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Nos. 08-17094, 08-17115

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**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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MARIA M. GONZALEZ, et al.,

*Appellant,*

vs.

STATE OF ARIZONA, et al.,

*Appellee.*

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On Appeal from the United States District Court  
for the District of Arizona  
No. CV 06-01268-PHX-ROS  
The Honorable Judge Roslyn O. Silver

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

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

*Amici* are Members of Congress whose names are listed in the Appendix. Members of Congress have a particular interest in seeing that federal statutes are properly interpreted and implemented. Because this case implicates Congress's intent in enacting the National Voter Registration Act of 1993, the views of *amici* are particularly relevant. *Amici* include the Chairman of the Committee on House Administration, which has jurisdiction over federal elections, and the Chairwoman of its Subcommittee on Elections.

### INTRODUCTION

The National Voter Registration Act of 1993 (NVRA), 42 U.S.C. § 1973gg *et seq.*, was enacted to provide citizens with a simple and uniform method for registering to vote. Congress sought to “establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” *Id.* § 1973gg(b)(1). Toward this end, NVRA requires States to allow registration by mail (*id.* § 1973gg-2(a)(2)), creates a uniform Federal Form that States “shall accept and use” (*id.* § 1973gg-4(a)(1)), prohibits States from developing their own forms that impose onerous requirements on would-be voters (*id.* §§ 1973gg-4(a)(2); 1973gg-7(b)), and directs States to “ensure” that eligible applicants who

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<sup>1</sup> All parties have consented to the filing of this amicus brief. Fed. R. App. P. 29(a).

return a valid mail voter registration form on time are registered to vote (*id.* § 1973gg-6(a)(1)(B)).

Congress has “‘the power to override state regulations’ by establishing uniform rules for federal elections, binding on the States.” *Foster v. Love*, 522 U.S. 67, 69 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)). “[W]hen the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” the State law must give way under the Supremacy Clause of the Constitution. *United States v. Locke*, 529 U.S. 89, 109 (2000) (internal quotation marks and citation omitted).

In 2004, Arizona voters adopted Proposition 200, a ballot initiative that restricts voter registration to the point of conflict with NVRA. Proposition 200 requires proof of citizenship before an eligible voter will be added to the rolls. Thus, even though NVRA requires States to “accept and use” the Federal Form, in Arizona, a fully-complete Federal Form will be rejected if new voters have not satisfied additional, state-imposed registration procedures. Similarly, even though NVRA prevents States from requiring information that is not “necessary” on State-developed forms, Arizona requires many applicants to supply documentary proof of citizenship, which has been determined *not* to be necessary by Congress and by the Election Assistance Commission (EAC), the federal agency that administers and designs the Federal Form.

After Proposition 200 was passed, Arizona’s Secretary of State petitioned the EAC to amend the Federal Form to incorporate Proposition 200’s additional proof of citizenship procedure. The EAC refused and further advised that, pursuant to NVRA, “Arizona may not refuse to register individuals to vote in a Federal election for failing to provide supplemental proof of citizenship, if they have properly completed and timely submitted the Federal Registration Form.” Letter from Thomas R. Wilkey, Executive Director, EAC, to Jan Brewer, Arizona Secretary of State (Mar. 6, 2006); *see also* EAC Tally Vote: Arizona’s Request for Accommodation (July 6, 2006). Nonetheless, Arizona continues to use Proposition 200 to reject voter registration applications. The procedural barriers imposed by Arizona interfere with Congress’s establishment of a uniform, simplified mail voter registration system. As a result, the voter registration requirements in Arizona’s Proposition 200 are preempted by federal law.

