

No. 12-71

IN THE
SUPREME COURT OF THE UNITED STATES

THE STATE OF ARIZONA, *ET AL.*,

Petitioner,

v.

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

Respondent.

***ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT***

**BRIEF OF MEMBERS OF CONGRESS
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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December 14, 2012

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INTERESTS OF *AMICI CURIAE*

Amici are certain Members of Congress whose names are listed in Appendix A. Members of Congress have a particular interest in the interpretation of federal statutes and their preemptive effect on state laws.¹ Because this case involves the extent to which the National Voter Registration Act limits the ability of states to determine the times, places, and manner of holding elections, the views of *amici* are particularly relevant. *Amici* include the Chairman of the Committee on House Administration, which has jurisdiction over federal elections, and the Chairman of its Subcommittee on Elections.

SUMMARY OF ARGUMENT

The Ninth Circuit created a new and ill-conceived test to determine whether an enactment of Congress under its U.S. Const. art. 1, § 4, cl. 1 (hereinafter “Elections Clause”) power to alter state regulations concerning the times, places, and

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, who are Members of Congress, their counsel, Lungren for Congress, or Gregg Harper for Congress made a monetary contribution to its preparation or submission.

manner of holding elections preempts state laws on similar subject matter. The Court's previous decisions make clear that the proper inquiry is whether the federal and state statutes conflict, not whether they "operate harmoniously." If the Ninth Circuit's test were adopted, it would impair the ability of Congress to legislate in the area of elections with confidence of the preemptive effect federal statutes would exert.

Using the correct test, the National Voter Registration Act does not preempt ARIZ. REV. STAT. § 16-166(F.), Arizona's law requiring that voter registration applicants provide proof of citizenship with their applications. The federal voter registration form contemplates additional information being required in the same manner that Arizona requires additional information to verify citizenship, and there is no conflict between requiring a state to "accept and use" the federal form and allowing the state to require additional verification of information on the form. Further, in reaching its decision the Ninth Circuit considered actions of the federal Election Assistance Commission that do not point to a clear result. Those actions should be given no weight by this Court.

ARGUMENT**I. *Siebold* and *Foster* Establish That the Proper Test is Whether Statutes Conflict, Not Whether They Operate Harmoniously**

To reach its decision, the Ninth Circuit used a newly-created test of when a federal statute under the Elections Clause preempts a state statute. This new test alters the analysis and leads to an incorrect result. Had the Court of Appeals correctly analyzed the federal and state statutes to determine whether they conflict, it would have found there is no preemption by the National Voter Registration Act (“NVRA”) in this case, even in the absence of a presumption against it.

The core of the preemption test announced by the Court of Appeals is whether the federal and state statutes “operate harmoniously.” *Gonzalez v. Arizona*, 677 F.3d 383, 394 (9th Cir. 2012). If they do not, then the *Gonzalez* majority would find that “Congress has exercised its power to ‘alter’ the state’s regulation, and that regulation is superseded.” *Gonzalez*, 677 F.3d at 394.

The “operate harmoniously” test departs from previous decisions of the Court analyzing preemption under the Elections Clause based on the existence of a conflict between the federal and state statutes (see, e.g., *Siebold*, 100 U.S. 371 (1879), and *Foster* 522

U.S. 67 (1997)). In the case of the “operate harmoniously” test, novelty is not a virtue. The test is an invitation to litigation and an impediment to effective lawmaking.

In *Ex parte Siebold*, 100 U.S. 371 (1879), the petitioners sought a writ of habeas corpus to escape imprisonment for violating federal statutes enacted to punish election fraud. The petitioners argued that the Elections Clause gave Congress the power to fully regulate elections or to not regulate them, but not to partially regulate them as was done by the statute under which the petitioners were convicted.

This Court rejected the claim that the Elections Clause provided an all-or-nothing grant of authority. Having concluded that the Constitution permitted Congress to partially preempt state laws governing elections, the Court in *Siebold* then made absolutely clear that the test for whether Congress had done so was the existence of a conflict between the federal and state enactments.

The Court unambiguously stated this test four times:

1. “When exercised, the action of Congress, *so far as it extends and conflicts with the regulations of the State*, necessarily supersedes them.” *Siebold*, 100 U.S. at 384 (emphasis added).

