

No. 12-71

IN THE
Supreme Court of the United States

THE STATE OF ARIZONA, et al.,

Petitioners,

v.

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

Respondents.

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

**BRIEF FOR *AMICI CURIAE*
OVERSEAS VOTE FOUNDATION, FEDERATION
OF AMERICAN WOMEN'S CLUBS OVERSEAS,
AMERICAN CITIZENS ABROAD,
MILITARY SPOUSES OF MICHIGAN, AND
ARIZONA STUDENTS' ASSOCIATION IN
SUPPORT OF RESPONDENTS**

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| <i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970) | 23 |
| <i>Project Vote/Voting for Am., Inc. v. Long</i> , 682 F.3d 331 (4th Cir. 2012) | 25 |
| <i>Scolaro v. D.C. Bd. of Elections & Ethics</i> , 691 A.2d 77 (D.C. 1997) | 26 |
| <i>Symm v. United States</i> , 439 U.S. 1105 (1979) | 25 |
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| <i>United States v. Georgia</i> , No. 1:12-CV-2230-SCJ, 2012 WL 4336257 (N.D. Ga. July 5, 2012)..... | 16 |
| <i>United States v. Texas</i> , 445 F. Supp. 1245 (S.D. Tex. 1978) | 25 |
| <i>Walgren v. Howes</i> , 482 F.2d 95 (1st Cir. 1973)..... | 26 |
| <i>Whatley v. Clark</i> , 482 F.2d 1230 (5th Cir. 1973) | 25 |
| <i>Williams v. Salerno</i> , 792 F.2d 323 (2d Cir. 1986)..... | 25 |

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| Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581, (codified at 20 U.S.C. § 1094(a)(23)(A)) | 24 |
| Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, 122 Stat. 3078 | 25 |
| National Defense Authorization Act of 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001)..... | 15 |
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| Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Pub. L. No. 99-410, 100 Stat. 924 (1986)..... | 14, 15 |
| Soldier's Vote Act of 1942, Pub. L. No. 77-712, 56 Stat. 753 | 12 |
| Voting Accessibility for the Elderly and Handicapped Act (VAEHA), Pub. L. No. 98-435, 98 Stat. 1678 (1984)..... | 32 |
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| 116 Cong. Rec. 5951 (1970) | 23 |
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| 139 Cong. Rec. S2738 (daily ed. Mar. 11, 1993) | 17 |
| <i>Equal Access to Voting for Elderly and Disabled Persons: Hearing on H.R. 1250 Before the Task Force on Elections of the Comm. on H. Admin., 98th Cong. (1983).....</i> | 32, 33 |
| H.R. Rep. No. 107-263 (2001) | 24 |
| H.R. Rep. No. 107-329, pt. 1 (2001)..... | 24 |
| S. Rep. No. 77-1581 (1942) | 12 |
| S. Rep. No. 84-580 (1955) | 13 |

OTHER AUTHORITIES

| | |
|--|----|
| Alvarez, R. Michael, et al., <i>Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem</i> , 34 Fordham Urb. L.J. 935 (2007) | 12 |
| Am. Political Sci. Ass'n, <i>Findings and Recommendations of the Special Committee on Service Voting</i> , 46 Am. Pol. Sci. Rev. 512 (1952) | 13 |
| Ariz. Dep't of State, <i>Election Procedures Manual</i> (2012), available at http://www.azsos.gov/election/ | 18 |

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|---|----|
| Ariz. State Univ., <i>ASU Enrollment Data</i> , http://diversity.asu.edu/asu-diversity (last visited Jan. 17, 2013) | 27 |
| Avon, Natalie, <i>Why More Americans Don't Travel Abroad</i> , CNN (Feb. 4, 2011), http://articles.cnn.com/2011-02-04/travel/americans.travel.domestically_1_western-hemisphere-travel-initiative-passports-tourismindustries?_s=PM : | 27 |
| Black, Jr., Charles L., <i>Structure and Relationship in Constitutional Law</i> (1969) | 11 |
| Brennan Ctr. for Justice, <i>Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification</i> (2006), available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf | 35 |
| Campus Vote Project, <i>Statistics</i> , http://www.campusvoteproject.org/statistics (last visited Jan. 17, 2013) | 31 |
| <i>Cat Tracks: November 8</i> , Daily Wildcat (Jan. 17, 2013), available at http://www.wildcat.arizona.edu/article/2012/11/cat-tracks-november-8-11812 | 29 |
| Def. Manpower Data Ctr., <i>2008 Post-Election Survey of Uniformed Service Members: Tabulations of Responses for Active Duty Military</i> (2009), available at http://www.fvap.gov/resources/media/ | 17 |

| | |
|---|----|
| Dep't of Homeland Sec., <i>Enhanced Drivers Licenses: What Are They?</i> , http://www.dhs.gov/enhanced-drivers-licenses-what-are-they (last visited Jan. 15, 2013)..... | 27 |
| Dep't of Justice, <i>Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act</i> , available at http://www.justice.gov/crt/about/vot/litigation/recent_uocava.php#vt_uocava12 (last visited Jan. 15, 2013) | 16 |
| Dep't of Justice, <i>Civil Rights Division Voting Cases</i> , available at http://www.justice.gov/crt/about/vot/litigation/caselist.php#uocava_cases (last visited Jan. 15, 2013) | 16 |
| Durr, Virginia Foster, <i>Outside the Magic Circle</i> (Hollinger F. Barnard ed., 1985) | 13 |
| European Union, <i>Documents You Need</i> (June 2012), available at http://europa.eu/youreurope/citizens/ | 21 |
| Fish, Eric S., Note, <i>The Twenty-Sixth Amendment Enforcement Power</i> , 121 Yale L.J. 1168 (2012) | 24 |
| Fitzpatrick, Jack, <i>College Students Face New Voting Barriers</i> , MinnPost, available at http://www.minnpost.com/politics-policy/2012/08/ | 29 |
| Gober, Patricia, <i>Geo-Demographics of Aging in Arizona: State of Knowledge</i> (2002), available at http://slhi.org/pdfs/studies_research/CoA_Geo-demographics_of_Aging.pdf | 34 |

- Grimes, Alison Lundergan, *Military Matters: Protecting the Rights of Those Who Protect Us* (2012)..... 21
- Guido, Jr., Kenneth J., *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment*, 47 N.Y.U. L. Rev. 32 (1972) 23
- Kasdan, Diana, Brennan Ctr. for Justice, *State Restrictions on Voter Registration Drives* (Aug. 21, 2012), available at http://www.brennancenter.org/content/resource/state_restrictions_on_voter_registration_drives/ 29
- Kilpatrick, Judith, *Wiley Austin Branton and the Voting Rights Struggle*, 26 U. Ark. Little Rock L. Rev. 641 (2004) 13
- Kohn, Nina A., *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 McGeorge L. Rev. 1065 (2007) 34
- Lewin, Tamar, *Voter Registration by Students Raises Cloud of Consequences*, N.Y. Times (Sept. 7, 2008), http://www.nytimes.com/2008/09/08/education/08students.html?_r=0..... 28
- O’Sullivan, Joan L., *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 J. Health Care L. & Pol’y 325 (2001) 37

