

No. 12-71

IN THE
Supreme Court of the United States

STATE OF ARIZONA, *ET AL.*,
Petitioners,

v.

INTER TRIBAL COUNCIL OF ARIZONA, *ET AL.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF STATE SENATOR
RUSSELL PEARCE AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

The question presented is whether Arizona's proof-of-citizenship requirement to register to vote by mail is consistent with the National Voter Registration Act.

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INTEREST OF THE *AMICUS CURIAE*¹

State Senator Russell Pearce is the author of, and driving force behind the Arizona Taxpayer and Citizen Protection Act, known as “Proposition 200.” As the author of Proposition 200, Senator Pearce submits this brief in support of Petitioners and offers his unique perspective as the author of the measure.

During his years in the Arizona State Legislature,² Senator Pearce authored numerous historic legislative initiatives designed to protect the citizens of Arizona from the adverse effects of unlawfully present aliens and, most importantly, to uphold the rule of law. These include: Proposition 100, a State constitutional amendment to deny bond to any person unlawfully present in the United States who commits a serious crime in Arizona; Proposition 102, which states that a person unlawfully present in the United States who sues an American citizen cannot receive punitive damages; the “Legal Arizona Workers Act,” upheld by this Court in *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011) (prohibiting employers from hiring unauthorized workers and requiring use of federal E-Verify system to confirm employee eligibility); and

¹ Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and his counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been lodged with the Clerk.

² Senator Pearce was a member of the Legislature for eleven years, including serving as Senate President.

the Support Our Law Enforcement and Safe Neighborhoods Act, known as “SB 1070,” the key provision of which was upheld by the Court last Term in *Arizona v. United States*, 132 S. Ct. 2492 (2011).

Senator Pearce’s initiatives have served as models for similar legislation in numerous other States across the nation, including numerous common-sense reforms to prevent non-citizens from illegally voting in federal elections. Proposition 200, adopted overwhelmingly by public initiative in 2004, is one of these measures and was designed to ensure the integrity of our electoral system. Proposition 200 was intended to prevent voting fraud, limit access to certain public benefits by ineligible individuals, and to increase reporting by state and local government officials to federal immigration authorities when they become aware of violations of federal immigration law by those who have unlawfully applied for public benefits.

In regard to the voter registration provision at issue here, Senator Pearce carefully crafted Proposition 200 to rely on the State’s authority to set voter eligibility requirements and protect the integrity of the election process. Proposition 200 reflects an entirely common sense precaution adopted by the citizens of Arizona against fraudulent voting by non-citizens. In contrast, the Ninth Circuit’s ruling prohibits the use of any form of identification to prevent voter registration fraud other than a mere signature on a federal form.

As author of Proposition 200, Senator Pearce has a direct interest in this matter, and therefore, respectfully submits this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Proposition 200's "proof of citizenship" requirement for voter registration applicants is entirely consistent with the National Voter Registration Act ("NVRA"), as it simply requires an individual seeking to register to vote in federal elections to provide evidence of citizenship. Because Proposition 200 fits comfortably within the plain language of the NVRA, the Ninth Circuit erred in its consideration of and conclusion that Proposition 200 is preempted. To reaffirm that Arizona retains the authority to enact such a common sense measure, this Court should reverse the decision below.

ARGUMENT

Proposition 200 requires prospective voters in Arizona to provide proof of U.S. citizenship in order to register to vote. Ariz. Rev. Stat. § 16-166(F). Specifically, Proposition 200 provides that state election officials "shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship." Such evidence may include a driver's license, a photocopy of a birth certificate or passport, naturalization documents, or "other documents that are meant as proof that [may be] established" pursuant to federal immigration laws.

Contrary to the view of Ninth Circuit, Proposition 200 is entirely consistent with the plain language of the NVRA. Because Proposition 200 was carefully crafted by Senator Pearce in reliance on this fact, the Ninth Circuit should be reversed.