2. “[T]he regulations made by Congress are paramount to those made by the State legislature and, *if they conflict therewith*, the latter, so far as the conflict extends, ceases to be operative.” *Siebold*, 100 U.S. at 384 (emphasis added).
3. “We have shown, as we think, that, *where the regulations of Congress conflict with those of the State*, it is the latter which are void, and not the regulations of Congress, and that the laws of the State, insofar as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws.” *Siebold*, 100 U.S. at 397 (emphasis added).
4. “[T]he Constitution and constitutional laws of the [United States] are, as we have already said, the supreme law of the land, and, *when they conflict with the laws of the States*, they are of paramount authority and obligation.” *Siebold*, 100 U.S. at 399 (emphasis added).

In contrast to *Siebold*'s clearly held rule that preemption occurs in the case of a conflict between federal and state laws, the Ninth Circuit casts aside the use of conflict as a test and instead looks to

whether the statutes “operate harmoniously.” Though the circuit court cites no case when declaring that test, it appears to have drawn the words from *Siebold*. However, its use of them is unsupported by the Court’s language in *Siebold*. While the Court declares the existence of conflict as the clear test for preemption, it mentioned the concept of harmonized state and federal statutes only in passing: “not the slightest difficulty in a harmonious combination,” *Siebold*, 100 U.S. at 384; “no such conflict between them as to prevent their forming a harmonious system,” *Siebold*, 100 U.S. at 386; “[w]here there is a disposition to act harmoniously there is no danger of disturbance,” *Siebold*, 100 U.S. at 386; and “we shall hear no more about the impossibility of harmonious action,” *Siebold*, 100 U.S. at 387. Nowhere in *Siebold* does the Court say that the existence of harmonious combinations, systems, or actions are to be used in determining whether the federal enactment preempts the state’s. The Court instead makes clear that the presence of conflict decides that question.

If the Ninth Circuit’s reliance on *Siebold* for its “operate harmoniously” test is unavailing, its reliance on *Foster* is mystifying. In *Foster v. Love*, 522 U.S. 67 (1997), the challenged statute was a Louisiana law providing for an election in October in which any candidate receiving more than fifty percent of the vote would be declared elected, with a subsequent election on the November date fixed in federal statute occurring only if no candidate achieved that threshold. The issue before the Court was whether the federal statute fixing the date for

federal elections in November preempted Louisiana's statute allowing a candidate to be elected in October.

While concluding that it did, the Court used no variation of the word "harmony" at any place in its opinion. The only test referred to by the Court was whether there was a conflict between the state and federal laws. In concluding its opinion, the Court said the Louisiana statute "conflicts with federal law and to that extent is void." *Foster*, 522 U.S. at 74.

The "operate harmoniously" test announced by the Ninth Circuit is a creature of its own making, one that did not exist previously and that conflicts with the proper test set forth by the Court beginning more than a century ago. Moreover, viewed by a legislator, the "operate harmoniously" test is a creature with fangs.

II. The Operate Harmoniously Test Impairs Congress' Ability To Legislate Effectively

When drafting legislation under the Elections Clause, Congress may intend to preempt known state laws or it may desire to set a rule that will supersede state laws that may be unknown and inconsistent with it. At the same time, Congress may wish to leave intact state laws that are different than but not inconsistent with the federal statute. When the test of preemption is a conflict between federal and state laws, Congress may calibrate its language

to ensure that it controls so much of the subject as it wishes but not more nor less. Congress may set out the rule it wishes to establish, and know how state statutes will be judged against that rule.

If, however, state statutes will be judged by whether they “operate harmoniously” with a federal statute, Congress is left to speculate as to what conclusions courts might reach. “Harmony” is a highly subjective term and how a pair of statutes will “operate” in connection with one another is susceptible to a wide range of factual speculations and interpretations. The result is that Congress cannot know with any reasonable measure of certainty how its enactments will affect state statutes under an “operate harmoniously” test.