### **ARGUMENT**

Section 4 of Proposition 200 provides that county recorders, who are responsible for maintaining Arizona’s voter registration rolls, “shall *reject* any application for registration that is not accompanied by satisfactory evidence of United States citizenship.”<sup>2</sup> (Emphasis added.) Arizona “requires submission of

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<sup>2</sup> Evidence deemed “satisfactory” by Proposition 200 is limited to: (1) the number of the applicant’s Arizona driver’s license or other identification license issued after October 1, 1996, or the number of a driver’s license issued by another

(cont’d)

proof of U.S. citizenship along with whichever application form the registrant submits.” Separate Statement of Facts in Support of Motion for Partial Summary Judgment by Defendants State of Arizona and the Arizona Secretary of State ¶ 9.

Arizona will refuse to register an otherwise eligible applicant using the Federal Form unless that person *also* happens to submit proof of citizenship that Proposition 200 deems “satisfactory.” The state form developed by Arizona similarly requires “satisfactory” proof of citizenship, even though such proof is unnecessary—as demonstrated by the lack of a corresponding requirement in the Federal Form itself. Thus, neither Arizona’s handling of the Federal Form nor the design of the Arizona Form comports with the plain language of NVRA.

Moreover, if there were any doubt that NVRA prohibited States from imposing obstacles to registration such as requirements of documentary proof, the Act’s legislative history makes it unambiguous. In passing NVRA, Congress specifically considered *and rejected* an amendment that would have *authorized* the States to require documentary proof of citizenship, and the bill’s detractors objected on the basis that it would *prevent* the same additional steps that Arizona now requires.

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state if the license indicates on its face that the applicant has provided satisfactory proof of citizenship, (2) a photocopy of the applicant’s birth certificate, (3) a photocopy of the applicant’s passport, (4) the applicant’s actual naturalization documents (or the number of the certificate of naturalization, which the county report must verify), (5) “other documents or methods of proof that are established pursuant to the Immigration Reform and Control Act of 1986,” and (6) the applicant’s Bureau of Indian Affairs card number, tribal treaty card number, or tribal enrollment number.

**A. Proposition 200 Violates NVRA By Requiring Additional Documentation Before Registering Eligible Voters Who Have Timely and Properly Completed the Federal Form.**

Under NVRA, the States must provide “simplified systems for registering to vote in federal elections.” *Young v. Fordice*, 520 U.S. 273, 275 (1997). “[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Texaco Inc. v. United States*, 528 F.3d 703, 707 (9th Cir. 2008) (“The [interpretive] inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.”) (internal quotation marks omitted).

Even where States design their own registration forms, they must continue to “accept and use” the Federal Form *as developed by the EAC*. 42 U.S.C. §§ 1973gg-4(a)(1), 1973gg-7(a)(2), 15532. At all relevant times, the Federal Form has had two items pertaining to citizenship:<sup>3</sup>

- An attestation signed under penalty of perjury that the applicant meets each of the eligibility requirements, including that of citizenship. 42 U.S.C. § 1973gg-7(b)(2)(A)-(C); 11 C.F.R. § 8.4(b).
- The question “Are you a citizen of the United States of America?” and boxes for the applicant to indicate whether the answer is yes or no. 42 U.S.C. § 15483(b)(4)(A)(i).

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<sup>3</sup> The most recent version of the Federal Form is available at [http://www.eac.gov/files/voter/nvra\\_update.pdf](http://www.eac.gov/files/voter/nvra_update.pdf) (revised Mar. 1, 2006).

It is a straightforward, streamlined application that fits on a single piece of paper that may be folded, stamped, and mailed. 11 C.F.R. § 8.5.

