

No. 12-71

IN THE
Supreme Court of the United States

ARIZONA, *et al.*,
Petitioners,
v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,
Respondents.

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

**BRIEF FOR ELECTION ADMINISTRATORS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

DAVID W. OGDEN
Counsel of Record
DANIEL S. VOLCHOK
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
david.ogden@wilmerhale.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
I. MAIL REGISTRATION UNDER THE NVRA LOWERS BARRIERS TO REGISTRATION AND THUS PROMOTES VOTER PARTICIPATION	3
II. REGISTRATION AND VOTING BY NON- CITIZENS IS RARE	7
A. Available Data Are Consistent With Amici's Experience That Registration And Voting By Non-Citizens Is Ex- tremely Uncommon	7
B. Reports Of Non-Citizen Voting And Registration Are Often Erroneous	11
III. ADDITIONAL PROOF-OF-CITIZENSHIP RE- QUIREMENTS IMPOSE SUBSTANTIAL BUR- DENS ON VOTERS AND INCREASE THE LIKELIHOOD OF ERRORS AND DELAYS	15
A. Proposition 200 Has Prevented And Would Prevent Thousands Of Eligible Citizens From Registering To Vote.....	15
B. Proposition 200 Increases The Likeli- hood Of Errors And Delays By Elec- tion Officials	19

TABLE OF CONTENTS—Continued

	Page
1. Arizona’s proof-of-citizenship requirement causes erroneous rejections of registrations, thus denying qualified citizens the right to vote.....	19
2. The Arizona requirement will lead to additional delays in processing voter registration forms	24
IV. ARIZONA’S PROOF-OF-CITIZENSHIP REQUIREMENT IS INCONSISTENT WITH THE HISTORY OF THE NVRA.....	25
CONCLUSION	31
APPENDIX	

TABLE OF AUTHORITIES

CASES

Page(s)

<i>Crawford v. Marion County Election Board</i> , 553 U.S. 181 (2008)	19
<i>Young v. Fordice</i> , 520 U.S. 273 (1997).....	26

STATUTES AND LEGISLATIVE MATERIALS

18 U.S.C.		
§ 611(b).....	15	
§ 1015(f).....	15	
42 U.S.C.		
§ 1973gg(a)(3)	26	
§ 1973gg-3	4	
§ 1973gg-4(c)(1).....	15, 28	
§ 1973gg-5	5	
§ 1973gg-7(b)(1)	5	
§ 1973gg-7(b)(2)(C).....	14	
§ 1973gg-10	15	
§ 1973gg-10(2)(A).....	28	
§ 15483(a)(5)(A)(i).....	14	
§ 15483(a)(5)(B).....	15	
§ 15483(b).....	15	
§ 15483(b)(4)(A)(i).....	14	
National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77.....		29
H.R. Rep. No. 103-9 (1993).....		26, 27, 28
H.R. Rep. No. 103-66 (Conf. Rep.) (1993)		29
S. Rep. No. 103-6 (1993).....		6, 26, 27, 28

TABLE OF AUTHORITIES—Continued

	Page(s)
139 Cong. Rec.	
1,343 (1993)	27, 29
2,445 (1993)	27, 29
5,237 (1993)	29
7,173 (1993)	29
9,219 (1993)	29
9,550 (1993)	29
9,631 (1993)	29

OTHER AUTHORITIES

<i>1 in 6 Maricopa County Voter Registrations Rejected for No ID</i> , Tucson Citizen, Aug. 16, 2006, available at http://tucsoncitizen.com/morgue/2006/08/16/22897-1-in-6-maricopa-county-voter-registrations-rejected-for-no-id/	18
<i>1,100 Pima Voter Applicants Rejected Down</i> , Tucson Citizen, Aug. 17, 2006, available at http://tucsoncitizen.com/morgue/2006/08/17/22965-1-100-pima-voter-applicants-rejected-down/	20
Arizona Department of Transportation, Motor Vehicle Division, <i>Driver License Information</i> , http://www.azdot.gov/mvd/DLInfo.asp (last visited Jan. 22, 2013)	22
Babington, Charles, <i>Feds Give Florida List of Resident Noncitizens</i> , Chi. Sun-Times (Associated Press), July 14, 2012, available at http://www.suntimes.com/news/washington/13784760-452/feds-give-florida-access-to-list-of-resident-noncitizens.html	13

TABLE OF AUTHORITIES—Continued

	Page(s)
Baker, Kristen, & Nelly Ward, <i>Survey of Georgia Elections Officials on Voting by Non-Citizens</i> (2009), available at http://brennan.3cdn.net/a996354605662fac4b_h6m6i6r2k.doc	7
Barreto, Matt A., et al., <i>The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana</i> , 42 PS: Pol. Sci. & Pol. 111 (2009), available at http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf	4
Bonnifield, Kathy, & Carol Johnson, <i>Facts About Ineligible Voting and Voter Fraud in Minnesota</i> (2010), http://www.eac.gov/assets/1/Page/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202001-2002%20accessible.pdf (last visited Jan. 22, 2013)	8
Brennan Center for Justice, <i>Citizens Without Proof</i> (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf	16, 21
Brown, Robbie, <i>Florida Halts Its Search for Violations of Voter Law</i> , N.Y. Times, June 9, 2012, at A13, available at http://www.nytimes.com/2012/06/09/us/politics/florida-stops-search-for-ineligible-voters-on-list.html?_r=0	22, 23

TABLE OF AUTHORITIES—Continued

	Page(s)
Caputo, Marc, et al., <i>Florida Sends Election Departments List of 198 Potential Noncitizens</i> , Miami Herald, Sept. 26, 2012, available at http://www.miamiherald.com/2012/09/26/3022387_p2/florida-sends-election-departments.html	12
Commission on Federal Election Reform, <i>Building Confidence in U.S. Elections</i> (2005), available at http://www1.american.edu/ia/cfer/report/full_report.pdf	24
DHS, <i>Profiles on Naturalized Citizens: 2011</i> , available at http://www.dhs.gov/profiles-naturalized-citizens-2011-1 (last visited Jan. 22, 2013)	22
Election Assistance Commission, <i>The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010</i> (2011), available at http://www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf	11
Election Assistance Commission, <i>Voter Registration Application</i> , http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (last visited Jan. 22, 2013)	6, 14

TABLE OF AUTHORITIES—Continued

	Page(s)
FEC, <i>The Impact of The National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2001-2002</i> , available at http://www.eac.gov/assets/1/Page/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202001-2002%20accessible.pdf	8, 9
GAO, <i>Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists</i> (2005), available at http://www.gao.gov/new.items/d05478.pdf	15
GAO, <i>States Reported that Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens</i> (2007), available at http://www.gao.gov/new.items/d07889.pdf	18
GAO, <i>Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote</i> (2005), available at http://www.gao.gov/assets/250/247944.pdf	24
Gaskins, Keesha, & Sundeep Iyer, <i>The Challenge of Obtaining Voter Identification</i> (2012), available at http://brennan.3cdn.net/773c569439b50452e0_kzm6bo5l6.pdf	17