III. Arizona’s Law Does Not Conflict With The National Voter Registration Act

When a “clear conflict” analysis is used, the requirements of ARIZ. REV. STAT. § 16-166(F.) do not create a clear conflict with the National Mail Voter Registration Form (“Federal Form”). Regulations made by Congress under the Elections Clause are paramount to those made by State legislatures, but only “so far as [the conflict] extends and conflicts with the regulations of the State” *Siebold*, 100 U.S. at 384. The statute’s requirement for documentary proof of citizenship accompanying the Federal Form does not conflict with the requirement

under NVRA that States “accept and use” the Federal Form. The statute is not in clear conflict with the NVRA under the requirement to “accept and use” the Federal Form developed pursuant to 42 U.S.C. § 1973gg-4(a)(1).

The Ninth Circuit admits that “[i]f a state law complements the congressional procedural scheme, we treat it as if it were adopted by Congress as part of that scheme.” Subsequently, when applying this test, the Ninth Circuit erred. Arizona’s enactment of ARIZ. REV. STAT. § 16-166(F.) complements the NVRA by requiring proof of citizenship in conjunction with the Federal Form. The NVRA included the stated purpose “to protect the integrity of the electoral process.” 42 U.S.C. § 1973gg(b)(3). Requiring proof of citizenship is a recognized method of ensuring the integrity of voter registration and the electoral process generally. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (discussing how dilution of votes debates or dilutes the weight of a “citizen’s vote”). Requiring documentary proof of citizenship both fits within the scheme of accepting and using the Federal Form and the NVRA process of having a state develop its own form.

The NVRA’s provisions requiring a state accept and use the Federal Form supplement, not supplant, the state registration system and the statute’s requirements. This Court has commanded lower courts to avoid construing statutes to create conflicts with statutes. See, e.g., *La. Pub. Serv.*

Comm'n v. F.C.C., 476 U.S. 355, 370 (1986) (“[W]here possible, provisions of a statute should be read so as not to create a conflict. . . .”). This Court has noted that “Congress may indicate pre-emptive intent . . . through a statute’s express language or through its structure and purpose.” *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). The NVRA specifically does not indicate intent to preempt the totality of a state system of registration. The NVRA indicated an intent to supplement the state system of registration by specifically allowing states to develop their own forms and permitting the Federal Form to require “identifying . . . and other information . . . as is necessary to enable the appropriate State Election official to assess the eligibility of the applicant.” 42 U.S.C. § 1973gg-7(b)(1). Both the text and the structure of NVRA indicate that Congress wished to supplement, not supplant, existing state voter registration methods.

NVRA specifically recognizes citizenship as an eligibility requirement. NVRA requires the contents of the mail voter registration form contain a statement that “specifies each eligibility requirement (including *citizenship*.” 42 U.S.C. § 1973gg-7(b)(2)(A) (emphasis added). NVRA’s congressional findings specifically state that “the right of *citizens* of the United States to vote is a fundamental right.” 42 U.S.C. § 1973gg(a)(1) (emphasis added). Even within the statute, NVRA recognizes that citizenship verification is an important aspect. The statute’s recognition of citizenship as an essential prerequisite

to voting dovetails with Arizona's requirement for documentary proof of citizenship.

Each Federal Form is required to include a statement specifying the eligibility requirement including citizenship. 42 U.S.C. § 1973gg-7(b)(2)(A). While the Federal Form specifically requires certain statements, the Federal Form specifically prohibits notarization or other formal authentication. 42 U.S.C. § 1973gg-7(b)(4). Thus, Congress has spelled out specific prohibitions for items that cannot be included in the Federal Form. Congress has not, however, prohibited requesting documentary proof of citizenship. When Congress includes language in one section of a statute but omits it in another section of the same Act, Congress is generally presumed to have done so intentionally. *Kucana v. Holder*, 130 S. Ct. 827, 838 (2010). Congress's exclusion of proof of citizenship on the contents of the Federal Form indicates that Congress permitted the use of proof of citizenship on the Federal Form so long as the proof of citizenship "is necessary to enable the appropriate State election official to assess the eligibility of the applicant." 42 U.S.C. § 1973gg-7(b)(1).