I. The NVRA Does Not Bar States from Requiring Those Registering By Mail to Provide Proof of Citizenship.

Proposition 200's proof-of-citizenship provision is entirely consistent with the NVRA. That federal statute requires States to provide the option of voter registration by mail for federal elections by completion of the "National Mail Voter Registration Form" ("the Federal Form"). To assure that only eligible citizens register to vote using the Federal Form, Arizona requires an additional form which requires proof of citizenship.

A. The Statutory Text Plainly Allows Arizona to Develop and Use Its Own Form.

While still required to accept and use the Federal Form, a State is expressly authorized to develop and use its own registration form in certain circumstances. The plain text of the NVRA authorizes a State to "develop and use a mail voter registration form . . . for the registration of voters in elections for Federal office," in addition to the Federal Form, if it "meets all of the criteria stated in section 1973gg-7(b)." 42 U.S.C. § 1973gg-4(a)(2). These criteria include a requirement that a mail

voter registration form “may require only such identifying 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) (emphasis added). Section 1973gg-7(b)(2) then specifies that citizenship is a necessary eligibility requirement.

Thus, the NVRA expressly permits Arizona to require proof of eligibility, including proof of citizenship, because “it is identifying information . . . necessary to enable the . . . State election official to assess eligibility.” 42 U.S.C. § 1973gg-7(b)(1). It is undisputed that Arizona also accepts and uses the Federal Form. In effect, the NVRA sets a minimum requirement reflected in the Federal Form but also allows a State to require more, as long as it is within the bounds of § 1973gg-7(b). An additional State form requiring proof of citizenship is entirely within the bounds of the statute. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed . . . [and if so,] the sole function of the courts is to enforce it according to its terms.”).

Significantly, while a State form must comply with the same general standards as the Federal Form, there is no mandate that states are limited to the information included in the Federal Form or that the Federal Form is a complete application. 42 U.S.C. § 1973gg-4(a)(2). A State has discretion to develop and use a form of its own design, as long as it is consistent with § 1973gg-7(b). Thus, the statute

expressly authorizes a State, consistent with the standards set forth in § 1973gg-7(b), to require additional information outside of the Federal Form for voter registration.

B. The “Accept and Use” Requirement of the Federal Form Does Not Prohibit Additional Requirements.

The Ninth Circuit concluded that the “accept and use” provisions of the NVRA were in conflict with the proof-of-citizenship requirement of Proposition 200. In fact, the “accept and use” requirements of the Federal Form (§ 1973gg-4(a)(1)-(2)) do not prohibit requirements beyond those included in the Federal Form. Section 1973gg-4(a)(2) makes clear that a State is not limited to only the Federal Form for federal voter registration. The plain text of the statute allows Arizona to develop its own form to require proof-of-citizenship in elections for federal office, as it has done through Proposition 200.

It is undisputed that Arizona uses the Federal Form for registration of voters in federal elections. The requirement to “accept and use” the Federal Form does not preclude states from imposing additional requirements. The only real issue then is whether Proposition 200’s requirement of proof of citizenship so conflicts with the use of the Federal Form that the requirement of proof of citizenship that it is preempted. The Ninth Circuit concluded that the NVRA preempts the proof-of-citizenship requirement, because the NVRA requires states to “accept and use” the Federal Form and Proposition

200’s requirement to “reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship . . . do not operate harmoniously. . . .” *Gonzalez v. Arizona*, 677 F.3d 383, 398 (9th Cir. 2012) (citing Ariz. Rev. Stat. § 16-166(F)). This conclusion was based on a misreading of the statutes.