TABLE OF AUTHORITIES—Continued

	Page(s)
Greenstein, Robert, et al., <i>Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens</i> (2006), available at http://www.cbpp.org/files/9-22-06id.pdf	16
Hasen, Richard L., <i>The Voting Wars</i> (2012).....	12
Hess, Douglas R., & Scott Novakowski, <i>Unequal Access: Neglecting the National Voter Registration Act, 1995-2007</i> (2008), available at http://www.demos.org/sites/default/files/publications/UnequalAccessReport-web(2).pdf	5
Hoover, Tim, <i>U.S. Citizens Among Those Who Got Letters Questioning Right To Vote</i> , Denver Post, Aug. 28, 2012, at 19A, available at http://www.denverpost.com/breakingnews/ci_21420652/u-s-citizens-among-those-who-got-letters?IADID=Search-www.denverpost.com-www.denverpost.com#ixzz2GE2CPR9P	23
Lipton, Eric, & Ian Urbina, <i>In 5-Year Effort, Scant Evidence of Voter Fraud</i> , N.Y. Times, Apr. 12, 2007, at A1, available at http://www.nytimes.com/2007/04/12/washington/12fraud.html?pagewanted=all&_r=0	9, 10
Lofholm, Nancy, <i>Colo. Clerks Press Gessler for Details on Alleged Illegal-Voting Problem</i> , Denver Post, Apr. 13, 2011, available at http://www.denverpost.com/news/ci_17831783#ixzz2G6jjRySc	8

TABLE OF AUTHORITIES—Continued

	Page(s)
Marouf, Fatma, <i>The Hunt for Noncitizen Voters</i> , 65 Stan. L. Rev. Online 66 (2012), available at http://www.stanfordlawreview.org/sites/default/files/online/articles/Marouf_-_65_Stan_L_Rev_Online_66.pdf	13
McDonald, Michael P., & Justin Levitt, <i>Seeing Double Voting: An Extension of the Birthday Problem</i> , 7 Election L.J. 111 (2008).....	14
Minnite, Lorraine C., <i>The Myth of Voter Fraud</i> (2010).....	10, 11
Moreno, Ivan, <i>Many Suspected Ineligible Colorado Voters Found To Be US Citizens</i> , Bangor Daily News (Associated Press), Aug. 30, 2012, available at https://bangordailynews.com/2012/08/30/news/nation/many-suspected-ineligible-colorado-voters-found-to-be-us-citizens/	23
Moreno, Ivan, <i>Republicans Look For Voter Fraud, Find Little</i> , Associated Press, Sept. 24, 2012 available at http://bigstory.ap.org/article/republicans-look-voter-fraud-find-little	8, 12, 12, 23
News21, <i>Election Fraud In America</i> , available at http://votingrights.news21.com/interactive/election-fraud-database/ (last visited Jan. 22, 2013).....	9
Overton, Spencer, <i>Voter Identification</i> , 105 Mich. L. Rev. 631 (2007).....	8

TABLE OF AUTHORITIES—Continued

	Page(s)
Pawasarat, John, <i>The Driver License Status of the Voting Age Population in Wisconsin</i> (2005), available at http://www4.uwm.edu/eti/barriers/DriversLicense.pdf	4, 5
Pitts, Michael J., & Matthew Neumann, <i>Documenting Disenfranchisement</i> , 25 J.L. & Pol. 329 (2009)	19
Rogers, Estelle H., <i>The National Voter Registration Act Reconsidered</i> (2011), http://www.acslaw.org/sites/default/files/Rogers_-_NVRA_Reconsidered_1.pdf	5
Rosenberg, Jennifer S., & Margaret Chen, <i>Expanding Democracy: Voter Registration Around The World</i> (2009), available at http://brennan.3cdn.net/3234b49c4234d92bf3_3km6i2ifu.pdf	6
Serebrov, Job, & Tova Wang, <i>Voting Fraud and Voter Intimidation: Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations</i> , 6 Election L.J. 330 (2007)	14
Slater, Wayne, <i>Ballot Box Scrutiny: AG Fails To Uncover Major Voting Fraud</i> , Dallas Morning News, May 18, 2008, at 1A	11
Tokaji, Daniel P., <i>Early Returns on Election Reform</i> , 73 Geo. Wash. L. Rev. 1206 (2005)	20

TABLE OF AUTHORITIES—Continued

	Page(s)
Urbina, Ian, <i>Voter ID Battle Shifts to Proof of Citizenship</i> , N.Y. Times, May 12, 2008, at A1, available at http://www.nytimes.com/ 2008/05/12/us/politics/12vote.html?page wanted=all	18

IN THE
Supreme Court of the United States

No. 12-71

ARIZONA, *et al.*,

Petitioners,

v.

THE INTER TRIBAL COUNCIL OF ARIZONA, INC., *et al.*,

Respondents.

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

**BRIEF FOR ELECTION ADMINISTRATORS
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI CURIAE¹

Amici are current and former state and local election officials from around the country. Collectively, they have administered elections—including the registration process—for more than 150 years. (Biographical information on each amicus is in the appendix to this brief.) Amici have a keen interest in promoting a strong electoral system, both by maximizing the level

¹ No counsel for a party authored any part of this brief and no person other than amici curiae and their counsel made a monetary contribution to the preparation or submission of the brief. Letters of consent are on file with the Clerk of the Court.

of participation by eligible voters and by preventing all forms of voting fraud. Amici's extensive experience gives them particular insight into the issues presented in this case.

SUMMARY OF ARGUMENT

Allowing individuals to register to vote by mail serves the important and salutary function of increasing citizen participation in voting, both by encouraging qualified individuals to register and by making it significantly easier for them to do so. The National Voter Registration Act's authorization of registration by mail has certainly produced these beneficial effects.

Although some individuals and groups have expressed concern that mail registration creates or exacerbates the risk of voting by non-citizens, amici's collective experience is that efforts by non-citizens to register and vote are extremely rare. This experience is confirmed by a variety of data showing how uncommon such efforts are.

Arizona's remedy to this low-incidence problem, by contrast, has already led the state to reject tens of thousands of registrations, many from citizens eligible to vote. That is not surprising, because many citizens do not have and cannot easily obtain the proof of citizenship that Arizona requires. The widespread rejections are troubling because they burden American citizens' fundamental right to vote—and in many cases effectively deprive them of that right. Arizona's proof-of-citizenship requirement also deters citizens from participating in our democracy, because of the significant burden it imposes on eligible voters. The requirement also increases the likelihood of errors in processing registration forms, causing additional impermissible disen-

franchisement. Ultimately, the number of eligible voters prevented from voting by Arizona's requirement would dwarf the number of ineligible voters prevented from doing so.

That result is not consistent with Congress's purpose in enacting the mail-registration provisions of the NVRA, which was to increase voter participation by providing a convenient and uniform way to register. Moreover, after considering the potential for voter fraud by non-citizens and balancing any concerns against the benefits of a simple mail-registration process, Congress rejected proposals that would have permitted states to require documentary proof of citizenship from registrants using the federal form. In Congress's judgment, such a requirement was both contrary to its legislative purpose and unnecessary in light of other anti-fraud provisions in the bill. Arizona's proof-of-citizenship requirement constitutes the same type of obstacle rejected by Congress in enacting the NVRA more two decades ago. The court of appeals correctly struck it down.

ARGUMENT

I. MAIL REGISTRATION UNDER THE NVRA LOWERS BARRIERS TO REGISTRATION AND THUS PROMOTES VOTER PARTICIPATION

Based on their collective 150-plus years administering elections around the country, amici's judgment is that allowing voter registration by mail is a valuable tool for boosting overall voter registration and participation. Congress expressed that judgment in authorizing mail registration as part of the National Voter Registration Act. That mail-registration process, including the prescription for a uniform federal form for registra-

tion for federal elections, provides several significant benefits.

First, the process provides eligible voters a convenient and accessible method of registering. Mail registration allows individuals to register without making a special trip to their state or local election office, and indeed without ever having to leave home. For those individuals for whom travel is difficult or costly, including some older or disabled Americans as well as the poor, that convenience can relieve a significant burden.

