

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

**STATE OF ARIZONA AND SECRETARY OF STATE KEN
BENNETT'S MOTION FOR LEAVE TO FILE RESPONSE BRIEF
TO UNITED STATES' AMICUS BRIEF**

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Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, the State of Arizona and Secretary of State Ken Bennett respectfully move this Court for leave to file the proposed brief in response to the Amicus Curiae Brief of the United States. As good cause for this motion, the State and Secretary of State provide:

1. The State of Arizona and Arizona Secretary of State Ken Bennett are charged with administering Arizona statutes related to protecting the integrity of the election process and ensuring that eligible voters are registered to vote.

2. The State and Secretary Bennett request leave to file this Response because, contrary to the arguments made in the United States' untimely brief, Arizona law does not conflict with the NVRA and thus is not preempted by the Act: (1) The United States misunderstands Arizona's law, which provides that applicants for voter registration may complete their registration by providing their driver's license number, or, if they are naturalized citizens, their A-number, which confirms their citizenship; (2) the United States ignores contrary authority regarding the purpose, text and structure of the NVRA, including failing to acknowledge the U.S. Supreme Court's decision in *Crawford v. Marion County Election Board*, 553 U.S.

181 (2008); and (3) the United States' incomplete legislative history does not support the conclusion that Arizona's statute conflicts with the NVRA.

3. Despite the fact that this litigation has been ongoing since 2006 and subject to appellate review since 2009, the United States only now has filed a brief in this matter. Therefore it is equitable for Defendants-Appellees to be given an opportunity to respond in writing.

Conclusion

The State and Secretary Bennett respectfully request that this Court grant this motion for leave and allow the submission of the attached Response Brief.

Dated this 14th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June 2011, I electronically filed the foregoing document with the Clerk of the Court for the United State 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 foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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**RESPONSE BRIEF OF DEFENDANTS-APPELLEES
STATE OF ARIZONA AND ARIZONA SECRETARY OF STATE
KEN BENNETT TO UNITED STATES AMICUS BRIEF**

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PROCEDURAL BACKGROUND

On April 27, 2011, this Court granted the State's request for rehearing en banc. On June 3, 2011, the United States moved for leave to file an amicus brief supporting the appellants' position in this matter on the issue of whether Arizona's Proposition 200 violates the National Voter Registration Act ("NVRA"). The Court granted that motion on June 6, 2011.

SUMMARY OF ARGUMENT

Contrary to the arguments of the United States, Arizona law does not conflict with the NVRA and thus is not preempted by the Act.

The United States misunderstands Arizona's law. Approximately 90% of Arizonans have driver's licenses or non-operatoring identification cards, and they need only insert the license number on the voter registration form in order to register. Naturalized citizens have certificates of naturalization, and they need only insert the "A number" from that certificate on the registration form in order to register. Therefore, the vast majority of registration applicants *never have to submit a document*.

Only the minority of the voting-age population that does not have a driver's license, a non-operating identification card, or a certificate of

naturalization may need to submit a document or a copy of that document. Arizona's statute, therefore, does not require of all registrants "presentation of documentation relating to citizenship" as referred to in the conference committee report emphasized in the United States' amicus brief. Conceivably, if documentation were required of all applicants, such a requirement would frustrate Congress' purposes in that it could seriously interfere with the mail registration program, but after extensive testimony, the district court found that the burdens were not excessive.

Pursuant to the federal Help America Vote Act ("HAVA"), those with licenses already have to write the number down. In *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), the United States Supreme Court held that "a somewhat heavier burden . . . placed on a limited number of persons" doesn't invalidate a statute as "against the State's broad interests in protecting election integrity." *Id.* at 199, 200.

ARGUMENT

I. **Arizona Law Permits the Vast Majority of Applicants to Register by Providing Numbers, Such as Driver’s License Numbers, on Their Registration Forms, Without the Need to Submit Documentation.**

The United States claims that Arizona Revised Statutes (“A.R.S.”) Sections 16-152 and 16-166 “*require[] documentary proof of citizenship to vote in a federal election.*” U.S. Amicus Br. at 1 (emphasis added). It is this alleged requirement, the United States argues, that creates conflict between Arizona law and the NVRA. *See, e.g., id.* at 18. The argument, however, proceeds from a false premise.

