No. 12-71

In the
Supreme Court of the United States

STATE OF ARIZONA, *ET AL.*
PETITIONERS

v.

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

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

Brief of the American Unity Legal Defense Fund As *Amicus Curiae* Supporting Petitioners

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QUESTIONS PRESENTED

Did the court of appeals err:

1) in creating a new, heightened preemption test under Article I, Section 4, Clause 1 of the U.S. Constitution ("the Elections Clause") that is contrary to this Court's authority and conflicts with other circuit court decisions, and

2) in holding that under that test the National Voter Registration Act preempts an Arizona law that requests persons who are registering to vote to show evidence that they are eligible to vote?

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STATEMENT OF INTEREST

Amicus curiae American Unity Legal Defense Fund ("AULDF") is a national non-profit educational organization dedicated to maintaining American national unity into the twenty-first century.[1] www.americanunity.org. AULDF has filed *amicus* briefs in recent cases, including *Arizona v. United States* ("*Arizona*"), No. 11-182, ___ U.S. ___ (June 25, 2012); *Chamber of Commerce v. Whiting,* No. 09-115, 563 U.S. __, 131 S.Ct. 1968 (2011), and *Horne v. Flores*, 557 U.S. 433, n. 10, 129 S.Ct. 2579, 2601 n. 10 (2009) (*citing* AULDF's *amici* brief). AULDF filed amicus briefs in the Ninth Circuit panel and en banc proceedings in this case.

AULDF supports the Petition and agrees with its reasons for granting the writ. AULDF writes separately to discuss "the prevalence and character of the fraudulent practices that allegedly justify those requirements." *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) ("*Purcell*") (Stevens, J., concurring), and the effect those factual findings should have on the lower court's analysis.

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[1] Pursuant to Rule 37.2(a), *amicus* certifies that counsel of record for all parties received notice of its intention to file this brief more than ten days prior to its due date, and all counsel of record consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

PRELIMINARY STATEMENT

It is important at the outset to identify clearly what the Ninth Circuit held below:

Even in the wake of widespread evidence of voter registration fraud, a federal agency can require a state to "accept and use" a voter registration application whose sole protection against non-citizen registration is a signature on a postcard.[2]

In recent years, "voting rights lawsuits have become part of the landscape,"[3] many involving "voter I.D." or requirements that prospective voters identify themselves.[4] This is a "voter I.D." case, but looks at a different stage of the voting process from the cases that have attracted substantial media headlines. This appeal deals only with a "voter registration fraud" law. The other cases often

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[2] "Once the [U.S. Elections Assistance Commission] determined the contents of the Federal Form, Arizona's only role was to make that form available to applicants and to 'accept and use' it for the registration of voters." *Gonzalez v. Arizona*, 677 F.3d 383, 400 (9th Cir. 2012) (en banc) ("*Gonzalez IV*"), Petition Appendix ("Pet. App.") at 1c, 36c.

[3] Robert Barnes, "In Ohio and elsewhere, battles over state voting laws head to court," *The Washington Post*, Aug. 6, 2012, A1, available at: http://www.washingtonpost.com/politics/in-ohio-and-elsewhere-battles-over-state-voting-laws-head-to-court/2012/08/05/a56b8ad6-dc19-11e1-8e43-4a3c4375504a_story.html?hpid=z4.

[4] "The controversy over voting rights is playing out against the backdrop of a growing national debate over the issue." Sari Horowitz, "Eric Holder vows to aggressively challenge voter ID laws," *The Washington Post*, July 10, 2012, A1, available at: http://www.washingtonpost.com/world/national-security/eric-holder-vows-to-aggressively-challenge-voter-id-laws/2012/07/10/gJQApOASbW_story.html.

involved challenges to "voter impersonation fraud" laws that require voters to show identification at the polls;[5] such laws were upheld in *Crawford v. Marion County Elections Board*, 553 U.S. 181 (2008), and in this case. *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (en banc) ("*Gonzalez IV*"); Pet. App. 6c ("We uphold Proposition 200's requirement that voters show identification at the polling place").