The Federal Form's inclusion of state specific instructions contemplates that States will request supplementary information. For example, the States of Alabama and Florida specifically request the execution of an oath in conjunction with the submission of their Federal Form. Election Assistance Comm'n, National Mail Voter

Registration Form (March 3, 2006), 3, 6, *available at* http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (hereinafter “Federal Form”) (Pet. App. 67c, 70c). Therefore, the Federal Form under the current NVRA scheme already requires that States not treat the Federal Form as a complete application. Instead, the current instructions for the Federal Form contemplate that the Federal Form requires certain outside pieces of information to complete the registration process. The requirement to “accept and use” the Federal Form in 42 U.S.C. § 1973gg-4(a)(1) requires that States only accept the Federal Form and use it as part of the process to assess the eligibility of the applicant. The State can still require that additional information be furnished in conjunction with the Federal Form. Denying a state the ability to require additional information when using the federal form could place the NVRA in conflict with the authority granted to states by U.S. Const. art. I, § 2, cl. 2 and U.S. Const. amend. XVII to determine the qualifications of electors.

IV. The Actions of the Election Assistance Commission Should Have No Weight in Deciding This Case

The Ninth Circuit cited the refusal by the Election Assistance Commission (EAC) to modify the Federal Form as evidence of a federal law in conflict with the Arizona requirement. *Gonzalez*, 677 F.3d at 400. Assigning any weight to the EAC’s actions or

inactions is an error that this Court should not repeat.

The Help America Vote Act (“HAVA”) includes the specific requirement that, “Any action which the Commission is authorized to carry out under this Act may be carried out only with the approval of at least three of its members.” 42 U.S.C. § 15328. The letter from the EAC’s then-Executive Director to Arizona stating the EAC’s refusal to modify the Federal Form was not based on a vote of the commissioners. If the EAC’s refusal to modify the Federal Form was a discretionary act of policy, then the decision should have been made by a majority of the commissioners and should be disregarded by the Court. If, on the other hand, the decision whether or not to modify the form did not involve the exercise of discretion but was instead directed by the NVRA and state law, then the action by EAC staff was administrative in nature and should not influence the Court.

Following the refusal letter of March 6, 2006, the EAC failed on five occasions to decide how it would act on requests to revise state-specific instructions in the Federal Form. By a vote dated July 31, 2006, taken on written ballots outside a public meeting, the commissioners considered a proposal to grant Arizona’s request and revise the Federal Form’s instructions. App. B (EAC Tally Vote). Two commissioners voted in favor and two against, so the motion failed. *Id.*

On October 4, 2007, the EAC voted on a proposal stating that EAC staff could revise the Federal Form instructions to reflect changes in mailing addresses but all other changes would require approval of the commissioners. Two commissioners voted in favor of that proposal and two against. App. C (EAC Meeting Oct. 4, 2007).

At a public meeting on January 17, 2008, the EAC commissioners considered another proposed policy on changes to the Federal Form's instructions. On this vote again, two commissioners voted in favor and two against. App. D (EAC Meeting Jan, 17, 2008). Yet another policy was considered at the EAC's public meeting on February 7, 2008, and again the vote was two in favor and two against. App. E (EAC Meeting Feb. 7, 2008). On March 20, 2008, the EAC at a public meeting again considered the Arizona request and the vote was two in favor and two against (at the same meeting the EAC approved seven other requests from states for changes to their instructions in the Federal Form). App. F (EAC Meeting Mar. 20, 2008).

While the EAC repeatedly refused to amend the Federal Form's state instructions to reflect Arizona's requirement for proof of citizenship, the Federal Form includes other statements regarding state requirements surpassing those in federal law. The HAVA imposed a requirement that those submitting their registration application by mail must either appear in person and show identification

the first time they vote, or include identifying information on their application. 42 U.S.C. § 15483(b). Forms of satisfactory identifying information include “at least the last four digits of the individual’s social security number” along with the individual’s date of birth. 42 U.S.C. § 15483(b)(3)(B). Notwithstanding that the federal statute requires only the last four digits of the social security number, the state instructions in the Federal Form describe requirements to include the full social security number for six states: Hawaii, Federal Form at 7 (Pet. App. 71c), Kentucky, Federal Form at 9 (Pet. App. 73c), New Mexico, Federal Form at 14 (Pet. App. 78c), South Carolina Federal Form at 16 (Pet. App. 80c), Tennessee, Federal Form at 17 (Pet. App. 81c), and Virginia, Federal Form at 18 (Pet. App. 82c).