- Overseas Vote Found., *2008 OVF Post Election UOCAVA Survey Report and Analysis* (2009), available at <http://www.electionreformproject.org/Resources/effd46f2-7862-4b2e-b28a8f92a3070f48/r1/Detail.aspx>..... 20
- Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient* (2012), available at <http://www.pewstates.org/research/reports/inaccurate-costly-and-inefficient-85899378437> 17
- U.S. Election Comm'n, *Register to Vote in Your State by Using This Postcard Form and Guide* (2006), available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf 7, 36
- Univ. of Ariz., *The University of Arizona Fact Book: Students by State 2011-12*, http://factbook.arizona.edu/2011-12/students/by_state (last visited Jan. 17, 2013)..... 27
- Yaccino, Steven, *Colleges Take a Leap into Voter Registration*, N.Y. Times (Oct. 13, 2012), http://www.nytimes.com/2012/10/14/us/politics/more-colleges-take-a-leap-into-voter-registrationhtml?_r=0 30

INTEREST OF *AMICI*

Overseas Vote Foundation (OVF) is the leading 501(c)(3) nonprofit, nonpartisan organization focused on supporting and facilitating electoral participation of overseas U.S. military and civilian voters. OVF provides the four to six million overseas voters, including more than one million affiliated with the Armed Forces, with access to state-of-the-art online voter registration and absentee ballot request services, emergency balloting assistance, interactive voter help desk access, and details regarding dates, deadlines, election office contacts, and candidate information. OVF is trusted and consulted by election officials; with millions of visitors to its affiliated and hosted websites during its eight years in operation, it is a heavily relied upon resource for voters and election officials alike. OVF is the only nongovernmental overseas organization that the Federal Election Assistance Commission links to on its homepage. Six states – Alabama, Kentucky, Ohio, Minnesota, New York, and Vermont – and two counties license complete, customized website services from OVF in order to better serve their overseas and military voters. The United States Postal Service and the National Association of

¹ Letters from the parties consenting generally to the filing of briefs *amicus curiae* are on file with the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Secretaries of State also license information services from OVF.

OVF is deeply concerned with aberrant state practices that undermine the uniform system of voter registration and ballot request established by the Federal Government. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) Federal Postcard Application and the National Voter Registration Act Federal Form are fundamentally endangered when states are allowed to overlay their own additional requirements. OVF has seen how these forms, when they lose their uniformity, also lose their efficacy. Allowing the UOCAVA and NVRA voter registration requirements to be tampered with would completely undermine UOCAVA and the NVRA. Of the many negative results that can be expected, one sure to occur is that OVF, and other organizations that work to support military and overseas voter participation, will face additional, and constantly changing, state-created obstacles as they seek to fulfill their mission of enfranchising overseas voters.

The Federation of American Women's Clubs Overseas (FAWCO) is an international network of independent volunteer clubs and associations. Founded in 1931, FAWCO promotes the rights of U.S. citizens abroad and has long been a strong advocate of improving overseas citizens' access to voting. FAWCO is also active as a nongovernmental organization with consultative status to the United Nations Economic and Social Council. Today, there are more than seventy-five member clubs in forty countries worldwide, with total membership exceeding 15,000.

In the decade following World War II, FAWCO began seeking solutions to the challenge of absentee voting from overseas; in the 1970s, it was instrumental in the passage of the Overseas Citizens Voting Rights Act, which guaranteed American civilians overseas the right to vote in federal elections. FAWCO is also a founding member of the Alliance for Military and Overseas Voting Rights, a group comprised of voting advocacy organizations and all branches of the military including military families and veterans.

In addition to advocacy, FAWCO partners with the Overseas Vote Foundation to provide online voter services to its members. FAWCO's efforts to ensure that overseas citizens can exercise their franchise will be impeded if state laws are allowed to undermine today's federally mandated uniform and streamlined process of voter registration.

Founded in 1978, **American Citizens Abroad** (ACA) is a nonprofit, nonpartisan, volunteer association whose mission is to represent the interests of Americans living overseas. Headquartered in Geneva, Switzerland, with offices in Washington, D.C., the association draws on more than three decades of rich experience and knowledge of laws affecting Americans living overseas.

Although Americans living overseas are impacted severely by a variety of U.S. laws and regulations, no governmental agency is responsible for informing Americans abroad of legislative and regulatory developments affecting them. Nor is there any effective mechanism in place to bring to the attention of Congress the issues affecting the daily lives of Americans overseas.

Building on a network of country contacts in over sixty countries and members in ninety countries, ACA is now the principal organization representing the interests of Americans residing overseas. ACA endeavors to inform and empower overseas Americans regarding issues of critical importance, including taxation, banking, voting, citizenship, Social Security, Medicare, and congressional representation. ACA favors the fullest expression of the right of all eligible Americans overseas to vote under federal law and therefore opposes measures that operate as an impediment to overseas voting. ACA regularly assists Americans worldwide in exercising their right to vote by means of online assistance, organization of voter information, “town hall” meetings, and periodic updates on potential threats to enfranchisement.

ACA is reorganizing as a U.S. tax-exempt organization operating under Section 501(c)(4) of the Internal Revenue Code.

Military Spouses of Michigan was founded in 2012 in response to the need for support and advocacy services for military spouses and family members. The organization provides pro bono legal advice and representation, educational opportunities, support networks, and access to information about employment and career support in Michigan. Military Spouses of Michigan keeps military spouses and families apprised of important state and federal changes or developments that affect the rights and benefits of servicemembers and their families, including their ability to register to vote and participate in elections. The organization also

encourages its members to advocate for legal and policy changes that protect our military community.

Military Spouses of Michigan submits that state laws that undermine the federally mandated uniform and streamlined process for voter registration make it more difficult for servicemembers and their families to register to vote. Such disenfranchisement of the military community impedes the community's participation in the democratic process and undermines its ability to choose representatives who will support legal and policy changes that protect the military.

The Arizona Students' Association (ASA), a nonprofit, statewide student advocacy organization founded in 1974, represents the 140,000 students attending Arizona's public universities. The organization's mission is to make college affordable and accessible by advocating student concerns to all levels of government and by showing grassroots support for student issues. ASA's board of directors, comprised of students from Arizona's public universities, is charged with accomplishing this mission through the creation of issue campaigns to engage students throughout the state. In 2012, ASA strongly supported student voter registration, helping to register 7000 new student voters.