In contrast, this appeal involves voter registration fraud. The Ninth Circuit prohibited the use of any voter identification to prevent voter registration fraud beyond a simple signature on a federal form. *Id*., 677 F.3d at 400; Pet. App. 33c.

The distinction is critical because, as this Court recognized the last time this case came before it, the court must resolve, *inter alia*, "the prevalence and character of the fraudulent practices that allegedly justify those requirements." *Purcell*, 549 U.S. at 6 (Stevens, J., concurring).

The contention in the voter impersonation cases was that such fraud "simply does not exist."[6] Brief of the Indiana Democratic Party in *Crawford*,

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[5] "Thirty states presently have laws in place that will require all voters to show ID at the polls this November. That number could rise; a total of thirty-three states have passed voter ID laws." "Voter Identification Requirements," National Conference of State Legislatures, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx, (last checked Aug. 3, 2012).

[6] This contention is incorrect, as *amicus* AULDF demonstrated in its brief in *Crawford*. *See, e.g.*, Brief of American Unity Legal Defense Fund as *Amicus Curiae* in *Crawford*, No. 07-21, 07-25, at 9-15 (documenting in detail several examples of in-person voter impersonation).

No. 07-21, 07-25, at 44. This Court rejected the "simply does not exist" theory, saying

> It remains true, however, that flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists, that occasional examples have surfaced in recent years, and that Indiana's own experience with fraudulent voting in the 2003 Democratic primary for East Chicago Mayor – though perpetrated using absentee ballots and not in-person fraud – demonstrate that not only is the risk of voter fraud real but that it could affect the outcome of a close election.

Crawford, 553 U.S. at 195-96 (footnotes omitted).

Thus, "the prevalence and character of the fraudulent practices" can be shown by examples of past fraud and by recent "occasional" examples. Under *Crawford*'s footnote 12, even a single incident would be sufficient. *Crawford*, 553 U.S. at 195 n. 12, *citing* Le & Nicolosi, "Dead Voted in Governor's Race," *Seattle Post–Intelligencer*, Jan. 7, 2005, p. A1.

Other circuits have followed this standard. The Eleventh Circuit used this standard to review a photo identification case. *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009). "Nor do the more recent decisions in *Burdick* [*v. Takushi*, 504 U.S. 428 (1992)], . . . and *Crawford*, [citations omitted] place an evidentiary burden on the state when defending a voting regulation. . . . The Supreme Court did not require Indiana to prove specific instances of voter fraud, and we decline to impose that burden on Georgia." 554 F.3d at 1353. The Tenth Circuit earlier used the same standard. *ACLU*

of New Mexico v. Santillanes, 546 F.3d 1313, 1323 (10th Cir. 2008)("Just as the Supreme Court did not require Indiana to present specific instances of past conduct to justify its photo identification requirements, we do not require Albuquerque to make such a showing.").

In contrast, there is no similar assertion that voter registration fraud "simply does not exist." *Crawford*, for example, noted that the Brennan Center for Justice, a fraud denier, admitted that "much of the [in-person] fraud was actually absentee ballot fraud or voter registration fraud." *Crawford*, 553 U.S. at 195 n. 12.

Nor is there any real question about the existence of voter registration fraud involving non-citizens in particular. Another prominent fraud denier, Prof. Richard Hasen, wrote recently: "Unlike impersonation fraud, noncitizen voting cannot be dismissed as a Republican fantasy." Richard Hasen, "A Détente Before the Election," *The New York Times*, August 5, 2012, *available at*: http://campaignstops.blogs.nytimes.com/2012/08/05/a-dtente-before-the-election/?ref=opinion (last visited Aug. 6, 2012). In *United States v. Knight*, 490 F.3d 1268, 1270 (11th Cir. 2007), the Eleventh Circuit upheld the conviction of a Jamaican citizen who voted in the 2000 Presidential election. In *Simmons v. Jones*, 838 S.W.2d 298, 299 (Tex. App. 1992), the Court of Appeals of Texas, El Paso, reported that "Simmons lost one vote because one person voted for him who was not a citizen of the United States."