Arizona does not “require documentary proof of citizenship.” The submission of a document is a fallback alternative for that minority of people who lack a number from a driver’s license, non-operating identification card, tribal identification, or certificate of naturalization. In fact, for the 90% of people who have driver’s licenses, HAVA requires that they put this on the voter registration form. 42 U.S.C. § 15483(a)(5)(A)(i)(I). Therefore, for 90% of registrants, this law makes no difference in what information they provide.

As the United States notes, HAVA itself provides that it does not contradict the NVRA in any way. The fact that HAVA could add this

driver's license (and social security) number requirement, yet not contradict the NVRA, demonstrates that it was not Congress' intent to preclude the States from requiring additional information.

Arizona law provides that "satisfactory evidence" of citizenship can be established by providing the number of the applicant's driver's license or non-operating identification, a tribal identification number, or the applicant's certificate of naturalization number.¹ *Id.* As noted above, approximately 90% of Arizona's voting eligible population possesses a valid driver's license or non-operating identification card. [ER 3 at 11-12 (Dist. Ct. Findings I(D)(i)); SER 230] Naturalized citizens have certificates of naturalization with an "A" number. Therefore, in the vast majority of cases, a complete and accurate Federal Form, which itself requests a driver's license number, will show sufficient evidence of citizenship under Arizona's law. *See* Federal Form, Box 6, http://www.eac.gov/voter_resources/register_to_vote.aspx (follow National Mail Voter Registration Form link).

¹ The appropriate number is the Alien Registration Number ("A-Number") which is included in a certificate of naturalized citizenship. [SER 219]

In *Crawford v. Marion County Election Board*, the United States Supreme Court considered burdens on voting on election day in a manner which is relevant here:

Both evidence in the record and facts of which we may take judicial notice, however, indicate that a *somewhat heavier burden may be placed on a limited number of persons*. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate; persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification; homeless persons; and persons with a religious objection to being photographed. . . .

. . .

It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation. . . .

. . .

Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burden against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.

553 U.S. at 199, 200 (emphasis added). Similarly, the district court in this case, after permitting plaintiffs extensive discovery from the records of the County Recorders, and after an extensive trial, found:

Of the approximately 20,000 voters ultimately unable to register to vote due to Proposition 200's proof of citizenship requirement, Plaintiffs have not presented any reliable evidence as to the number of these applicants or voting eligible persons generally who lack sufficient proof of identification or are unable to obtain it. *See Crawford*, 128 S. CT. 1620 ("The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of [the voter identification statute.]) Indeed, they have only produced one person, Shirely Preiss, who is unable to register to vote due to Proposition 200's proof of citizenship requirement. Nor have they demonstrated that the persons rejected are in fact eligible to register to vote.

[ER 3, at 32.]

The NVRA involves a balance of goals. It seeks to "increase the number of *eligible* citizens who register to vote" and it also seeks to "protect the integrity of electoral process." 42 U.S.C. § 1973gg(b). Had documentation been required of all registrants, this would have been closer to the concerns stated in the conference committee report regarding "documentation" and not interfering with the "register by mail" philosophy. But almost everyone has a driver's license number, tribal identification number or certificate of naturalization number to enter on the form. Only a minority must actually present documentation. It is not excessively

burdensome, as the district court found, and there is no contradiction with NVRA.

II. The United States Misconstrues “Accept and Use.”

According to the United States, to “accept and use” the Federal Form means a State must register the voter unless the application itself is “incomplete, illegible, or showing that they are not qualified.” U.S. Amicus Br. at 17. That would mean that the state cannot go beyond the four corners of the application in determining eligibility and cannot evaluate extrinsic evidence showing that the voter is qualified in order to assess eligibility.