Registration by mail also greatly improves accessibility for those citizens who cannot take advantage of the Act's "motor voter" provision, *see* 42 U.S.C. § 1973gg-3, because they do not drive or have not applied for a driver's license using their current address. Urban residents, minorities, older and disabled Americans, and the poor are particularly likely to fall into this category. *See, e.g.,* Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* 1 (2005) (finding that 23 percent of adults over 65 in Wisconsin, as well as 53 percent of African-Americans and 57 percent of Hispanics in Milwaukee County, lack a driver's license);² Barreto et al., *The Disproportionate Impact of Voter-ID Requirements on the Electorate—New Evidence from Indiana*, 42 PS: Pol. Sci. & Pol. 111, 113, 115 tbl. 4 (2009) (reporting similar results from Indiana, California, New Mexico, and Washington).³ Similarly, many post-secondary students who attend school away from their parents' home do not obtain a new driver's

² Available at <http://www4.uwm.edu/eti/barriers/DriversLicense.pdf>.

³ Available at http://faculty.washington.edu/mbarreto/papers/PS_VoterID.pdf.

license (or change the address on an existing license) when they move to start school. In fact, one study found that only 2 percent of students living in residence halls at several universities had driver’s licenses bearing their dormitory addresses. *See* Pawasarat at 2. Because the other 98 percent of these students never applied for a license (or submitted a change of address) using their school address, the NVRA’s “motor voter” provision did not help make voter registration more accessible.⁴

Second, the mail-registration process employs a generic federal form that is simple and easy to complete. The NVRA specifies that the federal form may “require only such 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). In implementing this provision, the Election Assistance Commission has created a form that fits on a single page—with the very first

⁴ Although the NVRA also provides for registration at certain public agencies, *see* 42 U.S.C. § 1973gg-5, that is not an adequate substitute for mail registration: Due in part to such agencies’ non-compliance with NVRA requirements, the number of registration applications coming from such agencies diminished by almost 80 percent over a ten-year period, from a high of over 2.6 million in 1995-1996 to under 550,000 in 2005-2006. *See* Hess & Novakowski, *Unequal Access: Neglecting the National Voter Registration Act, 1995-2007*, at 3, 15 tbl. 1a (2008), available at [http://www.demos.org/sites/default/files/publications/UnequalAccessReport-web\(2\).pdf](http://www.demos.org/sites/default/files/publications/UnequalAccessReport-web(2).pdf); Rogers, *The National Voter Registration Act Reconsidered* 6 (2011), http://www.acslaw.org/sites/default/files/Rogers_-_NVRA_Reconsidered_1.pdf (“Many state offices admit to having no registration forms on hand for several years running; many employees do not even know they are required to offer registration.”). In any event, many eligible voters have no contact with the designated public agencies.

question being whether the applicant is a U.S. citizen—and can be completed in a matter of minutes. See Election Assistance Commission, *Voter Registration Application*.⁵ Moreover, because the form can be used nationwide, voters need not spend time and effort searching for a registration form specific to their state. The simplicity of the federal form further lowers barriers to registration and therefore increases participation.

Third, the mail-registration process facilitates voter registration drives, which are a key tool for boosting registration of eligible voters. In many other democratic countries, the government plays an affirmative role in ensuring that eligible citizens are registered to vote. See Rosenberg & Chen, *Expanding Democracy: Voter Registration Around the World 2* (2009).⁶ In the United States, by contrast, that role is performed largely by private organizations, through registration drives. The NVRA’s uniform mail registration form assists that effort because it “permit[s] voter registration drives through a regional or national mailing, or for more than one State at a central location, such as a city where persons from a number of neighboring States work, shop or attend events.” S. Rep. No. 103-6, at 26 (1993).

In short, mail registration under the NVRA is an important means of maximizing voter registration and participation.

⁵ http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf (last visited Jan. 22, 2013).

⁶ *Available at* http://brennan.3cdn.net/3234b49c4234d92bf3_3km6i2ifu.pdf.

II. REGISTRATION AND VOTING BY NON-CITIZENS IS RARE

A. Available Data Are Consistent With Amici's Experience That Registration And Voting By Non-Citizens Is Extremely Uncommon

Amici strongly support the objective of ensuring that only eligible voters participate in U.S. elections. Actual fraud in voting is an obvious cause for concern, and preventing such fraud is and has been a key part of amici's work. Amici's experience, however, is that efforts by non-citizens to register and vote are exceedingly rare. Indeed, in the more than 150 years that they have collectively spent administering elections, amici have experienced almost no cases of non-citizens registering to vote, let alone actually casting a ballot. In light of this, amici's view is that the danger of non-citizen registration and voting does not justify the imposition of significant new barriers to registration by eligible individuals.

Amici's experience regarding the infrequency of non-citizen registration and voting is shared by other election officials around the country. One survey, for example, reported that "[o]f the elections officials who were interviewed, representing counties that comprised 40 percent of Georgia's population, none believed that non-citizens had fraudulently registered to vote or voted." Baker & Ward, *Survey of Georgia Elections Officials on Voting by Non-Citizens* 1 (2009) (footnote omitted).⁷ Similarly, one media account reported the statement by the president of the Colorado County Clerks Association that "county clerks across the state are not aware of a problem with noncitizens voting ille-

⁷ Available at http://brennan.3cdn.net/a996354605662fac4b_h6m6i6r2k.doc.

gally.” Lofholm, *Colo. Clerks Press Gessler for Details on Alleged Illegal-Voting Problem*, Denver Post, Apr. 13, 2011;⁸ see also Moreno, *Republicans Look for Voter Fraud, Find Little*, Associated Press, Sept. 24, 2012 (noting that North Carolina’s bipartisan elections board found no evidence of widespread fraud by noncitizens);⁹ Bonnifield & Johnson, *Facts About Ineligible Voting and Voter Fraud in Minnesota* 16 (2010) (county attorneys in Minnesota “did not express a concern about [non-citizen voting]”);¹⁰ Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 654 (2007) (in Ohio, “a statewide survey of each of [the] eighty-eight county Boards of Elections found only four instances of ineligible persons attempting to vote ... in the state’s 2002 and 2004 general elections,” or “a fraud rate of 0.000044%”).

Election officials’ view that fraudulent registration by non-citizens is rare extends to registration using the federal form, the concern targeted by Arizona’s Proposition 200. Studies of NVRA implementation by the Election Assistance Commission and Federal Election Commission, which are based on reports from election administrators from across the country, have not found non-citizen registration using the federal form to be a significant or widespread problem. See, e.g., FEC, *The Impact of The National Voter Registration Act of 1993 on the Administration of Elections for Federal Office*

⁸ Available at http://www.denverpost.com/news/ci_17831783#ixzz2G6jjRySc.

⁹ Available at <http://bigstory.ap.org/article/republicans-look-voter-fraud-find-little>.

¹⁰ <http://www.eac.gov/assets/1/Page/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202001-2002%20accessible.pdf> (last visited Jan. 22, 2013).

2001-2002, at 12 (“As in previous reports, States indicated very few problems with mail registration.”).¹¹ Nor have election administrators called for measures to address any such problem. *See id.* at 13 (“The States submitted no recommendations to improve registration by mail.”).

The data on convictions for voting by non-citizens are also consistent with amici’s experience. In fiscal years 2002 through 2005, the federal government prosecuted only 28 cases of alleged voting by ineligible voters, leading to just 18 convictions nationwide. *See* Lipton & Urbina, *In 5-Year Effort, Scant Evidence of Voter Fraud*, N.Y. Times, Apr. 12, 2007, at A1.¹² Some of those cases, moreover, likely involved non-residents, individuals convicted of felonies, or some other type of ineligible voter besides non-citizens. Similarly, a comprehensive effort to compile election-fraud cases from all 50 states uncovered only 19 convictions for non-citizen voting between 2000 and the present. *See* News21, *Election Fraud In America*.¹³ These convictions constituted under 3 percent of election fraud convictions generally—a smaller percentage than, for example, double voting, vote buying, and voting by individuals convicted of felonies. *See id.*

¹¹ Available at <http://www.eac.gov/assets/1/Page/The%20Impact%20of%20the%20National%20Voter%20Registration%20Act%20on%20Federal%20Elections%202001-2002%20accessible.pdf>.