Arizona has a similar record: "between 1996 and [2006], as many as 232 non-citizens tried to register to vote and that the State prosecuted ten of those 232 alleged non-citizens." *Gonzalez v. Arizona*,

485 F.3d 1041, 1048 (9th Cir. 2007) ("*Gonzalez I*"). Even before Arizona became a State, newspapers reported non-citizen voter fraud: "In 1868, the *Arizona Miner* had reported 'hundreds of non-citizens of Mexican origin at Tucson, Tubac, and other places' voting for the same United States congressional candidate 'as many as three times in one day'". Paula Mitchell Marks, AND DIE IN THE WEST, 1996, P. 108.

The New York Times estimated in 2008 that thousands of non-citizens tried to register to vote in Arizona in the prior five years. Ian Urbina, "Voter ID Battle Shifts to Proof of Citizenship," *The New York Times*, May 12, 2008, www.nytimes.com/2008/05/12/us/politics/12vote.html.

And a congressional committee reported:

> The [Maricopa] county recorder [Helen Purcell] has received inquiries from people seeking to become U.S. citizens who have been told by Immigration and Customs Enforcement to obtain a letter from her office confirming they have neither registered to vote nor voted. To date, a review of these matters has turned up 37 non-citizens who have registered to vote. Fifteen of these individuals have voted.

Committee on the Judiciary, "The Deceptive Practices and Voter Intimidation Prevention Act of 2007," H. R. Rep. 110-101 (2007), at 12.

This evidence of non-citizen voter participation does not necessarily mean that there is criminal intent. In June 2006, for example, Francine Busby lost the special election to replace convicted Cong. Randy "Duke" Cunningham (R-CA) in part because she was seen to have encouraged voting by illegal immigrants. "At the end of the event, a man asked Busby a question in Spanish, which was translated

for her: 'I want to help, but I don't have papers.' Busby responded: 'Everybody can help, yeah, absolutely, you can all help. You don't need papers for voting, you don't need to be a registered voter to help.'" John Gizzi, "GOP Moderate Scrapes by After Democrat Panders to Illegals," *Human Events*, June 12, 2006, *available at:* www.humanevents.com/article.php?print+yes&id=15479. Busby argued that she misspoke, but observers noted "those remarks really hurt Busby." *Id*.

It is not just Busby's encouragement which is remarkable. What is equally important, in the context of this case, is that an illegal immigrant wanted "to help." As the fear of immigration enforcement diminishes after federal agencies have announced that only criminal aliens and terrorists will be removed,[7] *Arizona*, __ U.S. at ___, 132 S.Ct. at 2521 (Scalia, J., dissenting), immigrants are increasingly likely to be encouraged to participate, legally or not, in the American political system.[8]

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[7] This lack of interior immigration enforcement and the agency memoranda setting forth that policy is discussed in detail in *Amicus* AULDF's brief in *Arizona*. No. 11-182, Pp. 6-11.

[8] Nor is such encouragement from the highest federal officials unique to this Administration. On the weekend before the November 2000 elections, the California Democratic Party mailed hundreds of thousands of fake "Voter Identification Cards" to lists which included non-citizens. Julie Foster, "Non-citizens vote with 'Clinton card'?" WorldNet Daily, November 7, 2000, *available at* www.worldnetdaily.com/news/printer-friendly.asp?ARTICLE_ID=18000. The cards were accompanied by a letter signed by then-President Bill Clinton, who exhorted recipients to vote. *Id*.

