7-1.1-2(b). The amended regulation requires an additional proof of residency document and a document showing lawful presence in the United States, among other items.

transcripts, and marriage and divorce papers, among other items. *Id.* § 7-4-3(d). A proof of residency document may consist of a voter registration card, social security card, vehicle registration, affidavit of residency, and change of address confirmation, among other items. *Id.* § 7-4-3(e).¹⁶

Thus, although Indiana offered free government-issued photo identification to cast a ballot at the polls, to obtain such identification, individuals were required to provide not only a “primary” document such as their birth certificate or passport, but two other identifying documents, in order to obtain such identification.

Arizona’s evidence of citizenship and voting identification requirements do not impose any greater restrictions on citizens than the law upheld in *Crawford*. With regard to registering to vote, individuals may use one of several forms of identification, including their Arizona driver’s license. If individuals lack a driver’s license, they may use their birth certificate or passport, among other items, to register. Moreover, if they wish to use their birth certificate, they do not have to take that document to a State office to have separate identification issued. Neither must they obtain or gather additional “secondary” or “residence” documents to get evidence of citizenship for purposes of registering.

With regard to voting in person at the polls on election day, voters can easily comply by using one or two forms of identification that they already possess.

¹⁶ Alternatively, a person could present two primary documents and a proof of residency document. 140 I.A.C. § 7-4-2(c) (2008).

Indeed, the large majority of Arizona voters can easily comply with the identification requirement by using their Arizona driver's license or non-operating license. Those who cannot use such a license or other acceptable photo identification may present two of several forms of non-photo identification, including a bank statement or utility bill.

Moreover, because every registered voter in Arizona must receive (at no charge) a registration card from the county recorder, voters may simply provide one other form of non-photo identification to comply with the requirement. In addition, many counties accept official election-related mail that is addressed to the voter as an acceptable form of identification. [SER 32-45, 48-50, 54, 57-59] Thus, many voters may receive at no charge both forms of non-photo identification simply by virtue of their status as a registered voter.¹⁷

Although Indiana's law contained a provision under which an individual could provide an affidavit of indigence and inability to obtain proof of identification without paying a fee, Arizona's law is not unconstitutional solely based on the absence of such a provision. Plaintiffs cannot establish a poll tax

¹⁷ In addition, unlike Indiana, Arizona offers early voting to every elector. Early voting in Indiana is available only to individuals who meet certain criteria, including absence from the county or disability. *See* Ind. Code § 3-11-10-24(a). By contrast, *every* Arizona voter has the option of voting through the absentee voting process. Thus, Arizona voters necessarily cannot be compelled to pay any "tax" for the privilege of voting because they can (and many do) vote early without having to provide any identification.

claim based merely on a hypothetical prospect that some, unidentified individual might possibly be required to pay money in connection with obtaining acceptable identification. *E.g.*, *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 827 (S.D. Ind 2006) (rejecting the plaintiffs’ poll tax claim as “purely speculative and theoretical, since they have provided no evidence to demonstrate that anyone will actually be required to incur this cost in order to vote”; and noting that the vast majority of the state’s voters already possess sufficient identification).¹⁸

Instead, on summary judgment Plaintiffs were required to show that Arizona’s evidence of citizenship and voting identification requirements actually impose a “tax” on voters or potential voters. Plaintiffs made no such showing. Plaintiffs offered no evidence that any plaintiff could not vote or register to vote due to Arizona’s evidence of citizenship or voter identification requirements. Indeed, all but one of the Plaintiffs are organizations and consequently unable either to register or to vote. The only individual Plaintiff, Steve Gallardo, has never alleged that he could not register or vote due to either of the requirements.

¹⁸ *Cf. Common Cause/Georgia v. Billups*, No. 07-14664, 2009 WL 81326, at *10 (11th Cir. Jan. 14, 2009) (upholding Georgia’s voter identification requirement against a Fourteenth Amendment challenge where the plaintiffs were “unable to direct [the] Court to any admissible or reliable evidence that quantifies the extent and scope of the burden imposed by the Georgia statute”); *Am. Civil Liberties Union of N.M. v. Santillanes*, 546 F.3d 1313, 1323 (10th Cir. 2008) (upholding a municipal voter identification requirement against a Fourteenth Amendment challenge because the challengers did not show that the requirement substantially burdened the right to vote).