¹² Available at http://www.nytimes.com/2007/04/12/washington/12fraud.html?pagewanted=all&_r=0 (click “In the Courts” hyperlink under “Multimedia”).

¹³ Available at <http://votingrights.news21.com/interactive/election-fraud-database/> (last visited Jan. 22, 2013) (adding “Convicted” and “Pleaded” totals under case status after sorting by “Type of Accusation”: “Non-Citizen Casting Ineligible Vote”).

Data from states that collect information on investigations of voter fraud confirm the rarity of non-citizen voting. From 1994 to 2006, the California Secretary of State's Office, which handles complaints of election fraud, received 1,588 complaints alleging voter fraud; of these, only 28 alleged voting by non-citizens and just two resulted in a finding that a violation occurred. *See* Minnite, *The Myth of Voter Fraud* 57, 59 tbl. 4.2 (2010). Over the same period, the Oregon Secretary of State's Office, which logs all election-law complaints aside from campaign finance violations, recorded 5,400 complaints, of which only three fell in the "miscellaneous" category that encompasses non-citizen voting. *Id.* at 74 tbl. 4.4; *see also id.* at 72 ("Among the states, Oregon appears to have the best system for keeping records of election law complaints."). In none of these cases was a criminal violation found. *Id.* at 74 tbl. 4.4; *see also* Bonnifield & Johnson at 10, 16 (reporting nine investigations of non-citizen voting in Minnesota, constituting 0.78 percent of all ineligible voter investigations, and no convictions).

The numbers for registration fraud are likewise very small. Of 55 convictions for federal election crimes between October 2002 and September 2005, only five were for registration fraud—a category that also includes registration by individuals convicted of felonies and other ineligible voters. *See* Lipton & Urbina. In California, 104 cases of voter registration by non-citizens, or about eight a year, were found to have occurred between 1994 and 2006. Of these, all but three were found to be inadvertent. *See* Minnite at 59 tbl. 4.2. Those three apparently fraudulent registrations (or even the larger population of eight incorrect registrations a year) must be compared to California's non-citizen population of more than five million—the highest in the nation—and an estimated voting age popula-

tion of almost 30 million. *See id.* at 60; Election Assistance Commission, *The Impact of the National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2009-2010*, at 14 tbl. 1a (2011).¹⁴

While the foregoing statistics would not, for obvious reasons, capture cases in which non-citizens managed to register and vote without detection, the statistics cover time periods in which federal and state officials, along with non-governmental entities, devoted substantial efforts to uncovering non-citizen registration and voting, as well as voter fraud more generally. Indeed, during most of the last decade, election fraud was a federal law-enforcement priority that, according to Justice Department officials, was “outranked only by crimes involving terrorism and espionage.” Minnite at 45 (quoting statement by Craig C. Donsanto, Director of DOJ’s Election Crimes Branch); *see also id.* at 46-47 (describing the department’s Ballot Access and Voting Integrity Initiative and its efforts to identify voter fraud). Similar energetic efforts to ferret out such fraud occurred at the state level. *See infra* pp. 12-13 (describing efforts in Florida and Colorado); Slater, *Ballot Box Scrutiny: AG Fails To Uncover Major Voting Fraud*, Dallas Morning News, May 18, 2008, at 1A. It is therefore unlikely that significant levels of non-citizen voter fraud have gone undetected.

B. Reports Of Non-Citizen Voting And Registration Are Often Erroneous

1. The data discussed above may seem inconsistent with media accounts, which often portray non-citizen voting fraud as pervasive. Based on amici’s ex-

¹⁴ Available at <http://www.eac.gov/assets/1/Documents/2010%20NVRA%20FINAL%20REPORT.pdf>.

perience, however, claims about such fraud are often highly exaggerated. *See, e.g.*, Hasen, *The Voting Wars* 59 (2012) (“Most of what gets called fraud in the media turns out to be innocent error or even coincidence.”). Colorado’s Secretary of State, for example, asserted in 2011 that 11,805 non-citizens were registered to vote there. *See* Moreno, *Republicans Look For Voter Fraud*. As those claims were challenged by voters and the press, that number dwindled by almost 99 percent, first to 3,903 and then to 141. *See id.* And even that last number lacks integrity. After eight of the 141 were reported to have voted in Denver, the Denver clerk and recorder’s office investigated and found that all eight were citizens. *See id.*

Similarly, in Florida “the state’s Division of Elections said that as many as 180,000 registered voters weren’t citizens.” Moreno, *Republicans Look For Voter Fraud*. But when challenged that number was reduced by nearly 99.9 percent, first to 2,600 and then to 198. *See id.*; Caputo et al., *Florida Sends Election Departments List of 198 Potential Noncitizens*, *Miami Herald*, Sept. 26, 2012.¹⁵ At least some of the 198, moreover, have asserted that they are U.S. citizens and have proof of citizenship. *See* Caputo et al. The reality, then, is that “[s]tate officials in key presidential battleground states ... found only a tiny fraction of the illegal voters they initially suspected existed.” Moreno, *Republicans Look For Voter Fraud*.

2. In both Colorado and Florida, the inflated claims resulted in part from officials’ reliance on outdated or flawed data in government databases, includ-

¹⁵ Available at http://www.miamiherald.com/2012/09/26/3022387_p2/florida-sends-election-departments.html.

ing driver's license information that failed to accurately reflect drivers' changed citizenship status. *See* Moreno, *Republicans Look For Voter Fraud*. Many errors were discovered only after checking a database containing federal immigration records, *see id.*, including information on naturalization, *see* Marouf, *The Hunt for Noncitizen Voters*, 65 *Stan. L. Rev. Online* 66, 66-68 (2012).¹⁶ Even that process was fraught with potential for error, both because of likely errors in matching state lists of voters to records in the database, *see id.* at 68, and because, as federal officials warned, "the list's information is incomplete and does not provide comprehensive data on all eligible voters," Babington, *Feds Give Florida List of Resident Noncitizens*, *Chi. Sun-Times* (Associated Press), July 14, 2012.¹⁷

Indeed, researchers studying these issues more generally have concluded that outsized claims of voting fraud can be attributed in part to outdated or flawed information in government databases and to errors in matching that data to lists of registered voters:

Allegations of ineligible felon ..., deceased, and ... non-citizen voting are based on [matching] machine lists of names, birth dates, and sometimes addresses of such people against a voting record.... However, there are a number of pitfalls for the unwary that can lead to grossly overestimating the number of fraudulent votes,

¹⁶ Available at http://www.stanfordlawreview.org/sites/default/files/online/articles/Marouf_-_65_Stan_L_Rev_Online_66.pdf.

¹⁷ Available at <http://www.suntimes.com/news/washington/13784760-452/feds-give-florida-access-to-list-of-resident-noncitizens.html>.

such as missing or ignored middle names and [suffixes] or matching on missing birth dates.

Serebrov & Wang, *Voting Fraud and Voter Intimidation: Report to the U.S. Election Assistance Commission on Preliminary Research & Recommendations*, 6 Election L.J. 330, 340-341 (2007). Problems also arise because in large populations, it is common for two or more individuals to share both a name and a birthday. See McDonald & Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L.J. 111, 121 (2008). An eligible voter may therefore be wrongly identified as a non-citizen because a non-citizen shares the eligible voter's name and birthday. The result is that "allegations of vote fraud or purging of voter registration rolls by list matching almost assuredly will find a large proportion of false positives." Serebrov & Wang at 341.