This cannot possibly be correct. The application form might be entirely perfect (complete, legible and showing that the voters qualified) and yet the election official may have a document external to the form that proves that the applicant is not a citizen. For example, the record shows that a number of non-citizens illegally registered, and voted, who later swore they were *not* citizens on a jury commissioner form, to escape jury duty. [ER 3 at 16] According to the United States’ definition of “accept and use,” the applicant must be registered unless the form *itself* is . . . “incomplete,

illegible, or showing that they are not qualified.”² A State would be required to register a non-citizen, even if the state official was staring at a jury commissioner form showing the applicant was not a citizen. That would be inconsistent with the NVRA’s purpose to increase the number of *eligible* voters, and “to protect the integrity of the electoral process.”

If the United States is incorrect and extrinsic evidence can be considered, then it is not unreasonable to ask the applicant to write down a license number, naturalization number, or, for those few who do not have those, provide an alternative document, to protect, in the NVRA’s words, the integrity of the process.

A more reasonable definition of “accept and use” is that suggested by the dissent in this case. To “use” an object is “to derive service from or utilize it.” *Gonzalez v. Arizona (Gonzalez II)*, 624 F.3d 1162, 1206 (9th Cir. 2010) (Kozinski, J., concurring in part and dissenting in part) (citing *Smith v. United States*, 508 U.S. 223, 228-229 (1993)). An airline may advertise that it “accepts and uses” e-tickets, and that paper tickets are not needed, yet could still require a photo identification before one could board the airplane.

² The Gonzalez Reply Brief to the three judge panel has a similar definition, and specifies that the application must be accepted unless the form itself is incomplete, illegible, or shows “an address outside the jurisdiction, or date of birth under the age of 18.” Gonzalez Reply Br., at 23.

Similarly, Arizona can “accept and use” the Federal Form, yet can also require that applicants write down a number from their driver’s license, their non-operating identification card, a certificate of naturalization, or a tribal certificate—or, in some cases, send in a copy of a document or present the document itself—and be consistent with the NVRA.

Under the NVRA, States are “free to set eligibility standards and evaluate whether each applicant meets those standards.” *U.S. Student Ass’n Found. v. Land*, 546 F.3d 373, 385 (6th Cir. 2008). A recent Colorado case, *Common Cause of Colorado v. Buescher*, is instructive. In that case, the plaintiffs challenged a Colorado practice of cancelling a voter’s registration if officials received the notification of registration sent to the voter returned as undeliverable. 750 F. Supp. 2d 1259, 1265 (D. Colo. 2010). The plaintiffs claimed that this practice violated the NVRA because it resulted in the removal of the voter from the “official list of eligible voters” under 42 U.S.C. § 1973gg-6. *Id.* Plaintiffs argued that once the prospective voter became provisionally eligible, such a voter could not be removed from the rolls until after the strictures of 42 U.S.C. § 1973gg-6 were complied with. *Id.* at 1276. The district judge rejected this argument. *Id.* at 1277. Noting that under the NVRA “States must strive to add *eligible* voters to their lists” the district court upheld the statute and rejected the plaintiffs’ argument as

“not only a hypertechnical and overreaching application” of the relevant provisions, “but antithetical to the NVRA[’s] . . . countervailing mandate that states ensure the accuracy of their lists of registered voters.” *Id.* (emphasis added).

In *McKay v. Thompson*, 226 F.3d 752, 755-56 (6th Cir. 2000), the Court held there is no violation of NVRA where a person refused to provide a social security number required by the state. The requirement of a social security number is not authorized expressly by the NVRA. As with Arizona’s requirements, the statute neither expressly authorizes nor expressly forbids the additional information being required of the applicant. The Sixth Circuit held that the state could require social security numbers because NVRA does not expressly prohibit them.

This places the Sixth Circuit directly in accord with *Gonzalez I*, and contrary to *Gonzalez II*.

In the latter opinion, the panel majority concluded that even absent an express prohibition, Arizona’s law violated the NVRA. In contrast, when Congress sought to forbid something, it did so expressly. For example, 42 U.S.C. §1973gg-7 (b)(3) expressly prohibits a requirement of notarization. As pointed out in the dissent, both the 9th Circuit and the U.S. Supreme Court have found that “the inclusion of specific prohibition is a *strong*

indication that other prohibitions weren't intended." *Gonzalez II*, 624 F. 3d at 1207 (Kozinski , concurring in part and dissenting in part) (citing *United States v. Cabaccang*, 332 F. 3d 622, 630 (9th Cir. 2003) and *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995)) (emphasis added).