Moreover, Plaintiffs offered no evidence that any other voter or identifiable class of voters would be required to pay any tax or fee as a result of Arizona's identification requirements. On summary judgment, Plaintiffs identified no individual who was unable to register or vote for lack of identification. Although Plaintiffs asserted that not every citizen eligible to register in Arizona possessed a valid Arizona driver's license or non-operating license, Plaintiffs never offered any evidence about whether or not those individuals also lacked sufficient identification *altogether*.¹⁹

Like the petitioners in *Crawford*, Plaintiffs here merely assert some possibility of harm to some unidentified individuals, without having made any

¹⁹ On appeal, Plaintiffs attempt to supplement the summary judgment record by citing to the district court's findings of fact and conclusions of law at the preliminary injunction stage and asserting that some individuals "will have to obtain" identification to vote. [See Pls.' Br. at 26, n.51] Preliminary injunction findings, however, are not binding on the district court for purposes of summary judgment. *E.g., Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007) (stating that the district court's preliminary injunction findings were not binding on the court at the summary judgment stage, by which time the parties have had an opportunity to take discovery and develop the factual record). Moreover, such "finding" already was considered by this Court in the first appeal, which reviewed the district court's preliminary injunction order. Finally, even if it had been established that some individuals must obtain a form of identification to use as evidence of citizenship or voting identification, such a result does not transform Arizona's requirement into a poll tax. Incidental costs to a voter associated with establishing eligibility to vote are not a "tax" on that right. *E.g., Rokita*, 458 F. Supp. 2d at 827 (holding that "the imposition of tangential burdens does not transform a regulation into a poll tax," and observing that elections laws "will invariably impose some burden upon individual voters") (*quoting Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

factual showing for such a claim. Under *Crawford*, such a showing (or lack thereof) plainly is insufficient for the relief sought by Plaintiffs. See *Crawford*, 128 S. Ct. at 1623 (stating that based on the record that was made in the litigation, “we cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters”).

Under *Crawford*’s holding and reasoning, Arizona’s laws requiring individuals to establish their eligibility to vote by providing evidence of citizenship or voting identification plainly are constitutional. Like Indiana, Arizona has an important and legitimate interest in counting only the votes of eligible voters, of eliminating or preventing fraud in the State’s elections, and in ensuring the integrity of and public confidence in the State’s electoral process.

The requirement that individuals establish their identity to vote is not an “invidious” restriction like the tax struck down in *Harper*, which had nothing to do with whether the taxpayer was eligible to vote. Arizona does not require any citizen to pay any tax (or any other fee) to register to vote or to cast a ballot at the polls on election day. Instead, Arizona’s identification requirements to vote and register to vote are directly tied to individuals’ eligibility to do either.

II. PLAINTIFFS' NVRA CLAIM ALREADY HAS BEEN DECIDED BY THIS COURT AND LACKS MERIT IN ANY EVENT.

A. The Court Previously Held that Arizona's Evidence of Citizenship Requirement Does Not Violate the NVRA.

In the first appeal of Plaintiffs' NVRA claim, this Court expressly rejected the legal basis for that claim and held that the Act "does not prohibit documentation requirements," including Arizona's requirement of evidence of citizenship. *Gonzalez*, 485 F.3d at 1050. The Court further stated:

Indeed, the statute permits states to "require[] such identifying information . . . as is necessary to enable . . . election official[s] to assess the eligibility of the applicant." *Id.* at § 1973gg-7(b)(1). The NVRA clearly conditions eligibility to vote on United States citizenship. *See* 42 U.S.C. §§ 1973gg, 1973gg-7(b)(2)(A). Read together, these two provisions plainly allow states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote.

Id. at 1050-51 (alterations and ellipses in original).

In this appeal, Plaintiffs ignore the Court's earlier and dispositive holding on their NVRA claim and merely reassert the same arguments they previously made and the same legal authorities. Indeed, Plaintiffs barely mention the Court's earlier decision or reasoning in the legal argument section of their brief.

"Under law of the case doctrine, however, one panel of an appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case." *Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1392 (9th Cir. 1995) (declining to reconsider the interpretation of a federal statute decided by a different Ninth

Circuit panel in a previous appeal of the same case). In a second appeal of the same case, the panel in *Leslie Salt Co.* was asked to reconsider a different panel's holding in the first appeal of the case on the legal interpretation of the federal Clean Water Act. *Id.* The court declined to do so.