ASA understands the power and impact that student voters can and do have in elections and therefore supports measures that help to amplify student voices. In working with Arizona students, including many who moved to the state to attend school, ASA has seen the benefits that the NVRA postcard offers and the challenges that would be presented if a uniform voter registration form were

not available. ASA believes that the NVRA postcard protects students' rights to participate in democracy and that Proposition 200's additional documentation requirement would disenfranchise students by creating additional and unnecessary obstacles to voter registration.

STATEMENT

Arizona's Proposition 200 requires all individuals to produce state-approved documentation to prove their citizenship in order to register to vote. This case raises the question whether Arizona's law is preempted by the mail registration provision of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg-4. That provision mandates that states "accept and use" the Federal Mail Voter Registration Form, *id.*, which requires that voters do only one thing to establish their citizenship: swear to their eligibility under penalty of perjury, *id.* § 1973gg-7(b).

The federal form that Arizona seeks to augment is a postcard (the "NVRA postcard") developed by the Election Assistance Commission.² *See* 42 U.S.C. § 1973gg-4(a); 59 Fed. Reg. 32,316 (June 23, 1994). In crafting this simple postcard, the Commission determined that citizenship would be adequately proven by "the oath required by the Act and signed by the applicant under penalty of perjury." 59 Fed. Reg. 32,316 (June 23, 1994).

The Commission's decision followed from the fact that Congress considered, and rejected, a version of the NVRA that would have permitted states to require the kind of documentation Arizona now

² An electronic version of the NVRA postcard, which can be printed and mailed without an envelope, is available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf. U.S. Election Comm'n, *Register to Vote in Your State by Using This Postcard Form and Guide* (2006).

demands. *See* Pet. App. 91c-93c (Kozinski, C.J., concurring). Congress opted instead to “protect the integrity of the electoral process” and to “ensure that accurate and current voter registration rolls are maintained” by creating a registration process for federal elections that includes the ability to mail in a simple form. 42 U.S.C. § 1973gg(b)(3)-(4).

The Ninth Circuit, sitting *en banc*, held that the NVRA’s registration process – specifically the requirement that states “accept and use” the NVRA postcard – “supersedes Proposition 200’s” documentation requirement. Pet. App. 6c. The plain language of the NVRA “on its face” does not “give states room to add their own requirements to the Federal Form.” *Id.* 38c. Moreover, the underlying purpose of the NVRA was to “streamline the registration process,” *id.* 37c, and to replace a patchwork of “discriminatory and unfair registration laws and procedures,” 42 U.S.C. § 1973gg(a)(3), with uniform “procedures that [would] increase the number of eligible citizens who register to vote in elections for Federal office,” *id.* § 1973gg(b).

Amici represent two categories of individuals who have previously faced “discriminatory and unfair registration laws and procedures” and for whom Congress has gone to special lengths to ensure equal access to the political process: members of the Armed Forces and civilians overseas and college students. These groups’ experiences parallel the experiences of a third category of citizens: elderly and disabled residents of long-term care facilities. The difficulties each of these groups face in complying with Arizona’s documentary proof-of-citizenship requirement

reinforce the conclusion that the NVRA preempts Arizona's demand for additional documentation.

SUMMARY OF ARGUMENT

The National Voter Registration Act of 1993 (NVRA) streamlines voter registration for federal elections. Congress has repeatedly used its powers under the Elections Clause of Article I, § 4, and other constitutional provisions to ensure equal and uniform access to the political process. In the course of this history of legislation, Congress has evinced particular concern for groups whose circumstances make it difficult to vote. Overseas servicemembers and civilians, college students, and residents of long-term care facilities are each groups that have received special congressional protection.

Aberrant state laws and policies have, at times, impeded the voting rights of each of these groups. Acknowledging this problem, Congress enacted a federal regime of standardized election procedures that overrides these onerous state laws and prevents states from enforcing similarly burdensome provisions in the future. The NVRA is a central piece of this federal regime. Recognizing the federal interest in enfranchising these groups, courts have repeatedly held state laws that conflict with this federal regime to be preempted.

Arizona, however, has rejected this federal regime. When it passed Proposition 200, Arizona substituted its judgment for that of Congress in determining what burdens may be placed on would-be voters. The requirement that all voters provide specified documentary proof of their citizenship is especially burdensome for the groups discussed in

this brief. Congress's longstanding efforts to protect the voting rights of these groups is further evidence that Congress preempted laws like Proposition 200 when it passed the NVRA.

ARGUMENT

Congress has long recognized that effective participation in the political process encompasses a number of phases ranging from registering to casting a ballot to having that ballot properly counted. *See, e.g.*, 42 U.S.C. § 1973(c)(1). As the first step in this process, voter registration is the gateway to everything that follows. Congress's passage of the National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg *et seq.*, reflects this understanding.

The NVRA is one piece of the larger federal scheme for ensuring, among other things, that *all* citizens – including members of the military, overseas civilians, college students, and residents of long-term care facilities – have the opportunity to participate fully in the political process. This regime includes constitutional provisions – most directly, the Equal Protection Clause and the Twenty-Sixth Amendment – as well as federal statutes, like the Uniformed and Overseas Citizens Absentee Voting Act, the Military and Overseas Voter Empowerment Act, and the Help America Vote Act.

Congress would not have gone to the trouble of enacting the NVRA to create a uniform national registration procedure if it had intended to permit states to fundamentally alter the federally prescribed procedure by promulgating new restrictions like Proposition 200. Congress's longstanding efforts to enfranchise servicemembers, college students, the

elderly, and people with disabilities make it all the more implausible that Congress intended to allow states to displace the NVRA's comprehensive requirements with their own different and more burdensome conditions.

I. The Obstacles To Registration For Members Of The Armed Forces That Proposition 200 Poses Reinforce The Conclusion That The NVRA Preempts It.

Throughout American history, the Federal Government has protected the voting rights of servicemembers. When state laws have impinged upon this federal interest, Congress has promulgated national standards that ensure members of the Armed Forces can participate fully in the political process.

This Court has also recognized the paramount federal interest in protecting servicemembers' right to vote. In *Carrington v. Rash*, 380 U.S. 89 (1965), the Court struck down a Texas law that barred citizens who moved to the state as servicemembers from registering to vote. The Court relied explicitly on the Equal Protection Clause, but the case has long been understood to express a broader proposition as well. Soldiers are "recruited by the national government to perform a crucial national function." Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 10-11 (1969). It therefore undermines the "national structure" and the idea of national citizenship, *id.* at 11, when states enact laws "[f]encing out" servicemembers, *Carrington*, 380 U.S. at 94. *See also Crandall v. Nevada*, 73 U.S. (6 Wall.)

35, 48-49 (1868) (developing a theory of national citizenship).

Proposition 200 impedes the ability of servicemembers overseas, and others similarly situated, to register to vote. Allowing it to stand would undermine the work that the Federal Government and this Court have done to protect servicemembers' voting rights – a consequence that is incompatible with Congress's passage of the NVRA.