The Clinton letter included a postscript, just below President Clinton's signature, which read: "Here is your personal Voter Identification Card. Sign your name, then detach

A more contentious example of non-citizen voter registration fraud was in the 1996 election in California's 46th Congressional District. Comm. on House Oversight, "Dismissing the Election Contest Against Loretta Sanchez," H. Rpt. 105-416. In that election, Loretta Sanchez defeated incumbent Robert Dornan by only 979 votes. *Id.*, at 15. A congressional investigation found "significant vote fraud and vote irregularities."[9] *Id*., at 16.

An advocacy group was alleged to have encouraged illegal voter registration and voting. *Id*., at 3. The Orange County, California, District Attorney found that 61% of the voter registrations by the advocacy group, Hermandad Mexicano Nacional, were illegal. *Id*., at 337. In addition, the California Secretary of State determined that 303 non-citizens registered by the group had voted in the disputed election. *Id*., at 19, 337.

The organization admitted having registered illegal immigrants. PBS Online Newshour, "Contested Contest," *Online Focus*, October 22, 1997, *available at* www.pbs.org/newshour/bb/congress/july-dec97/dornan_10-22.html ("And Lopez of Hermandad Mexicana admits his group registered non-citizens."). There was no prosecution.

These are not isolated frauds, but are similar to allegations of fraudulent voter registration

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your card. Bring your card with you to your polling place on Election Day. It will help your voting go more smoothly." *Id.* A copy of the Clinton letter can be found at: http://www.worldnetdaily.com/images/20001106_Clintonltr.jpg.

[9] The Committee nevertheless determined that the number of non-citizen and other illegal votes uncovered by the investigation was not as large as Sanchez's margin of victory, so the election challenge was dismissed. *Id*.

incidents nationwide. Some of these allegations are staggering in their magnitude, particularly those involving the now-defunct advocacy group, the Association of Community Organizations for Reform Now ("ACORN").[10] Of 1.3 million voters ACORN claimed to have registered, only 450,000 were actually legitimate new voter registrations. Michael Falcone, "Group's Tally of New Voters Was Vastly Overstated," *The New York Times*, Oct. 24, 2008, A1, *available at* www.nytimes.com/2008/10/24/us/politics/24acorn.html. ACORN officials admitted that up to 30 percent of the registrations they submitted were "faulty." *Id*.

ACORN worked in Arizona and was an original plaintiff in this case. First Amended Complaint, ¶ 17. ACORN off-shoots are still conducting voter registration drives. *See, e.g.,* Tony Lee, "Watchdog Group Calls on IRS to Investigate Re-Branded TX

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[10] *See, e.g.,* Eric Shawn, "ACORN Pleads Guilty to Voter Registration Fraud in Nevada," FoxNews.com, April 6, 2011, http://www.foxnews.com/politics/2011/04/06/acorn-pleads-guilty-voter-registration-fraud-nevada/, (last visited Aug. 2, 2012); "Three of seven defendants in the biggest voter-registration fraud scheme in Washington history have pleaded guilty and one has been sentenced, prosecutors said Monday. . . . The defendants were all temporary employees of ACORN." Keith Ervin, "Three Plead Guilty in Fake Voter Scheme," *Seattle Times*, October 30, 2007, *available at* http://seattletimes.nwsource.com/html/localnews/2003982533_acorn30m.html?syndication=rss. "Federal indictments allege the four turned in false voter registration applications. Prosecutors said the indictments are part of a national investigation," KMBC-TV, "ACORN Workers Indicted on Alleged Voter Fraud," Kansas City, Missouri, Nov. 1, 2006, *available at:* http://www.kmbc.com/politics/10214492/detail.html.

ACORN Branch," Breitbart.com, July 20, 2012, http://www.breitbart.com/Big-Government/2012/07/19/Taxpayer-Watchdog-Group-Calls-on-I-R-S-To-Investigate-Re-Branded-Texas-ACORN-Branch, (last visited Aug. 2, 2012).

Indeed, at least one expert, Kansas Secretary of State Kris Kobach, attributes the recent surge in state voter identification laws to widespread concern about ACORN and similar efforts. Ryan J. Reilly, "Kris Kobach credits ACORN Hysteria With GOP-led Voter ID Renaissance," TPM, July 26, 2012, http://tpmmuckraker.talkingpointsmemo.com/2012/07/kris_kobach_credits_acorn_coverage_for_voter_id_push_video.php (last visited on Aug. 2, 2012).