In sum, registration and voting by non-citizens is an exceedingly rare phenomenon, one that is already subject to meaningful checks. It thus does not, in amici's judgment, afford a legitimate basis for imposing substantial additional barriers to voter registration by mail.¹⁸

¹⁸ Multiple mechanisms operate to both deter and detect non-citizen voter fraud. *First*, the federal form requires applicants to swear under penalty of perjury that they are citizens, and it alerts them that providing false information risks imprisonment and deportation. See *Voter Registration Application*; 42 U.S.C. §§ 15483(b)(4)(A)(i), 1973gg-7(b)(2)(C).

Second, federal law requires an applicant for registration to provide his driver's license number or, if he does not have a driver's license, the last four digits of his social security number. See 42 U.S.C. § 15483(a)(5)(A)(i). States use this information to check the information provided on registration forms against that stored in databases belonging to the state motor vehicle authority or the

III. ADDITIONAL PROOF-OF-CITIZENSHIP REQUIREMENTS IMPOSE SUBSTANTIAL BURDENS ON VOTERS AND INCREASE THE LIKELIHOOD OF ERRORS AND DELAYS

A. Proposition 200 Has Prevented And Would Prevent Thousands Of Eligible Citizens From Registering To Vote

The foregoing makes clear that Arizona's Proposition 200 is an attempt to solve a problem of extremely limited scope. But the collateral consequences of the attempt are not harmless. To the contrary, the proposition's proof-of-citizenship requirement erects serious barriers to many eligible voters' ability to exercise their fundamental right to vote.

Social Security Administration. *See id.* § 15483(a)(5)(B). States can also take other steps to check information provided. For example, election officials can obtain notification from county jury administrators when a potential juror seeks to be excused on the basis of non-citizenship. *See* GAO, *Additional Data Could Help State and Local Elections Officials Maintain Accurate Voter Registration Lists* 16 (2005), available at <http://www.gao.gov/new.items/d05478.pdf>.

Third, mail registrants must vote in person and present appropriate identification the first time they vote in a jurisdiction, unless (a) they include a copy of such identification with their registration application or (b) the state has been able to verify their identity based on a driver's license or social security number. *See* 42 U.S.C. § 15483(b). States can also require mail registrants to vote in person the first time they vote in a jurisdiction even if one of these exceptions applies. *See id.* § 1973gg-4(c)(1).

Finally, federal law provides severe penalties for fraudulent registration. *See, e.g.*, 42 U.S.C. § 1973gg-10 (five years' imprisonment for false registration information); 18 U.S.C. § 1015(f) (similar); *id.* § 611(b) (one year imprisonment for voting by a non-citizen). These penalties—which surely have a strong deterrent effect considering the minimal benefits a person receives from voting fraudulently—are in addition to penalties under state law.

1. Many individuals who are eligible to register and vote do not have and cannot easily obtain the documentation that Arizona requires to satisfy its proof-of-citizenship requirement. A recent national survey, for example, found that 7 percent of U.S. citizens “do not have ready access to citizenship documents.” Brennan Center for Justice, *Citizens Without Proof 2* (2006);¹⁹ see also Greenstein et al., *Survey Indicates House Bill Could Deny Voting Rights to Millions of U.S. Citizens* (2006) (national survey finding that 5.7 percent of citizens do not have access to a passport or birth certificate).²⁰

This problem typically falls with particular severity on certain groups: For example, fully 12 percent of citizens who earn less than \$25,000 “do not have a readily available U.S. passport, naturalization document, or birth certificate”—a rate more than twice as high as the general population. See *Citizens Without Proof* at 2. Similarly, “[r]ural residents ... are more than twice as likely to lack a birth certificate or passport as non-rural residents.” Greenstein et al. at 4. Indeed, 4.5 million rural citizens may lack such documents. See *id.* Older Americans, citizens without a high school diploma, and African-Americans are also less likely than other citizens to possess citizenship documents. See *id.* at 3.

Citizens who lack such documents will often find it costly or difficult to obtain them. “[M]ore than 10 million eligible voters live more than 10 miles from their nearest state ID-issuing office,” and many of those offices—particularly in rural areas—have limited hours.

¹⁹ Available at http://www.brennancenter.org/page/-/download_file_39242.pdf.

²⁰ Available at <http://www.cbpp.org/files/9-22-06id.pdf>.

Gaskins & Iyer, *The Challenge of Obtaining Voter Identification* 5 (2012).²¹ Even if the distance problem can be overcome, obtaining a passport or a driver's license often requires a person to produce a birth certificate. Some citizens, however, lack birth certificates because they were not born at a hospital. J.A. 243. And Arizona makes it quite difficult for such a person—years later—to obtain a certificate, requiring no less than four separate elements of proof, each of which may present significant or even insuperable obstacles. As the district court explained:

To obtain a delayed birth certificate for a child who is 15 years of age or older, the following documentation must be provided: (1) an affidavit by someone with personal knowledge of when and where the child was born; (2) a document by an unrelated person that was established before the child was ten years old stating the child's name, date of birth, place of birth, and the date the document was created; (3) an independent factual document that was established at least five years prior to the application date stating the child's name, date of birth, place of birth, and the date the document was established; and (4) an independent factual document that establishes the mother's presence in Arizona at the time of the child's birth stating the mother's name, street address and date the document was created.

Id. at 258-259. The difficulty is even greater if the citizen was born outside Arizona: Individuals “who were

²¹ Available at http://brennan.3cdn.net/773c569439b50452e0_kzm6bo5l6.pdf.

born out of state may [face] additional delays while attempting to obtain documentation from their birth state. For example, one state noted that it could take 6 months or more to obtain a birth certificate from another state.” GAO, *States Reported that Citizenship Documentation Requirement Resulted in Enrollment Declines for Eligible Citizens and Posed Administrative Burdens* 18 (2007).²²

2. The realities just discussed are undoubtedly a significant part of the reason many eligible voters have had their registration applications rejected pursuant to Proposition 200’s proof-of-citizenship requirement. The district court found that in the two-and-a-half years from January 2005 to September 2007, 31,550 voters had their registrations rejected due to the requirement. *See* J.A. 263. By May 2008, the number had reached 38,000. *See* Urbina, *Voter ID Battle Shifts to Proof of Citizenship*, N.Y. Times, May 12, 2008, at A1.²³ For some Arizona counties, the rejection rates were particularly high. For example, in the first eight months of 2006 (the second year the proposition was in effect), fully one-sixth of all registrations in Maricopa County—the state’s most populous—were rejected for failure to provide proof of citizenship. *See 1 in 6 Maricopa County Voter Registrations Rejected for No ID*, Tucson Citizen, Aug. 16, 2006.²⁴

Most of the individuals whose applications were rejected, moreover, did not or could not successfully re-

²² Available at <http://www.gao.gov/new.items/d07889.pdf>.

²³ Available at <http://www.nytimes.com/2008/05/12/us/politics/12vote.html?pagewanted=all>.

²⁴ Available at <http://tucsoncitizen.com/morgue/2006/08/16/22897-1-in-6-maricopa-county-voter-registrations-rejected-for-no-id/>.

apply—and thus were denied their right to vote. As the district court noted, for those individuals whose registrations were rejected between 2005 and 2007 because of inadequate proof of citizenship, approximately 70 percent, or about 20,000, were not subsequently able to register. *See* J.A. 264.²⁵

Finally, the number of rejected applications does not take into account those citizens who are deterred from attempting to register in the first place because it is too onerous or costly to obtain and submit the necessary documentation. The total number of eligible voters prevented or deterred from voting is therefore almost certainly higher than the already substantial number of voters actually rejected.