A. Time And Again, The Federal Government Has Intervened To Protect Servicemembers From State Laws That Impede Their Ability To Register And Vote.

1. Beginning with the Civil War, the Federal Government has acted to enfranchise soldiers despite restrictive state laws to the contrary. Because several northern states refused to allow soldiers to vote absentee, President Lincoln went so far as to halt military operations to enable troops to return home to cast ballots. R. Michael Alvarez et al., *Military Voting and the Law: Procedural and Technological Solutions to the Ballot Transit Problem*, 34 Fordham Urb. L.J. 935, 948 (2007).

2. During World War II, the Federal Government outright preempted restrictive state laws in order to protect servicemembers' voting rights. In the Soldier's Vote Act of 1942, Pub. L. No. 77-712, 56 Stat. 753, Congress "intended to afford every opportunity" to servicemembers to vote "by removing those procedural requirements established by State law which in practical operation would tend to disenfranchise soldiers and sailors." S. Rep. No. 77-

1581, at 2 (1942). The Act directed the War Department to provide each soldier with a postcard that, if mailed to his secretary of state, would enable the soldier to obtain a ballot. Alvarez, *supra*, at 955. It also relieved servicemembers of the obligation to comply with state poll tax requirements, which operated at the time as part of the registration system in many parts of the South. See Virginia Foster Durr, *Outside the Magic Circle* 177-78 (Hollinger F. Barnard ed., 1985) (describing the registration function performed by the poll tax); Judith Kilpatrick, *Wiley Austin Branton and the Voting Rights Struggle*, 26 U. Ark. Little Rock L. Rev. 641, 651 (2004) (same).

3. Experience during the Korean War prompted further legislation. A 1952 report by the American Political Science Association found that when World War II-era federal protections expired, state laws once again burdened servicemembers' ability to participate in the political process. Am. Political Sci. Ass'n, *Findings and Recommendations of the Special Committee on Service Voting*, 46 Am. Pol. Sci. Rev. 512 (1952). For example, Texas did not allow military personnel to vote at all, six states once again required military personnel to comply with their in-person registration laws, two states had abolished absentee voting, and twenty states had short windows for requesting and returning ballots that effectively disenfranchised overseas servicemembers. Alvarez, *supra*, at 959-60.

Concerned that "our soldiers and sailors and merchant marines must make a special effort to retain their right to vote," S. Rep. No. 84-580, at 3 (1955), Congress passed the Federal Voting

Assistance Act of 1955, Pub. L. No. 84-296, 69 Stat. 584. That statute recommended states waive registration requirements entirely for military voters covered by the Act “who, by reason of their service, have been deprived of an opportunity to register.” *Id.* It further urged states to accept a Federal Postcard Application “as a simultaneous application for registration and for [a] ballot.” *Id.* § 102, 69 Stat. at 584-85; see *Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307-08 (N.D. Fla. 2000) (describing the Act).³

4. In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). Pub. L. No. 99-410, 100 Stat. 924 (1986). The Act consolidated the Voting Assistance Act and other federal laws governing overseas voting to create a uniform regime for active duty military and their families who are absent from the place of residence where they are qualified to vote because of their service and for civilian voters living overseas. The Act added new safeguards for these voters. With respect to registration, it created a Federal Postcard Application (the “UOCAVA postcard”), which serves simultaneously as a voter registration and absentee ballot application for groups covered by the Act. *Id.*

³ In 1968, Congress amended the Voting Assistance Act to include civilians residing abroad. See Act of June 18, 1968, Pub. L. No. 90-343, 82 Stat. 180, 180-81. Congress subsequently enacted the Overseas Citizens Voting Rights Act of 1975, which replaced the Voting Assistance Act’s *recommendation* that states abolish burdensome residency prerequisites for overseas citizens with a *requirement* that they do so. Pub. L. No. 94-203, § 4, 89 Stat. 1142, 1143.

§§ 101, 104, 100 Stat. at 926. In 2001, Congress declared that military personnel must “receive[] the utmost consideration and cooperation when voting” and amended UOCAVA to *require* that states accept the UOCAVA postcard. National Defense Authorization Act of 2002, Pub. L. No. 107-107, § 1601, 115 Stat. 1012, 1274 (2001).⁴

5. In 1993, Congress passed the NVRA, which authorized creation of a simple Federal Form (“NVRA postcard”) that all citizens, wherever located, can use to register. By requiring states to accept the NVRA postcard, the Act allowed all servicemembers to benefit from a streamlined registration process similar to the one that UOCAVA provided to troops stationed away from home.

6. In light of the federal commitment to full enfranchisement for servicemembers, courts have consistently struck down state laws that hamper servicemember voting. For example, in *Bush v. Hillsborough County Canvassing Board*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000), the court pointed to UOCAVA’s “simplified procedure” for registration and voting to hold that Florida’s policies for accepting or rejecting absentee ballots sent by overseas servicemembers violated federal law, *id.* at 1307. More recently, other courts have required states to

⁴ In 2009, Congress amended and strengthened UOCAVA with the Military and Overseas Voter Empowerment Act (the “MOVE Act”), which requires states, among other things, to transmit absentee ballots to UOCAVA voters a full forty-five days prior to a federal election. 42 U.S.C. § 1973ff-1(a)(8)(A).

bring their policies into compliance with federal law.⁵ *See, e.g., United States v. Georgia*, No. 1:12-CV-2230-SCJ, 2012 WL 4336257 (N.D. Ga. July 5, 2012) (requiring the state to comply with UOCAVA, as amended by the MOVE Act); *United States v. Alabama*, 857 F. Supp. 2d 1236 (M.D. Ala. 2012) (same); *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Md. 2010) (same); *United States v. Cunningham*, No. CIV.A.3:08CV709, 2009 WL 3350028 (E.D. Va. Oct. 15, 2009) (granting summary judgment for the United States and holding that Virginia's absentee ballot procedures violated UOCAVA).

B. The NVRA Preempts Proposition 200 Because Arizona's Law Reintroduces The Kinds Of Burdens On Servicemember Voting That Congress Has Repeatedly Condemned.