The context of this case is that voter registration fraud is a known, widespread danger. Whether or not voter impersonation fraud exists, it has not been reported to be as prevalent as voter registration fraud. Courts, following *Crawford*, routinely uphold the use of identification to prevent the less-likely voter impersonation fraud, as did the Ninth Circuit below. *Gonzalez IV*, 677 F.3d at 388; Pet. App. 31c. But, despite the higher likelihood of voter registration fraud, the decision below prevents Arizona from asking for anything more from voter registration applicants using the "Federal Form" than a signature on a postcard. *Gonzalez IV*, 677 F.3d at 398, 400; Pet. App. 32c-33c.

This Court, in a Voting Rights Act pre-clearance decision, seemed to view the statute differently:

> Nonetheless, implementation of the NVRA[11] is not purely ministerial. The NVRA still leaves room for policy choice. The NVRA does not list, for example, all the other information the State may – or may not – provide or request.

Young v. Fordice, 520 U.S. 273, 286 (1997).

Thus, at a time when advocacy organizations admit that they have submitted hundreds of thousands of "faulty" voter registration applications, the Ninth Circuit suggests that the only protection against fraud a State is permitted to use on a federal form that must be accepted is whether the applicants "attested to being U.S. citizens." *Gonzalez IV*, 677 F.3d at 398-99 (emphasis added); Pet. App. 31c. This willful blindness toward fraud cannot be consistent with the "language and structure" of the NVRA, whose four express purposes include "increas[ing] the number of eligible citizens who register to vote," "enhanc[ing] the participation of eligible citizens as voters," "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1), (2), (3), and (4).

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[11] National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg *et seq*.

ADDITIONAL REASONS TO GRANT THE WRIT

The Petition described several conflicts with other decisions, including over preemption under the Supremacy and Elections Clauses, and under the NVRA. There are, however, two other important conflicts with other decisions.

First, the Ninth Circuit misunderstood the "language and structure" of the NVRA, rewrote the text of the statute, ignored three of the four statutory purposes of the NVRA, and its opinion conflicts with, *inter alia*, *Fordice*.

Second, the Ninth Circuit minimized the state interests set forth by this Court in *Purcell*, the last time this case came before it, and considered in *Crawford* and by the 11th and 10th Circuits.

In this hyper-politicized environment, the lower courts are struggling to determine challenges to voter identification laws.[12] The Court should grant the Petition to assist the lower courts in understanding how to analyze voter registration fraud laws.

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[12] *See, e.g.*, *Voting Integrity Project v. Andrade*, No. 3:12-cv-00044, (S.D.Texas, August 2, 2012), Opinion And Order Granting In Part And Denying In Part Plaintiffs' Motion For A Preliminary Injunction, Pp. 37-41. "Although it is clear that the Elections Clause grants Congress the power to override state election laws regulating federal elections, case law says little about the proper standard to apply when analyzing Elections Clause preemption." *Id.*, at 38. The lower court there adopted the Ninth Circuit's analysis. *Id*., at 40.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS ON THE "LANGUAGE AND STRUCTURE" OF THE NVRA.

The initial question is whether the Ninth Circuit correctly assessed the "language and structure" of the NVRA. *Gonzalez IV,* 677 F.3d at 403 n. 29; Pet. App. 41c. Whether or not, as the Ninth Circuit asserts, there is a difference between Supremacy Clause and Election Clause preemption analyses, the difference is likely not in the controlling nature of Congressional intent. "[O]ur task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Sprietsma v. Mercury Marine,* 537 U.S. 51, 62-63 (2002).