In sum, the EAC has granted some requests to change the Federal Form’s state instructions while refusing Arizona’s. It denied Arizona’s request through a staff decision, but the commissioners voted on other requests (and took later votes on the Arizona request). Moreover, it denied Arizona’s request to modify its state instructions to note a requirement beyond those in the NVRA notwithstanding that six other states’ instructions note requirements of verification information beyond those in the HAVA. This case does not challenge the EAC’s actions as arbitrary and capricious, but they are sufficiently incoherent that we urge the Court to accord them no weight in its decision.

CONCLUSION

Determining whether two statutes “operate harmoniously” is an inherently subjective and uncertain exercise. In establishing this test, the Ninth Circuit introduced novelty to an area of the law that does not require it. This Court and others consistently have used conflict between federal and state statutes as the test of whether the former preempts the latter. Altering that test would introduce a new measure of uncertainty into the legislative process. The decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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1a

APPENDIX A

LIST OF AMICI CURIAE

Congressman Daniel E. Lungren (Ca.)
Chair, Committee on House Administration

Congressman Gregg Harper (Ms.)
Chair, Subcommittee on Elections

APPENDIX B

BEFORE THE ELECTION ASSISTANCE
COMMISSION

In the Matter of
Arizona Request for Accommodation

CERTIFICATION

I, Paul S. DeGregorio, Chairman of the U.S. Election Assistance Commission, do hereby certify that on July 11, 2006, the Commissioners voted on the above referenced matter. This matter proposed that the Commission accommodate Arizona's proof of citizenship procedure by amending the state specific portion of the Federal Voter Registration Form. The matter also proposed a letter to communicate this decision to the state. All ballots were timely submitted.

After review of the ballots, I certify that the measure fails, having not achieved the requisite 3 votes required by law. Commissioners Davidson and DeGregorio voted affirmatively, and Commissioners Martinez and Hillman objected.

Attest:

July 31, 2006

Date

/s/

Paul S. DeGregorio

Chairman

APPENDIX C

[1] U.S. ELECTION ASSISTANCE COMMISSION
PUBLIC MEETING

1225 New York Avenue, N.W. Washington, D.C.

Taken on the date of: Thursday, October 4, 2007

[150]

MR. GILMOUR: The Chair has not stated the question or stated the motion.

CHAIR DAVIDSON: She made the motion. I have not reread it. The question before we do the vote. We were at that discussion point. [151]

I will read the question. The Elections [sic] Assistance Commission, the EAC, hereby authorizes the director of the Election Administration to amend the state instruction portion of the federal mail voter registration application form when a state government official notifies the EAC of a change in the state mailing address.

For all other requests submitted by the state government official to amend the state instructions portion of the federal mail voter registration application form the director of Election Administration shall immediately notify the executive director who shall amend the state's

instruction portion of the federal mail voter registration form.

Provided, one, the request properly [152] reflects the state law and, two, the request does not require the EAC to alter the voter registration application.

The Commission shall vote on all appeals brought by a state government official of the executive director's decision. [153]

MR. GILMOUR: My apologies, but to make sure we have a clear record before debate began so we all know what we are voting on. I think we should make clear what action we are taking oon [sic] the statement.

CHAIR DAVIDSON: A motion and a second. And I just read the question.

MR. GILMOUR: The action would be to approve this as the EAC policy.

THE COURT: [sic] That's correct.

MR. GILMOUR: I just wanted to make that clear.

CHAIR DAVIDSON: Thank you. And a roll call vote has been requested. So, if you would do the roll call vote, please.

MR. GILMOUR: Again, I'm going by the [154] rules. Do you want to have a debate on issue?

CHAIR DAVIDSON: I thought we had the discussion prior to my reading it. I thought that was the final. I read it the final time. Everybody is prepared to vote.

MR. GILMOUR: All right. Chair Davidson? [155]

CHAIR DAVIDSON: Yes.

MR. GILMOUR: Vice Chair Rodriguez?

5a

COMMISSIONER RODRIGUEZ: No.

MR. GILMOUR: Commissioner Hillman?

COMMISSIONER HILLMAN: No.

MR. GILMOUR: Commission Hunter?

COMMISSIONER HUNTER: Yes.

CHAIR DAVIDSON: The motion fails. It's a tie vote.