First, it is beyond dispute that the NVRA explicitly allows states to develop and use a form “[i]n addition to accepting and using the [Federal Form].” 42 U.S.C. § 1973gg-4(a)(2) (emphasis added). Moreover, no provision of the NVRA prohibits States from requiring additional identifying documents to verify a voter’s eligibility. In fact, the NVRA only expressly prohibits states from requiring “notarization or other formal authentication.” 42 U.S.C. § 1973gg-7(b)(3). *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, (2003) (citation omitted) (“We . . . read the enumeration of one case to exclude another [if] it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it. . . .”). Thus, while the NVRA prohibits requiring notarization or other formal authentication, it notably does not prohibit proof-of-citizenship, while expressly recognizing its importance in voter registration. 42 U.S.C. § 1973gg-7(b); see also *Kucana v. Holder*, 558 U.S. 233, 130 S. Ct. 827, 838 (2010) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (alteration and citation omitted)).

The NVRA also does not provide that it is the *exclusive* authority on eligibility verification or that, as the Ninth Circuit contended, “Arizona’s *only* role was to make [the Federal] [F]orm available to applicants and to ‘accept and use’ it for the registration of voters.” 677 F.3d 398 (emphasis added). The language of the statute not only does *not* prohibit additional documentation requirements, it permits states to “require . . . such identifying 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).

Besides express authorization for a state to “develop and use” a form compliant with the statute’s criteria (42 U.S.C. § 1973gg-4(a)(2)), the NVRA also provides that “each State shall establish procedures to register to vote in elections for Federal office . . . (2) by mail application pursuant to section 1973gg-4 of this title, . . . *in addition to any other method of voter registration provided for under State law,*” *id.* § 1973gg-2(a) (emphasis added). Although the NVRA requires that states “accept and use” the Federal Form, *id.* § 1973gg-4(a)(2), the NVRA does not foreclose states from using other methods for registering voters, *id.* § 1973gg-2(a), and allows states to develop and use state specific forms, if those forms fit within set criteria, *id.* § 1973gg-4(a)(2). Therefore, Congress did not “assume exclusive control of the *whole* subject” *Ex Parte Siebold*, 100 U.S. 371, 383 (1879) (emphasis in the original).

Arizona is plainly permitted to require proof of citizenship for federal voter registration because of its expressly granted authority to develop and use a form complying with § 1973gg-7(b) and may deny voter registration for federal elections for lack of such proof. *See id.* at 392 (“[W]e think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such cooperation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State . . .”).

II. If Upheld, The Ninth Circuit’s Ruling Would Impose a Significant Burden on Arizona and Other States.

The Ninth Circuit’s conclusion would have the effect of imposing a significant new burden on voter registration in Arizona and other States. For example, a person in Arizona that completes the Federal Form, but lacks proof of citizenship, would have to be allowed to vote for federal officials but could not vote for State officials. States that desire a proof-of-citizenship requirement in their State forms (as the Ninth Circuit seemed to conclude is allowed by the NVRA), would be required to determine which election (federal, state, or both) in which residents are permitted to vote. This creates a significant new burden on States and a confusing result that is certainly not anticipated in the NVRA.

The Ninth Circuit also failed to give any weight to the stated goal of the NVRA to “protect the

integrity of the electoral process” and “enhance the participation of *eligible* citizens as voters in elections for Federal office” as guiding purposes of the statute. 42 U.S.C. § 1973gg(b) (emphasis added). Proposition 200’s proof-of-citizenship requirement is fully in accord with these important purposes. Under no sensible reading of the statute is the goal of election integrity advanced by allowing non-citizens to vote.

In sum, the Ninth Circuit’s holding turns on § 1973gg-4(a)(1)’s requirement that states “accept and use” the Federal Form. However, § 1973gg-4(a)(2) also plainly allows a state to “develop and use” its own form if it complies with the standards set forth in § 1973gg-7(b). Because Proposition 200 is plainly consistent with these standards, it is entirely harmonious with the NVRA.

CONCLUSION

For the foregoing reasons, Senator Pearce respectfully requests that this Court reverse the Ninth Circuit's decision and hold that Proposition 200 is not preempted by federal law.

Respectfully submitted,

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