Although the court acknowledged that it may reconsider previously decided questions in cases in which there had been an intervening change of controlling authority, where new evidence had surfaced, or where the prior holding was “clearly erroneous” and would result in a manifest injustice, the court held that the appellants had made no showing of any such circumstances to warrant reconsideration. *See id.* at 1393, 1395-96. The court further emphasized that, assuming the appellants were seeking to establish that the prior panel was incorrect in its legal interpretation, the appellants had the burden of demonstrating that the prior decision was not only “wrong, but that it was *clearly* wrong.” *Id.* at 1393 (emphasis added).

In addition, the court rejected the appellants' argument that the law of the case should not be applied because the prior panel's discussion of the legal issue was “a bare conclusion” and “without any discussion.” *Id.* at 1392 (quoting appellants' argument). The court noted that although the prior panel's holding was brief, the panel's opinion specifically had addressed the legal issue in a discrete section of the opinion. Moreover, the court stated, “even summarily treated issues

become the law of the case.” *Id.* (citing *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1135 (D.C. Cir. 1994)).

Plaintiffs concede (at 24) that “[i]t is generally appropriate to follow an earlier appellate ruling in the same case.” Plaintiffs do not explain, however, why the Court appropriately should disregard its earlier decision on Plaintiffs’ NVRA claim under any of the criteria recognized in *Leslie Salt Co.* The Court issued its previous decision based on full briefing by, and oral argument of, the parties. Although the Court’s decision involved the review of a preliminary injunction ruling, the Court’s holding plainly was based on its interpretation of the NVRA—a matter of *law*, not a matter to be reconsidered after further factual development. Plaintiffs have provided no basis upon which the Court should set aside that decision and reverse itself on Plaintiffs’ NVRA claim.

B. The Court’s Previous Interpretation of the NVRA Was Correct.

Not only did the Court decide Plaintiffs’ NVRA argument, the Court *correctly* decided that legal issue. Arizona’s requirement that individuals provide evidence of their U.S. citizenship when registering to vote neither violates the NVRA nor undermines the purposes of that Act. As explained below, in enacting the NVRA, Congress did not expressly or impliedly preempt all state laws regarding voter registration. Neither does Arizona’s requirement that individuals

provide evidence of their U.S. citizenship conflict with any provision of the NVRA.

1. Background and purposes of the NVRA and subsequent registration legislation.

Congress enacted the NVRA (also known as the “motor voter law”) in 1993 to achieve four goals:

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

42 U.S.C. § 1973gg(b).

Congress set out to achieve those goals by, among other things, allowing applications for driver’s licenses to double as voter registration forms, by requiring states to permit voter registration by mail, and by having public assistance agencies and other state offices serve as registration sites. *See id.* § 1973gg-2(a)(1), (2); *id.* § 1973gg-5(a)(2)(A). Congress also established procedures for removing the names of ineligible persons from the voter rolls. *See id.* § 1973gg-6(c).

Congress tasked the Federal Election Commission (“FEC”), and subsequently amended the Act to task the Election Assistance Commission

(“EAC”), with developing a federal voter registration form in consultation with the States. *See id.* § 1973gg-7(a)(2). The NVRA provides that states must “accept and use” the resulting federal form. *Id.* § 1973gg-4(a)(1). The NVRA further provides that the federal form may require only such identifying information as is necessary to enable the states to assess the eligibility of the applicant. 42 U.S.C. § 1973gg-7(b)(1). After a federal form is submitted by an applicant, states must notify registrants of the “disposition” of their application. *Id.* § 1973gg-6(a)(2). Congress did not specify what form the notice should take, but instead left that decision to the states.

The FEC, however, did prepare a sample form that could be used for such a notice. *See Nat’l Clearinghouse on Election Admin., Fed. Election Comm’n, Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples* 5-26 (1994) (“FEC Guide”).²⁰ That sample form contains as a possible explanation for rejection of an application that the form was “received incomplete.” *Id.* The form also contains a space in which a state may list other reasons why the application was rejected. *Id.*

Nearly ten years after the NVRA was enacted, Congress enacted the Help America Vote Act (“HAVA”). 42 U.S.C. §§ 15301, *et seq.* That legislation was intended to ensure the updating of voting systems, to establish the EAC to assist

²⁰ Relevant excerpts of the FEC Guide are attached for the Court’s convenience.

election administration, and to “establish minimum election administration standards” for states, among other purposes. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, preamble.