APPENDIX D

[1] Minutes of the Public Meeting
United States Election Assistance Commission
1225 New York Avenue, NW Suite 150
Washington, DC 20005

Held on Tuesday, January 17, 2008

[45]

CHAIRWOMAN RODRIGUEZ: Thank you Vice-Chair Hunter. Is there any further discussion? We have a motion on the table. Are we ready to vote? And

just to restate the motion it is to adopt the Federal Election Commission policy for amending state instructions to state law. [46]

I suppose we should do a roll call, Madam General Counsel.

COUNSEL HODGKINS: Commissioners the question is whether or not to adopt the proposal that was made by Commissioner Hunter, which is essentially the exact same policy that was in place at the FEC. A vote of yea would vote to adopt that policy. A vote of nay would vote not to adopt that policy. So please respond by saying yea or nay when I call your name.

Rosemary Rodriguez, Chair?

7a

CHAIRWOMAN RODRIGUEZ: No.

COUNSEL HODGKINS: Caroline Hunter?

VICE-CHAIR HUNTER: Yes.

COUNSEL HODGKINS: Donetta Davidson?

COMMISSIONER DAVIDSON: Yes.

COUNSEL HODGKINS: Gracia Hillman?

COMMISSIONER HILLMAN: No.

COUNSEL HODGKINS: Madam Chair, the vote is two to two. The motion does not pass.

APPENDIX E

[1] Minutes of the Public Meeting

United States Election Assistance Commission
Hyatt Regency on Capitol Hill
Yorktown Room
400 New Jersey Avenue, NW Washington, DC
20001
Held on Thursday, February 7, 2008

[72]

COMMISSIONER HILLMAN: I would call the question, Madam Chair.

CHAIR RODRIGUEZ: Thank you. All those in favor of adopting the "Proposed Interim Procedure for Updating the Federal Mail Voter Registration Form" indicate by saying aye.

COMMISSIONER HILLMAN: Aye.

CHAIR RODRIGUEZ: Aye. Those opposed?

VICE-CHAIR HUNTER: Nay.

COMMISSIONER DAVIDSON: Nay.

CHAIR RODRIGUEZ: Any abstentions? Okay, the motion fails for lack of a majority.

[The motion failed for lack of a majority.]

APPENDIX F

[1] Minutes of the Public Meeting

United States Election Assistance Commission
Hyatt Regency Denver at Colorado Convention
Center
Mineral Hall
650 15th Street
Denver, CO 80202

Held on Thursday, March 20, 2008

[123]

CHAIR RODRIGUEZ: It's been moved and seconded to adopt a change submitted by the State of Colorado correcting its mailing address. Apparently they've moved. Is there any discussion on this motion?

COMMISSIONER DAVIDSON: Call for the question.

CHAIR RODRIGUEZ: As Chair, I didn't get to say what I was going to say. I, too, lament -- I believe we unanimously lament the lack of an over-arching policy by which we can make changes to the state instructions on the form. This change, because it's a

change to existing information, simply an update of existing information on the form, even in the absence of a policy, I will support.

Okay, all those in favor of making the requested change by the State of Colorado indicate by saying aye. Any opposed?

[The motion carried unanimously.]

CHAIR RODRIGUEZ: We are unanimous in making the Colorado change.

Commissioner Hillman?

COMMISSIONER HILLMAN: I will continue but, I will say to my colleagues if anyone of them wants to jump in and read any one of these, please feel free.

Number two is New Jersey. New Jersey has submitted a change to its voter registration procedures, moving the voter [124] registration deadline from 29 days before an election to 21 days before an election. So I move that EAC approve the request from New Jersey to update the state-specific instructions reflecting that the "Registration Deadline is 21 days before the election."

COMMISSIONER DAVIDSON: I'll second it.

CHAIR RODRIGUEZ: It's been moved and seconded to adopt a change submitted by the State of New Jersey. Is there discussion on the motion?

I'll just invoke my previous statement, I won't repeat it. Any further discussion? All those in favor of making the New Jersey submitted change indicate by saying aye. Any opposed?

[The motion carried unanimously.]

CHAIR RODRIGUEZ: Okay, New Jersey is done. Rhode Island?