The Ninth Circuit, in its analysis, deflected this question to an agency's interpretation and "balance" of legislative purposes:

> With respect to the Federal Form, Congress delegated to the EAC the decision of how to balance the need "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and the need to protect "the integrity of the electoral process," *id*. § 1973gg(b)(1), (3). The EAC struck this balance by requiring applicants to attest to their citizenship under penalty of perjury, but not requiring other proof of citizenship.

Gonzalez IV, 677 F.3d at 403; Pet. App. 42c.

Leaving such a decision to a federal agency means that a decision not to enforce the statute operates the same as an affirmative act by Congress

to displace the State law, but this would seem to conflict with decisions such as *Altria Group, Inc. v. Good*, 555 U.S. 70, 89-90 (2008)("agency nonenforcement of a federal statute is not the same as a policy of approval.").[13]

The Court should not ratify an "unauthorized assumption by [the] agency of [a] major policy decisio[n] properly made by Congress." *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983), *quoting, American Ship Building Co. v. NLRB,* 380 U.S. 300, 318 (1965). Similarly, while reviewing courts should uphold an agency's reasonable and defensible constructions of its enabling statute, they must not "rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Id., quoting NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

Leaving aside these questions, however, the Ninth Circuit's analysis indicates substantial conflicts

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[13] Such an interpretation also raises questions about implied repeals. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662-64 (2007)("repeals by implication are not favored" and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." (internal quotation omitted)). If the Elections Clause treats the NVRA as a later enactment by the same "legislature" that passed Arizona's Proposition 200, *Gonzalez IV*, 677 F.3d at 395, Pet. App. 20c, then any repeal that is not express would necessarily be implied. And it likely could not be said that the Arizona provision is a "positive repugnancy" to the federal act, *Home Builders*, 551 U.S. at 664 n. 8, perhaps justifying implied repeal, since it seems to support the statutory purposes of the NVRA. 42 U.S.C. § 1973gg-b(1)-(4).

with statutory interpretation principles as described in other decisions.

A. The Ninth Circuit's Analysis Would Rewrite the Text of the NVRA.

The relevant statutory provision says that a State "may require only such identifying information (including the signature of the applicant) and other information (including data relating to previous registration by the applicant), as is necessary to enable the appropriate State election official to assess the eligibility of the applicant and to administer voter registration and other parts of the election process." 42 U.S.C. § 1973gg-7(b)(1).

The Ninth Circuit would rewrite that provision to read: "may require only … the signature of the applicant." This would, in effect, delete the remainder of the sentence so as not to suggest that information other than the signature might be requested.

That revision would be inconsistent with *Fordice*. The Court "recognize[d] that the NVRA imposes certain mandates on States, describing those mandates in detail." 520 U.S. at 286. But the *Fordice* Court disagreed with the Ninth Circuit's revision of the relevant sentence: "The NVRA does not list, for example, all the other information the State may – or may not – provide or request." *Id*. The original panel in this case similarly analyzed this requirement and determined that the NVRA "plainly allow[s] states, at least to some extent, to require their citizens to present evidence of citizenship when registering to vote." *Gonzalez I,* 485 F.3d at 1050-51.

It would also conflict with the decision of the Sixth Circuit in *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000) (upholding requirement that voter

registration applicants provide valid social security numbers to register). "The NVRA does not specifically forbid use of social security numbers." *Id.*, 226 F.3d at 755.

The Ninth Circuit's reading of the "language and structure of the NVRA" conflicts with that in *Fordice* and *McKay*.

B. The Ninth Circuit Opinion Recognizes Only One of the Four Purposes of the NVRA.

The Ninth Circuit mentioned in passing that the NVRA has "four articulated purposes," *Gonzalez,* 677 F.3d at 403; Pet. App. 41c, but saw only one as controlling: "Proposition 200's registration provision is discordant with **the NVRA's goal** of streamlining the registration process." *Gonzalez IV*, 677 F.3d at 400 (emphasis added); Pet. App. 36c.

The use of the term "goal" (instead of "goals") of the NVRA is revealing. The NVRA was a balance of interests with more than one purpose, but the Ninth Circuit did not recognize most of them.