HAVA provided, among other things, that states were prohibited even from accepting voter registration forms from applicants who possess a driver’s license or social security number if such applicants do not provide that information on the form. 42 U.S.C. § 15483(a)(5)(A). The Act further provided that the states are required to verify the accuracy of that information for purposes of voter registration. *Id.* § 15483(a)(5)(A)(iii).

HAVA specifically requires the appropriate state officials to agree to match information from the statewide voter registration database with the information in the motor vehicle division database “to verify the accuracy of the information provided” on voter registration applications. *Id.* § 15483(a)(5)(B)(i). In addition, under HAVA states must “ensure that voter registration records in the State are accurate” and must have a “system of file maintenance that makes a reasonable effort to remove registrants to who are ineligible to vote.” *Id.* § 15483(a)(2)(B)(4).

HAVA states that its fraud-prevention measures are only “minimum requirements” and that the Act was not intended to prevent states from establishing election technology and administrative requirements that are “more strict” if those requirements are not inconsistent with federal law. *See id.* § 15484. Congress

further provided that the “specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State.” *Id.* § 15485.

2. *Congress neither expressly nor impliedly preempted state regulation of elections, including voter registration, through the NVRA.*

Plaintiffs suggest (at 33-35) that Congress preempted state regulation of voter registration by enacting the NVRA. None of the legal bases for finding preemption exists here, however. Preemption can only be found where (1) Congress expressly announces that action by the states is preempted (“express preemption”); (2) federal law so completely occupies a field as to leave no room for state action (“field preemption”); or (3) the state action “actually conflicts with federal law” (“conflict preemption”). *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). None of those circumstances is present here.

In analyzing preemption issues, courts begin with the presumption that Congress does not lightly displace state law. *E.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating that “because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action”); *Malabed v. North Slope Borough*, 335 F.3d 864, 869 (9th Cir. 2003) (in considering a preemption claim, the court “must begin with the presumption that Congress did not intend to preempt state law”).

Moreover, doubts about congressional intent should be resolved against a finding of preemption. *Malabed*, 335 F.3d at 869 (stating that “Congressional intent to preempt state law must be clear and manifest”) (quoting *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1150 (9th Cir. 2000)).

In the field of elections, the Constitution confers authority on the States to prescribe “[t]he Times, Places and Manner of holding elections for Senators and Representatives.” U.S. Const. art. 1, § 4, cl. 1. Thus, the States have constitutional authority to develop complete election codes for both federal and state elections that regulate not only the time, place and manner of elections, but the registration of voters, as well as the prevention of fraud and corrupt practices. *E.g.*, *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972) (noting the “bre[a]dth” of states’ constitutional authority to regulate in the area of elections, including the authority to promulgate election codes, to regulate registrations, prevent fraud, supervise voting, and to perform other functions); *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (stating that the Constitution “confers on the states broad authority to regulate the conduct of elections, including federal ones” and that because “an unregulated election system would be chaos, state legislatures may without transgressing the Constitution impose extensive restrictions on voting”).

Indeed, states historically have legislated and administered voter registration laws as a matter of states’ constitutional authority to regulate the time, place and

manner of elections. *E.g.*, *Storer v. Brown*, 415 U.S. 724, 730 (1974) (stating that “the States have evolved comprehensive . . . election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates”); *Sandusky County Democratic Party v. Blackwell*, 387 F.3d. 565, 568 (6th Cir. 2004) (stating that “States long have been primarily responsible for regulating federal, state, and local elections” and that those “regulations have covered a range of issues, from registration requirements to eligibility requirements to ballot requirements to vote-counting requirements”).

The NVRA did not expressly (or otherwise) purport to displace that longstanding and constitutional state authority. Indeed, such an express statement would be inconsistent with the respective constitutional allocations of authority and responsibility of both Congress and the States in the area of elections. Accordingly, there is no express preemption of Arizona’s evidence of citizenship requirement.

Neither did Congress impliedly preempt state laws governing voter registration by enacting the NVRA. Such field preemption is found only where the conduct regulated (*i.e.*, voter registration) takes place “in a field that Congress intended the Federal Government to occupy exclusively.” *English*, 496 U.S. at 79.

Even Plaintiffs must concede that voter registration is largely a matter left to state regulation. In any event, as explained above, Congress plainly has not acted to occupy that field exclusively. To do so likely would contravene states' constitutional authority under Article I.