Arizona cannot reject the Federal Form on the grounds that it does not contain what Proposition 200 would deem “satisfactory” proof of citizenship, based on that additional state-law requirement, without violating the plain language of NVRA. *See also Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 408 F.3d 1349, 1353 n.4 (11th Cir. 2005) (“The Act mandates that the states accept a particularly defined federal registration form . . . for purposes of registration for federal elections.”); *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1214 (S.D. Fla. 2006) (recognizing that state was required to accept the Federal Form even though its own registration form included additional checkboxes because NVRA provides that “all states must accept the national registration form”).<sup>4</sup>

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<sup>4</sup> The EAC has arrived at the identical conclusion, explaining that “apply[ing] proof of citizenship requirements for Arizona voter registration to the Federal Form registration process . . . would effectively result in a refusal to accept and use the Federal Registration Form in violation of Federal law.” Letter from Thomas R. Wilkey, Executive Director, EAC to Jan Brewer, Arizona Secretary of State (Mar. 6, 2006); *see also* Letter from Gavin S. Gilmour, Associate General Counsel, EAC to Dawn Roberts, Director, Division of Elections, Florida Department of State (July 26, 2005) (“The language of the NVRA mandates that the Federal Form, without supplementation, be accepted and used by States to add an individual to its registration rolls.”). Because Congress charged the EAC with developing the “mail voter registration application form for elections for Federal office,” §§ 1973gg-7(a), 15329, its interpretations of NVRA, even when offered in the form of opinion letters, “are entitled to respect.” *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

Arizona’s refusal to accept the Federal Form violates NVRA in yet another respect. Each State “shall . . . ensure” that any eligible applicant who submits a “valid” mail voter registration form on time is registered to vote. 42 U.S.C. § 1973gg-6(a)(1)(B).<sup>5</sup> A Federal Form completed in accordance with the Federal Form’s instructions (and *only* those instructions) is “valid” because state-imposed procedural requirements do not and cannot affect the validity of the Federal Form. *See Charles H. Wesley Educ. Foundation, Inc. v. Cox*, 324 F. Supp. 2d 1358, 1367 (N.D. Ga. 2004), *aff’d* 408 F.3d 1349 (11th Cir. 2005) (“Congress simply did not allow the states to impose restrictions that would permit denial of an application that otherwise satisfies the federal requirements.”); *Association of Community Organizations for Reform Now (ACORN) v. Edgar*, No. 95 C 174. 1995 WL 532120, at \*1-2 (N.D. Ill. Sept. 7, 1995) (invalidating “Address Verification Form” rule because it “impos[ed] a requirement that [was] not authorized by” 42 U.S.C. §

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<sup>5</sup> Arizona argued before the district court that 42 U.S.C. § 1973gg-6(a)(2), which requires election officials to “send notice to each applicant of the disposition of the application,” also authorizes States to demand proof of citizenship as a matter of course from applicants using the Federal Form. A “disposition” is just that, however: the announcement of a result, not a request for more documentation. Congress meant what it said and said what it meant. *See Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). As the EAC put it, election officials cannot “take in the Federal form, only to turn around and require its user to re-file or otherwise supplement their Federal application using a state form.” Letter from Gavin S. Gilmour, Associate General Counsel, EAC to Dawn Roberts, Director, Division of Elections, Florida Department of State (July 26, 2005). When a state conditions acceptance of the Federal Form on state-imposed requirements, it interferes with “the clear directives of the mail-in registration processes protected by the NVRA.” *See Charles H. Wesley*, 408 F.3d at 1354.

1973gg-6(a)(1)). Arizona fails to “ensure” the registration of eligible applicants who properly complete the Federal Form unless they satisfy Proposition 200’s proof of citizenship requirement.

Arizona must *accept* valid Federal Forms timely submitted by eligible applicants, whereas Proposition 200 requires election officials to *reject* those very same forms unless they satisfy its “satisfactory” proof of citizenship requirement. Proposition 200 cannot stand because it conflicts with NVRA’s scheme for mail voter registration via the Federal Form. This conclusion is unaffected by the Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666.