During the debates preceding passage of the NVRA, Arizona's own Senator, John McCain (himself a veteran), listed some of the reasons members of the Armed Forces face challenges registering to vote: "They are away from home. They are spread all over

⁵ Since 2000, the Department of Justice has filed twenty-five actions against states to enforce UOCAVA. *Civil Rights Division Voting Cases*, Department of Just., http://www.justice.gov/crt/about/vot/litigation/caselist.php#uocava_cases (last visited Jan. 15, 2013). Courts have issued preliminary injunctions in some cases. In others, courts have entered a stipulated order or consent decree. *Cases Raising Claims Under the Uniformed and Overseas Citizen Absentee Voting Act*, Department of Just., http://www.justice.gov/crt/about/vot/litigation/recent_uocava.php#vt_uocava12 (last visited Jan. 15, 2013).

the world. . . . Many [have] left home at an early age to join the military, some at age 18. Many of them have not been able to get home very often.” 139 Cong. Rec. S2738 (daily ed. Mar. 11, 1993); *see also* Def. Manpower Data Ctr., *2008 Post-Election Survey of Uniformed Service Members: Tabulations of Responses for Active Duty Military* 9 (2009) (reporting that 35% of overseas troops were 18-24 years of age).⁶ The NVRA and UOCAVA did much to address these challenges. Nonetheless, overseas troops (and their families) continue to report problems with registration at almost twice the rate of the general public. Pew Ctr. on the States, *Inaccurate, Costly, and Inefficient* 7 (2012).⁷ Allowing Arizona to impose registration requirements beyond what federal law itself authorizes would only exacerbate the registration challenges faced by military and overseas voters, especially troops deployed in war zones.

1. Proposition 200 has already prevented some members of the Armed Forces from registering to vote, despite the fact that these servicemembers followed the applicable federal registration process. Since implementing its law, Arizona has rejected otherwise complete UOCAVA forms because they did not include the documentation required under Proposition 200. Resp. Br. 16 & n.6.

⁶ Available at http://www.fvap.gov/resources/media/military_summary_data.pdf.

⁷ Available at <http://www.pewstates.org/research/reports/inaccurate-costly-and-inefficient-85899378437>

Under Arizona's regime, individuals who lack a recent Arizona driver license must submit additional documentary proof of citizenship with their voter registration form. This requirement poses four separate barriers for servicemembers. First, they must have physical access to one of the documents Arizona is willing to accept as proof of citizenship, which do not include military identification documents.⁸ To the best of *amicus's* knowledge, while servicemembers nearly always carry military identification and often carry driver licenses or credit cards, troops in combat theaters seldom, if ever, carry passports or birth certificates. Moreover, because legal permanent residents may serve in the military, military identification does not constitute documentary proof of citizenship. Second, servicemembers must be able to copy their documents to comply with the state's requirement that no originals be submitted. Ariz. Dep't of State,

⁸ Arizona limits the documents that it deems to be acceptable proof of citizenship to the following: "the number of the applicant's driver license or nonoperating identification license issued after October 1, 1996 by the [Arizona] department of transportation or the equivalent governmental agency of another state" if the license indicates that the applicant has "provided satisfactory proof of . . . citizenship"; a photocopy of a birth certificate; a photocopy of a United States passport; United States naturalization documents (which must be presented to the county recorder rather than photocopied) or number of the certificate of naturalization; the applicant's Bureau of Indian Affairs card number, tribal treaty card number or tribal enrollment number; or documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986. Ariz. Rev. Stat. § 16-166(F).

Election Procedures Manual 308 (2012).⁹ Third, troops who need to physically append additional documentation cannot use the UOCAVA postcard or NVRA postcard alone; they must instead track down mailing supplies. Fourth, because many citizenship documents reveal personal or confidential information about the holder, servicemembers may be concerned about the security of the mail service they use to transmit those documents.

Some troops may face all four of these barriers, while others may only encounter one. In any event, allowing Arizona's Proposition 200 to stand would contravene the intent of Congress and its commitment to enfranchise members of the Armed Forces.

2. Not only does Proposition 200 place unacceptable burdens on overseas troops, it also undercuts the military's role in domestic voter registration. The NVRA specifically designates military recruiting stations as voter registration agencies. 42 U.S.C. § 1973gg-5(c). For some potential voters, Proposition 200 makes it completely impossible for recruiting stations to facilitate registration: registrants whose documentary proof of citizenship is a naturalization document, which is illegal to photocopy, cannot be registered except at Arizona's own facilities by presenting the document in person. Ariz. Rev. Stat. § 16-166(F). The other registration avenue for individuals with a

⁹ Available at http://www.azsos.gov/election/Electronic_Voting_System/manual.pdf.

naturalization document is to write in their certificate of naturalization number, which then must be verified by the county recorder with the Federal Government before that individual will be added to the rolls. *Id.* In practice, however, this leads to automatic rejection of all such voter registration forms because naturalization certificate numbers cannot be verified by the Federal Government. Resp. Br. 21 & n.9.

Even with respect to aspiring voters who are not categorically foreclosed from registering through military recruiting stations, Arizona's law would pose difficulties. In order to ensure that Arizona does not reject qualified applicants, recruiting stations across the nation would have to provide photocopying services, postage, envelopes, and personal assistance beyond what the NVRA postcard demands. Doing these tasks imposes a burden on the military that Congress did not choose. *See* 42 U.S.C. § 1973gg-5(a)(4)(A) (listing services that shall be made available at voter registration agencies). Not doing these tasks undermines the NVRA's express goal of expanding registration opportunities, particularly for individuals considering military service. Under either scenario, Proposition 200 undermines federal interests.

3. When Congress passed UOCAVA in 1986, it extended the same protections to both overseas civilian and military voters. The expansion of this protection acknowledges that civilian voters face many of the same challenges in exercising their franchise as deployed servicemembers confront. *See, e.g.,* Overseas Vote Found., *2008 OVF Post Election UOCAVA Survey Report and Analysis* 5 (2009

(finding that 23.7% of experienced overseas voters, including both servicemembers and civilians, reported questions or problems relating to registration).¹⁰ Proposition 200 threatens to compound these registration difficulties for overseas civilians in much the same manner as it exacerbates challenges for overseas military voters. For example, an Arizona resident serving as a Peace Corps volunteer in Africa could face many of the same barriers to voter registration as someone from the Armed Forces serving in Afghanistan. The Peace Corps volunteer may not have access to her citizenship documents, the ability to duplicate them, or a reliable, secure means of transmitting them to Arizona. *Cf.* Alison Lundergan Grimes, *Military Matters: Protecting the Rights of Those Who Protect Us* 3 (2012) (Kentucky’s secretary of state reporting, for example, that mail service in Kuwait is unsecure and unreliable: “Indeed, embassy staff never send passports or visas through Kuwait mail, but require them to be picked up at the embassy.”).

Other overseas civilian voters likely to be disenfranchised by Arizona’s law include those whose U.S. passports have expired. This is not a rare occurrence for Americans abroad, particularly those with dual citizenship in a European Union (EU) country who can move about much of the EU without a passport. *See Documents You Need*, Eur. Union

¹⁰ Available at <http://www.electionreformproject.org/Resources/effd46f2-7862-4b2e-b28a8f92a3070f48/r1/Detail.aspx>.

(June 2012).¹¹ Those whose only citizenship documents are naturalization papers, which Arizona requires be presented in person at the county recorder's office (instead of copied and mailed in), would face even more insurmountable obstacles. And, of course, the destruction of uniformity caused by Proposition 200 also burdens many overseas groups, like some of *amici*, active in registering overseas voters.