B. Proposition 200 Increases The Likelihood Of Errors And Delays By Election Officials

1. Arizona’s proof-of-citizenship requirement causes erroneous rejections of registrations, thus denying qualified citizens the right to vote

If the tens of thousands of individuals whom Proposition 200 has blocked or deterred from registering were in fact not eligible to vote, there would be no cause for concern. But that is not the case. To the contrary, the district court found here that “[m]ost reject-

²⁵ The number of people directly prevented from voting by Arizona’s proof-of-citizenship requirement is therefore far higher than the number prevented from doing so by the Indiana voter-identification requirement at issue in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008). *See* Pitts & Neumann, *Documenting Disenfranchisement*, 25 J.L. & Pol. 329, 330, 365 n.128 (2009) (concluding that in the 2008 elections, Indiana’s requirement caused approximately 900 ballots not to be counted).

ed applicants”—including “86.6% of Latinos and 92.9% of non-Latinos”—“listed their birthplace in the United States,” which makes them United States citizens. J.A. 264. Consistent with that finding, the recorder’s office in Arizona’s most populous county concluded that of the thousands of people whose registrations were rejected because of Proposition 200, “[m]ost ... were probably legal citizens who for one reason or another lacked the required identification.” *1,100 Pima Voter Applicants Rejected Down*, Tucson Citizen, Aug. 17, 2006.²⁶

Erroneous rejections arise for at least two reasons. *First*, as discussed above, significant numbers of eligible voters lack access to the documents required to prove citizenship. *Second*, even when eligible voters possess documentation and attempt to submit it, they may nonetheless be rejected as a result of processing errors or subtle deficiencies in their documentation.

The large number of rejections that Proposition 200 has engendered, many erroneous, is not particularly surprising. Election-law scholars have long known—and amici’s own experience confirms—that even “seemingly simple new registration requirements” can create significant complications. Tokaji, *Early Returns on Election Reform*, 73 *Geo. Wash. L. Rev.* 1206, 1224 (2005). Such requirements necessitate “the exercise of discretion by election officials” that can, “either purposefully or inadvertently, result in the denial of some citizens’ votes.” *Id.*; see also *id.* at 1224-1228 (explaining how decisions by Ohio in 2004 on whether to accept registration applications with missing information or

²⁶ Available at <http://tucsoncitizen.com/morgue/2006/08/17/22965-1-100-pima-voter-applicants-rejected-down/>.

submitted on insufficiently heavy card stock caused applications to be treated inconsistently).

Arizona's proof-of-citizenship requirement illustrates this danger well. For example, even among women who have ready access to documents proving citizenship, a third do not have such documentation bearing their current legal name. *See Citizens Without Proof* at 2. Election officials therefore face the task of determining whether to accept or reject applications in which the name on the application does not match that on the document proving citizenship. Additionally, errors are often made in the process of determining what constitutes adequate proof of a name change when submitted. Errors in handling situations like these—and thus wrongful rejections—are inevitable.

Indeed, past experience demonstrates the problems that surround the form of proof Arizona citizens are most likely to submit: a driver's license. When a voter submits a license as proof of citizenship along with the federal form, Arizona checks the license against a Motor Vehicle Division database. The state rejects the application if the license was obtained using non-citizen identification—a "Type F" license—or was issued before October 1, 1996. J.A. 261. Applicants cannot determine from the face of their license, however, whether they have a "Type F" license. As a result, applicants who were naturalized after obtaining their (Type F) licenses will have their registrations wrongly rejected. *See id.* at 262.

This concern is far from hypothetical. According to the Department of Homeland Security, 12,784 Arizona residents became naturalized citizens in 2011 alone. *See*

DHS, *Profiles on Naturalized Citizens: 2011*.²⁷ Because Arizona requires photographs and vision tests to be updated only once every 12 years (Arizona driver's licenses never expire), many of these individuals unknowingly possess "Type F" licenses. See Arizona Department of Transportation, Motor Vehicle Division, *Driver License Information*.²⁸ And many, unaware of the problem, will likely submit their licenses as proof of citizenship with their federal voter-registration form. In fact, the district court here found that 1,300 applicants could not register online because they possessed either a "Type F" license or one issued before October 1, 1996. See J.A. 261. Given the large number of Arizona citizens that possess "Type F" licenses, it is likely that many of those rejected were in fact citizens eligible to vote.

Other states' experience confirms the risk of disenfranchisement that inheres in using driver's license data as a means to establish citizenship. Just last year, for example, Florida election officials sought to purge non-citizens from the state's voting rolls. Relying on driver's license data, officials compiled a list of 2,700 voters suspected of being non-citizens and began canceling their registrations. The officials were forced to suspend the effort, however, after discovering that the list was "outdated and inaccurate." Brown, *Florida Halts Its Search for Violations of Voter Law*, N.Y. Times, June 9, 2012, at A13.²⁹ The president of the

²⁷ <http://www.dhs.gov/profiles-naturalized-citizens-2011-1> (last visited Jan 22, 2013).

²⁸ <http://www.azdot.gov/mvd/DLInfo.asp> (last visited Jan. 22, 2013).

²⁹ Available at http://www.nytimes.com/2012/06/09/us/politics/florida-stops-search-for-ineligible-voters-on-list.html?_r=0.

Florida State Association of Supervisors of Elections explained that “[w]e felt the information wasn’t credible and reliable,” and that “[t]oo many voters on the state’s list turned out to actually be citizens.” *Id.*

In a similar effort in Colorado, officials “sent letters to nearly 4,000 people questioning their citizenship as part of a plan to have them voluntarily withdraw or confirm their eligibility to vote.” Moreno, *Many Suspected Ineligible Colorado Voters Found To Be US Citizens*, Bangor Daily News (Associated Press), Aug. 30, 2012.³⁰ After running 1,400 of the names through a federal database, however, officials discovered that at least 1,200 were U.S. citizens. *Id.* Further investigation confirmed that at least some of the remainder were also U.S. citizens. Moreno, *Republicans Look for Voter Fraud*. As in Florida, the false positives arose in part because officials relied on driver’s license data, singling out many naturalized citizens who had obtained driver’s licenses prior to obtaining their citizenship. See Hoover, *U.S. Citizens Among Those Who Got Letters Questioning Right To Vote*, Denver Post, Aug. 28, 2012, at 19A.³¹

In sum, Arizona’s imposition of a proof-of-citizenship requirement results not simply in tens of thousands of registration rejections; a very high proportion are *erroneous* rejections, i.e., rejections of eligible voters.

³⁰ <https://bangordailynews.com/2012/08/30/news/nation/many-suspected-ineligible-colorado-voters-found-to-be-us-citizens/>.

³¹ Available at http://www.denverpost.com/breakingnews/ci_21420652/u-s-citizens-among-those-who-got-letters?IADID=Search-www.denverpost.com-www.denverpost.com#ixzz2GE2CPR9P.

2. The Arizona requirement will lead to additional delays in processing voter registration forms

Proposition 200 burdens qualified individuals' right to vote for an additional reason. Reviewing and verifying registration applications is already a time-consuming and exacting process. There are multiple processes required by federal law for verifying an applicant's eligibility. And the limited period between the close of registration and Election Day means that elections officials frequently lack sufficient time to undertake the communication with both applicants and other government databases that is necessary to ensure eligibility while avoiding unlawful disenfranchisement. The too-frequent result is that eligible citizens are unable to vote in a particular election, despite having submitted the registration form by the specified deadline. See, e.g., GAO, *Views of Selected Local Election Officials on Managing Voter Registration and Ensuring Eligible Citizens Can Vote* 7 (2005) (“[W]e and others have found that challenges managing the voter registration process can result in eligible citizens not being registered to vote on Election Day.”);³² see also Commission on Federal Election Reform, *Building Confidence in U.S. Elections* 3 (2005) (noting that one of the primary problems in the 2000 election was that “voters were discouraged or prevented from voting by the failure of election offices to process voter registration applications”).³³

³² Available at <http://www.gao.gov/assets/250/247944.pdf>.