Arizona contended before the district court that HAVA’s information verification provision, 42 U.S.C. § 15483(a)(5), means that it can also require applicants using the Federal Form to produce additional evidence of citizenship.<sup>6</sup> This argument fails to take account of the distinction between verifying information that is *already* on voter registration forms and requesting *new* information. Under

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<sup>6</sup> HAVA’s savings clause provides that “[e]xcept as specifically provided in [42 U.S.C. § 15483(b)] with regard to the National Voter Registration Act of 1993 . . . nothing in this Act may be construed to authorize or require conduct prohibited under any of the following laws, or to supersede, restrict, or limit the application of such laws: . . . . The National Voter Registration Act of 1993.” 42 U.S.C. § 15545. Thus, even though HAVA gives states some discretion in implementing its provisions, *id.* § 15485, and allows them to impose stricter “election technology and administration requirements,” *id.* § 15484, they cannot establish requirements that are “inconsistent with the Federal requirements under [HAVA] or any law described in [§ 15545],” *id.*, including NVRA. Proposition 200’s proof of citizenship requirement is “inconsistent” with NVRA for the reasons given above and, accordingly, is not sheltered by HAVA.

HAVA, states must reject voter registration forms that do not include “in the case of an applicant who has been issued a current and valid driver’s license, the applicant’s driver’s license number; or . . . in the case of any other applicant . . . the last 4 digits of the applicant’s social security number.” *Id.* § 15483(a)(5)(A)(i).<sup>7</sup> The Federal Form already includes a space for applicants to enter a “[v]oter identification number as required or requested by the applicant’s state of residence.” 11 C.F.R. § 8.4(a)(6). HAVA therefore directs state election officials to use the applicant’s identification number and match his or her other responses against the information in the state’s motor vehicle agency database, 42 U.S.C. § 15483(a)(5)(B)(i), or the Commissioner of Social Security’s database, *id.* § 15483(a)(5)(B)(ii).

HAVA’s verification procedure in no sense operates as an implied repeal of NVRA’s unqualified “accept and use” provision. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal must be clear and manifest.”); *Grindstone Butte Project v. Kleppe*, 638 F.2d 100, 102 (9th Cir. 1981) (repeals by implication disfavored). Applicants using the Federal Form supply their driver’s license or social security number in the space indicated (if

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<sup>7</sup> “If an applicant . . . has not been issued a current and valid driver’s license or a social security number, the State shall assign the applicant a number which will serve to identify the applicant for voter registration purposes.” 42 U.S.C. § 15483(a)(5)(A)(ii).

they have one, *see supra* note 7), and states, after verifying the provided information to the extent possible, must “accept and use” the Federal Form by registering eligible applicants without requiring supplementation.<sup>8</sup> Read together, NVRA and HAVA allow states to match information supplied on the Federal Form with information in other databases, but forbid states from conditioning acceptance of the Federal Form on the receipt of information (e.g., documentary evidence of citizenship) that the Federal Form does not already require.

**B. Proposition 200 Violates NVRA By Requiring Documentary Proof Of Citizenship From Eligible Voters Who Do Not Use The Federal Form.**

NVRA permits states to develop their own mail voter registration forms for federal elections, but only if those forms are simple to administer and do not impede registration efforts. *See* 42 U.S.C. § 1973gg-4(a)(2); *Young*, 520 U.S. at 276 (“NVRA specifies . . . the type of information that States can require on a voter registration form.”). In particular, the state’s form

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<sup>8</sup> This does not mean that all successful registrants can cast their ballots without further ado. HAVA requires some first-time voters who register by mail to provide identification before they vote. 42 U.S.C. § 15483(b). Voters who supplied their driver’s license or social security number on their registration forms, *see supra* note 7 and accompanying text, are exempt from this requirement if the state election official is able to match that number against existing identification records. *Id.* § 15483(b)(3)(B). All other voters must at some point exhibit an acceptable form of identification (or a photocopy of the same if voting by mail). *Id.* § 15483(b)(2)(i)-(ii), (b)(3)(A). This could include “current and valid photo identification” or “a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.” *E.g., id.* § 15483(b)(2)(i)(I)-(II).