COMMISSIONER HILLMAN: Rhode Island's request is for the state instructions to be updated concerning voter eligibility requirements listed under item number nine, and the change would read as follows and it is my motion to – for EAC to approve the request to update Rhode Island's state-specific instruction nine -- number nine which is under "Signature." And it would read, "To register in Rhode Island you must: be a citizen of the United States, be a resident of Rhode Island for 30 days preceding the next election, be 18 years old by election day, not be currently incarcerated in a correctional facility due to a felony conviction, not have been lawfully judged to be mentally incompetent."

[125] COMMISSIONER DAVIDSON: I'll second it.

COMMISSIONER HILLMAN: I didn't explain what the change was. Prior to that you were not eligible if you were on probation or parole.

CHAIR RODRIGUEZ: Okay, it's been moved and seconded to adopt the change submitted by the State of Rhode Island to the state-specific instructions on the form. Is there any discussion? I'll reference my earlier statement. Are we ready to vote? All those in favor indicate by saying aye. Any opposed?

[The motion carried unanimously.]

CHAIR RODRIGUEZ: Also Commissioner Hillman referenced a letter from Secretary of State Brewer that we'll include in the record of this meeting. I have copies.

Commissioner Hillman?

COMMISSIONER HILLMAN: Delaware. Delaware has submitted a request concerning its voter registration deadline. I move approval of the request to upgrade Delaware's state-specific instructions concerning registration deadline. The registration deadline is now "The 4th Saturday before a primary or general election, and 10 days before a special election."

COMMISSIONER DAVIDSON: Second.

CHAIR RODRIGUEZ: [126] It's been moved and seconded to adopt this change submitted by the State of Delaware to the state-specific instructions. Is there any discussion on the motion? I reference my earlier statement. All those in favor indicate by saying aye. Any opposed?

[The motion carried unanimously.]

COMMISSIONER HILLMAN: Iowa. Request from Iowa to update the state-specific instructions concerning registration deadline. I move that EAC approve an update to Iowa's state-specific instructions to reflect its new "Registration Deadline" which is "must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election..."

CHAIR RODRIGUEZ: That should be -- that's a typo.

COMMISSIONER HILLMAN: State primary or general election? I would just ask Edgardo Cortes, because I wasn't sure if that meant state primary during the general election. Is that "of" or "or"?

MR CORTES: It's "or."

COMMISSIONER HILLMAN: "Or"? Okay. All right, I will just read that again. "Registration Deadline - must be delivered by 5 p.m. 10 days before the election, if it is a state primary or general election; 11 days before all others. Registration forms which are postmarked 15 or more days before an election are considered on time even if received after the deadline." And there's a footnote as a part of the instructions. "If you fail to meet the voter registration deadlines above you can [127] register and vote by following the guidelines for election day registration. You can find these on the Iowa Secretary of State's website," and then it quotes the website address.

CHAIR RODRIGUEZ: Are we sure that is correct, Mr. Cortes?

MR. CORTES: It is.

CHAIR RODRIGUEZ: That website. I just want to make sure there's no typos in that.

MR. CORTES: Well, I copied it straight from the information that they provided.

We can -- I can contact Iowa to...

CHAIR RODRIGUEZ: We'll proofread everything.

MR. CORTES: But it's copied directly from the information provided to us.

COMMISSIONER DAVIDSON: I second the motion.

CHAIR RODRIGUEZ: It's been moved and seconded to accept the change to the state-specific instructions from the State of Iowa. I'll reference my earlier statement. Is there any further discussion? All those in favor indicate by saying aye. Any opposed?

[The motion carried unanimously.]

CHAIR RODRIGUEZ: We are unanimous.

COMMISSIONER HILLMAN: [128] Utah. Request from Utah to update its state-specific instructions concerning voter registration deadline. I move that the request be approved and the instructions updated. The "Registration Deadline - 30 days before the election for mail-in applications; 15 days before the election for walk-in registration at the county clerk's office."

COMMISSIONER DAVIDSON: Second the motion.

CHAIR RODRIGUEZ: It's been moved and seconded to accept the change from the State of Utah to its state-specific instructions. Is there discussion on the motion? I reference my earlier statement. All those in favor of adopting Utah please indicate by saying aye. Any opposed?

[The motion carried unanimously.]