³³ Available at http://www1.american.edu/ia/cfer/report/full_report.pdf.

Arizona's proof-of-citizenship requirement only exacerbates this problem. Requiring election officials to verify another document in addition to the registration form itself adds more time and complexity to an already-challenging task. Yet Proposition 200 does not allocate any additional resources for processing voter registration applications, and Arizona has not put forward any evidence that it has done so. This is yet another way in which Proposition 200 will deny qualified citizens their right to vote.

IV. ARIZONA'S PROOF-OF-CITIZENSHIP REQUIREMENT IS INCONSISTENT WITH THE HISTORY OF THE NVRA

Amici's views regarding the wisdom of a proof-of-citizenship requirement like the one at issue here accord with those of the Congress that adopted the NVRA. Congress was well aware of arguments, advanced by those opposed to the bill, that mail registration would lead to widespread instances of non-citizens registering and voting in U.S. elections. But Congress was also aware that reports on states' experience with mail registration (including reports from election administrators like amici) demonstrated that in fact such registration did *not* cause significant problems with non-citizen voter fraud. Members also concluded that other measures in the bill were sufficient to address any residual concerns. Congress accordingly rejected amendments that would have permitted states to require proof of citizenship, finding them contrary to the purposes of the NVRA generally and its mail registration provision in particular. Arizona's proof-of-citizenship requirement contradicts this legislative judgment and conflicts with Congress's objectives in enacting the statute.

1. The Senate report accompanying the NVRA explained that the legislation sought to address “[t]he declining numbers of voters who participate in Federal elections.” S. Rep. No. 103-6, at 2. And the House report explained that the primary obstacle to increasing voter registration (and hence voter turnout) was “a complicated maze of local laws and procedures ... through which eligible citizens had to navigate in order to exercise their right to vote.” H.R. Rep. No. 103-9, at 3 (1993); *see also* 42 U.S.C. § 1973gg(a)(3) (finding that “discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities”). The “unfinished business of registration reform,” the House report concluded, was “to reduce these obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process.” H.R. Rep. No. 103-9, at 3.

Congress therefore sought, the two reports explained, to “provide uniform national voter registration procedures for Federal elections,” S. Rep. No. 103-6, at 3, that would “reduc[e] barriers, particularly government-imposed barriers, to applying for registration wherever possible,” and thereby “[e]xpand[] the rolls of the eligible citizens who are registered,” H.R. Rep. No. 103-9, at 3; *accord Young v. Fordice*, 520 U.S. 273, 275 (1997) (explaining that the NVRA “requires States to provide simplified systems for registering to vote in federal elections” (emphasis omitted)).

One way the Act sought to accomplish this goal was to permit registration by mail. Mail registration, the Senate report stated, was “an effective means for increasing the voter rolls because it relieves the voter of the need to appear in person at one central registration

office during prescribed hours and it permits organizations to go to the voter with organized registration drives.” S. Rep. No. 103-6, at 12. The effectiveness of mail registration was established by “substantial evidence” from the “approximately half” of states that had implemented such measures, which showed “that this procedure not only increased registration but successfully reached out to those groups most underrepresented on the registration rolls.” H.R. Rep. No. 103-9, at 4.

2. Prior to passage of the NVRA, however, opponents argued that by making voter registration easier, the bill would enable non-citizens, and in particular undocumented immigrants, to register and vote. *See, e.g.*, 139 Cong. Rec. 1,343-1,344 (1993) (statement of Rep. Livingston); S. Rep. No. 103-6, at 55 (minority views) (alleging that up to 24 percent of ballots were cast by illegal aliens). These concerns extended specifically to the mail registration provision. *See, e.g.*, S. Rep. No. 103-6, at 55 (minority views) (“Nationwide mail registration, as proposed by this bill, raises the very real specter of adding to America’s illegal immigration problems.”); 139 Cong. Rec. 2,448 (1993) (statement of Rep. Callahan).

The legislative record indicates that Congress declined to alter the mail registration provision in response to these concerns for two reasons. *First*, the experience of several states, recounted in part by reports from election administrators like amici, demonstrated that mail registration was not associated with any significant level of non-citizen voter fraud. *See, e.g.*, S. Rep. No. 103-6, at 12 (“[V]oter registration officials in all eighteen States for which data are available reported they have had little or no fraud with post car[d] registration.”).

Second, many members believed that the bill's anti-fraud provisions were "sufficient to deter fraudulent registrations." S. Rep. No. 103-6, at 26. These provisions included: requiring "that mail applications include a statement of voting qualifications and an attestation," signed "under penalty of perjury, that the applicant meets all those requirements," *id.* at 13; creating a new federal crime for the submission of false or fraudulent information on voter registration applications, 42 U.S.C. § 1973gg-10(2)(A); S. Rep. No. 103-6, at 11; permitting states to require mail registrants to vote in person the first time they vote in a jurisdiction, 42 U.S.C. § 1973gg-4(c)(1); and requiring "notice to each applicant of the disposition of his or her application," which "could be met by a follow-up mailing ... as a means of protecting against possible fraud in the mail registration process," H.R. Rep. No. 103-9, at 10. These various safeguards were deemed sufficient in large part because, according to reports from election administrators, they had already proven effective in states that had implemented mail registration. *See, e.g.*, S. Rep. No. 103-6, at 13 (citing evidence from California, New York, Texas, Ohio, New Jersey, and Pennsylvania).

3. Unpersuaded, some members of Congress contended that the law's postcard-registration provision improperly prevented states from employing "modest verification procedures," S. Rep. No. 103-6, at 54 (minority views), including requiring documentary proof of citizenship. In their view, fraud by non-citizens "might be combated by requiring proof of citizenship at the time of registration," but "mail registration under [the NVRA] would preclude such corrective action." *Id.* at 55; *see also id.* (explaining that the NVRA would prohibit Alaska's requirement that some mail registration

applicants provide “identification or other documentation” of Alaska residency with their application).

These members accordingly sought to amend the bill to either permit or require states to insist on documentary proof of citizenship at registration. *See, e.g.*, 139 Cong. Rec. 2,455-2,456 (statement of Rep. McCollum); *id.* at 1,349-1,350 (statement of Rep. Livingston) (noting rejection of such an amendment in the House). These efforts gained traction only in the Senate, which passed a floor amendment providing that “[n]othing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration.” *Id.* at 5,237 (1993). The amendment’s sponsor explained that it would, among other things, permit states to “ask for a photocopy of a document proving citizenship with mail-in applications.” *Id.* at 9,571-9,572 (1993) (statement of Sen. Simpson).

Following debate on the amendment in both chambers, the conference committee rejected this amendment as “not necessary or consistent with the purposes of this Act.” H.R. Rep. No. 103-66, at 23 (1993) (Conf. Rep.).³⁴ The committee noted in particular that the amendment could “permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act.” *Id.* The conference committee’s report was adopted by both chambers, and the bill as reported was enacted into law. *See* Pub. L. No. 103-31, 107 Stat. 77 (1993).

³⁴ For examples of debate on the amendment, see 139 Cong. Rec. 9,226 (1993) (statement of Rep. Livingston); *id.* at 9,631 (1993) (statement of Sen. Helms); *id.* at 9,221-9,222 (1993) (statement of Rep. Conyers); *id.* at 7,178 (1993) (statement of Rep. Richardson).