Moreover, Arizona's statutes and practices are consistent with its responsibilities under HAVA to "verify voter information contained in a voter registration application." *Crawford*, 553 U.S. at 192; *see also* 42 U.S.C. § 15483(a)(5)(A). The United States argues that HAVA should not be interpreted to contradict the NVRA. *See* U.S. Amicus Br. at 6 n.2. A State does not fail to "accept and use" the Federal Form, however, merely by verifying the accuracy of the information contained in that form. *Cf. Beuscher*, 750 F.Supp.2d at 1277-78 (recognizing "NVRA and HAVA's . . . mandate that states ensure the accuracy of their lists of registered voters"). Were the United States correct, a State complying with HAVA would inherently violate the NVRA with respect to federal elections by verifying the information provided in the form. Arizona, in contrast, acts consistently with the mandates of the NVRA and HAVA to ensure that eligible voters are registered. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, ___ U.S. ___, 130 S.Ct. 2433, 2477 (2010) ("Where the text permits, congressional enactments should be construed to be consistent with one another.").

III. The EAC Does Not Have the Power to Determine Whether Arizona's Law Is Preempted.

The determinations of the EAC do not govern the question of preemption, as the dissent observed. 624 F.3d at 1208 (Kozinksi, J., concurring in part and dissenting in part) (noting that the EAC has been given very limited powers by Congress). Nor could they, as the U.S. Supreme Court has held that deference is not given to administrative agencies on questions of preemption. *Wyeth v. Levine*, 555 U.S. 555, ___, 129 S. Ct. 1187, 1200-01 (2009) . Furthermore, an informal letter lacks “the force of law.” *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

Even under the majority decision in *Gonzalez II*, contradiction is the test of preemption. 624 F.3d at 1175. The United States has tried to make something out of nothing regarding the EAC because it can find no language in the NVRA which is contradictory to the Arizona statute. ,

IV. There Is Substantial Legislative History Supporting Arizona's Position.

As noted earlier, the conference committee report is not contradictory to Arizona's position because Arizona's statute does not implicate the conferees' concern. H.R. Rep. No. 66, 103d Cong., 1st Sess. (1993) at 23-24. Arizona does not require “documentation” from the vast majority of citizens, and that is an option only for the small minority who lack a driver's

license, non-operating identification card, tribal number, or naturalization “A” number (which naturalized citizens receive on their certificates).

Furthermore, the conference committee did not replace the Senate rule of construction with another rule, but instead determined that the NVRA should be silent regarding its interpretation. Courts do not “give[] authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute.” *Shannon v. United States*, 512 U.S. 573, 583 (1994). “The Supreme Court thus made clear that principles in legislative history that have no statutory reference point and do not purport to explain any part of the enacted law do not carry the force of law. As such, they do not bind *anyone*” *Nw. Environmental Defense Ctr. V. Bonneville Power Admin.*, 477 F. 3d 668, 683 (9th Cir. 2007) (emphasis in original).³

In addition, there is substantial legislative history that supports Arizona’s position. The House did not include the amendment rejected by the conference. Yet the House committee report stated:

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*

³ Cases relied upon by the United States, in contrast, address the construction of existing statutory provisions.

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. 9, 103d Congress, 1st Sess. (1993) at 8, as reprinted in 1993 U.S.C.C.A.N. 105, 112 (emphasis added). Similarly, the Senate report stated:

States may adopt whichever procedure they deem best suited to provide notice to the applicant and to *provide the registrar with verification of the accuracy of the information provided by the applicant.*

S. Rep. No. 6, 103d Cong., 1st Sess. (1993) at 30 (emphasis added).

CONCLUSION

It is respectfully requested that the Court reverse the *Gonzalez II* decision and reinstate the district court's entry of summary judgment in favor of the State and Secretary.

Respectfully submitted this 14th day of June, 2011.

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This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A)(B) 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. It contains 2,972 words.

Dated this 14th day of June, 2011.

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