3. *Arizona's evidence of citizenship requirement for voter registration does not conflict with the NVRA.*

Because Plaintiffs cannot establish either express or implied preemption, they argue (at 37-38) that Arizona's evidence of citizenship requirement nonetheless is preempted because that requirement conflicts with the NVRA. Congress does not supplant states' authority, however, unless the state action at issue "actually conflicts with federal law." *E.g., English*, 496 U.S. at 79 (discussing the types of preemption and holding that federal law did not preempt a state law tort claim).

Arizona's law requiring applicants to provide evidence of citizenship when registering to vote presents no conflict with the NVRA, including the Act's provision for the use and acceptance of a federal form. Today in Arizona, just as before the adoption of Proposition 200, individuals may easily register to vote using the federal form, just as they may register to vote using the state form. Nothing about that policy changed since the passage of Proposition 200 in November 2004. [SER 23 ¶ 2]

Plaintiffs' argument is based on their mistaken notion that "accept and use" must mean "automatically register the applicant to vote." Plaintiffs offer no authority for such proposition, however, and their argument is not supported by the language of the Act. Under the NVRA, states are not required to register any and all applicants who submit a federal form merely by virtue of the applicants' use of that form.

Indeed, that cannot be true because the Act expressly provides that states must notify "each applicant of the disposition of the application" submitted by such applicant. *See* 42 U.S.C. § 1973gg-6(a)(2). As further demonstrated by the FEC's sample form, an incomplete application is only one of several reasons that an application may be rejected. *See* FEC Guide, at 5-26. The statute necessarily contemplates that not all applications will result in registration. Accordingly, Plaintiffs' use of the phrase "accept and use" synonymously with "automatically register every applicant who uses a federal form" is contrary to the language of the NVRA.²¹

²¹ In addition, the Act's provision regarding the promulgation of a dual-purpose form for applying for both a driver's license and registration to vote undermines Plaintiffs' argument here. The Act sets forth the requirement of such a dual-purpose form and the criteria for that form. *See* 42 U.S.C. § 1973gg-3(c). The Act specifically provides that the state may develop a form which requires information that is necessary to "enable State election officials to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." *Id.* § 1973gg-3(c)(2)(B)(ii). Nothing in the language of that provision can be construed to prohibit states from requiring evidence of citizenship to enable

Moreover, the plain language of the NVRA does not prohibit states from requiring evidence of U.S. citizenship of applicants to register to vote. Nothing in the NVRA suggests that states no longer may properly assess whether an applicant is eligible to register or whether the registration form as submitted complies with state law.²²

Indeed, the NVRA expressly recognizes and affirms states' role in assessing voter eligibility, including U.S. citizenship. *E.g.*, 42 U.S.C. §1973gg-7(b)(1) (providing that the federal form may require identifying information necessary to enable states to assess eligibility to register); *id.* § 1973gg-3(c)(2) (providing that the state motor vehicle application form may require information necessary to enable states to assess voter eligibility to register to vote).

It is not impossible (or even difficult) for individuals to comply with both the NVRA and Arizona's evidence of citizenship requirement. Accordingly, there is no preemption. *E.g.*, *Beveridge v. Lewis*, 939 F.2d 859, 862 (9th Cir. 1991)

election officials to assess an applicant's eligibility.

²² *Cf. McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000) (rejecting the claim that the NVRA prohibited the state from requiring a social security number to register to vote in part because the NVRA "does not specifically forbid use of social security numbers"); *Bell v. Marinko*, 367 F.3d 588, 591-92 (6th Cir. 2004) (holding that state law procedures for challenging a registered voter's eligibility to vote and for removing names from the voter roll did not violate the NVRA: "The [NVRA] protects only 'eligible' voters from unauthorized removal").

(stating that a conflict will be found “where compliance with both federal and state regulations is a physical impossibility”).²³

Arizona’s evidence of citizenship requirement is consistent with the use and acceptance of the federal form, the language of the NVRA, and the historical responsibility of the States to assess voter eligibility. As this Court previously (and correctly) held, the NVRA “plainly allow[s] states” to require evidence of citizenship to register to vote. *Gonzalez*, 485 F.3d at 1050-51.²⁴