II. That Proposition 200 Undermines The Federal Interest In Enabling Students To Vote Reinforces The Conclusion That The NVRA Preempts Arizona's Documentation Requirements.

The Twenty-Sixth Amendment expresses a constitutional commitment to the voting rights of young people. Many of today's most hotly debated issues – for example, reform of student loan and federal entitlement programs – will have an especially great impact on younger citizens. Contrary to Congress's decision in the NVRA to permit registration for federal elections on the basis of an applicant's sworn statement, Proposition 200 places substantial burdens on the many students who lack ready access to the documents Arizona requires.

¹¹ Available at http://europa.eu/youreurope/citizens/travel/entry-exit/eu-citizen/index_en.htm.

A. In Recent Years Congress And The Courts Have Rejected The Historic Practice Of Preventing Students From Registering Where They Attend School.

1. The history of the Twenty-Sixth Amendment provides a powerful measure of the depth of the congressional commitment to enfranchising young people. Originally, Congress sought to accomplish this goal legislatively. In Title III of the Voting Rights Act of 1970, Pub. L. No. 91-285, tit. III, 84 Stat. 314, 318-19, Congress extended the franchise to all citizens between the ages of eighteen and twenty-one.

Congress provided two rationales for its decision. One focused on the perceived unfairness of drafting young men who lacked any voice in the political process. *See, e.g.*, 116 Cong. Rec. 20,176 (1970) (statement of Rep. Richard Ottinger). The second focused explicitly on college students. As Senator Mansfield explained: “The colleges and universities are filled with alert minds, eager, willing and able to participate. Permitting them to do so would be a large step forward.” 116 Cong. Rec. 5951 (1970) (statement of Sen. Mike Mansfield); *see also* Kenneth J. Guido, Jr., *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment*, 47 N.Y.U. L. Rev. 32, 39 (1972) (tracing passage of 1970 Act).

While this Court upheld Congress’s decision to lower the voting age for federal elections, it held that Congress had exceeded its powers when it did so with respect to state and local elections. *See Oregon v. Mitchell*, 400 U.S. 112 (1970). That decision prompted Congress almost immediately to propose,

and the states to ratify, a constitutional amendment extending the franchise in all elections to eighteen-year-olds. *See* U.S. Const. amend. XXVI; *see also* Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168 (2012) (outlining the history of the amendment and Congress’s enforcement power).

2. Since passage of the Twenty-Sixth Amendment, Congress has reaffirmed its bipartisan commitment to full enfranchisement for young adults. In 1998, Congress required colleges and universities accepting federal funds to “make a good faith effort to distribute a mail voter registration form” to enrolled students. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 489, 112 Stat. 1581, 1750-51 (codified at 20 U.S.C. § 1094(a)(23)(A)). The Help America Vote Act of 2002 (HAVA) similarly sought to “encourage civic involvement by high school and college students” and combat “the discouragement of our young people from the electoral process,” H.R. Rep. No. 107-329, pt. 1, at 35 (2001), by creating a College Program. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 501-502, 116 Stat. 1666, 1717 (codified at 42 U.S.C. § 15521).¹² The program instructed the Election Assistance Commission: (1) “to encourage students enrolled at institutions of higher education

¹² The House’s proposed Voting Technology Standards Act of 2001, which was largely incorporated into the Help America Vote Act, also had as one goal ensuring that students could take advantage of new voting technologies. *See* H.R. Rep. No. 107-263, at 24 (2001).

(including community colleges) to assist State and local governments in the administration of elections by serving as nonpartisan poll workers or assistants; and (2) to encourage State and local governments to use the services of the students participating in the Program.” *Id.* § 501.

Most recently, in the Higher Education Opportunity Act of 2008, Congress adapted its requirement that universities provide registration documents by allowing them to distribute those materials by e-mail. *See* Pub. L. No. 110-315, § 493, 122 Stat. 3078, 3308 (2008) (codified as amended at 20 U.S.C. § 1094(a)(23)(D)).

3. The attitude that students “are not members of the community among whom they sojourn,” and therefore should not be entitled to vote where they attend school, *Case of Fry*, 71 Pa. 302, 311 (1872), has no rightful place in American law. Heeding this principle, courts have repeatedly struck down laws disenfranchising students. For example, in *Symm v. United States*, 439 U.S. 1105 (1979), this Court affirmed a judgment that imposing a rebuttable presumption of student nonresidence is unconstitutional. *See United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978); *see also Project Vote/Voting for Am., Inc. v. Long*, 682 F.3d 331 (4th Cir. 2012) (enforcing the NVRA’s disclosure of records requirements in the face of voter registration problems encountered by students at Norfolk State University); *Williams v. Salerno*, 792 F.2d 323, 328 (2d Cir. 1986) (holding a presumption that a dormitory cannot be a voter’s “residence” unconstitutional); *Whatley v. Clark*, 482 F.2d 1230, 1234 (5th Cir. 1973) (holding a rebuttable

presumption of non-residency for students unconstitutional); *Levy v. Scranton*, 780 F. Supp. 897, 903 (N.D.N.Y. 1991) (holding a presumption that on-campus living quarters cannot be a “residence” for voting purposes unconstitutional); *see also Walgren v. Howes*, 482 F.2d 95 (1st Cir. 1973) (recognizing that a municipality’s decision to hold primary elections during a university’s winter vacation may have violated the Fourteenth or Twenty-Sixth Amendments); *Scolaro v. D.C. Bd. of Elections & Ethics*, 691 A.2d 77, 86 (D.C. 1997) (collecting cases).

B. The NVRA Preempts Proposition 200 Because Proposition 200 Introduces New Barriers To Students Who Seek To Register.

Proposition 200 frustrates Congress’s twin goals in the NVRA of increasing student turnout and making voter registration uniform. This Court should thus hold that its documentation requirement is preempted.

1. Proposition 200’s documentary proof-of-citizenship requirement threatens to deny many students at Arizona universities the ability to register and thus to vote. Specifically, Arizona’s law imposes two sorts of burdens. First, Proposition 200 imposes a barrier to registration for students who do not arrive on campus with the requisite documentation, such as a birth certificate or a passport. To be sure, some students will have an Arizona driver license and will be able to satisfy the additional documentation requirement by copying their license number onto the NVRA postcard. There are, however, currently more than 25,000 students

who come from out of state to attend college in Arizona. Arizona State University and the University of Arizona alone have at least 24,900 such students between them. *See ASU Enrollment Data*, Ariz. St. U., <http://diversity.asu.edu/asu-diversity> (last visited Jan. 17, 2013); *The University of Arizona Fact Book: Students by State 2011-12*, U. of Ariz., http://factbook.arizona.edu/2011-12/students/by_state (last visited Jan. 17, 2013). These recently arrived students are unlikely to possess Arizona licenses, and any license they do carry is unlikely to satisfy Arizona's documentary proof-of-citizenship requirement.¹³ Many of these students will, quite sensibly, have left their birth certificates and their passports (if they even have either document) at their parents' home or in a safe-deposit box. *See* Natalie Avon, *Why More Americans Don't Travel Abroad*,

¹³ Even if some other states request documentary proof of citizenship when issuing licenses, whether and under what circumstances Arizona would accept such licenses as satisfactory proof of citizenship is unclear. Even driver licenses sufficient to facilitate international travel throughout North America, which at present are issued by only four states, do not say on their face that the license holder is a U.S. citizen. Instead, they simply contain the word "enhanced"; thus, anyone submitting an enhanced driver license would be at the mercy of an Arizona election official's understanding the format of this out-of-state license. *See Enhanced Drivers Licenses: What Are They?*, Department of Homeland Security, <http://www.dhs.gov/enhanced-drivers-licenses-what-are-they> (last visited Jan. 15, 2013).