This "single-purpose" view of the NVRA is inconsistent with the statutory language and has been rejected by this Court. "In the … NVRA … Congress established procedures that would **both** increase the number of registered voters **and** protect the integrity of the electoral process." *Crawford*, 553 U.S. at 192 (emphasis added). *See, also*, *Project Vote/Voting for America v. Long*, 682 F.3d 331, 334 (4th Cir. 2012)("Congress enacted the NVRA in order to 'increase the number of eligible citizens who register to vote' in federal elections, 'enhance[ ] the participation of eligible citizens as voters,' 'protect the integrity of the electoral process,' and 'ensure

that accurate and current voter registration rolls are maintained.'"); *Lake v. Neal,* 585 F.3d 1059, 1060 (7th Cir. 2009) ("Congress passed the NVRA to (1) make it easier to register to vote and (2) to help protect the integrity of the process by ensuring that accurate voter registration rolls are maintained."); *U.S. Student Ass'n Foundation v. Land*, 546 F.3d 373, 391 (6th Cir. 2008) (NVRA has "dual objectives" of "increas[ing] the number of eligible citizens who register to vote in elections for federal office,' while also assuring that '*accurate and current* voter registration rolls are maintained." Emphasis in original.); *Disabled in Action of Metropolitan New York v. Hammons*, 202 F.3d 110, 114 (2nd Cir. 2000).

Each of the four statutory purposes of the NVRA includes a reference to eligibility, integrity or accuracy:

- to "increase the number of **eligible citizens** who register to vote";[14]
- to "enhance[] the participation of **eligible citizens** as voters";[15]
- to "**protect the integrity** of the electoral process";[16] and,
- to "ensure that **accurate and current** voter registration rolls are maintained."[17]

None of the highlighted terms fit into a singular "goal" of the NVRA, solely to "streamline" registration. The Second Circuit, for example, rejected an argument that defeat of an amendment by

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[14] 42 U.S.C. § 1973gg(b)(1) (emphasis added).

[15] 42 U.S.C. § 1973gg(b)(2) (emphasis added).

[16] 42 U.S.C. § 1973gg(b)(3) (emphasis added).

[17] 42 U.S.C. § 1973gg(b)(4) (emphasis added).

the NVRA conference committee was effective, in the face of statutory text, to show the controlling nature of the purpose of increasing voter registration opportunities. *Disabled in Action*, 202 F.3d at 127.

Each statutory purpose is inconsistent with an interpretation which permits only a signature requirement to account for eligibility concerns. Congress was apparently as interested in "protect[ing] the integrity of the electoral process," § 1973gg(b)(3), as in reduc[ing] state-imposed obstacles to federal registration.

"There is no question about the legitimacy or importance of the State's interest in counting **only the votes of eligible voters**. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for **carefully identifying all voters participating in the election process**." *Crawford,* 553 U.S. at 196 (emphases added). The *Crawford* analysis of the state's interests was not confined to the polling places, but seems to encompass the "election process." *Id.*

Protecting the integrity of the electoral process is necessary to the achievement of the other purposes. For example, Congress recognized that the integrity of the electoral process was crucial to "enhanc[ing] the participation of eligible citizens as voters." § 1973gg(b)(2). In an earlier proceeding in this case, the Court agreed with that approach: "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell*, 549 U.S. at 4*; see, also, John Doe No. 1 v. Reed,* ___ U.S. ___, ___, 130 S.Ct. 2811, 2819 (2010) ("The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce

fraudulent outcomes, but has a systemic effect as well: It 'drives honest citizens out of the democratic process and breeds distrust of our government'", *citing, Purcell,* 549 U.S. at 4, and *Crawford,* 553 U.S. at 196).

By focusing solely on a singular "goal" of the NVRA, the Ninth Circuit conflicts with *Crawford* and other cases. The lower court's view does not appear to be supported by either the text of the statute or precedent. The Petition should be granted.