4. Congress thus gave focused consideration to the concern that mail registration would create or exacerbate problems with non-citizen voter fraud. Its enactment of the NVRA reflects its judgment that such problems were unlikely to be significant and that the statute's anti-fraud provisions were sufficient to address any problems that might occur. The legislative history reveals, moreover, that both supporters and opponents of the NVRA shared the common belief that the statute as enacted prevented states from requiring documentary proof of citizenship when registering by mail. That understanding prompted opponents to propose the amendment discussed above, which was rejected as inconsistent with the statute and particularly with the mail registration provision.

Ultimately, the NVRA reflects a legislative judgment—confirmed by amici's experience—that any benefit from permitting states to require documentary proof of citizenship when registering by mail is outweighed by the serious harm that such a requirement would do to Congress's objective of providing a convenient and uniform means of registration. Arizona's proof-of-citizenship requirement is contrary to this legislative judgment and an obstacle to the NVRA's objectives. It therefore should be set aside.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DAVID W. OGDEN
Counsel of Record
DANIEL S. VOLCHOK
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 663-6000
david.ogden@wilmerhale.com

JANUARY 2013

APPENDIX

- **Jennifer Brunner** served from 2007 to 2011 as Ohio's Secretary of State, the first woman elected to that position. Her work in reforming Ohio's voting systems earned her a Profile in Courage Award in 2008 from the bipartisan board of the John F. Kennedy Library and Museum. Before serving as Secretary of State, she was elected twice and served nearly five years as a state trial court judge in Columbus on the Franklin County Court of Common Pleas. In addition to 15 years in or private practice focusing on election law, Brunner served as a member of the Franklin County Board of Elections and as Legislative Counsel to one of her predecessor Secretaries of State. Since leaving elective office she has rejoined the law firm she founded in 1988, Brunner Quinn. In 2012 she served as an expert to the Serbian government through the auspices of USAID on campaign finance and judicial reform. Her efforts in forming and co-chairing Fair Elections Ohio in 2011 after leaving office, and in promoting a statewide referendum, succeeded in preventing restrictive changes to Ohio voting laws. She is the author of *Cupcakes and Courage*, published in 2012.
- **Jennifer Collins-Foley** served from 1996 to 2004 in the office of the Registrar-Recorder/County Clerk for Los Angeles County, the largest election jurisdiction in the United States. She has developed election day manuals used by officials in Los Angeles County, Miami-Dade County, and Washington, D.C. She also developed and produced *Best Practices in Election Administration, Management and Security for Voting Systems and Provisional Voting: A Tool Kit for Election Administrators and Stakeholders* for the U.S. Election Assistance Commission. She has also

worked extensively with foreign officials to improve their electoral systems.

- **George Gilbert** has been the Director of Elections for Guilford County, North Carolina, for the past 25 years. He is a nationally Certified Election/Registration Administrator (CERA) through the Election Center and Auburn University. He also served during 2001 and 2005 on the Election Center's Ad Hoc Task Force on Election Law Reform, and co-chairs the Legislative Committee of the National Association of Election Officials.
- **Ernest Hawkins** served Sacramento County, California, for 27 years; he was the Registrar of Voters from 1980 to 2003, and a Senior Administrative Analyst in the Registrar's office from 1976 to 1980. Mr. Hawkins has been deeply involved with the Election Center—a national nonprofit organization of election officials offering research, information, training, and certification—since the organization's inception, and has been the chair of the Board of Directors for the last 20 years. Mr. Hawkins has also served in leadership positions with the National Association of County Recorders, Election Officials and Clerks; the California Association of Clerks and Election Officials; the California Voter Foundation; and Electionline.org. He has further served on the Federal Election Commission's Advisory Panel and is currently a member of the Advisory Board for the U.S. Election Assistance Commission. In July 2000, he was inducted into the Election Hall of Fame.
- **Phil Keisling** served as Oregon's Secretary of State from 1991 to 1999. Before that he served as a member in the Oregon House of Representatives. Phil is currently director of the Center for Public Service at

the Mark O. Hatfield School of Government, Portland State University. (Institutional affiliation is for identification purposes only and does not constitute institutional endorsement of this brief.)

- **Scott Konopasek** has administered elections in three different jurisdictions, serving as the Director of Elections of Snohomish County, Washington, from 1997 to 2002; then as the Registrar of Voters for San Bernardino County, California, from 2002 to 2004; and most recently as the Director of Elections of Salt Lake County, Utah, from 2008 to the present. Between 2004 and 2008, as the Managing Partner of Forefront Election Solutions LLC, he consulted with more than forty counties and states on election-related projects. He served on the Standards Board for the U.S. Election Assistance Commission, and was a member of the National Task Force for Election Reform; the National Association of County Recorders, Election Officials and Clerks; and the International Association of Clerks, Recorders, Election Officials, and Treasurers.
- **Deborah L. Markowitz** served as Vermont Secretary of State from 1998 to 2011. She is also a past president of the National Association of Secretaries of State, and continues to serve on the Board of Advisors of the U.S. Election Assistance Commission. She is currently Secretary of the Vermont Agency of Natural Resources.
- **Conny McCormack** served six years as the Elections Administrator of Dallas County, Texas; seven years as the Registrar of Voters for San Diego County, California; and twelve years as the Registrar-Recorder/County Clerk for Los Angeles County, California. Ms. McCormack has also been an Elec-

tions Specialist with the International Foundation for Electoral Systems, with extensive experience consulting on elections abroad. Among her other affiliations, she was the President of the Texas Association of Election Administrators and of the California Association of Clerks and Election Officials.

- **Gary McIntosh** served as Elections Director for the State of Washington from 1988 to 2001. Prior to that he served for ten years as Elections Supervisor for Thurston County, Washington. He is also a past president of the National Association of State Elections Directors. Among other accomplishments, Mr. McIntosh helped design and secure legislative approval of Washington State's "Motor Voter" registration program, and played a key role in Congress's adoption of a similar program in the NVRA.
- **David Orr** has served since 1990 as the County Clerk for Cook County, Illinois, the second-largest election district in the United States. He previously served for over a decade as alderman of the 49th Ward in Chicago, and was also briefly acting mayor of the city in 1987.
- **Connie Schmidt** served as the Election Commissioner for Johnson County, Kansas, from 1995 to 2004, after a long career in various aspects of local government. During her tenure, Johnson County pioneered several new, and award-winning, election programs that have been replicated around the country; after stepping down as commissioner, Ms. Schmidt served as co-project manager for several best practices programs of the U.S. Election Assistance Commission. Ms. Schmidt has also served as the chair of the Professional Education Program Certification Board for the Election Center, and as a

member of the National Association of State Election Directors Voting Systems Standards Board; she has received the National Association of Secretaries of State Medallion Award for outstanding service to American democracy, and has been inducted into the Elections Hall of Fame.

- **Deborah Seiler** served as registrar of voters for San Diego County, California, from 2007 through 2012. She previously served as assistant registrar in Solano County, California; as a member of the California Fair Political Practices Commission, and as assistant to the California Secretary of State for elections and political reform. She also co-chaired both the secretary's advisory panel on elections and the Elections Legislative Committee of the California Association of Clerks and Election Officials.
- **Tom Wilkey** has been active in improving the administration of elections since 1968—first, with the Erie County, New York, Board of Elections, and then with the New York State Board of Elections, becoming Executive Director of the state board in 1992. After stepping down from the New York State Board in 2003, Mr. Wilkey was appointed Executive Director of the U.S. Election Assistance Commission, the federal institution devoted in part to research on and dissemination of best election practices. Mr. Wilkey has also served as secretary, treasurer, vice president, and president of the National Association of State Election Directors; in various capacities on advisory boards and committees of the Federal Election Commission; on the State and Local Alliance Board of the Secretary of Defense's Federal Voting Assistance Program; and as a member of the Board of Directors of the International Center on Election Law.