CNN (Feb. 4, 2011) (reporting that only 30% of Americans have passports).¹⁴

Second, retrieving and duplicating the requisite documentation can pose an obstacle. Many of the students whose documents are kept elsewhere will not be able to count on parents or guardians – who may not have the time, interest, or ability to seek out and copy the documents – to provide them with copies in time to register for an upcoming election.

2. Allowing Proposition 200 to stand would grant states even more leeway to impose restrictions on student voter registration. Indeed, that some states continue to limit student voting suggests that they would seize additional opportunities to do so. For example, in 2008, a registrar of voters in Virginia issued an official release falsely claiming that out-of-state students would lose their entitlement to health care under their parents' plans if they registered to vote in Virginia. *See* Tamar Lewin, *Voter Registration by Students Raises Cloud of Consequences*, N.Y. Times (Sept. 7, 2008).¹⁵ Refusal by many states to treat student IDs as adequate documentation for voting purposes is a particularly salient recent example of state hostility to student

¹⁴ Available at http://articles.cnn.com/2011-02-04/travel/americans.travel.domestically_1_western-hemisphere-travel-initiative-passports-tourismindustries?_s=PM:TRAVEL.

¹⁵ Available at http://www.nytimes.com/2008/09/08/education/08students.html?_r=0.

voting. *See* Jack Fitzpatrick, *College Students Face New Voting Barriers*, MinnPost (Aug. 16, 2012).¹⁶

3. Proposition 200 will also hamper campus voter registration drives, contravening Congress's intent to encourage such drives by making voter registration uniform. As the Federal Election Commission observed, "organized voter registration drives may prefer to use the national form when state forms are not readily available or are extremely complex, or where registrants come from many states." 59 Fed. Reg. 32,318 (June 23, 1994); *see generally* Diana Kasdan, Brennan Ctr. for Justice, *State Restrictions on Voter Registration Drives* 3 (2012).¹⁷ In 2012, with Proposition 200 enjoined with respect to federal form registrants, student voter registration in Arizona increased by 7000. *See Cat Tracks: November 8*, Daily Wildcat (Nov. 7, 2012).¹⁸ At the University of Arizona, more than 2000 students registered, thanks to the "largest student registration drive Arizona has ever had." *Id.*

If Proposition 200 is permitted to go into effect again, these drives will no longer be one-stop-shopping operations. Many of the potential registrants will not be carrying documents that satisfy Arizona law when they happen upon a volunteer in their dining hall or student union. Thus,

¹⁶ Available at <http://www.minnpost.com/politics-policy/2012/08/college-students-face-new-voting-barriers>.

¹⁷ Available at http://www.brennancenter.org/content/resource/state_restrictions_on_voter_registration_drives/.

¹⁸ Available at <http://www.wildcat.arizona.edu/article/2012/11/cat-tracks-november-8-11812>.

the individuals and groups conducting these drives will not be able to simply distribute, collect, and forward the NVRA postcards to registrars as Congress intended. Instead, they must either leave responsibility for obtaining the documentation and submitting the applications on individual voters, with all the problems *amici* have already described, or they must conduct costly and burdensome follow-up operations. If this Court permits Proposition 200 to go into effect, conducting a voter registration drive would accomplish little more than would leaving a stack of forms in a dorm common space.

Moreover, permitting nonuniform registration requirements, like the ones in Proposition 200, threatens the efficacy of college registration drives more broadly. “Dozens of colleges have begun their own voting registration drives in orientation programs, class registration, intranet Web sites and other interactions crucial to campus life, institutionalizing services that had often been left to outside efforts.” Steven Yaccino, *Colleges Take a Leap into Voter Registration*, N.Y. Times (Oct. 13, 2012).¹⁹ These drives seek to register students in many different states; some will want to register in the state where they grew up, while others will want to register in the state where they attend college.

If Arizona can tack onto the NVRA postcard a burdensome documentation requirement, then other states can presumably impose their own distinct but

¹⁹ Available at http://www.nytimes.com/2012/10/14/us/politics/more-colleges-take-a-leap-into-voter-registrationhtml?_r=0.

equally onerous requirements. If the organizers of college registration drives cannot rely on a standard form, but must instead provide state-specific applications and assistance, college voter registration drives would simply become impracticable.

The available evidence suggests that the vast majority (87%) of college students who are registered to vote will cast ballots. *Statistics*, Campus Vote Project.²⁰ This statistic reaffirms Congress's wisdom in reducing barriers to registration. Proposition 200 flouts this wisdom and contradicts Congress's clear intention.

III. The Burdens That Proposition 200 Will Impose On Voting By Qualified Citizens Who Live In Long-Term Care Facilities Reinforce The Conclusion That It Is Preempted By The NVRA.

Residents of long-term care facilities, like military and overseas voters and college students, have historically faced logistical and institutional obstacles to full exercise of the franchise. Congress has sought to improve their access to voter registration facilities and polling places, as well as to make it easier to register and vote by mail. Arizona's Proposition 200 creates new impediments, however, by requiring that many residents of long-term care facilities locate, photocopy, and mail satisfactory documentation of their citizenship. Proposition 200

²⁰ <http://www.campusvoteproject.org/statistics> (last visited Jan. 17, 2013)

thus eliminates much of the benefit of the NVRA for long-term care residents.

A. Congress Has Repeatedly Expressed A Federal Commitment To Facilitating Voting By Elderly And Disabled Citizens.

1. Many residents of long-term care facilities have physical conditions that prevent them from registering or voting in person. Prior to 1984, when in-person registration and voting requirements were the norm, “[t]he most common problem, and for many disabled and elderly citizens the most serious problem, [was] the physical inaccessibility of registration sites and polling places.” *Equal Access to Voting for Elderly and Disabled Persons: Hearing on H.R. 1250 Before the Task Force on Elections of the Comm. on H. Admin., 98th Cong. 112 (1983)* [hereinafter *Hearing on H.R. 1250*] (statement of Institute for Public Representation, Georgetown University Law Center). The prevalence of facilities that had too many steps or were wheelchair inaccessible, for example, resulted in “significant numbers of disabled and elderly citizens with mobility limitations” being excluded from the political process. *Id.*

2. In response, Congress initially enacted the Voting Accessibility for the Elderly and Handicapped Act (VAEHA) in 1984. Pub. L. No. 98-435, 98 Stat. 1678 (codified as amended at 42 U.S.C. §§ 1973ee–1973ee-6). The express purpose of the statute was “to promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections.” 42 U.S.C. § 1973ee. The VAEHA required

states for the first time to “provide a reasonable number of accessible permanent registration facilities” and “make available registration and voting aids for Federal elections for handicapped and elderly individuals.” *Id.* §§ 1973ee-2, -3(a).