²³ Plaintiffs imply (at 39-40) that Arizona’s evidence of citizenship requirement is not really intended to ensure that only eligible persons register to vote because the requirement was implemented prospectively. In other words, according to Plaintiffs, because Arizona did not require every person who was registered to vote at the time Proposition 200 passed to re-register, Arizona’s evidence of citizenship requirement does not further the State’s interest in ensuring that only eligible individuals register. In implementing an electoral law or regulation, however, States are not required to address or correct every conceivable election-related irregularity. *E.g.*, *Santillanes*, 546 F.3d at 1321 (noting that states may “‘take reform one step at a time,’ and need not ‘cover every evil that might conceivably [be] attacked.’”) (*quoting McDonald v. Chicago Bd. Of Election Comm’rs*, 394 U.S. 802, 809 (1969)) (alterations in original). Arizona adopted its evidence of citizenship requirement as a reasonable measure against fraud or potential fraud in the State’s electoral process. The fact that Arizona also could choose to take other measures to address a real or potential problem of existing registered but ineligible individuals does not render Arizona’s evidence of citizenship requirement ineffective in preventing registration fraud going forward.

²⁴ Plaintiffs’ assertion (at 34) that Arizona’s evidence of citizenship requirement “has led to the rejection” of 31,500 people, some of which have not registered since, is not supported by any evidence in the summary judgment record and accordingly should not be considered on appeal for the reasons explained in part A of the Statement of Facts section above. Because Plaintiffs did not offer that evidence on summary judgment, Defendants were not afforded any opportunity to respond to the same in the district court. Moreover, Plaintiffs attempt to rely on such “evidence” to assert (at 34-35) that Arizona is violating the “letter and the

4. *The EAC’s view of Arizona’s evidence of citizenship requirement is not entitled to deference.*

As they did in their first appeal of their NVRA claim, Plaintiffs attempt to support their argument by offering an EAC letter addressed to Secretary Brewer and legislative history of the NVRA. The Court need not (and should not) resort to such secondary sources, however, because as explained above Arizona’s evidence of citizenship requirement does not conflict with the language of the NVRA. *E.g.*, *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.”).

Moreover, with regard to the EAC’s expressed view of Arizona’s evidence of citizenship requirement, that agency has no authority whatever either to issue legal opinions regarding interpretation of the NVRA or to enforce any of the provisions of that Act. To the contrary, Congress expressly provided that the EAC “shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local

purpose” of the NVRA. Plaintiffs do not (because they cannot) inform the Court what portion of those individuals whose registration application was rejected because those persons failed to provide evidence of U.S. citizenship *actually were citizens* who were entitled to register. For that additional reason, the Court should not consider additional “facts” that were neither considered nor tested below for purposes of Plaintiffs’ NVRA claim.

government, except to the extent permitted under section 1973gg-7(a).” 42 U.S.C. § 15329.²⁵

That single subsection addresses only the development of the federal form and the prescription of regulations necessary for such development, and the submission of periodic election-related reports about the States. *See* 42 U.S.C. § 1973gg-7(a). Providing legal interpretations on the meaning of the NVRA is not within the scope of the EAC’s statutory powers. Because they have no powers beyond what Congress authorized, their agency view of Arizona’s evidence of citizenship requirement is not entitled to deference. *See Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 374 (1986) (stating in preemption case that “an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it” and that “[a]n agency may not confer power upon itself”).

Moreover, in contrast to the EAC, the record on summary judgment demonstrated that the Department of Defense instructs military and overseas voters who register to vote using the federal post card application form to provide proof of citizenship in compliance with Arizona law. [SER 24 ¶ 6] Thus, the EAC’s view is not the only “federal” view on the subject.

²⁵ Instead, Congress authorized the Attorney General to enforce the provisions of the NVRA. 42 U.S.C. § 1973gg-9(a). Apart from the Attorney General, only a person “aggrieved” by a violation of the NVRA may bring any action under the Act. *Id.* § 1973gg-9(b)(1).

5. ***The legislative history of the NVRA must be considered in light of other congressional statements and action regarding states' verification of eligibility to register to vote.***

The committee report cited by Plaintiffs does not represent the collective expression of all members of Congress when it comes to interpreting the statute. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 530 (1989) (Scalia, J., concurring) (saying that Congress has spoken should not mean a committee report). Moreover, other portions of the legislative history undermine Plaintiffs' assertion that the Act was intended to prevent states from taking reasonable steps to confirm voter eligibility.

A separate committee report from the House of Representatives stressed that local officials in charge of elections should continue to confirm an applicant's eligibility under the NVRA, even as to citizenship:

Only the election officials designated and authorized under State law are charged with the responsibility to enroll eligible voters on the list of voters. [The NVRA] should not be interpreted in any way to supplant that authority. The Committee is particularly interested in ensuring that election officials continue to make determinations as to applicant's eligibility, *such as citizenship*, as are made under current law and practice.