II. THE NINTH CIRCUIT'S FAILURE TO RECOGNIZE LEGITIMATE STATE INTERESTS CONFLICTS WITH OTHER COURTS' DECISIONS.

This Court, in *Purcell* and *Crawford*, established standards for reviewing the state interests underlying voter identification laws. The Ninth Circuit, on the other hand, simply announced, as part of its Elections Clause analysis, that "the Elections Clause affects only an area in which the states have no inherent or reserved power." *Gonzalez IV*, 677 F.3d at 392; Pet. App. 16c.

It is true that the Elections Clause looks to the Constitution to find state interests, *id*., but that does not necessarily mean that the States have no interests to consider. The Ninth Circuit simply ignored the legitimate State interests long recognized by this Court, saying "Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause need not be concerned with preserving a 'delicate balance' between competing sovereigns". *Gonzalez IV*, 677 F.3d at 392; Pet. App. 16c.

The States have long been viewed as having inherent rights to protect against voter fraud. "There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Crawford,* 553 U.S. at 196; *see also, Project Vote/Voting for America*, 682 F.3d at 340 ("State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible.").

Similarly, the State has a substantial interest in protecting voter confidence:

> Finally, the State contends that it has an interest in protecting public confidence "in the integrity and legitimacy of representative government." Brief for State Respondents, No. 07-25, p. 53. While that interest is closely related to the State's interest in preventing voter fraud, public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process. As the Carter-Baker Report observed, the "electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."

Crawford, 553 U.S. at 197.

There are thus three specific state interests at stake, two involving prevention of voter fraud ("counting only the votes of eligible voters" and "orderly administration and accurate

recordkeeping"), and one involving the protection of public confidence in the integrity of the voting process by deterring fraud and "confirm[ing] the identity of voters." *Id*. Each of these three interests is implicated in this case and protected by the Arizona identification requirement.

As shown *supra*, each of the *Crawford* sources of evidence of voter fraud, 553 U.S. at 195, is present here: historical accounts; recent examples; and Arizona's own evidence of fraud significant enough to affect close elections. That evidence shows that Arizona's interest in preventing voter fraud is strong.

Arizona's separate, though related, concern about public confidence in the electoral system is also strong. In *Purcell*, an earlier part of this case, this Court, per curiam, said:

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

Purcell, 549 U.S. at 4.

Arizona has perhaps one of the strongest indications that the public lacked confidence in the electoral system: Arizona's voters overwhelmingly voted to change the system and replace it with one in which they had more confidence. In response to increasing concerns about the level of voter fraud in Arizona and elsewhere, in 2004, the voters of Arizona adopted Proposition 200. "The measure sought to combat voter fraud by requiring voters to present proof of citizenship when they register to vote and to

present identification when they vote on election day." *Purcell*, 549 U.S. at 2; *see also, Santillanes*, 546 F.3d at 1323 ("The resolution submitting this measure to the voters echoes those [fraud] concerns.").

Yet, despite this Court's admonition that the lower courts engage in a factual investigation of, *inter alia*, "the prevalence and character of the fraudulent practices", the Ninth Circuit did not mention or apparently consider the direct or public confidence implications of the fraud found in the case record or in other sources used by this Court in its reviews. As a result, the lower court's Elections Clause analysis may have downplayed legitimate State interests recognized by other courts.

At a minimum, such an analysis seems to conflict with the interests recognized in *Purcell* and *Crawford*. It also conflicts with other Circuits' decisions, including the 11th Circuit's decision in *Common Cause/Georgia*, 554 F.3d at 1354-55, *quoting Burdick*, 504 U.S. at 440. "The legitimate state interest in preventing voter fraud, as recognized in *Crawford*, is more than 'sufficient to outweigh the limited burden' of producing [citizenship] identification." *Id*.

These State interests seem to be significant enough to be considered in any review of voter registration procedures. If the Court wishes to preserve these State interests, it should review this decision.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* respectfully requests this Court to grant the Petition and review the decision below.

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