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).

By requiring many eligible applicants to submit documentary evidence of citizenship with Arizona's mail-in form, Proposition 200 violates NVRA. Given the information elsewhere requested on the form, such evidence is not "necessary" to assess eligibility; instead, the requirement is duplicative and needlessly burdensome. NVRA already directs all voter registration forms to include a statement that "(A) specifies each eligibility requirement (including citizenship); (B) contains an attestation that the applicant meets each such requirement; and (C) requires the signature of the applicant, under penalty of perjury." *Id.* § 1973gg-7(b)(2). Forms must also include the question "'Are you a citizen of the United States of America?" and boxes for the applicant to check to indicate whether the applicant is or is not a citizen of the United States." *Id.* § 15483(b)(4)(A)(i). States are forbidden from imposing "any requirement for notarization or other formal authentication," because such obstacles would impede the registration of voters. *Id.* § 1973gg-7(b)(3).

Documentary proof of citizenship is not “necessary” to assess voter eligibility. To the contrary, the above-quoted passages reflect Congress’s considered judgment that citizenship can be properly determined on a mail voter registration form by attestations signed under the penalty of perjury. Additional evidentiary requirements would be redundant and would seriously undermine Congress’s intent to “establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” *Id.* § 1973gg(b)(1). NVRA reflects a judgment that the imposition of a felony penalty for knowingly submitting fraudulent voter registrations is a sufficiently serious sanction that promotes integrity in the registration system while eliminating barriers to registration. *Id.* § 1973gg-10. By comparison, Proposition 200 insists on forms of proof that are often difficult to come by on short notice. *See supra* note 2. Many eligible applicants will be turned away by the investment of time or money necessary to obtain, locate, or photocopy “satisfactory” evidence of citizenship.

The Federal Form serves as further evidence that documentary proof of citizenship is not “necessary” within the meaning of NVRA. The Federal Election Commission (FEC)—which administered the Federal Form prior to 2002—conducted surveys of state election officials and took public comments to determine what is “necessary” on voter registration forms. *See* National Voter Registration Act of 1993, 59 Fed. Reg. 32,311 (June 23, 1994). In the course of

this analysis, the FEC rejected requests to incorporate questions that did not meet “the ‘necessary threshold’ of the NVRA to assess eligibility.” *Id.* at 32,316. In particular, questions concerning naturalization information and birthplace data were deemed extraneous because the “issue of U.S. citizenship is addressed within the oath required by the Act and signed by the applicant under penalty of perjury.” *Id.* at 32,317.

Where, as here (*see* 42 U.S.C. §§ 1973gg-7(a), 15329), Congress has delegated to an agency authority to “speak with the force of law,” *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), “*Chevron* requires a federal court to accept the agency’s construction of the statute,” *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005), as long as it is a reasonable one. The authorized agency interpreted § 1973gg-7(b)(1)’s “necessary” requirement to preclude requests for duplicative information. Documentary evidence of citizenship is not “necessary” because Arizona’s mail voter registration form, through the required attestation and the checkboxes, already addresses the issue of United States citizenship.

**C. NVRA’s Legislative History Supports Its Plain Meaning.**

Although consultation of NVRA’s legislative history is unnecessary in view of the statute’s plain meaning, it confirms Congress’s intent to preempt state-law proof of citizenship requirements. The legislative history shows that Congress

intended to create a uniform method of mail voter registration that would be effective in all states, and specifically contemplated—and rejected—efforts to allow documentary verification of citizenship.