Additionally, the VAEHA addressed a prevalent state practice mandating that elderly and disabled voters submit “official” documents in order to obtain an absentee ballot. In 1983, seventeen states required voters with disabilities to submit a doctor’s certificate, and twenty states, including Arizona, required notarization for at least one step in the process to vote absentee. *Hearing on H.R. 1250, supra*, at 118-19. The VAEHA scotched these practices by making it illegal in most cases to require notarization or medical certification for disabled voters applying for an absentee ballot. 42 U.S.C. § 1973ee-3(b).

3. The NVRA continues the process of vindicating the voting rights of elderly and disabled voters by requiring states to “accept and use” the Federal Form. *See* 42 U.S.C. § 1973gg-4(a). Congress was aware that the NVRA would make it easier for these citizens to register. *See, e.g.*, 139 Cong. Rec. H505 (daily ed. Feb. 4, 1993) (statement of Rep. Richard Neal) (“These new procedures are also a boon for the elderly and handicapped people who have difficulty getting to a municipal building to register in person.”).

B. Proposition 200 Will Exacerbate The Registration Difficulties Already Faced By Arizona Residents Of Long-Term Care Facilities.

Arizona's elderly population is expected to triple by 2050. *See* Patricia Gober, *Geo-Demographics of Aging in Arizona: State of Knowledge* 1 (2002).²¹ Much of that growth is the result of Arizona's attractiveness as a retirement destination – more than 47% of Arizona's senior citizens move to the state after they have turned fifty-five. *Id.* Those who come to Arizona from another jurisdiction where they were previously registered to vote face challenges in re-registering when they arrive at their long-term care facility. *See* Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 *McGeorge L. Rev.* 1065, 1103 (2007).

1. Proposition 200's documentation requirement may by itself foreclose many elderly residents from registering. Arizona law requires any person who has moved to the state, or even anyone who has moved to a different county within the state, to provide documentary proof of citizenship when registering or re-registering to vote. *Ariz. Rev. Stat.* § 16-166(G)-(H). Given the high percentage of Arizona senior citizens who move to the state after retiring, the registration requirements affect a significant number of Arizona's elderly voters. Even

²¹ Available at http://slhi.org/pdfs/studies_research/CoA_Geo-demographics_of_Aging.pdf.

lifelong Arizona residents, however, must comply with Proposition 200's documentation requirement if they retire or move to a long-term care facility in a different county.

It is hardly surprising that residents of nursing homes are less likely both to have the identification required by Proposition 200 and to be able to access and photocopy it. *Cf. Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 182 (2008) (opinion of Stevens, J., joined by Roberts, C.J. & Kennedy, J.) (recognizing the difficulty that newly arrived elderly residents may face in acquiring identification documents). A 2006 study found that 18% of American citizens over age sixty-five lacked government-issued photo identification. Brennan Ctr. for Justice, *Citizens Without Proof: A Survey of Americans' Possession of Documentary Proof of Citizenship and Photo Identification* 3 (2006).²² Retirees who move to a long-term care facility from out of state may simply choose not to obtain an Arizona driver license. Similarly, it should go without saying that many persons with physical disabilities will never have obtained a driver license if their impairment prevents them from driving. Finally, the problem of insufficient documentary proof of citizenship may be especially acute for elderly women, considering that "only 66% of voting-age women with ready access to *any* proof of citizenship have a document with [their] current legal name." *Id.* at 2 (emphasis in original).

²² Available at http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

2. Even when documents exist that would satisfy Proposition 200, elderly and disabled voters may face severe practical barriers to registering. First, they must know what Arizona's law requires. *See* Ariz. Rev. Stat. § 16-166(F) (instructing the county recorder to "reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship"). The instructions for filling out the NVRA postcard mention no requirement to provide supplementary documentation of citizenship. *See* U.S. Election Comm'n, *Register to Vote in Your State by Using This Postcard Form and Guide* 3-4 (2006).²³ Nursing home residents may therefore have to rely on staff, friends, or family to inform them of the additional steps needed to register that are not mentioned in the federal materials.

Second, those who know of the additional requirements still must locate their documents, access and use a photocopier to copy them, and then arrange for those documents to be mailed. Many elderly and disabled citizens likely can navigate the current version of the NVRA postcard, which the Election Assistance Commission designed to be "as 'user friendly' and clear as possible to the applicant." 59 Fed. Reg. 32,312 (June 23, 1994). Yet these same citizens, when confronted by Arizona's new requirement, may understandably find themselves unable to register on their own.

²³ Available at http://www.eac.gov/assets/1/Documents/Federal%20Voter%20Registration_1209_en9242012.pdf.

Prior experience shows that when elderly and disabled citizens require assistance to comply with registration requirements, they are less likely to achieve success. Facility staff face many competing demands on their time that will seem more important than helping residents register to vote. For example, one study found that when local voting officials traveled to nursing homes to facilitate registration and voting, resident participation was far higher than when the responsibility was left to facility staff. *See* Joan L. O'Sullivan, *Voting and Nursing Home Residents: A Survey of Practices and Policies*, 4 J. Health Care L. & Pol'y 325, 344-45 (2001). Even those staff currently willing to assist residents would be significantly more burdened under Proposition 200. It is one thing to expect facility staff to help residents fill out a simple form like the NVRA postcard; it is quite another to expect them to search for documents that may not be in files the facility itself maintains and then complete a variety of secretarial tasks.

Worse, many long-term care facilities provide assistance to residents only after the staff conclude, often on the basis of exceptionally subjective criteria, that a would-be voter should retain his voting rights. *See* Kohn, *supra*, at 1073. This self-authorized, ad hoc screening can take many forms – at some facilities, staff will ask residents specific questions on subjects such as current events to assess whether they should vote. *Id.* Other facilities may opt to provide information on voting only to residents that staff deem sufficiently competent. *Id.* Either way, elderly and disabled voters will lose out on the opportunity, which Congress provided under the

NVRA and related statutes, to participate in elections. Because Proposition 200 frustrates Congress's goals in enacting the NVRA and providing for a uniform, easy-to-complete federal form, this Court should hold that Arizona's additional documentation requirement is preempted.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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