COUNSEL HODGKINS: Madam Chair, if I might, I just wanted to note for the record Mr. Cortes informed me that Utah did make a request to

change their address on the form as well, but the change was to the same address that is already on the form. So there was effectively no change. In other words, they sent in a request to update their address, but it was the same address that was already on the form, so that's why we did not propose that change for your consideration.

COMMISSIONER HILLMAN: There was no change required.

COUNSEL HODGKINS: Right. Thank you for stating that much better than I did.

[129] COMMISSIONER HILLMAN: Okay. Next is Georgia. The request is to update the state-specific instructions regarding item "#6. ID Number." And I move that the request be approved and the information updated as follows: "#6. ID Number. Federal law requires you to provide your full Georgia Drivers License number or Georgia State issued ID number. If you do not have a Georgia Drivers License or Georgia ID you must provide the last 4 digits of your Social Security number. Providing your full Social Security number is optional. Your Social Security number will be kept confidential and may be used for comparison with other state agency databases for voter registration identification purposes. If you do not possess a Georgia Drivers License or Social Security number, a unique identifier will be provided for you."

COMMISSIONER DAVIDSON: Second the motion.

COMMISSIONER HILLMAN: And just to clarify, that prior to this updating, Georgia was requesting

the full Social Security number. And this would bring it into compliance with HAVA.

CHAIR RODRIGUEZ: Very good. Okay, it's been moved and seconded to accept the Georgia submitted revision to its state-specific instructions. Is there discussion on the motion? I'll reference my earlier statement. All those in favor of adopting the Georgia change indicate by saying aye. Any opposed?

[The motion carried unanimously.]

[130]COMMISSIONER HILLMAN: Madam Chairman, those are the seven pending requests to update the state-specific instructions that EAC had not previously considered.

CHAIR RODRIGUEZ: Thank you. Commissioner Hunter?

VICE-CHAIR HUNTER: Madam Chair, I'd like to bring up another pending request from the State of Arizona to amend their state instructions to properly reflect their state law. I don't have the full language with me. It's rather lengthy. In any case, but I move to adopt the language as submitted to the EAC by the State of Arizona. Thank you.

COMMISSIONER DAVIDSON: I second that motion.

CHAIR RODRIGUEZ: It's been moved and seconded to accept the language to Arizona's state-specific instructions as previously...

VICE-CHAIR HUNTER: As submitted.

CHAIR RODRIGUEZ: ..and frequently -- as submitted...

COMMISSIONER HILLMAN: Frequently too, yes.

CHAIR RODRIGUEZ: ...as previously submitted by the State of Arizona. Is there discussion on the motion?

COMMISSIONER HILLMAN: [131] Madam Chair, I just want to say that this Commission has considered that request on several occasions and I would just state for the record that my position remains the same. I do not think that EAC ought to take action while the issue is currently being litigated.

COMMISSIONER DAVIDSON: Madam Chair?

CHAIR RODRIGUEZ: Commissioner Davidson?

COMMISSIONER DAVIDSON: My feeling, is once a state has requested change to their -- to the form, the National Voter Registration Form, that we need to act with the states having that ability to change their instructions. And because of my concern, going even further, that we could possibly be disenfranchising as elections get closer to the time, making sure we don't disenfranchise voters, I definitely support this change on the instructions.

CHAIR RODRIGUEZ: Thank you. Commissioner Hunter?

VICE-CHAIR HUNTER: Madam Chair, Mr. Cortes just helpfully told me that the date of the last memo that includes the proper language for the Arizona form was a memo that Edgardo Cortes wrote on

December 14, 2007. Thank you, Mr. Cortes. And I've spoken on this matter numerous times and put out several statements, so I won't belabor the fact, due to our restrictions of time, but I continue to believe that the EAC has no discretion to not approve a proper state request to amend [132] the state form instructions. And, further, that the law is a good law unless and until it's overturned by the courts.

Thank you very much.

CHAIR RODRIGUEZ: Thank you, Commissioner Hunter. I'm in the process of drafting a statement that will fully articulate my position and reasoning for not voting to adopt the Arizona change. Is there further discussion?

All of those in favor of the change submitted by the State of Arizona indicate by saying aye. Opposed?

[Commissioner Gracia Hillman and Chair Rodriguez voted in opposition to the motion. The motion was defeated on a tie vote.]