H.R. Rep. No. 103-9, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 105, 112 (italics added).

Moreover, as discussed above, since the passage of the NVRA Congress enacted HAVA, which plainly evidenced an intent to permit states to ensure the

eligibility of individuals for voter registration purposes. Moreover, HAVA made it clear that the “minimum requirements” of the Act could be exceeded by states in carrying out their registration functions as specified in the Act.

When viewed in the context of other reports and subsequent congressional action, the legislative history cited by Plaintiffs does not mandate any finding of preemption here. Moreover, whenever possible, courts are to “reconcile the operation of both statutory schemes with one another rather than holding [that state law has been] completely ousted.” *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973).

CONCLUSION

For the foregoing reasons, the Court should affirm the district court’s judgment.

Respectfully submitted this 3rd day of February 2009.

Terry Goddard
Attorney General

/s/ Barbara A. Bailey
Mary R. O’Grady
Solicitor General
Barbara A. Bailey
Assistant Attorney General
Attorneys for Defendant-Appellee
Arizona Secretary of State Ken
Bennett

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellee respectfully advises the Court that, apart from the case with which this appeal was consolidated (No. 08-17094), which case is identified in Appellants' opening brief, Defendant-Appellee is not aware of any related cases pending in the Ninth Circuit.

/s/ Barbara A. Bailey
Barbara A. Bailey
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,468 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

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 in fourteen-point Times New Roman type style.

Dated this 3rd day of February, 2009.

/s/ Barbara A. Bailey
Barbara A. Bailey
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2009, 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 further certify that some of the participants in the case are not registered CM/ECF users. I have mailed a copy of the foregoing document by First-Class Mail, postage prepaid, to the following participants on the 3rd day of February, 2009 to:

Andrew P. Thomas
Maricopa County Attorney
M. Colleen Connor
MCAO Division of County Counsel
222N. Central Ave., Suite 1100
Phoenix, AZ 85003

Terrance C. Hance
Coconino County Attorney
Jean E. Wilcox
Deputy County Attorney
110 E. Cherry Avenue
Flagstaff, AZ 86001

James P. Walsh
Pinal County Attorney
Chris M. Roll
Nicole Weber
Pinal County Attorney's Office
PO Box 887
Florence, AZ 85232

I further certify that pursuant to Fed. R. App. P. 25(d) and Rule 4(a)(2) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases (11/10/2008), on the 3rd day of February, 2009, four copies of the Excerpts of Record were sent via Federal Express to:

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95 Seventh Street
San Francisco, California 94103

and that on the 3rd day of February, 2009, I mailed one copy of the Excerpts of Record by First Class Mail, postage prepaid, to

David B. Rosenbaum
Thomas L. Hudson
Sara S. Greene
OSBORN MALEDON, P.A.
2929 N. Central Ave., Suite 2100
Phoenix, AZ 85012-2794

David J. Bodney
Karen J. Hartman-Tellez
STEPTOE & JOHNSON, LLP
201 E. Washington St., Suite 1600
Phoenix, AZ 85004-2382

Nina Perales
Mexican American Legal Defense and Education Fund
110 Broadway, Ste. 300
San Antonio, TX 78205

Daniel R. Ortega, Jr.
Roush McCracken Guerrero Miller & Ortega
650 N. 3rd Avenue
Phoenix, AZ 85003-0001

Terrance C. Hance
Coconino County Attorney
Jean E. Wilcox
Deputy County Attorney
110 E. Cherry Avenue
Flagstaff, AZ 86001

Andrew P. Thomas
Maricopa County Attorney
M. Colleen Connor
MCAO Division of County Counsel
222N. Central Ave., Suite 1100
Phoenix, AZ 85003

Dennis I. Wilenchik
Kathleen Rapp, SBN
Wilenchik and Bartness, P.C.
The Wilenchik & Bartness Building
2810 N. Third Street
Phoenix, AZ 85004
Melvin R. Bowers, Jr.
Lance B. Payette
Navajo County Attorneys Office
PO Box 668
Holbrook, Arizona 86025

James P. Walsh
Pinal County Attorney
Chris Roll
Chief Civil Deputy County Attorney
PO Box 887
Florence, AZ 85232

By: /s/ Elizabeth A. Stark

APPENDIX