NVRA was developed “to establish national voter registration procedures for Federal elections.” H.R. Rep. No. 103-9, at 1 (1993); *accord* S. Rep. No. 103-6, at 3 (1993) (“This legislation will provide uniform national voter registration procedures for Federal elections and thereby further the procedural reform intended by the Voting Rights Act.”). All parties understood that uniformity was intended—the Senate minority balked at NVRA because it “forbids precautions states may take to reduce the chance of the unscrupulous taking advantage of the system.” S. Rep. No. 103-6, at 52; *accord* H.R. Rep. No. 103-9, at 35 (“The bill limits the state’s ability to confirm independently the information contained in voter registration applications.”). Indeed, President Bush vetoed a nearly-identical bill in 2001 because it would “forc[e] [States] to implement federally mandated and nationally standardized voter registration procedures.” 138 Cong. Rec. S9772 (daily ed. July 2, 1992) (vetoing S. 250, 102d Cong. (1992)).

But the clearest evidence that Congress intended, through NVRA, to preclude State efforts to require documentary proof of citizenship to register for Federal elections is that Congress specifically contemplated—and rejected—allowing States to require such proof. “Few principles of statutory construction are

more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1174 (9th Cir. 2001) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987)). The bill that ultimately became NVRA, H.R. 2, 103d Cong. (1993), passed the House without any allowance for States to require documentary evidence of citizenship. The Senate, however, passed the Simpson-Helms Amendment, which provided: “Nothing in this Act shall be construed to preclude a State from requiring presentation of documentary evidence of the citizenship of an applicant for voter registration.” 139 Cong. Rec. S2901 (daily ed. Mar. 16, 1993). The Conference Committee rejected the Senate amendment, finding that documentary proof “is not *necessary* or consistent with the purposes of this Act. Furthermore, there is concern that it could be interpreted by States to permit registration requirements that could effectively eliminate, or seriously interfere with, the mail registration program of the Act.” H.R. Rep. No. 103-66, at 23-24 (1993) (Conf. Rep.) (emphasis added).<sup>9</sup>

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<sup>9</sup> The House and Senate Committees had previously determined that NVRA’s provisions, such as the attestation requirement on mail voter registration forms, were “sufficient to deter fraudulent registrations.” H.R. Rep. No. 103-9, at 10; S. Rep. No. 103-6, at 13 (“[T]he bill also provides that there will be sufficient safeguards to prevent an abuse of the system with fraudulent registrations.”).

Senator Jesse Helms, who co-sponsored the Senate amendment, decried the Conference Committee's bill and urged its defeat because his amendment had been omitted. 139 Cong. Rec. S5739 (daily ed. May 11, 1993). However, the Senate agreed to the conference report by a vote of 62-36. *Id.* at S5748. Congressman Bob Livingston made a similar appeal on the floor of the House, urging his colleagues to recommit the conference report with instructions to include the Simpson-Helms Amendment. 139 Cong. Rec. H2265 (daily ed. May 5, 1993). The House rejected the Livingston motion by a vote of 253-170 (*id.* at H2275) and agreed to the conference report (*id.* at H2276).

Allowing States to require documentary proof of citizenship would do violence to the careful legislative balance struck by Congress. The "House bill[] . . . won out over the Senate bill[]," and, in so doing, Congress "specifically rejected" the very provision that "could have left room" for the position appellees now defend. *See Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999). Arizona may disagree with the result as a matter of policy, but it nonetheless must comply with NVRA's mandate.

## CONCLUSION

The judgment of the district court should be reversed.

Dated: January 29, 2009

Respectfully submitted,

s/Brian D. Netter

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## **APPENDIX: LIST OF *AMICI CURIAE***

Congressman Robert A. Brady (Pa.),  
*Chair*, Committee on House Administration;

Congresswoman Zoe Lofgren (Cal.),  
*Chair*, Committee on House Administration, Subcommittee on Elections;

Congressman Charles A. Gonzalez (Tex.);

Congressman Raúl M. Grijalva (Ariz.);

Congressman José E. Serrano (N.Y.).

## CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 29(d) and 32(a)(7)(B) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less.

Dated: January 29, 2009

s/Brian D. Netter

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## CERTIFICATE OF SERVICE

I hereby certify that, on the 29th day of January 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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